UNIVERSITY OF CALIFORNIA
RIVERSIDE

Rule of Law Establishment with Corruption; The New Democracy Model

A Dissertation submitted in partial satisfaction
of the requirements for the degree of

Doctor of Philosophy

in

Political Science

by

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December 2012

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ABSTRACT OF THE DISSERTATION

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What are the obstacles in the establishment of rule of law in democratizing countries? I argue that political corruption has a causal negative effect on the establishment of rule of law. I find that political and judicial corruption makes the implementation and the enforcement of the laws practically impossible. This mixed methods dissertation consists of a two-case comparative study of two new democracies, Czech Republic and Romania, with different levels of corruption and rule of law, based on field work and interviews with over 50 elites; and several cross national tests in all new democracies around the world. This dissertation makes both a theoretical contribution to the study of establishment of rule of law, by hypothesizing the negative impact of corruption on this process, and an empirical contribution by thoroughly testing the hypothesis within cases and cross-nationally.

Table of contents

List of Tables

List of Figures

Abbreviations:

ANI Agentia Nationala de Integritate (National Integrity Agency, Romania)

CC Curtea Constitutionala (The Constitutional Court, Romania)

CIPB Corrupt Practices Investigation Bureau, Singapore

CNI Consiliul National de Integritate (National Council of Integrity, Romania)

CSM Consiliul Superior al Magistraturii (The Superior Council of Magistracy, Romania)

CSSD Česká strana sociálně demokratická, (Czech Social Democratic Party)

DGA Directia Generala Anticorruptie (Anticorruption General Directorate, Romania)

DNA Directia Nationala Anticoruptie (National Anticorruption Directorate, Romania)

ECHR European Court of Human Rights (Curtea Europeana a Drepturilor Omului)

FSN Frontul Salvarii Nationale (National Salvation Front, Romania)

ICAC Independent Commission Against Corruption, Hong Kong

ICCJ Inalta Curte de Casatie si Justitite (High Court of Cassation and Justice, Romania)

ODS Občanská demokratická strana (Civic Democratic Party, Czech Republic)

PDL Partidul Democrat Liberal, Romania (Democratic Liberal Party)

PMSZ The Office of the Prague Municipal State Attorney, Czech Republic

PNA Parchetul National Anticorruptie (National Anticorruption Prosecutor's Office)

PSD Partidul Social Democrat, Romania (Social Democratic Party, former PSDR, FSN)

UOFKF Corruption and Financial Crime, Czech Republic

VV Věci veřejné (Public Affairs Party, Czech Republic)

Part I. The framework

INTRODUCTION

Plato: "where the law is subject to some other authority and has none of its own,
the collapse of the state, in my view, is not far off;
but if the law is the master of the government and the government is its slave,
then the situation is full of promise
and men enjoy all the blessings that the gods shower on a state"

This dissertation sheds light on the puzzle of why so many new democracies around the world struggle in a state of lack of rule of law. While there is agreement on the fact that the establishment of rule of law is deeply connected with the process of consolidation of democracy, and there is consensus that this process is very difficult, slow, and far from complete, there is little agreement on the factors that determine its success. The literature on this topic is thin and inconclusive.

Most studies examine the rule of law establishment from an instrumental point of view; that is, it leads to economic development, attracts investors, cures corruption and ensures political stability. Few studies look at the causes for rule of law establishment. Most cite cultural reasons of incompatibility with a tradition of rule of law in order to explain variation.[1] Others look at foreign intervention and aid to reform institutions, but

[1] Smulovitz, Catalina, "How Can the Rule of Law Rule? Cost Imposition through Decentralized Mechanisms" in *Democracy and the Rule of Law,* edited by Maravall, Jose Maria and Adam

observe its shortcomings in succeeding.[2] Citizens' pressure is hypothesized to have a positive effect on establishment of rule of law[3] but citizens face significant collective action problems, which prevents it from being successful.[4] Other studies explore the expected pressures for property rights enforcement from the business community[5] and find that that, at times, the beneficiaries of such reform fail to demand it.[6]

Some works observe that political will, or lack there of, may be linked with the lack of reforms.[7] However, since 'political will' is a mysterious notion it does not render much meaning as a concept. While political will may be justified on altruistic, utilitarian, and moral grounds, it is not in itself a reliable explanation due to the difficulty in

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Przeworski*,* (Cambridge: Cambridge University Press 2003)**;** Daniels, Ronald and Michael Trebilcock, "The Political Economy of Rule of Law Reform in Developing Countries," in *Michigan Journal of International Law,* (Fall 2004); Channel, Wade, "Lessons not learned about legal reform" in *Promoting the Rule of Law Abroad* edited by Carothers, Thomas, (Carnegie Endowment for International Peace, 2006); Kelinfeld, Rachel "Competing definitions of the rule of law" in *Promoting the Rule of Law Abroad,* edited by Carothers, Thomas, (Carnegie Endowment for International Peace, 2006)

[2] Carothers, Thomas, *Promoting the Rule of Law Abroad,* (Carnegie Endowment for International Peace, (2006); Emmert, Frank, "Rule of Law in Central and Eastern Europe," in *Fordham International Law Journal,* Vol. 32 (2) (2008)

[3] Smulovitz, "How Can the Rule of Law Rule? Cost Imposition through Decentralized Mechanisms"

[4] Weingast, Barry, "The Political Foundations of Democracy and the Rule of Law", in *The American Political Science Review,* Vol. 91 (2), (1997)

[5] Shleifer, A and J. Hay, "Private Enforcement of Public Laws: a Theory of Legal Reform," in *American Economic Review Papers and Proceedings,* (May 1998)

[6] Hoff Karla and Joseph Stiglitz, "After the Big Bang? Obstacles to the Emergence of the Rule of Law in Post-Communist Societies", in Working paper, National Bureau of Economic Research, (Cambridge, Massachusetts 2002)

[7] Maravall, Jose Maria, Adam Przeworski, *Democracy and the Rule of Law,* (Cambridge University Press, 2003); Daniels, Ronald and Michael Trebilcock, "The Political Economy of Rule of Law Reform in Developing Countries

identifying, conceptualizing, and quantifying it. I set to solve this puzzle by identifying one specific form of behavior that represents a direct negative cause to the establishment of rule of law.

Given the institutional constraints and incentives of a procedural democracy, I argue that corrupt politicians will not reform the enforcement mechanisms (justice system, police, anticorruption agencies) necessary for complete and legitimate rule of law establishment for fear of punishment. Thus I offer a refined operationalization of this failure and in place of a generic 'political will' variable I use a variable identified as the *misappropriation of public funds for private gain* by political leaders. In doing so, I narrow the scope of a broad definition of corruption encompassing a wide variety of clientelistic behavior by using a specific meaning.

This hypothesized relation also solves another puzzle from the literature on reform, which argues that the establishment of rule of law is a 'cure all evils' medicine. One of the evils that apparently rule of law would cure is *political corruption.* However, I ask, how can politicians, who have unlawfully been taking advantage of state resources, be suddenly hit by altruism and find the will to change the system by reforming the enforcement mechanisms, rendering possible their own incarceration? That will simply not happen. It has been hypothesized[8] that politicians will only reform the system if it is in their advantage, from a cost-benefit analysis. This hypothesis makes a substantial contribution by identifying that in the case of political corruption this will never be the

[8] Przeworski, Adam and Fernando Limongi, "Political regimes and economic growth," in *Journal of Economic Perspectives*, Vol. 7, No. 3 (1993), pp. 51–71

case. Any situation that would lead to establishment of enforcement mechanisms will cost the political leader her freedom. Assuming that leaders are rational actors that value freedom, then we will not see true rule of law reform. Consequently I identify the first hypothesis explored in this study, that *corrupt politicians prevent the establishment of rule of law for fear of punishment, if the reforms for better enforcement mechanisms are applied.*

Since the historical contexts for the natural emergence of rule of law as it happened centuries ago are lacking, since cultural change within a generation can hardly be expected, since citizens have lots of power but face collective action problems, and since politicians are corrupt and do not introduce enforcement mechanisms to establish rule of law, one is left to wonder how do or will countries reach a state of rule of law. I argue that while independent judiciaries and police are not the answer because they can hardly be truly independent from influence in a society prevalent with informal corrupt networks of politicians, prosecutors, judges and police, the answer may come from a truly independent anti-corruption agency. More manageable in scope as a reform it can have critical consequences in the establishment of rule of law. Smaller in size than the entire judiciary, and powerful in capabilities, a truly independent anti-corruption agency would eliminate corrupt politicians, and create the expectation of predictability of punishment for illicit behavior. This would render legitimacy and support from citizens and media, and it would clean up the government, legislative and the judiciary from people who oppose reform. Such that, before changing culture, the entire judicial system, or transforming corrupt politicians into voluntary altruistic people, a truly independent

corruption agency needs to be established. *The creation of a truly independent anti-corruption agency progressively leads to the establishment of rule of law*.

Following I present a review of the literature on the rule of law; the conceptualization of the two key terms used in this study, the rule of law and corruption; and a detailed analytical framework;

The negative impact of corruption on the establishment of rule of law

The relevance of this study comes from a broader perspective. The lack of rule of law hits the most important actors in new democracies, the citizens.

The necessity of addressing this topic is brought forth by the fact that, following transition from authoritarian regimes, and the establishment of procedural democracies, new democracies find themselves in a state of political instability and lacking accountability mechanisms. Corrupt politicians, due to their desire to hold on to power, take advantage of the lack of accountability in order to extract rents from the state, and render the establishment of enforcement mechanisms to punish corrupt behavior impossible. One of the goals of corrupt politicians is to abuse the loopholes in the system. For instance, they use exceeding governmental powers to pass laws in order to subtract state funds. It is common to pass governmental decrees to illegally assign public procurement contracts to personal companies or the businesses of the political allies. These practices go unpunished because the very people that illicitly take advantage of

these contracts do not institute the accountability mechanisms to apply the law such as an independent police, judiciary and anti-corruption agencies.

Politicians and their families thrive on state money acquired through these public contracts. The wealth obtained illegally is immense, consisting of estates overseas, big accounts in Switzerland, lavish lives, and opulence, while millions of people struggle to survive bellow the poverty line and pay exceedingly high taxes. Votes are bought, judges are corrupt, legislation is poor and serves the rich, laws to protect citizens do not apply, all institutions are over politicized, and the bureaucracy is inefficient and corrupt. The reason behind this vicious cycle is the fact that establishing the rule of law proves itself much more difficult and costly than just establishing free and fair elections and democratic institutions. The legal and illegal coexist, especially in former authoritarian regimes that never fully reached a clear separation of the public and private spheres after the transition.

Unlike Western European countries and the United States, the rule of law has not developed naturally in the new democracies, it has been imposed. New democracies are old authoritarian regimes with rare experiences of democracy. After a long history of disobedience and antagonizing the authority, of lack of differentiation between the private space intro public space, and living in a culture of informal versus formal rules, Central and Eastern European countries, for instance, found themselves in the position of having to simultaneously introduce the market economy, democratic procedures, and the rule of law. While the first two have been successfully introduced, the third component lags behind.

In many democratizing countries, individuals can be regarded as citizens in respect to their political rights, while they are not citizens when it comes to their civil rights, and this is because the spread of civil rights in highly developed countries happened long before the acquisition of political and welfare rights. These civil liberties are the classical liberal freedoms and guarantees. Many democratizing countries may fall in the democratic bracket but they poorly show another component of the democracies existing in the developed world, that of liberal democracy[9] or constitutional liberal democracy.[10] Democracy is on the rise but constitutional democracy is not, which results in half of the 'democratizing' countries of today to be 'illiberal democracies.'[11]

Constitutional liberalism does not refer to the procedures of selecting a government, but to government's *goals*. Rooted in Western history it is represented by the practice of protecting an individual's autonomy and dignity against coercion from all sources, such as state, church, or society. *This means to secure the checks on the power of each branch of government, equality under the law, impartial court and tribunals, and separation of church and state.*[12] Constitutional liberalism leads to democracy, but apparently, democracy does not seem to lead to constitutional liberalism.[13] This phenomenon is not widely studied by political scientists, due to lack of expertise in legal

[9] O'Donnell, Guillermo, "Horizontal Accountability in New Democracies," in *Journal of Democracy,* Vol. 9, No. 3, (1998), pp. 11-31

[10] Zakaria Fareed, "The Rise of Illiberal Democracy," in *Foreign Affairs,* (November 1997), p. 22

[11] Ibidem, p. 24

[12] Ibidem, pp. 25-26

[13] Ibidem, p. 27

matters and the highly qualitative composition of the data.[14] Consequently, I set up a design to explore this paradox and bring to light some of the causes and consequences related to it.

The rule of law is not only a generic characteristic of the legal system or the performance of courts. But it is a crucial part of democracy. It should be regarded as the legally based rule of a democratic state. It should be composed of a legal system in itself democratic by three standards: guarding the political freedoms and guarantees of polyarchy, protecting all civil rights of the whole population, and creating networks of responsibility and accountability for all agents private and public, who are all subject to 'appropriate, legally established controls of the lawfulness of their acts.[15]

This study makes a notable correction to previous studies about the rule of law. Most works may or may not acknowledge, but do not address the fact that corruption is not only the result of the dysfunctional institution, but it is the premiere cause of the dysfunction, not only an outcome but the core cause. Corruption exists *because* of the lack of rule of law, but it *generates* a rule of law deficit. To fix this two-way causal relationship, known as the 'endogeneity' problem, I isolate through in-depth analysis, the top down relationship between corrupt politicians and the lack of enforcement mechanisms to guarantee the rule of law; and through quantitative analysis, using innovative and advanced statistical tools, I isolate this effect in multiple new democracies. This is an important study, addressing issues that lack currently from the

[14] O' Donnell, "Horizontal Accountability in New Democracies," pp. 11- 31

[15] Ibidem, p. 23

literature. It is absolutely necessary to explore this causal direction, since without specifying the correct relationship and testing it, most studies dwell on noting how complicated the relation between corruption and rule of law is, and fall short of making a significant contribution, leading also to confusion for the scholars, policy makers, and analysts.

It is important to note that rule of law definitions are very complex. Much like defining democracy, defining rule of law is similar to going through a very extended check list organized in five major themes: accountability, legislation, enforcement, fairness, and efficiency. The Rule of Law Index compiled by the World Justice Project (WJR)[16] refers to legal based rule of law systems that uphold four universal principles: the government and its officials and agents are accountable under the law; the laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property; the process by which the laws are enacted, administered and enforced, is accessible, fair and efficient; and the laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges who are of sufficient number, have adequate resources, and reflect the makeup of communities they serve.[17]

These underlined principles are representative for all social, cultural, economic and political systems, and contain both procedural elements, often found in 'thin'

[16] The World Justice Project, Rule of Law Index, http://www.worldjusticeproject.org/rule-of-law-index, 2010

[17] Ibidem, p. 2

definitions and substantive elements, such as self-government and fundamental rights and freedoms, typical of so-called 'thick' definitions.[18]

The most recent version of the index categorizes 10 dimensions of the rule of law, limited government powers; absence of corruption; clear, publicized and stable laws; order and security; fundamental rights; open government; regulatory enforcement; access to civil justice; effective criminal justice; and informal justice. The full set of categories and subcategories defined by the WJP Project, a total of 49, can be found in Appendix number 2.

Following I present a new analytical framework for the establishment of rule law and its main obstacle, political corruption. Chapter one starts with an exploration of the current literature about the rule of law establishment continues with the conceptualization of terms, and the main theoretical framework.

[18] Ibidem, p. 8

CHAPTER1. RULE OF LAW. THE THEORETICAL FRAMEWORK

About the rule of law in new democracies. Current explanations

It was expected that the emergence of rule of law in new democracies would result from *investors' pressures for property rights*. Shleifer and Vishny[19] argue that privatization, for instance, offers 'enormous political benefits for the creation of institutions supporting private property', since it creates the very private owners who lobby the government to create market-supporting institutions. These institutions will eventually follow private property instead of the other way around. The property rights theory does not exactly explain how the institutional frameworks and practices would change to facilitate this process. Meantime the rule of law failed to emerge in newly privatized countries. Through a dynamic equilibrium model of the political demand for the rule of law, Karla Hoff and Joseph Stiglitz[20] show that beneficiaries of mass privatization may fail to demand the rule of law even if it is the Pareto efficient 'rule of the game.' The reason Hoff and Stiglitz cite is that uncertainty about the legal regime can lead to asset stripping, which can generate in agents an interest in prolonging the absence of the rule of law.

[19] Shleifer and Vishny 1998, pp. 10-11

[20] Hoff and Stiglitz, "After the Big Bang? Obstacles to the Emergence of the Rule of Law in Post-Communist Societies."

In a similar vein, de Meza and Gould and Greif,[21] on the Nash equilibrium choice of enforcement of property rights, argue that agents who build 'value' demand reform—the rule of law—because it is the only legal regime that enforces property rights. On the other hand, asset-strippers do not, since they follow a strategy of "take the money and run" and can illegitimately profit from their control of rights. Thus, the economic strategy of an agent determines his political position.[22] One answer has to do with the credibility of property rights protections. If an individual's property rights to a company are not expected to be enforced in the future, then the investor cannot make billions, by normal business investments.[23] Second, the perceived justice of a system is important to gaining the cooperation of those involved in the process of producing the rule of law (judges, regulators, jurors, potential offenders, etc.). Accordingly, state protection of asset strippers may be unfeasible, even under an ostensible rule of law. Knowing this, asset strippers will be less supportive of the rule of law.[24]

Among other factors with a hypothesized positive effect on the establishment of rule of law, is *foreign assistance and pressure.* Frank Emmert[25] examines the

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[21] De Meza, David and J.R. Gould, "The Social Efficiency of Private Decisions to Enforce Property Rights," in *Journal of Political Economy* Vol. 100, No 3, (Jun 1992); Greif, Avner, "Cultural beliefs and the organization of society: A historical and theoretical reflection on collectivist and individualist societies." *Journal of political economy* (1994), pp. 912-950.

[22] Hoff and Stiglitz, p. 10

[23] Ibidem, p. 13

[24] Ibidem

[25] Emmert, Frank, "Rule of Law in Central and Eastern Europe," in *Fordham International Law Journal,* Vol. 32 (2) (2008)

preconditions set by the European Union for accession, which are presumed to promote the rule of law in the Central and Eastern European candidate states, concluding that conditionality is not sufficient and there is lack of rule of law in these countries. Further, the concept of "rule of law," though often quoted, is poorly defined and understood, creating an obstacle for countries aspiring to construct a system based on rule of law.

The measures summarized as "money and men" (M&M) work on the EU assumption that all it takes for an effective application of EU law in the new member states is the appointment of a sufficiently large number of qualified staff and whatever resources they may require. Contrary to the "official" reliance on knowledge and ability, Nicolaides recommends a focus on the willingness of the people in the new member states, starting with the top officials, via the average administrators and judges, and ending with the population in general, to comply with EU law and "rule of law."[26] While Roland Bieber[27] seems optimistic in the ability of the technical assistance to lead to the establishment of rule of law, Emmert refutes this hypothesis, arguing that rule of law is "still wanted in this part of the world."[28]

Foreign aid and technical assistance from the US and other Western countries has been directed to the establishment of rule of law. Aside from the close links to democracy and capitalism, rule of law has stood apart as a non-ideological, technical

[26] Nicolaides, Phedon, "Preparing for Accession to the European Union: How to Establish Capacity for Effective and Credible Application of EU Rules" (2003); Emmert, p. 579

[27] Bieber, Roland. "An Association of Sovereign States." *European Constitutional Law Review* 5, no. 3 (2009), p. 391.

[28] Emmert, p. 579

solution. While in many countries people may still disagree about the appropriateness of various models of democracy or capitalism, almost no one will admit being against the idea of rule of law.[29] The reform menu prescribed by the US and other Western countries has three types.

Type one reforms target the laws, revising whole codes, drafting and redrafting legislation on bankruptcy, corporate governance, taxation, intellectual property, and financial markets. In regards to criminal law, they focus on expanding the protection of basic rights in criminal procedure codes, by changing criminal statutes to cover new problems such as money laundering and electronic-transfer fraud, and revising the regulation of police.[30] Type two reforms refer to strengthening law-related institutions to make them more competent, efficient, and accountable. Judges and court staff benefit from increased salaries. Other reform efforts target the police, prosecutors, public defenders, and prisons along with attempts to toughen ethics codes and professional standards for lawyers, revitalize legal education, broaden access to courts, and establish alternative dispute resolution mechanisms. They also include efforts to strengthen legislatures, tax administrations, and local governments.[31]

Type three reforms have a more in-depth objective of increasing government's compliance with the law. The key step is considered achieving genuine judicial independence. Several of these measures are compatible with those targeted in type two

[29] Carothers, *Promoting the Rule of Law Abroad* (2006)
[30] Ibidem, p.7

[31] Ibidem

reforms, especially better salaries and revised selection procedures for judges. But Carothers observes that the most crucial changes lie elsewhere. Above all, government officials must abstain from interfering with judicial decision-making and accept the judiciary as an independent authority.[32] I argue that even if that was possible, in a corrupt society without the rule of law, an independent judiciary does not suffice. Independent judiciaries (formally) may be corrupt and not truly impartial or independent practically.

Carothers himself concludes that the efforts to strengthen basic legal institutions have proven slow and difficult. "Training for judges, technical consultancies, and other transfers of expert knowledge make sense on paper but often have only a minor impact. The desirability of embracing such values as efficiency, transparency, accountability, and honesty seems self-evident to western providers, but for those targeted by training programs, such changes may signal loss of perquisites and security."[33] Rule of law aid focuses on more easily attainted type one and type two reforms, affecting the most important elements of the problem least. Type three assistance necessitates powerful tools that aid providers are only starting to develop, such as activities that help bring pressure on the legal system from the citizenry and help the pockets of reform that may exist within an otherwise self-interested leadership. The level of interventionism, political attention, and visibility that type three reform requires may be too much for many donor governments and organizations which cannot, or do not wish to apply them. Most of all it calls for patient, sustained attention, as "breaking down entrenched political interests,

[32] Ibidem
[33] Ibidem p. 12

transforming values, and generating enlightened, consistent leadership will take generations."[34]

Among the alternative explanations, *cultural change* takes primacy among scholars. Kelinfeld notes that focus on changing institutions does not suffice. From her point of view the flaw lies in the procedural formal legal definition. She charges that many modern practitioners admit the cultural dimensions of the rule of law in theory, but "their definitions of the concept and means of attacking it impede this realization from seriously impacting reform efforts."[35] She emphasizes that achieving rule of law ends requires political and cultural, not only institutional change.[36]

There are several mistaken assumptions informing the cultural change arguments, among which the one that the governments are the key to achieving legal reform. However this proposition underemphasizes the role of the private sector and the civil society.[37] Another mistaken assumption is that cultural issues are peripheral to legal reform, one example being the culture of delaying trial in different cultures[38] I argue that he looks at 'delaying' as devoid from will, which is generally not the case in new democracies.

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[34] Ibidem

[35] Kelinfeld, p. 51

[36] Ibidem, p. 55

[37] Channel, p. 146

[38] Ibidem

In a review of the unsuccessful implementation of rule of law in developing countries, Daniels and Trebilcock[39] advance the hypotheses that lack of resources, culture, and political economy affect the implementation of rule of law in developing countries. Rule of law is seen as a component of development in that it guarantees the protection of freedoms and rights. It falls short of its intent because it does not fully explain the mechanism linking political economy to the establishment of rule of law, while political economy is not fully identified and defined.

Smulovitz (2003, p.168) sets to explore how costs for noncompliance can be imposed on rulers. If pressure for enforcement of property rights fails, and if technical institutional changes imposed by foreign actors are insufficient, then *citizens* should attempt to punish the corrupt leaders through democratic means at their disposal. An autonomous civil society is crucial since it involves the presence of multiple external eyes with interests in the enforcement of law and denunciation of non-obedience.[40]

However, this scenario does not take into consideration the serious difficulties in establishing the rule of law derived from a massive coordination problem faced by citizens acting in a decentralized manner (Weingast 1997). Though Weingast acknowledges that the rule of law becomes self-enforcing if all subjects are equally and simultaneously affected, but this situation how and why the establishment of rule of law may be possible but it is unable to explain how it could be sustained.[41] I align with Weingast's conclusion that in citizen-apathetic new democracies the collective action

[39] Daniels and Trebilcock, 2004

[40] Smulovitz, p. 171
[41] Smulovitz, p. 168

problem seems very realistic. I also do not foresee that everyone may be simultaneously affected to meet Weingast's condition for change.

About the rule of law. Definition and conceptualization

There is a strong distinction between the theoretical discourse and the political and public discourse on the rule of law. It is also not clear whether the conception that aid providers use is as well grounded, or widely accepted, as they believe. A common debate revolves around whether to conceive of rule of law in terms of certain types or configurations of legal and political institutions, or as rooted in a more basic sphere of sociopolitical relationships and norms, which may be embodied in specific institutions. Even more, there are two other important concerns. First, some of the rule of law advocates, Hayek included, claim that it is not compatible with an expansive social welfare state or with the goal of social distributive justice. While liberalism, capitalism, and the rule of law are often presented in a single package, many non-Western societies agree with the rule of law but not with liberalism, and many Western societies managed to have both rule of law and a social welfare state. A second ongoing concern is that the rule of law may become rule by judges and lawyers, this being even more problematic when this group is selected from elite or other discrete groups. Establishing rule of law must take these problems into consideration.[42]

[42] Tamanaha, Brian Z., *On the Rule of Law. History, Politics, Theory* (Cambridge University Press, 2004); Carothers 2006

The rule of law concept came into existence in a slow and unpredictable manner, each related to a recognized historic-political context. Its definition is very intimately related to a 2,000-year-long evolution of the legal system and the government. Its meanings cannot be replicated in every situation, owing a uniqueness to each sociopolitical context from which it was derived.

Athens put in place several mechanisms and standards to maintain a democratic system while trying to subordinate the 'principle of popular sovereignty to the principle of sovereignty of laws.' Both Plato and Aristotle were preoccupied about the possibility for tyranny in a populist democracy, so they advocated for the law to represent an enduring and unchanging order; Plato's legal code was meant to be permanent (Tamanaha 2004, pp. 4-8).

Later on, three historical moments contributed to the current shape of the rule of law definition. One of them is the contest between kings and popes for supremacy, second, the Germanic customary law, and third, the Magna Carta, which embodied the effort of nobles to use the law to enforce restraints on sovereigns. The fundamentals of the medieval political theory were construed on the principle of the supremacy of law. This supremacy operated through monarchs taking oaths to abide by the divine, natural, customary and positive laws; through shared understanding that everyone, including the kings, acted within the law boundaries; by Romanic, Germanic, and Christian ideas that a good king should abide the law; through kings' custom of entering into agreements that offered others the protections of ordinary legal processes; through pressure from different

actors to legally restrain kings' and barons' actions; and through kings' awareness that legitimacy can be obtained if they are bound and act consistent with the law.[43]

Easing the economic activities of merchants evolved into a new society with a different set of institutions from the feudal order, with entrepreneurs looking to accumulate wealth and requiring the enforcement of property rights. The simultaneous recognition in politics and law of bourgeoisie's interests lies at the core of liberalism. Above everything liberalism stresses individual liberty, or as Mill put it 'the only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it'. The liberal social contract writings, with John Locke's being the most influential, explain the origins of law and the state in idealized terms. Since life without law, in the state of nature, is not safe and prone to disputes, keeping peace requires laws, and unbiased law enforcers and judges. "Equality within liberalism entails that citizens possess equal political rights and be entitled to equality before the law."[44]

Three prominent early works lay the groundwork for the integral place of the rule of law in liberal systems, Locke's *Second Treatise of Government (1690),* Montesquieu's *Spirit of the Laws* (1748) and *The Federalist Papers* (1787 -88) by Madison, Hamilton and Jay. Locke called for individuals to come together to create a government and empower it to make, execute, and apply laws for the public good, and 'all this for the preservation of property of all the members of that society as far as is possible'.

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[43] Tamanaha, pp. 15-31

[44] Tamanaha, pp. 31- 32

Montesquieu's contribution was the call for separation of powers plus an independent judiciary; while *The Federalist Papers* contribution was the formalization of checks and balances and judicial review. [45]

The concept of rule of law travels along borders and while the translations differ, the meanings behind the translations vary too. Rechtsstaat and rule of law differ in terms of the meaning they assign to the relationship between the state and the law. While the American conception of the rule of law is represented by a separation between the state and the rule of law, giving prominence to the paradox between the law as dependent on, and independent from, the state, the German concept is rooted in the assumption that there is a symbiosis between the law and the state. In *Rechtsstaat,* law becomes inextricably linked to the state as the sole legitimate channel for the state to wield its power. Thus, 'state rule through law' is a better approximation in English for "rule of law." The concept evolved from Kantian roots toward more positivistic configurations in Bismarck's late nineteenth century Germany, and it became increasingly tied to issues of form rather than substance.[46]

Though the literal translation for the German Rechtsstaat, and originated from it, the French Etat de Droit has a completely different meaning from that connoted by the positivistic Rechtsstaat. It does not mean 'state rule through law', but rather 'constitutional state as legal guarantor of fundamental rights' against infringements

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[45] Tamanaha, pp. 47-54

[46] Rosenfeld, Michael, "The Rule of Law and the Legitimacy of Constitutional Democracy," *Southern California Law Review,* Vol. 74, (2000) p. 1309

stemming from law made by parliament.[47] Unlike the United States system of rule of law, the United Kingdom does not have a written constitution and the judges do not have a clear mandate to provide a check on the legislative powers, making the two cases dissimilar. Yet, the Anglo-American tradition, evolved with a strong sense for the rule of law, and represents a buffer between the interests of states and its citizens.[48]

In the American tradition, the rule of law is based on a written constitution, created to offer legal expression to preexisting, inalienable fundamental rights, transcending both the social contract and the civil society. The state has two duties, a negative one, to refrain from interfering with the citizen's full enjoyment of their rights and a positive one to deter and punish private infringements on citizen's rights, through the provision of police protection and enforcement of private contracts.[49]

The modern understanding of the principle of rule of law was brought forth by the British constitutional lawyer Professor A.V. Dicey.[50] According to Dicey there were two principles inherent in the non-codified British constitution. First was the 'sovereignty and supremacy of Parliament constitution' and second, tempering the first, the rule of law. He saw rule of law as a constraint, though not ultimate, of the theoretically unlimited power of the state over the individual. The three core features of the rule of law are: "no person should be punished but for a breach of the law, which should be certain and prospective, so as to guide peoples' actions and transactions and not to permit them to be punished

[47] Ibidem, pp. 1310
[48] Ibidem, p. 1134

[49] Ibidem

[50] Dicey, A.V. *Introduction to Law of the Constitution,* Indianapolis Liberty Fund (1982[1908])

retrospectively (discretionary power results in arbitrariness); no person should be above the law, rule of law should emanate not from any written constitution but from common judge made law." Table 1 consists of a list of the most frequently employed definitions of rule of law both by scholars and practitioners.

Another divide in rule of law debate follows the distinction between the formal and substantive use of the term. The core distinction is that formal theories are centered on the proper sources and form of legality, while substantive theories include requirements about the content of the law, which must be according with justice and moral principles. There are formal versions that have substantive implications and vice versa. The Anglo-American legal theorists are using the formal legal theories, labeled 'formal legality'. However, Western societies have proved for over a century that the social welfare state can merge with formal legality. A thick substantive rule of law, including formal legality, individual rights, and democracy approximates the common practice of rule of law within Western societies.[51]

Hayek identifies one crucial component of rule of law: *certainty*. It requires that all people subject to the law "be able to predict reliably that legal rules will be found to govern their conduct and how those rules will be interpreted and applied."[52] Predictability is a necessary characteristic of the knowledge that leads to freedom of action.[53]

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[51] Tamanaha, pp. 92-114; Raz, Joseph. "The obligation to obey the law." *The Authority of Law: Essays on Law and Morality* 233, no. 233 (1979): 245-49*;* Emmert 2008

[52] Tamanaha, p.66

[53] Ibidem

This study aligns with the characteristics of rule of law identified by in the Rule of Law Index compiled by the World Justice Project.[54] It refers to legal based rule of law systems that uphold four universal principles: the government and its officials and agents are accountable under the law; the laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property; the process by which the laws are enacted, administered and enforced, is accessible, fair and efficient; and the laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges who are of sufficient number, have adequate resources, and reflect the makeup of communities they serve.[55]

Table 1. Rule of Law Definitions

Author/ Source	Definition Rule of law
Albert Dicey British jurist	Introduces the phrase 'rule of law' in 1885. It was composed of three aspects: no one can be punished or made to suffer except for a breach of law proved in an ordinary court; no one is above the law; everyone is equal before the law regardless of social, economic, or political status; and the rule of law includes the results of judicial decisions determining the right of private persons.
Joseph Raz (1979)	The law must be capable of guiding the behavior of its subjects. The law must be protective, general, clear, public, and relatively stable. Independent judiciary, open and fair hearings without bias, and review of legislative and administrative officials and limitations on the discretion of police to insure conformity to the requirements of the rule of law.
F. A. Hayek (1944)	Government in all its actions is bound by rules fixed and announced before-hand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's

[54] The World Justice Project, Rule of Law Index
[55] Ibidem, p. 2

	individual affairs on the basis of this knowledge. All rule of law systems possess three attributes: 'the laws must be general, equal and certain'.
Karla Hoff and Joseph Stiglitz ("After the Big Bang? Obstacles to the Emergence of the Rule of law" (2002)	Well-defined and enforced property rights, broad access to those rights, and predictable rules for resolving property rights disputes. *No rule of law* –a legal regime that does not protect investors' returns from arbitrary confiscation, does not protect minority shareholders' rights from tunneling, and does not enforce contract rights
Douglas North (1990)	'Protection of property rights', the 'law and order tradition' or 'legality'. It entails broad societal respect for /and protection of legal entitlements and including ownership in tangible and intangible property (contractual rights, patents, etc.)
Thomas Carothers (1998)	A system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is resumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Most importantly, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding. It makes possible individual rights, which are at the core of a democracy. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy – regulatory mechanisms, tax systems, customs structures, monetary policy, and the like – would be unfair, inefficient, and opaque.
Tom Bingham (2010)	All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered
Copenhagen political criteria for new member states in the European Union (Arnull 2002, p 240-1)	Member states rule of law: laws must be an effective guide to action, they must be publicized, reasonably clear and prospective, rather than retrospective in effect. […] there must in addition be an independent and impartial judiciary with responsibility for resolving disputes over precisely what the law requires and providing effective remedies where the law is

	breached. The judiciary must respect the rules of natural justice and be accessible to those who claim that their rights have been infringed. Controversies must be decided timeously and according to rational and reasonably predictable principles. Judgments and the reasoning on which they are based must be made public so that they can guide future conduct and be in the subject of critical scrutiny
United Nations	A system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is resumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Most importantly, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding. It makes possible individual rights, which are at the core of a democracy. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy – regulatory mechanisms, tax systems, customs structures, monetary policy, and the like – would be unfair, inefficient, and opaque.
International Bar Association	A principle of governance in which all persons, institutions and entities, public and private, including the State itself are accountable to laws that that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.
World Bank	An independent, impartial judiciary, the presumption of innocence, the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental

	principles of the Rule of Law. Accordingly, arbitrary arrests, secret trials, indefinite detention without trial, cruel or degrading treatment or punishment, intimidation or corruption in the electoral process, are all unacceptable. The Rule of Law is the foundation of a civilized society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect.
World Justice Project	The government and its officials and agents are accountable under the law. The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient. The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.
European Commission for Democracy Through Law (Venice Commission)	Necessary elements for the rule of law: legality, including a transparent, accountable, and democratic process for enacting law, legal certainty, prohibition of arbitrariness, access to justice before independent and impartial courts, including judicial review of administrative acts, respect for human rights, non-discrimination and equality before the law.

About corruption. Definition and conceptualization

'Corruption' is a trendy term and, unlike the establishment of rule of law it has received a lot of attention from contemporary scholars. There is a large amount of literature on the significance and the measurement of corruption. The tendency has been to enlarge its meaning, shifting away from specific types of office, organization or behavior. The latest definition focuses towards a 'relationship-centered' approach. Corruption is thus defined

as 'the abuse of entrusted power.'[56] However, in order to isolate particular behavior with causal negative consequences on rule of law, I will focus on a narrow definition of corruption based on the essence of this accepted 'official' definition.

In 1994 a transnational NGO, Transparency International (TI) was created to address the problems related to the lack of transparency and accountability in governance. According to TI, public corruption is the abuse of public office for private gain.[57] Klitgaard[58] defined a corrupt official as one who 'deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain private-regarding behavior'. First of all, it is important to identify if there is a common similar understanding of what corruption is across countries.

In some cultures it is common practice when a public official provides a service, for the beneficiary to respond with a tip or gift.[59] The difficulty is to identify when the gift or tip becomes a bribe. If the service is not based on the gift, thus the timing of transaction is different and the tip is given later, one could consider it courtesy and not corruption (Rose-Ackerman 1999, 91-111). An important question is thus, is corruption culture specific? Similarly, can campaign financing be considered a form of corruption? Campaign practices in the U.S. can be and are by some considered to serve the purposes

[56] Sampford, Charles and Adam Shacklock, Carmel Connors, and Fredrik Galtung *Measuring corruption,* (Ashgate 2006), p. 59

[57] Pope J., *Confronting Corruption*, the Elements of a National Integrity System TI, (2000)

[58] Klitgaard, 1988

[59] Azfar, Omar, Satu Kahkonnen, Patrick Meagher, *Conditions for Effective Decentralized Governance*, IRIS Center, University of Maryland, (2001), p. 44

of corruption in other countries (Azfar et al. 2001, p. 44). The literature is rich in definitions of corruption. Some refer only to situations in which one of the parties is a public official (LaPalombara 1995; Oldenburg 1987). Others look also at corruption between two private parties as in the case of commercial bribery (Coase 1979). Despite these disagreements, there is a broad similar understanding of the term 'corruption' in the world.

The 'classic' definition refers to the use of public office for private gain. Here is a more detailed explanation of the components of this definition. First, there is a public official (X) acting for personal gain, who violates the norms of the public office and damages the interests of the public (Y) to benefit a third party (Z) who rewards (X) for access to the public goods and services that he/she (Z) could not otherwise obtain.[60] This definition, like most attempts to capture corruption suffers from shortcomings.

The United Nations Convention against Corruption proposed and began to define corruption as a list of specific acts or types. Thus, some of the more encountered forms are 'Grand' and 'Petty' corruption. Grand corruption refers to the highest levels of a national government. Petty corruption refers to the exchange of a small amount of money, the granting of minor favors by people looking for preferential treatment, and, even the employment of relatives in minor positions.[61] Such that it can take the form of bribery, embezzlement, conversion, extortion, or fraud or it can take the form of nepotism or cronyism, abuse of discretion, improper political contributions, which fall outside of

[60] Philp in Sampford et al. 2006, p. 45
[61] Langsth, Petter, "Measuring Corruption," in *Measuring corruption,* edited by Charles Sampford, Adam Shacklock, Carmel Connors, and Fredrik Galtung (Ashgate, 2006), p. 9

what is traditionally considered criminal. Grand corruption is more likely to affect the reform in a systematic way (TI).

Grand political corruption has two elements, motives and consequences. The intention is enrichment and power preservation. The recipients of this type of corruption are senior officials from the executive, such as heads of state, the cabinet, the government ministers, top civil servants (including military and security apparatus leaders); from the legislative, members of the parliament; from the judiciary, supreme and high court judges; and from the local and regional authorities, governors, and local council members. Their motivations should be for the well being of the nation and the electorate and not for the use of public position for private gain. Grand political corruption takes place when these senior officials who make and enforce the laws in the name of the people are corrupt. They use their power to capture and accumulate resources in an illegal way through corrupt behavior such as bribes, fraud and embezzlement. Examples of corrupt political activity are privatization, land allocation, public contracting, lending. They are performed in order to acquire wealth and it damages the private sector; or to preserve power and the consequence is obstruction of participation in the political process of other groups and misrepresentation of the electorate's interests.

Accumulation can be done through extracting bribes, 'commissions' and fees from the private sector for delivering government services such as licenses, guarantees and loans, public projects and contracts, or by offering market protection, preferences and monopoly, through taxes, environmental protection or labor laws. Additionally, the senior politicians grant preferences and favors to businesses in which they or members of their

family or friends have interests. It has been noted that this is how people in power build their businesses while holding public office. Lastly, the ruling elite can simply detour public resources through theft and embezzlement.

Mauro,[62] and Burki and Perry,[63] find that corruption reduces economic growth via reduced private investment. Gupta, Davoodi and Alonso- Terme[64] showed how corruption has an impact on economic development and worsens poverty. Kaufman et al.[65] claim that corruption limits development, while Bai and Wei[66] make the case that corruption affects the making of economic policy. Rose-Ackerman also argues that increased levels of corruption negatively affect investment and growth. Poverty, poor health, low life expectancy and severe inequalities in the distribution of income and wealth are maintained when corruption is prevalent.[67] Other authors[68] find that the arrow

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[62] Mauro, Paulo, *Corruption and Growth,* in The Quarterly Journal of Economics, 110(3), (1995), pp. 681-712

[63] Burki Shahid Javed, Guillermo Perry, William R. Dillinger, *Beyond the center: decentralizing the State,* World Bank Latin American and Caribbean Studies, (1999)

[64] Gupta, S., H. Davoodi and R. Alonso-Terme, "Does Corruption Affect Income Inequality and Poverty?," in *International Monetary Fund Working Paper*, No. 98/76, (May1998)

[65] Kaufman, Daniel, Aart Kraay, and Pablo Zoido-Lobaton, "Governance Matters," *Manuscript,* The World Bank (1999)

[66] Bai, Chong-En, and Shang-Jin Wei, "Quality of Bureaucracy and Open Economy Macro Policies," NBER Working Paper No. 7766, (June 2000)

[67] Rose-Ackerman, Susan, *Corruption and government: Causes, consequences, and reform,* (Cambridge: Cambridge University Press, 1999)

[68] Treisman, Daniel, "What have we learned about the causes of corruption from ten years of cross-national empirical research?," in *Annual Review of Political Science,* Vol. 10, (2007), pp. 11-44; Paldam, Martin, "The Cross-country Pattern of Corruption: economics, culture and the seesaw dynamics," *European Journal of Political Economy,* Vol. 18, Issue 2, (June 2002), pp. 215-240

can go the other way, the level of development affecting the level of corruption. The key mechanism behind the negative effect of corruption on economic growth and development is through inhibiting foreign direct investment. Foreign investors avoid corruption because it is wrong and can create operational inefficiencies.[69]

The relationship between income inequality and corruption is among the most blurred ones and one found to be mutually reinforcing.[70] It is very damaging in that when corruption becomes endemic, it can have a negative effect on the rule of law, property rights, and the enforcement of contracts.[71] Olson,[72] North[73] and others argue that the benefits of markets can be fulfilled only when the appropriate institutions sustain them. Additionally, public trust in government is damaged by corruption.[74] Citizens come to believe that their governments are ineffective which leads to distrust of civil servants.

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[69] Habib, M., L. Zurawicki, "Corruption and foreign direct investment." *J. Internat. Bus. Stud.* Vol. 33, (2002), pp. 291–307

[70] You, Jong-sung and Khagram Sanjeev, "A Comparative Study of Inequality and Corruption," *American Sociological Review,* Vol. 70, No. 1 (February 2005) pp. 136-157

[71] Azfar et al., p. 46

[72] Mancur, Olson, Jr., "Distinguished Lecture on Economics in Government: Big Bills Left on the Sidewalk: Why Some Nations are Rich, and Others Poor," The Journal of Economic Perspectives, Vol. 10, No. 2 (Spring, 1996), pp. 3-24

[73] North, Douglass C., *Structure and Change in Economic History* (W.W. Norton & Co, New York 1981); North, Douglass C., "Institutions, Institutional Change and Economic Performance," (Cambridge University Press, 1990)

[74] Anderson, Christopher J., and Yuliya V. Tverdova, "Corruption, political allegiances, and attitudes toward government in contemporary democracies", in *American Political Science Review,* Vol. 47 (1), (2003), pp. 91-109

A different school of thought argues that in the case of rigid egalitarian regimes, corruption does not necessarily deteriorate economic performance.[75] In some cases bribes and other forms of corruption 'grease' the system and lead to Pareto optimality.[76] However, companies who pay more bribes end up wasting more time negotiating with bureaucrats.[77] Consequently, the speed money effect might not materialize due to corrupt officials.[78] It is possible that the most efficient firms pay the most bribes.[79] Since the firms placing high value on time pay the highest bribes to increase efficiency,[80] in the end, the ones paying the most might not be the most efficient but the most successful rent-seekers.[81]

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[75] Leff, Nathaniel H., "Economic Development Through Bureaucratic Corruption," in *American Behavioral Scientist,* Vol. 8, No. 3, (1964), pp. 8-14; Nye, J.S., "Corruption and Political Development: A Cost-Benefit Analysis," in *American Political Science Review,* Vol 61, No 2, (1967), pp. 417-427; Braguinsky, Serguey, "Corruption and Schumpeterian Growth in Different Economic Environments," in *Contemporary Economic Policy,* Vol. XIV, (July 1996), pp. 14-25

[76] Rashid, Salim, "Public Utilities in Egalitarian LDC's: The Role of Bribery in Achieving Pareto Efficiency," in *Kyklos,* Vol. 34, Issue 3 (1981), pp. 448-460

[77] Kaufman, Daniel and Shang-Jin Wei, "Does 'Grease Money' Speed Up the Wheels of Commerce?," in *NBER Working Paper No. 7093,* (April 1999)

[78] Tanzi, Vito, "Corruption Around the World: Causes, Consequences, Scope, and Cures," in *Staff Papers – International Monetary Fund,* Vol. 45, No. 4, (December 1998), pp. 559-594

[79] Beck, Paul and Michael Maker, "A Comparison of Bribery and Bidding in Thin Markets," in *Economic Letters,* Vol. 20 (1996), pp. 1-5; Lien, Da-Hsiang Donald, "A Note on Competitive Bribery Games," in *Economic Letters,* Vol. 22 (1986), pp. 337-341

[80] Lui, Francis T., "An Equilibrium Queuing Model of Bribery," in *Journal of Political Economy,* Vol. 93, No. 4, (August, 1995), pp. 760-781

[81] Tanzi, Vito, "Corruption Around the World: Causes, Consequences, Scope, and Cures"

In regards to the relationship between corruption and democracy, to date, scholars have shown that party competition encourages unscrupulous politicians to win by exploiting the opportunities for vote buying and illegal party financing.[82] The protection of civil liberties and the enforcement of an independent judiciary can have negative effects on corruption.[83] Also, the protection of freedom of speech allows investigative journalism to find out about and deter corrupt public dealings.[84] Statistical studies find on the one hand a linear negative relationship between democracy and corruption,[85] while others observe corrupt practices increased by the political liberalization in Southeast Asia, Latin America, and former Soviet republics.[86] An argument has been made that

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[82] Little, Walter, and Eduardo Posada-Carbo, *Political corruption in Europe and Latin America.* London: Institute of Latin American Studies, (New York: Macmillan Press, 1996); Johnston Michael, "Public Officials, Private Interests, and Sustainable Democracy: Connections between Politics and Corruption." In Kimberly A. Elliott, ed., *Corruption and the Global Economy*, (Washington, D.C.: Institute for International Economics, 1997), Della Porta, Donatella, and Alberto Vannucci, "The 'perverse effects' of political corruption," in *Political Studies* Vol. 45, No. 3, (1997), pp. 516-38

[83] Rose-Ackerman, 1999; Schwartz, S.H., "A Theory of Cultural Values and Some Implications for Work," in *Applied Psychology: An International Review*, Vol. 48, (1999), pp. 23 – 47; Moran, J., "Democratic Transitions and Forms of Corruption", in *Crime, Law & Social Change*, Vol. 36, No. 4, (2001), pp. 379–393

[84] Giglioli, Pier Paolo, "Political Corruption and the Media: the Tangentopoli Affair," in *International Social Science Journal,* Vol. 48, Issue 149, (September 1996), pp. 381-394; Da Silva, Carlos Eduardo Lins," Journalism and corruption in Brazil," in *Combating Corruption in Latin America* (2000), pp. 173-192

[85] Goldsmith, Arthur A., "Slapping the grasping hand: Correlates of political corruption in emerging markets," *American Journal of Economics and Sociology,* Vol. 3,(1999), pp. 865-883; Sandholtz, Wayne, and William Koetzle, "Accounting for corruption: Economic structure, democracy, and trade," in *International Studies Quarterly,* Vol. 44, (2000), pp. 31-50

[86] Harris-White B., and White G., *Liberalization and new forms of corruption.* (Brighton: Institute of Development Studies, 1996)

because democratic achievements lead to higher wages[87] the incentives and opportunities for corruption among elected and appointed officials are reduced. [88]

New theoretical framework. No rule of law without enforcement

In many new democracies politicians are *still above the law* and the application of rules and legislation continues to be *unpredictable*. This section explains why the 'sovereign' is still not complying with the law in these countries, and introduces the only mechanism that can realistically lead to establishment of rule of law in societies with endemic corruption.

The success of establishment of rule of law is predicated upon several factors, such as property rights pressures from investors, foreign aid and intervention, citizenship pressure from below, and a generic political will. This menu of explanations for the success of rule of law establishment fails to account for one simple but not insignificant relationship. In new democracies, where the public and private spaces have never achieved separation, corrupt leaders and their supporters will prevent reforms to the system and the establishment of rule of law in order to deter future punishment. Conducting only superficial changes to the system dodges investors, foreign powers, or

[87] Goldsmith 1995; Rodrik, Dani, "Democracies Pay Higher Wages," in *The Quarterly Journal of Economics*, Vol. 114, No. 3, (1999), pp. 707-738

[88] Sandholtz and Koetzle 2000; Van Rijckeghem, Caroline and Weder, Beatrice. Bureaucratic Corruption and the rate of temptation: Do wages in the civil service affect corruption? *Journal of Development Economics,* 65 (2), (2001), pp. 307-332

citizen pressures. In an attempt to gain political support, whether domestic or international, elites in power introduce reforms (new legislation, new criminal codes, and again, more laws and regulations, better salaries for judges, better technology in courts, and so on), but not enough to lead to true accountability. If, by chance, citizens do manage to punish politicians through the electoral process, a new set of corrupt leaders takes over the system and benefits from the same vicious cycle of state theft, lack of punishment, and the incentives to keep the 'show' going.

The failure of the current explanations for rule of law success is also debated in the literature. Practice shows that pressures to reform from conventional sources (civil society, business community, foreign aid) are not successful nor do they lead to establishment of rule of law, even with incentives in place. Some incentives work, such that for a brief period, through European Union conditionality effects, some new member states from Central and Eastern Europe, have introduced some reforms. But the vast majority of them have fallen in the 'superficial reforms' category, i.e. new laws, new codes, better salaries, independent systems of appointments, or better technology, among a few others. To be sure, none have led to the true *implementation* of the law and the punishment of illegal behavior.

Even under the assumption that politicians initiate steps toward reforms by introducing good laws and some procedural changes, this will not lead to true establishment of rule of law because it still lacks the key ingredient – the enforcement of these laws. There is still a need to create real obstacles to breaking the law. I call this the

'no rule of law without enforcement', or better the 'rule of law only with enforcement' argument.

This stand goes contrary to the general belief that rule of law exists in the presence of a mysterious ingredient, an almost invisible hand that makes everyone legitimize and agree with the superior value of such a system. Only then, it is argued, do we have the rule of law. Even Weingast[89] admits that this is not a very realistic scenario. I argue that rule of law exists only when people can predict (Hayek's favorite ingredient) there will be punishment for breaking the law, there will be an obstacle for attempting to go through illegal paths. Both scholars and practitioners can agree that this outcome is not present in new democracies just yet.

To clarify, by the terminology 'no implementation', 'no application of the law' and 'no enforcement,' I refer to the lack of predictability of implementation or enforcement. There are cases when the law is applied and the punishment is enforced, but what lacks is the *predictability* of application and of enforcement.

The implementation and application of laws does require political will, but not a generic altruistic idea of good behavior, but true interest to enforce the law. But corrupt politicians will never have an interest in enforcing the laws because such enforcement would likely result in punishing [their very own] corrupt behavior. It is true that political will as political interest would lead to true reform in a hypothetical world, but that is not expected if we assume politicians to be rational actors, since they have no interest in

[89] Weingast, Barry, "The Political Foundations of Democracy and the Rule of Law"

being punished by the enforcement of the rule of law short of unintended positive consequences of otherwise 'superficial' reform, the rule of law will not be established.

Some may argue, but how did the United States and several Western European countries establish the rule of law? I would argue that a better use of the word (though 'establishment' is quite fine) would be 'evolve'. In the US and the advanced democracies, rule of law rather evolved than was established, and mostly through unintended consequences as well, such as the conflict between the Church and the kings, the lords and the king, the bourgeoisie and the landed aristocracy, and later the workers movements, and over a period of several centuries. Among those the clearest enterprise to establish the rule of law might have been to guarantee the private rights protection. In the late 20th century, beginning of 21st century establishment of rule of law refers to the active pursuit to reform previously authoritarian and totalitarian regime with the overall scope of instating an Anglo-Saxon rule of law template; which, for the moment failed to happen.

Hypothesis 1: *Corrupt politicians prevent the establishment of rule of law for fear of punishment, if the reforms for better enforcement mechanisms are applied*

With the mechanism through which rule of law establishment is undermined now identified, I will discuss what exactly politicians are not doing to enforce the rule of law. While the first hypothesis shows why the rule of law is not established in the presence of corruption, the second hypothesis explains how to establish the rule of law.

Establishing the rule of law requires a different set of factors than those required for maintaining it. Though contemporary Western societies struggle with a decay of the rule of law, the recipe to reconcile its inherent, historically contextual, tensions is not the same as the prescription for successful rule of law establishment.

The only experience we can rely on for inspiration is the Western centuries-long evolution of the prominence of law over government, its fall in disgrace in some societies at the beginning of the 20th century, and its reemergence after World War II as the core system of reference within a liberal society. Centuries-long conflicts resulting in incremental addition to the practice and concept of rule of law cannot be possibly transposed in a couple of decades in new democracies. First, the institutional and societal mechanics of the establishment of rule of law in new democracies in the similar vein as in the Western societies are absent. Second, there has not been enough time for the assimilation of values that come with the procedural changes.

Practitioners and scholars ask for cultural change first. But this is nearly impossible in a short period of time. The private and public have not evolved into separate spaces in new democracies. One crucial obstacle is the lack of *practice*. In most previously authoritarian regimes the norm was to disobey authority. Defying the law was associated with a good outcome. For instance, in the former Soviet Communist societies the state was one with the party and the law. In some of these societies the saying went "if you do not steal from the state, you steal from your family". Studies show that people still truly prefer a culture of corruption, out of habit, ease, and interest to pursue illegal rent seeking without fear of punishment. Within the same generation, one can hardly

expect a full psychological shift in which the actor (elite or mass) sees the state different from the law, on the one hand, and the law as the protector from the state, on the other. There has not been enough time for cultural change, and I argue there will not be a change too soon. The majority prefers corrupt practices, for reasons outlined above, and there is little incentive for collective action.

I argue that the lack of practice is probably the most detrimental to the assimilation of values in these new democracies. Short of experiencing the rule of law, nothing can truly make the citizens in these countries know what rule of law is. And, since they cannot experience it in their own societies, this can be accomplished only through travelling to countries with the rule of law. Much hope has been put in the 'exodus' of people in the Western countries after the fall of authoritarian regimes both in Latin America, and more recent in Central and Eastern Europe. It was expected that some of them will return to their home countries after experiences in universities and will share the experiences and pressure for change. However, the ones that return to their home country, though they know rule of law when 'they see it', they can not truly pass on this knowledge to the locals, which leads again, to the collective action problem.

Since we cannot reproduce the evolution of rule of law establishment over centuries and the creation of rule of law values within societies over a few decades, what else can be done? One approach is to create independent judiciaries and police. However, both the judiciary and the police, though formally independent from politicians can be

very corrupt internally[90]. They are not truly independent from influence. Though judges do not owe politicians their judicial position anymore they still keep their loyalty to them creating a dangerous network of politicians, prosecutors, and judges. Financial perks (even in the presence of substantial discretionary budgets) are more than welcome if the predicted expectation is the lack of punishment. The network of politicians, prosecutors, judges, and business companies will keep undermining the law and not go through lawful channels.

While introducing an independent judiciary and police are good efforts, they are not sufficient. Cultural change on the other hand may take way too long and may not happen ever. What these countries need is to *introduce the institutions that will make punishment predictable;* to make obstacles to unlawful behavior predictable so as to *create the expectation that breaking the law will result in punishment if one is caught.*

I argue that the establishment of rule of law has to start with its most important obstacle, the corrupt politicians. The agents of change have to be clean before expecting any real progress. I posit that creating a truly independent anti-corruption agency may be the only answer to the establishment of rule of law in the short term. This is a more realistic and manageable change than changing culture, or creating an independent and impartial judicial system as a whole, or having all actors in one polity simultaneously desire change, or expect altruistic behavior to take over corrupt politicians fearful of

[90] Parau, Cristina Elena. "Impaling Dracula: How EU accession empowered civil society in Romania." *West European Politics* 32, no. 1 (2009): 119-141; Danilet Cristi, *Corruption and anti-corruption in the justice system,* (Bucharest, C.H. Beck, 2010)

punishment. A truly independent anti-corruption agency would be a more manageable change.

Additionally, if this anticorruption agency maintains its independence it can be a motor for further change. Such an institution is a relatively small but powerful one isolated from political games that can start cleaning up the system by eliminating the corrupt politicians. If other actors come to its aid, in the form of citizen support or media support, it is that much more successful. Whereas the success of other reforms and changes might be difficult to quantify, observe, and associate with the rule of law, the punishment of corrupt politicians is a readily observable and quantifiable measure for rule of law establishment. Not only that, but the acknowledgment of the success of this agency will most likely lead to its increase in legitimacy, interest, and more importantly, it would most likely generate what we are interested in, *the expectation of punishment for corrupt behavior.*

Having created the fear of punishment, corrupt rent seeking politicians would most likely move their interests to the business sector, for more profitable and less dangerous affairs. The ultimate positive consequence of the success of this anticorruption agency is that there are less and less people in power that are corrupt. Since we have established that the main obstacle in the establishment of rule of law is fear of punishment then, the less corrupt or uncorrupt politicians remained in power will have less fear and less interest not to implement changes to lock-in future behavior and further the establishment of rule of law.

In a review of the relationship between corruption and inequality Uslaner[91] asks how Singapore and Hong Kong, where corruption was deeply rooted, become from lawless societies, became model city states.[92] The answer is that they both introduced truly independent and powerful anticorruption agencies, the Singapore Corrupt Practices Investigation Bureau, and Hong Kong's Independent Commission on Corruption. These are strong institutions with the power to investigate, prosecute, and arrest people suspected of corrupt behavior. In 1960 the Singapore's Prevention of Corruption Act was passed in an attempt to clean up the system and attract investors. The result is that Singapore has not only cured corruption, ranking at number one with Denmark and New Zeeland as the *least corrupt country in the world* (Hong Kong 13th, UK 20th, US 22nd) (Corruption Perception Index from Transparency International, 2010), but also ranks at 93.3 percentile of countries with most established rule of law (Hong Kong 86.6, UK 94.3, US 91.8).[93] In 2011, Singapore surpassed the US in global competitiveness ranking at number 2 (US at number 5).

Though one has to remember that both Singapore and Hong Kong are both authoritarian regimes, the constructive lesson is that a decision in 1960 to clean up the system starting with curing corruption resulted in ranking at number 1 in lack of corruption, 93.3 percentile in rule of law and number 2 in the world at economic

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[91] Uslaner M Eric, *Corruption, inequality and the rule of law. The bulging pocket makes the easy life,* (Cambridge: Cambridge University Press, 2008)

[92] Ibidem, p. 203

[93] World Bank, Worldwide Governance Indicators http://info.worldbank.org/governance/wgi/index.asp

competitiveness. And though criticism may be raised about the applicability of such a truly independent institution in non-Asian, non-authoritarian regimes, we have more to lose form not testing and considering it a solution, than from looking at discordances in environment.

Hypothesis 2: *The creation of a truly independent anti-corruption agency progressively leads to the establishment of rule of law*.

While the first hypothesis of the study proposes to uncover its universal value within cases and across countries, the second hypothesis has normative value since it explores the possible solution to this puzzle. I set up a mixed methods research design with two case studies, Romania and Czech Republic, and several cross national analyses to test these hypotheses.

Methods and case selection

The Czech Republic case was set up as the critical case for the first hypothesis. As it will be further explored in chapter two, the elements for successfully establishing the rule of law were in place. Czech Republic had experienced being a democracy between the two World Wars, it is situated in the vicinity of the advanced liberal democracies with rule of law, it was characterized by economic growth, lack of ethnic conflict, it came out of communism through a rather peaceful transition, and it became the best example of democratic consolidation in Central Europe. Despite all of these elements, Czech

Republic lacks rule of law. Recent European Union[94] and Transparency International reports have concluded that Czech Republic has fallen back, and is rattled by political fights and endemic corruption. This case is relevant because it exposes the problem with establishing the rule of law even in the case of favorable historical legacy, economic success, and foreign support. Rule of law establishment is stalled in the presence of political corruption in the contemporary democratic history.[95] This study will show how the rent-seeking behavior of politicians leads to both mechanisms of undermining rule of law establishment mentioned above, the interference with the judiciary, and the lack of reform for law enforcement.

The second case Romania was chosen because its Ottoman past, the long history of disobeying authority, the lack of experience with self government, the most severe totalitarian regime, a 'stolen' revolution by communists that came back to power during transition to democracy, a very subdued society and almost inexistent opposition, plus a country full of resources made this country the best choice to uncover the mechanism at play in the first hypothesis. After uncovering this mechanism the expectation was to test its validity in Czech Republic.

However, Romania was the selected choice also because it offers a critical test for the second hypothesis. If a country coming out of Communism as the last hope for

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[94] "Reform of the Judicial System of the Czech Republic and the Accession to the European Union," *Europeum,* October 2012; and *Regular Report from the Commission on Czech Republic's Progress towards Accession.*

[95] I make this temporal note because rule of law can be established, as it actually was, during centuries of societal conflicts (between the kings and the Church, the kings and the land lords, the bourgeoisie and the landed aristocracy, the workers and the capitalist class, and the civil rights movements) and this evolution was a natural progression in the currently advanced Western democracies.

economic success and rule of law, inheriting the communist party with a new name (the Social Democratic Party of Romania), a network of corrupt politicians, judges and business is able to have a successful record of the anti-corruption agency then, this case can confirm that the establishment of an independent anticorruption agency leads to the progressive establishment of rule of law. It is the most unlikely place for anti-corruption success; while Czech Republic, out of all the new democracies in Central and Eastern Europe is the most unlikely to be in a dire state of lack of rule of law and submerged in corruption.

In order to test my hypotheses I first employ the method of structured focused comparison in the two comparative case studies. Documents and newspapers are used as an important source of descriptive information. They provide details about reform content, reform progress, actors involved, corruption cases and their evolution and resolve. Interview data are used as a primary source of explanatory information about why reforms were adopted and implemented the way they were, or not adopted and implemented at all.

The data were gathered in two stages. The first stage involved collecting the documents such as body of laws, press releases, progress reports, and case evaluations, sentencing records, and media articles. The second step consisted of the interviewing stage. This enabled the acquisition of more data on the influence of political corruption and the level of reforms. I used snowball sampling and maximum variation sampling.[96] I

[96] Patton, Michael Quinn. *How to use qualitative methods in evaluation*. Vol. 4. (Sage Publications, Incorporated, 1987)

conducted 50 in-depth interviews in Czech Republic and Romania with prominent political and judicial elites, and members of the civil society, academia, and media. A full list of interviewees can be found in the appendix.

This dissertation also shows cross-nationally the effect of corruption on the rule of law. I use advanced statistical tools to show that the negative relation between corruption and rule of law holds across countries. I also introduce an innovative instrument to fix the problem of endogeneity between the two concepts.

A note is necessary at this point. Since corruption is a hidden activity hard data is difficult to gather. I use mostly interviews, media accounts, and court records. This study specifically avoids what other studies rely mostly on to study corruption, that is, public opinion data. This type of data is not completely missing from the study, especially for the cross-national analysis, since there it is almost impossible to replace. But if at all possible I tried to avoid perceptions polls. Perceptions are hardly transferable, they are context bound, cannot be really compared. Thus, I preferred as much as this topic allowed looking at hard facts and personal experiences. They are context specific and case specific. But I emphasized the similarities between experiences and cases and that makes the findings specifically valuable. This study avoids being a collection of public opinion surveys, and tries to look in depth at mechanisms, relationships, incentive structures and similarities between findings from very different sources.

PART II. Rule of law in practice; the case studies, Czech Republic and Romania

CHAPTER 2: ON POLITICAL BEHAVIOR, ESTABLISHMENT OF INSTITUTIONS, AND ENFORCEMENT OF LAWS.

-The mechanism and the historical perspective –

"To draft and adopt a good law is an immensely difficult task, calling for a high degree of responsibility. It is a far more difficult task, however, to bring into existence a law-based state."[97]

K.R. Popper

Introduction

Two prominent academics heading two public institutions in Romania, shared a similar story, during interviews in 2011. I will keep their identity anonymous due to the nature of the material. Both of them had a member of their family get really sick recently, mother-in-law and wife respectively. One of them was a very high regarded member of the administration in Romania, and is well connected to President Basescu. I found out through their stories that the hospital experience is horrendous for a regular citizen in this European Union member state. There are no available beds, no sheets on the beds, no tape, medicine or other indispensible material for a hospital. Both of them had to bribe

[97] Popper K.R 1992. *Die öffene Gesellschaft und ihre Feinde,* 7th German edition, Tübingen, Foreword, in Hendrych Dusan "Constitutionalism in the Czech Republic," *The rule of law in Central Europe. The reconstruction of legality, constitutionalism and civil society in the Post Communist countries,* eds. Priban Jiri and James Young, Ashgate, Dartmouth, p. 13

the doctors and the personnel in order to receive decent care. One had to eventually appeal to his higher position in the country and his title to have their relative moved to a floor with actual care. I found one of the academic's exclamation to be all encompassing and very relevant about the effect of corruption on citizens at all levels: "well, I am sorry that I did not have time to write a reform package, my mother in law was going to die in 6 hours."[98]

At the beginning of 21st century new democracies find themselves at the intersection of two opposite types of conducting state affairs, rule of law and rule by the people. Rule of law as exposed in the previous chapter, is the Anglo-Saxon born tradition, developed through centuries of frictions, conflicts between kings, landlords, the bourgeoisie, and later the workers, and through the civil right movements. This is represented by the rational rule of procedures over arbitrary power and is found in established democracies. We are witnessing now an unprecedented moment in history; on the one hand the democratic institutions and procedures have been established in a very large number of new democracies;[99] on the other hand they do not accomplish their main function, to protect the rights and liberties of citizens. That is because they exist in paper but not applied in practice. Politicians act above the law.

New democracies on four continents are unable to pass from the stage of rule by people to a stage of rule of law. The following chapters expose a specific causal relation between political corruption and the dismantlement of rule of law institutions and

[98] Interview no. 37 and interview no. 24 (anonymous due to the sensitivity of the information)

[99] Freedom House reports that over 50 per cent of the people in the world live now under democratic institutions. http://www.freedomhouse.org/

practices in two new democracies Czech Republic and Romania. This study shows how the rule by the people prevents the establishment of rule of law. I refer here to a different type of corruption than the one we observe in advanced democracies. It is widely acknowledged that in established democracies most corruption cases revolve around interests groups that influence politics through lobbying. By contrast, the cases explored here present a completely dysfunctional state of affairs marred in every level of the democratic society, the separation of powers, the independence of judiciary, and the equality before the law.

We cannot speak of an established rule of law in either one of the two countries. While the laws are good, albeit too many, they are not applied and enforced in a predictable manner. Predictability[100] is the number one ingredient for rule of law. The first hypothesis that political corruption, specifically the misappropriation of public funds for private gain, harms the establishment of rule of law has been confirmed. This happens through two mechanisms. The first is represented by the *direct interference with the judiciary, dismantling the separation of powers principle of rule of law*. The second is represented *by the lack of reforms that could lead to the predictable application of laws and to holding corrupt leaders accountable*. Even if attempts are made to show progress through drafting of new legislation or through superficial reforms, these changes have no in-depth power. The main consequence is that the judiciary remains unreformed. Thus, citizens' right to fair, predictable, and impartial trials is dismantled.

[100] Hayek, 1973

This has been confirmed by a vast majority of the people interviewed. The some examples include Monica Macovei, former minister of Justice and current MP at the EU parliament, Daniel Morar chief prosecutor of the National Anti-Corruption Directorate, Cristi Danilet member of the Romanian Superior Council of Magistracy, Vaclav Zak former member of the Czech Republic parliament, Tomas Kafka senior manager Ernst & Young Fraud and Investigation Disputes, Vladimira Dvorakova leading Czech political scientist and Head of the Universities Accreditation Committee, David Ondratcka Head of Transparency International Prague, Daniel Barbu leading political scientist, Jonathan Stein editor Project Syndicate, Michael Smith leading academic, Laura Stefan Romanian anti-corruption expert, Codru Vrabie Romanian leading civil society member and anticorruption expert, Radu Nicolae expert at the Center for Legal Resources Romania, Mircea Toma president Active Watch media monitoring agency in Romania, Lenka Andrysova Czech member of the parliament, Florin Diaconu, academic and director of the Romanian Diplomatic Institute, Pavol Fric, academic at Charles University, and other important members of the political, judicial, academic, business, and civil society spheres in Czech Republic and Romania. A complete list is provided in Appendix 1.

The Czech Republic case was set up as the critical case to disprove this theory. As shown in the previous chapter, all the elements for successfully establishing the rule of law were in place. Czech Republic had experienced being a democracy between the two World Wars, it is situated in the vicinity of the advanced liberal democracies with rule of law, it was characterized by economic growth, lack of ethnic conflict, it came out of communism through a negotiated transition, and it became the best example of

democratic consolidation in Central Europe.[101] Despite all of these elements, Czech Republic lacks rule of law. Recent European Union[102] and Transparency International reports have concluded that Czech Republic has fallen back, and is rattled by political fights and endemic corruption. This case is relevant because it exposes the problem with establishing rule of law even in the case of favorable historical legacy, economic success, and foreign support. Rule of law cannot be established in the presence of corruption. This study will show how the rent-seeking behavior of politicians leads to both mechanisms of undermining rule of law establishment mentioned above, the interference with the judiciary, and the lack of reform for law enforcement.

The second case, Romania, is no surprise in regards to cross verifying the first hypothesis. However, it offers a critical test for the second hypothesis. It confirms that the establishment of an independent anticorruption agency leads to the progressive establishment of rule of law. Coming out of Communism as the last hope for economic success and rule of law, inheriting the communist party with a new name (the Social Democratic Party of Romania), a network of corrupt politicians, judges and business interests, and sank in endemic corruption, Romania is very short of a success story. Thus, this Eastern European country has potentially found the way out of the unbreakable relationship political corruption and lack of rule of law when it established two anticorruption agencies. The two entities, the National Anti-corruption Directorate (DNA) and the National Integrity Agency (ANI), supported by what is called the

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[102] *Europeum,* "Reform of the Judicial System of the Czech Republic and the Accession to the European Union" (October 2012), and *Regular Report from the Commission on Czech Republic's Progress towards Accession.*

'historical accident Monica Macovei' (the former minister of justice) have been created as proof to the EU that Romania is on a path to justice reform during the accession negotiations. There is disagreement on the success of these entities. The opposition regards them as political institutions used to attack and eliminate political opponents.[103] Others regard them as locking-in Romania on a path of irreversible reform as it began to clean the system of corrupt politicians. I assess that these entities have a positive effect towards the establishment of rule of law. The weakness, though, comes from the judges who are still part of the corrupt networks. The files sent by the prosecutors of the National Anti-corruption Directorate[104] sit in the judges' offices for years. They rarely sentence corrupt politicians. However, recent convictions of high profile politicians, such as the former Romanian prime minister, prove great progress.

These findings clarify a lack of distinction in the literature. Recently 'political corruption' and 'rule of law' have been thought of as the two sides of the same coin. The definition of rule of law in some sources such as Worldwide Governance Indicators, World Bank, is the absence of political corruption. Kaufman, Kraay, and Matruzzi write in regard to corruption and rule of law, that "these dimensions of governance should not be thought of being independent of one another,"[105] but the authors go further and place these under the same sub-theoretical definition of governance "the respect of the citizens

[103] This finding has been supported by prominent members of the civil society in Romania, Codru Vrabie, Radu Nicolae, of the academia Daniel Barbu, and the prosecution Maximilian Balasescu, while it was opposed by the heads of these institutions Horia Georgescu, head of the National Integrity Agency and Daniel Morar, chief prosecutor at the National Anti-corruption Directorate

[104] The Romanian Anticorruption Agency (described in detail in chapter 2).

105 Kaufmann, Daniel, Aart Kraay, and Massimo Mastruzzi. "The Worldwide Governance Indicators (WGI) project." *WGI World Bank Institute. Washington DC, USA* (2011).p. 5

and the state for the institutions that govern economic and social interactions among them."[106] Comparative politics has been more and more interested in how democratic institutions incentivize behavior. However, in many non-Western societies the study of how formal institutions impact behavior may escape the effects of networks of relationships. These networks of interactions create a different set of behavior incentives. In the case of rule of law establishment in new democracies this manifests through lack of institutional reform and lack of enforcement of laws. These two case studies reveal how agents precede formal institutions. The private and public spaces are not clearly defined and the rule of the people in power dictates the level of institutional establishment.

This study thus, clarifies this misuse and proposes the return to two separate definitions. From a political science standpoint, it is not correct to use political corruption interchangeably with lack of rule of law. Political corruption is a type of behavior, the abuse of public office for private gain. It is at most *one* way to not respect the rule of law. On the other hand, lack of rule of law encompasses several dysfunctions, ranging from interference with the separation of powers, to the disrespect for the freedoms and rights of the citizens, the lack of impartiality in the judiciary, and an ineffective and unpredictable criminal justice system. All political corruption acts interfere with the rule of law. But not all rule of law offenses are political corruption acts. This study responds to the criticism that rule of law and political corruption cannot be separated as concepts. They can be separated, and this study shows that even though their existence may have

106 Ibidem, p.3

common roots, the presence of political corruption as a *type of behavior* affects the establishment of rule of law as a *set of formal institutions.* [107]

Romania

Brief background

Romania is a country situated at the intersection of Central and Southeastern Europe, bordering Hungary, Serbia, Ukraine, and Moldova and with opening to the Black Sea.[108] Most of its history, Romania has been under foreign occupation. During the Middle Ages, Transylvania, a Romanian province, became part of the Habsburg Austrian Empire. The other two provinces, Wallachia and Moldavia have been under Ottoman suzerainty. Romanians were considered hierarchically inferior (second class citizens) to the occupying population. These foreign occupations will have a major impact on the cultural development of the regions, with relevance for the study of corruption. For instance, in the Ottoman Empire, bribing officials was a commonly accepted practice. Later, Prince Alexander Ioan Cuza united the principalities of Moldavia and Wallachia forming the Kingdom of Romania in 1859. The first constitution and attempt to rule of law dates back to 1866.

[107] Even if we accept that the type of behavior can equal the set of incentives created by the present institutions, this does not apply in the process of state building and reforming, when the behavior of agents precedes the type of *formal* institution.

[108] CIA, The World Factbook

A prosperous and progressive time started with the end of World War I when the Kingdom of Romania added new territories, Transylvania, Bukovina, and Bessarabia. Between the wars Romania was a kingdom ruled by Carol II, and experienced a period of growth, stability and constitutionalism, albeit feeble. Though developing an extremist party and joining the war on the side of Germany and Italy, Romania ended the war on the Allies side. Unfortunately for future developments, the Communists won the elections and asked for King Michael to abdicate and leave the country. For two decades starting 1940s Romania was under Communist terror, lead by the secret police (Securitate) that ran campaigns to 'eliminate enemies'.

Ceausescu, who came to power 1965, came to be known as one of last Stalinist dictators[109]. The citizens lived under terror while paying for the grandiose of the leader. They lacked food, heat during the winter, electricity was often cut, and people had to endure very long lines to purchase basic food. Towards the end of his regime, Romanians lived through a state of terror since all opposition and dissent were treated as criminal offenses. The brave who dared to criticize the system were victims of expel, house arrest, imprisonment, and disappearance. In lieu of a 'Charta 77' like document[110], Romania did organize within the Writer's Union a group that challenged the party's ideological monopoly. The movement was tightly restricted and eventually dismantled by the Ceausescu regime, the active members retreating in opposition through culture or later

[109] Tismaneanu Vladimir "Romanian exceptionalism? Democracy, ethnocracy, and uncertain pluralism in post-Ceausescu Romania" in Dawisha Karen and Bruce Parrot, eds., *Politics, power, and struggles for democracy in South-East Europe,* (Cambridge University Press, 1997), p. 410
[110] The document that resulted from the Czechoslovak dissident movement lead by intellectuals and artists

becoming open active dissidents. During 1989 opposition movements intensified. Ceausescu underestimated them to the point that he called a mass rally on December 21, 1989. Romanian's protests that prompted the revolution were captured. As crowds entered the Central Committee Building, Ceausescu and his wife fled from the rooftop by helicopter. He was later captured, trialed, and executed, all in a vacuum of power. [111]

The subsequent creation of the new administration was filled with figures from the former communist party representatives, the army, and some citizens that were randomly caught in the rebellion. The former bureaucracy reorganized as the National Salvation Front[112.] This had consequences over the future make up of the Romanian political and business class. The communist networks of power were very smoothly transferred into the new transitional landscape leading to the dysfunctional mechanisms discussed in this study. The National Salvation Front later disintegrated into the Social Democratic Party (SDP), the Democratic Party (DP), and the Alliance for Romania (AR). SDP was the governing party between 1990 and 1996. Ion Iliescu of SDP was elected head of state. Following a wave of disappointment and desire for true democratic change, in 1996 a political shift took place. The democratic-liberal opposition won elections, and its leader Emil Constantinescu became the new president. Due to lack of coherent and convincing leadership the new administration lost legitimacy in front of people and suffered defeat to Social Democrats and Iliescu once again in 2000. Then, the people tried to change the communist inheritance once more; an electoral coalition of center-

111 Tismaneanu, pp. 412-417

112 Ibidem, p. 418

right, Justice and Truth Alliance, won the elections in 2004 and Traian Basescu became president. He was reelected by no more than a margin of 90,000 votes in 2009. He was suspended from power twice (2007, 2012), but reinstated after the two attempts to impeach him through popular referendum failed.

Part of the long term goal of Romania to be part of the West, it became a member NATO in 2004 and a European Union member state in 2007, though it has strategically been kept out of crucial policies such as the Schengen area and the Euro zone. During the process of negotiation, the European Union acknowledged the problems of lack of rule of law, of justice reform progress, and the endemic corruption in Romania. The EU created a mechanism to check the progress of reform in the areas of freedom, security and justice, and internal market policy, called the Mechanism for Cooperation and Verification (CVM). It also created conditionality incentives for the acceding member state to signal real steps for reform. This effort led to the revamping of the National Anti-Corruption Directorate in Romania (former National Anticorruption Prosecutors' Office) and the creation of the National Integrity Agency. These institutions along with a firm political verbal commitment to change, have secured the Romanian entrance in the EU, a process that is puzzling even today for practitioners and many scholars. These institutions are still in place and may, in spite of their unlikely existence,[113] be the motor for change in a society rattled by corruption, and economically destabilized by state capture.

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[113] Many agree that had without pre-accession conditionality they may have never been created.

Rule of law defended

Historical evolution

Shaping up the constitutional system

Romania, geographically located in South East Europe, had substantial influence from the Ottoman, Russian, and the Habsburg (later Austro-Hungarian) Empire, which occupied the territories until 1866 and 1918 respectively. The lack of self-government on behalf of the native population led to the construction of informal networks, and a culture of subordination. While Czech Republic, as we will see further down, had a more pronounced Western institutional and legal influence, the Romanian territories inherited paternalistic and clientelistic state relations from the Ottoman and Russian occupations, while developing a subdued and non-participatory citizenry. Though there is a long-standing experience with a form of constitutional monarchy, this never fully developed into a representative regime. Until the fall of communism, Romania hardly ever experienced an Anglo-Saxon form of rule of law democratic regime. The lack of experience, and the culture of informal relationships inherited from the Ottoman occupation and half of century of Communism, had dire consequences leading to a clumsy attempt to establish rule of law after 1989.

After the unification of the three provinces, Wallachia, Moldavia, and Transylvania, Romania was under the leadership of an ethnic Romanian, prince Alexandru Ioan Cuza for seven years (1859-1866). He reigned and reformed the two

principalities united, only to be removed by the landed aristocracy and to be replaced with a foreign prince, Charles of the German Hohenzollern family. [114] The 1866 Constitution, though modeled after the Belgium one was in effect modified to contain the illiberal views of the new order in regards to property, elections and local government. The king rotated the two parties in office. Upon request to form a government, the first task of the new party was to organize elections. The state intervened to make sure that the majority necessary to win was guaranteed. This was a façade democracy that frustrated the intellectuals at the time. The dominant political figure, Ion C. Bratianu, became visibly more authoritarian, while the two political parties harbored the interests of the bourgeoisie and the landlords only. The representative political parties encountered in Western Europe, founded on traditions and based on class interests did not take shape in Romania.[115] Parties were considered forms without substance,[116] and this trend to see unauthentic Western institutions imitating on the surface the civilized practices of the advanced political systems has been prevalent in Romania to the present.[117]

The liberals pushed through the Constitution of 1923, emphasizing the ethnic character of the newly formed Romanian state. This did not lead to the establishment of an accountable, democratic regime. The new document was drafted with little input from

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[114] Gallagher, Tom, *Modern Romania. The end of Communism the failure of democratic reform, and the theft of a nation,* (New York University Press, 2005)

[115] Constantiniu, Florin, *O istorie sincera a poporului Roman,* Bucharest, Univers Enciclopedic, p. 239, (1997), in Gallagher, Tom, *Modern Romania. The end of Communism the failure of democratic reform, and the theft of a nation,* (New York University Press, 2005), p. 26

[116] Hitchins, Keith, *Rumania, 1866-1947,* Oxford University Press, p. 2 in Gallagher, (1994), p. 26

[117] Gallagher, p. 26

the other political parties and it was mainly an extension of the 1866 Constitution to the new territories. The king benefited from extensive legislative powers, being able to veto bills. The parliament failed to fulfill its function of being the place to channel societal demands. The elections were rigged to gather a majority for the government elected by the king. In 1920 the prefectures (all seventy-one of them), which represented the local divisions, were appointed from the centre (Bucharest), and enjoyed absolute control locally. [118] In the meantime King Carol continued to lead the country in very much 'Ottoman' style misappropriating the public domain into his hands, by the mid 1930 the actual power resided into the hands of the financial cronies. [119]

In actuality, the constitutional monarchy of 1866- 1938 lasted just a little longer than the French Third Republic (1871-1940). This was a time to experience with self-government and the challenges and responsibilities that come with it, and to create viable political structures. However, the social backwardness, the economic exploitation, and the lack of experience with self-rule had a negative impact on the experience overall. The quality of the government was poor, the parliamentary institutions remained unconsolidated, and there were slightly any forms of democracy in the region to serve as models to reproduce. Thus Romanians used as inspiration the post-1789 French centralized rule model. The democratic experiment failed during the interwar Romania.

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[118] Ibidem, p. 30

[119] Alexandrescu, Sorin, *Paradoxul Roman,* (1988), Bucharest, Univers and Nagy-Talavera, Nicholas *N. Iorga – O biografie,* Iasi, Institutul European (1999) in Gallager, p. 32

And though it was one of the wealthiest countries in Europe,[120] it was its shortage of social capital and not of material resources which handicapped Romania as it sought to develop."[121] The Constitution of 1923 was not based on the approval and consensus of the major political parties and it was weak to assault, 15 years later. Romania, apart from Germany and Italia, is the only other country that developed an in-grown fascist movement, and later regime, without foreign pressure. The extremists had won the anti-democratic battle long before King Carol II dismissed the parliamentary institutions in 1938.[122]

Several choices prevented furthering the commitment to the rule of law. Thus, the import of institutions did not contain the typical medieval charters that limit the rights of the government or demarcate them from the private sphere. Even more, the local politicians did not assimilate, transfer, or maybe even understand the concept of separation of powers. Unfortunately also, the Belgian Constitution that served as a model, originated in its turn in the French constitutional arrangements of 1791, 1814 and 1830, and was not very generous on political rights. Another set back was the fact that the Romanian institutions inherited from the Ottoman and Russian occupations were inferior to the ones specific to the Hungarian controlled lands. Romanians, unlike Czechs as we will see further down, discarded the Austro-Hungarian institutions from Transylvania,

[120] In 1937 it was Europe's largest oil exporter, fifth largest in the world, it produced 15% of the world corn, and it was the fifth wine producer in the world, in Gallager, p. 42

[121] Gallager, p. 42
[122] Ibidem, p. 42

which proves now to have been an unfortunate choice[123] since the Hungarian legal and institutional set up was closer than the Romanian one to the rule of law. However, the motivation to adopt these constitutions among the countries in the region with similar background (Serbia, Albania, Bulgaria, Greece) appears to have come from the internal belief that the Western style institutions lead to prosperity. [124] So it was an output affect rather than a system affect choice.

An interesting distinction needs to be made here. It has been argued that Romania has inherited the *Etat de Droit* tradition versus the Anglo-Saxon rule of law principles, which is also different than Rechtsstaat. Accordingly, in the German model, the ideas of equality before the law, the protection of individual rights, the binding of the state actions by general laws, and the presence of tribunals to decide disputes in accordance with the law, did not present implications for the political and constitutional outcomes of these ideas. By contrast, Albert Venn Dicey insisted on the link of rule of law in Anglo-Saxon terms with the parliamentary sovereignty, while *Etat de Droit* implied limits on the king's power by the democratically elected parliament. While rule of law is inherently linked to the democratic principles of representation and guaranteeing security and freedom, Rechtsstaat, is not the legal form of democracy but can be attached to any form of

[123] Ibidem, pp. 63-65

[124] Pippidi, Alina-Mungiu, "Failed institutional transfer? Constraints on the political modernization of the Balkans" in Pippidi Alina Mungiu and Wim van Meurs eds *Ottomans into Europeans. State and institutions building in South-East Europe,* Columbia University Press, New York, (2010), pp. 60-61

government meaning only that the law binds the rulers.[125] Romania aspired to apply the *Etat de Droit* principle but it failed due to the above-mentioned poor choices.

Technically speaking we cannot identify the Romanian constitutional developments of 1866 to 1938 to have successfully emulated either one of the models of rule of law tradition or the Etat de Droit. It rather practically subscribed to a form of government controlled by the king. The power in the constitutional monarchy was biased towards the monarch who elected the government, the political parties were not strong enough, and hardly representative, the electoral fraud was rampant and even the elected governments proved highly authoritarian especially towards the end of the period. However if Romania had not fallen for the rest of the century under totalitarian regimes it probably would have developed towards a more representative democracy and a more established legal system. However the following roughly 50 years have destroyed the potential centers for opposition and the ability to create a law based state.

The socialist system

Before socialism, the CEE countries had long legal traditions based on Roman civil law.[126] However, when communism took power in Romania and the neighboring Central European countries the socialist public law became the legal framework within

[125] Tassopoulos, Ioannis A., "The formation of the rule of law in the Balkans," in Pippidi and Wim van Meurs eds., (2010), pp. 153-155
[126] Anderson James H., Bernestein David S., and Gray Cheryl W., *Judicial systems in transition economies. Assessing the past, looking into the future,* The World Bank, (Washington, D.C. 2005), p. 8

the socialist state.[127] Thus, the subdivisions of public law were the constitutional law, the administrative law and the criminal law.[128] The administrative governed the actions of the administrative agencies of the government. Because the state was in charge with conducting all economic and social affairs, the administrative law and institutions, representing the executive branch, comprised the most extensive part of the legal infrastructure. Since the state regulated all activity, the private law had reduced competencies, covering mostly family matters, based on civil law principles and transformed to accommodate Marxist-Leninist ideology. [129]

Since the economic activity was under central command, most companies were state owned. So the arbitration between them was controlled by the Ministry of Economy rather than by the courts. "Arbitrators were not supposed to be independent, and the primary objective of these proceedings was the fulfillment of the state economic plan rather than justice per se."[130] The judiciary thus, was mainly responsible for non-economic issues, specifically most civil and criminal law. Due to the fact that there was no principle of independent checks and balances in the communist countries, the

[127] Public law guides the relationship between individuals or companies and the state. It also defines the structure and operation of the government in Anderson James H., Bernestein David S., and Gray Cheryl W. 2005 *Judicial systems in transition economies. Assessing the past, looking into the future.* The World Bank, Washington, D.C. p. 7, 21

[128] Anderson, p. 21

[129] Ibidem, p. 8

[130] Ibidem

judiciary was practically hierarchically subordinated to the communist party. Since the party was the ultimate authority and law, there was no need for a constitutional court.[131]

During Communism, Constitutions were irrelevant. Though all Communist countries had them, none was formally in use. They did not result in constraining the power of elites,[132] and much less into preserving any rule of law principles. In practice the Communist years left a damaging legacy for the establishment of rule of law. The basic pillars of rule of law were destroyed, the separation of power, the equality before the law, the supremacy of the law, the respect for people's rights and freedoms. Almost two generations, if we count a generation to average anywhere between 25 to 30 years, have been socialized to develop economic and social activity into informal networks of survival. In the meantime, the elites have juggled with large industrial projects and state ownership concentrated in the hands of a relatively small number of central and local elites. This did not change much during the first decades after the fall of Communism. Besides the fact that the pre-existing elites have taken over the state and economic apparatus, the judiciary inherited a culture and practice of deference to political order and pressure. While the citizens, highly distrustful of the law and the judicial system, were in large subject to the lack of performance, efficiency, and at time abuse of the judiciary.

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[131] Ibidem, p. 9

[132] Elster Jon, Clauss Offe, and Ulrich K. Preus with Frank Boenker, Ulrike Goetting, and Friedbert W. Rueb, *Institutional design in Post-Communist societies. Rebuilding the ship at sea,* Cambridge University Press, (1998), p. 63

Post-Communist rule of law and Judiciary reform

After the fall of Communism all CEE and CIS countries including Romania had to conduct an enormous transformation at the political, economic, social and eventually cultural level. The initial attention was given to stabilizing the political sphere and introducing market reforms, while long-term institution building took a back seat. Passing laws and decrees in support of the macroeconomic reform took precedence. There was also an extra drive to adopt the acquis communautaire[133] within the potential European Union member states. Unfortunately, these enterprises used little feedback from companies, lawyers, or judges, actors who in actuality use the proposed legislation. The rush lead to a non-transparent lawmaking process, with negative consequences for the courts, lawyers, regulatory bodies, and other institutions in charge with implementation, who more often than not had difficulty in applying and enforcing the new laws. The ultimate consequence was an 'implementation-gap' between the legislation needed and the one delivered.[134]

In regards to the constitutional arrangement, though the 1923 Constitution postulated the separation of powers, the supremacy of the fundamental law, and the guarantee of the fundamental rights, these were hardly observed. Thus, Romania barely had a constitutional tradition to build upon. In 1990 and 1991 the political leadership represented by the National Salvation Front (Frontul Salvarii Nationale -FSN) had a

[133] The EU body of laws.

[134] Anderson, p. xii

vested interest to make sure that the new law of the land expressed and protected their wellbeing. The Constitution actually let a lot of room for interpretation. The lack of precision in drafting the functions of the institutions allowed for the later altering through ordinary legislation.[135] These dysfunctions are explored in detail further down, under the heading '*The legal and institutional framework.'*

The Romanian Constitution adopted in 1991 concentrates power in the executive branch. On occasions, the president and the government exceed those powers. Many important reforms have been adopted by the so-called "Emergency Ordinances." These are governmental decrees that enter into force right away. The parliament eventually adopts them, but sometimes only after two or three years. This practice, that oversteps the separation of power priciple, is used to an abusive extent by the executive. It can be safely claimed that the letter, the spirit and the guarantees of the Constitution have not been observed. However, maybe precisely due to its imperfections, the Constitution allows for the later modifications, which can lead to a more reliable text for the development of democracy.[136]

The policy makers involved in making reforms preferred the development of the private sector since according to their expectations this would have eventually led to the consolidation of the democratic framework. The growth of the private sector would create the demand for institutions to protect property rights and the effective enforcement

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[135] Weber, Renate, "Constitutionalism as a Vehicle for Democratic Consolidation in Romania," in Jan Zilonka ed. *Democratic Consolidation in Eastern Europe. Volume 1. Institutional Engineering*, (Oxford University Press, 2001), pp. 212 -123

[136] Ibidem

of contracts.[137] This was more wishful thinking than reality. Not every private company was interested in thorough institutional reforms. Many managers of new private entities found more benefits in slow legal and institutional change, which gave them an advantage in consolidating their monopolistic positions.[138] These findings are in line with the theoretical assumptions of the study, postulating that pressure from the private sector is not sufficient to lead to the establishment of rule of law.

The other theoretic assumption of the study was that the general pressure of foreign donors (World Bank,[139] the EU) leads only to superficial reforms. This was also the case in Romania in the beginning transitory phases. The foreign actors initially mostly emphasized legislative drafting versus judicial reform. The consequence was that the rapid economic reform coupled with lack of thorough institutional reform lead *to the incapacity of the judicial system to implement and enforce the newly adopted laws*.[140] The European Commission pointed in the Regular and Monitoring Reports to the weaknesses in the implementation of laws and the problems in the judiciary as key

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[137] Black, Bernard, Reinier Kraakman, and Anna Tarrasova, "Russian privatization and corporate governance: What went wrong? *Stanford Law Review,* Vol. 52, (2000), pp. 1731-1808, cited in Anderson, p. 12

[138] Pistor, Katharina, Martin Raiser, and Stanislaw Gelfer,. *Law and finance in transition economies,* Economics of Transition 8 (2). London: EBRD, (2000) cited in Anderson James, p. 12

[139] World Bank, along with other donors have contributed resources towards increasing the efficiency and effectiveness of the legal institutions, by financing modern facilities, case management practices, information sharing, training judges and court personnel, and mechanisms to ensure transparency and accountability (Anderson, p. XV)

[140] Anderson, pp. 13-14

problems preventing these countries to join the EU.[141] Only when the EU seriously considered incorporating Romania as a member state and the consequences it would have for the internal market, did it get specifically involved into putting pressure and condition integration on the judicial reform. Thus, the accession processes to the European Union structures contributed to a very large extent to the direction, pace, and progress that the legal and judicial reform took. To monitor reform the EU established for the first time in the accession process an institution called the Mechanism for Cooperation Verification for Bulgaria and Romania.

Business and citizens evaluating the state of the reform have assessed that the judicial reform lags behind almost any other area policy or institutional reform in new democracies in Central and Eastern Europe.[142] While the reforms in the post communist world have lead to more independence for judges, the Judiciary is still highly dysfunctional in the management and transparency dimensions.[143] These however, offer the opportunity for corruption and influence. They open the door for a larger set of actors that can pressure and bribe judges and increases the judges' choice for corrupt behavior without the fear of political control and eventually dismissal.

[141] Ibidem, p.18
[142] Anderson, p. xiii citing BEEPS1 (Business Environment and Enterprise Performance Surveys) and BEEPSs surveys

[143] Anderson, p. 27

The legal and institutional framework – the incompatibilities

In order to understand the dynamic between the politicians, the public officials, the judges, and the business people one needs to understand the formal incentive structure, the institutions. In the following section I present the power dynamic between the main political and judicial institutions in Romania emphasizing the weaknesses that are easily exploited by corrupt networks.

The Judiciary

The Romanian Constitution stipulates that the Judiciary is composed of the courts of justice, the prosecutor's offices and the Superior Council of Magistracy.[144] After 2004 the Judiciary has experienced a number of reforms. The six principles by which the Judiciary practices its activity are efficiency, efficacy, cost-effectiveness, independence, impartiality and integrity, but they are hardly fulfilled. The first three cannot be achieved because of the large number of cases and insufficient number of personnel. The last three

[144] Cospanaru Iulia, "The Judiciary," *The National Integrity System,* ed. Transparency International Romania, (2010a), p. 61

cannot be reached due to the pressures on magistrates from political actors and interest groups. To these, one can add the public disaffection and mistrust of the justice system.[145]

The Judiciary has a hierarchical structure. At the lowest level there are the chanceries, public institutions with no legal personality that hear cases of minor offences; next, the tribunals, which have juridical authority, and try as courts of first instance; then, courts of appeal that have authority to act as first instance courts for complex and severe cases or in which the parties hold an significant governmental office. On top of the hierarchy sits the most important court, the High Court of Cassation and Justice (Inalta Curte de Casatie si Justitite, in translation – ICCJ), the equivalent of the Supreme Court in other countries. The ICCJ's role is to interpret and guarantee the uniform application of the law by all the other courts of justice. It also decides in cases in which one of the parties is a governmental official.[146] The judges general assemblies are represented by the totality of standing judges of the court, including interning, delegated and assigned judges from different courts. The assembly's meetings are held every year, and elect the members of the Superior Council of Magistracy[147] and the members of the steering committee.[148]

The most important principle in the functioning of the courts is independence, which implies that at no time the process of justice is influenced by the executive and the

[145] Cospanaru 2010a, p. 61

[146] Ibidem, p. 62

[147] This is the institution that defends judges and prosecutors against acts that may infringe their impartiality and protect their reputation. For a further description, go to 'The Superior Council of Magistracy" section in this chapter.

[148] Cospanaru 2010a, p. 64

legislative branches.[149] Given the first hypothesis of the study I identify this as the first mechanism with negative consequences for the establishment of rule of law. Politicians, thus prevent the establishment of rule of law by infringing through *illegal* means on the independence of the justice system. They do that in order to prevent being punished for acts of corruption and to be able to continue their rent seeking activities without fear for retribution. A distinction needs to be made. It has been argued that in practice this independence cannot be achieved since the judicial system is financially tied to the executive. The Ministry of Justice[150] manages the Judiciary's budget. Similarly the laws that the Judiciary is supposed to respect come from the legislative, and more so from the executive. In that sense the Judiciary is once again dependent on the executive and eventually the legislative. These dependencies are related to administrative aspects but theoretically do not infringe on the substantive judging activity. [151] This study is mainly focused on a different type of pressure. Though financial pressure can have an effect on independence, when I refer to interference in the justice system, I specifically mean the illegal pressure that has more to do with networks of power rather than budgetary dependencies.

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[149] Law no. 304 / 2004 that states that the Judiciary is separate from other powers of the state, in Cospanaru 2010a, p. 64

[150] All the courts and prosecutor's offices receive money from the state, which can have an important impact on the independence of the institutions. The High Court of Cassation and Justice has a separate budget, while the courts of appeals, tribunals, and chanceries are controlled by the Ministry of Justice. All prosecutor's offices budgets are managed by the Prosecutor's Office of the High Court of Cassation and Justice. The National Anticorruption Prosecutor's Office drafts its budget proposals each year. The budget proposals are subject to review by the Superior Council of Magistracy, which has its own separate budget (Cospanaru 2010a, pp. 63-64)

[151] Cospanaru 2010a, p. 64

The *prosecutors'* offices are part of the Public Ministry. This institution is part of the judicial system and it protects the general interests of the society and preserves the law and order, the rights and liberties of citizens. This ministry functions through the prosecutors organized in prosecutor's offices that exercise their activity alongside courts of justice. This institution is subordinated to the Ministry of Justice. One specific and important institution is the National Anticorruption Directorate (Directia Nationala Anticoruptie in translation- DNA)[152], which will be the topic of chapter 5 in this book. This institution is subordinated to the Prosecutor General and its main function is the investigation of corruption and other related offences. The General Prosecutor's Office is in charge with coordinating all the subordinated offices and also conducts criminal investigations for serious offences and by those committed by high officials. In regards to integrity, the situation seems even more complicated than with the courts. The prosecutor's offices are subordinated to the Ministry of Justice, which is part of the executive. So, they may not be perceived as having independence from the political branch.[153]

The Superior Council of Magistracy

The Superior Council of Magistracy (Consiliul Superior al Magistraturii –CSM) was created to guarantee the judicial independence. Its function is to defend judges and

[152] The most important anticorruption agency in Romania. It prosecutes acts of corruption involving high ranked officials. Further details are found under the heading "The Anticorruption Agencies" in this chapter.

[153] Cospanaru 2010a, p. 64

prosecutors against acts that may infringe their impartiality and independence and to protect their reputation. This is the institution responsible for the entrance exams, nominations, promotions, reassignments, dismissals, and disciplinary actions for magistrates.[154] Though it is supposed to guarantee the independence of the judiciary, it is charged to act as a professional entity. Its decisions are overwhelmingly biased toward protecting the magistrates, and it is unable to act as a disciplinary court. It is an independent institution composed of 19 members, of which 14 are elected by the general assembly of the magistrates (nine judges and five prosecutors); three are permanent members, i.e. the president of ICCJ, the prosecutor general and the minister of justice; and two are civil society representatives. [155]

The Romanian President at the recommendation of the Superior Council of Magistracy appoints judges.[156] They have independence and permanent appointment (immovability). The prosecutors are as well appointed by the President at the

[154] "CSM departments coordinate the delegation and reassignment of judges and prosecutors, appoint judges and prosecutors, solve contestations submitted against the marks given by the evaluation committees each year on the professional activities of judges and prosecutors, strive to solve petitions received from litigants or other persons regarding inappropriate conduct on behalf of judges and prosecutors; the departments also dismiss judges and prosecutors; approve the creation and dismissal of courts and prosecutor's offices, approve search, detainment, and arrest warrants for judges and prosecutors for acts stipulated in Law no. 303/2004 republished. The Plenum recommends to the Romanian president the nomination or dismissal of judges and prosecutors, appoints intern judges and intern prosecutors, promotes judges and prosecutors, coordinates the general assemblies of judges and prosecutors, reviews draft legislation regarding the activities of the judiciary and solve the contestations submitted by judges and prosecutors against CSM departmental resolutions, except those that relate to disciplinary measures," in Cospanaru 2010a, p. 65

[155] Cospanaru 2010a, p. 66

[156] The magistracy represents the judicial activity that is carried out by judges to promote justice and by prosecutors to defend the general interests of the society, rule of law and the rights and freedoms of citizens. In 2010, there were 5860 magistrates, of whom 4104 judges and assistant magistrates and 1756 prosecutors (Cospanaru, p. 67)

recommendation of CSM, and enjoy substantial stability and independence. The prosecutors in Romania can be transferred, delegated or promoted only with their approval. The dismissal of both judges and prosecutors is carried out by presidential decree at the recommendation of the Superior Council of Magistracy, in case they have resigned, retired, transferred to a different position, have been penalized for a crime, or have violated the prohibition of collaboration with the secret service.[157] The appointments and dismissal leave room for abuse of influence and pressure on behalf of the politicians, especially for prosecutors.

In regards to the last provision, in an interview conducted with one judge serving in the Superior Council of Magistracy, I brought up the issue that some judges may be collaborating with the secret service. He confirmed to me that it is true and that he knows of some instances. However, what is most striking is his reaction to this question. He blatantly said "Well, what's wrong with judges being part of the secret service?"[158] This is by definition more than just collaborating, which is illegal. The fact that a judge may not think there is something inherently wrong with judges collaborating with the secret service, with dire consequences for impartiality and independence of the judiciary, says a lot about the perception of judges of their relation to the law. But the fact that a judge, from the supreme authority of discipline against magistrates' wrongdoings, considers collaboration with the security an acceptable behavior puts into question the integrity of the whole system of justice in Romania. This judge was selected among the 'most

[158] Anonymous interview, due to sensitivity of information

efficient and reputable judges.' If he regards behavior that impairs integrity acceptable, Romania is in a worrisome state of lack of rule of law.

Promotions represent one of the most vulnerable points in the relation between the political and the judicial branch. The President of Romania at the recommendation of the Superior Council of Magistracy appoints the chairman and the vice-chairmen at the High Court of Cassation and Justice.[159] He also appoints the prosecutor general at the High Court of Cassation and Justice, the prosecutor general of the National Anticorruption Prosecutor's Office, their deputies, the chief prosecutors within these departments, and the chief prosecutor for the Directorate for the Investigation of Organized Crime and Terrorist Crime and their deputies. They are appointed at the recommendation of the minister of justice. The Superior Council of Magistracy has to give its approval.[160]

The problem with the independence of the prosecutors is quite severe. According to the law[161] the prosecutor is independent in her decisions but a higher ranked prosecutor can reject the solutions adopted by the prosecutor in case they can be proved unlawful. Additionally, another problem comes from the hierarchical control of the division of projects and the ability of reassignment of files to a different prosecutor than the one deemed responsible. Due to the hierarchical subordination the principle of impartiality is rendered almost irrelevant since the evaluation of the prosecutor depends on the good

[159] The promotion to the position of judge in the High Court of Cassation and Justice the Superior Council of Magistracy chooses from a pool of candidates that served as judges for two years at tribunals and courts of appeals, and received a 'very good' mark on their last evaluation, has not been subject to a disciplinary penalty, has good reputation and has acquired experience for at least 12 years (Cospanaru, p. 67)

[160] Cospanaru, p. 67

[161] Law no 304/2004 in Cospanaru Iulia, p. 69

evaluation of her higher-ranking official.[162] Thus, these sensitive points open up the opportunities for political pressure. In case a politician has an interest in a file that is investigated by an unfamiliar figure, then they usually intervene by the superior (probably appointed politically) and move the file under the jurisdiction of the friendly familiar prosecutor. This is a rather popular practice. There are roughly four[163] important prosecutors that have are politically manipulated, who maneuver files of interest from a lower ranked prosecutor to their own jurisdiction.

The Parliament, the Executive, and the Public Administration

Though there are many incompatibilities with the rule of law related to the other major institutions in the state, I focus in this section on some specific irregularities. These have direct effect on the freedom that the politicians exercise in the relation with the law and the judiciary and with consequences for the establishment of rule of law.

The *parliament*[164] establishes its own organization and operation rules, its own budget and internal regulations that the government has to approve. The members of the

[162] Cospanaru, p. 69

[163] Revealed to me in an interview with a top prosecutor in Bucharest, Romania, 2011. Anonymous due to sensitivity of information

[164] The Romanian parliament represents one of the two central representative authorities in the country. The other one is the presidency. It is made up of two Chambers, elected through a mixed proportional representation and uninominal system, the parliament. The two chambers have similar almost identical tasks. There is high instability in the legislative procedure both chambers having almost similar activities. This leads to normative instability and the ability of the Constitutional Court (CC)164 to reject legislative acts based on formal procedural grounds rather then on substance. The Constitutional Court is the sole authority with power to rule on weather the laws, decrees, and the bills enacted are in accordance with the constitution. Though the Constitution specifically assigns the parliament the role of sole legislative authority, this is hardly

parliament have immunity only in matters of potential criminal offences without including the protection from disciplinary responsibility. All problems with MPs conduct enter the jurisdiction of parliamentary immunity stipulations. In regards to integrity, the Law 96/2006 and 161/2003, that cover the statute on deputies and senators, mention only the requirements that all senators and deputies have to submit an annual wealth and interest statement and that parliamentarians have to conduct their activity respecting the principle of transparency. There is great suspicion that the implementation of the legislation concerning integrity is inefficient because of the prosecution's inability to prove the suspicions and due to the fact that fellow MPs have to approve certain investigations for deputies, and senators. [165]

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respected. The practice of the majority of legislative proposals to come from the government is popular in many democracies. However what is dysfunctional and specific about the Romanian legislative practice is that the proposals coming from the government arrive in the form of Ordinance's or Emergency Ordinance's. This means that they represent normative acts that are already in effect at the time they get to the parliament. Most of the regulation is passed this way. After being passed by the government the laws are already put in practice and only after long debates in parliament, of up to years in some cases, the legitimate legislative body passes them. One worrisome practice is the governmental de facto limitation of parliamentary legislative initiatives. There are several cases in which the government repealed the laws passed by the parliament. They are then passed again by the parliament, and rejected once again by legislative derogation in the government.

I approached this topic in my conversations with the members of parliament interviewed during the summer of 2011 and I inquired about the inherent problems that this practice generates with the principle of separation of powers. The majority of people interviewed confirmed that they do not see a problem with this practice, since there would be no restrictions in parliament to the Ordinances passed by the government anyway. In fact, I was assured that there are amendments that the parliament adds before the Ordinance is passed in the government, which ensures that the members of the parliament have an input. An MP confirmed to me that in practice the government receives a blank check on legislation. This has severe effects on the rule of law principle of separation of power (Tanasescu, Simina, "The Legislative," *The National Integrity System,* Transparency International Romania, (2010) pp. 30-37)

[165] Tanasescu, pp. 38-39

In the case of the *executive*[166], as far as criminal liability is concerned, both parliamentary chambers and the President can ask for the initiation of criminal prosecution against suspicious members of the government. The president can dismiss members of the government in case of a criminal prosecution.[167] This provision was controversial because the word 'may' left room for options, while the word 'solely' excluded other actors from the ability to refer prosecution. This is a breach of the rule of law since art 16 alin. (2) in the constitution specifies that "No person is above the law."[168]

[166] According to the Constitution (1991) the executive has two centers of power, the president and the government, which is lead by a prime minister. The president's power has been tentatively limited by the Revision Law no. 429/2003 that prohibits the president to revoke the prime minister. The Romanian political system is categorized as a semi-presidential system with a strong parliament, or a mixed regime. The president, representing the state, has three functions, the Head of State, Head of the Executive together with the prime minister, and guarantor of the Constitution and mediator between the powers of the state. *The presidential administration is composed of appointed members based on the confidence received from the president*. The members of this administration have to sign a commitment of loyalty. By withdrawing the confidence they are revoked from the appointment. The government has two functions, political and administrative. Its functions include the strategy, regulation and administration of state property, representation and authority in the state. In regards to the relations with other institutions, the government has hierarchical superiority over prefectures, collaboration with public administrative autonomous authorities, and administrative guardianship controlling the legality exercised by the prefect. The budget for the government is established through the Draft Legislation concerning the state budget submitted by the government for adoption by the parliament.

The practice that is most detrimental to the rule of law is the abusive use of the constitutionally guaranteed legislative power of the government through Emergency Ordinances. Though these are meant to be used only in extraordinary situations, the governments have made extensive use of them causing legislative inflation with silent parliament witnessing and approving this practice. (Tofan, Dana, "The Executive," *The National Integrity System*, Transparency International Romania, (2010) pp. 48-56)

[167] Art. 109 alin. (2) and (3) in the Constitution, in Tofan Dana, p. 47

[168] Art. 16 alin. (2) Romanian Constitution, in Tofan , p. 48

This has been later fixed by the Law of Ministerial Responsibility no. 115/ 1999 that regulates political responsibility and legal responsibility of the government members. [169]

In regards to integrity, the members of the government are prohibited to enact administrative and legal documents, cannot be part of the public decision-making process that will lead to generating material benefits for themselves, their spouse, and first degree relatives.[170] The National Integrity Agency (Agentia Nationala de Integritate - ANI)[171] verifies the assets obtained while in public office by the members of the government and the presidency, any conflicts of interests and incompatibilities.[172] However, Law no. 161/2003 postulates that the members of the government may have the possibility, under certain circumstances, to take part, as representatives of the state in the general assembly of shareholders and as members of administrative councils in autonomous, national or commercial companies, banks and credit institutions if strategic interests of public interests necessitate it. This creates a zone of incompatibility that can lead to the breach of the regulations in place.[173]

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[169] Tofan, p. 48

[170] Ibidem, p. 51

[171] Established by Law no. 144/2007 an anticorruption institution having the function of verifying the assets obtained while in public office, conflicts of interests and incompatibilities. *Monitorul Oficial* no. 359/2007. Details on this institution can be found under the heading *The Anticorruption Agencies* in this chapter and in chapter 5, under the heading *The agencies and the European Union pressure – the National Integrity Agency*

[172] Article 105 in the Constitution and Law 161/2003 related to incompatibilities of the ministerial position, transparency in public, authority, and business positions, preventing and sanctioning corruption, in Tofan, p. 50.

[173] Ibidem p. 50

The role of the ministries, which are the specialized bodies of central public administration, is to implement governmental policy in specific areas of activity. In the hierarchy of *public administration* the government sits at the top and the ministries have the main role within the specialized central public administration. [174] In regards to integrity, the Code of Conduct [175] stipulates the respect for the principles of moral integrity, honesty and fairness. Moral integrity is a principle by which it is forbidden for civil servants to ask or receive, both directly and indirectly, for themselves or others, *any advantages, benefits in relation to the public position they hold, or to abuse in any way this position*. The civil servants are required to be in good-faith when exercising their public function and executing their responsibilities. According to art. 14 in the same code, civil servants are prohibited to ask and/or accept presets, services, favors, invitations, and any other benefit for themselves, their families, parents, friends, or persons with whom they have had business or political relationships, and which can have an influence on the impartiality of exercising the public function.[176] The same Code of Conduct stipulates at art. 19 that civil servants are allowed to buy goods in the private property of the state or of the territorial administrative units, that have been legally opened for sale or rent, with the exception when she was aware of the value or quality of the goods as a consequence of her exercising her job; when she was part of organizing the

[174] According to la 90/2001 art. 34, in Popescu, Ion, "Public administration," *The National Integrity System,* ed. Transparency International Romania, (2010a), pp. 83-88
175 Law no. 7/ 2004 in Popescu Ion, p. 88

[176] Popescu Ion 2010a, p. 88

sell of the respective good; when she is able to influence the selling operations; or when she has information that other bidders do not have access to. [177]

The Anticorruption Agencies

These agencies are the topic of an extensive analysis in chapter five. However, since I will refer to them on many occasions in all the preceding chapters I will briefly introduce them here. Most of these institutions have been created and consolidated in relation to the Romanian accession to the European Union. There has been a need for independent anticorruption agencies all along, but as postulated in this book, politicians do not want such a precise functioning tool created since it will lead to their punishment. However, since corruption was rampant and the EU did not want such a dysfunctional member within its Union, during the accession negotiations Romania was asked to fight corruption. As part of the negotiation conditions, thus Romania created several authorities to deal with the problem of conflicts of interests and corruption. The remarkable outcome of this enterprise is that they have had positive results in the fight against corruption that lead to the incarceration of several leaders and politicians including a former prime-minister. The weakness still stems from the fact that they are in part politically dependent, which leads to one side of the political spectrum being more affected by this tool than the other. The expectation is though, that with time, there will be enough sentenced cases on both sides of the spectrum that they will lead to a

[177] Ibidem p. 88

predictable perception that with corruption comes punishment. The expectation is that this predictability will deter a substantial number of corrupt enterprises.

The National Anticorruption Directorate (DNA) was the first of this kind of institution. It was first established as the National Anticorruption Prosecutor's Office (Parchetul National Anticorruptie- PNA). Its function was to sanction corruption. Then in 2005, the General Anticorruption Directorate was created within the Ministry of Administration and Defense, to prevent and fight corruption. Last but not least, the National Integrity Agency, founded at the specific request of the EU deals with conflicts of interests and it took no less than three years to create.[178] Following I present a brief description of the two most important ones.

One of the two very important anticorruption agencies in Romania is the National Integrity Agency (Agentia Nationala de Integritate – ANI). Between 2005 and 2007 several drafts of the law establishing this institution passed through the parliament. Eventually the majority approved in May 2007 due to a credible threat by the EU to activate the safeguard clause.[179] ANI is an autonomous administrative institution. Its main

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[178] Cospanaru Iulia, "Anticorruption Agencies" *The National Integrity System,* ed. Transparency International Romania, (2010b), p. 137

[179] "If there are serious shortcomings ... in *[the acceding state]* in the transposition [of Acquis Communautaire] relating to mutual recognition in the area of criminal law (…) and (…) civil matters (…) the Commission may, until the end of a period of **up to three years after accession**, (...), take appropriate measures. (...) These measures may take the form of temporary suspension of the application of relevant provisions (...) in the relations between the acceding state and any other member state (…)The safeguard clause may be invoked even before accession (...) The measures (...) shall be lifted when the shortcomings are remedied. They may however be applied **beyond** the period *[of three years after accession]* as long as these shortcomings persist," in the Act of Accession of Bulgaria and Romania, art. 38, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:157:0203:0220:EN:PDF

function is the control of the wealth accumulated by public servants while in office, and to detect possible conflicts of interests and incompatibilities. It is composed of integrity inspectors. The president of ANI has the rank of state secretary and a vice-president assists him; they are both appointed by the Senate. The institution is state funded.

If there is reason to believe any of the ANI staff is under conflict of interest then the National Council of Integrity (Consiliul National de Integritate –CNI) investigates the incompatibility. This latter institution is a representative body that supervises the activity of ANI. It is under the direct control of the Senate.[180] There is reason to believe that while ANI benefits from independence, CNI does not since it is subject to political control. However given that one of its main functions is to nominate appoint and dismiss ANI's leadership then, the lack of independence extends to the National Integrity Agency. Even though this is the case, as it will be analyzed and revealed in chapter five, this is a fairly successful institution, albeit its limitations.

The most important anticorruption agency is the National Ancorruption Directorate (DNA), initially founded in 2002 as the National Prosecutor's Office (PNA). This institution benefits from an autonomous structure and it exercises its activity within the institutional framework of the Prosecutor's Office. Its main purpose is to fight corruption. This is a state funded institution. It prosecutes in acts of corruption involving high ranked officials, or if the value of the asset involved in corruption is greater than 10,000 euro, including crimes against the financial interests of the European Union (if the

[180] Cospanaru 2010b, p139

material damage is greater than 200,000 euro).[181] DNA is managed by a chief prosecutor, named by the Romanian President at the recommendation of the Minister of Justice, and then approved by the Superior Council of Magistracy. DNA is thus, subordinated to the Romanian General Prosecutor functioning under the authority of the Ministry of Justice. However, by the constitution prosecutors are magistrates and they are supposed to be part of the judicial branch, and not responsible to the executive.[182]

One other impediment to the well functioning of the institution is the law for ministerial accountability,[183] which makes the enforcement of prosecution of the targeted politicians nearly impossible. A Constitutional Court decision (no. 270/2008) which is supposed to ease matters states that the President has to give a positive decision for the initiation of criminal investigation for ministers and former ministers; the Chamber of deputies has to approve investigation of ministers and former ministers with status of deputy and senator. If the member of the government is at the point of investigation, then the Chamber to which the politician belongs has to approve the investigation. These procedures prevent the independent functioning of DNA.

The anticorruption agencies have performed well in the context of lack of political will for reform. This finding supports the first hypothesis related to the lack of reform in lieu of politicians' active involvement in change. According to these examples we can see how foreign pressure and the threat of losing the economic benefits that came with

[181] Law no. 78/200 and EO 43/2002 art. 13 in Cospanaru 2010b, p. 144

[182] Cospanaru 2010b, p.144

[183] Law 115/1999 in Cospanaru 2010b, p.145

European integration lead to positive institutional change. Since politicians, even with this kind of conditionality, tried to stop, prevent, and delay the creation and functioning of these institutions (as it will be shown more in detail in chapter 5) one can conclude that without the EU we would not witness the creation of these enforcement mechanisms.

The Constitutional Court

The Constitutional Court (Curtea Constitutionala - CC) of Romania is the sole authority with power to rule on weather the laws, decrees, and the bills enacted by Romanian authorities are in accordance with the Constitution. This is a creation of post-communist democracy. The first constitution of 1923 assigned the Court of Cassation and Justice (the equivalent of the Supreme Court) the role to decide on the unconstitutionality of statues. It is in theory independent of any other authority.[184] However, given the method of appointment this can hardly be the case. It is composed of nine members appointed for one nine-years term. There of the members are appointed by the President of Romania, three by the Senate, and three by the Chamber of Deputies.

The role of the Constitutional Court includes adjudicating on the constitutionality of treaties and other international agreements and the constitutionality of the Standing Orders of the Parliament, both at the notification by the President of either Chamber of the Parliament, or by a number of at least fifty Deputies or twenty-five senators. It also decides on the objections of laws and ordinances brought to courts or commercial arbitration, or at the request at the Ombudsman. It can solve constitutional disputes

[184] The Constitutional Court General Presentation, Constitutional Court website HTTP://WWW.CCR.RO/DEFAULT.ASPX?PAGE=PRESENTATION

between public authorities when the President of Romania, one of the Chamber's President, the Prime Minister, or the President of CSM requests it. It guards the presidential election procedure and confirms the ballot; it also guards the procedures for the organization of referendums and confirms the results. It makes an assessment on the justification to replace the President of Romania with an interim president, and reports the findings to the Parliament and Government. It gives only an opinion related to the proposal to suspend the President. It verifies the compliance by citizens in the exercise of a legislative initiative and it decides on the constitutionality of a political party.[185]

The review of the Romanian institutional framework shows that there are a variety of incompatibilities and vulnerable points that permit pressures on behalf of politicians in the judiciary process. One of the most detrimental dispositions is related to the conditionality of approval of investigation from the President, respectively from the Chamber of the parliament of the culpable members of the government or the legislative. As we will see later, this de facto political monopoly presents a crucial obstacle for the enforcement of the rule of law. Somewhat politicians do not want to remove through reforms their safety nets. Reforms would mean prosecution and maybe sentences for criminal acts. The politicians are the only ones who can enforce the change. But they, as it will be presented in chapter two, cannot. They have active vested interests in the state money and they cannot afford to be punished. Their conflict of interest bears a huge cost for the country and the citizenry.

[185] Ibidem

The legal framework –corruption[186]

It is generally accepted that corruption is a deviation from morality and honor and it represents a serious state of moral degradation (Romanian dictionary).[187] Corruption is in practice the abuse of power by the public official invested with it with the scope of obtaining material and other advantages. Neither the Penal Code[188] nor other special laws define the concept of 'corruption' or the criminal act of 'corruption.' Romanian

[186] The following is a list of legislative resources related to the fight against corruption that can be found at: http://anticoruptie.hotnews.ro/stiri-anticoruptie-7530407-resurse-legislative-domeniul-luptei-impotriva-coruptiei.htm. The National Anticorruption Strategy; The Penal Code – Law no. 286/ 2009; Law no. 78/2000 regarding the prevention, uncovering and sentencing corruption acts. It was modified by Law 161/ 2003; Emergency ordinance no 43/ 2002 regarding PNA. Law no. 27/ 2002 to ratify the Penal Convention regarding corruption adopted in Strasbourg on January 27, 1999

Law no. 147/ 2002 to ratify the Civilian convention regarding corruption adopted in Strasbourg November 4, 1999. Law no. 365/ 2004 regarding the establishment, organization and functioning of the National Integrity Agency modified by Emergency ordinance no. 49/ 2007. Law no. 43/ 2003 regarding the political party finance and electoral campaigns. Ordinance no. 27/2002 regulating petition solving. Law no. 52/2003 regulating the decision making transparency in public administration. Law no. 7/ 2004 regarding the public officials code of conduit. Law no. 477/ 2004 regarding the contractual personnel and authorities in public institutions code of conduct. Law no. 544/ 2001 regarding the free access to the public interest information. Law no. 109/ 2007 regulating the reuse of information from public institutions. Law no. 571/ 2004 regarding the protection of public office personnel. Law no. 677/ 2001 protecting people's private information. Law no. 182/

[187] Romanian dictionary cited in Mihai, Mariana and Valerian, Stan, *Instruments to monitor anticorruption institutions (Instrumente de monitorizare a institutiilor anticorruptie),* Cornelius, Baia-Mare, (2006), p. 16

[188] The Penal Code (Criminal Code) is a document, which contains all, or most of a specific jurisdiction criminal law.

legislation introduces the first time a definition of corruption in Law 78/2000.189 Note the year, it is approximately two decades after the first post-communist Constitution.

According to this law, corruption is limited to four crimes, bribe taking (art. 254 from the Penal Code), bribe giving (art. 255 Penal Code), gift receiving (art. 256 Penal Code), and influence peddling (art. 257 Penal Code).[190] The same law criminalizes (in sections 3 and 4 of Law 78/2000) the acts committed in relation with corruption and the acts assimilated with corruption. For examples, concealing the goods resulted from a corrupt act, being accomplice in a corruption act, using false identity to commit a corruption act, forgery, falsification of signature, blackmailing. This law was modified in 2003 by Law 161, which criminalizes the recipient of influence peddling.[191]

Crucial for this study are the criminal acts associated with corruption stipulated in Law 78/2000. Accordingly *it is prohibited that a person holding a leadership position in a party, political group, union or non-profit association to use her influence to obtain for herself or others money, assets, and other benefits*. It is also *prohibited to intentionally establish a lower value than the commercial value for assets belonging to economic*

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[189] Mihai Mariana, p. 16

[190] Bribe giving and receiving refers to "two individuals, the one who promises or offers an asset or other benefit and the one who requests or receives it in exchange for the legal or illegal completion of an action which is part of one's job description; who initiates the act is irrelevant. Gift receiving involves the receiving of benefits while exercising one's duty, not necessarily intended to distort the handling of that proceeding, but which may facilitate the establishment of unethical relations…[Influence peddling] relates to benefits offered to an individual who promises to convince a public agent to carry out (or fail to carry out an action that is part of their job description" Danilet Cristi, 2010. *Corruption and anti-corruption in the justice system,* C.H. Beck, Bucharest, p. 49

[191] Mihai Mariana, p. 18

agents with state or public administration shareholding, as part of privatization or a commercial transaction. It is against the law to obtain benefits related to the supervision, control and dismantlement of a private economic agent. It is prohibited to offer credits or subventions that are not regulated by the law; to use credits and subventions with purposes other than the ones specifically designed. It is also against the law to allow unauthorized persons to information that is not meant for public use. [192]

At the administrative level, there are two separate categories of corruption. The first refers to services and contracts normally offered legally. In this case the public official receives an illegal profit performing an activity included in her job description. The second situation involves corruption to obtain services that a public official is prohibited to offer.[193]

In order to modify and complete the Penal Code and other laws art. 253 from Law no. 278/2006 criminalizes the '*conflict of interest*.' According to this law a conflict of interest is punishable from six months to five years and is defined as the 'deed conducted by a public official while exercising the functions of her job, through which she participates in a decision that results directly or indirectly in material benefits for herself, spouse, relative up to second degree kin, or a person with which she had commercial or employment relations during the past five years, or from whom she receives services.' [194]

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[192] Stan Valerian, Adrian Sorescu, Andreea Nastase, Gabriel Moinescu; ed. Radu Nicolae, *Integritatea administratiei publice locale,* Editura Didactica si Pedagogica, (2007), p. 6

[193] Stan Valerian et al, p. 5

[194] Law no. 278/2006 in Stan Valerian et al, p. 6

The most concise definition of 'conflict of interests' is a competition between the public interest that the public official is mandated to respect and her own interest. Accordingly all corruption acts are based on a conflict of interests and they represent the final outcome of this conflict. On the other hand the situations defined as 'incompatibilities' in exercising the functions the public official job are determined nominally and not generically. The regulations for public office include specifications to all other incompatible positions. [195]

In regards to public procurement the Government Emergency Ordinance 34/2006 contains the legal framework to be applied in granting public money. It clearly states the ground principles to be followed in the award procedure. These include non-discrimination, equal treatment, mutual recognition, transparency, proportionality, efficient utilization of public funds and accountability.[196]

This legal framework introduction will serve further along to evaluate if the Romanian politicians activities are short of random occurrences, or if they are indeed part of the endemic problem this book attempts to uncover.

Corruption changes clothes but not habits

A tradition, the tradition

[195] Stan Valerian et al, p. 7

[196] GEO 34/2006 in Stecko, Carmen, "Public Procurement," *The National Integrity System,* ed. Transparency International Romania, (2010), p. 203

As part of the traditional South Eastern European con Romania appears to have inherited the Ottoman culture of informal relations, in comparison with the Central European region that received from the Austro-Hungarian legacy a rather more clear distinction between the private and the public space. During Ottoman times, the Romanian lands were lead by Greek princes, called Phanariotes. These rulers bough their positions from sultans and they financed them with money raised by taxing the Romanian people. The princes challenged each other and funded bidding wars.[197] With the decline of the Ottoman Empire these practices did not improve. On the contrary, from the first to the last Romanian king, before the Second World War, the state property and its due functions were characterized by severe influence peddling and corruption.[198]

Thus, the lack of an accountably self-government has several possible causes, among which the lack of historical autonomous cities and the subordination of the Church to state that led to the absence of a consistent civil society. To these one can add the lack of opposition from the landowners in the Romanian Principalities. Consequently there was a lack of historical conflict between the central government and the periphery, which traditionally generates more accountability. Specifically the appointments and dismissals in the Ottoman lands were conducted in an arbitrary manner typical of

[197] Pippidi Alina Mungiu 1997 "Crime and corruption after Communism: Breaking free at last: Tales of corruption from the Postcommunist Balkans," *East European Constitutional Review,* 6, in Uslaner M Eric 2008 *Corruption, inequality and the rule of law. The bulging pocket makes the easy life,* Cambridge University Press

[198] Uslaner, p. 126

cronyism, which lead to more of the same and the failure of a sound government to develop.[199]

This type of leadership largely affected the average people. They resorted to "informal devices to keep them and their families afloat."[200] When the organized Ottoman state disintegrated into a corrupt entity, it became a necessity to act dishonest. For over two centuries the survival of the people, including their leaders depended on the ability to outwit their superiors[201] most of the times disobeying the law. However, the post-communist corruption seems not to relate to this legacy since it is more similar to the same forms of corruption seen in other former soviet and former communist states. So it may not be the case that the level of informal/formal cross that we see after 1989 is the consequence of the Ottoman inheritance.[202] The author of the present book subscribes to the stand that it is a combination of both. Even without the communist forms of informal networks, inheriting the pre-existing tradition from centuries of corrupt behavior does not serve well the demands of a legal state. However, the communist long history of dismantling all forms of pluralism, accountability, representation, separation of powers, and justice crucially impacted the unruly post-1989 scenery.

The form of corruption discussed here thus, is largely impacted by the legacy of communism. All spheres of life were conducted mostly unlawfully, under the table,

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[199] Pippidi, p. 69

[200] Ibidem

[201] Sugar, Peter, *Southeastern Europe under Ottoman rule, 1354-1804,* University of Washington Press, Seattle, (1977), pp. 193-194 in Pippidi, p. 69

[202] Pippidi, p. 70

arbitrarily and many times abusive. "The persistent shortages and dishonest official made it impossible for ordinary people to get either staples of the 'free' state services without bribes, connections, or both."[203] Nepotism was one of the most damaging and common forms of corruption during communism. All leadership positions, management and control were assigned based on familial and familiar lines, usually from the higher ranked communist officials. Cronyism (corruption based on networks of people that have shared interests) was another form of state capture and control. This specific one spilled over into the post-communist scene and is at the bottom of the relationships and interests that are under study here. Bribery at all levels of life, health, education, administration was not only common but also necessary for survival. Non-reporting of data, blackmail, forging documents, embezzlement were all normal tools on the communist landscape. After a society, both the elites and citizens, relies for almost two generations on informal relations it is probably unlikely that people will change without incentives. If the laws that punish this kind of behavior are not applied then people will resort to familiar forms of interactions.

Post-communism - Privatizations, Restitutions, Procurements

After the fall of Communism, Romania inherited the illicit networks of corruption that crystallized during almost half of century of totalitarian rule. The perception of the state as an adversary and the intent of surviving and thriving not within state rules but despite them remained engrained in the local culture after 1989. Immense opportunities

[203] Uslaner, p. 126

of misappropriations of public funds for private gain arose with the transfer of most property from state to private ownership, through privatizations and restitutions. Later, after these drained out, public procurement contracts and European funds became the target of fund extractions for party and personal benefits.

Unlike communism, democracy rotates leaders more often. Every four yeas or so, people get a chance to punish corrupt inefficient politicians. The problem is that, in an unreformed polity, one that does not have the institutional and legal apparatus to punish criminal activity and abuse of office, the opportunity to change the bad leaders is wasted. A new set of leaders comes in place and takes advantage of the unreformed state, and has an incentive to keep the status quo. The actors within the networks may change, and the politicians from different political parties may rotate in taking advantage from the already formed system of extraction. What is relevant for this discussion is that even though the object of state rent may differ from a factory, to a large piece of land, to tenders, or rights to distribute national energy, the mechanism and the effect is the same.[204] That is, the people who and are the ultimate winners of the extraction of these rents are politicians who are at the same time in charge of drafting legislation to ensure the correct and predictable application of laws. "Corruption will not end. It's a very innovative phenomenon and my reading of it is that if you manage to stop certain forms of it, they

[204] This chronology has been revealed to me in an interview with David Ondracka, director of Transparency International Czech Republic, Summer 2011

will be inventive (…) those who fuel the whole machine are very inventive and smart guys."[205]

We can identify four stages of corruption, privatizations, restitutions, public contracts and European funds. They at times overlap. The object of misappropriation differs but the mechanism hardly changes. In Romania, the first wave of misappropriations of public funds for private gain that prevented the establishment of rule of law happened through the *privatization* process. This led to widespread and unchecked corruption. Due to a complicated institutional structure and the government's reluctance to give up economic control, political clientelism played a major role in the process.[206] Thus between 1990 and 1996 the state did not want to give up control during the Mass Privatization Program (MPP), purposefully designing the MPP to manipulate it. The financial institutions created to handle the process were captured by the industrial elites. [207] The relationship between politicians and the inequitable distribution of public resources reached paroxysm during this stage. High-ranking politicians were at the same time members on the management board for the privatization of state enterprises.

After 1996 a law made this practice illegal, but again the politicians were the first to break it, and kept their positions, being sheltered by parliamentary immunity. In 2000 a Government's Control Department (DCG) uncovered that 75 MPs were on 51 boards of directors, management boards or audit commissions. While 3100 civil servants from the

[205] David Ondracka, director of Transparency International Czech Republic, June 24 2011

[206] Tache, Ileana "The mass privatization process in Romania: A case of failed Anglo-Saxon capitalism", Transylvania University of Brasov, p.1

[207] Ibidem, p. 12

Ministry of Finance, were on audit commissions for state enterprises. This is a clear example of how certain laws are passed to prevent and punish corrupt behavior, and they may be good, but they are useless unless put in practice, enforced. The above politicians involved in the management boards probably din not have any incentive to also reform the justice system.

The second stage involves the *restitutions* of the private properties, which were nationalized with the arrival of communism, to their rightful owners. Romania was one of the few former communist countries that delayed the decision on restitution. The first law dating from 1991 was followed, only after a decade, by the restitution law. Protecting tenants during 1990s was more prevailing than repairing abuses. In 1995, a law (112) was passed that allowed tenants to purchase their houses at a very low price. Many politicians used this law to buy the houses they were living in. During this time, the only restitution method was the judicial one. Politicians attempted to block that, saying that judges need laws to guide such process, and they are the only ones with the power to pass the laws. President Iliescu at the time opposed court restitutions. He asked that they should not be applied, and that it is a breach of law biased towards the former owners. Though other countries practiced this method too, for example Poland.[208]

The Supreme Court decided, after political pressure, that the courts could not rule on restitutions in the absence of a law. The Chief Prosecutor, at the time and the successors, practiced recourse in annulment to change mandatory court decisions, a very clear case of breach of rule of law. Against these there were a lot of complaints addressed

[208] Romanian Academic Society, "Property Restitutions: what went wrong in Romania?" 2008 *SAR Policy Brief No. 38*, p. 4

to the European Court of Human Rights (ECHR) and the recourse in annulment was eventually eliminated in 2004. The law referring to restitutions was eventually passed in 1998, which allowed retrieving property even without a title. Only in 2001, with pressures from the European Union, Romania adopted a law on the judicial regime of properties confiscated by communists.[209] While the regulating process took very long, the implementation is, to the day, moving even slower. In 2007 out of 202,000 requests submitted, only 103,128 received a decision.[210] This highlights that the problems with the predictable application of laws and the transfer of state ownership towards private use has always been a space for political manipulation and capture.

The third stage involves *government contracts and public procurement.* This is the core form of abuse of public office in this study. It revolves around selling of state property or purchase of services and assets at undervalued respectively overvalued prices on behalf of state institutions and agencies. Politically appointed institutions are in charge with either selling or buying state property. The people assigned with the distribution of these contracts, at the probable request of a political figure or at their own initiative sell/ buy the respective asset or service to a preferential bidder. This is illegal by Romanian law as reviewed in the previous section. Private firms who usually are part of a corrupt network with the politician(s) execute the contracts or buy the property. The politicians and their business partners (in case they are not the one and the same person) then pocket the financial benefit. Some sums are huge and involve a more concerted party effort.

[209] Ibidem

[210] Ibidem, p. 5

Those funds are usually funneled for party finance. This is why this network functions very well. Because many people have a vested interest that they work properly. The party finance and elections depend on this money so many actors act in conjuncture to have this 'successful' outcome.

This is the topic of the current study. This is where most new democracies get stuck in the vicious cycle corruption- lack or rule of law.

The fourth stage, which is a variation of the third, is related to the *European Union funds.* The EU, in an attempt to bring all its territories to a similar level of development, allocates to the new member states huge sums of money for modernization and standardization. Though the process started in the 1990s, the amount of money climbed to billions of euro since Romania joined the European Union in 2007.[211] The mechanism of abuse is similar to the one highlighted above in the third stage. The only difference is that European money is involved. One would suspect that EU would do something about it. However, the lack of enforcement mechanisms is one of the most important dysfunctions of the Union as well. So the money is drained from the state and the EU since there is a predictable expectation that there will not be punishment for it.

This review highlights that while the subject of interest changed, the mechanism did not. Politicians practiced misappropriation of state resources that returned to their pockets since the fall of the authoritarian regime. The relevance is that this is a perpetual mechanism; and as long as, at any time during these stages, politicians were corrupt they could have not pursued the reformation of the enforcement mechanisms. Then, just like

[211] Ondracka, June 24 2011

today, they were protecting their corrupt interests and lacking incentives to establish rule of law.

At any point in time

One is bound to wonder, when does this all happen? Are they sparing moments and episodes of corruption? Is this phenomenon random, are some politicians taking advantage of loopholes? Because if that is the case then this is no different from the United States or other advanced democracies at the time. The answer is, no, this is different. For purposes of exemplification, take the second Social Democrat administration (2000-2004).[212] The prime minister at the time Adrian Nastase (he will be the topic of a discussion in chapter 6) was in fact part of the pre-1989 communist ruling elite. His father-in-law was minister of agriculture and then ambassador in China. Nastase himself, was among the few young officials allowed by the hardliner communists to travel, becoming one of the most trusted communist young elites. [213]

At the same time, the PSD parliamentary group was made up mostly of figures from the early post –communist period plus local businessman who rose to riches in the party. Nicolae Vacaroiu, another ex-communist reborn into a banker, who led an anti-reform government from 1992 to 1996 became the president of the Senate, as accusation of corruption against him increasingly grew. Victor Ponta an unknown, (whom will meet

[212] The governing party changed their name from the Party of Romanian Social Democracy (PDSR) to the Social Democratic Party (PSD) in 2001.

[213] Gallagher, p. 310

again in chapter 6), was discovered by Nastase and appointed to the very important position of the head of the Corps of Control, the watchdog in charge with overseeing the government spending. This institution entrusted with the investigation of the fraudulent use of European Union funds was particularly nonperforming.[214]

Besides the cozy members of the parliament who went on with their private business, another pole of influence developed in the PSD party during this administration. They were known as the 'barons,' and it was made up of a group of powerful local politicians that exercised absolute control in their areas, usually the poorest areas of the country (they were probably so poor with a reason). They controlled the courts, the police and most economic power, plus the elected bodies. Among the most 'popular' figures were Nicolae Michelie, Marian Oprisan, Lilion Gogoncea, and Constantin Bebe Ivanovici, leaders at a point in time of the local councils in Gorj, Vrancea, Galati and Ilfov provinces. "The ability of the barons to run their towns, cities and, in some cases counties, as private fiefdoms shows the extent of the authority they had in the PSD."[215]

These are good enough reasons to stop the reform process and the creation of a truly independent anticorruption agencies. However, the wolf became his own enemy. Due to the process of integration going in parallel with these events Nastase was in the position of having to make some appropriate, if harmful changes to signal to the European Union the Romanian 'commitment on the path of reform.' The irony is that Nastase's people in the PSD lands have rigged even the ballots agreeing to the European

[214] Ibidem pp. 313-314

[215] Ibidem p. 314

integration. But the EU went ahead since at the end of the day the union was the net winner of the integration. What is relevant is that at any point in time we can take a slice of the government, the state institutions, the judiciary and we can find almost the same patterns. The institutional incentives are not positive. The lack of enforcement mechanisms over blows the connections between politicians and their business friends, drain state money and make sure the rule of law reforms are not thorough, *at any point in time.*

Czech Republic

Brief background

Czech Republic is regarded as an example of a postcommunist country very advanced in the process of becoming a consolidated democratic political system. It appears as one of the more stable and successful in the region in both politics and economics. Democratic developments include a multiparty system, a growing interest group system, and an active parliament, along with fast privatization. The people have an accepting, but somewhat reserved attitude towards democratization. [216]

This country is located in Central Europe, surrounded by Poland, Slovakia, Austria, and Germany. It has a more advantageous position in the geographical hierarchy of Europe than Romania. The Lands of the Bohemian Crown, as it was known before the independence of 1918, was created in the late 9th century. After 1526 it became a part of the Austro-Hungarian Empire, with consequences for the legal traditions, as it will be noted in the next section. When the empire collapsed in 1918, the independent Republic of Czechoslovakia was born (Czech and Slovak lands).[217] It was the only Central and Eastern European nation that experienced a continuous democracy between the wars. It

[216] Olson David M. "Democratization and political participation: the experience of the Czech Republic" in *The consolidation of democracy in East-Central Europe,* edited by Dawisha Karen and Bruce Parrot, (Cambridge University Press, 1997), p. 150

[217] CIA The World Factbook

was characterized by regular parliamentary elections, a multiparty system and a proportional electoral system. [218] One of the most important post-1989 trends is to try to emulate the essence and in some respects the format of the system. The current proportional representation electoral law emulates that system with the expectation that it continues the multi-party arrangement of the first republic.[219] The Communist party and the current Christian Democratic Union – Czech People's Party are historical parties. The pre-war economic structure was more industrial and commercial in comparison with the rest of the countries in the region. Hitler assumed control over Czechoslovakia, however it treated the Czech and Slovak parts differently.[220]

The Red Army liberated a major portion of Czechoslovakia at the end of World War II, such that in 1946 the Communist party won the elections. However it did not become a communist state until 1948 thorough a coup d'état. It was not a fortunate event for a country that almost opted for the Marshall plan. The Soviet Union did not like that direction and assumed control of the Czechoslovak affairs. This led to several societal changes, such as the nationalization of the means of production, and the establishment of the command economy. It was a very illegitimate rule that led in 1968 to the attempt to bring economic reform and political easement within the Communist party. Known as the 'Prague Spring', the attempt was stopped by the invasion of the armies of the Warsaw Pact, excepting Romania. The troops remained on the territory until 1989. The Prague

[218] Olson David M., p. 151

[219] Oskar, Krejci, *History of Elections in Bohemia and Moravia,* Boulder Colorado, East European Monographs, (1995)

[220] Olson David M., pp. 151-152

Spring led to two decades of suppression of freedom of expression and action. As a reaction to the oppression, the intellectuals and the artists organized behind the "Charter 77" initiative. [221] It was more a "network for communication and of artistic expression, than a formal association for action." [222] The Communist regime was very oppressive. Around 250,000 Czechs and Slovaks were sent to prison for 'anti-state activities.' [223]

The Velvet Revolution of 1989 put an end to the Communist rule. The Federal Assembly elected Vaclav Havel president. In 1993, on January 1, Slovak national aspirations took form in the peaceful split with Czech Republic. Currently Czech Republic has a pluralist multi-party parliamentary representative democracy. The head of the government is the Prime Minister. The parliament is formed of the Chamber of Deputies that harbors 200 members and a Senate, with 81 members. The prime minister has sizeable powers, such as setting the agenda for most foreign and domestic policy, mobilize the parliamentary majority and choose the governmental ministers. The head of state has limited powers, such as to return the bills to the parliament, to nominate the Constitutional Court judges for the Senate approval, and dissolve the parliament under special circumstances.

The multi-party system encompasses two or three strong parties and one other party that helps to form the coalition. In 2010, though the Czech Social Democratic Party (CSSD) won 22 per cent of the share of votes, the Civic Democratic Party (ODS) with 20

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[221] One of the signatories, Vaclav Zak, and the son of one of the movement leaders, Marek Benda agreed to be interviewed for this study. Their comments will surface in this and later chapters.

[222] Olson David M., p 153

[223] Kosslerova, Diana, "Czech schools revisit communism," *BBC News,* (Nov 1, 2005)

per cent formed a coalition with TOP 9 and the Public Affairs (VV) party, these two fairly new parties which were born out of dissatisfaction with the way traditional parties run the country. The CSSD is of social democratic ideology, ODS is conservative, TOP 09 is liberal conservative and Public Affairs is conservative liberal. As their names point the Communist Party of Bohemia and Moravia is communist, and the Christian and Democratic Union -Czechoslovak People's Party is Christian democrat. The parties alternate to power. In 2006, and 1996 ODS won the majority of seats, CSSD in 1998 and 2002.224. Czech Republic has been a NATO member since 1999 and of the European Union since 2004, and it held the EU Presidency for the first half of 2009. [225]

Rule of law defended

This section emphasizes the fact that Czech Republic theoretically had a head start in the establishment of rule of law. Its pre First World War legal experience and the inter-war experiment with a constitutional democracy put it on a better footing than Romania. We will see that regardless of this advantage the corrupt networks function almost unhindered in Czech Republic as well, and the country is still struggling in a state of unaccomplished rule of law. This runs counter to international indexes of democratization and rule of law governance indicators. I started from the presumption that the indexes were very accurate. However, on the ground, gathering the evidence that

[224] www.volby.cz the elections website

[225] CIA The World Factbook and Source

will be presented in this book I came to the conclusion that it is mostly a perception that Czech Republic is doing better and can successfully be placed in the bracket of advanced democracies. Up until the economic downturn Czech Republic was doing great economically, but not legally. Many unchecked corruption networks funnel a hemorrhage of public funds towards party and personal benefits. This evidence will be presented in chapter 5. In this section we turn our attention to why the expectation is that Czech Republic was theoretically on a better footing than Romania at the jump-start in 1989.

Constitutionalism, a tradition

Czech Republic, unlike Romania has had a more direct and extensive experience with the rule of law tradition. Out of all Central and Eastern European countries it is the only one to have experienced a Western type democracy with a liberal constitution, beginning with the end the First World War and ending with the German invasion in 1938. Two figures stood up during the democratic republic, Tomas Masryk and Eduard Benes. After the Second World War, Benes lead the government returned from exile, and from 1945 to 1948 Czechoslovakia was reunited and guarded by the pre-war constitution. This ended in 1948 when the Communists seized power.[226] This evolution and revival of the rule of law tradition of Czech Republic is the topic of this section.

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[226] Priban Jiri and Young James, "Central Europe in transition: An introduction," *The rule of law in Central Europe. The reconstruction of legality, constitutionalism and civil society in the Post Communist countries,* edited by Priban Jiri and Young James Ashgate, Dartmouth, 1999, p. 4

Starting with 1867, while being part of the newly formed Austro-Hungarian Empire the Czech Lands fell under the Austrian sphere of influence. In contrast to the Hungarian Crown lands, it experienced a powerful growth of democracy. It manifested itself through strong local self-government, guaranteed regional constitutions, and judicial review of the administration.[227] By comparison, only one Romanian province, Transylvania, was part of the Austro-Hungarian Empire, and it fell under the more authoritarian Hungarian influence.

The significant constitutional period for the Czech Lands started with the end of First World War. When the Czechoslovak state was born in 1918, with the decomposition of the Empire, it absorbed the legal order of the Austrian and Hungarian law. This meant that it received a dual order, since each one had its own legal tradition. This dualism was only removed with the replacement with the socialist order and law. The first Constitution was adopted in 1920. Though not a specifically original one it included a fair amount of guarantees to human rights and freedoms and to the democratic and legal structure. The French Constitution served as its inspiration. It obliged to the fundamental principles of rule of law, separation of powers and independence of the judiciary. What resulted was a parliamentary republic with a two-chamber parliament, a cabinet accountable to the parliament and a weak president. The independence of the judiciary from the legislative and executive powers was guaranteed.[228]

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[227] Ibidem, pp.17-18

[228] Adamovich L. *Grundriss der tschechoslowakischen Staatsrechtes,* Vienna, Österr. Saatsdruckerei, (1929), in *The rule of law in Central Europe. The reconstruction of legality,*

Democratic constitutionalism was overthrown by Germany's actions in 1938-1939 and remained like that for approximately half a century. While the territory was chopped by annexation to Germany (Bohemia and Moravia) and autonomous actions and movements from Slovakia (Ruthenia), the Constitution of 1920 was under attack as well. The principles of rule of law were severely damaged. A constitutional act allowed the President to amend the Constitutional Charter by issuing a decree. This granted the government extraordinary powers to issue regulation.[229]

For a brief period 1945-1948, after World War II, the Czechoslovakian state restored benefited from a constitutional democracy that reinstated the pre-war legal order and the abolition of all legal acts issued during the period of occupation. This was abruptly cut by the Communist take over. The period from 1945 to 1989 is characterized by a complete repression of all democratic constitutional forms. The three constitutional acts of the period, the Constitution of 1948, of 1960, and Constitutional Act No. 143/1968 Sb., had clear incompatibilities with democratic constitutionalism. They were documents that responded to traditional requirements, but the legal norms were not applied. The prevalent principle was socialist legality, which is in severe contrast with democratic constitutionalism.[230]

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constitutionalism and civil society in the Post Communist countries, edited by Priban Jiri and Young James (Ashgate, Dartmouth, 1999), pp. 18-19

[229] Hendrych Dusan, "Constitutionalism in Czech Republic," in *The rule of law in Central Europe. The reconstruction of legality, constitutionalism and civil society in the Post Communist countries,* edited by Priban Jiri and Young James (Ashgate, Dartmouth, 1999), p. 19

[230] Ibidem pp. 21-22

After the fall of Communism in 1989, the drafting of the new Czech Constitution incorporated elements of the progressive Czechoslovak tradition dating back to the First Republic (1918-1938) and the contemporary constitutionalism in Europe and America. The final result adopted on September 1, 1992 fairly guarantees that Czech Republic abides by the principles of democratic, law-based state, founded on the respect for the rights and freedoms of citizens. The most important criticism revolves around the issue explored in this book, i.e. the fact that the Constitution of Czech Republic "has not yet been implemented by legislation."[231]

To add to the argument that Czech Republic was on a good ground to establish rule of law, a lustration and decommunisation process followed the fall of Communism. This is relevant in the context that the first politicians who vote on establishing institutions and vote the first set of laws at the moment of creation of the newly democratic state carry a lot of weight in the future development of a country. Such that if they are part of the previous regime, connected with the authoritarian past they will have an incentive to not introduce reforms that would lead to their punishment post facto. In order to prevent this, many post-authoritarian/totalitarian regimes introduced lustration laws.[232] One of the main issues though was the lack of information since the agents of the previous regime hid and destroyed the records prior to losing power.[233]

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[231] Ibidem pp. 26-28

[232] A lustration law requires that persons in positions of power to influence state administration and laws, to agree to a background check to assess their involvement and assistance in the totalitarian regime's abuses. They are mandated to publicly disclose the compromising information or to be removed from office. The aim was to eliminate elements that could hinder the establishment and well functioning of the democratic state's goals. The Czechoslovak lustration statute was composed of two lists. The first represented the inventory of offices and

A distinction is necessary. Since Czech Republic is at the intersection of the Western and Eastern sides of Europe one is bound to wonder what tradition influenced its constitutionalism. The rule of law Anglo-Saxon concept as pointed above in the description of the Romanian legal tradition, is different from the concept of Rechstaat. The law-based society underlined by the rule of law principle, means a form of *democratic* law-based state. On the other hand, constitutionalism can evolve without liberalism; such as it did in the German Rechstaat and ancient Athens. The democratic law-based state guarantees the fundamental rights and basic freedoms. This is part of the constitution or of a charter that is part of the constitutional order. One can evaluate the effectiveness of a democratic law-based state based on the ability to guarantee the protection of equal rights and freedoms. By these criteria Czech Republic subscribes to the principles represented by humanity and democracy.[234]

Czech Republic had a good start, and then Communism swept over the significant advances in the establishment of rule of law made before the war. The consequences of almost half a century of Socialist law, discussed previously in regards to the Romanian

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positions which persons are allowed to hold only if they are not part of the second directory, containing the offices and activities held and performed during the communist regime. For instance, the first catalog contained all positions filled by election, nomination and appointment in bodies of administration, army, security service, police force, office of the President, government, parliament, Supreme and Constitutional court, state radio and television. The second roll contained party offices raging from the rank of district secretary upwards, related to security police, and activities related to purges after the 1948 takeover and informing for the secret police. According to the law those that were part of the second list were to be automatically excluded, removed from office without the right of hearing and appeal.

[233] Gillis Mark 1999 "Lustration and Decommunisation," in *The rule of law in Central Europe. The reconstruction of legality, constitutionalism and civil society in the Post Communist countries,* edited by Priban Jiri and Young James (Ashgate, Dartmouth, 1999), pp. 56-63

[234] Hendrych Dusan, p. 15

historical developments, were tragically no different in Czech Republic. Those fateful years have dismantled the core principles of rule of law and have left a society struggling to cope with everyday life through informal networks and disregard for authority and the law.

Institutional and legal framework

The Judiciary before and after loss of identity

The application of law and the fundamentals of rule of law sit in the judicial branch, its independence, integrity, and impartiality. The following section discusses the evolution of the judiciary in Czech Republic, pre and post -1989. It also points to the consequences to the establishment of rule of law of a dysfunctional judicial branch.

The promising beginnings

The Constituent Law of the State of 1867, declared judges relatively independent and autonomous. It postulated that the judges were appointed by the Emperor or in his name for life. This included a very restricted transferability of judges. At that time independence meant judicial decision-making within the limits of the valid legislation based on the judges' conviction and conscience. [235]

[235] Vasely F.X. 1899 Vseobecny slovnik pravni (A general dictionary of law), Topic, Prague, in Wagnerova, Eliska, "Positions of Judges in the Czech Republic", Systems of Justice in transition

With the establishment of the independent Czechoslovakia in 1918 the judiciary's stability was temporarily weakened. This is due in part to the fact that the Slovak and Sub-Carpathian courts became inoperable. They were required previously to work in Hungarian language, but after 1918 they had to operate in the language of the population. This led to a paralyzing period. The vacant positions needed to be filed with Czech judges. But many judges from the Czech lands left for the central administrative positions or were appointed at the Ministry of Justice. Many preferred to leave the judiciary than to go east (to the Slovak lands). The judges perceived influence the state administration influence to be very intrusive and creating problems of independence.[236]

In relation to this juncture in the history of the Czech judiciary, an observation needs to be made. There is a difference between the perception of a judge as defending the law of the state and defending human rights. The latter leads to more legitimacy and credibility in the eyes of the people.[237] During the First Republic, while there was a demand to strengthen the institutional independence of the judiciary, the judge was perceived more as 'the mouthpiece of the law,' typical of the tradition of the French Revolution, and less the defender of the individual rights. Because this lead to skepticism in the judgment of the judiciary, it allowed for the interference of the executive branch in the activity of the judicial branch, justified by the need to build the democratic

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Central European experiences since 1989, edited by Priban Jiri, Roberts Pauline and Young James, (Ashgate 2003)

[236] Wagnerova Eliska, pp. 163-165

[237] Ibidem, p. 166

republic.[238] This in turn had consequences for the system that the post-1989 judiciary inherited and tried to emulate, by emphasizing the letter of the law versus the rights of the people.

The loss of identity

During the German protectorate since 1989, German courts were established in addition to the Czech ones. It was possible to appoint legally unqualified persons as judges and presidents of courts. The number of Czech judges during this time further decreased; there were no new appointments, some retired (forcefully or not), some were sent to concentration camps, and many lost their lives as victims of prosecution. In 1946 the Czech judiciary was in a very decayed state, with only around half of the positions filled.[239] The acting minister of justice supported close adherence to the law, but decisions against the Nazi regime were justified 'provided that there is an interest in the ruling regime.'[240] He also applauded the Soviet principle of 'independent' judicial decision-making. The close following of the law was guarding against political bias, however, it disregarded the idea that the law could be immoral.[241] This marked a clear departure by the Czechoslovakian practice from any principle of rule of law.

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[238] Ibidem, p. 166

[239] Ibidem, p. 167

[240] Drtina, Prokop, *O soudcovske nezavislosti, lidovem soudnictvi a jinych casovych otazkach cs. justice (On the Judicial independence, popular justice and other current problems of the Czechoslovak sytem of Justice),* Mlada fronta, Prague in Wagnerova Eliska, (1946), p. 167

[241] Wagnerova Eliska p. 167

After the Communist takeover, the judges became subject not only to the laws passed by the legislative body, but to all additional 'sub-statutory' acts of government and ministries. According to the directives of the ministry of justice the judges *had to abide by the prosecutor's opinions and suggestions.* With the Constitution of 1960 the judge had to interpret the legislation in accordance with the socialist law. Another horrendous attack on the Judiciary was represented by the purges of 1969-1970 as a consequence of the 1968 invasion of Czechoslovakia after the Prague Spring. It led to the severe decimation of the judiciary dismissing the judges not compliant with the occupation. All these dysfunctional steps had dire consequences for the state of the judiciary after the fall of Communism.

Post-1989 hope

At the top of the judiciary of the free Czech Republic lays The Supreme Court, which is the highest court for all issues except for constitutional matters, who fall under the jurisdiction of the Constitutional Court, and except the topics falling under the Supreme Administrative Court. Hierarchically under the Supreme Court there are two High Courts (Prague and Olomouc), and seven Regional Courts, and at the lowest level the District Courts, which correspond to the administrative districts in Czech Republic. In Czech Republic at the moment of the split from the Slovaks there were 1680 judges. In 2001 this number grew to 2465, with 1431 practicing for up to ten years. The salary structure included in article 80 of the Constitution demoted judges to the status of

'inferior officials' by relating their salaries to the ones of prosecutors. This way they ended up being rewarded by the political power at their whims.[242]

The early 1990s legislation in regards to appointments and preparatory service for judges was inspired from the First Republic. The minister of justice decided all appointments of judges and the President approves his nominations. The minister of justice decides the courts assigned to judges promoted, except for the Supreme Court, where the Chief of the Supreme Court has to approve. The minister of justice appoints and removes all the court presidents and vice-presidents. An exception to this rule is the Supreme Court where the President of the Republic appoints representatives for an indefinite period. Severe problems of interference come from the fact that the minister can remove the chiefs of courts and deputies without giving reasons, or based on arbitrary reasons. This is very worrisome since presidents of courts have been dismissed in very large numbers. This mirrors the instability of the political scene, where during a three and a half years period the minister of justice was replaced three times. The new choices for presidents of courts are justified as attempts to improve the functioning of the justice system. "Certainly, these purges have brought 'discipline' to the ranks of the newly installed presidents, who demonstrate their loyalty to the Ministry of Justice."[243]

As part of the process of integration in the European Union, the European Commission, through an instrument called the Agenda 2000, monitors progress on the candidate countries. In the evaluation of Czech Republic's application to join the EU the

[242] Ibidem, pp. 169-170

[243] Ibidem pp. 172-173

European Commission described in its first opinion (1997) that the situation of the Czech courts represents 'a major challenge in the country's integration into the European Union." At this point this does not sound any different than Romania. Despite their quite different pre war experiences it seems that the Communist experience leveled the field. The report mentioned that the courts were working over capacity and many cases did not receive judgment. For example the medium period for commercial law proceedings was over three years. The cause was determined to be the lack of experience and qualification of judges. The 1998 Regular Report noted the large number of vacancies for judges, the inadequate equipment in the courts and the lack of communication. To this it added the lack of qualification of state prosecutors. Due to lack of remuneration, the best-qualified graduates sought higher income in the private sector. The following reports hardly met progress. In the 2000 Report there was some progress in the adoption of some amendments to the Codes. But they were refused by the parliament, as it will be detailed further down. The preparation of judges and prosecutors remained unchanged and the length of judicial proceedings the same. The Commission's reports asked for judicial reform as a condition to accession to the European Union. [244]

The first attempt to judicial reform, of 1999 failed rejected by the parliament and labeled as too revolutionary. Initiated by the ministry of justice, a previous Chief Justice at the Supreme Court, it came as a response to the criticisms on the state of the judiciary from the EU in as part of the accession process. The proposed independent judicial

[244] Scheu Harald Christian, Barbara Stepankova, and Stovicek "The Reform of the Judiciary in the Czech Republic in the Context of EU Enlargement," *The European Legal Forum,* (E), (Jan 2000/01), pp. 236-239

boards were charged of having no responsibility and accountability and the removal of financial authority was charged as subjugating the judiciary to the executive by financial control. The second attempt at reform, of 2001, reduced an attempt to create Judicial Boards, to nothing more than advisory boards at individual courts. They had no power other than in matters of composition of the disciplinary panel and only in conjunction with the president of the court. This reform tried to formalize the education of judges by creating a broadly conceived Judicial Academy, to which the Supreme Court objected on the premise that this would lead to monopolization of education. Though the Judicial Academy was struck down, a form of education similar to it was to be enforced. At the moment it is still to be determined what shape it will take.[245]

The position of the Supreme Court is weakened, while the minister has now the right to take part in any session of the Supreme Court. It can interpret the law at an abstract level by giving opinions, instead of solving individual cases that present challenges to individual rights. This reminds of the Communist Judicial regime, being one of the tools to escape constitutional principles.[246] The law passed in both chambers, though it had serious objections from judges. "The President of the Republic has signed the law, but he attached a letter expressing serious doubts about the constitutionality of the law in attaching judges to the executive branch, in the fatal career consequences of the regular judge's assessment, in the authority of the minister of justice over court

[245] Ibidem pp. 174-175

[246] Ibidem pp. 175

presidents and in the compatibility of the judicial function with functions of public administration."[247]

The reform of the judiciary system points to the second mechanism identified in this study. I posit in the beginning that there are two methods to prevent the establishment of rule of law. One is through intervention in the judiciary and the second is through superficial reforms that do not thoroughly lead to the establishment of efficient enforcement mechanisms. The Czech judicial reform is part of the second mechanism. In order to be able to exercise control over the judiciary the politicians preferred a reform that eased their influence over judges. Not reforming the judiciary presumes an inactive politician minding his own corrupt business and initiating or voting on appropriate legislation. The Czech judiciary reform goes a step further. It shows that politicians when pressed with the need for reform, they will do it; but in such a way to benefit themselves and not the rule of law.

Corruption changes clothes but not habits

"If you don't steal from the state you steal from your family"

The pre-communist experience is slightly different from the Romanian Ottoman past, in that the corruption was not as blatant and bribery was not as popular. However, living under foreign occupation pre First World War has taught the native population in the Czech Lands to deal with it by forming the familiar informal networks we

[247] Ibidem p. 176

encountered on the Romanian territory. Besides these, the locals have developed distrust, divorce, and resentment towards the occupiers. The disobedience from the authority runs deep into Czech culture as well. The state was not the ally of the people, but its perceived enemy. However, what makes the Czech experience very similar with the Romanian one is the Communist legacy. Roughly the same behavior of nepotism, cronyism, bribery and disobedience characterized the Czechoslovak experience as well. There was one saying that was popular that said, *"If you don't steal from the state you steal from your family."* And yet again, two generations that lived under these circumstances can hardly yield the creators of an overarching legal system that tells them what to do. Both elites and citizens alike learned to have room for 'movement,' and they value that. The elites because of rent-seeking reasons and the people because it is costly to change networks, and they are distrustful of the state.

Post-Communism - Privatizations, Restitutions, Procurements

The transfer of state owned property to private hands had offered the opportunity for grand corruption in Czech Republic. The first wave, the *massive privatization*, which happened between 1990 and 1998 roughly, resulted in the change of 80 per cent of state to private ownership. The Klaus administration embarked on the first of the two large-scale privatization waves to return large state-owned enterprises to private parties. One of the five-privatization techniques was applied: public tender, public auction, direct sale, unpaid transfer, or popular voucher scheme. Depending on the choice of method, enterprises inherited a diffuse ownership, including a residual state shareholding. The

voucher scheme was extremely controversial, involved a wide range of actors, each influencing differently the process of privatization.

The cross ownership led to conflicts of interests from the overlapping network of beneficiaries, such as domestic direct investors, investment privatization funds (IPF), temporary holdings of the National Property Funds (NPF), shares sold to the banks and transfer of municipalities. The repercussions of the voucher scheme included severe conflicts of interests, such as banks landing to the same firms that their funds owned. Some major mistakes of the Klaus administration include delaying the banks privatization, and not regulating intermediaries. The amount of the quality lending was reduced and the loan losses increased. The governmental pressure to finance new risky enterprises, corruption, and nepotism lead to billions crown (Czech currency) in losses. [248]

The second wave, the *restitutions*, of smaller and shorter extent then privatizations, lasted roughly from 1994, 1995 to the end of the 1990s and was represented by the process of returning the property seized by the communist party to the rightful owner. The process was rather fast and besides being a method to fix property abuses by the communists, it was also a way to transfer state property to private ownership.[249] "This created a lot of difficulties because it allowed for a lot of corruption

[248] Helicher, Brad A., "Klaus's 'Middle Game': Repercussions of Privatization and Democratization in Czech Republic" in *Transitions to Capitalism in Russia and Central Europe,* edited by Hancock M. Donald and John Logue eds., Praeger, (Westport Connecticut, London, 2000), pp. 160-163

[249] Romanian Academic Society "Property Restitutions: what went wrong in Romania?" 2008 *SAR Policy Brief No. 38*, p. 2

opportunities. In Czech Republic there were thousands of legal disputes, and the courts were overloaded with restitution cases for almost a few years from 1996 to 2001." [250]

While the first stage was a concentration of ownership in Czech Republic, the third stage was a process of *consolidation of ownership*, when the small shareholders actually sold their shares to larger owners, between 1997 and 2001. Somewhat the Czech privatization[251] was a privatization without capital. "The managers of the state owned company were able to use the company funds to actually pay for the company itself,"[252] and this happened because the state owned both the companies and the banks that gave the money to purchase them. Then after the insolvency issues and the financial problems of 1998 the Czech banking system was sold to foreign companies and foreign banks. But since the banks had bad loans, no one was interested in buying those banks, so the government decided to clean the balances and to erase the bad loans from the banks and then sold the 'clean' banks to the foreigners. French, Austrian, German and other investors bought the Czech banks, which was a positive step, because it stabilized the banking sector. However, they created a huge moral hazard because all the bad loans were transferred to a consolidation agency that handled the debt in huge packages, mixing both good and bad loans.

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250 Ondracka, June 24 2011

[251] In 1995 Czech Republic had already privatized 87 per cent of the state owned enterprises (while Romania only 20 per cent). Thus, one of the big differences between the cases is that in Czech Republic both privatization and restitutions happened relatively fast, and that allowed for some type of quicker recovery. Most of the state owned companies were sold rather fast, unlike Romania where the process of privatization was delayed and created a state-compliant and state-dependent private sector (Tache Ileana "The mass privatization process in Romania: A case of failed Anglo-Saxon capitalism", Transylvania University of Brasov, pp. 12-15)

[252] Ondracka, June 24, 2011

The whole process ended with people that borrowed even millions of dollars at the beginning at 1990s paying only 5 percent back to the consolidation agency. "This was a fantastic process which is still influencing a lot and it is creating a lot of anger. That created a stratum of society of business entrepreneurs that got their free launch. And that is completely unfair, is illegal, but that was the policy at the time, and I think that even ten years later, now, it is influencing very much the business environment, because lots of other businesses… they had to pay their loan completely and it made their business more difficult." "There is no doubt, that there were a lot of connections and conflict of interests between politicians and selling of banks and privatization of companies. But I say that politicians in general were not distinguished in people in the government and people in power. Because they changed in the process, and we cannot say that the conservatives would allow free launch and socialists would be against, or vice versa."[253] Which stands in support to the idea that the mechanism withstands location, time, or political orientation. While people may change, the act of siphoning state resources is universal in transition societies. "Which makes it more difficult, because then you can hardly hold someone accountable."[254]

The fourth stage involves *government contracts and public contracts*. They existed during the 1990s but they became the popular means of extracting state funds around 2000. During that time the volume of public spending and the number of government contracts increased, public procurement accounting for up to 17 per cent of the GDP

[253] Ondracka, June 24, 2011

[254] Ondracka, June 24, 2011

which makes up for around 640 billion crowns in spending, the largest in OECD countries. [255] Public procurement became a huge and sophisticated source of misuse and draining of capital from the state. The actors involved became more and more skilled at manipulating tenders and rigging the bidding procedures, creating a lot of corruption opportunities.[256] Since this is the topic of the study these exact procedures are explored in detail further down.

The fifth stage, not unlike Romania is related to the *European funds.* Though the process of distribution started in the 1990s, the amount of money climbed to billions of euro since Czech Republic joined the European Union in 2004 and Romania in 2007. "Czech Republic, along with Poland has the highest ratio of EU funds per citizen, lots of money, and that is another fantastic opportunity to steal."[257] It is difficult to decide where there is more corruption, since sometimes the EU funds are run as domestic governmental programs. For instance, in Czech Republic the Ministry of Finance is the only administrator of the funding. They, then, divided it to specific departments, which are called operational programs and deal with transportation, education, environment and other contracts. The key problem is with those specific departments, and not necessarily

[255] According to estimations drawing from National Accounts data, governments in OECD member countries spend on average 12% of their GDP on public procurement (excluding procurement by state-owned utilities). Variations reflect the different size of the state, its role in the economy and the existence of big spending projects (e.g. infrastructure investments). In 2008, the Netherlands, the Czech Republic and Iceland spent over 15% of GDP by way of public procurement transactions, the largest shares amongst OECD countries. Source: OECD http://www.oecd-ilibrary.org/docserver/download/fulltext/4211011ec046.pdf?expires=1342462357&id=id&accname=guest&checksum=C1E3D952E22370D19566321847E67EC1

[256] Ondracka, June 24 2011

[257] Ondracka, June 24 2011

the ministry of finance. What is particular to Czech Republic is that they have a very large system of twenty-four operational programs, which is unique from a European perspective. Other countries have only one department or ministry, which makes the distribution of funds more controllable. Thus there are twenty-four administrative bodies, with twenty-four bureaucratic procedures, paying for their own advertising and marketing. Some of these are operated through regional administrations, which increase the risk of patronage, because local governments have connections and preferences with local businesses.

Anticorruption Legislation

The Czech Constitution and legislation thoroughly covers most acts of corruption and conflicts of interest. In the Criminal Code (Act No. 40/2009 Sb.), corruption is defined as bribe-taking (art. 331), bribe-giving (art. 332), and indirect bribery (art. 333) only. Due to the fact that the public sector is specifically sensitive to corruption, the same code defines the offences carried out by public officials, such as abuse of power (art. 329) and public official's negligent failure to perform (art. 330). Other crimes that involve corruption under certain circumstances involve breach of trust (art. 220 and 221), conniving in a bankruptcy procedure (art. 226), insider trading (art. 225), facilitation of preferential treatment in public procurement, public tender, or public auction (art. 256), conspiring in the public procurement process (art. 257) and in the public auction (art.

258).[258]

In addition, the Czech Constitution is the most important document that defines the conflict of interest. It outlaws the concurrence of specific public offices. Those stipulations are supplemented in the Conflict of Interest Law (Act. No. 159/ 2006 Coll.), prohibiting the conflict of interests of public officials. The document proscribes business activities on behalf of public officials. Other similarly crucial provisions about these limitations are derived from bylaws (prejudice) and other laws (for instance art. 84 of the Act on Municipalities, or art. 74 and 76 from the Public Procurement Act).[259]

Concluding Remarks

One important disclaimer is necessary here. In this section and in the following chapters I refer to 'politicians' at plural. They are in charge with the institutional choices, the reforms, and with the legislation. They are also in charge with appointing their loyal people in key administrative positions. And they are the ones that put pressures on the judges. As well, there is a generic 'they' for the corrupt impressionable judges. However, not all politicians are corrupt, nor all judges take bribes or let themselves influenced by greedy politicians. What is significant is that a number high enough, too high actually to be acceptable, is in this category. That number is substantial enough to allow the preservation of the status quo. If there was a demand for change, and if there was a

[258] The Government Anticorruption Strategy for the years 2011-2012, Czech Republic, p. 6
[259] Ibidem

number sufficiently high of actors of interest attached to that demand, then the collective action problem would be resolved, and we would witness change. But we mostly do not.

I conclude that the biggest finding of this review is that long-standing constitutional arrangements and experience with democracy do not guarantee the faster establishment of rule of law or a more successful fight against corruption. *Before institutions can create incentives for behavior, the choice for institutions at transitions knots needs to be made*. Those people randomly chosen by history to make the institutional choices carry the weight for the future of the country. Founding fathers are not always heroes. In fact some the most wonderful institutional designs came from a desire of the political actors to protect themselves, the American Constitution being precisely the case. If the authors of constitutions and designers of institutions take the route of protecting themselves through the actual institutional design, this does not guarantee the positive unintended consequences for *all other groups.* We witness how the American institutional and constitutional arrangements are biased to protect the wealthy. However, in most cases, two of which highlighted here, the designers purposefully leave out the thorough establishment and reformation of the enforcement mechanisms. If the founders have less reason to fear punishment they will opt for a system that strengthens the judiciary to protect themselves from other groups, but they will also probably bias the regulatory system. If the politicians have reason to fear punishment for corrupt and criminal activity they will leave the enforcement institutions and mechanisms unreformed, as the following chapters will highlight.

There are two categories of politicians that are in charge with the institutional design after the fall of Communism, the former Communists (most of them) and the opportunists. Both categories, but specifically the first, were very connected with the economic activities and agents, since communist states and economies were both under the command of the party. Many of them benefited tremendously from the privatization and restitution processes. Since there was not yet a regulatory system to overlook these processes, many of the respective politicians got from rich to richer in ways that even if not so intended, were highly illegitimate (e.g. sells of enterprises and state assets for ridiculously small sums). Thus, even if these politicians did not intend to be corrupt at the start of the process they more or less willingly became so. This is what prevents them from thoroughly reforming the system. And this is why the establishment of rule of law is stuck in a vicious circle of fearful and (probably greedy) politicians.

CHAPTER 3. CORRUPTION STALLS THE ESTABLISHMENT OF RULE OF LAW IN PRACTICE AS WELL

-General findings-

"Fighting corruption with legislative measures is like fighting the narcotics mafia with legislation"[260] *Tomas Kafka*

Who does what to whom?

Before moving to the specific findings in Romania and Czech Republic I present here the mechanisms underlying the relationships under study. How do the actors interact with each other and the institutions discussed (figure 1)?[261] The mechanism starts with the interest of enrichment of some business beneficiaries. The party finance law facilitates this mechanism in Czech Republic and Romania. In Central and Eastern Europe political parties receive small contributions from their members and from the state. The amount is not enough to win elections. The competition between the parties in power is very tight and according to the people interviewed in both countries, the election results depend very much on the number of billboards a party can provide. These cost a

[260] Tomas Kafka, interview June 2011

[261] I owe part of this terminology to a conversation with Mircea Toma and the other with Michael Smith. The mechanism has been confirmed by a vast majority of the people interviewed. The most prominent examples include Monica Macovei, former minister of Justice and current MP at the EU parliament, Daniel Morar chief prosecutor of the National Anti-Corruption Directorate, Cristi Danilet member of the Romanian Superior Council of Magistracy, Vaclav Zak, Tomas Kafka, Vladimira Dvorakova, David Ondratcka, Daniel Barbu, Jonathan Stein, Michael Smith, Laura Stefan, Codru Vrabie, Radu Nicolae, Mircea Toma, Lenka Andrysova, Florin Diaconu and other important members of the political, judicial, academic, business, and civil society spheres in Czech Republic and Romania.

lot of money, money that the business beneficiaries can provide. This is similar to the situation in advanced democracies. What's different is the mechanism to subtract the necessary rents to win elections. In established democracies the regulatory process can be seen as a function of the governments' ability to offer benefits to private parties. They do that by restricting entry to markets, policing cartels and legitimizing various price-fixing strategies; these allow private firms to support effective political coalitions, to earn competitive returns known as economic rents.[262]

Unlike advanced democracies, in these new democracies, politicians do more than to bias the regulatory system. They illegally facilitate huge public procurement contracts to large companies, which siphon some small part of the gains back to the political party. This specific type of illicit behavior is the center of the present study. An even more direct version of this practice is when politicians or local political appointees direct these tenders to members of their own families or acquaintances, and keep most of the profits from the contracts for themselves. In this version the large business 'beneficiaries' are by-passed, and in most cases this practice is typical for small tenders. In both cases, the key word is 'illegal'. While in advanced democracies the distribution of rents is done unfairly but legal, in new democracies it is mostly illegal, which incentivizes politicians to delay the establishment of rule of law so they avoid punishment.

Several levels of the society are involved and affected by this relationship. Figure 1 traces the chain reaction. There are three layers. The causal link starts with the actors.

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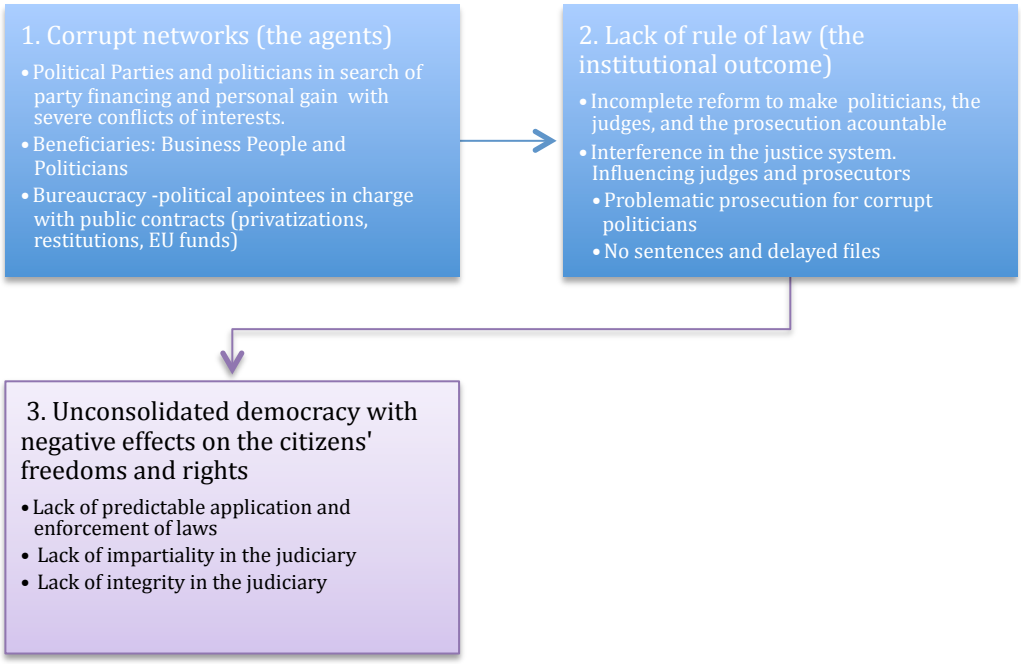
[262] Stigler, George J. *The citizen and the state: Essays on regulation*. Vol. 834. Chicago: University of Chicago Press, 1975

The *economic beneficiaries in tandem with politicians* target state resources for enrichment and party finance. Many of these actors already know each other, being part of the inherited networks of power from the communist regime. The boundaries between the political and economic spheres were very blurry. State managers, who were party members at the same time, ran the command economy. These connections between political and economic elites proved difficult to break. At the fall of the totalitarian regime the nomenclature took effective control over the major industries, businesses and state assets. Many of them stayed in politics as well, or if not, they had close connections with the former communists transformed into moderate democrats overnight. This is how they know each other. In time, some individual business people build local riches. Less in number and initially in power they were rarely part of these powerful networks. Further down the line, after accumulating more power and prestige some of them became indispensible enough to be co-opted in the big game.

Thus, both the economic elites and the political members of the parliament (and government) have an incentive to accumulate wealth and money for party finance. Once the need is there, the means are easy to find in a state without predictable application of laws. The public administration is mostly a political administration. The political appointees heading all state institutions, local offices, prefectures, agencies are in charge with the distribution of public money and assets. At the political pressure of the central administration they illegally grant the public contracts to the preferential bidder. The media sometimes uncovers this illegal activity. Police and prosecutors get behind investigations. However, none of the actors involved can risk sentencing.

Figure 1. The big picture: Corrupt networks – lack of rule of law- unconsolidated democracy



This is the second element in the causal link. The politicians and their partners involved in the corrupt acts put pressure on the prosecutors, judges and superior judges to drop the cases. They act above the law. Chief prosecutors and judges are politically appointed so they are prone to respond to these requests. This is the intuitive avenue. However, the not so intuitive path is related to the fact many of the judges have also been holding positions in the judiciary during communism. The judicial branch was under direct command from the executive before 1989. Judges were independent to make decisions only on criminal matters falling outside of economic and political activities (e.g. family law). This is how they know each other (the judicial with the economic and

political elites). They responded to them a couple decades previous. The dysfunctions in the judiciary are inheritable. New networks of power are formed and judges that know how the system 'works' are less likely to avoid corrupt behavior.

What the politicians fear is punishment. If the politicians interfere in the justice system they prevent sentencing. This is a privilege of an unreformed system. The same politicians have a conflict of interests, being in charge with making this same judiciary impartial, independent and efficient. *Two core measures can lead to these outcomes. One is the complete depoliticization of the judiciary. The second is the introduction of truly independent powerful agencies to control on all political and judicial corrupt elites.* Politicians oppose both of those. As we will see further down, even with the foreign pressure and intervention they resist these reforms. (Luckily for Romania, the delay of the reform was not an option anymore). Because they do not perform these changes the institutional outcome is the unpredictable applications of laws and lack of applicable enforcement mechanisms.

The third element looks at the relevance of this dysfunction. Without the reformation of the judiciary the citizens' rights and freedoms remain unprotected by the law. The lack of predictable application and enforcement of laws, and the lack of impartiality and integrity in the judiciary have horrendous consequences for the state of democracy and its guarantees. The following section looks at the effects of these dysfunctions on the rights of citizens to equal, fair, and impartial justice.

Relevance – some citizens 'more equal' than others

The importance of this study emphasizes the negative impact of corruption on the establishment of rule of law. An advanced democracy is one that guarantees the predictable protection of the rights and liberties of its citizens. A society that fails to accomplish this cannot be successfully called a consolidated democracy, regardless of how much economic growth posits and the fact that elections are held freely and fairly.

In advanced democracies corrupt behavior finds its way through the loopholes in the law, in newly democratizing countries this behavior illegal and more evident. Why is this relevant? Because while in advanced democracies the taxpayer systematically ends up paying the unfairly distributed rents, this is done within a system of relative rule of law evolved over centuries of reforms. The average citizen can say *with a margin of predictability what the outcome may be while pursuing legal action*. This is not the case in new democracies. The difference between the two types of behavior found under the same rubric of corruption is that one operates within a system of relative established rule of law, while the other within a system of lack of rule of law. Basic judicial impersonality and integrity for every citizen is affected, since the justice system is not reformed. Either through lack of personnel, access to justice, overwork and overload, complicated legislation, uncompetitive judges, the judiciary branch harms the right of citizens to predictable and impartial justice, which is the core of rule of law. Corruption is endemic

in these countries and the mechanism explored in this study prevents the reformation of the justice system to execute its basic functions for the citizens.

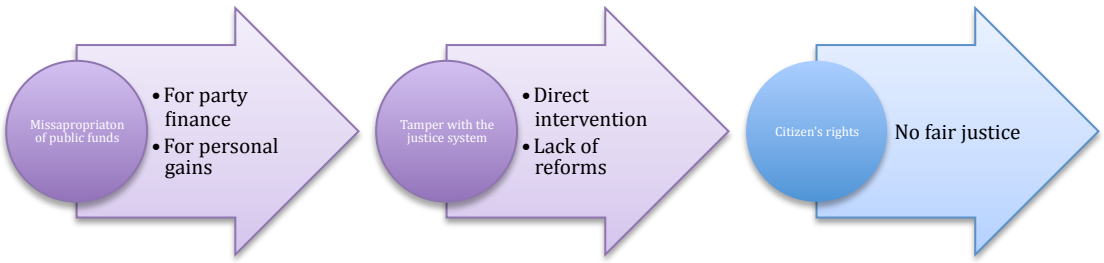
Thus, though paying taxes and voting like in a democracy, the citizen in Czech Republic and Romania lives in a very unfair society. The findings have generalizing implications. Though the Czech and Romanian cases have quite different economic and political make ups, the dysfunction under study seems to be replicated in other countries (chapter 7 deals in detail with this topic). Thus, the expectation is that all new democracies struggle with the same problem. The specific form of corruption, to misappropriate public funds for private gains on behalf of top politicians and their appointees in the bureaucracy, leads ultimately to a lack of independence and impartiality in the justice system.

I identify four main pillars of rule of law in a state, the separation of powers, the predictability of the legal system, the independence and impartiality of judiciary, and the equal protection of civil rights and liberties in front of the law. The illicit activities that are described bellow affect all three of them. *However, since the justice system is the guardian of rule of law I choose the independence and impartiality of the judiciary and the predictability of the legal system as the crucial weak links in the process of rule of law establishment.* If these two components are harmed, the effect spreads out to all other pillars of rule of law. If the judiciary is not predictably watching the implementation of the codes of conduct in a state then abuse of power is incentivized.

Politicians prevent the complete and efficient reformation of the justice system for reasons outlined above; on the one hand to not be prosecuted for their deeds and second

to be able to continue the rent seeking behavior. The ultimate effect is corruption in the judiciary, which affects the independence and impartiality of the system. If the system lacks independence and impartiality then the law cannot be predictably applied which affects the rights and liberties of citizens.

Figure 2. Chain Reaction



Because of corruption, the judiciary develops into a preferential entity or an inefficient body. These both are considered tantamount to injustice. Due to corruption, political actors benefit from self-protection mechanisms, that is, in high-level corruption cases, there may be attempts to bribe the magistrates, to intervene in their work and in their career. Another effect of corruption is the reduced quality of services, due to the fact that the personnel obtaining benefits from preferential services may no longer be interested in improving the quality of their services. A particularly damaging effect is that

the number of cases pending in courts increases, which can be used as justification by corrupt judges to 'delay' high profile cases.[263]

Corruption in the judiciary has also an impact on the judges' integrity, professionalism, and accountability and can have several effects. Among these there will be a decrease in their professionalism and quality of work; the judicial personnel may no longer show interest in improving skills because the services that they are providing ensure supplemental gains. Another detrimental effect of corruption in the justice system is that it spreads among co-workers. It also leads to unfair practices in the long-run. And lastly, it can perpetuate a lack of courage, since it weakens judicial personnel's confidence in reforming the system[264]. I will explore in this section several channels through which corruption in the judiciary harms the average citizen in a new democracy

What happens in the judiciary?

There are several categories of personnel involved in the judicial process, policeman, prosecutors, judges, clerks and experts. Because the justice system is unreformed each and one of these levels presents a point of weakness and potential for lack of integrity and independence. Not all dysfunctions are consequences of corruption, however they are the result of other forms of corruption at previous levels (in education,

[263] Danilet Cristi 2010. *Corruption and anti-corruption in the justice system,* C.H. Beck, Bucharest, pp. 54-55

[264] Danilet pp. 54-55

preparation, examination, legislation). Corruption in conjunction with incompetence leads thus to the following dysfunctions with negative consequences for the citizens.

In the order of appearance in the criminal investigation, policemen come first. In a system lacking the rule of law, criminals are able to corrupt police officers so that they prevent investigation through inaccurate reporting. Criminals can use their influence to convince (or their money to pay) police officers to give them notice when action is taken against them (e.g. home search), or to not record a victim's complaint, investigate only a small portion of the offences, or to give a note to the prosecutor to adopt a solution favorable to the criminal. [265] This outcome of lack of rule of law has negative consequences on the victims of the deeds. They not only have to suffer the consequences of the wrongdoings in the first place but also have to deal with the fact that the police officers do not protect them or even put their well being in danger.

Prosecutors represent the second level in the judicial system. They look at the evidence gathered by the police officers, sometimes conduct the investigation, and carry out the prosecution. They bring the suspicious individuals to court and they solely have the authority to initiate prosecution or close cases.[266] This position makes them particularly suspicious to corrupt behavior. Criminals want to avoid going to court so they may bribe or influence prosecutors to present partial evidence against them or to not challenge court decisions favorable to them.[267] As reviewed before, higher ranked

[265] Danilet Cristi, p. 23

[266] Ibidem, p. 25

[267] Ibidem, p. 26

prosecutors can take over files that were not lawfully assigned to them. This is a common practice through which a prosecutor, under more direct political influence than a judge, due to appointment procedure, is influenced in her decision by a high ranked politician and drops the case, or delays it until it is prescribed.

Judges represent the next step in the judicial system. They resolve the litigation and make rulings that are binding to citizens. Criminals may bribe or influence them to accept or deny evidence to justify certain rulings, order an inaccurate recording of the statements, speed up or delay the settlement of cases, or they may even pass a ruling that is contrary to the evidence presented. Corruption affects the justice at the judges' level at different points in the process, from the appointment of the judge and the case assignment, to the way the case is handled, the time allotted, the manner the debates are conducted, and in the decision making process. Recently in Romania a system of random assignment of cases has been introduced but judges found ways to get around this and still self selected themselves into cases.[268] Another vulnerable point is the resolution of transfer requests, which shows the extent of discretion and lack of transparency in judicial bodies. For instance, in Romania, the High Court of Cassation and Justice solves transfer requests. These decisions are made behind closed doors and they do not need to

[268] According to Cristi Danilet in "Corruption and anti-corruption in the justice system" it is possible 'to circumvent this [the IT random assignment system n.a.] and have a case assigned to a particular judge thorough the help of a court clerk or judge entrusted to a particular judge through the help of the court clerk or judge entrusted with using the system.' Also ' judges who have been appointed to solve a case can only be replaced for objective reasons. However these reasons may be abused by the assigned judge file applications for leaves of absence, sick leaves, and annual leaves, which results in having a substitute judge become a member of the panel. If the substitute also falls "suddenly ill" then eventually the case may end up before the desired judge.' Another method is altering panel membership and transferring files from old panels to new ones.

be substantiated and are not subject to appeal. There is nothing that can bind a panel of judges to explain why they have approved a certain transfer. To make matters worse there is no specific criteria to select the transferring court.[269]

A very direct practice is the offer of a bribe in exchange for a lesser punishment. This makes judges of last instance trials particularly vulnerable to this practice since there is no mechanism to prevent them from abusing their position. "As long as there is no other court to asses their rulings, appeal judges will be the 'targets' of choice for bribe givers, unlike judges in lower-ranking courts."[270] Other forms of tampering with the justice system are to corrupt a judge to speed up a ruling, delay proceedings, deferral of hearings to push the case towards prescription, not issuing the sentence-execution warrant thought the sentence is final.[271]

The lack of predictability in justice has unsolvable consequences for the society as a whole. People take advantage of the knowledge that judges can be bribed, cases can be delayed or never solved and that with the right amount of money there are no consequences for ones actions. The ultimate effect is that the public administration is unpredictable, the enforcement of private property is endangered and uncertainty prevails.

A Dutch businessman in Romania shared to me how he had to pay 100,000 in bribes to obtain a building license to add a floor for his hotel. He added, "plus you are

[269] Danilet Cristi, p. 29
[270] Ibidem, p. 29

[271] Ibidem

never sure that someone is not going to knock on the door and come with a letter that there are problems with your construction and ask for more money. There is no predictability here. Justice? It depends. Is your opponent someone with money? Then, there is no justice. We should be equal before the law; both the poor and the rich. Justice should be money blind. I wish I never learned Romanian, because I would have never understood the depth of the problem."[272] This businessman also worked as a consulting director at an audit company. After starting a family in Romania, he decided that the situation is too unfair and the business environments too corrupt so he has moved to Austria. In Czech Republic the same story resonates. One interlocutor confirmed to me that, "people don't want to go to court. They know it takes too long and there never will be a solution for them. It deters people to seek justice."[273] Theo Nicolescu, former state secretary at the Ministry of Justice in Romania concluded "there is no respect for the fundamental rights of people, and that is the major consequence of this corrupt system. The corruption in the justice system is the worst for the rule of law"[274]

Alternative hypotheses

While I posit that punishment for corrupt politicians is the only cure and the path to the establishment of rule of law, I do consider the alternative hypotheses. It has been

[272] Anonymous interview no 10. June 2011

[273] Jan Kovar, Political Science Professor, June 19, 2011

[274] Theodor Nicolescu former state secretary at the Ministry of Justice, July 9 2011

argued that the civil society can put pressure on politicians and can demand change. I found that both in Czech Republic and Romania the civil society is quite active. Unfortunately the civil society suffers from the fact that it is very divided. Because activism in NGOs is often used as a trampoline to 'move up the ladder' to the public sector, it is a place for competitiveness and less for cooperation. On the other hand, there is a lot of money coming from advanced democracies and international organizations for projects that involve the 'study of rule of law' or the 'state of reform', or 'the progress in the fight against corruption'. NGOs compete for that money which fractions them in opposing groups.[275]

Not to disregard the advancements that the civil society has made in uncovering the depth of the corruption problem, in demanding to take part in the policy making process, and in informing people of means to resist corruption, these are still not enough to prevent a minister to call an appointed judge or prosecutor to stop a file. It is not sufficient to convince a parliamentary majority to raise the immunity of an MP, in order to indict him for a corruption act. Or to convince the politicians to not steal public money so they do not have a reason to worry, or to persuade them to give up their illegally acquired wealth, and to put Romania on a path for reform. Civil society pressure is good, but it is not enough.

[275] This has been confirmed by representatives of the civil society Codru Vrabie, Laura Stefan, Radu Nicolae, Mircea Toma, Paul Chioveanu

The second problem with the civil society is that citizens are highly tolerant to unethical behavior[276]. A study conducted by Ernst & Young in Europe in 2011 showed that around 25 per cent of the managers in Czech Republic and more than 29 per cent in Romania consider unethical and corrupt behavior justifiable in order to obtain a contract. More disconcerting is that the managers show this trend even more than their employees[277]. Under these circumstances the agents of control, the people, lack not only powerful organization but also *the ethical motivation for change*.

Another center of power in society, the media is also highly manipulated. This is probably not different than in established democracies, but it is brought to an extreme. For instance in Romania, the owners of the media trusts are politicians from the opposition themselves. This way media is manipulated towards representing the interests of the opposition. While the written press is rendered almost irrelevant, due to lack of investigative journalists and very low pay, which perpetuate lack of expertise[278].

Perceptions versus reality

Some disagree that the mechanism starts with the business beneficiaries. Pavol Fric at Charles University confirmed, "A lot of people talk about a state capture, that the

[276] I borrowed the terminology from an interview with Tomas Kafka, senior manager at Ernst & Young, Czech Republic

[277] Tomas Kafka, senior manger Ernst & Young, Fraud Investigation and Dispute Services, June 19, 2011

[278] This has been confirmed in an interview with Florin Diaconu, academic, director of the Romanian Diplomatic Institute.

state is somehow captured by the businessmen. The opposite is true. We should say that the businessmen are caught by politicians and administrators."[279] Businesses can either precede the intent of politicians or they can act as a consequence of the politicians' interests. For the purpose of this study what is relevant is that they represent the actors that are the recipients of the corrupt act and are intermediaries in the process of political corruption.

Some theoretical considerations are necessary here. The nature of the topic of this study makes it very difficult to observe the occurrence of the act. The fact that we do not observe how corrupt politicians make the deals with the economic beneficiaries, the fact that we do not observe how they put pressure on the people who are in charge of awarding public contracts, and that we are not there when politicians discuss dropping charges on files with prosecutors or judges, does not mean that we cannot draw conclusions based on outcomes. The alternative to this hypothesis is that the cases are dropped by chance, and that most corrupt cases are delayed in the judiciary by chance, and that there is yet no civil service (in Czech Republic), also by chance. There is a lot that chance would have to explain. An overwhelming majority of the people I spoke with, high profile politicians, academics, members of the civil society, investigators, have confirmed this story.

What about the non-occurrence? What if there are public tenders that are awarded correctly? What if in certain corruption cases the prosecution does not get any phone call that puts pressure to drop the case, what if legislators vote fairly and not for a private

[279] Pavol Fric, Center for Social Economic Strategies, Faculty of Social Sciences, Charles University, Prague, June 30, 2011

interest. This would not harm the theory because we are not interested here that ninety five cases out of a hundred to be corrupt and the rest to not be corrupt. What matters is that predictability is harmed. Predictability is the number one ingredient of rule of law. That is why we instated rule of law to begin with; to make transactions and interactions predictable. And if in so many cases (too many) we find misdemeanor on behalf of politicians and the judiciary then the rule of law does not hold. The rule by the people above the law does. The democratic phrase 'rule by the people' should more accurately be 'rule by the people within the limits set by the law.'

And what if, to go to the extreme, the majority of cases are honest high integrity transactions, and a sort of mass conspiracy theory hit all my interlocutors? This is unlikely, but if that were true, I believe this theory still holds, because I had the opportunity to speak with the intermediaries in these transactions. The people that handle the tenders, that talk with the judges and that manipulate the law drafting. To protect them I will keep their identity anonymous.

One source arranged for me to meet with an intermediary in this corrupt network of politicians and public acquisition distribution. He picked up a piece of paper and started to draw the trail of money. A public institution grants the contract to a preferential company, which then executes it through a lot of intermediaries, somewhere in this redistribution to the intermediaries the money gets 'lost' towards another fictitious company and part of it is returned to the politicians that facilitated the contract. He confirmed that the amount of the commission is not small; he talked about double the price of the contract, which at times comes to millions of dollars. "Politicians make a lot

of money like this. But you cannot see it. It is not in their names. Someone else purchases the houses on the French Riviera for them, and some else owns the cars that they are driving, and the accounts in Switzerland, are also under a different name. So you can never catch them."[280]

Another 'friend' confirmed to me that he had a case for which he had to bribe a judge to influence a decision with 10,000 euro, and then a similar sum of money to not go to jail. "These are small cases, he exclaimed, but this happens all the time. I never went to jail. I paid the money and stayed home, while they thought I was in jail." I was curious how he knew whom to bribe and what to do. He said, "it's a network, you get to the right person, he's friends of a friend." This is not an isolated conversation. I had suspicions that people are overreacting and their perception is distorted but these conversations have confirmed to me that it is a systematic event and they supported the theoretical assumptions posted in the beginning.

Concluding remarks

To cover their corrupt acts, politicians intervene in the justice system. They put pressure on prosecutors to drop the files, to move the files so they can be dropped, and put pressure on the judges to delay the cases, to move the cases, to close the cases without conviction, or to close them with suspended conviction. In the process of doing this, corrupt politicians have huge conflicts of interests. They are in charge of

[280] Anonymous businessperson, Interview 31.

establishing the rule of law, that is, drafting legislation and reforming enforcement institutions, the judiciary, the anticorruption agency, and the ombudsman, to punish people like them. This study assumes that politicians are rational actors. They will do only as much as to make sure that they will never be convicted. They will usually pass legislation, because they know that the laws are useless without enforcement and application. And the laws are not predictably applied in new democracies.

This comparative study highlights how politicians perform these acts, why, and the consequences for the rule of law establishment. To support this argument I use relevant information subtracted from approximately fifty interviews with high political and judicial officials, representatives of the civil society, academics, business people, and one secret service agent (I suspect there were more, but there is only one that identified him/herself)[281]. Several ideas that confirm the two hypotheses consistently emerged from the interviews. The value of the findings is increased because the information is cross validated along a variety of sources. I also use official documents, reports, law bodies, and media accounts.

[281] Due to the sensitivity of the material I will not disclose the identity of some of the sources, for their protection or because some information is 'off the record.' For the interviewees that wished to be disclosed, the ideas incorporated in this study reflect their personal opinion and not the stand of the institution they belong to.

CHAPTER 4. CASE STUDY ROMANIA
-Public procurement, party finance, corrupt judiciary-

Introduction

Romania represents a critical case to test the hypothesized relationships identified in this study. First, it offers the ground to explore the underlying mechanism that links political corruption with the establishment of rule of law. Second, due to recent events related to a historical unique opportunity to become a member of the EU, Romania was forced to make certain judicial reforms. This event created the space to explore if any institutional changes, be they attributed to external intervention, lead to the progressive establishment of rule of law.

This country, evolved out of centuries of oppressive foreign rule, has developed an automatic reliance on informal networks of relationships. They reflect in the day-to-day life and in the practice of all spheres of life, economic, social, cultural, but also political. The experience with the Anglo-Saxon tradition of rule of law is almost inexistent. Romanians have always associated the idea of legal state with the set of norms that the foreign occupation was imposing on the local community. They thus, felt the need to develop their own culture and forms of authority, outside of the legal framework.

This set of informal relations crystallized in systematic networks of informal interactions that prevail even under democratic institutions. Since the pre-1989 experience with democratic norms and practices in this country is minimal, I found there the ground to uncover the detailed connections between corrupt politicians and the

operations that prevent the establishment of rule of law. The objective was to identify a set of critical mechanisms and to further test their validity in another country where the expectation was not to find them.

Thus, I identify that in Romania, politicians' conflicts of interest lead to two specific mechanisms through which they prevent the establishment of rule of law. As reviewed in chapters one and three, the first mechanism is the direct interference of corrupt politicians to influence judicial decisions. The second mechanism is the superficial reform of the bureaucracy and the judiciary to depoliticize them. The cause is the distribution of public procurement contracts facilitated by politicians in power. This is done in two ways. One form is through legal decision (in the government or the parliament). The second form is through the illegal allocation of state contracts to preferential bidders. The first form is common in Western advanced democracies. The second is specific to new democracies and represents the center of inquiry in this study.

On the other hand, Romania represents a critical case for the second hypothesis that '*an independent* anticorruption agency leads to the progressive establishment of rule of law.' I noted in chapter one that rule of law can be established through internal frictions between social classes and groups over several centuries. This is how Britain, France, the United States and other advanced Western democracies reached a stage of rule of law. However, the development of the new democracies of today was stalled by the formation of authoritarian and totalitarian regimes. Since the inherent social tensions that pre-existed in these societies (between the Church and the king, the landed aristocracy and king, the bourgeoisie and the aristocracy, and the workers and the

capitalist class) have pretty much been resolved, the new democracies are left with attempting to introduce the rule of law through its institutions, separation of powers, independent judiciary, predictable respect for citizens' rights and liberties. These however, as I pointed in the previous chapters are hardly achievable at the hand of corrupt politicians and citizens tolerant to unethical behavior. In lieu of the classical historical development corruption prevents the establishment of rule of law. I also argued that, rule of law is easier and faster to establish at the hand of a dictator or an authoritarian regime, but that is not democratic rule of law. Based on the examples of Singapore and Hong Kong, I posit that even new democracies can instate rule of law practices by introducing truly independent anticorruption agencies and bodies.

This chapter will explore both of these trends. The Romanian tendency to the vicious cycle of corruption and lack of reform, and the historical accident that lead to the establishment of the institutions that are currently in charge of cleaning up Romania, the National Anti-corruption Directorate (DNA) and the National Integrity Agency (ANI). Governments around the world establish weak and unaccountable anti-corruption agencies to signal to their constituencies that they intend to fight corruption. It is a rather easy enterprise and for a brief moment it generates some popularity for the leaders. Unfortunately, in most cases they prove to be façade institutions, used for political pressure against opponents and with rare positive lasting effects. They key is the introduction of *efficient and independent* anti-corruption agencies. But these are far and few in between; they mostly take shape due to unique historical accidents. Even the two most efficient in the world the Corrupt Practices Investigation Bureau (CIPB) in

Singapore and the Independent Commission Against Corruption (ICAC) in Hong Kong were not successful off the bat. For instance it took the CIPB several reforms to reach the independent and efficient stage of today. The ICAC inherited some dysfunctional departments established two decades before the creation of the anti-corruption agency.

Truly independent anti-corruption agencies are different enterprises than attempts by politicians to please international donors or angry constituencies. It has been argued that a deep state of economic crisis justifies the creation of such agencies. I posit that true historical accidents lead to the establishment of an institution that may lead to the punishment of its creators. In the case of Romania, this was the crucial incentive to enter the European Union common market and the potential severe consequences, had it been left out. Without this promise, Romanian politicians, the way they will be exposed in this chapter, would not have been the ones to bring it to light. Though the findings are promising, I draw attention to caution in overplaying the positive effect of these institutions. Only thorough sustained effort and commitment to eliminate corrupt politicians, but most importantly corrupt judges, we could witness real progress.

In this section I present a detailed description of the mechanism, the actors involved, the transactions, and the outcomes. Then I present proof of this mechanism at play. I bring evidence about members of the parliament who own private companies and execute illegally granted private contracts. I then present four case studies that show the link between politicians, illegal procurement, party finance and interference in the justice system. I continue with proof about the prevention of establishment of rule of law due to the conflicts of interest. And I finish with a section about the most recent constitutional

crisis in Romania, through which the president was impeached and suspended from power by the people, but the Constitutional Court under political pressure, invalidated the results. All these examples bring proof to the first hypothesis that political corruption leads to the prevention of the establishment of rule of law.

Public contracts, political money[282]

The actors and the game

New democracies are still simultaneously going through a process of modernization and development. Lots of public money is spent on infrastructure, construction, technologization, or re-technologization. These contracts are the target of a network of rent-seeking politicians and business people. In advanced democracies with the rule of law, this money (though in a lesser amount, since they are already developed) is also the target of certain interest groups and political elites. What differentiates a country like Romania from an advanced democracy is that in Western countries the illegal and uncompetitive distribution is more a random occurrence and the legal biased regulatory system is the norm, whereas in new democracies the *illegal* misappropriation

[282] This relationship has been confirmed by Bianka Sankenzi the vice president of the National Authority for Regulating and Monitoring Public Procurement, Monica Macovei former minister of Justice and current Europarlamentarian, Daniel Morar Chief Prosecutor at the National Anti-corruption Department, Maximilian Balasescu former Criminal Prosecutor at the Bucharest Appeal Court, Cristi Danilet, Judge at the Superior Council of Magistracy, Codru Vrabie from the National Anti-corruption Council, Radu Nicolae Center for Juridical Resources, Mircea Toma President of the Active Watch Media Monitoring Agency, and other high officials and members of the business community who wished to remain anonymous.

of public money is mostly the norm. There is also a difference in outcome; while in advanced democracies this draw of money affects the taxpayers' pockets, in new democracies it also leads to interference in the judiciary, and it prevents the reformation of the system.

The main players are the politicians. Public institutions, such as ministries and other departments are in charge with granting the huge contracts. Politicians, more precisely the governing coalition, are in charge with appointing their loyal people in key positions to head and work in these institutions. During the public procurement selection process, the political appointees, at the request of the politicians (the governing coalition) eliminate bidders illegally, and facilitate the contract to specific companies. In their turn, these specific companies have a connection with top politicians from the governing party, usually the Minister herself.

Once the contract has been granted illegally, a huge sum of money reaches 'the beneficiaries,' the owners of the companies. In order to lose the track of money, sometimes the contracts ore subcontracted to other firms. It is easier to lose the trail when trying to follow the money if a large number of intermediaries are involved. Out of that sum, many times as large as billions of dollars, a percentage (around 5-10 percent) is delivered, most of the times through foreign accounts back to politicians. This is the cause. The effect of this activity is the interference in the justice system. Due to media's relative independence these transactions are exposed. The prosecution starts investigations, but the targeted politicians intervene and put pressure on prosecutors to stop the files, or put pressure on judges to acquit them. *This is possible because the*

justice system is unreformed. But it is also a cause why the justice system will stay unreformed. Top prosecutors, and judges, who are politically appointed, can take control of the corruption files and dismiss them. This is not possible in advanced democracies.

In order to keep having influence over the judiciary, politicians pass legislation, but do not reform the enforcement mechanisms. Politicians put pressure on their nominees when their own freedom is in danger. In the meantime the justice system remains unreformed. Punishments are applied arbitrarily depending most of the times on how much influence and money the accused has. *The lack of rule of law for politicians extends to lack of predictable rule of law for all citizens*.

The judges, the weak link

The judiciary is the weak link in the relationship political corruption and the rule of law. The judges are *the "exponents of a very politicized view of what the law is, serving this economic and financial elite"*[283] confirmed to me in an interview US political scientist of Romanian origin, Vladimir Tismaneanu.

There is consensus in Romania that one of the biggest issues in the establishment of rule of law is that the judges and the judiciary in general block progress. They do so through allowing influence by politicians to delay the cases, to not impose responsibility on magistrates and perpetuate judicial lack of impartiality at the expense of the

[283] Vladimir Tismaneanu, July 15, 2011

citizens.[284] "There is a lot of corruption in the justice system and that is the most dangerous for rule of law."[285] The other problem is the lack of competence and preparation. "Romanian courts do not have judges that can decide on public acquisition cases. They simply do not have the qualifications. For instance how do you decide that a contract was worth 200 million Euros instead of 300 million. It's really difficult to see a judge that knows in depth economic policy. They do not have enough perspective either or knowledge."[286]

While the DNA prosecutors are making progress, several corruption cases are sent to justice, and some arrests made, unfortunately the judges do not give condemnations afterwards. "We have big problems with the judges (…) they keep the files for 3-4 years, some of them ending up proscribed." Additionally, the Superior Council of Magistrates (CSM) does not sanction these judges, and if they do then the High Court of Cassation and Justice (ICCJ) reverses the decision.[287] This has been confirmed to me by a judge from the Superior Council of Magistracy, "That's where the 'dinosaurs are' at High Court of Cassation and Justice. The old ones have been appointed politically so they will never

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[284] This has been confirmed in interviews with Monica Macovei, Daniel Morar, Maximilian Balasescu, prosecutor at Bucharest Court of Appeal July 12 2011, Codru Vrabie, several members of the parliament, Laura Stefan, Radu Nicolae, Theo Nicolescu former secretary of state at the Ministry of Justice, Cristi Danilet, and several citizens.

[285] Theodor Nicolescu, 2011

[286] Daniel Morar June 16 2011, this has been confirmed by Mircea Grosaru, member the Juridical Committee in the Romanian Parliament (Chamber of Deputies June 15, 2011), also by Cristi Danilet, and Maximilian Balasescu, 2011

[287] Monica Macovei in "Simple people should have the power to hold magistrates accountable", *Kamikaze magazine,* June 3, 2011

judge them."[288] For instance, the judge from CSM told me unofficially about an instance when politicians met with a hiring committee and put pressure to hire their own judges. They have not been hired eventually but this is not a random occurrence within the judiciary.[289]

I will present in the following sections evidence obtained in the study of several cases, reports and documents regarding corruption cases. What I looked for is cross-sources validation for the above mechanism. Almost every single person interviewed in Romania has confirmed this sequence. Besides the confirmation from several sources I use evidence from four cases to illustrate the above mechanism, Monica Ridzi, Hidroelectrica, Romsilva, and Jimbolia. I look at the mechanism of funds extraction, their use for private benefit and the consequential intervention in the justice system with an effect on the lack of establishment for the rule of law. I supplement these with statistical evidence of the extent of this phenomenon.

"The Beneficiaries"

This section follows the trail of money and identifies two types of beneficiaries. There are two groups involved. The private interests, the so-called business beneficiaries, who are very close to politics officially or not, represents the first group. The politicians

[288] Cristi Danilet, July 18 2011, Danilet also published a book about corruption in the judiciary that was met with a lot of criticism and an investigation by CSM was opened against him for publishing revealing information about bribing in the judiciary and the effect on the citizens.

[289] Cristi Danilet July 18 2011

themselves represent the second group. [290] If the transaction involves the first group, then the politicians are second hand recipients of the state money, which makes them very dependent on these private interests groups. If the transactions involve politicians, then, they are the direct recipients of huge sums of money from the state.

The majority of the interviewees have identified a red line. The source is the state public contracts and the EU funds. They represent the most vulnerable points for political corruption.[291] *These are granted through illegal preferential allocation of contracts by public institutions.*[292] The authority that allocates the public contracts breaks the law and their obligations and *grants these tenders to preferential companies*. For them the state "sells cheap and buys expensive."[293] Which means that, "for instance, if a contract is worth 100 million dollars, and the company buys it with 200 million than the extra 100 million is the bribe."[294] That money goes into the 'beneficiaries' and politician's pockets respectively.[295] These transactions are illegal. According to Law 78/2000 "it is prohibited that a person holding a leadership position in a party, union on non-profit association to use her influence to obtain for herself, *or others*, money, assets, and other benefits." The same law criminalizes (art. 257) influence peddling, which is practiced during these

[290] Mihai Marcoci, Professor at the Police Academy July 11 2011

[291] This has been confirmed by Monica Macovei, Daniel Morar, Mircea Toma, Vladimir, Tismaneanu, Theo Nicolescu, and Radu Nicolae

[292] Bianka Szenci Vice-president at the National Authority for Regulating and Monitoring Public Procurement June 12 2011

[293] Daniel Morar, June 16, 2011; Mircea Toma, July 13, 2011

[294] Daniel Morar, June 16, 2011

[295] Theodor Nicolescu, July 8, 2011

transactions and prohibits "to intentionally establishing a lower value than the commercial value for assets belonging to economic agents with state or public administration shareholding, as part of (…) a commercial transaction."[296] And last but not least according to Law no. 278/ 2006 this activity falls under the criminalized conflicts of interest concept, defined as the 'deed conducted by a public official while exercising the functions of her job through which she participates in a decision that results directly or indirectly in material benefits for herself, spouse, relative up to second degree kin, or a person with which she had commercial or employment relations during the past five years, or from whom she receives services."[297]

If the laws were observed we would not witness illegal accumulated wealth through preferential contracts with the state on behalf of the members of the parliament. But we do, as I present further down. *This activity breaches three major prohibitions in the Romanian Penal Code, conflicts of interest, influence peddling, illegal granting of commercial contracts* (according to Law no. 78/2000 and 278/2006).

The State's Friends

First, I present evidence from the 'declarations of wealth' that the members of parliament have to provide as per Law no. 176/2010. According to this law, regarding the

[296] Law no. 78/2000 Penal Code, Romania

[297] Law no. 278/ 2006 Penal Code, Romania

integrity of the public officials, politicians and high officials have to publicly declare their wealth and their economic activities. Initially, the National Integrity Agency could request the court to confiscate any sum of money that could not be justified by public officials. But this was contested by one of the lawyers of a politician who was about to lose a sum of 4 million euro that he could not legally account for. Such that in 2010 the Constitutional Court modified the law, and currently, though public officials still have to make public their wealth, there is no provision to confiscate money that cannot be legally justified.

For the past approximately five years, around 72 senators and deputies have executed through their companies contracts of a total of up to 320 millions of dollars.[298] Most of the money *was obtained from the institutions in their constituencies*. The politicians are the actual owners of the companies or a first-degree member of their family is. As pointed above, *this is illegal according to at least two laws (Law no. 78/2000 and Law no. 278/2006).* Three of them were at the time of the data collection holding a position in the Romanian government (Elena Udrea, Valeriu Tabara and Valerian Vreme). I present here a partial list of these members of the parliament for illustration purposes. The full list of names for these members of the parliament is made available in the appendix.[299] A large number of these contracts are *granted illegally without contest*. They are offered directly and uncompetitive to the 'connected' company.

[298] This information is made available due to the 176/2010 Law, regarding the integrity of the public officials.

[299] Sercan Emilia "Cat castiga deputatii nostri din contractele cu statul," Jan. 20 Jurnalul, and "Prietenii statului, episodul II. Lista senatorilor si contractele lor," Jan. 21, 2011

The allocation methods vary from negotiation with one source, to direct granting, to auction.

Table 2. Politicians, their firms, and public money[300]

This is a partial list of the 72 members of the parliament (both the Chamber of Deputies and the Senate) who run contracts with public institutions, through their companies or the companies of their first-degree relatives. This is against at least two laws (Law no. 78/2000 and Law no. 278/2006). The sums of money are reproduced exactly from the source [301] The full list of 72 politicians is available in the appendix. (1 dollar = .81 Euros, 1 dollar = 3.64 Romanian Lei)

Member of the Parliament	**Public Institutions**	**Companies**	**Money**
Silviu Prigoana (PDL)	Romanian Banking Institute, DIICOT, Sector 3 City Hall, etc.	Rosal Group	over 6,215,888 Lei
Ana Gheorghe (PSD)	Local Council Dambovita, Tartaresti City Hall, Petresti City Hall, The Tourism Ministry, etc.	Complis SA	22,219,274 Lei
Florin Anghel (PDL)	Campina City Hall, Tomsani City Hall, Brebu City Hall, etc	Fibec SA Campina	50,272,417 Lei
Marian Bobes (PSD, PDL)	Local Council Cungrea, Slatina City Hall,Valcele City Hall	Serena 94 SA	13,485,666 Lei
Cristian Ion Burlacu (PNL, PDL)	Sanatoriul Balnear Techerghiol, Sinaia City Hall	Marami Construct SRL	9,396,122 Lei
Cristian Petrescu (PDL)	CNADNR	Law Office	549,000 Euro and 4,612,800 Lei
Costica Canacheu	The Ethnography	Neico SA	576,715 Lei

[300] Ibidem

[301] Ibidem

(PDL)	Institute, Tarom, Rompress, etc.		
Palasca Viorel (PNL)	The National Institute of Patrimony	Piramid 92 SRL	3,167,796 Lei
Valeriu Tabara (PDL) Agriculture Minister	n/a	SC Da Lovrin and UASMVB Timisoara	1,182,000 Euro and aprox. 1,500,000 Lei
Elena Udrea (PDL) Development Minister	Fundeni Institute, Emergency, Emergency Hospital Floreasca, Ministry of Defense	Calamari Trading Impex	Aprox. 6,591,557 Lei
Nini Sapunaru (PNL)	n/a (33 direct contracts)	Europroiect SRL	1,554,627 Lei and 43,347 Euro
Mihai Lupu (PNL)	Hidroelectrica SA, Administratia Bazinala de Apa Siret and ANIF	Constructii Hidrotehnice SRL	621,463,654 Lei
Ion Dumitru (PSD)	Local Council Valeni, Tartaresti, Valea Lunga, Visinesti, Ulmi; Electrica Distribution Muntenia Nord, etc.	Blitz Lighting SRL	7,295,768 Lei
Cornel Itu (PSD)	Caseiu City Hall, Mintiul Gherlii City Hall, Ministry of Finance, etc.	Mecsom SA	1,501,669 Lei
Eduard Stelian Martin (PSD)	327 contracts with public institutions among which: The Romanian Secret Service, Constanta City Hall, CFR, RAR, Electrica Serv., The Postal Services,etc.	Polaris Holding SRL and GMG Management SRL	8,707,279 Lei
Constantin Mazilu (PSD)	The Streets Administration Bucharest, County council Buzau,	Ghecon Construct SRL	57,928,155 Lei

	Sector 6 City Hall, etc.		
Ioan Munteanu (PSD)	Hidroserv Bistrita SA, Piatra Neamt City Hall, Roman City Hall, etc.	Proinvest SRL	15,716,456 Lei
Dan Nica (PSD)	APIA	Viticom SRL	425,837 Euro
Florin Constantinescu (PSD)	Environment Minister, etc.	ACK SRL, Morlux Florena SRL	68,890,759 Lei
Ion Toma (PSD)	Education Minister, National Company of Investment, Olt County Council, etc.	SCADT SA	96, 948, 115 Lei
Anghel Stanciu (PSD)	Iasi Kinder garden No.13, AJOFM Vaslui, OIR Posdru Nord Est	Getop Constructii SRL and Fundatia Ecologica Green	8,423,102 Lei
Horia Teodorescu (PSD)	Local Council Beidaud, Luncavita, Cerna, etc.	Condor SRL	38,618,966 Lei
Dan Voiculescu (PC)	Labor Ministry, Transelectrica, OPCOM, ANCTI, RAR, The State Patent Office, etc.	GRIVCO SA, Antena 1 SA, etc	24,630,971 Lei and 3,710,844 Euro
Serban Mihailescu (UNPR)	Compania Nationala a Huilei, Rovinari, Energy Complex Turceni, Energy Complex Craiva, etc.	Hanex SRL	1,568,622 Lei
Ion Vasile (Independent)	APIA	Ion Vasile PF	1,000,000 Euro

Amongst the most notable examples, there is Florin Anghel (PDL) who has run contracts of up to 15 million dollars with the city hall in his constituency. The former minister of defense, Dan Nica has received business contracts from the European Union of up to 600,000 dollars. Eduard Martin (PSD) had no less than 327 contracts that were

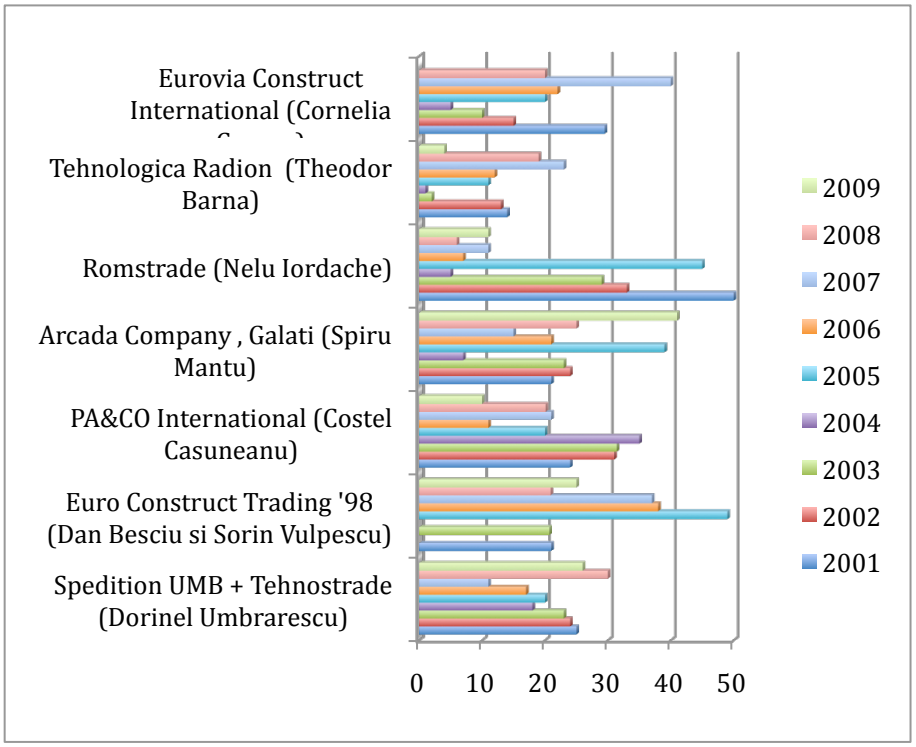
financed with public money. Martin Bobes (PSD then PDL) 3.5 millions of dollars, Cristian Ion Burlacu (PNL then PDL) 2.5 millions, or Ana Gheorghe (PSD) around 20 millions of dollars, senator Florin Constantinescu (PSD) with contracts up to 20 millions, are only a few of these members of the parliament with severe conflicts of interests.[302] The minister of development, Elena Udrea's husband (PDL) obtained contracts from public money of up to 1.7 millions of dollars. One outstanding example is Petru Basa, member of the Romanian Senate with 617 contracts with state institutions, all granted directly. Two interesting examples are Cristian Petrescu (PDL) with almost 2 million dollars contracts with public money and Mate Andras (UDMR) with approximately 30,000 dollars, both interviewed by me in 2011. They admitted that political corruption is a huge issue but have not mentioned their personal involvement in the issue. The above-mentioned politicians cover the entire political spectrum, from the right, centre right and the left.

The Romanian Academic Society confirms through a study that after 2004 the most of the political clientele oriented itself towards public acquisitions and learned to manipulate them. They also obtained preferential contracts with the few left state enterprises. These are non-transparent transactions. However, and this can be observed (figure 4 and 5), once the contracts are obtained they can be executed transparently. So, we can see that the profit margins started to increase for the local companies that were conducting public tenders themselves or as intermediaries in the energy transactions. Their profits increased by 30-40 per cent. The highest profitability was registered for the

[302] Ibidem

contracts executed with the ministry of transportation.[303] The numbers show that the profit margins are unusually high for almost all domestic companies executing public contracts in comparison with foreign companies executing public contracts. "This indicates the existence of privileged companies on this relatively closed market while these preferential agreements are accepted by the state at the expense of the taxpayer."[304]

Figure 3. Net profit Romanian companies.
Source: *Ministry of Finance, Romania,* and The Romanian Academic Society "Beyond Perceptions. Did Romanian governance have more integrity after 2004?" Romania 2011, http://www.sar.org.ro/files/547_Coruptie.pdf



[303] The Romanian Academic Society "Beyond Perceptions. Did Romanian governance have more integrity after 2004?" Romania 2011, p 13 http://www.sar.org.ro/files/547_Coruptie.pdf

[304] Ibidem

These examples are very relevant in the context that politicians who have business interests in illegally granted public procurement contracts could not at the same time vote and put pressure to reform enforcement mechanisms of punishment. Rule of law could lead to their impossibility to have access to public money and also potentially a loss of freedom. In this context we expect to see a causal relation between politicians owning private companies that do business with state money (awarded without competition) and lack of rule of law.

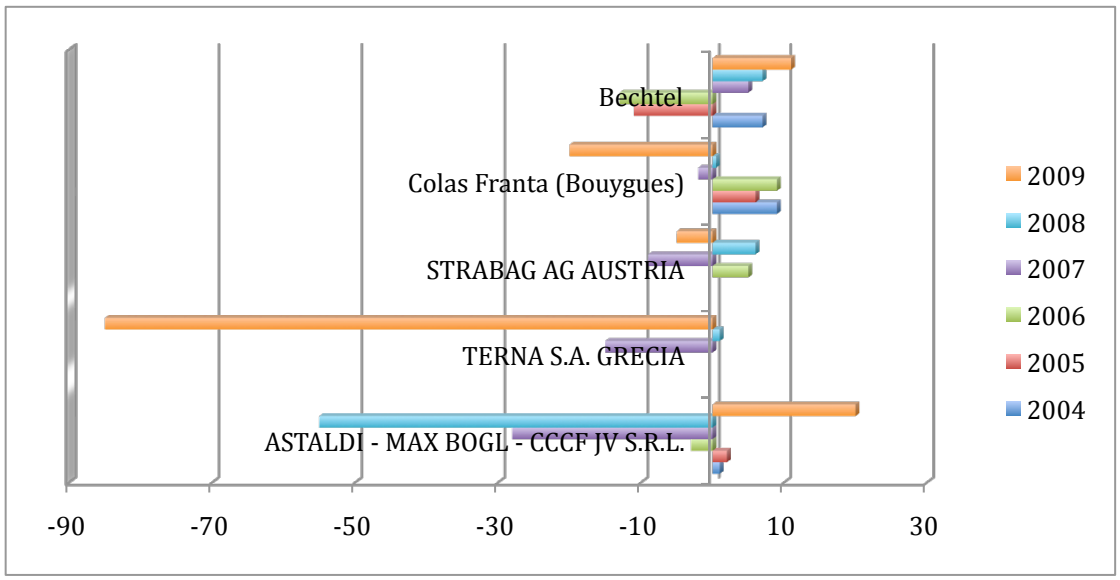


Figure 4. Net profit multinational corporations Romania.
Source: *Ministry of Finance, Romania,* and The Romanian Academic Society "Beyond Perceptions. Did Romanian governance have more integrity after 2004?" Romania 2011, http://www.sar.org.ro/files/547_Coruptie.pdf

Monica Macovei, former minister of justice, confirmed my first hypothesis, that "*when you fight political corruption you have to take anti-corruption measures. Who is*

going to take these measures? The politicians have to do it. They have to modify the constitution and the laws, they have to decide not to give the contracts like that, but many of them are corrupt. That's why we call it political corruption. You need the agents of change because the groups will not do it, they will never lead to change in an organized manner because they do not want that change. They want the same habits and to never have to pay for any misbehavior."[305] This finding is supported across the board, a prosecutor at the Bucharest Court of Appeal added "*it can't change, it has to change from inside, but as long as there are people to serve this system it will never change."*[306]

Cases

Monica Ridzi and the President's daughter

The purpose of the review of this case study is to exemplify a classic example of detracting public funds to directly finance advertising for campaigns. This is not unique but rather the norm.

The actors involved in this case are Monica Ridzi, the former Minister of Transportation and Elena Basescu, the Romanian President Traian Basescu's daughter. They are both part of the Democratic Liberal Party (Partidul Democrat Liberal – PDL), the same party as the President. In 2009 when these events took place, Elena Basescu was a candidate for a seat in the European Parliament. So during the time of these events she

[305] Monica Macovei, June 12, 2011

[306] Maximilian Balasescu, July 12, 2011

was running an electoral campaign. Previously, Elena Basescu had served as an intern in Monica Ridzi's office. Thus, to finance Basescu's campaign, Monica Ridzi organized an unnecessary overpriced event to detract public money. She preferentially detoured the execution of the event to connected private companies. The money obtained was used to buy advertising for Elena Basescu on national television, which is illegal in Romania. Elena eventually won elections and represented Romania in the EU parliament. Monica Ridzi was prosecuted and is awaiting the sentence from the High Court of Cassation and Justice.

In 2009 Monica Ridzi, the Minister of Transportation and Sport (MTS) at the time, organized the Youth Day. The event, which happened on May 2, was financed with approximately 600,000 euro from the ministry. The contracts to organize the festivities were granted directly, without competitive auction, to certain private companies. This is illegal according to the law GEO 34/2006, which contains the framework for public procurement. This act makes a clear reference to the fundamental principles to be followed in the award of public procurement contracts. These are *non-discrimination, equal treatment, mutual recognition, transparency, proportionality efficient utilization of public funds and accountability*.[307] Two of the three firms that executed the contracts (Artisan Consulting SRL and Publicitate Mark SRL) had common shareholders and had their offices in the same apartments. The costs of the events have been largely overvalued,[308] in order to subtract illegal financial benefits from the transaction.

[307] Government Emergency Decision, GEO 34/2006 in Stecko Carmen 2010 "Public Procurement," p. 205
[308] Neagu Alina "Monica Ridzi, trimisa in judecata de DNA," *HotNews.ro,* May 3, 2011

Monica Ridzi, along with other public officers from the Ministry of Transportation and Sport have granted these contracts without following the legal procedures[309] to organize an auction. False documents were created to cover this illegal distribution and to fake the organization of an actual auction, also explicitly illegal by Law no. 78/2000. The former minister, Ridzi, asked the IT department to erase the illicit transactions from the minister's computer system, in order to cover the facts.[310] The minister's counselor personally met with Bogdan Iacobescu, administrator at both Artisan Consulting and Compania de Publicitate Mark, the two firms involved, and let him know that the Ministry of Transportation and other public institutions will have advertising and event organizing contracts.[311] This is against Law no. 78/2000 that prohibits the public official to share unauthorized information that is not meant for public use.

After facilitating the illegal distribution of the public money, large sums were spent on campaign advertising, approximately 40 per cent for Monica Ridzi, and 20 percent for Elena Basescu. The money obtained was used to buy advertising for Elena Basescu on national television, which in Romania is extremely expensive. This was realized by buying publicity for the event and by buying 'news slots' for the two politicians.

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[309] According to Government Emergency Decision, no. 34/2006, these are *non-discrimination, equal treatment, mutual recognition, transparency, proportionality efficient utilization of public funds and accountability*

[310] Neagu Alina "Monica Ridzi, trimisa in judecata de DNA," *HotNews.ro,* May 3, 2011

[311] Ibidem

According to the Audiovisual Law[312], buying news slots that endorse a politician is illegal in Romania, but it was covered up, by not specifically including it in the contract for the event. The networks denied the involvement but the news and the masked publicity was in actuality broadcast and there is hard proof for it. [313] The MTS thus dictated a part of the TV news agenda, which is against European norms, and against the law. For instance, Antena 3, one of the national networks broadcast between 1-4 May 2009: 76 news about the Youth Day May 2 event, 30 news about Monica Ridzi, and 14 news about Ridzi and Elena Basescu.[314]

In Romania the members of parliament enjoy immunity against prosecution. This means that the Parliament has to approve first to raise the immunity before the MP can be the subject of an investigation. In July 2009, the Romanian Parliament approved the initiation of the investigation procedures by the National Anticorruption Directorate.[315] But, although the DNA solicited the search of her personal computer and the computer system, the Romanian Chamber of Deputies rejected the request in December 2010. I asked Mircea Grosaru, member of the Justice Committee in the Parliament why they did

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[312] Art. 6.3 "It is prohibited that the public authorities, or any physical and juridical persons Romanian and foreign, to interfere in the content, the form and means of presentation of the audiovisual media services elements." Art. 29.3 Audiovisual commercial communications with hidden commercial content are prohibited.

[313] Gazeta Sporturilor "Cum a platit MTS false stiri pentru Monica Ridzi si Elena Basescu. Dovezi." (June 22, 2009)

[314] Neag Mirela, Catalin Tolontan, "Monica Iacob-Ridzi a cumparat stiri si emisiuni TV pe bani publici," (June 19, 2009)

[315] A thorough description of these institutions can be found under in the section entitled *Romania,* under the heading "The legal and institutional framework" in chapter 2.

not allow it. He explained to me that the MPs thought that no parliamentarian would like to be in that position, and that the vote was a "solidarity vote." [316] This provision is very detrimental to the independence of the prosecution. If investigation and prosecution are dependent on political approval this creates another inherent moral hazard for political leaders. They would rather not approve actions that could lead to the punishment of their peers for fear that they will be one day in the same position.

The National Anticorruption Directorate prosecuted Monica Ridzi in May 2011. The file is judged by the High Court of Cassation and Justice (ICCJ), which is the Romanian Supreme Court and the court of last resort. She is charged with abuse of public office against public interest and falsification related with corruption acts. She denied any involvement in the acts, she claims she did not sign any documents though the money was allocated. No decision has been yet reached in this file by the three judges.[317]

This case is relevant because it is a very explicit example for how the money is stolen and spent. It is also illustrative about the activity of the National Anticorruption Directorate that prosecuted a former minister regardless of political color. Ridzi is part of the Democratic Liberal Party (PDL), while the beneficiary of the money is the President's daughter, all three from the same party. Elena Basescu, though, is not prosecuted in this case. At times DNA is criticized for prosecuting political opponents only. This case shows it is not the case. As it will be expensively discussed in chapter 6, the

[316] Mircea Grosaru, 2011 Member of the Chamber of Deputies, Justice Committee, June 15

[317] Muresan Ionut "Monica Ridzi a demontat acuzatiile DNA: 'Nu am participat la intocmirea sau falsificarea inscrisurilor…nu am semnat ordonantele de plata…ordonantele in original, nesemanate, au fost predate de catre mine urmatorului ministru, Sorina Placinta", *Lumea Justitiei,* (June 28, 2012)

Anticorruption Directorate is independent and successful enough and it brings to justice elements like Ridzi (but not yet like the President's daughter). *This is a new development* (DNA was only created in 2007 at the pressure of the EU).

This case, as most of this study, posits that the DNA is a oasis of rule of law. It was created as an accident and it does not reflect the rest of the society. It is the solution to the problems, but we are yet to see its full potential. However, what is not clear yet is if this will have any long-term effects. Will Monica Ridzi also receive a sentence? The DNA is separate from the High Court of Cassation and Justice. On e is a prosecution office one is the Supreme Court in the country. The ICCJ is politically appointed and unreformed. In a society governed by rule of law the expectation would be the Ridzi would get an enforceable sentence against her act. To date no decision has been reached. It is too early to tell but the expectation, based on other examples explored further down (e.g. Romsilva), is that during the current administration she will not be sentenced to jail.

Hidroelectrica and the "smart boys"

This case represents probably the most fraudulent business after 1989, run by politicians and their 'beneficiaries' friends (also known as "the smart boys" in Romanian circles). It involves Hidroelectrica, a state owned company that sells energy produced by hydropower and several private companies run by these 'smart boys.' The big winners in these transactions are the beneficiaries, the private companies owned by the 'smart boys' and their politician friends, and the big loser is the state, more precisely the state owned

company Hidroelectrica. Hidroelectrica covers approximately 30% of the energetic consumption at the national level and the Ministry of Economy holds its shares. The transactions with the preferential companies are facilitated by the politicians in charge of the Ministry of Economy, at any point in time. They have a vested interest to protect this affair since they receive a good share of the money, from the 'smart boys,' (illegal according to Law 78/2000).[318] The trail is simple. Hidroelectrica sells undervalued energy to private companies. This is prohibited by two legal provisions, Law no. 78/ 2000 that criminalizes the sell at lower prices than the commercial value of the state assets and GEO 34/2006 (previously covered by other legislation) that criminalizes the preferential distribution of contracts. This is the first stage, when the private company makes a profit. The second is even more perverse. The 'smart boys' sell back to the state the energy at overvalued prices; this is also illegal criminalized by the same legislation. Consequently, the state loses twice, when it sells and when it buys. Both the beneficiaries and the politicians win twice as well. Every time the 'smart boys' win the politicians get a kickback.

The relevance of this case study is the involvement of several governments in the facilitation of these transactions, the lack of transparency in the transactions, the false rhetoric, the lack of investigations or prosecution, and the huge sums of money that these

[318] Being an illicit transaction the politicians do not visibly display the exchange of money. We can deduct though their benefit and involvement by looking at their preferential choices of companies and their kin or friendship relations with the owners of the private companies, which I attempt to uncover in this section. We can also look at the specific choice to instate, keep and renew these preferential contracts despite the fact that the politicians play double standard and tell the media these are completely illegal and wrong.

transactions involve. The European Commission started an investigation regarding this case.[319]

Hidroelectrica has contracts with several companies since 2001. In 2012 it had 10 contracts with Alro Slatina, Elsid Titu, Electrocarbon Slatina, and Electromagnetica among others. Around 70 per cent of the energy produced by Hidroelectrica (which has the lowest production cost) is sold through direct contracts signed outside of the energy market and at prices lower than the market value. There are two mechanisms of theft. One involves selling energy by Hidroelectrica to preferential companies, which purchase energy at undervalued prices of as low as 25 dollars per megawatt and sell it to the population and companies at 80-90 dollars per megawatt. This practice is illegal (Law no 78/2000). In the second scenario Hidroelectrica sells cheap to these "beneficiaries" and then it buys it back from the "smart boys" at overpriced value. This is also an illegal practice. The IMF estimates that the loss produced to Romanian state reaches 250 million euro annually.[320]

For the past decade all ministers of economy (from both sides of the political spectrum) had a double standard attitude towards these transactions involving Hidroelectrica and the "smart boys." On the one hand they publicly criticized these contracts, asked for more transparent transactions or the termination of the contracts, but on the other hand they did nothing to actually prevent the state to conduct these

[319] Grosu, Cristian, "Resursele Romaniei – cazul Hidroelectrica: poveste adevarata despre pe cine as chema eu la Parched," (June 18, 2012)

[320] Ionescu Vladimir "Comisia Europeana a inceput 5 investigatii pe contractele de energie ale 'baietilor destepti'," (April 25, 2012)

inefficient deals. If questioned by the media they usually defended by saying that they cannot intervene and that the responsibility belongs to Hidroelectrica.[321] However they are the ones that chose the preferential companies, signed the contracts, enforced the contracts and guarded that they were renewed. I present here a condensed historical overview of their involvement in these operations.

The politicians benefit from this scheme. In fact they set it in motion and guided its evolution. The first minister of economy who set in motion this 'business,' Dan Ioan Popescu approved these contracts for 10 years during his tenure at the Ministry (2003-2004). The energy was sold at undervalued prices, at half of the price on the market or even under the production price. The recipient companies, Energy Holding and Luxten Lighting were lead by a relative of the minister of economy (Bogdan Buzainu) and his business partners (Ionel Pepenica and Claudiu Radulescu) respectively.[322] Under his leadership at the ministry, also took place the most corrupt transaction after 1989. This involved the re-technologization of the hydropower plant Portile de Fier, the most efficient and cheap energy source in Romania. This cost Romania up to five times more than the expected value (a loss of approximately 600 million dollars).[323]

The next minister Codru Seres (Conservatory Party, protected these transactions during his tenure. One of the preferential contracts involved a firm belonging to the president of the Conservatory Party. He also fired several of his employees, whom he

[321] Sercan, Emilia, "Cum au petrecut 'baietii destepti criza. Profiturile, contractele si ministry lor", (December 9, 2011)
[322] Ibidem

[323] Grosu, Cristian, "Resursele Romaniei – cazul Hidroelectrica: poveste adevarata despre pe cine as chema eu la Parched", (June 18, 2012)

suspected were collaborating with the media. He has not yet been prosecuted, sent to court, or sentenced. However in 2008 the Romanian Senate approved to raise his immunity and start investigations in relation with these transactions. Varujan Vosganian (PNL), the following minister (Jan 2007-April 2007), under pressure from the media, sent a request to the Romanian Supreme Council of Defense to investigate these preferential deals. Nothing followed up.[324]

Adrian Videanu [325](PDL) minister starting with 2009 started his mandate with very strong declarations against the "smart boys." Following a request from President Basescu, who was always a critic of these contracts, but never too strong to pursue action, Videanu announced that he would make the Hidroelectrica contracts public. However, he soon switched into protector of the "smart boys" to the point that he declared publicly that they do not deserve this label and without justification extended most of their contracts, though they were not coming to an end. [326] Ion Ariton (PDL) the following minister (September 2010 – February 2012) completed the extension of all the contracts

[324] Sercan Emilia 2011 "Cum au petrecut 'baietii destepti criza. Profiturile, contractele si ministry lor", December 9

[325] In 2008 an investigation against him was started in regards to another corruption scheme, but not with this one. He is under fire for illegally obtaining around 4 million euro from public funds that he used to purchase curbstones from China between 2006 and 2008. A unnecessary number of streets in the capital, Bucharest have been the recipients of these curbstones and of severe traffic disturbance. http://www.gandul.info/actualitatea/bordurile-lui-videanu-dosar-greu-la-dna.html?3927;2443549

[326] Ibidem

that Videanu did not manage to finalize. Though the president has asked that these contracts end, under the last two ministers they have all been extended.[327]

This case is relevant since it illustrates the extent of the participation in the misappropriation of public funds on behalf high profile politicians. It is also significant because it illustrates the involvement of these politicians in the judiciary. Thought the media has generously spent a lot of space and time uncovering the facts of these deals, none of the figures involved has yet been prosecuted in this obvious case of political corruption. Except of one minister, Codru Seres, the DNA has not yet started investigations on either of them. As the above table illustrates the sums of money circulated are extremely large. There is a very high probability that there is political intervention at high level to prevent investigation and prosecution. I bring here an example of a similar intervention that involves one of the owners of two of the preferential companies in the Hidroelectrica case.

Table 3: Preferential companies that do business with the state owned company Hidroelectrica and their profit margins. (Approximate numbers converted in dollars)

Company	**Net profit 2009**	**Net profit 2010**	**Number of employees**
Energy Holding	2.5 million	4.5 million	49
Alpiq Romenergie SRL	33 million	23 million	11
Alpiq Romindustries	20 million	19 million	17
Electrocarbon	1 million	4.3 million	393
Elsid SA Titu	8 million	17 million	206
Luxten Lighting Company	6.2 million	5 million	391

[327] Sercan Emilia "Cum au petrecut 'baietii destepti criza. Profiturile, contractele si ministry lor", (December 9, 2011)

Mihai Anastasescu is one of the business beneficiaries who own part of the Electrocarbon SA and Elsid Titu firms (involved in the above described deals). He bought these companies, and 7 others, at extremely undervalued prices from AVAT, the national authority that handles state shares. He obtained these prices during a time when the head of the AVAT institution was Ovidiu Musatescu, the husband of Prime Minister Adrian Nastase' personal counselor, Dorina Musatescu. He was investigated in a fraud file involving an alcohol business. His file was dropped because of high profile intervention. According to documents reviewed in his case, among the ones who intervened to drop the file there are Dorina Mihailescu (Prime Minister Adrian Nastase's counselor), Ion Stan (Member of the Parliament, former head of the Secret Service Control Committee in the Chamber of Deputies), Daniel Savu (Senator) and Ion Savu (Secret Service Head of Campina Chapter).

The Hidroelectrica case is a classic case of misappropriation of public funds for private gain, involvement of a net of politicians, business people, judges, and political appointees. Not only do they cost the state losses of up to 250 million of dollars a year, but they intervene in judiciary making the application of laws unpredictable and impersonal. The fact that most of the actors involved in this illegal scheme were never prosecuted or sentenced sends a signal to other politicians involved in similar activities that they may not be subject to law either. The expectation is lack of predictable enforcement, which perpetuates corruption.

Romsilva and the 20,000 per cent overpriced value

This is a very illustrative case of the elements under study here. The misappropriation of public funds for private gain, the abuse of public office, the connections between the politicians, their appointees in the public administration and the judicial pressures they put to avoid sentencing. This case involves a minister that detoured public funds by overvaluing the price of the purchased goods and was caught. In order to protect himself, he or his political allies, potentially put pressure on the judiciary for him to be acquitted. In order to make a judgment about these interactions we can observe the hard facts. That is, the illegal purchases, the attempt to cover the deed and the ridiculous explanation the highest court in the country gave in order to acquit him. The main actor in this case is Ion Dumitru, a Senator from the Democratic Social Party (PSD) who was until December 2004 the director of the Romsilva Agency. This is a public institution that manages the entire forest resources of the country. Although him and his partners have illegally spent the agency's money, causing loses of up to 2.5 million euro (over 3 million dollars), he was acquitted by the High Court of Cassation and Justice in 2009. [328]

In 2004 Ion Dumitru granted illegally eight public acquisition contracts to four preferential companies (Hunting Com SRL, Romarmy SRL, Express Trading SRL and

[328] "Primul caz de mare coruptie monitorizat de Uniunea Europeana s-a incheiat la instanta suprema cu o achitare, in chiuda prejudiciului estimat la 2.5 milionae euro" *Adevarul;* and "Dosar finalizat in 2429 zile de la inceperea urmaririi penale. Dosarul 'Romsilva' –Ion Dumitru" *Hotnews.ro*

Romtextil Com SRL). These were controlled by a business 'beneficiary' Alfred Florea. According to Law no. 78/2000 and GEO 34/ 2006 this uncompetitive bidding is illegal. The audit completed by the Fiscal Authority in Romania and the investigations conducted by DNA brought to light that the purchases of equipment (bullets, guns, ties, tie bars, hunting clothing, and others) were overpriced by over 20,000 per cent. [329] Besides buying the goods at prices way over the market price (criminalized by Law no. 78/2000), Romsilva, which deals with the forest resources of the country purchased goods that it can never use, such as bullets, hunting clothing, or tie bars. This is a common practice by which politicians overvalue purchases, run contracts through friends or family companies and keep the difference between the commercial value and the paid value.

The National Anticorruption Directorate started an investigation in this case and prosecuted Ion Dumitru. The prosecutors gathered evidence that shows that the other "competitors were eliminated from the competition, through bureaucratic procedures, in the preliminary stages of the auction."[330] At the final stage only Alfred Florea's companies were left. This way he could impose the price he offered. After winning the bid, Florea actually bought the products from the competing firms in the auction and resold them to Romsilva at the final auction price.[331]

Ion Dumitru's file, after several delays, got to the High Court of Cassation and Justice, the highest court in the Country. Though the evidence brought by the DNA

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[329] Ibidem

[330] "Primul caz de mare coruptie monitorizat de Uniunea Europeana s-a incheiat la instanta suprema cu o achitare, in chiuda prejudiciului estimat la 2.5 milionae euro" *Adevarul*

[331] Ibidem.

supported the facts, the judges took an ad litteram the explanation that Ion Dumitru gave in his testimony and delivered it as the justification for their decision to acquit the Senator. Thus, though almost ridiculous and untrue, they explained that Romsilva does not use public money but it has its own funds. The second reason for their decision is related to the 'market economy.' They argued that those prices (with 20,000 per cent added value) were the competitive prices. This justification includes the purchase of 50,000 bullets for which Romsilva paid 900,000 lei though they cost 1,855 lei.[332] Against all the proof the high court acquitted all defendants twice (February and September 2011), the latter one being irrevocable.

This case is very relevant. First we see the same pattern of misappropriation of public funds for private gain. Second, we see how the National Anticorruption Directorate investigates and prosecutes the MPs. And last we see the High Court of Cassation and Justice, unjustifiably acquits the member of the parliament. The decision of the highest court of justice in Romania to let this politician go raises severe questions about the integrity of the judges and has again, similar to the case of Hidroelectrica grave consequences for the predictable application of laws. If senators can get away with this kind of misappropriations then this presents an incentive for other politicians to do the same. The political class in charge with reforming the system and establishing the rule of law has high conflicts of interest that prevent the eventual successful introduction of rule of law reforms.

[332] Ibidem

Milosevici, 1107 gas wagons, and money for party finance

This case illustrates that political corruption is an old trade. It involves very high profile politicians and political appointees and brings to light the involvement of these people in Romania's breach of the international embargo against Yugoslavia. People with decision-making power (e.g. Virgil Magureanu, former chief of the Romanian Secret Service (SRI), Aurel Novac, former Minister of Transportation) organized and coordinated a 'black market' network which involved the export to Yugoslavia of up to 7,799 tons of gas and 36,064 tons of diesel gas. According to the over 3000 pages investigation file, this money was used for *party finance* (for the governing party PDSR).[333]

The "Jimbolia Operation," named after the customs entrance point for the 1107 wagons of oil, involved several secret service police officers. The secret service officers guarded the transport following the order of Virgil Magureanu, the SRI chief. Magureanu, the main coordinator of this operation had also been a secret service officer during the Communist era. His appointment as the head of the institution was thus illegal. The owner of one of the nine companies involved in this traffic, a classic "beneficiary," Constantin Bostina, was before 1989 the President of the Communist Students Association in Romania. He has served as the personal counselor to the dictator Nicolae

[333] Oprea, Parius, "Bani pentru partid=motorina pentru Milosevici," (April 4, 2005)

Ceausescu and in 1989, when the Romanian Revolution started, he was the Minister of Industry. He is currently the vice-president of the Romanian Business Association. [334]

I chose this case for two reasons. First reason is that it is very relevant because it shows that operations that lead to misappropriations of public funds for party finance lead to interference in the judicial process. There was an intent to prosecute the former Prime-Minister Nicolae Vacaroiu (PDSR) and Doru Ioan Taracila, the former Minister of Defense, and Aurel Novac, former Minister of Transportation, based on the law of ministerial responsibility (Law no.115/1999). However the Judicial Commission in the Senate blocked the attempt, invoking that the law cannot be applied retroactively for facts committed before the existence of the law. Additionally, in March 2000 the Military Court suspended the investigation against the secret service officers involved in the case, invoking "not enough evidence" that criminal activity took place.

The second reason is to exemplify the importance of the first round of politicians after the fall of an authoritarian regime. In the discussions in chapter two and three I have pointed out that it is crucial that the institutional choices are healthy from the very first phases of the transition to democracy. Unfortunately, as seen here, the highest positions of authority were occupied by no one else, but formerly committed Communists. These people were part of the economic and political networks of power in charge with Romanian resources before 1989 as well. They knew each other, they knew the operations, and they controlled the judges. All that changed is that after 1989 they were theoretically legitimate in their positions, since they got/ remained in power through 'free

[334] Ibidem

and fair elections.' So, who are the people that took over the industries and the state institutions? The former communists. They had no incentive to reform the enforcement mechanisms.

First, they feared punishment for the involvement with the totalitarian regime, and second they had a lot to fear from operations that drained state money. This is only one of the operations, involving more than 40,000 tons of fuel. Others draining other resources had a similar fate. The inherent conflict of interest in this set of politicians led to the superficial reforms and consequent lack of true mechanisms for punishment. What is quite tragic is that many former communist politicians are involved in the networks of power and are patiently (and some times not so patiently as it will be seen further down) waiting their turn back in power. A very corrupt government was in power in 2012, however the opposition that tried to replace them by pushing the boundaries of constitutionality carry the legacy of the former communist political class discussed above. Countries like Romania are stuck in between the former abusers and the current ones.

This operation cost the state huge sums of money through tax evasion and theft of resources. Unlike previous cases that involved public procurement or sell of state resources where the price of the goods were either overvalued or undervalued, in this case the gas was simply stolen. None of the money can be found in state balance sheets. *"In Romania, the biggest thieves are the ones that are in charge with making the law or appointed to respect it."*[335] This is another example of how the biggest players in these

[335] Ibidem

corruption cases never pay for their deeds even in the event that the facts become public and the investigations against them are started. The phenomenon is not isolated and as this case shows it has been part of the first "post"-communist administration, and of the "reformist" governments. Because they want to never be jailed none of these politicians intervenes to fully reform the system and to create reliable punishment and enforcement mechanisms.

These are just a few cases. The phenomenon is widely spread and its endemic character has important consequences for the establishment of rule of law. As I will present in the next section these politicians are in charge of making laws and reforming the enforcement mechanisms. We will see in the following examples that they will not proceed to make enforceable changes due to fear of punishment.

The politicians, the laws, and the prevention of rule of law establishment

This section analyzes the second effect of political corruption on the rule of law establishment, *the lack of reforms*. Since it would be unrealistic to set the goal to empirically prove non-occurrences, I chose to present two crucial clear cases of efforts made by politicians to prevent the establishment of rule of law. Thus, instead of proving what reforms are not made, I analyze here two cases that expose the systematic involvement in diminishing the enforcement mechanisms power through political legislative means. The first case exemplifies the politicians' effort to diminish the powers

of ANI, the National Integrity Agency, while the second case presents the attempt to enhance the powers given to the High Court of Cassation and Justice judges, the supreme court in Romania, in judging corruption cases. These choices are relevant. Since it is empirically impossible to capture 'non-reform', due to conceptualization and measurements problems, then focusing on clear cases of counter-reform can bring to light the essence of politicians' opposition to rule of law establishment, which is the topic of this study.

Lawmakers vote to reduce the powers of the National Integrity Agency

This case brings to light a clear connection between a corrupt politician, and the prevention of establishment of rule of law. Bradisteanu is a Senator who misappropriated public procurement contracts for private gain. The National Integrity Agency[336] uncovered the facts, The National Anticorruption Directorate prosecuted him and when the time came to confiscate the illegally obtained money, the Constitutional Court took notice, declared ANI's actions unconstitutional, while the *Parliament modified the legislation to diminish ANI's powers.* The firm intervention of MPs and the President along with the Constitutional Court was meant to protect the corrupt politicians.

ANI is an anti-graft agency that was created in 2007 and it was backed by European Union in an effort to curb corruption. This agency was initially granted extended competencies to investigate illegal wealth declarations by politicians.

[336] For a description of these institutions and their functions refer to chapter 2, section *Romania,* Heading "The legal and institutional framework"

According to law 176/2010, regarding the integrity of the public officials, politicians and high officials have to publicly declare their wealth and their economic activities. Initially, the National Integrity Agency could request the court to confiscate any sum of money that could not be justified by public officials. Around 100 Romanian lawmakers, representing about a quarter of the Romanian Parliament, half of the members of the government, and almost all Constitutional Court judges were under investigation by this agency. Which can explain why suddenly, as soon as the agency taped into its first confiscation, the Constitutional Court and then the Parliament reduced its competencies.[337] A case can be made that judges and politicians perceived the dangers that could have lead to loss of position, wealth, prosecution and even sentencing, that the actions of agency could lead to, and took measures to prevent these potential consequences.

Chronologically, in 2007 ANI discovered that the 'wealth declaration' of a senator, Serban Bradisteanu, and documents from the suspect institutions showed that he obtained huge sums of money of around 5 million dollars from illegally granting public procurement contracts. Thus, during 2001 – 2002, he facilitated the illegal and uncompetitive distribution of money to specific firms, while he was holding the position of head of the evaluation commission for a public auction that involved acquisition contracts of approximately 14 million dollars. As a 'repayment' to this abusive use of his public position he was rewarded with huge sums of money directed to his off-shore company accounts (Arnell Development Lt, based in British Virgin Islands) through

[337] "Draga de ANI s-a zbarcit"

Union Bank of Switzerland in Zurich. Prosecutors confiscated his real estate belongings and prohibited him to leave the country. Though he formulated a request to drop the accusations because he was unable to participate in the trial due to health reasons and a potential surgery in Germany, the Romanian officials decided that he is apt for trial.[338]

Then came the changes in the one of the stronghold institutions of the anti-corruption fight, the National Integrity Agency. In June 2009 Bradisteanu's lawyer counterattacked by claiming that many articles in the law that established ANI were unconstitutional and addressed the issue to the Constitutional Court. This found the ANI competencies unconstitutional and the Romanian Parliament voted to amend its fundamental law. Under the new rule, politician's personal wealth declarations were not mandatory anymore. Additionally, according to these changes, it will be impossible for civil courts to seize assets that are illegal since prosecutors would have "to present hard evidence of the criminal wrong doing."[339] In December of the same year Bradisteanu was acquitted and all his belongings returned. In 2010 President Traian Basescu decorated this obviously corrupt politician that broke the law and lead to the dismantlement of rule of law protection mechanisms, granting him a noble title.[340]

This exemplifies the extent to which politicians would go to prevent the predictable application of law against their wrongdoings. Bradisteanu and his lawyer, the prosecutors, the judges, the parliament, and all citizens know that Bradisteanu

[338] "ANI ingropata de prima ei victima" and "ANI nu mai poate verifica averile demnitarilor"

[339] Horia Georgescu in "Romania waters down anti-corruption agency rules"

[340] Ibidem

misappropriated public funds for personal gain. He abused his office and channeled state funds into his bank accounts. He though, kept his parliamentary position and challenged not his wrongdoings or the ones of his peers in the parliament. He challenged the constitutionality of a newly instated integrity agency to question him. And he won. It is probably impossible to obtain information on how the Constitutional Court judges were influenced. But they probably were. But as we look at the outcomes we do not find a parliament that voted in response to the Constitutional Court new legislation to make ANI constitutionally able to confiscate illegally acquired wealth. That is the purpose of a legislative body. To protect the citizens elected who are paying for Mr. Bradisteanu's wealth with tax money. No, the parliament voted to strike down ANI's power to put their illegally acquired wealth in danger. This is where corrupt politicians stand. And this is why Romania is not seeing progress from them.

The High Court of Cassation and Justice inequitable and impartial selection

The second case involves President Traian Basescu and the enhancement of powers for the Supreme Court judges regarding corruption cases. The highest court in Romania, and the court of last appeal is the High Court of Cassation and Justice (ICCJ). In September 2010 Basescu appointed two judges as the president and vice-president of this Supreme Court. The two judges, Livia Stanciu and Rodica Aida Popa received *discretionary powers* through a specific new law. Though this runs against the principles

of equitable trial, the new law (no. 202/2010), published in the Official Monitor no. 714 confers the two judges some inequitable powers. A majority in the parliament held by President Basescu's party PDL passed this law. [341]

According to the new provisions, the two judges are in charge with selecting two separate five-judges courts, one lead by the president, and the other by the vice-president to judge all appeals in high profile corruption cases. The two five-judges panels are renewable after a year. Second, they received the right to judge each other's appeals. Third, they received the right for speedy trial, even from one day to the next. The two receive by law all appeal files in high profile corruption cases, which runs counter to the principle of random selection of files. The randomness should guarantee against the possibility of abuse or of impartial decision. The tenure of one year is also against the same principle of random selection.[342] This is a clear case in which the President, through his parliamentary majority intervened in the legislative process to prevent the establishment of rule of law enforcement mechanisms.

The ICCJ's president and vice president hold a monopoly over the corruption cases files. And President Basescu has appointed these two positions. Behind this decision to modify the legislation to create this source of dependence and monopoly is probably the intent by the high ranked politicians to control the last step in the judicial process. Since the prosecution of corruption is taken over by a relatively independent

[341] Sancu, Adina and Savaliuc, Razvan, "Completele Gorgonelelor: Cnad le-a numit sefe la Inalta Curte pe Livia Stanciu si Aida Popescu, Traian Basescu le-a dat o lege cu dedicatie," (August 7, 2012)

[342] Ibidem

group of agencies among which the DNA and ANI, then senior politicians have to make sure that their files do never reach negative resolve in the later steps of the judicial process, with the judges. This is a case that exemplified the clear intervention on behalf of senior politicians to prevent the establishment of efficient enforcement mechanisms by creating a politically controlled monopoly of power within the highest court in the country.

The constitutional crisis - the politicians first, the rule of law after

Impeaching the President

In the following section I bring proof in support of the hypothesis that political corruption has a permanent damaging effect on the establishment of rule of law. Since rule of law does not exist, then networks of politicians from both sides of the ideological spectrum may push the constitutional boundaries to fulfill their goals. In corrupt states, the goal is to be in power, with an ultimate aim at the state funds. One severe form of state institutions manipulation involves unconstitutional measures to push the president out of power. Thes sort of interventions took place in Romania during the summer of 2012. Even though the effects of removing a corrupt president, who ruled Romania without respecting the law on many occasions, and who modified institutions for his personal benefit, would have been good, the means of the new political team proved as unconstitutional. The point of this example is to show how politicians from both sides of the political spectrum act above the law, hurting the respect for rule of law and preventing its establishment. It also draws attention to the fact that the stakes for power

increased since the anti-corruption agencies started having positive outcomes towards the establishment of rule of law. The politicians not only prevent the reform of the system to establish rule of law, but they also have to stay in power to protect themselves since the two anticorruption agencies DNA and ANI started making victims.

The crisis revolves around the impeachment of President Traian Basescu on July 6, 2012. It all started with several political conflicts at the beginning of 2012, that lead President Basescu to eventually nominate a Prime Minister from a rival political party, Mr. Ponta (PSD). He is the obscure politician uncovered by Adrian Nastase, the former communist elite transformed into democratic Prime Minister. Mr. Ponta was appointed during 2000-2004 PSD Administration as the head of the Corps of Control, the watchdog in charge with overseeing the government spending. Starting in May of the same year, Ponta has lead the country on the basis of a new formed majority, won the local elections by an overwhelming majority and preceded with a political take over by replacing the old political appointees with his own new people.[343] He then went on and accused the president of overstepping his constitutional powers, intervening in policy areas where he had no attributions,[344] approving illegal wire-tapping, using the national secret services against his political enemies, and putting pressure on prosecutors in several criminal

[343] "Romania: The political economy of a constitutional crisis," *Policy Brief # 60 July 2012, Romanian Academic Society (SAR)*, http://www.sar.org.ro/wp-content/uploads/2012/07/SAR-Policy-Brief-no.60.pdf p. 2

[344] "Romania: The political economy of a constitutional crisis," *Policy Brief # 60 July 2012, Romanian Academic Society (SAR),* p. 1

cases.[345] The following moves prompted many circles in Romania, the EU and the US to intervene and put pressure to stop what was read as a rule of law crisis.

Prime Minister Ponta and his new found majority in the parliament replaced the speakers of the two houses of parliament. He then appointed his political ally Mr. Crin Antonescu (PNL) as the speaker of the Senate, who according to the constitution became the interim president during the impeachment procedures. The Parliament also dismissed the Ombudsman, the only institution who could have contested to the Constitutional Court any governmental and parliamentary decisions. The same coalition accused the Constitutional Court of politicization and initiated legislative procedures to reduce its competencies. They also passed a decree that would have allowed President Basescu to be removed by simple majority, which was unconstitutional.[346] The Constitutional Court, at the pressures made by the European Union for an alarming breach of rule of law, rejected this last decree.[347] This was the beginning of the constitutional crisis, but it was not the beginning of the disrespect for the rule of law the way the world saw it.

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[345] Bilefsky Dan "Romania Votes on Whether to Remove Its President". *The New York Times* http://www.nytimes.com/2012/07/30/world/europe/romania-votes-on-removing-president-from-office.html (29 July 2012)

[346] Timu, Andra, "Romanian Government Changes Referendum Law to Ease Impeachment," Bloomberg.http://www.bloomberg.com/news/2012-07-05/romanian-government-changes-referendum-law-to-ease-impeachment.html, (July 5, 2012)

[347] "Romania: The political economy of a constitutional crisis," *Policy Brief # 60 July 2012, Romanian Academic Society (SAR)*

The constitutional conflict

The Constitutional Court in Romania rules on the constitutionality of the laws and decrees issued by the authorities. It is a politically appointed 9 members court; 3 members appointed by the Senate, 3 members by the Chamber of Deputies, and 3 members by the President. The Constitutional Court, the Parliamentary majority coalition, the Prime Minister Ponta and President Basescu are the main actors in this crisis. The goal was getting, respectively staying in power, and the means was the modification of laws and the competencies of institutions. In this case we can see no rule of law but rule by people above the law.

In 2009 the government lead by the President's Party PDL in coalition with UDMR (the Hungarian minority party) and UNPR, amended the Referendum Law, by emergency ordinance.[348] An emergency decision on behalf of the government enters into force right away, before the Parliament gets a chance to see it. It is published and then, the Parliament can make proposals to amend it. Thus, through this decree it was decided that there was a threshold of 50 per cent plus 1 for the validity of any referenda.[349] We can see here that Prime Minister Ponta and his coalition were not the only ones who intervened to change the state institutions in their favor. This is a common practice in Romania. President Basescu was making sure that it would be close to impossible to be removed.

[348] Ibidem, p. 4

[349] Ibidem

Law 62/ 2012 approved the emergency ordinance and provided that only if a majority of the registered voters will turn to the polls then the President could be removed. This would be very difficult given that the electoral lists have not been updated to reflect a major population decrease, and in Romania there has not been a turnout close to 50 plus 1 in many years. In the same attempt to make his dismissal impossible President Basescu submitted to the Parliament amendments to the Constitution to make the Constitutional Court's opinion binding. Another law, 47/1992 was amended by the same coalition to give the Court competence to review all Plenum decisions in Parliament. Consequently the impeachment decision would have been subject to binding review by the Court.[350] So, though the EU and the US governments got very alerted by the Prime Minister Ponta's acts, we can see here that they are just a continuation of the regular practices in Romanian politics.

In order to remove these safe guards imposed by Traian Basescu, Ponta's government in turn passed a governmental emergency ordinance to modify the Referendum Law. According to this change a simple majority could remove the President, eliminating the quorum validity condition. The only ways an emergency decree can be contested is if the Ombudsman raises unconstitutionality concerns, or if one of the parties in the course of ordinary litigation refers it to the Constitutional Court. Since Mr. Ponta was afraid of such a procedure, he (through his parliamentary coalition) removed the Ombudsman appointed by the previous administration. Eventually after international pressure the Prime Minister accepted to organize the referendum by the old

[350] Ibidem p. 5

law imposing the quorum criteria. However in another attempt to control the Constitutional Court an emergency ordinance was given to remove the Court's jurisdiction over the Plenum decisions in both of the Houses of the Parliament.[351]

All these dramatic changes that challenge the constitutionality and stability of institutions have been supplemented by several scandals of conflicts of interests involving the Constitutional Court's judges. Accordingly, it appears at least two of the Constitutional Court judges also have private companies (or their first degree relatives do) that received public contracts and benefits from the state through these firms.[352] Another judge receives disability pension while receiving remuneration, which is prohibited under Romanian legislation. And yet another judge has a record that would probably not allow her to be part of the Constitutional Court. Aspazia Cojocaru's was a Secret Service informant during the communist regime. But that is not all of it. She was convicted during Ceausescu regime for being part of a net involving several members of her family (including an uncle who was a law professor), which falsified law degrees. She and her uncle received amnesty from Ceausescu and never went to jail.[353] One can only wonder how does the Romanian Parliament and President select their supreme judges.

The Cojocaru case draws very close parallels with a similar net of law degrees falsifications in Czech Republic (discussed in the next chapter). This appears to be the

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[351] Ibidem

[352] "Judecatorii Curtii Constitutionale trebuie sa se explice in legatura cu acuzatiiile privind conflictele de interese"

[353] "Apazia Cojocaru gratiata dupa o condamnare la un an si jumatate de inchisoare"

avenue through which unqualified "judges" become part of this corrupt net who serves the misappropriation of state funds activity.

The referendum

The referendum that took place on July 29 2012 showed that 88.7 per cent of the people voted to remove the president. But the turnout was around 46.24 percent and did not meet the 50 plus 1 quorum requirement, which rendered the referendum invalid. [354] Before elections day, President Basescu called the referendum a putsch attempt and he asked the public to boycott the poll. There was some reason to believe that there may have been some sort of manipulation of the electoral lists. Due to electoral administration' lack of resources, the lists were not updated to reflect the 2011 census data. According to this last count the Romanian population decreased to its level in 1966, which means that the electoral lists were over counting the electorate by 2,000,000 people, of an estimated electorate of 18,000,000 people.[355] Since a majority of 50 plus 1

[354] "Romanian president survives impeachment referendum".*Chicago Tribune*. 5 July 2012. http://www.chicagotribune.com/news/sns-rt-us-romania-politicsbre86s0i4-20120729,0,1138271.story. Retrieved 30 July 2012; Luiza Ilie and Sam Cage (29 July 2012). "UPDATE 5-Romanian president survives impeachment referendum". Reuters.http://www.reuters.com/article/2012/07/29/romania-politics-idUSL6E8IT1NE20120729. Retrieved 30 July 2012; "Romania impeachment vote falls short, president says". CNN. 26 July 2012. http://www.cnn.com/2012/07/29/world/europe/romania-referendum/index.html. Retrieved 30 July 2012.

[355] "Romania: The political economy of a constitutional crisis," *Policy Brief # 60 July 2012, Romanian Academic Society (SAR),* p. 3

was necessary to impeach the president, then this over counting greatly hurt the over 88% of the voters who wanted to dismiss president Basescu.

Consequently, the Social Liberal coalition lead by Prime Minister Ponta made a contestation with the Constitutional Court about the method of turnout measurement. The court rejected Ponta's appeal in regards to the method of vote counting. However it went on to order the government to explain the related irregularities and to update the elections list.[356] It thus postponed the verdict about the referendum validity until after September 12. It eventually reached the verdict on August 21 and invalidated the referendum.[357] Thus, even though 88 per cent of the citizens that voted (almost half of the electorate) wanted to remove Traian Basescu, the Constitutional Court decided to allow him to come back to power.

The 'dismantlement' of the rule of law

Thus, only 3 months before the parliamentary elections in Romania, the world took notice of what they called a 'rule of law crisis.' The European Union, of which Romania is a member state since 2007, the United States, and other governments expressed outcry for the apparent dismantlement of rule of law. The measures took by the prime minister Ponta and his political allies in an attempt to remove president

[356] Antena 3 (2 August 2012). "The Court pospones a verdict until 12 September". http://www.antena3.ro/politica/ccr-amana-decizia-basescu-nu-revine-la-cotroceni-antonescu-interimar-pana-pe-12-septembrie-178532.html

[357] "Curtea Constitutionala a invalidat referendumul cu scorul 6-3. Traian Basescu revine la Cotroceni". http://www.hotnews.ro/stiri-esential-13063437-ora-10-00-incepe-sedinta-curtii-constitutionale-care-urmeaza-decida-daca-referendumul-este-sau-nu-valid.htm. and "Traian Basescu: Romanian impeachment vote ruled invalid". BBC. 21 August 2012. http://www.bbc.co.uk/news/world-europe-19332259. Retrieved 21 August 2012

Basescu from power, including removing the leaders of both chambers of parliament, firing the ombudsman, threatening the constitutional court judges with impeachment and changing the provisions of the constitutional court functions, organizing an unconstitutional referendum to remove the president, remind of a third world country in the middle of a coup. However, there was no rule of law to dismantle. That was just an episode of lack of rule of law. What all these governments fail to see is that this is not a big bang moment in Romanian politics. This is not a dismantlement of the rule of law as if it existed before. This episode is just a continuation of many others, which the international community, probably rightly busy with the economic downturn, the EU institutional crisis, and other pressing problems, failed to acknowledge as worrisome.

Unfortunately, things have been like this for a while in Romania. The administration under attack by these unconstitutional means practiced the same, while preaching for a very aggressive anticorruption program. The European Union is in actuality criticizing an *effect of the rule of law lack of establishment.* The president of the European Commission, Jose Barroso wrote in the June 2012 EU Cooperation and Verification Mechanism (CVM) report on the progress of justice reform that, "Romania has stepped back from the edge."[358] This implies that Romania was on some sort of edge of implementing reforms and establishing the rule of law. What is disconcerting is that the European Union did not until this event pay attention to the fact that things were not in any way different during president Basescu's administration. If foreign governments

[358] "Barroso: Romania 'stepped back from the edge. A new report expected in 2012", Bucharest Herald Tribune July 20 2012, "Report from the Commission to the European Parliament and the Council. On Progress in Romania under the Cooperation and Verification Mechanism" *European Commission,* July 18 2012

and in particular the EU had an interest in the rule of law in Romania they would have probably acknowledged that small steps and superficial reforms are *reversible.* And though, through conditionality, the EU contributed to the historical accident of the two anticorruption agencies, the recent events show that, for rule of law establishment in the long run, the small changes may not be enough. The EU has been the changing force. But it was not sufficient. The reaction to 'Putin-politics' in Romania proves that there is a very high level of tolerance for lack of rule of law below this threshold.

In the CVM report Romania is urged to respect rule of law and the independence of the judiciary. It specifically asked Romania to abrogate the governmental decisions to limit the Constitutional Court's functions, and to fix the simple majority provision that would suspend the president through the referendum. The report also asked the authorities to introduce a transparent process to name the state prosecutor and the anticorruption directorate chief prosecutor. Additionally the ombudsman should be a non-partisan position, while the ministers and politicians should not have problems of integrity. Other requests include the reform to make the judiciary accountable[359]. All these have been regarded as mandatory and problematic within the context of this government. But close attention shows that these have been the demands *through all of the CVM reports*. These demands never change. And the problems have not been fixed. The explanation is that short of the conditionality mechanism of integration that mandated and in a way enforced change, all of the above will remain on the agenda.

[359] "Final CE recommendations in the report about the justice system" 2012 http://www.digi24.ro/stire/Recomandarile-finale-ale-CE-in-raportul-pe-justitie_30768 July 18

The theoretical assumptions posted in this study are thus verified. Politicians will not reform the system or will dismantle the rule of law as the EU calls it, in order to prevent the accountability for their acts that would come with the rule of law. The report is "missing the point that all parties and politicians, starting with Presidents Constantinescu, Iliescu, Basescu and Justice Ministers Stoica, Stanoiu, Diaconescu, Macovei, Chiuariu, Predoiu and Corlatean, carry the responsibility for this report, for the lack of progress in the justice reform and anticorruption, for the lack of civic and judiciary education. (…) There is no evidence of the money spent on these realms of interest for CVM, and no one can truly tell what has been done with hard facts and numbers."[360]

The stakes; it becomes costly to be corrupt.

The reason why this constitutional crisis took place has a lot to do with the timing of reform. Romania is still corrupt, it does still not have rule of law. But as it will be analyzed in the following chapter, at the pressure of the European Union, it has anti-corruption prosecution agencies. These are not perfect, but they progressively contribute to the establishment of rule of law by incessantly prosecuting and sending to courts high profile politicians. Recently (June 2012), the first former Prime Minister (Adrian Nastase) was sentenced to jail. This is a great achievement. Though he allegedly staged a suicidal attempt, involved politically connected doctors and police officers in an effort to

[360] Codru Vrabie, leading member of the civil society, anti-corruption expert "I cried once for no reason", http://codruvrabie.blogspot.com/2012/07/am-plans-candva-aiurea-ro.html

escape jail time, he is now behind bars. This is a tangible outcome of the fight against corruption. The EU pressure and conditionality was the impulse, but the anti-corruption agencies are somewhat color- blind (if such a thing can exist). There could be a suspicion that they target political opponents (such as former Prime Minister Nastase), but the highest court in the nation currently judges Monica Ridzi, who was part of the governing party at the time of prosecution.

Thus, one can interpret that politicians are becoming anxious of the dire possibility that DNA and ANI , the anticorruption bodies may actually do their job. And what if, by a similar turn of events (i.e. the opposition is in power and judges are difficult to manipulate)? Then corrupt politicians, who I suspect is the majority of them, are scared. The stakes are higher than in any other country without these agencies. Which has an effect on the establishment of rule of law. Scared politicians are politicians that attempt to take and hold power by any means (see actions by President Basescu and Prime Minister Ponta to modify constitutional provisions). Being in power becomes the only way to still be in control of their freedom. I posit that even if the anti-corruption agencies are not fully independent, by continuing their work on prosecuting both sides and unpredictably leading to sentencing, then progress has been made.

The expectation is that in time the corrupt elements will find avenues outside of the political light to continue their wealth increasing activities, since this one becomes dangerous. Which leaves room for politicians with less fear and actions to hide, to push for real reform. Only then can a country hope to make substantial progress.

Concluding remarks

The Romanian example has helped uncover the mechanism at play. Presenting the link between political corruption and lack of establishment of rule of law can prove to be quite challenging. But the success of this enterprise helps policy makers and scholars to see a direct causal relation between the two and can set in motion a switch in paradigm. If rule of law cannot be established in the presence of political corruption then we need to start with politicians. Not allowing low integrity figures with ownership in private companies in parliament could be a start. Chapter 5 explores a possible solution to this apparent unbreakable cycle that involves indeed an institutional creation. The problem is that no one politician will feel compelled to create such an institution. The outside pressure and help from the EU represented a key element in the establishment of the anticorruption agency in Romania, as we will see in chapter 5. *The real problem lays in the fact that not all new democracies are in the process of integration in the Union, which means that they will be stuck in this lack of rule of law equilibrium for a really long time, for example Czech Republic,* which is the topic of the next chapter.

Czech Republic is in the same position, corrupt politicians, beneficiaries, corrupt judges, no real reform. However, it squeezed in the EU before being forced to introduce a truly independent anti-corruption agency. One of the most important characteristics of the Czech case is that the problem starts with the prosecution. Most of the times the files do not even get to judges. Since they do not have a DNA or ANI, the political pressure happens at the level of prosecutors.

CHAPTER 5. CASE STUDY CZECH REPUBLIC
-Public procurement, party finance, no anticorruption agency-

Introduction

> A genuinely functioning law-based state, however defined, does not come into existence merely by declaring it to be so in the constitution, rather a whole host of further factors are involved, only some of which are of purely juridical nature.
> Hendrich Dusan[361]

Czech Republic was set up as the critical case for the first hypothesis that misappropriation of public funds for private gain on behalf of top politicians prevents the establishment of rule of law. Due to a set of resilience mechanisms Czech Republic should have been able to overcome the first years of confusion after the fall of communism and strengthen its rule of law. This is a country that had a democratic past and the experience of rule of law between the world wars. It had high economic growth during the transition years, and it is neighboring the Western advanced democracies more than any other former communist country. The expectation was that rule of law will be more prevalent here than in Romania and that the Czech politicians introduced reforms to strengthen it for the past two decades. The findings show otherwise. Czech Republic is a highly corrupt country and the rule by people is more widespread than the rule of law. This strengthens not disproves the first hypothesis. This chapter will uncover these findings.

[361] Hendrych Dusan "Constitutionalism in the Czech Republic," *The rule of law in Central Europe. The reconstruction of legality, constitutionalism and civil society in the Post Communist countries,* eds. Priban Jiri and James Young, Ashgate, Dartmouth, p.13

Thus, not unlike advanced democracies, it was expected that some level of corruption is present in Czech Republic. Privatizations, restitutions, and links between interest groups and politicians customarily lead to preferential contracts. However, based on the evaluation that this country is one of the most successful cases of democratic consolidation, one would be surprised to find a level of corruption expected only in developing countries. Many politicians facilitate public procurement contracts through ministries and other public institutions. From these contracts they extract a commission that is later used for personal enrichment and to finance electoral campaigns. A network of politicians, business people, bureaucrats, prosecutors and judges, facilitate the derailment of public funds towards 'the beneficiaries' (business people) and their political protégés. The anonymity of the actors is protected most of the times by what is known as the 'bearer shares',[362] courtesy of which, there *is no legal provision to require that the identity any company owner should be disclosed*.

In parallel with this process, politicians are in charge with drafting legislation and reforming institutions, which creates a fundamental conflict of interests. This chapter shows how politicians, in order to protect this preferential practice, intervene in the justice system, put pressure on the prosecution and judges, and are never punished for their deeds. The most damaging consequence is the lack of reforms for enforcement mechanisms. As it will be shown further down, this mechanism involves politicians from

[362] Czech Republic is one of the few nations to have a provision under which owners of companies can have "bearer shares." This is an equity security wholly owned by the person who holds the physical stock certificate. This is a very convenient way to cover the true ownership of a company. Kenney, Brian, "Justice Ministry to propose scrapping 'bearer shares', *CzechPosition.com,* http://www.ceskapozice.cz/en/news/politics-policy/justice-ministry-propose-scrapping-%E2%80%98bearer-shares%E2%80%99, March 3, 2012

all sides of the political spectrum; no one is interested in building a coalition to push for reform.

These acts are also masked by misleading rhetoric. Since the media is relatively free, the citizens took note of the wrong doings. However, people do not have a voice. They only have elections. And in elections, they vote lately for the ones that promise to cure corruption. As the Czech case will illustrate, this is a very efficient practice to get in power, only to benefit from a system that does not apply the law. So, after campaigning on an anticorruption ticket, politicians come to power to dilapidate the state funds. The Czech Public Affairs party, created by a business-person owning the biggest security firm ABL, who targeted the Ministry of Interior is a classic.

This chapter will cover some of the most prominent cases and their resolve, or lack there of, and analyze the facts in light of the set hypothesis, that misappropriation of public funds by politicians, leads to the prevention of establishment of rule of law. The findings show that Czech Republic, the most 'successful' case of democratic consolidation in the former soviet sphere of influence, is far from what is expected. Lack of rule of law and highly corrupt politicians, illegal misappropriation of state money, all point to an incomplete consolidation process. In light of these findings, there is a need to re-evaluate what scholars' mean by consolidation or, drop multiple countries from this category in an effort to more accurately define and measure democracy. These findings also have implications for the European Union policy making. Unless Europe wants to be facing multiple crises and political instability within its territory it has to devise better measures to monitor and enforce the application of laws. Rule of law reforms, like in the

case of Romania (which will be analyzed in the following chapter) should be a primary objective before situations like Greece happen again. Though Czech Republic is not in the Euro[363] zone yet, EU still has to acknowledge more that its Southern and Eastern sides practice rule by the people more than the rule of law and that may not be the best for the stability of all the other member states.

Public procurements for party finance

The mechanism

The actual mechanism of misappropriation of public funds and the interference in judiciary, along with superficial reforms in Czech Republic is very similar to the one in Romania, which cross verifies the general application of this framework. Thus, regardless of the initial conditions and unpropitious environment, corruption is a very sticky phenomenon that harms rule of law even in potentially advanced new democracies. Accordingly, we find the same actors at play. Politicians in power appoint their loyal officials to head public institutions. Same politicians either hold stakes in private companies with interest to state businesses or have close ties with business 'beneficiaries' that do. Politicians, put pressure on their appointees to illegally rig the bidding process and grant the contracts (of up to billions of euro/dollars) to their companies or friend's companies. Czech Republic's politicians have an immense advantage, and the rule of law

[363] Only 17 out of the European Union member states are part of the Euro zone; neither Romania nor Czech Republic are part of those 17

an immense disadvantage. In this country it is not required by law to publicly declare who holds a company's shares. This is very different than in Romania, where we saw that there is transparency in regards to private ownership, *and* politicians are actually required by law to publicly declare their wealth and shares in companies.

Once the public contracts reach the politicians companies, many times there is a process of money laundry that redirects huge sums, later allocated to party finance. This happens because the party finance law allows only small contributions, while the party membership is very low. However, in order to win elections politicians have to spend a lot of money on billboards and advertising in order to win. If the money is not used for elections it is kept for personal enrichment. In the event that politicians use companies in which they do not have shares, then they receive only a percentage of the contract (5-10 per cent) in bribes.[364] Usually, since the contracts are so large (millions of dollars) that makes for a lot of money. These sums are usually deposited in foreign banks in order to lose track of it.

Since the fight against corruption became a national goal, the media uncovers these schemes. However, when the police starts investigating the corruption allegations, the politicians massively intervene around prosecutors and judges to drop the charges and to give favorable sentences. If, by any chance the files do get in front of the judiciary, politicians may receive sentences with suspension. Which means that they never pay for their deeds (with their freedom or money). In fact, they maintain their parliamentary seat in most cases (e.g. V. Barta from the Public Affairs Party). The need to keep the

[364] Cross verified with different sources interviewed

intervention in the justice system an open option makes politicians weary of making serious reforms to establish rule of law. Thus, rule of law enforcement mechanisms (truly independent and impartial judiciary, anticorruption agencies, and police) can never be established because they would put the very freedom of their creators in danger.

Thus, due to this conflict of interests, the country remains in the state of permanent lack of rule of law, which has severe consequences for citizens in Czech Republic. Many citizens, mostly wealthy and connected citizens, can make use of these dysfunctions at the expense of the innocent people. From this point of view not much has changed since the fall of communism. If justice equals connections then there is no rule of law, but "the rule by people above the law." This says a lot about the stage of democratic consolidation in Czech Republic.

The people confirm

Since political corruption is for the most part a hidden activity I could not directly observe how they misappropriate the funds and take bribes (give bribes) or how they make phone calls to judges and put pressure on the judiciary. So I chose two avenues to proof my hypothesis. One is through cross verification from several sources and one is through case studies of corruption cases that have been already uncovered by the media and in some instances have been also trialed. In this section I present proof using the first method. I systematized their responses and I found that most interlocutors agree with all the details of the above-described mechanism.

Here it is in the words of one Ernst and Young Senior Manger, "there is a very strong suspicion that political parties are financed by granting public contracts to companies and requesting some percentage of those contracts. This flow of money goes into the party's accounts to finance their campaigns. This money is not official and not disclosed. It does not show up on the firms accounting, because it would be illegal and it would prompt questions about the involvement of politicians in the transaction"[365]. It is usually a big institution, which awards a big contract. "For example the ministry of transportation, which is awarding a contract for freeway construction, or the ministry of interior involved in bribery to award military contracts.[366]"

Vaclav Zak, former signatory of the Charta 77 and former vice chair of the parliament exclaimed, "In Czech Republic there is no rule of law because there are rules that cannot be enforced."[367] Czech Parties are very small, around 2000 to 3000 members, so they have very small contributions. "The people who make contributions like to use black money, because this way they can cut taxes."[368] If they make contributions to the

[365] Tomas Kafka, senior manger Ernst & Young, Fraud Investigation and Dispute Services, June 19 2011. In Czech Republic this relationship was confirmed by Pavol Fric, Charles University, Tomas Hudececk, from the Ministry of Justice, Victor Cech Deputy Minster at Ministry of Interior, David Ondracka the Director Transparency International, Lenka Andrysova MP from the Public Affairs Party, Petr Brichacek lobbyist, Vladimira Dvorakova, President of the Accreditation Commission and head of the Political Science Department at the University of Economics in Prague, Vaclav Zak former MP and President of the Council of Radio and TV Broadcasting and a businessman F. (he preferred to remain anonymous) involved as an intermediary in this process, Jonathan Stein editor Project Syndicate, Michael Smith academic, Jan Kovar Proferssor Political Science, Karel Janecek member of the business community and founder of an Anticorruption NGO.

[366] Kafka, June 19, 2011

[367] Vaclav Zak, June 28, 2011

[368] Ibidem

party officially, then they have to be taxed. "So that's why they use dirty money (…) and this money is produced by public orders (…). And the amount of money is tremendous, billions and billions of crowns, in soft money for the party. The billboards are the most expensive"[369] Political parties invest indeed a lot of money in the campaigns. They have to because they depend on this 'dirty' money to win elections[370].

The electoral competition is extremely tight in Czech Republic, "around 50:50 on each side, so if you move let's say the few undecided through marketing, that could make you the winner of the election"[371] Indeed, during the May 2010 elections for the Chamber of Deputies the CSSD obtained 56 seats with 22% of the votes (a count of 1,155,267) and ODS scored 53 seats with 20% of the votes (a count of 1,057,792), that is a difference of exactly 97,475 people[372]. Can this be considered electoral fraud? It is difficult to tell, but it is an interesting idea to explore later.

Karel Janecek (owner of an anticorruption NGO) also confirmed that big state tenders in which government officials have a stake are the most damaging cases of corruption for the rule of law. "Politicians can keep doing this since many of them are not visible due to the bearer shares."[373] I asked Janecek why do politicians not change that,

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[369] Ibidem

[370] Fric, June 30, 2011

[371] Brichacek, June 27, 2011

[372] Official election website www.volby.cz. In Romania In 2009 President Traian Basescu won elections with 5,091,432 votes versus his opponent who received 5,004,503 votes, a difference of only 86,929[372].

[373] Karel Janecek, member of the business community and founder of the Anticorruption Agency June 20 2011, Prague

and make things transparent. Janecek confirmed the set hypothesis as well, "*because it is stupid, and they do not want to cancel that. Because it would be against the people in the parliament. Many of the people that should cancel that are in the parliament and they are themselves corrupt*."[374] The anti-corruption strategy, he added, has a minimalist approach. The public procurement law is good. But the problem is that "as it goes into the parliament they will try to weaken it. There are some things that are good. But the question is, will they be implemented? The government has to do something because it promised and because people want it, but in the end they will do as little as possible, they just want to show that they are doing something, to satisfy the people."[375]

So, on the one hand there is the problem of parties financing, second, there is no professional bureaucracy, because there is no reform on the civil service,[376] and third there is no enforcement. If you do not have transparent party funding you cannot have a transparent functioning of the state, because the political parties are to some extent dependent on how the procurement is distributed. If you do not have professional administration, the political appointees cannot reject politician's requests, because they want to keep their jobs, and in the end there is no predictable enforcement of laws from the enforcement authorities[377]. The dismantlement of the rule of law comes with this last

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[374] Ibidem

[375] Ibidem

[376] Vladimira Dvorakova, President of the Accreditation Commission of Czech Republic, Head of the Department of Political Science, University of Economics Prague, July 2 2011, Prague

[377] This relation has been confirmed to me in an interview with Tomas Hudececk, form the Ministry of Justice, at the Department for International Organizations and International Cooperation June 27 2011, Prague

link. "The prosecutor's office lacks independence and constantly comes under pressure to drop cases[378]."

If politicians wanted to punish this behavior they would be changing the electoral law, which allows for this behavior. However they are not doing it. To change the law a majority in parliament would be needed. Not one of the larger parties has 50 per cent of the votes because it is a proportional system. So, they have to rely on other parties. The conclusion is that there is not enough politicians interested in changing the law to give political parties other means of acquiring money, such as cutting taxes on direct donations, or cutting deals on the billboards[379]. Nothing has changed in terms of legislation[380] to fix this issue for a decade.[381] Answering my question "why would they not change the law?" my interlocutor, confirming the hypothesis tested in this case answered, "*because the law needs to be modified by the politicians to change the system, and they are afraid that if they do that, the result will not be good for them."*[382]

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[378] Jonathan Stein, member of the Editorial Board of Project Syndicate confirmed this in an interview on July 4 2011 (Project Syndicate provides the world's leading newspapers with exclusive commentaries by prominent leaders and opinion makers) http://www.project-syndicate.org/editors-page. Karel Janecek, 2011

[379] Brichacek, June 27, 2011

[380] "The general rules concerning political parties and political movements in Czech Republic are the articles No. 5 of the Constitution and the articles No. 20, 21 and 22 of the Charter of Fundamental Rights and Freedoms. Other laws define the State's financial contribution in order to cover part of the electoral campaign expenses (law number 247/1995 Sb. specifies electoral rules, also amended several times). Another specific law also regulates political parties' finances in the case of elections in the European Parliament (62/2003 Sb.)." Perottino, Michel, "Political Parties Finances in Czech Republic," EUROPEUM Institute for European Policy

[381] Michael Smith, June 21 2011

[382] Brichacek, June 27 2011

An even stronger example to support this hypothesis is the fact that political parties in Czech Republic cooperate not to modify the laws to hold themselves accountable. For a period of time they did not allow conflict to lead to accountability. For instance due to the Opposition Agreement of 1998, after ODS came to power there was no initiative to investigate cases which happened before. "They have an agreement[383] to not attack each other in the field of corruption and bribery."[384]

A very large proportion of the official and high profile people interviewed agree with the statement that the biggest problem in Czech Republic is the lack of enforcement. The enforcement agencies do not have the proper tools for the rule of law. [385] *And the people who are supposed to make the changes "have their hands sank into these companies. And some of them are protected by the bearer shares*."[386] I would not go as far as to assert that there is no enforcement. What lacks is the predictability of enforcement, which is very damaging to the rule of law.

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[383] In 1998 Czech Republic defied the rules of democracy to channel conflict through institutions and concluded a pact between the power and the opposition. The Opposition Agreement was signed between the party then opposition ODS, and CSSD. It pledged that it would provide confidence and support to the CSSD government. This pact canceled the basic function of the opposition to bargain and negotiate for fair ruling. " Basically the opposition decided to give up its own purpose and its main purpose to criticize the government in exchange for stability if you can call it that way, in exchange for, of course, positions in some business government institutions and so on." (Ondracka, June 24, 2011) This pact was replaced by the 'Patent of Tolerance' in 2000 and completely eliminated in 2002, when the opposition assumed its rightly intended role.

[384] Kafka, June 19 2011

[385] This has been confirmed by Mr. Horni PhD. expert in anticorruption at the Ministry of Interior June 23 2011, Prague

[386] Jan Kovar, June 19, 2011

In the following section I turn to presenting the hard proof from several case studies that show the link between political corruption and the lack of establishment of rule of law explored in this study.

Cases

The following cases highlight the first mechanism indentified in this study that links the corrupt politicians and the delayed establishment of rule of law. Accordingly, after misappropriating public funds for private gain, politicians sometimes are caught. In order to prevent punishment they intervene in the judiciary to stop the investigations, to stop the prosecution, to delay the execution of the files, to avoid sentencing, and eventually to receive a sentence that acquits them. The following cases highlight this first mechanism. Though this is a concealed activity the outcomes are obvious. Further down I will explore the second mechanism, the lack of reforms that lead to the establishment of rule of law.

Drobil and the environment

A noteworthy case that captures the relationships under study, the misappropriation of public funds for party finance, the abuse of public office, the relationships between politicians and their appointees, and the interference in the

judiciary with the respective effects for the rule of law establishment is the Drobil case.[387] It involves Pavel Drobil, the former Environment minister from the Civic Democratic Party (ODS) and one of his deputies turned whistleblower, Libor Michalek. Drobil was caught staging to grant a preferential contract for a water-treatment facility. This is illegal in Czech Republic and its prosecuted by the Criminal Code Act no. 40/2009 Sb., art. 256 (in regards to facilitation of preferential treatment in public procurement, public tender, or public action). Michalek recorded one of the minister aides when he was describing how to manipulate a government tender for a water-treatment facility, so that they can embezzle money for Drobil and an ODS party fund. Michalek presented the recordings to Drobil, but instead of turning the aide in to the police, Drobil was also caught on tape asking Michalek to destroy the evidence in exchange for a promotion. Bribing is also prohibited by the Criminal Code (Act No. 40/2009 Sb.)

The case emerged in the press and Drobil fired Michalek and denied any involvement. The Prime Minister Petr Necas (ODS) asked Drobil to resign, though he kept his position in the parliament as an ODS deputy chairman. The aide that was involved in the case was prosecuted, while the Municipal Prosecutors Office dropped Drobil's case. This shows the preferential treatment given in a highly corrupt justice system to protect high ranked politicians.

[387] This has been confirmed in an interview with Michael Smith on June 21 2011

When a spokeswoman for the Municipal Prosecutor's Office was asked why Drobil's charges were dropped she responded that, "We do not provide answers to this question."[388]

This situation lead to a dispute between the police unit for combating Corruption and Financial Crime (UOFKF) and the office of the Prague Municipal State Attorney (PMSZ) because the latter stated that it was the police who in fact wanted to close the case, which was vehemently denied by the police. The police president wanted to ask the Chamber of Deputies to release Drobil for prosecution, since because he is a member of parliament he has immunity, but the Prague Municipal State Attorney rejected this request and wrote an order to "officially shelve the case by 11 am" on that respective Friday. Another police representative confirmed that his unit had to shelve the case at the prosecutors' office demand, despite coming to a contradictory conclusion.

On June 18, 2011 the Prague Municipal State Attorney stated that the investigation of Drobil had been dropped at the recommendation of police. Their spokeswoman publicly declared that detectives had found no evidence of crime.[389] "It is ridiculous that the government has an anti-corruption strategy while in this particular case acts the complete opposite (…) Drobil has not left politics at all. What I find inappropriate is how politicians always say 'Let's allow an independent investigation to

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[388] Cunningham, Benjamin, "Drobil aide accused of bribery. Police say probe of former minister was swept under the carpet," *The Prague Post,* http://www.praguepost.com/news/9776-drobil-aide-accused-of-bribery.html, (August 10, 2011)

[389] Lehane, Bill, "Drobil case is dropped, raises ire. Police say Prague state attorney ordered them to stand down, *The Prague Post,* http://www.praguepost.com/news/9157-drobil-case-is-dropped-raises-ire.html, (June 22, 2011)

proceed, and if we're found guilty, then we'll resign,' but then there is no independent investigation,"[390]

This is a very good example of the link between political corruption, involvement in the prosecution and lack of reforms. Thus, in Czech Republic the law does not protect the whistle blowers, which is another reason why one may conclude that politicians do not pass laws that would really lead to their punishment. Accordingly, Mr. Michalek was fired and Drobil is still in the Chamber of Deputies. Karel Janecek's Anticorruption NGO awarded the whistleblower a prize of around 50,000 euro for his brave act. However, that is not a guarantee for every whistleblower. On the other side of the battle, at the ministry of interior, deputy Victor Cech, himself in charge of the anti-corruption strategy, explained to me that Mihalek made a mistake. Even if he had a statement from the minister he still could have not used the recordings because they were conducted without approval from the public prosecutor in charge.[391]

In a country ranked as high as Czech Republic ion the rule of law indicator, one can be surprised to find instances of such blatant intervention with the prosecution to drop Drobil's file. Certainly, I was not there to see how it happened, but the outcome of this and all the following cases that I present, are sufficiently telling. They all capture the same outcome, the lack of prosecution, the feeble attempt to prosecute, the dismissal of files, the delay of files, and eventually the lack of sentencing. As per the discussion in chapter three under general findings I conclude that, such a large number of occurrences

[390] Ibidem Ondracka

[391] Victor Cech Deputy Minister, Ministry of Interior of the Czech Republic, in charge with the implementation of the Anti-corruption strategy June 23 2011, Prague

could hardly be random. This is a habit, a normal practice with severe negative consequences for the establishment of rule of law. These same politicians that interfere with the judiciary are in charge with reforming it. Just as in Romania, this is a very stable undesired equilibrium kept so by the politicians themselves.

Unfortunately Drobil has not paid for his acts and he is still a member of the parliament at the time this research was concluded. He is probably one of the politicians that would not vote for reform.

Too many Grippen planes

This is another case that involves top political corruption, high ranked politicians from both sides of the political spectrum, lack of investigation, prosecution, and sentencing. This is an important case because since foreign companies are involved we can make a comparison with the procedures executed in the advanced democracies with established rule of law versus the lack of procedures in Czech Republic. This case underlines the same problem as the Drobil one. The corruption, though uncovered, does not lead to prosecution. There is more likely than not important intervention from the involved politicians to cover the cases.

The purchase of two dozen JAS-39 Gripen jet fighter planes by the 2002 Social Democrat (CSSD) prime minister Milos Zeman, may be regarded as one of the biggest suspected corruption cases in Czech Republic. There have been allegations of bribery involving the British defense and aerospace group (BAE Systems), which is part of a

consortium with Sweden's Saab SA bid to sell Gripen planes to Czech Republic[392]. Bribery, preferential granting of public contracts, and facilitation of preferential treatment in public procurement are prohibited by the Criminal Code (Act. no. 40/ 2009 Sb., art. 256-258). The inherent conflicts of interest involved in this practice are criminalized by the Conflict of Interest Law (Act. No. 159/2006 Coll).

Swiss prosecutors have been investigating these allegations of bribery after a group of investigative journalists from Sweden got a tip that there was something wrong with this deal. The source confirmed that he worked on the Gripen deal and claimed that he had details of how systematic illegal payments have been siphoned to influence politicians. The reporters' investigation was the topic of a documentary series "Gripen: the Secret Deal" which brought to light a massive network of alleged bribed, shell corporations and secret contracts. The journalists were disguised as business intelligence agents and used hidden cameras. They caught on tape Jan Kavan, a high level Czech politician, former president of the United Nations General Assembly explaining that Czech politicians from all sides of the ideological spectrum had accepted bribes from this deal[393]. This is probably anyone would ever come to a confirmation of one of these corrupt deals, short of an official investigation.

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[392] Shabu Martin, "Swiss misfired in seeking Czech help on Gripen bribery case. Swiss OECD official sparked diplomatic incident by claiming Czechs failed to answer request in Gripen jet figher corruption probe" czechposition.com, (December 21, 2011)

[393] Frontline/ World, "Sweden: Uncovering the Secret Deals", http://www.pbs.org/frontlineworld/stories/bribe/2009/03/sweden-uncovering-the-secret-deals.html it includes footage of the actual conversations with the politicians, 2009

Bribery in army contracts is not unusual[394], but this case is relevant from the point of view of rule of law establishment. While the Swedish, British, Switzerland and other governments prompted investigation, Czech officials repeatedly refused to cooperate with the Switzerland federal prosecutors office. There has been criticism within the OECD working group on Combating Bribery of Foreign Public Officials in International Business Transactions, directed to Czech officials, and there is evidence that the local prosecutors made serious errors in handling the case.[395] While other countries are proceeding with applying the law and Mendsdorff-Pouilly, a BAE lobbyist, was arrested in Austria in relation with money laundering and bribery in this deal, in Czech Republic the prosecution dropped the case twice and there is no advancement or resolve[396].

Both the Grippen and the Pandur (further down) cases are corruption files that are being investigated in other countries too, but Czech Republic did not ever come to any results. British investigators found out that there was a "horrible amount of dirty money offered to the Czech, but nobody was accused, although there was suspicion that politicians took money from the representatives of Gripen. The police received information from Great Britain but nothing happened in Czech Republic."[397]This happens because there are huge problems of enforcement. "The reason there is no investigation

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[394] TI report on military

[395] Frontline/ World, "Sweden: Uncovering the Secret Deals", http://www.pbs.org/frontlineworld/stories/bribe/2009/03/sweden-uncovering-the-secret-deals.html, 2009

[396] Ibidem

[397] Pavol Fric, June 30, 2011

success is because there is no political support to investigate these cases[398]." In the case of Pandur, there has been an investigation in Austria with a witness that was supposed to remain protected. They provided this name to the Czech authorities but somehow the name leaked out. The state prosecution was coordinating the investigation and four people had access to the information. So it was a top-level leakage. The influence and pressure happens at all levels of the justice system. "Politicians can exercise force on the police, on the prosecutors, on the judges (…) they can always exercise pressure to stop the cases."[399]

Army contracts, Pandur

One of the most prominent corruption cases in the Czech Republic is the purchase of the armored personnel carriers (APC) Pandur. Czech politicians are behind this billion-dollar contract between General Dynamics' Austrian subsidiary Steyr and the Czech Ministry of Defense.[400] Both sides of the spectrum are involved, with politicians from the center-left, the Social Democrats (CSSD) and the center-right, the Civic Democrats (ODS). Both party leaders, Jiri Paroubek (CSSD) and Mirek Topolanek (ODS) are claiming that the other has more responsibility in the affair. Allegedly the sum of 18

[398] Kafka, June 19 2011

[399] Ibidem

[400] Wikileaks

million euro was to be cashed by the prime minister at the time, Topolanek.[401] The key politicians in this case, deny the involvement. None of the big players has been sentenced or ever prosecuted. This case highlights the propensity of the Czech government for public procurement mismanagement due to lack of transparency,[402] and the lack of prosecution and sentencing due to political interference in the judiciary.

In 2003 a decision was made to replace the old Soviet vehicles with 240 new APCs. The center-left CSSD government led by Jiri Paroubek, made the decision to purchase the 199 Pandurs with an option for another 35, of total value of 20.8 billion crowns (about 1 billion dollars) in 2006. In 2007 the center-right ODS government led by Topolanek withdrew the order based on a breach of contract by the Austrian supplier Steyr.[403] This was only temporary. Within a half year, the same government came over the decision and ordered 107 Pandurs for 14.4 billion crowns (700 million dollars).[404]

The scandal involves the allegedly 6% of the Steyr's Pandur contract that was distributed as payoffs to CSSD and ODS.[405] Several high profile politicians are involved, among which Kuehnl who actually signed the contract with Steyr in 2006 (later became Czech Ambasador in Croatia); Martin Bartak (former ODS Minister of Defense), who signed a renegociated form of the contract with Steyr, in his position of then Deputy of

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[401] "Respekt: Pandur case shows Czech corruption network's bases not firm," CTK *Prague Monitor Daily* (May 17, 2011)

[402] Wikileaks

[403] "Respekt: Pandur case shows Czech corruption network's bases not firm," CTK May 17, 2011 *Prague Monitor Daily*

[404] Ibidem

[405] Wikileaks

the Ministry of Defense; Jiri Paroubek (CSSD party leader at the time), whose administration approved the deal in 2003. Lobbying for army contracts is very common in any country and in particular in advanced democracies.[406] This case is different though, because it involves bribery. It involves the purchase by the state of overpriced, and probably unnecessary equipment and extracting a commission for party finance all prosecuted by the Criminal code Act. No. 40/2009 Sb.

This case also has clear elements of interference in the justice system. In late 2006 the Anticorruption and Financial Crimes Unit (AFCU) of the Czech National Police started an investigation of this tender. However the investigation was 'moved' to a Special Department of the Czech Military Police (note the practice of moving files). The military police concluded that the tender "has been conducted in accordance with the rules."[407] The Austrian authorities though, hearing that some journalists have recordings of the politicians planning for this corruption act, asked them for the tapes. Back on the Czech side, the police hearing about the attempt to investigate this crime, proceeded with a raid on the main suspects' residencies trying to find and hide and evidence. Only six weeks later they started questioning the suspects. In the meantime the suspected actors had time to coordinate the stories and hide the evidence.[408]

This case is relevant because it exemplifies the extent to which the Czech police are involved in these corrupt cases at high level. It also illustrates very well the

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[406] Ibidemn

[407] Ibidem

[408] "Respekt: Pandur case shows Czech corruption network's bases not firm," CTK May 17, 2011 *Prague Monitor Daily*

relationship between political corruption, party finance and involvement in the judiciary. Cases like these, which are not isolated but common create incentives to keep the accountability system unreformed and not introduce rule of law enforcement mechanisms.

The Public Affairs party is after public money affairs

In 2010 people became tired of corruption and voted for change. Two new parties became popular before elections, TOP 9 and the Public Affairs (VV). V. Barta, a very successful businessman owning the biggest security firm in Czech Republic ABL, created the Public Affairs party, as it later turned out, as a business model. He put in charge a very charismatic journalist Radek Jon, and surrounded himself with very attractive women, invested a lot of money, and won elections.[409] This is relevant only because of the elections campaign that this party ran. Lenka Andrysova, MP from the Public Affairs confessed to me in an interview (2011) that, the party members sat down and thought about what people would be interested to change. And they realized that the catchiest phrase would be 'to fight corruption.' So they faced elections with an anticorruption ticket.[410] Unfortunately, this party turned out to be a big disappointment because of alleged corruption involvement of the ABL Company run by Barta.

[409] This has been confirmed by Jan Kovar, June 19 2011

[410] Lenka Andrysova, Member of the Czech Parliament form the Public Affairs Party, June 29, 2011

The media revealed in 2011 that the Public Affairs Party (VV) was a political project run by the owner of the private security agency ABL, created with the goal to gain public procurement orders. When it was established in 2001, the party operated as a civic initiative of Prague residents. But in three years, people from ABL started being accepted as members. ABL, one of the largest security firms in Czech Republic has a majority of contracts with Prague's public and local governmental institutions.[411] Part of the business plan to gain popularity with the party was the nomination of a popular investigative journalist Radek Jon as the head of the VV party.

They won approximately 11 per cent of the vote in the parliamentary elections in 2010. Their slogan to fight against 'political dinosaurs' gained them a lot of attention and votes. The Public Affairs Party entered a coalition with The Civic Democratic Party (ODS) and TOP 9. [412] The unofficial leader of the party Vit Barta, the owner of ABL sold his company to his brother after elections, and became the Minister of Transportation. The party received a total of four ministerial seats. The deal however was that VV gets the Ministry of Defense. Though ODS and TOP 9 opposed this deal because they did not want people linked to ABL to be in charge of the Ministry of Defense due to conflicts of interest, they VV party still received the seat.

In November 2010 Radek Jon the former minister of interior from the Public Affairs Party, ordered a forensic audit from Ernst and Young at the Ministry of Defense. A senior manager at E&Y has confirmed this to me in an interview, in June 2011. They

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[411] Groszkowski Jakub "The government crisis in the Czech Republic" *Center of Eastern Studies,* (April 13, 2011)

[412] Ibidem

investigated the police and fireman headquarters and above all, the organization responsible for the facility management and purchasing, which is in charge of most of the public contracts, and a lot of illegalities were uncovered. They found many cases of manipulated tenders, some attempt to embezzle state property and antitrust violations of suppliers[413]. Later, Kudice, the prime minister, replaced Radek Jon, because his party was involved in these problems. There was some wiretapping of discussions in which it is stated that he wanted to facilitate contracts to the company. Radek was not involved, but Barta the de facto party leader was involved[414]. "The minister's meetings were taking place at Barta's apartment and that's because he is the absolute leader" …"this party was supposed to be the leader for anticorruption but in fact, it is exacerbating the problem."[415]

A political crisis was started when several MPs reported to the media that Barta bribed them to keep secrets about the 'mysterious' ways the party was financed. [416] Lenka Andrysova, MP for the VV party, confirmed to me in an interview in 2011, that Barta has offered indeed those sums of money but that he pretends that he was just lending the money to them for school and other expenses, and that it was not bribery money. [417] The conversations about these bribery allegations became public after one of

[413] At the time of the interview with the Ernst & Young employee there was yet no criminal complaint in regards with these allegations or no public record. Tomas Kafka, June 19 2011, Prague

[414] Kafka, June 19, 2011

[415] Kovar, June 19, 2011

[416] Ibidem

[417] Lenka Andrysova, June 2011

the Public Affairs MPs, Kristina Koci recorded Barta and made the tapes available to the media. Consequently Barta resigned from his post of minister of transportation and two other ministers with connections with ABL were dismissed.[418] Barta was prosecuted for bribing Kristina Koci and another MP, but the court imposed in April 2012, an 18-month suspended sentence with a 30-month probation on him.[419]

This case is very relevant for the first hypothesis. We first have a rent-seeking businessman that creates a party to misappropriate public funds for private gain, then, under a lot of pressure from the media and the civil society he is prosecuted, but his trial ends with an acquittal. One can only assume that him or someone on his behalf intervened for him with the judges. Given the insurmountable evidence against him (bribery, preferential granting of contracts, abuse of office for private gain, intimidation) there are not many other explanations for this acquittal. This corrupt politician is still a member of the Parliament. He is most probably not going to push for reform to punish corruption and create rule of law enforcement mechanisms due to his conflict of interests. As we see from the other cases this is not an isolated occurrence. These examples just add up to paint the picture of a class of politicians in search for public money that stalls the process of rule of law establishment.

[418] Groszkowski Jakub "The government crisis in the Czech Republic" *Center of Eastern Studies,* April 13, 2011

[419] "Czech court gives suspended sentence to VV's Barta for bribery" April 13, 2012

Undermining rule of law establishment

Pressure on prosecutors and judges

The legal system "is not in a good condition. There is an understanding between the police force and the prosecution, and it is in the hands of the politicians."[420] This section presents more evidence about the dysfunctions in the judiciary.

A key figure in this dysfunction has been Vladimir Rampula, Prague's Chief Prosecutor. The Czech Minister of Justice Jiri Pospisil removed him from office twice on corruption charges. He accused Rampula for holding key corruption investigations and mishandling of major privatization cases, which cost the state tens of billions in damages. He was potentially responsible for many of the files dropped in the cases highlighted above. He was apparently involved in the Czech Coal deals and the infamous Grippen case. This story is relevant because it shows the strength of the corruption network in a state without rule of law.

Despite the corruption charges, and though he was dismissed in July 2011 by the minister of justice, Rampula was able to take his office of Chief Prosecutor back in February 2012. This was possible because the Municipal Court in Prague decided that even if his subordinates had made mistakes, Rampula was not responsible for correcting these mistakes and he had not failed to fulfill his responsibilities. This allowed Rampula

[420] Brichacek, June 27 2011

to go back to work the following day.[421]For a while Rampula continued as Chief Prosecutor besides all these allegations. In June 2012 though, The Supreme Administrative Court (NNS) struck down the Prague Municipal Court ruling in favor of the cassation complaint by the Minister of Justice, based on evidence of serious misconduct[422]. Thus Rampula was eventually removed from office.

Unfortunately, based on the evidence that in Czech Republic the politicians and the judiciary act above the law this may not the end of it. This does not mean that Rampula has been convicted and paid for his mistakes. It just means that the decision is going back to the Municipal Court of Justice. Some say that this is a major moment for the shape and direction of the Czech Justice. "The dispute went so far that Pospisil (the Justice Minister) is considering the reform of the prosecution system even the elimination of the Supreme Prosecutor's Office as a whole. The Minister said that if the concept fails in the Cabinet, he will resign his post."[423] It would be interesting to see how Mr. Drobil would vote on that. Others would be worried that the file will just end up in the hands of the corrupt network. "It is a clientelistic network, and maybe they are not the same people that were before but it is still functioning as a network."[424]

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[421] Kenety Brian "Top Czech court upholds justice minster's sacking of Prague prosecutor. Vlastimil Rampula has been accused of dragging his feet on political sensitive corruption cases, hampering investigations, *Czech Position* http://www.ceskapozice.cz/en/news/politics-policy/top-czech-court-upholds-justice-minister%E2%80%99s-sacking-prague-prosecutor, June 6 2012

[422] Ibidem

[423] Novacek George, "The Supreme Administrative Court upheld Pospisil's complaints, Rampula end as Chief Prosecutor, *Mediafax,* 2012

[424] Vladimira Dvorakova President of the Accreditation Commission and head of the Political Science Department at the University of Economics in Prague July 2 2011

The over-the-weekend law degrees

One very disconcerting scenario that has been uncovered by the Accreditation Commission in Czech Republic, lead by Vladimira Dvorakova a political science professor, involves a very complicated net of judges, prosecutors, policemen, politicians and businessmen. This discovery involves a law school that was illegally enrolling students and giving law and other degrees in just a few weeks or months. This case is relevant for this study since it involves the invisible net of politicians, judges, political appointees that are potentially linked to the public tenders-party finance scheme.

According to this commission, high rank officials and a network of people from the judiciary were acquiring law degrees in a few weeks and then they were incorporated into the judicial system. They, it is assumed, are part of this network of judges, prosecutors, and policemen that can be blackmailed and manipulated. Additionally, the Dean of the law school in Plzen was also serving over the Institute of State Law, responsible with the state property, which is the target of public funds corruptions allegations. To date no one was prosecuted in the case. In an interview in July 2011, Dvorakova confirmed to me that she is still committed to putting pressure to see people justly trialed in this case.[425]

It all started with a student at the University of West Bohemia law school who uncovered that the Vice Dean Ivan Tomazic had plagiarized his dissertation.[426] The

[425] Vladimira Dvorakova, President of the Accreditation Commission of Czech Republic, Head of the Department of Political Science, University of Economics Prague. July 2 2011
[426] "Scandal in Bohemia" and Wikileaks id #233660

media then uncovered that several politicians, law faculty, police officers, custom officials, and even mafia figures' first-degree relatives received law degrees even though they have not completed the five-year program.[427] Among other irregularities the admission process lacked transparency, several theses and dissertation have never been in the faculty's library (it is assumed that they never existed) and students were passing exams at subjects that they never attended. [428]

This case is very relevant for the implication of highly connected individuals who benefited from this set up, such as the mayor of the city of Chomutov, the head of the Plzen police, and even the head of the constitutional law parliamentary committee. Other people involved "authored legal opinions that significantly influenced some of the largest government tenders in recent history."[429] Interesting enough Marek Benda, member of the Czech Parliament also admitted to the media to using the same dissertation to obtain two degrees from this law school. I had the chance to interview Benda but this was never mentioned in the interview, and he avoided corruption altogether as a subject.

Vladimira Dvorakova, in her position as the head of the accreditation commission and as a well respected political scientist assessed that organized crime was involved in "setting up the system, with the goal of controlling officials once in office."[430] She thinks that since the school dates back to 1991, very soon after the fall of Communism, and

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[427] Wikileaks id #233660

[428] "Scandal in Bohemia"

[429] Ibidem

[430] Wikileaks id #233660

because of the very close relations between the school leaders and the Institute for State and Law there is a suspicion of systematic misappropriation of state funds and property. For instance, the Institute asked that a 6.5 billion dollars environmental project to be treated as a concession project instead of a public tender (in a concession treatment a company receives the right to fully complete the project, which can lead to cartel agreement by binding firms).[431]

The case became even more controversial and political after the Accreditation Commission withdrew its license. However, the education minister from the Public Affairs Party (yes, the same as in the ABL case) Josef Dobes decided to extend the accreditation despite of the final decision made by the Commission. This is an illegal decision. The minister cannot override the decision of the independent accreditation committee. Dvorakova committed to send a complaint against this decision to the Supreme State Prosecutor's Office. Of what we have seen above that the State Prosecutor's Office is doing with the corruption files this will probably also be dropped or sit in that office for a really long time without resolve.

There is reason to believe there are very large interests at stake to block investigations, prosecution, and trial in this case. The actual net of politicians and their judges friends may be at risk. This is a very telling case since it illustrates how far the relation between state money and politicians and their judiciary friends goes. My assessment is that these large interests will be protected at the expense of establishment of rule of law enforcement mechanisms.

[431] Ibidem

Lack of reforms

As part of the corruption network the political appointees play a large role in the mechanism of corruption and rule of law dismantlement. Czech Republic does not have civil service. This body would allow independence from the government, clearer separation between politics and administration, with the end goal of de-politicization and professionalization of the civil service. Czech Republic created a Civil Service Office by law in 2002, but the law has not entered into force.[432] The civil service example in Czech Republic is very telling for all the points made above. The enforcement of laws is unpredictable, politicians make only superficial moves towards reforms, and they maintain control of all positions that are important for the public acquisitions. Every position that is important is still political; there have been some changes but the ministers, the deputies, and the experts are still political. [433]

Vladimira Dvorakova, leading political scientist in Czech Republic confirmed to me that, "there is this interconnection of these regional politicians that are getting on these departments and these experts, and so on …the conflict here is about who will be on which minister, department, to get control or to influence the conditions under which

[432] Cardona, Francisco, "The Management of the Civil Service: European Models", http://www.oecd.org/dataoecd/32/16/44110196.pdf

[433] This has been confirmed in an interview with Vladimira Dvorakova July 2 2011

they can get money."[434] And confirming again the theory set up with this case "*it is very difficult to understand why a parliament that has an absolute majority is not able to make any decision. They cannot find compromise. Because they have this firm and that firm (...) and this is the problem with politics, they are directly interconnected".* And what is worse is that if you are corrupt there is little that happens to you, but if you go against the corrupt system you are "gone, look what happened to Mihalek in the Drobil case."[435]

Another example of how political corruption affects the establishment of rule of law is the cancelation by the Klaus government of a bill that required politicians to publicly declare their wealth. Romania has a similar law that requires high officials to publicly post their assets value and shares in companies. Also Romania has introduced an institution, which will be the topic of the following chapter, the National Integrity Agency, which monitors if all high profile officials comply with this law. Czech Republic on the other hand does not make mandatory for politicians to publicly declare their properties and financial situation. When Vaclav Zak was the former vice chairmen of the Czech Parliament at the beginning of 1990s, the government proposed a tax law that was designed to make property declarations mandatory. This law passed, but the Klaus government that came after cancelled it.

They probably would have not been able to allow this law anyway, because some of them have parts in bearer shares and they are non-transparent. Czech Republic is one

[434] Vladimira, July 2, 2011

[435] This has been confirmed to me by Fric, Ondratcka, and Dovrakova. It is worse to go against the system. Mihalek for instance lost his job though he was the one that uncovered major corruption cases.

of the few nations to have a provision under which owners of companies can be anonymous, known as 'bearer shares'. They represent equity securities wholly owned by the person who holds the physical stock certificate. This is a very convenient way to cover the true ownership of a company, since there is no law that requires that the actual physical owner needs to be disclosed. "Bearer shares are pieces of paper, which can always be exchanged with anyone. I give you this piece of paper and you are now the owner."[436] Because of this, the mechanism outlined above of misappropriation of public funds is facilitated even more than in other countries. Since politicians, same as in Romania, have ownerships in the companies involved in the illegal granting of public contracts, they have no interest in removing the provision and making their wealth transparent. "At the present, the state is unable to check all these transactions in the companies. I would make a law that there should not be any business confidentiality when public contracts are involved."[437]

Concluding remarks

Czech Republic confirms this dire hypothesis that rule of law establishment is impossible in the presence of political corruption, if natural historical developments that lead to the establishment of rule of law in mature advanced democracies are not present. In this section I bring evidence both from case studies and cross-verified interview data.

[436] Brichacek Petr, June 27 2011, and confirmed by Michael Smith June 21 2011

[437] Zak, June 28 2011, Prague

The consequences for the citizens in this new democracy are that rule of law establishment is as far as it was at the fall of communism in 1989. This is completely unexpected from Czech Republic, which benefited from some experience with a democratic form of government and is located in the heart of Europe practically bordering rule of law. Why then does it manage to have a track record similar to Romania? One explanation is historical, because Communism successfully destroys all forms of pluralism and check on abusive power. To rebuild from such a low standard seems like a task more difficult then anticipated.

However, and related to the past, is the presence of the corrupt elites. Apparently not even the Czech past, geographical position, economic growth and European Union pressure do not dismantle the corrupt networks. Politicians, who misappropriate public funds for private gain, prevent the reformation of the enforcement mechanisms and intervene in the judiciary process. Without clear reforms such as the introduction of truly independent anti-corruption agencies that can lead to the predictable application of laws, in this society highly tolerant to unethical behavior, we will probably hardly witness progress.

CHAPTER 6. ROMANIA, TOWARDS RULE OF LAW
The anti-corruption agencies-

Introduction

This section explores the second hypothesis that *the creation of a truly independent anti-corruption agency leads to the progressive establishment of rule of law.* An emphasis is put on 'truly independent' since many governments do fancy with introducing weak anticorruption agencies to gain popularity with their constituencies or to please foreign donors. This study refers only to strong, independent and efficient anti-corruption bodies. Though the acknowledgement that political corruption prevents the establishment of rule of law poses important scholarly and practical interest, I try to move this study further, by identifying a possible solution.

Romania represents a good critical case for this hypothesis, being ranked one of the most corrupt countries in Europe. If the anticorruption agency has a positive effect for the establishment of rule of law in this country then it should have a similar or even better effect in any other country.

I argue in chapter one that corruption is so sticky that it never leads to rule of law establishment in lieu of the classical natural historical development, which took decades and even centuries to evolve in other countries. I also argue that, rule of law is easier and faster to establish at the hand of a dictator or an authoritarian regime, but that is not democratic rule of law. Based on the examples of Singapore and Hong Kong, I posit that

even democracies can instate rule of law practices by introducing truly independent anticorruption agencies and bodies.

I present in this chapter evidence from Romania that an anticorruption agency has the advantage of moving the fight against corruption at a faster pace that the unreachable goal of reforming an entire justice system. Consequently, with prosecution from the anticorruption department, more and more political figures' integrity is questioned. Additionally, successful sentences and imprisonment of politicians create incentives for rent seeking outside of this potentially dangerous avenue. The cleansing of the political arena of corrupt politicians diminishes the number of actors with conflicts of interests, which leads to a change in incentives. Instead of protecting themselves against the establishment of enforcement mechanisms, politicians become prone to making reforms to gain voter's confidence, which can ensure reelection.

How did Romania get on a committed anticorruption path? In 2005, the anticorruption fight became a national priority as a consequence of the European accession process. [438] Despite the disappointment with the anticorruption fight and with the weakness of the institutions, many, even among the critics acknowledge that the National Anti-corruption Directorate and to some extent the National Integrity Agency

[438] Though these efforts were acknowledged in the Romanian and European communities, critics and in particular Transparency International Romania, asserted that the "anticorruption strategies outcomes point out a merely façade fight against corruption and a weak political will rather than real commitments." "The National Integrity System" *Transparency International Romania* 2010, this disillusionment has been confirmed to me in interviews with Codru Vrabie Summer 2010, Radu Nicolae, expert Center for Legal Resources July 11 2011, Maximilian Balasescu Criminal Prosecutor, The Appeal Court Bucharest July 12, 2011, Mircea Toma July 13 2011, Daniel Barbu Political Science Professor, Romanian Political Science Institute and University of Bucharest, July 12 2011, Florina Presada Center for Public Participation Resources July 25 2011 and other members of the civil society, business community, and the academia.

represent the only oases of integrity. I explore here their creation, evolution, and the relevance of these institutions for the second hypothesis, that the presence of a truly independent anticorruption agency is the only solution to the progressive establishment of rule of law.

The agencies and the European Union pressure

The European Council decision of December 1999 specified the establishment of an independent anti-corruption department as a condition from the Accession Partnership between Romania and the EU. Additionally, in the Criminal Law Convention on Corruption, Strasbourg 1999, and ratified by Romania in 2002 there is a provision about the specialized authorities to fight corruption. It is emphasized that the signatory states have the obligation to take the necessary steps to ensure that persons or entities will be specialized in the fight against corruption. The first anticorruption specialized office was created in 2002 in Romania, the National Anti-Corruption Prosecutor's Office (PNA). This is the institution that through successive legal changes became the national Anti-Corruption Directorate (DNA) as it functions currently.[439]

[439] http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-2382&language=SK and Law 78/2000

The National Anticorruption Directorate

Starting in 2005 the DNA's jurisdiction was restricted to high impact cases. It thus has now authority to prosecute corruption offences, and those associated directly or indirectly to corruption offences, where the prejudice is over 200,000 euro, the object of the offence such as the bribe is over 10,000 euro, or the perpetrator holds a high office position.[440] It was set up after a model established in other European States, such as Spain, Norway, Belgium, Croatia. It is an independent body in relation with the courts, the prosecutor's offices attached to the courts, and in relations to other public authorities.[441] It also has jurisdiction over offences of abuse of office, tax evasion and offences against the customs regime. DNA, thus, can focus on specific cases. Its institutional structure ensures specialization; it has its own judicial police officers and on site specialists.[442]

This agency is very relevant. The Adrian Nastase government, in 2002, at the EU pressure, created it. Ever since the former prime minster Nastase has been himself indicted by this agency for several corruption cases. After several years of unjustified delays, he was eventually judged, and sentenced to two years in prison. The fact that a former prime minister, a figure that contributed to the establishment of this agency is eventually convicted for his felonies can be interpreted as a successful display of

[440] http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-2382&language=SK and the legislation.

[441] *The National Anticorruption Directorate,* http://www.pna.ro/faces/index.xhtml

[442] http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-2382&language=SK

establishment of rule of law. This case will be discussed in detail further down. There is a lot of speculation that this was a political revenge case. Nastase was a leading candidate for the president office during the 2004 elections and lost to Traian Basescu, and he was regarded as a powerful opponent for the fall 2014 elections. This is open to debate, and sure there is a chance that the indictment of the former prime minister was done for political reasons, but the facts show that DNA eventually did its job on the most unlikely actor, its 'father'.

The establishment of DNA is due to a historical 'accident.'[443] In this, Monica Macovei, the former Ministry of Justice (December 2004 to April 2007) played a crucial role. She was a key actor at a crucial moment during the negotiations with the EU as part of the accession process that lead to the integration in the EU in January 2007. European Union made several conditional requests that tied the accession to the Union to reforming the justice system and fighting corruption. Though at times Monica Macovei was a controversial figure, she is tightly linked with several positive reforms that needed to be accomplished to prove to Brussels that Romania is committed to the anticorruption and justice reform. Within the time constraints she had to give visible and convincing signals to the EU, she refreshed the legislative framework, and granted more independence to prosecutors, to restrain superior prosecutors right to take over files without justification.[444]

[443] This has been confirmed to me by Mircea Toma, and Monica Macovei June- July 2011

[444] Mircea Toma, July 13, 2011

She confirmed to me in the interview we had in June 2011 that, DNA "was a good initiative but it was crucial to give the [prosecutors] independence, and it mattered who was in charge. In actuality the DNA Chief Prosecutor is not independent since he is appointed by the Ministry of Justice and is subordinate to the politically appointed Chief Prosecutor of Romania. To [lead the National Anti-corruption Directorate] I proposed Daniel Morar, whom I see as a hero of this country. I conducted an interview, and the selection process was public, we looked at the files, but I think the most important part in his selection was that I had a psychologist in the selection committee. He looked for behaviors signs of integrity and honesty. He agreed that based on his file and his behavior he is like a 'sour pickle' and nothing will influence him. I did not have any history with Morar."[445]

The Romanian Parliament did not receive the former justice minister's anticorruption initiatives very well. She was often accused of abuse of power. Monica countered the accusations asserting that the members of parliament are trying to stop the judicial reform and the anticorruption measures in order to cover their own interests and problems. The parliament opposed in 2006 a measure initiated by Macovei to keep the National Anti-Corruption Directorate independent. The MPs suggested that it is not truly independent and it is politically influenced. The president vetoed the parliament action and following negotiations and international pressure, the MPs voted to allow DNA's independence. It appears that the parliamentarians may have reacted to the large number

[445] Monica Macovei, June 12, 2011. The view that he is an oasis of integrity was shared by many of my interviewees Codru Vrabie, Laura Stefan leading anti-corruption expert, Romanian Academic Society, July 25, 2011

of anticorruption files that DNA started. In 2006, 6 MPs were sent to trial for corruption cases, among which the high profile former Prime Minister Adrian Nastase. [446] She encountered the same type of opposition while attempting to create the National Integrity Agency (ANI), which was meant to check the source of the members of parliament's assets and to investigate any potential conflicts of interests.

In figure 5 we see the composition of the prosecution system in Romania and the position of the National Anticorruption Directorate respective to other courts. Figure 6 and figure 7 show how the number of indictments and defendants sent to trial has increased every year, and it illustrates the growing efficiency of the institution. Further down I analyze three examples of successful cases carried out by the justice system in Romania that started with prosecution by the DNA.

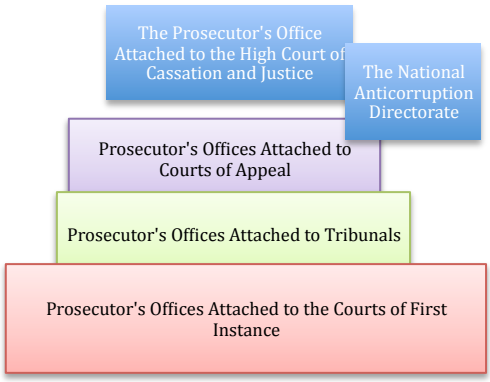

Figure 5. DNA within the Public Ministry's Organization[447]

[446] Report of the Activity of the National Anti-corruption Directorate 2006 – Synthesis Statistical Data http://www.pna.ro/faces/bilant_activitate.xhtml?id=10
[447] The National Anticorruption Directorate, http://www.pna.ro/faces/index.xhtml

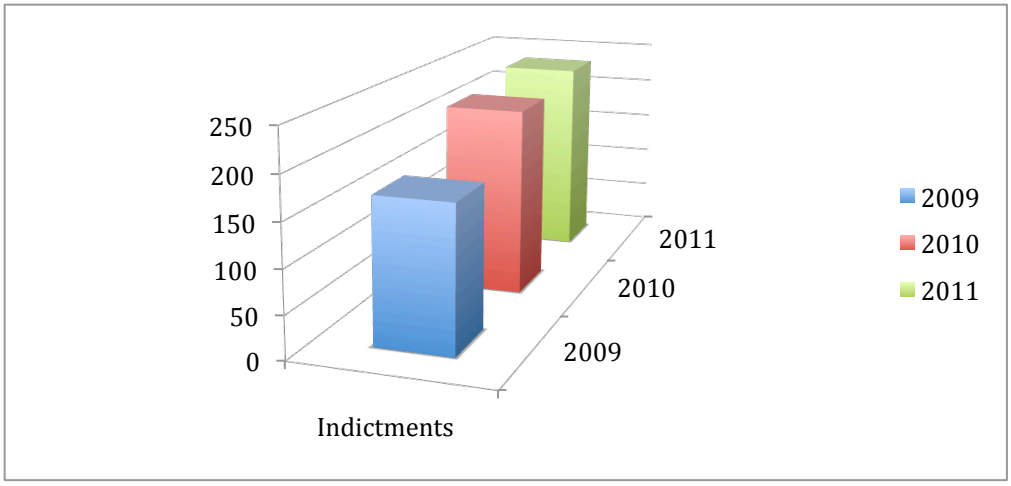

Figure 6. Indictments by DNA. Source DNA.[448]

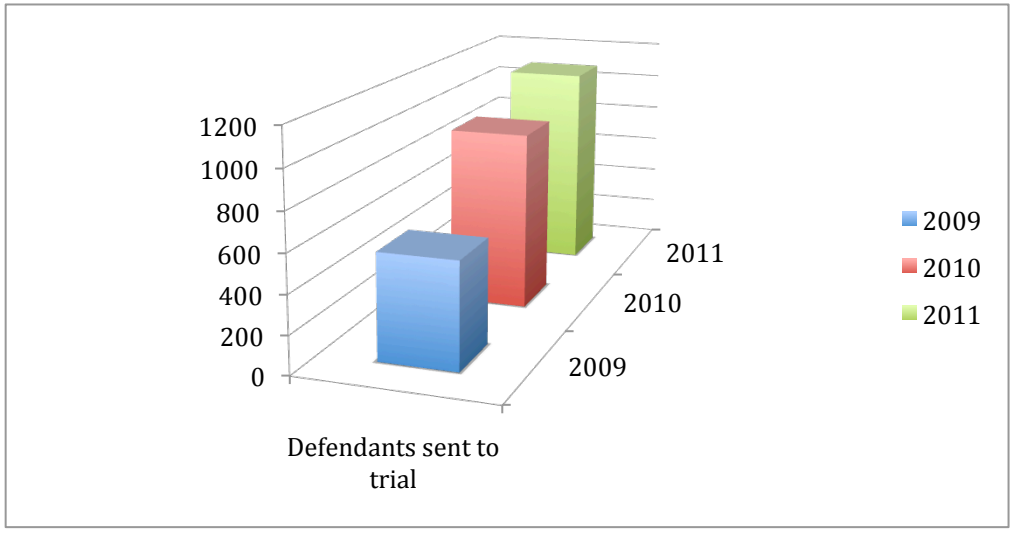

Figure 7 Defendants sent to trial by DNA. Source DNA[449]

[448] Annual Report Activity DNAhttp://www.pna.ro/faces/obiect2.jsp?id=175, p. 7

[449] Annual Report Activity DNAhttp://www.pna.ro/faces/obiect2.jsp?id=175, p. 7

The National Integrity Agency

In the same EU integration context, an important development in the Romanian anti-corruption fight was the 2005-2007 National Anticorruption Strategy[450]. It targeted the prevention policies, the enforcement of laws, and monitoring and evaluation of these policies. The National Integrity Agency was established[451] under the umbrella of this strategy. It was meant to be an independent body, with legal personality and national functioning under a centralized structure[452]. Many of the measures incorporated in this strategy have been proposed through a package of 10 demands by Transparency International in 2004, in an effort to close the negotiations of accession with the European Union.[453]

The creation of the National Integrity Agency was marred in political conflicts, obstacles and dramatic turns of events. In 2004, the project passed the Chambers of Deputies and had to pass through the Senate. This happened right before the 2004 parliamentary elections. The majority in the parliament belonged to the Social Democratic party, while Macovei was a member of the Democratic Party. An unofficial source told me that apparently she asked the president of the judicial committee in the

[450] By Government Decision No. 231/2005. Source: "The National Integrity System" *Transparency International Romania* 2010

[451] Law 144/2007

[452] "The National Integrity System" *Transparency International Romania* 2010, p. 28

[453] Anonymous Interview No.1

parliament to delay the voting of the strategy until after the elections, when she was anticipating a majority for her party in the Senate[454]. The draft law remained in the parliament for a while, time during which the MPs altered many of the measures and thinned down the project. Finally, ANI was established in 2007. However, the law (no.144/2007) with the provisions about the functioning and the competencies of this institution has been attacked several times by the Constitutional Court. Eventually in 2010 several provisions in the law no 144 have been declared unconstitutional in an effort to restrict the competencies of ANI.

At the moment ANI's main mission is to execute control over the wealth acquired by public servants during their mandates or public serving, and to identify the existence of conflicts of interests and incompatibilities. It has the right to verify the income statements and interest statements and their submission within the deadlines, to observe the non compliance with the legal provisions related to the conflict of interests and incompatibilities regime, to inform about the criminal investigation bodies in regards to the perpetration of criminal offences, and to implement sanctions and measures stipulated by the law within the level of its competencies. Another body was also created to supervise the activity of the ANI.

Attached to ANI is the National Council of Integrity, which is a representative body under the control of the Senate. Its role is to supervise the implementation of the procedures for the nomination of the president and vice-president of ANI, to analyze activity reports, to make recommendations referring to the activity, to analyze the annual

[454] Ibidem

audit report and to submit its report to the Senate. While ANI is composed of integrity inspectors as public servants, CNI is a high profile body composed of members representatives from the Ministry of Justice, the Ministry of Economy, the Romanian National Union of County Councils, the Association of Romanian Communes, high public servants, magistrate associations, legally constituted civil society organizations, and parliamentary groups. I have audited one of the CNI meetings and though it seems like a place of debate, and sometimes conflict (especially between the presidency of the institution and the civil society), it is probably what I would call a weak institution.

These two agencies have internal problems and incompatibilities themselves. The presidents are still nominated politically and depend on state budgets, but both represent strongholds in the fight against corruption. I had the opportunity to interview both Daniel Morar, Chief Prosecutor of the National Anticorruption Agency, and Horia Georgescu, president of the National Integrity Agency, and they both confirmed to me that their biggest frustration is that they gather information and send the files out to the judiciary and they sit in the judges offices for years without resolve or the files get dropped, or the sentences are with suspension.[455] "I would be interested to see the files move faster, to get sentences sooner, and to see better laws interpretation. The laws are good, but the interpretation is bad. Everyone is interpreting the way they want to. The biggest problem we have [at ANI] is that the files come back from the judiciary under the premise that there was no intent. Sure they forgot to add 40 million Euro in their declarations, they

[455] Daniel Morar, Chief Prosecutor, the National Anti-corruption Department June 16 2011

say, but that was not intentional, so it's not bad,"[456] confessed Horia Georgescu. Macovei confirmed, "things changed but the people are disappointed that things are not moving faster and they are not seeing convictions."[457]

Two crucial figures – politicians do not want enforcement mechanisms

This section is relevant because it puts in comparison two key figures in the process of rule of law establishment. On the one hand we have a minster with some suspicion of conflict of interests who literally had to introduce reform as part of a condition to integrate in the EU (Monica Macovei), and a subsequent minister who immediately reverted back to regular practices of undermining the establishment of rule of law (Tudor Chiuariu). This example illustrates two ideas. The first is that even reformist characters have less than impeccable files. Probably, had not been for the EU's conditional integration, Romania would not have a national integrity group of institutions now. What is also very significant about this example is the fact that after the establishment of the DNA, it was not as easy for ministers to manipulate prosecution anymore. So though the mechanisms of manipulation of the justice system do not change overnight, the presence of an independent anticorruption agency does slow intervention down. It has a lock-in effect, over time

[456] Horia Georgescu, July 13, 2011

[457] Monica Macovei, June 12, 2011

Macovei's positive influence in the establishment and functioning of these two institutions was crucial. But she was a controversial figure, and had herself problems of conflict of interests, such as being a founding member of the Transparency International non-profit organization and a Minister at the same time. TI executed a public tender evaluating the National Strategy, and though there may be no connection between the two, it still raises suspicions of conflicts of interests even in the case of Monica Macovei.[458]

One very telling story shared by an anonymous interlocutor is related to a discussion between Monica Macovei and my source about the anticorruption targets. He asked Monica to remove from the anticorruption strategy the clause that corruption is a threat to national security. This provision would have justified any abusive behavior on behalf of the secret services and it would have restricted the media access about corruption. This is very uncommon in democracies, but this was a provision that president Basescu wanted. She assumedly said that she is willing to try to modify and improve any provision but "not that one, because president Basescu wants it there."[459] If true, this example shows the prevention at the highest level of the establishment of rule of law. Eventually the Liberal Prime Minister Tariceanu excluded Monica Macovei from the Parliament in 2007, as part of what is now remembered a political feud against the Democratic Party, which she was representing.

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[458] This has been confirmed to me by Codru Vrabie July 2011. Additionally Laura Stefan, leading anticorruption expert, after working on this tender was hired by Monica as an Director on her staff at the Ministry of Justice, which also raises suspicions of incompatibility.

[459] Anonymous source.

The arrival of the following Minister of Justice, Tudor Chiuariu, illustrates a successful test for both hypotheses. It revolves around a politician in a key position, who was opposing reform because of corruption, and the National Anticorruption Directorate's successful counter attack. Tudor Chiuariu, dismissed right away Macovei's secretaries, advisers, and judges, and replaced them with lawyers from the same town in the north of Romania, most of whom had little experience as judges.[460] A month after taking office, DNA opened a file against him for allegedly approving to a governmental decision to transfer over 25,000 sq feet of public land on a prime location in Bucharest to private ownership who was targeting the construction of a 300-rooms hotel.

Tudor Chiuariu tried to protect himself by requesting from the Supreme Council of Magistracy that they dismiss the DNA prosecutor that opened his file.[461] However this request raised a lot of protest and was later dropped.[462] Chiuariu also entered a conflict with chief anticorruption prosecutor Daniel Morar. Apparently the former Justice minister made personal phone calls to DNA and requested to be informed about politicians' files ahead of time. The Council of Supreme Magistracy confirmed that he put some pressure on DNA. He went even as far as to write in a letter to the European Commission to eliminate the praising passages about DNA's performance in an

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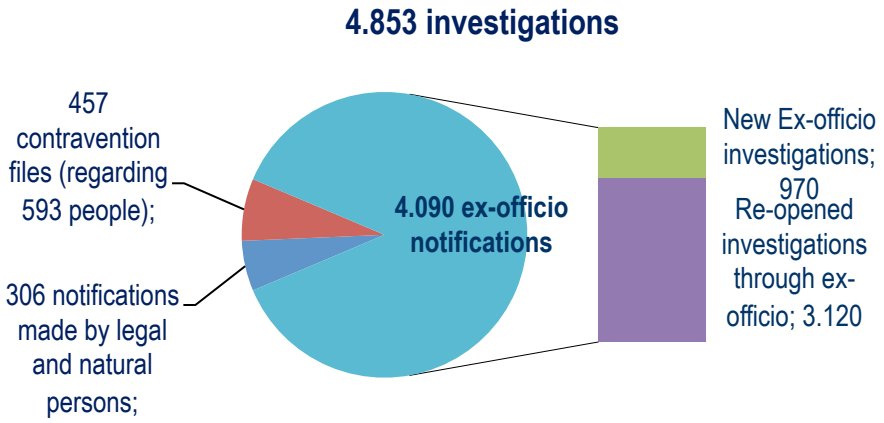
[460] Anghel, Doina, "Chiuariu is changing the justice people named by Monica" *Ziarul Financiar,* http://www.zf.ro/politica/chiuariu-schimba-oameni-din-justitie-numiti-de-monica-macovei-3029105/, (May 9, 2007)

[461] Confirmed by Mircea, Toma July 13, 2011

[462] Anghel Doina "Justice Minister resigns after a scandal related to public land." *Ziarul Financiar,* (December 10, 2007)

upcoming report.[463] One of the most direct interventions in the rule of law was to initiate an emergency decree to literally block the criminal investigations from DNA into 8 of the ministers (former and present at the time), including himself.

Figure 8. The National Anticorruption Agency. Total number of investigations, 2011



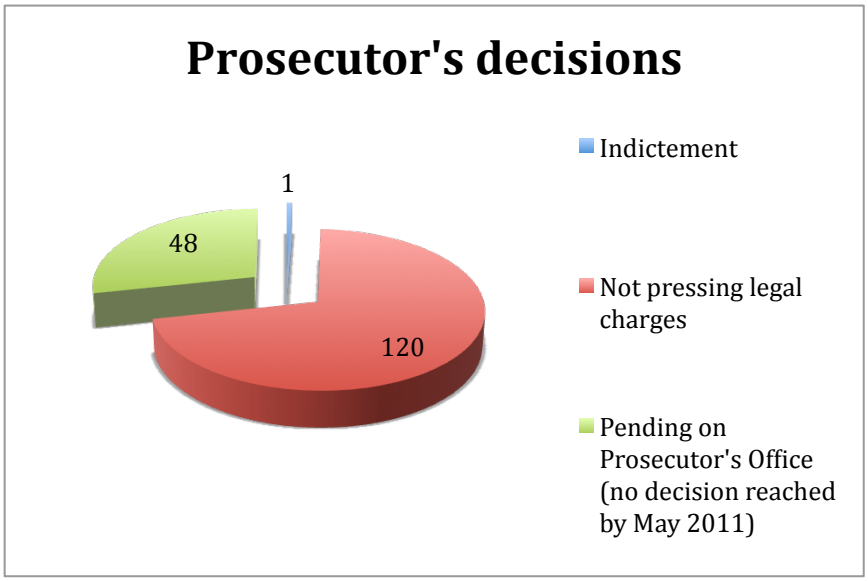
This minister's actions represent clear illustrations of how politicians, afraid that they would be prosecuted and eventually sentenced to prison, intervene in the justice system on the one hand, and propose legislation/ emergency decree to protect themselves on the other hand. Both mechanisms of rule of law establishment prevention hypothesized in this study are verified by this example. In conclusion, the creation of these two agencies is not enough for the complete establishment of rule of law, despite their success. However my assessment is that they can be regarded as a fundamental lock-in change and the weak link in the chain of corruption in Romania. Prosecuting and

[463] Iordache, Narcis and Anca, Simina, "Chiuariu Justice falls", *Evenimentul Zilei,* (December 10, 2007)

eventually convicting the actors that are blocking reform is crucial for the establishment of rule of law.

Between July, 2010 – May, 2011 the National Integrity Agency had under evaluation a total number of 4.853 investigations as follows: 306 notifications made by legal and natural persons, 4.090 ex-officio: 970 new and 3.120 re-opened investigations, 457 contravention files regarding 593 persons.[464]

Figure 9. Prosecutor's decisions on files investigated by ANI[465]



[464] Data Provided by ANI as follow up information for the interview with President Horia Georgescu, July 2011

[465] Data Provided by ANI as follow up information for the interview with President Horia Georgescu, July 2011

Success stories

The National Anticorruption Directorate has a lot of files under investigation and has prosecuted a lot of corrupt high profile politicians. Prosecuting the 'entire' corrupt country though would not have any effect if the files would not get any resolve (sentence). As per the analysis of the justice system in chapter 2 we saw that intervention in the judiciary and the corrupt judges make the application of law unpredictable. Lack of predictability, I also pointed out leads to a decreased expectation on behalf of wrongdoers that they will be punished. Which reinforces the cycle of corruption. However, another way to look at it is that the unpredictable application of laws is better than a predictable non-application of laws. It may cause a deterrent to political corruption. So, here I present three telling examples of the contribution of DNA to the progressive establishment of rule of law.

Former Prime Minister Nastase shoots himself but still goes to jail

Though this is a case study that fits very well along with the rest in chapter 3, I chose to present it in this section for one reason. The prime minister actually received a sentence for one of the three corruption cases he was involved in, and is serving time in jail. Many consider his conviction a political act, since he was the runner up in the presidential race. I see it as an occurrence of a resolved corruption case. This is not an

obscure means to eliminate an adversary. This case actually illustrates a high profile politician that was caught misappropriating public funds for private gain and using the money to finance his campaign. He was investigated, prosecuted, sent to trial, went through months and years of delay but eventually got sentenced and is now behind bars. This is a victory for the fight against corruption. He did commit the facts. And now he is paying for that. If nothing else, this occurrence creates the same uncertainty about the outcome of committing corruption acts, which can lead to a possible decrease in this activity. If politicians resort less to 'theft' of public money then they will have less to worry about when proposing legislation and reforming the enforcement mechanisms. Which can lead to establishment of rule of law.

Adrian Nastase served as a Prime Minister between 2000 and 2004 and was a high profile politician after the fall of communism. Him and the new prime minister in Romania, Mr. Ponta (discussed in chapter 2) are part of the Social Democrat Party (PSD) the de facto inherited communist party. Nastase was the president of the PSD at the time. They both have very close ties with former president Ion Iliescu a very committed former communist himself. [466] The High Court of Cassation and Justice sentenced him in June 2012 to two years in jail with execution in the "Quality Trophy" file (Trofeul Calitatii, in translation). He was accused of misappropriating public funds in his attempt to collect campaign finance for his presidential race. [467] He was also trialed for two other major corruption cases ("Aunt Tamara" and "Goods from China"). In the former the High Court

[466] "Adrian Nastase trial: Romania probes plot to spare ex-PM jail" (BBC)

[467] "Adrian Nastase, condamnat la doi ani de inchisoare cu executare- decizie DEFINITIVA "

of Cassation and Justice acquitted him, while in the latter no decision has yet been reached.

The National Anticorruption Directorate has accused the former prime minister that in 2004 he organized a trade fare "The Trophy Quality in Construction" with the goal of raising money for his campaign finance. This event was organized by the State Control Inspectorate (ISC) and the participation taxes of around 2 million dollars have been detoured to two companies owned by close friends of Nastase. From there the money went to a firm that purchased a variety of campaign materials and resources. Irina Jianu, the head of the ISC organized the event. Allegedly she occupied this position courtesy to her connections with Nastase. Additionally, as president of PSD he was able to put pressure on high political appointees in several public institutions that participated in the fare, who paid substantial taxes to be part of an event with no relevance for their respective institution.[468]

The money that was collected through this event was supposed to be included in the ISC budget. However, the head of the institution Irina Jianu ordered that these taxes be cashed directly in the accounts of four private companies controlled by two associate 'friends' Bogdan Popovici and Marina Popovici (SC Mediaglobe Invest SRL, SC Urban Consult SRL, SC Axa Management SRL, SC Contur Media SRL). According to the DNA prosecutors, ISC did not properly record these transactions. Even more, the four companies conducted transactions with a fictitious company SC Arond SRL, also

[468] "Dosarul 'Trofeul Calitatii' – Adrian Nastase. 1276 de zile de la trimiterea in judecata" *Hotnews.ro, Corruption Files.*

controlled by the Popovici family. A lot of money laundry followed these transactions, and a large sum of money was eventually transferred from Arond SRL to SC Eurografica SRL, which is the firm that paid large sums of money for campaign finance.[469]

Nastase appealed an initial decision in January against the same two years sentence. But the High Court of Cassation and Justice upheld the decision.[470] The former Prime Minister denies any implication in the facts. When police came to pick him up he made a suicide attempt. One of the police officers saved his life by grabbing the gun when he fired. Eventually he went to the hospital and when his health improved he went to jail. The political opponents charged him with attempt to hinder the enforcement of the punishment applied. Prosecutors even started to investigate allegations that one doctors and three police officers were involved in helping Nastase to avoid punishment.[471]

Through there may have been real or alleged attempts to escape punishment, one corruption senior politician is behind bars. If anticorruption agencies maintain their positive record then we should witness more of these soon, or many more.

The Minister of Agriculture

This case is relevant because it is the first instance when a Minister was actually sentenced to jail for a corruption case, after being prosecuted by the National

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[469] Ibidem

[470] "Adrian Nastase, condamnat la doi ani de inchisoare cu executare- decizie DEFINITIVA "

[471] "Adrian Nastase trial: Romania probes plot to spare ex-PM jail" (BBC)

Anticorruption Directorate and judged by the High Court of Cassation and Justice. In 2003 Ioan Avram Muresean and several others high officials from the Ministry of Agriculture and Alimentation were prosecuted in a corruption file involving the misappropriation of ministry's funds. This operation lead to one million dollars in losses for the institution.[472]

He was prosecuted in 2003 for repeatedly (during 1999-2000) illegally borrowing 5000 tons of oil from the state reserve to a private company SC Oil SRL. Avram and his parteners also detoured money that the Romanian government received from the US AID and used it for activities that were not regulated through the governmental decision related to the transaction (HG 949/1999). The High Court of Cassation and Justice reached the verdict and sentenced him to 7 years in prison.[473] He is currently serving his time in jail. These cases are proof that the National Anticorruption Directorate's activity leads to the progressive establishment of rule of law. These were not common in the past.

Romsilva, take two

This is an interesting turn of events. Though I tried to steer clear of interpreting any time effects, this case may show that there may be 'momentum' to progress. I analyzed Romsilva's case in chapter 4. The High Court of Cassation and Justice (ICCJ)

[472] Muresan Ionut " Ioan Avram Muresan, condamnat definitive la 7 ani de inchisoare a fost ridicat de la domiciliu" Gandul

[473] Lica, Ramona, "Premiera Completul de 5 al ICCJ condus de Aida Popa a condamnat definitive un fost ministru" (May 28, 2012)

unjustifiably acquitted Ion Dumitru in a high profile illegal public acquisitions file in 2009. Only two years later (2011) Ion Dumitru was again acquitted in another corruption procurement case by the Supreme's Court penal section. However this time around, in a case known as Romsilva 2, the same institution ICCJ, strongly criticized the penal court and did not uphold the decision to acquit him. This has relevance in the context of creating success stories for the anticorruption fight, but also for the interesting fast developments in this effort.

In 2003 a 'ghost' company imported from Ukraine a military four-wheels armoured type of vehicle modified to be used in civilian applications at the price of 6250 dollars. In 2004 Ion Dumitru, general manager at Romsilva (a state institution in charge with the administration of the forest resources) discussed in the Administration Council a proposal to purchase the above-mentioned vehicle. Though the vehicle was practically not useful he agreed to purchase it at an overpriced value of up to 1,744 percent causing a significant loss to the state institution's budget.[474]

Taking an unexpected turn, in this case the ICCJ notes that the penal court did not want to seriously address the file and make a decision based on the proofs provided during the investigation and trial periods. One could charge the ICCJ for the same faults in the Romsilva file in 2009. Though it is difficult to make an assessment of the progress made by ICCJ, it is becoming more and more clear that 'stealing' state money may not be a sentence free avenue. And this is all well received progress. If politicians anticipate

[474] Ionel Corina " ICCJ a decis rejudecarea dosarului Romsilva 2. Instanta a anulat achitarea deputatului Ion Dumitru" *Hotnews.ro* April 2012; and Burda Virgil and Stoica Ionel "Deputatul PSD Ion Dumitru, achitare suspecta: 'Judecatorii nu au vrut sa afle adevarul," *Evenimentul Zilei*

that at the end of the road there may be jail time, then they may choose to stop the corrupt activities.

Truly independent

So are ANI and DNA independent? Many say no. Are only politicians from the opposition targeted? No, but a lot of the time they get more attention. Many voices express worries that a new 'team' will take over these institutions and use them for political purposes. If that is the case then one can only hope that in time there will be enough uncovering and reputation ruined on both sides that the system will start purging out incompatible corrupt politicians; and once more honest actors with higher level of integrity will take over they will be the ones to make more locked-in reforms that will progressively lead to irreversible trends. For them it would not be irrational to make the changes. The consequence is that corruption will become politically costly. These agencies have a ripple effect. The citizens are starting to become involved and to send information to the agencies and try to hold corruption politicians accountable as well.

There are many critics to the initiatives taken by the 2004-2012 administration towards anticorruption. There is a wide range of people, from prosecutors, leading civil society figures, citizens, and usually members of the opposition that pose that all the initiatives have nothing to do with rule of law but with political control. For instance, one very critical prosecutor, Maximilian Balaseanu, asserted that, "most of what they are doing at DNA is with a 'specific' target. They do not start files because they have to.

They start them to look good for the EU commission, or because president Basescu does not like that person."[475] Also, he added that the Chief Prosecutor of Romania Ms. Kovosi obtained this position following a very informal meeting that president Basescu had with her father. Assumedly, Basescu wanted to name her father as Chief Prosecutor, which they discussed at a party dinner in his town. Mr. Kovosi though, pointed to his daughter and asked the president to name her.

Though this is unofficial information, that could explain why Ms. Kovosi had very little experience but was still named as Chief Prosecutor of Romania.[476] Another factual point in defense of this prosecutor's theory is the story surrounding Horia Selaru's appointment. He is a prosecutor involved in dropping one of the most prominent corruption cases files in Romanian history, Agro Slatina. After doing this Horia Selaru was named Chief Prosecutor.[477] This information is verifiable. A similar sorry revolves around Marius Iacob, another chief prosecutor who managed to arrest one of the biggest self declared enemies of president Basescu, Ovidiu Vantu. A friend of my source did not want to arrest him, but Marius allegedly insisted that she should. After Vantu was successfully arrested Marius Iacob became prime adjunct to Romanian Chief Prosecutor Ms. Kovosi.[478]

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[475] Maximilian Balasescu Prosecutor, Bucharest Court of Appeal, July 12 2011

[476] Ibidem

[477] Ibidem

[478] Ibidem

Balasescu also explained to me that between all prosecuting institutions DNA, the Directorate for Investigating Organized Crime and Terrorism (DIICOT), and the National Anticorruption Direction (DGA), *there are only four important prosecutors who control most of the files*. He added that there are understandings between prosecutors and judges the morning of the trial, that appointments at territorial courts are unfair, and that he personally investigated files in which some networks of gypsy were involved in rigging elections. Much of the information is verifiable and the rest is hard to prove. If he was right then the fact that he was arrested on bribery charges in July 2012 is indeed a political maneuver against a potential enemy. The latest news on this source is that he was in jail and he was asking the High Court of Cassation and Justice to move him from his cell because he has been forced to share the space with one of the people that he previously prosecuted. He was worried about his life, but the supreme court extended his arrest.

Several interlocutors have presented a radical version of this very tight network of manipulation to me. It involves the fact that most if not all of these high profile key actors that respond to political pressure are black mailed with secret service files. Apparently some time in their past they may have done something illegal that the Romanian secret service has a file about. The current administration, controlling the secret services, has access to those files and uses them against their own allies.[479] This can explain why people with very high education and experience act at times irrationally and prefer to stay loyal to a very profound network of political influence and illegal interventions. This is

[479] Radu Nicolae CRJ, Codru Vrabie, Gabriela Nicolescu interviews

also difficult to verify. I had though the opportunity to speak with Cristi Danilet who was in charge for a very brief period of the SIPA files, the security files about the mishaps of magistrates. He told me that he safely returned them to the secret service and that no one is misusing them. He on the other hand told me that he does not see anything wrong with a member of the Superior Council of Magistracy to be a secret service agent.[480]

Concluding remarks

The dysfunctions that lead to episodes such as the one in July 2012 targeting the suspension of the president are still persisting. As in Czech Republic the failure to establish rule of law harms citizens at the level of *predictability.* "This uncertainty, this permanent feeling that you do not know what the outcome may be, this is the most harmful effect of corruption on the rule of law,"[481] Vladimir Tismaneanu, prominent US academic of Romanian origin, has confirmed to me.

I conclude by assessing that there may be reason to believe that political manipulation hurts even the two strongholds for rule of law establishment in Romania, the National Anticorruption Directorate and the National Anticorruption Agency, but as far they have not been proven. And there may be truth to the assumption that secret service control and blackmail lay at the heart of much political manipulation of institutions and reforms or lack of reforms. If that were the case, which again at this point

[480] Cristi Danilet, July 18, 2011

[481] Vladimir Tismaneanu, July 15 2011

I lack the investigative tools to find out, then that can be interpreted as an ultimate test on my first hypothesis. I would then be proven wrong in my assumptions that rule of law can be established in countries sank in political corruption just because they were 'forced' by an international organization to introduce anticorruption agencies. But my first hypothesis would be proven to the extreme. That *nothing,* not even foreign pressure, not even anticorruption agencies or any other effort to clean the system will work. Political corruption will stick to the end, and many generation of watering down culture will take before we see Anglo-Saxon models of rule of law in these new democracies.

PART III. Rule of law in practice; new democracies

CHAPTER 7. CROSS NATIONAL TESTS

After exploring the relationship under study within cases, I turn in this chapter to the general applicability of the first hypothesis, that political corruption prevents the establishment of rule of law, in other new democracies. The intuition is that it does. However, the Romanian and Czech systems presented very difficult obstacles to the establishment of rule of law due to the specifics of the Communist regime and the destruction of all layers of pluralism and competition, check on power, and accountability. These circumstances may make the two countries more susceptible to the uncovered mechanisms. Thus, I set up in this chapter a cross-national design to verify if the posted hypothesis is applicable in all democracies around the world. In order to test my hypothesis I use panel data, cross-national, time-series with random effects and perform several two-stage least-squares analyses with one instrumental variable.

The dependent variable is *Rule of law.* I use the *Rule of law* measure from the Worldwide Governance Indicators (WGI)[482] index developed by the World Bank (1996-2008). This measure is defined as "the extent to which agents have confidence and abide

[482] World Bank, Worldwide Governance Indicators http://info.worldbank.org/governance/wgi/index.asp

by the rules of society, and in particular the quality of contract enforcement, the police and the courts, as well as the likelihood of crime or violence" (WGI). The individual data sources for the aggregate indicators are obtained from a variety of survey institutes, think tanks, non-governmental organizations, and international organizations. The results are reported in standard normal units ranging from around -2.5 to 2.5 on a continuous scale. Since a crucial part of rule of law is represented by the guarantee for fundamental rights, I also select the *Voice and Accountability* measures of the WGI index, defined as "the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media" (WGI).

As a secondary validity test I also use the Freedom House (FH), political and civil rights scores. Besides political rights, this composite index measures 'freedoms and expressions and beliefs, associational and organizational rights, rule of law, and personal autonomy without interference from state' (FH). *Though Freedom House considers the presence of legal rights, it puts more emphasis on the application and implementation of rights in practice.* It has the benefit of an extensive temporal and geographical coverage. I reverse the scale with 1 to indicate a country that is most free and 7 to indicate least free for ease of interpretation.

For further robustness checks, I conduct tests with the *Polity IV* measure of democracy. This measures the extent of authoritarian patterns within a country. The *Policy IV measure* observes how the executive is selected, the degrees of checks on executive power, and the form of political competition. While this is not a measure of rule of law per se, its components surely represent clear observable implications of the

existence or lack of rule of law, such as competitiveness of the executive, regulation of chief executive recruitment, executive constraints.[483] It ranges -10 to 10.

The independent variable of interest is *Corruption.* Due to its illicit and immoral nature, political corruption is one of the most inaccessible human behaviors to study scientifically. It is a clandestine action, and the high profile modes of enrichment and power abuse are intentionally tacit, concealed, and non-communicated. Observing a purposefully concealed activity poses problems for statistical measurement.[484]

In order to test the proposed hypotheses I use the Transparency International's Corruption Perception Index (CPI). The CPI employs a ten-point scale to one decimal place and ranges across different indicators. It is a composite index that uses compiled and/ or published data for two previous years. All sources use generally the same definition of corruption such as 'the misuse of public power for private benefit', including bribing of public officials, kickbacks in public procurement, or embezzlement of public funds (TI). I reverse the scale for better interpretation, thus corruption ranges 1 most corrupt to 10 least corrupt. Though scholars do not recommend the use of this index due to collection, meaning, and TSCS issues, in a recent study Ko and Samajdar[485] show

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[483] Marshall, Monty, Jaggers Keith, Ted Robert Gurr, *Polity IV Project. Political Regime Characteristics and Transitions, 1800-2010,* (2010) http://www.systemicpeace.org/polity/polity4.htm

[484] Amundsen 1999, 28

[485] Ko, Kilkon and Ananya Samajdar, "Evaluation of International corruption indexes: should we believe them or not?," in *The Social Science Journal*, Vol. 47, (2010). pp. 508-540

that among all the indexes for corruption available (e.g. ICRG, World Bank, BEEPS), CPI remains the most reliable. [486]

In what follows I present a list of control variables, with attention to recent studies and their solutions for problems of endogeneity and omitted variable bias.

Economic Indicators. I test the alternative hypothesis that pressure for property rights from investors and the business community will lead to the establishment of rule of law, by using economic development and economic growth indicators. Since one of the most important pitfalls could also be the direction of causality between economic development and growth on the one hand and rule of law on the other, I use a now commonly employed method of controlling for endogeneity by lagging the economic variables.[487] Both GDP and Growth are lagged at t-2. Additionally, I control for the effect of the financial crisis on the level of rule of law by adding a binary variable coded 1 for 2007. The expectation is that with economic hardship, leaders will be more inclined (especially in less established democracies) to break the law in order to temporarily control the flow of the economy and possible unrest by citizens. (See Appendix 1 for variable coding).

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[486] One of the pitfalls of this perception index is that it depends mostly on largely ordinal and imprecise judgments of its respondents; For example, there is a noted tendency for the CPI surveys to portray the view of Western businessmen that conduct business overseas. This existing index also avoids the challenge of integrating 'harder' versus 'softer' sources of data. Such 'hard' data would include figures for prosecutions for corrupt activity. Sure, these accounts would pose another puzzle, if the high number of prosecutions is due to the support of high corruption or as proof of low tolerance within the respective society (Philp, in Sampford et al, 2006, p. 49). Despite these pitfalls, CPI remains the most commonly employed measure for corruption.

[487] Wright, Joseph, "How Foreign Aid Can Foster Democratization in Authoritarian Regimes," in *American Journal of Political Science,* Vol. 53. (July 2009), pp.552-571; Back, Hanna and Axel Hadenius, "Democracy and State Capacity. Exploring a J Shaped Relationship" *Governance*, 21, I, (Jan2008), pp.1-24

Institutional factors. Several binary variables have been added to test for the likelihood that institutional makeup has an influence over the level of rule of law. For example, former British colonies are usually associated with good governance due to the nature of the English legal system.[488] Additionally there is an expectation that parliamentary versus presidential systems might have a positive effect on the success of the rule of law establishment process due to the higher availability of political contestation in parliamentary systems. I introduce a binary variable, coded 1 if parliamentary, to control for this institutional difference. Similarly, a decentralized government should be an obstacle in the ability of corrupt political officials to extract local rents. A binary variable for federal government is also introduced.

Cultural factors. Within ethnically divided societies, depending on the ability to have both political representation as well as judicial representation on behalf of all groups, we may expect less rule of law if one particular group has disproportionate power. I test the effect of a variable that measures the degree of ethnic fractionalization within a country represented by an index from 0 to 1 (continuous) with 0 meaning no heterogeneity and 1 complete fractionalization.[489]

Additionally, three binary variables are used to control for religious composition (Muslim, Catholic, Orthodox). According to previous studies, there is an inherent incompatibility between Muslim and Orthodox religions and rule of law due to

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[488] La Porta, R, F. Lopez-de-Silanes, A. Shleifer, R. Vishny, "The Quality of Government," in *Jurnal of Law, Economics, and Organization,* Vol. 15, Issue 1, (1999), pp. 222-279

[489] Source: Alessina, el al 2003

hierarchical organization or unclear boundaries between state and church. The only religion found to be positively influencing the level of rule of law is the Protestant religion.

Regional factors. Several regional dummies have been added to control for the geographic effect on the establishment of rule of law.

-Table 4 about here-

The Instrument

This section discusses the methodological pitfalls of testing the effect of political corruption on the level of rule of law, and the utility of employing an instrumental variable. As mentioned above, attempting to isolate the effect of corruption on the level of rule of law suffers from grave statistical problems since the two variables are highly endogenous.

Consequently, I use a statistical tool (instrumental variable) and I test this effect by modeling several cross-sectional time-series two-stage least squared regressions (2SLS). This method allows me to isolate only the effect of the endogenous variable (corruption here) on the dependent variable (rule of law) without the noise from the correlation between the unobserved causes of the two. I have selected an instrument measured as the level of tariffs in a country (*Tariffs)*, which represents the tariff rates

based on unweighted averages for all goods in ad valorem rates, applied rates, or MFN rates.

The logic behind this method is that the 2SLS regression is a fix for models in which the disturbance term of the dependent variable is correlated with the cause or causes of the independent variables, in this case the disturbance term of the rule of law variable is correlated with the disturbance term of corruption. The instrumental variable replaces the problematic variable. 2SLS analysis requires that two critical assumptions are met: one, that the instrument (Z=tariffs) be highly correlated with the endogenous variable (X=corruption); and two, that Z be uncorrelated with factors influencing the dependent variable (Y=rule of law) (including the injunction that Z not directly influence Y).

As the name indicates, the method includes two stages. In the first stage the instrumental variable (Z) is used as an independent variable, while the endogenous variable (X) is the dependent variable. The second stage consists of an OLS regression using the predicted values of the newly created variable to approximate the initial dependent variable (Y), in this case, the effect of the values of corruption, approximated by the level of tariffs, on rule of law.

The reasoning behind choosing the 'level of tariffs' as the instrumental variable in the model is due to the assumption that the level of tariffs is correlated with the level of corruption, but that tariffs are not correlated with the unobservable determinants of rule of law. R1! Consequently, I first show that Z correlates with X and then that Z has no effect on Y.

Z correlates with X. There are two generally accepted models of explaining this relationship. The first model, developed by Ades and di Tella,[490] argues that the presence of foreign competition has a negative outcome for corruption since it can put pressure on the domestic sector ('foreign competition effect'). The direct consequence would be a decrease in rent-seeking behavior. On the contrary, having high tariffs and non-tariff barriers discourages imports, and keeps competition at a minimum, which fuels corruption. The second model, labeled the 'direct policy effect' (Gatti, 2004, 852) refers to how restrictions to trade and financial flows create the opportunities for collusive interaction between private and public sector, which result in exchange of favors for bribes. It is more attractive for actors to pay a bribe versus large amounts of taxes and customs duties required by governments.

In order to achieve accurate results, the disturbance term of the instrumental variable should not be correlated with the disturbance term of rule of law. This is truly an unknown fact, and there is no statistical test for its validity. It is nearly impossible to definitely test whether there could be any such contamination, so the norm is to make an airtight theoretical case that Z has no effect on Y.

Z has no effect on Y. While a truly exogenous instrument is nearly impossible to find in real world settings, I looked for a measure that could approximate corruption and also has the least to do with rule of law. Scholars avoid instrumental variables because, since they cannot be truly exogenous, they are frequent targets for criticism. I here isolate

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[490] Ades, A. and R. Di Tella "Rents, competition, and corruption", *American Economic Review,* Vol. 89, No. 4, (1999), pp. 982-993

the corruption – rule of law relationship through 'level of tariffs', which is most likely one of the closest approximations of an exogenous factor for this model, in a real world setting.

The level of tariffs per se can hardly account for the freedoms and liberties in one country, the separation of powers, the independence of the judiciary, the way policies are implemented, or how the law is enforced. But what the level of tariffs stands for needs to be analyzed. It represents trade openness and readiness for competition.

While the relationship between trade and economic growth is solid, it does not easily translate in rights and freedoms or better rule of law in the countries involved. For example, China, though it is greatly open to trade and has experienced very high economic growth, this has not led to democratization and rule of law established in Western terms. China has a record of rule by law, but not of limited government powers, fundamental rights, nor fair access to civil and criminal justice. The law is still represented by the will of the government and the will of the party.

On the other hand, highly democratic countries such as the US and the European Union member states employ very high tariffs. Since the record for rule of law is the highest in these regions one can hardly conclude that it has something to do with the level of tariffs, or trade openness. Countries change their level of tariffs due to economic interests. Trade practices are very much interconnected in all countries. The US Smoot-Hawley Tariff Act of 1930 and the consequent retaliation do not reflect in worse democratic or rule of law record within the countries involved but a reaction to the international financial situation.

A more difficult case to make though is for the puzzle: what if through trade openness the unobservable consequences of lower tariffs lead to some societal and economic changes that lead to rule of law? I will address this concern here.

The concern centers around the question of whether foreign countries will demand good rule of law practices? This is difficult to establish. Oftentimes, foreign firms and investors benefit from lack of rule of law, regulations, and union pressures present in Western countries. They benefit from low prices and at times rule of law. Foreign investors are idolized and consequently protected within corrupt networks. Some may pressure for rule of law enforcement, however as Hoff and Stieglitz find that this will most likely not happen.

Due to economic growth a new social stratum of entrepreneurs arises in these countries, people get exposed to Western values and rule of law practices. Would they then pressure for change? Most certainly, they will. How about local investors, would they put pressure on the private property enforcement? Yes, again. Do they have an effect on the rule of law? As argued in the theoretical framework section, though these two factors can have positive effects, they do not succeed in having an effect on the rule of law establishment due to collective action problems and financial and personal interest of keeping the status quo.

Not to forget the main obstacle for these unobservable effects to take place: the corrupt politicians who will preclude the efforts to establish rule of law. So, though lower tariffs-through increased trade-lead to economic growth, they do not lead to democracy and establishment of rule of law. The obstacle is nothing more than X, the independent

variable of interest, corruption. Pressure exists from all the groups mentioned. But the political interest among politicians manifested in change is still lacking.

One case can be made for low tariffs democratizing countries. I argue that is a spurious relationship. What determined the opening of trade also contributed to political reform. It is not consequential but simultaneous. For example many Central and Eastern European countries lowered their tariffs, after the fall of communism, in the meantime they conducted very serious democratizing reforms. One can hardly argue, for instance, that the reason CEE counties went through with democratization is because of trade. The will and the support for it were there to begin with.

For all the above reasons I believe 'tariffs' is a good instrument (IV) for corruption and it does not violate the relationship with the rule of law restrictions.

The two-stage least square generic regression model for this study is:

1st stage $$Corruption = \alpha_0 + \alpha_1\ Tariffs\ + \alpha_j X + \xi_{1t} + \mu_{1i} + \varepsilon_{1it}$$

2nd stage $$Democracy = \beta_0 + \beta_1 Corruption + \beta_j X + \xi_{2t} + \mu_{2i} + \varepsilon_{2it}$$

I use the above econometric model to separately test the effects of the variable of interest (*Corruption*) against all of the selected indicators of rule of law. Here X is a vector of control variables such the economic, institutional, regional, social, and demographic indicators.

This is a cross-sectional and over time model with random effects. An ideal model would include country fixed effects, which can account for variation over time excluding all country-specific noise. However, since there are a high number of cases in the panel

that do not vary in the level of rule of law over time, dropping these observations would induce severe selection bias; such that, the next best available method is TSCS with random effects.

The universe of cases is composed of all democracies and hybrid regimes around the world as defined by the Economist Intelligence Unit (EIU) index of democracy (2007) from 1996 until 2007 for WGI indicators, and 1994 to 2007 for FH and Polity IV.[491] The EIU index is built on five democratic categories, the electoral process and pluralism, civil liberties, the functioning of government, political participation, and political culture.[492] It represents a snapshot of the present stage of democracy around the world for 165 independent states and two territories. The large choice of cases offers a wide variance on the level of rule of law excluding all authoritarian regimes. This way we can see the effect political corruption at all stages of democratic development. In the next section, I present the results for the 125 countries over 14 years.

Results

The results of the two-stage least squared TSCS models presented in table 2 are in line with the expectations. They show clear statistical and substantive significance for the effect of corruption on democratic levels.

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[491] I chose 1996 as base year for WGI indicators since this is the first year with available data. For FH and Polity IV I chose 1994 as base year since it is the first year with available data, from Transparency International, while 2007 is the last year with available data on tariffs.

[492] The Economist Intelligence Unit Democracy Index http://graphics.eiu.com/PDF/Democracy_Index_2010_web.pdf, p.2

-Table 4 and 5 about here -

Models one and two report results for the Worldwide Governance Indicators aggregate measures of rule of law. Corruption is significant at the p<.05 level (-.22) in the first model testing the effect on the rule of law indicator, and at the p<.10 level (-.59) in the second model, testing the effect of corruption on the voice and accountability indicator. Models three and four perform robustness checks for these tests. In the third model, using the Freedom House indicator, the variable of interest reaches significance at the p<.05 level with a coefficient of -1.06 points. Model four presents the estimation for the Polity IV index. Similar to the previous three models, the instrumented corruption measure achieves significance at the p<.10 level by -2.07 points. The F test against the null hypothesis that the coefficients on the instruments other than the constant are not zero for all four models is significant at the p<.01 level for all four models. [493] For a single instrumental variable, F statistics under 10 are thought to suggest a problem of weak instruments (Sovey and Green 2009, p. 7), which is not the case here.

Only in the first model the development indicator (GDP per capita) reaches significance at the p<.10 level by .178 points. Interestingly enough, the financial crisis dummy only reaches significance in the first model (-.09), although the magnitude is almost negligible. This is probably due to the fact that data availability stops in 2007, and I use lagged economic indicators. So, the effect of economic crisis might have not been captured by this analysis. Having a decentralized government is a drawback according to these findings (-.13), and so is being a South American country (-.54). Contrary to the

[493] F = 650 (model 1) 472 (model 2), 696 (model 3), and 709 (model 4)

expectations, Catholic countries are more likely to be democratic (.16). Similar to estimations from previous studies, I find in the first model that being a British colony has positive effects on the rule of law component of democracy (.22). Additionally ethnic fractionalization seems to have a considerable negative impact (-.33) on this measure of democracy.

In the third model, which uses the Freedom House indicator the findings show, contrary to expectations that being a Central or Eastern European country has a positive effect on the level of democracy (and its rule of law component) by no less than 1.89 points.

One interesting finding is that very few other variables test significant while controlling for corruption, which suggests omitted variable bias in previous studies.

Discussion

These findings are very valuable both from a theoretical and empirical point of view. From a theoretical perspective this study represents an important contribution to the rule of law literature. While it sustains previous hypotheses that being a British colony, a decentralized country, and better developed country has a positive influence on the level of rule of law, it sheds light on a previously held assumption about the mysterious ingredient that makes rule of law function and be established: *political will*. I identified one instance of political will, the misappropriation of public funds for private gain and I

argued that fear of punishment will lead to a stage of lack of rule of law due to lack of provision of enforcement mechanisms.

Though most statistical studies suffer from shortcomings expected in quantitative analyses, these results show a clear negative effect of what is perceived as corrupt behavior on the rule of law. If this is the case major reforms and change dependent on corrupt politicians will not happen. Previously stated hypotheses about private property pressure from investors, citizen pressure, and interest on behalf of politicians that may lead to establishment of enforcement mechanisms, are replaced by the finding that unless corrupt politicians are eliminated from power, rule of law will be incompletely established. These past studies look at how corruption can be cured with law, and punishment. These studies fail to acknowledge the major obstacle to their theoretical scenario, leading to a state of confusion among practitioners.

The rule of law literature and the broader democratization literature in general stand to gain from this study. Since the well functioning of democratic mechanisms crucially depend on the establishment of rule of law, this study also sheds light on the puzzle of the lack of consolidation of democracy around the world. As pointed at the start of this study, most new democracies remain in an illiberal stage. Interference from government and arbitrary rule are still present. Democratic consolidation is yet another item that political corruption prevents. Democracy scholars should take seriously the dilemma of such a long consolidation processes around the world and look into the critical obstacles to it.

Form an empirical point of view it is important to note that the magnitude of the change in the democratic level with a unit improvement in the corruption score is very significant. The first model tests the hypothesis of a negative effect of corruption on the rule of law. The findings show that the magnitude of the expected effect is noteworthy. By decreasing the level of corruption by 1 point there is an increase of approximately -.22 points on the rule of law scale. Since approximately 77% of the countries range on this index between -1.25 and 1.25, then the .22 points increase in the WGI indicator can represent a considerable improvement to the rule of law in a country. In the second model, the findings are quite significant as well, since the magnitude of the effect is very substantial. With a one point decrease on the corruption scale we can observe an increase of .59 points on the voice and accountability scale. Taking into consideration that the range is similar to the rule of law indicator (from -1.25 to 1.25) this more than half a point increase is a very significant improvement in the quality of inclusion in politics for new democracies. The interpretation of IV results is similar to OLS regressions, and thus I calculated the magnitude of the effect of one unit change in corruption on the rule of law indicators.

This is significant especially for societies that are attempting to establish the rule of law. In these countries, with a decrease in grand corruption, politicians may have less incentive not to conduct reforms for introducing enforcement mechanisms, which can have a lock-in effect for establishing the rule of law.

Models three and four perform less specific tests on the rule of law. However, they represent robustness checks for the findings in the previous models.

In the third model (Freedom House index), the magnitude of the effect of corruption is in line with the theorized hypotheses. The negative coefficient means that indeed corruption has a negative impact on democracy (and its rule of law component) by 1.06 points, which is also significant. Such that fighting corruption and decreasing its value, by 1 point only, generates an increase in the Freedom House measure by 1.06 points. While FH ranges 1 to 7, and since approximately 70 percent of the countries range on the democracy scale between 3.5 and 6.5, an increase of 1.06 on this scale can make a meaningful difference. Substantively it can move *flawed democracies* to the *full democracies* bracket.

The Central Europe measure also reaches significance. New democracies in Central and Eastern Europe have almost a 2 point advantage on the democratic scale (1.89).

In model four, the magnitude of the estimator is also significant by -2.07 points. Since the Polity index ranges -10 to 10 and given that 90 percent of the cases here are above the 1 point threshold, a 1 point decrease in the corruption index represents a noteworthy 2.07 points increase in the democratic level. This represents a significant jump on the democratic scale.

In the first model we note a very significant negative effect of ethnic fractionalization on the level of rule of law. This confirms the hypothesis that in ethnically diverse societies, most likely due to an uneven distribution of power in political and judicial institutions, there is a deficit of rule of law. The magnitude of the effect of being a country in South America has on the level of rule of law is large enough

to raise questions about what distinctly South American attributes make it less likely to have good governance scores. It most likely has a lot to do with the arbitrariness of the judicial system and the persistent use of undemocratic methods for solving conflict especially within the territories of South American countries, where centralized governments have less control and access. Local centers of power maintain patronage as a means of conducting politics and justice. This is a question to explore in further detail in future studies.

Conclusion

These findings shed light on two debates in the literature. First, they address the development-democracy dilemma and add a causal factor for the success of the democratization process. When controlling for corruption, we observe flawed democratic mechanisms of inclusion in politics and control of power. Second, they highlight that economic development loses significance in the democratic equation. With the exception of the first model, where economic development is statistically significant but negligible in magnitude, neither income per capita nor higher economic growth generate better democracy scores when accounting for corrupt behavior and all other regional, social, and institutional factors. Tested separately (without the corruption indicator), economic indicators are significant.

These findings point to two important contributions. One is that corruption is very highly correlated with level of economic development and growth. Taking into consideration, though, that in this study used the lagged value of the economic indicators

we can draw an additional point, being that the link between higher income and better institutions is not obvious when corrupt political behavior is factored in. One excellent example is China. Though experiencing incredible levels of growth, the outcome is not translated in better civil rights and liberties, inclusion in politics, and definitely not accountability or the rule of law.

In a less radical example we could imagine two countries experiencing high growth, one being corrupt and one less corrupt. In the latter, much of the wealth, during periods of increased growth, might go untaxed since corrupt behavior, such as bribes from companies to taxing agencies or simply non-reported gains will diminish the amount of money the government will receive. In less corrupt states most of the funds will be properly taxed and will reach governmental programs, which can improve institutions by properly remunerating, for instance, civil servants. On the other hand, even if economic growth may yield more government revenues, in corrupt countries, these funds get budgeted to projects that benefit companies related to politicians instead of going to social programs; which in their turn, can improve the lives of citizens through education and health care, and can also increase governmental legitimacy.

Not discounting institutional constraints and structural dependencies, we need to explore how the lack of institutional control on political leaders creates a vicious circle of manipulation on behalf of and for the benefit of politicians in power. If all else is given, corruption accounts for almost a quarter of the variation in the rule of law score, depending on the source, then we can conclude that it is a universal problem regardless of the environment.

Table 4. Summary statistics

Variable	Mean	Std. Dev.	Min	Max	Observations
Democracy (FH)	5.45	1.42	1	7	1994
Democracy (Polity2)	6.73	3.96	-9	10	1647
Democracy (WGI v)	.36	.77	-2.03	1.82	1375
Democracy (WGI r)	.17	.97	-2.29	1.96	1361
Corruption	5.25	2.37	.1	10	1267
Tariffs	11.02	7.02	0	47.8	1120
GDP pc	11326.92	11918.81	14.20	82440.74	2088
GDP growth	4.07	4.28	-44.40	24.95	1963
Economic crisis	.23	.42	0	1	2108
Parliament	.4	.49	0	1	1785
Federal	.34	.47	0	1	1732
British colony	.27	.44	0	1	1785
OECD	.24	.42	0	1	2125
Ethnic fractionalization	.39	.24	.002	.93	2085
Africa	.2	.40	0	1	2125
Asia	.18	.38	0	1	2125
Central Europe	.16	.36	0	1	2125
South America	.24	.42	0	1	2125
Middle East	.03	.17	0	1	2125
Protestant	.29	.45	0	1	2125
Catholic	.37	.48	0	1	2125
Muslim	.10	.30	0	1	2125
Orthodox	.08	.27	0	1	2125

Table 5. Rule of law and corruption

	Rule of Law (WGI)	Inclusion (WGI)	Freedom House	Polity IV
Corruption	-0.221**	-0.599*	-1.060**	-2.072*
	(0.106)	(0.369)	(0.441)	(1.178)
GDP pc	0.178*	-0.306	-0.574	-1.294
(lag T-2)	(0.104)	(0.355)	(0.424)	(1.134)
Growth	0.012	-0.0002	-0.088	-0.242
(lag T-2)	(0.0220)	(0.0310)	(0.0789)	(0.216)
Financial Crisis	-0.09***	0.001	0.168	0.191
	(0.0363)	(0.0592)	(0.130)	(0.366)
Parliament	0.041	-0.065	-0.259	0.269
	(0.0857)	(0.217)	(0.325)	(0.928)
Federal	-0.131**	0.096	0.090	0.763
	(0.0660)	(0.157)	(0.234)	(0.665)
British	0.22***	0.056	-0.130	-0.824
Colony	(0.0718)	(0.146)	(0.247)	(0.667)
CE Europe	-0.086	0.900	1.892*	3.743
	(0.239)	(0.748)	(1.000)	(2.744)
South America	-0.549**	0.608	1.445	4.002
	(0.238)	(0.767)	(0.956)	(2.564)
Africa	0.025	0.228	0.710	0.373
	(0.170)	(0.429)	(0.609)	(1.616)
Asia	-0.088	0.179	0.375	0.635
	(0.189)	(0.564)	(0.737)	(1.955)
Middle East	-0.302	0.370	0.619	3.299
	(0.301)	(0.915)	(1.137)	(2.995)
Catholic	0.163*	0.177	0.318	0.484
	(0.0902)	(0.188)	(0.302)	(0.811)
Orthodox	-0.172	-0.006	0.023	1.080
	(0.154)	(0.402)	(0.537)	(1.410)
Muslim	-0.052	0.096	0.142	0.094
	(0.118)	(0.318)	(0.463)	(1.274)
Ethnic	-0.336**	-0.018	0.125	-1.472
Fractionalization	(0.171)	(0.434)	(0.610)	(1.686)
Constant	0.032	5.832	15.48***	28.62**
	(1.295)	(4.457)	(5.351)	(14.33)
Observations	437	437	550	548
Overall R^2	.85	.53	.30	.16
chi2	851.4	152.5	131.6	102.2
df_m	16	16	16	16

Standard errors in parentheses * p<.10, ** p<.05, ***p<.01

Table 6. First stage results rule of law and corruption

	Rule of Law	Voice and Accountability	Freedom House	Polity IV
Tariffs	0.045***	0.019***	-0.030***	0.030***
	(0.013)	(0.012)	(0.010)	(0.106)
GDP pc	-0.890***	-0.92***	-0.896***	-0.895***
(lag T-2)	(0.068)	(0.077)	(0.065)	(0.065)
Growth	-0.036	-0.022	-0.107***	-0.108**
(lag T-2)	(0.057)	(0.048)	(0.497)	(0.049)
Financial Crisis	-0.0974**	0.127*	0.211**	0.226***
	(0.0363)	(0.075)	(0.089)	(0.089)
Parliament	-0.463***	-0.463**	-0.526***	-0.568***
	(0.180)	(0.208)	(0.174)	(0.178)
Federal	0.229	0.274	0.265*	0.294*
	(0.157)	(0.180)	(0.152)	(0.154)
British Colony	-0.248	-0.206	-0.274	-0.268
	(0.185)	(0.212)	(0.181)	(0.179)
CE Europe	1.977***	1.939***	2.101***	2.156***
	(0.307)	(0.356)	(0.296)	(0.299)
South America	1.801***	1.928***	1.901***	1.903***
	(0.313)	(0.363)	(0.300)	(.298)
Africa	0.737**	0.853**	0.837**	0.787**
	(0.378)	(0.435)	(0.363)	(0.363)
Asia	-1.264***	1.353***	1.348***	1.321***
	(0.324)	(0.376)	(0.311)	(0.310)
Middle East	-2.314***	2.307***	2.224***	2.161***
	(0.463)	(0.540)	(.447)	(0.447)
Catholic	0.305	0.271	0.227	0.232
	(0.230)	(0.268)	(0.223)	(0.225)
Orthodox	-0.848***	-0.882**	0.781**	0.690**
	(0.335)	(0.386)	(0.326)	(0.335)
Muslim	-0.710***	0.724***	0.801***	0.828***
	(0.227)	(0.260)	(0.222)	(0.223)
Ethnic	-0.958***	-0.932**	0.951***	0.99***
Fractionalization	(0.356)	(0.409)	(0.347)	(0.334)
Constant	11.204***	11.61***	11.403**	11.40***
	(0.768)	(0.866)	(0.737)	(0.734)
Observations	437	437	550	548
F test	650	472	696	709

Standard errors in parentheses
* p<.10, **p<.05, *** p<.01

CONCLUSIONS

This dissertation focused on the effect of political corruption on the establishment of rule of law. Though there are reasons for optimism, one has to take them with a grain of salt. Assuming that there will be no turn towards authoritarianism in the new democracies in the world and given a commitment to liberal democracy, we can hope that eventually these countries will evolve towards rule of law. However, one is bound to wonder, is liberal constitutional democracy universally applicable granted a certain period of time to establish? Or is it a breed specific to Western democracy? Will the new democracies perpetually linger in a state of 'rule by certain people, legitimized through elections, above the law?' Or will they develop into entities that truly value the checks on power and apply them? It is difficult to tell.

I posit that liberal constitutional democracy is universally compatible with all systems and cultures. Maybe not right away after the break from the authoritarian past. But given enough time, new democracies can stabilize and learn to respect and apply the rule of law. Germany's cultural legacy was highly authoritarian, obedient in a hierarchical structure, highly militarized and expansionist. At the beginning of 21st century, Germany is one of the most successful liberal constitutional democracies in the world. It does have an advantage, the respect for structure, but the choice of structure is somewhat contrary to its tradition. And so is the Japanese case, though to a less extent than Germany. The culture is still prevalently hierarchical, obedient, and unequal. However is has established rule of law and the choice of structure is democratic.

I turn here to a topic avoided in the present dissertation; that all democracies, with or without established rule of law, are corrupt. One of the biggest obstacles in explaining the detrimental effect of political corruption on the establishment of rule of law in new democracies is the perception that, advanced democracies are 'as corrupt.' I have spent a fair amount of space in this dissertation to highlight the extent of the new democratic form of corruption, which is endemic. But no one can refute the theory that even advanced democratic states (for instance the United States), are sank in political corruption. I also showed the relevance of accepting such a flawed form of corrupt state. Because while in advanced democracies politicians are corrupt, the average citizens can still look for justice in court and expect with a margin of predictability a fair outcome. These outcomes are rather random in new democracies without established rule of law.

So are we to accept that rule of law leaves room for corrupt politicians and biased regulatory systems, and unequal outcomes, though every one is theoretically equal before the law? What are the new democracies striving for? More of the same? Are citizens supposed to accept that this is the dead end and that rule of law with corruption is the model of governance? These are the questions for further research.

Political institutions can only do so much. They are human creations and people inhabit them; people with will and reason. If given the opportunity, people may take advantage of loopholes and enrichment strategies. Economic downfalls make choices even more difficult. The 21st century has started with a lot of instability, the terrorist attacks and hunt, the financial crisis, the slowdown of economic growth, the Arab spring, the rise of extremist parties in Europe. In the context of emancipation and high mobility

of people and goods (first African American president, dictators thrown out of power in the Middle East, economic growth and middle class growth in China) one cannot escape to notice the movement towards representativeness and participation. As Dahl put it, the ideal democracy cannot yet be achieved, but the trend is towards those core characteristics of liberal constitutional democracies; the trend matters. Rule of law was not an instant discovery, but a direction of development, where the gains and the successes became the milestones of rule of law, as we know it today. They can hardly be taken back. Once established, institutions are difficult to move and change. These tiny steps we perceive today as a trend are the milestones of the future of constitutional democracies in the world.

Appendix 1

Politicians, their firms, and public money

This is a list of members of the parliament (both the Chamber of Deputies and the Senate) who run contracts with public institutions, through their companies or the companies of their first-degree relatives. The sums of money are reproduced exactly from the source [494] (1 dollar = .81 Euros, 1 dollar = 3.64 Romanian Lei)

1. Member of the Chamber of Deputies	**Public Institutions**	**Companies**	**Money**
Gheorghe Albu (PDL)	The Water Company Targoviste, Targoviste City Hall, University 'Valahia,' etc.	Universul Dambovitean SRL	82,371 Lei
Ana Gheorghe (PSD)	Local Council Dambovita,	Complis SA	22,219,274 Lei

[494] Sercan Emilia 2011 "Cat castiga deputatii nostri din contractele cu statul," Jan. 20 Jurnalul? and "Prietenii statului, episodul II. Lista senatorilor si contractele lor," Jan. 21 Jurnalul

	Tartaresti City Hall, Petresti City Hall, The Tourism Ministry, etc.		
Florin Anghel (PDL)	Campina City Hall, Tomsani City Hall, Brebu City Hall, etc	Fibec SA Campina	50,272,417 Lei
Marian Bobes (PSD, PDL)	Local Council Cungrea, Slatina City Hall,Valcele City Hall	Serena 94 SA	13,485,666 Lei
Cristian Ion Burlacu (PNL, PDL)	Sanatoriul Balnear Techerghiol, Sinaia City Hall	Marami Construct SRL	9,396,122 Lei
Sorin Gheorghe Buta (PDL)	Vladesti City Hall, Cetateni City Hall, Lesesti City Hall, etc.	Global Proiect Consult SRL	65,729 Lei
Costica Canacheu (PDL)	The Ethnography Institute, Tarom, Rompress, etc.	Neico SA	576,715 Lei
Palasca Viorel	The National	Piramid 92 SRL	3,167,796 Lei

(PNL)	Institute of Patrimony		
Ioan Palar (PNL)	Romatsa Bacau	Luxor SRL	41,307 Lei
Gabriel Plaiasu (PNL)	CFR marfa, CFR Infrastructure, Metrorex	Quartz SRL	180,580 Lei
Nini Sapunaru (PNL)	n/a (33 direct contracts)	Europroiect SRL	1,554,627 Lei and 43,347 Euro
Florin Turcanu (PNL)	The Pedagogic High school, The Economic High school, The Neuropsychiatry Hospital Saveni, etc.	Poienita SRL	349,826 Lei
Ion Dumitru (PSD)	Local Council Valeni, Tartaresti, Valea Lunga, Visinesti, Ulmi; Electrica Distribution Muntenia Nord, etc.	Blitz Lighting SRL	7,295,768 Lei
Cornel Itu (PSD)	Caseiu City Hall,	Mecsom SA	1,501,669 Lei

	Mintiul Gherlii City Hall, Ministry of Finance, etc.		
Eduard Stelian Martin (PSD)	327 contracts with public institutions among which: The Romanian Secret Service, Constanta City Hall, CFR, RAR, Electrica Serv., The Postal Services,etc.	Polaris Holding SRL and GMG Management SRL	8,707,279 Lei
Constantin Mazilu (PSD)	The Streets Administration Bucharest, County council Buzau, Sector 6 City Hall, etc.	Ghecon Construct SRL	57,928,155 Lei
Ioan Munteanu (PSD)	Hidroserv Bistrita SA, Piatra Neamt City Hall, Roman City Hall, etc.	Proinvest SRL	15,716,456 Lei

Dan Nica (PSD)	APIA	Viticom SRL	425,837 Euro
Ioan Sorin Roman (PSD)	APDRP	Intreprindere Individuala	243,000 Euro
Lucretia Rosca (PSD)	Health Insurance House	Medical Office Lucrecretia Rosca	340,000 Lei
Anghel Stanciu (PSD)	Iasi Kinder garden No.13, AJOFM Vaslui, OIR Posdru Nord Est	Getop Constructii SRL and Fundatia Ecologica Green	8,423,102 Lei
Horia Teodorescu (PSD)	Local Council Beidaud, Luncavita, Cerna, etc.	Condor SRL	38,618,966 Lei
Gheorghe Zoicas (PSD)	Somcuta City Hall	n/a	138,235 Lei
Derzsi Akos (UDMR)	The Official Monitor Bihor County, County Council Bihor, Bihor Court, etc.	Europrint SRL	291,511 Lei
Edler Andras Gyorg (UDMR)	Ghidfalau City Hall, Lemnia, Poian, Bretcu City Hall,	Edler Laszlo Gyorg PFA and Unit Prest SRL	105.249 Lei

	etc.		

Attila Korodi (UDMR)	Miercurea Ciuc City Hall, Santimbru, Cozmeni City Hall, etc.	Webmedia SRL	7,359 Lei
Lakatos Petru (UDMR)	State Theatre Oradea	Sprinkler SRL	1,200 Euro/ year
Mate Andras Levente (UDMR)	State Land Agency	Law Office "Mate Andras"	26,000 Lei
Olosz Gergely (UDMR)	Garda de Mediu Sibiu, Electrica Transilvania, Electrica Serv.	Cleantech SRL	208,910 Lei
Ovidiu Gant (Minorities)	Emergency Hospital for Children "Louis Turcanu" Timisoara	Diagnostic Terapie Halcis Alergie SRL	10,233 Lei
Dragos Adrian Iftime (PDL)	Emergency Hospital Valsui	Fleischparty SRL	90,321 Lei

Dumitru Pardau (PDL)	Sapard, APDRP, The Ministry of Finance	Clas Decent SRL and Agroturism Paraul Pietrei SRL	1,547,325 Lei
Cristian Petrescu (PDL)	CNADNR	Law Office	549,000 Euro and 4,612,800 Lei
Silviu Prigoana (PDL)	Romanian Banking Institute, DIICOT, Sector 3 City Hall, etc.	Rosal Group	over 6,215,888 Lei
Valeriu Tabara (PDL) Agriculture Minister	n/a	SC Da Lovrin and UASMVB Timisoara	1,182,000 Euro and aprox. 1,500,000 Lei
Gabriel Nita Trasculescu (PDL)	Brasov City Hall	Law Office "Tita Nicolescu Gabriel"	188,750 Lei
Alin Silviu Trasculescu (PDL)	Jaristea, Odobesti, Urechesti City Hall, Focsani Jail, etc.	TSDM Dollar Prod SRL	0.21 Euro per aprox. 2 pounds garbage.
Elena Udrea (PDL) Development Minister	Fundeni Institute, Emergency, Emergency Hospital Floreasca, Ministry of Defense	Calamari Trading Impex	Aprox. 6,591,557 Lei

Valerian Vreme (PDL)	Barsanesti City Hall, Gura Vaii City Hall, Termoelectrica, etc.	UM-SOFT	5,468 Lei/ month
Valeriu Zgonea (PSD)	Petrom SA, Integration Ministry	"Tinerii lupta impotriva viciilor mileniului III" Association	37,045 Lei and 49,020 Euro
Tudor Chiuariu (PNL)	Local Council Caransebes	Law Office "Chiuariu and Associates"	2,400 Euro
Ciprian Dobre (PNL)	Iernut City Hall	Law Office "Iuliana Dobre"	7,200 Euro
Mihai Aurel Dontu (PNL)	APIA	Robusta Horus Tour SRL and Donad Turism SRL	396,998 Euro
Gheorghe Dragomir (PNL)	APIA Constanta	Histria Industry SRL	285,714 Euro
Relu Fenechiu (PNL)	Emergency Hospital, County School District Iasi, etc.	Fene Grup SRL	5,857,490 Lei

Mihai Lupu (PNL)	Hidroelectrica SA, Administratia Bazinala de Apa Siret and ANIF	Constructii Hidrotehnice SRL	621,463,654 Lei
Dan Mihai Marian (PNL)	Municipal Hospital "Dumitru Castroian" Husi, Emergency Hospital Valui	Industrial Marian SRL	216,279 Lei

2. Member of the Senate	**Public Institutions**	**Companies**	**Money**
Mircea Florin Andrei (PDL)	County Consil Giurgiu, Electrica SA	Law Office "Mircea Andrei and Associates"	145,000 Euro
Petru Basa (PDL)	Sighisoara, Danes, Biertan City Halls, Romanian Academy, National Administration for Romanian Water, etc.	Idea Media & Publicitate, Teleson SRL	617 contracts, n/a

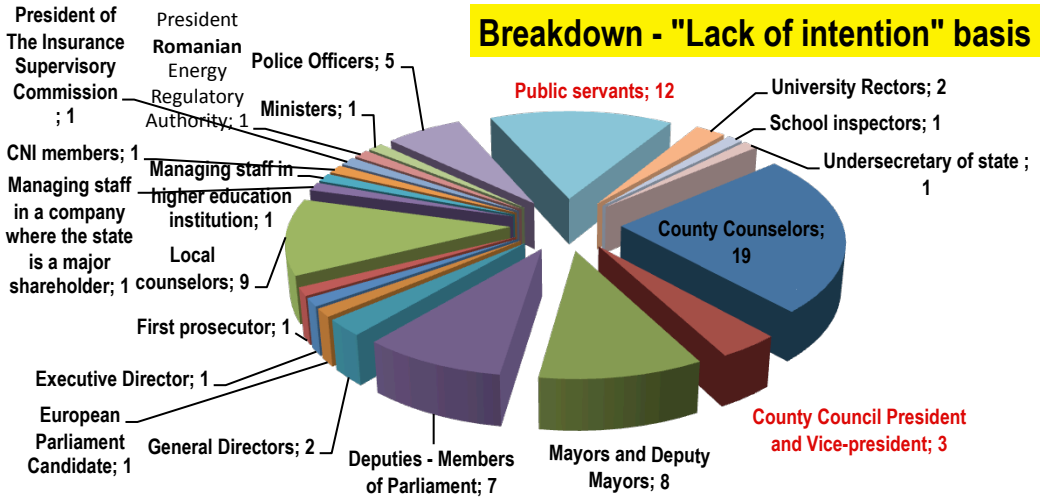
Viorel Constantinescu (PDL)	Largu City Hall, Buzau City Hall	Proiect SA, Constotal SRL	
Mihail Hardau (PDL)	AJOFM Cluj	n/a	200 Lei/ per hour
Sorina Placinta (PDL)	Tg. Mures City Hall, Energy Complex Turceni, Energy Complex Craiova, Otopeni Airport, The Defense Ministry, The Ministry of Economy, etc.	Sorste, Fundatia Zi Deschisa	4,923,834 Lei
Ion Ruset (PDL)	Nagomir City Hall	Clinmac SRL	15,896 Lei
Mihail Stanisoara (PDL)	Drobeta Turnu Severin, Craiova University, Romsilva, Mehedinti Court, ANAF, etc.	Terra Sat Severin	85,259 Lei
Iulian Urban (PDL)	Termoficare	n/a	90,798 Lei

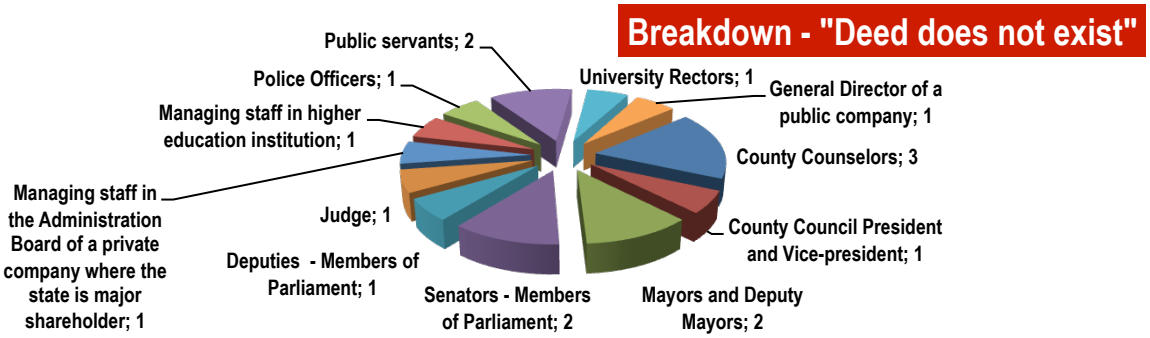
	Craiova and CET Brasov, Bragadiru City Hall, etc		
Iulian Badescu (PSD)	Conpet SA Ploiesti, Ploiesti Industrial Park, Brazi Industrial Park	Bloom Press SRL	74,854 Lei
Ioan Chelaru (PSD)	Roman Hospital, Roman City Hall	n/a	64,924 Lei
Florin Constantinescu (PSD)	Environment Minister, etc.	ACK SRL, Morlux Florena SRL	68,890,759 Lei
Ioan Mang (PSD)	Polytechnic University, County Hospital Bihor Oradea, etc.	DEC SRL	815,990 Lei
Doina Silistru (PSD)	National Council of Programs Management	ICD Pajisti Vaslui	300,000 Lei
Dan Sova (PSD)	Romanian National Bank	Law Office "Sova and Associates"	16,612 Lei
Ion Toma (PSD)	Education Minister,	SCADT SA	96, 948, 115 Lei

	National Company of Investment, Olt County Council, etc.		
Emilian Valentin Francu (PNL)	Valciu County City Halls	CET Govora	148,202 Lei
Ioan Ghise (PNL)	n/a	Asociatia Patronatul Medicinei Integrative	188,640 Lei
Liviu Titus Pasca (PNL)	Health Insurances Maramures	n/a	n/a
Albert Almos (UDMR)	FEADR Covasna	n/a	25,000 Lei
Gyorgy Frunda (UDMR)	Health Insurances of the Ministry of Transportation, Ministry of Defense, etc.	Ortoprofil Prod SRL, Marmed SRL	n/a
Verestoy Attila (UDMR)	Odorheiul Secuiesc, Hospital, City Hall and Kinder Garden	Junior Com SRL	558,000 Lei
Dan Voiculescu (PC)	Labor Ministry, Transelectrica,	GRIVCO SA, Antena 1 SA, etc	24,630,971 Lei and 3,710,844 Euro

	OPCOM, ANCTI, RAR, The State Patent Office, etc.		
Serban Mihailescu (UNPR)	Compania Nationala a Huilei, Rovinari, Energy Complex Turceni, Energy Complex Craiva, etc.	Hanex SRL	1,568,622 Lei
Ion Vasile (Independent)	APIA	Ion Vasile PF	1,000,000 Euro

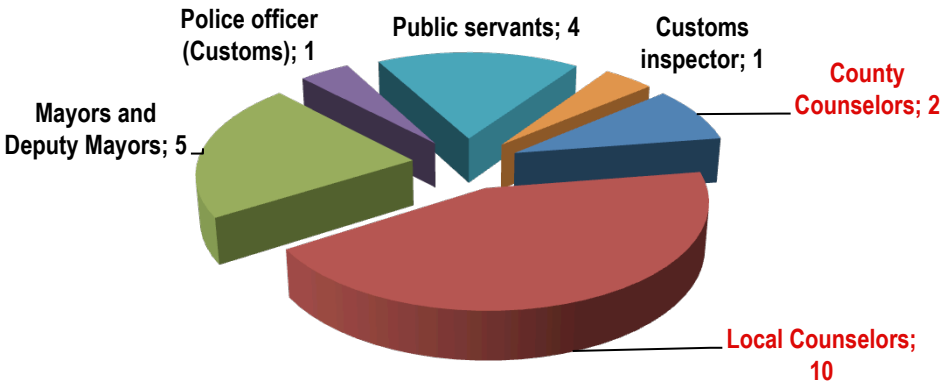
Appendix 2. The National Integrity Agency[495]

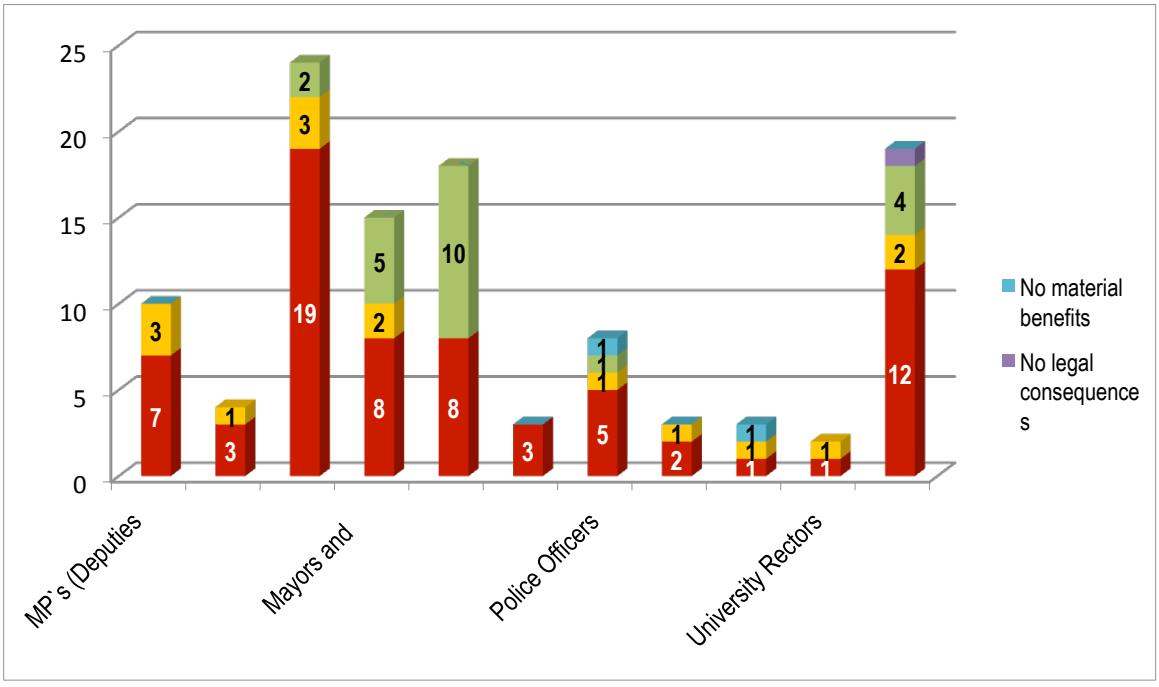




[495] Data Provided by ANI as follow up information for the interview with President Horia Georgescu.

Breakdown - "The deed exists but it does not constitute a social danger"





Milestones

Longest period for a case which is still pending on Prosecutor`s Office at the end of the reporting period	912 days (2,5 years) – Mr Ardelean Andrei, Deputy Executive Director within a public institution
Longest period for a Prosecutor to issue a decision in a case referred by ANI	650 days (1,8 years) – Mr. Mujea Gelu, General Director within a public institution
Shortest period for a Prosecutor to issue a decision in a case referred by ANI	40 days – Mr. Mircea Marin, Deputy, Member of Parliament
Longest period for the Court to issue a definitive solution in a case referred by ANI	461 days (1,3 years) – Mr. Urdea Nicolae, Mayor
Shortest period for the Court to issue a definitive solution in a case referred by ANI	22 days – Mr. Iovici Victor, Local counselor
Longest period for an ANI`s referred case to remain definitive	699 days (1,9 years) – Mr. Florea Geica, General Director within a public authority
Shortest period for an ANI`s referred case to remain definitive	86 days – Ms. Stoica Elena, Public servant

From the 1.438 complaints against the administrative fines applied by ANI before May, 2010, Courts issued definitive and irrevocable decisions in 1.263 cases as follows:

- ✓ 1.053 (84 %) decisions were in favour of ANI,
- ✓ 210 (16%) were unfavourable

Appendix 3. Description of variables, coding, and data sources

Name	Description and data sources
Corruption	Index Inverted Corruption Perception Index; -10 = non corrupt, 1 = Corrupt (Transparency International)
Democracy	Index Combined Average Ratings; 7 = most democratic, 1= least democratic (Freedom House) Composite Index Polity IV 21-point scale from -10 (hereditary monarchy) to +10 (consolidated democracy) - Marshal and Jaggers World Governance Indicators *Voice and Accountability* and *Rule of Law* Aggregate Indicators; -2.5 to 2.5
GDP	Log of GDP, purchase-power-parity, per capita (IMF), two yeas lag
Growth rate	Calculated as the positive or negative growth percentage of one year from the previous year value of GDP, two years lag
Ec. Crisis	coded 1 starting 2007, the year when the financial crisis evolved into a world economic crisis.
Parliament	1 if parliamentary (Norris, 2009)
Federal	Type of unitary-federal state, 1 if federal (Norris, 2008 'Driving Democracy)
OECD	1 if member state (Norris, 2009)
Muslim	1 if predominant Muslim nation, (CIA, Factbook)

Catholic	1 if predominant Catholic nation (CIA, Factbook)
Orthodox	1 if predominant Orthodox nation (CIA, Factbook)
Protestant	1 if predominant Protestant nation (CIA, Factbook)
Central Eur	1 if Central or Eastern Europe (Norris, 2009)
Middle East	1 if Middle East (Norris, 2009)
South America	1 if South America (Norris, 2009)
Africa	1 if Africa (Norris, 2009)
Asia	1 if Asia (Norris, 2009)
Ethnic Fract.	Combined linguistic and racial 0-1 (Alessina)

Appendix 4. List of interviewees:

Romania (2011)

Monica Macovei – Former Minister of Justice, current Member of the European Parliament

Daniel Morar – Chief Prosecutor, The Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anticorruption Department (DNA)

Cristi Danilet – Judge, Superior Council of Magistracy (CSM)

Horia Georgescu – General Secretary National Integrity Agency (ANI)

Laura Stefan – Anticorruption Expert, Romanian Academic Society (SAR)

Theodor Nicolescu – Former Secretary of State for the Ministry of Justice

Sanda-Maria Ardeleanu – Member of the Romanian Parliament (PDL)

Adrian-Miroslav Merka - Member of the Romanian Parliament (PDL), Committee for Budget, Finance and Banks

Mircea Grosaru - Member of the Romanian Parliament (Minorities), Justice Committee

Dan-Radu Zatreanu - Member of the Romanian Parliament (PDL)

Cristian Petrescu - Member of the Romanian Parliament (PDL)

Mate Andras Levente – UDMR Member of the Romanian Parliament, President UDMR Party Cluj

Petru Luhan –Member of the European Parliament, Committee on Regional

Development, Committee on Civil Liberties, Subcommittee on Security and Defense

Oana Tamas – Juridic expert Ministry of Justice

Bianka Szenczi – Vice-president National Authority of Regulating and Monitoring Public Procurement

Maximilian Balasescu – Criminal Prosecutor Bucharest Court

Codru Vrabie – Anti-corruption expert, leading member of the civil society, member of the National Integrity Council

Radu Nicolae – Center for Legal Resources

Mircea Toma – President Active Watch Media Monitoring Agency

Paul Chioveanu – Program Coordinator Active Watch Media Monitoring Agency

Vladimir Tismaneanu – President of the Institute for the Investigation of Communist Crimes, Political Science Professor University of Maryland

Ioan Stanomir – Former Presidential Counselor (Constitution Revision), member of the Institute for the Investigation of Communist Crimes, Law Professor University of Bucharest

Radu Carp – Former Presidential Advisor, Director Romanian Diplomatic Institute, Law Professor University of Bucharest

Florin Diaconu – Director Romanian Diplomatic Institute, Political Science Professor University of Bucharest

Daniel Barbu – Political Science Professor, Romanian Political Science Institute and University of Bucharest

Mihai Marcoci – Member of the Romanian Secret Service, Professor Police Academy

Florina Presada – Center for Public Participation Resources

George Tiugea – Head of International Relations Department Ovidiu Sincai Institute

Silviu-Ioan Popa – Advisor to the President National Integrity Agency

Bogdan Cristian Iacob – Secretary of the Scientific Council at the Institute for Investigation of Communist Crimes

R1- Juridic Expert Ministry of Justice (under condition of anonymity – A)

R2 – Former Director Deloitte Romania, Audit, Consulting, Financial Advising, Risk Management and Tax Services (Independent) (A)

R3 – Member of the business community (A)

R4 – Member of the business community (A)

Czech Republic (2011)

David Ondracka - Director Transparency International, Prague, Czech Republic

Lenka Andrysova – Member of the Czech Parliament, Vice-Chairperson of Committee on Foreign Affairs, Member of Committee on Public Administration and Regional Development

Marek Benda – Member of the Czech Parliament Vice President of the Judicial Committee

Viktor Cech – Deputy Minister Ministry of Interior of the Czech Republic, in charge with the implementation of the Anticorruption Strategy

Pavel Zeman – Chief Prosecutor Czech Republic

Tomas Kafka – Senior Manager Ernst & Young, Fraud Investigation and Dispute Services

Martin Bohman – Senior official Ministry of Interior

Karel Janecek – member of the business community and founder of the Anticorruption Agency

Tomas Hudechek – Ministry of Justice, Department for International Organizations and International cooperation

Helena Lisuchova – Ministry of Justice, Acting Head of International Cooperation Department

Petr Brichacek – Lobbyist ODS party

Vaclav Zak – former Member of the Parliament, President of the Council of Radio and TV broadcasting

Jan Alexa – drafted the anticorruption strategy for the Ministry of Health

Pavol Fric – Center for Social and Economic Strategies, Faculty of Social Sciences, Charles University in Prague

Vladimira Dvorakova – President of the Accreditation Commission of Czech Republic, Head of the Department of Political Science, University of Economics Prague

Jaques Rupnic – Senior research fellow, Centre for International Studies and Research (CERI)

Michael Smith – Senior Manger at the Institute of Sociology, Academy of Sciences Czech Republic

Jonathan Stein – Editor Project Syndicate.

Jitka Vlcova - Journalist *Dnes* (leading journal)

Jan Kovar – doctoral candidate Political Science

Mila Hartman – Member of the business community (A)

CZ1 – Shana – member of the business community (A)

CZ2 – Fidel – member of the business community (A)

CZ3 – member of the business community (A)

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