
The Effect Of EU Anti-Corruption Measures On The Romanian Judiciary

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Abstract:

This study is an examination of a changing judiciary in an emerging democracy. As part of the conditions mandated for European Union (EU) accession, Romania has been urged to demonstrate movement toward greater rule of law (Romania, 2008). One way in which Romania has responded to this objective is through the creation of the Superior Council of the Magistracy (CSM), a judicial body separate from the executive branch.

Additionally, changes are occurring to the Romanian judiciary as a result of the European Court of Human Rights (ECHR) power to remand cases that are inconsistent with the European Convention on Human Rights (Janis, 2000).

This qualitative research involved an attitudinal study based on semi-structured interviews of members of the Romanian judiciary. This research is unique because, although many studies of the population's perception of corruption are available, this study involves the suggestions of members of the Romanian judiciary themselves.

1. Romanian Historical Background

After more than 40 years of communist rule in Romania, in 1989 the bloody Romanian revolution led to more than 1,000 deaths and the overthrow of Nicolae Ceausescu (Jan. 26, 1918-Dec. 25, 1989). Ceausescu, president of Romania from 1965 until his execution on December 25, 1989, ruled Romania in a totalitarian manner using fear to maintain control (Gallagher, 2005). During Ceausescu's rule, prosecutors had much greater power than judges and were used as a tool of the government to keep political opponents in line and to protect allies from accountability for engaging in corrupt practices (Gallagher, 2005; Freedom House, 2005).

Initially after the 1989 revolution, many of those involved in the second power tier of the communist system gained control of the government in Romania (Gallagher, 2005). In the period after the fall of communism, Romania experienced economic stagnation due to corrupt practices in government (Gallagher, 2005). The initial lack of reform created an environment of "poor rule of law, widespread corruption, societal frustration, conflicts and distrust in state institutions" (Transparency International, NIS, 2005, p.11). Thus significant progress in the rule of law did not occur in the legal system during this transition period.

1.1 Romanian EU Accession History

In 1999 Romania began accession talks in hopes of joining the EU in 2004. As part of these discussions regarding accession, Romania came under pressure to reduce corruption, and formed an anti-corruption strategy in 2001 (Transparency International, NIS 2005, p.10).

Because of a lack of preparedness due to corruption in the areas of the judiciary and public administration, Romania missed joining the EU in 2004 (Gallu, 2006). However, Romania was able to become part of the EU in 2007 (Gallu, 2006). As part of the accession requirement for Romania to join the EU in 2007, the European Commission (EC) issued a moratorium on corruption and imposed the Cooperation and Verification Mechanism (CVM) mandating that Romania comply with anti-corruption mandates; absent such compliance, the EC could use special safeguards included in the accession treaties that could lead to a refusal to recognize court decisions by the ECHR or to cut EU funds (Commission to the European Communities, 2008). The safeguard clause was to remain in effect in Romania for the first three years of EU membership (Bulgaria, June 28, 2007). However, in 2009 although the CVM was about to expire, the EC concluded that more progress needed to be made in the areas of judiciary reform and corruption (Stephan, Tapalaga, & Inoita, 2009, p.19). A new assessment was conducted in Summer 2011 (Commission, Interim Report, February 18, 2011). In this report the EC stated that much progress had occurred but that further progress needed to be made in anti-corruption efforts in the Romanian judiciary (Commission, Final Report, July 20, 2011).

1.2 Superior Council of Magistracy

Romania has responded to the EU mandate to demonstrate movement toward greater rule of law with the creation of the CSM, an independent judicial oversight body. After the 2003 revision of the Constitution in June 2004, Romania followed the Latin European model of establishing the CSM as a separate body in the judiciary elected by magistrates (Alistar,

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2007). The CSM has the responsibility for recruitment, career development and sanctioning judges and prosecutors (Alistar, 2007). Sanctioning judges is now solely the purview of the CSM as a mechanism to avoid political interference (Freedom House, 2005). Furthermore, appointing judges now involves an examination procedure administered by the CSM through the National Institute of Magistrates (NIM) to ensure knowledge and competency (Dumitru & Ungureanu, 2011).

This structural change was intended to create judicial autonomy from the Ministry of Justice (MoJ), which is under the control of the executive branch and has traditionally had responsibility for criminal matters (Freedom House, 2005). This modification has the potential to create greater autonomy for the judicial branch as well as to provide a symbolic demonstration of the government's willingness to provide institutional mechanisms to ensure independence of the courts (Alistar, 2007).

2. Research Question and Methodology

The research question for this study examines whether members of the Romanian judiciary believe that the development of the CSM designed to make the judiciary more independent has actually resulted in a more independent judiciary, thus providing a check on corruption.

This qualitative research is an attitudinal study based on semi-structured interviews of members of the Romanian judiciary. This study includes interviews with 23 judges throughout Romania in Cluj-Napoca and Bucharest, at all levels of their careers and includes magistrates from the Tribunal, which are courts of first instance, Court of Appeals and Supreme (High) Court. Their answers were coded and analyzed to determine patterns and themes, then cross-referenced by experience and gender. The data was then analyzed using a Rational Choice, neoinstitutional framework incorporating current theory which applies when domestic actors follow EU conditionalities to determine which factors have influenced behavior.

Because Romania is a country of networks, where people often do not trust people they do not know, the ability to contact the judges was often a result of connections. Therefore, this study does not involve a random sample. However, the lack of unanimity in answers given indicates that a variety of opinions were represented.

3. Summary of Interview Results

The results of the interviews were mixed regarding the effectiveness of the CSM. Overall, the magistrates agreed that the CSM is a good system and they preferred it to the previous system where the MoJ, controlled by the executive branch, had oversight of the judiciary. The magistrates felt more secure and freer from political interference because, after the change, only the CSM could terminate, promote or discipline magistrates.

However, the magistrates did not believe that the CSM was as helpful as it could or should be. Part of the impediment to the effectiveness of the CSM was that many in the Romanian government did not see the judiciary as a separate branch. For example, many magistrates stated that the other branches of government used media sources to discredit the judicial body and put pressure on judges to decide cases with a particular outcome. Also, nearly every judge said that because the MoJ, instead of the judiciary, controls the budget for the judiciary, the CSM was less effective than it would ordinarily be.

Exams graded on the basis of objective criteria are given to judicial students for the initial appointment as a magistrate and an interview process exists for the Court of Appeals and the Supreme Court. Magistrates agreed that the initial appointment process for becoming a magistrate was fair. However, no magistrate thought that the process to become promoted to the Court of Appeals or the Supreme (High) Court was transparent. Most magistrates indicated that although perhaps the written exam for promotion to the higher courts is fair, the criteria for what is considered a good interview and promotion process is very ambiguous. Furthermore, no magistrate found the process for transferring magistrates from one court to another to be transparent.

When asked about the overall quality of the rule of law in Romania, the magistrates generally thought that the quality of judicial opinions and jurisprudence was improving. Some believed this improvement was a result of the establishment of the CSM, whereas others believed that this was a result of the ECHR.² The CSM requires each judicial decision to have certain elements. The CSM evaluates magistrates based on the quality of these judicial decisions. The magistrates agreed that judicial opinions have become more accessible to the public, but improvements could still be made in this

² Now the ECHR has the power to remand cases back to Romania that were in conflict with the European Convention on Human Rights. Articles 8-11/14 ECHR (Janis, 2000).

accessibility area. Cases are also now catalogued in a computer system called European Criminal Record Information System (ECRIS), but this system is not entirely complete and is difficult for the public to navigate. Also magistrates indicated that a lack of civic education exists in Romania, so the public has trouble understanding judicial cases and tends to trust talking to people with whom they have a connection as opposed to reading published formalized information.

Most magistrates also complained that they were overworked and underpaid and stated that a lack of resources was the reason that cases took a long time to resolve, and that there were sometimes problems with clarity and accessible language of opinions.

Magistrates further complained that the code law in Romania is ambiguous. One magistrate commented that the Romanian legislation changed three times in one summer. Some of the ambiguity was a result of the Romanian transition from communism to capitalism, then accession to the EU.

When asked whether the CSM has increased integrity within the judiciary, magistrates thought that the primary way in which the CSM had an effect on corruption was that it monitored judicial opinions and was able to discipline judges. Furthermore, magistrates believe it helps that there is random assignment of cases to magistrates. However, generally magistrates did not think that the CSM had changed the level of integrity and the court culture as much as have personnel changes such as the introduction of younger judges with transformed expectations and new supervisors.³

4. Theoretical Framework

4.1 Data Analysis through a Rational Choice/Neoinstitutional Lens

In *Formal institutions and informal politics in Central and Eastern Europe; Hungary, Poland, Russia and Ukraine*, Meyer defines institutions as stable patterns of interaction in social relations (2008). Formal institutions are based on explicitly defined rights, duties and norms (Meyer, 2008). Institutional theory provides that institutions give order and provide normative orientation for behavior (Meyer, 2008). In communist systems, a monopoly of power existed. As a result of this monopoly, a socialization process occurred to evade pressure from the state and to obtain economic goods through personal contacts (Karklins, 2005). This situation created an unofficial way of doing things, and informal networks emerged with particular operational rules which have caused “neoinstitutional” patterns (Karklins, 2005, p. 76). Neoinstitutionalism, where informal rules and networks become stronger than formal rules and institutions, often occurs in post-authoritarian societies (Meyer, 2008). The population uses these informal rules and networks to trade favors to survive (Karklins, 2005). Under neoinstitutional theory, these informal practices become legitimized instead of laws. This process is also known as path dependency (Meyer, 2008, p. 73).⁴

Rational Choice Theory assumes that people will act in such a way to advantage themselves and their group and that institutions are shaped around what will bring the most benefit to the actor in both formal and informal interactions (Meyer, 2008, p. 20). This approach clarifies how choices are structured when people decide how to behave in certain situations (Karklins, 2005).

Magen and Morlino in “European Union transformation strategies and the rule of law in weakly governed states” flesh out how choices are made in such societies.⁵ The authors contend that the depth to which states choose to comply with EU mandates is multifaceted and occurs in stages. Magen and Morlino assert that rule adoption, rule implementation and rule internalization are layers of impact in the EU membership conditionality model (2008). They define “rule adoption” as the transposition of EU mandated rules and standards into domestic laws and the restructuring of institutions according to EU rules (Magen & Morlino, 2008). “Rule implementation” means the acceptance of transferred rules, beyond formal adoption by elites (Magen & Morlino, 2008). According to Magen and Morlino’s model, implementation involves complying with the adopted rules but does not necessarily involve valuing a democratic society and rule of law. These value transformations occur at the rule internalization stage (Magen and Morlino, 2008, p. 14).⁶

³ Moreover, a new generation of Romanian magistrates not trained under Communism has emerged. Magistrates believed that this situation has negative and positive implications for the rule of law. Young judges are less experienced and have a greater degree of difficulty relating to the parties. However, a greater number of magistrates have traveled abroad and are bringing influences of other court systems back to Romania and applying principles of the ECHR (Bogdan, 2008, p. 27).

⁴ However, the degree of neoinstitutionalism and the strength of these networks increase with the historical level of brutality (Karklins, 2005).

⁵ The ideas published in Magen and Magen’s 2008 APSA conference paper “European Union transformation strategies and the rule of law in weakly governed states” were later discussed in *International actors, democratization and the rule of law: anchoring democracy*. (2009) Routledge: Oxford Abingdon.

⁶ Because the challenge still involves implementation of adopted rules, the internalization stage will not be discussed here.

4.2 Effectiveness of Conditionalities

Rational Choice calculus plays a part in whether the domestic elites, the CSM and the magistrates themselves all act in a neoinstitutional or a rule based manner. Magen and Morlino also use Rational Choice Theory to explain the implementation of laws that are adopted as part of conditionality for EU accession (2008). As suggested by Magen and Morlino, EU conditionalities mandated by the CVM can tip the Rational Choice calculus of government elites from neoinstitutional behavior to acts promoting democratic legitimacy including transparency and integrity. Thus what “rational” action is chosen depends upon the prevalence of neoinstitutionalism versus the strength of EU conditionalities. However, Magen and Morlino argue that for conditionalities to be effective, they must be credible, making the choice to comply with conditionalities as opposed to other preferences “rational” action (2008 p. 32). Magen and Morlino contend that conditionalities are often at their most credible in the beginning stages (2008).

There has been some indication of the effectiveness of the conditionalities. After Romania’s accession to the EU, when Romanian judicial decisions conflict with the European Union Convention on Human Rights, the ECHR may override Romanian judicial decisions (Daglita & Bodgan, 2007). The ECHR has, in fact, remanded cases by the Romanian courts decisions that are in conflict with EU law instructing the Romanian courts to issue decisions that are consistent with EU law (Daglita & Bodgan, 2007). However, despite the EU enforcing mandates in these ways, numerous problems still exist within the judiciary.

Magen and Morlino state that where the cost of compliance for domestic elites is high, conditionalities by international bodies such as the EU are less effective, because strong veto players are not likely to fight to eliminate public sector corruption. Thus, despite less favorable treatment from the EU, those in power are less likely to sacrifice privileges that are most important to them to improve transparency in government. Reforming the judiciary in Romania is high politics and involves strong veto players (Magen & Morlino, 2008, p. 28). Therefore, the existence of an independent judicial check on the executive and legislative branches in corruption cases is particularly high politics in Romania because it challenges long held norms. Not surprisingly, the other branches of government often have difficulty accepting the judiciary as a separate branch. The MoJ still controls the budget, making independence of the courts difficult to attain.

Despite these challenges, progress has been made in incremental amounts. The greatest areas of success include appointment of judges and the issue of more clearly written legal opinions that are catalogued in a computerized database with a search engine. Areas in the judiciary that require greater reform include transparency in the promotion procedure for judges to higher courts and autonomous control of the judicial budget. However, progress in both of these areas has been impeded by strong neoinstitutional influences.

4.3 MoJ Control of Finances and Separation of Powers

The first issue discussed involves MoJ control of judicial finances and the impact of separation of powers in Romania. The magistrates interviewed universally complained that the MoJ refuses to turn over financial control of the courts to the judiciary. Because finances determine the autonomy and power of courts, the changes in rule of law required by the EU can only occur to a certain point without financial backing. Thus the courts are responsible for complying with EU rule of law mandates, without being given control of the resources to do so effectively. This lack of power of the judiciary may stem from how others in government regard judges. Many magistrates indicated that the other branches of government have trouble viewing the judiciary as a separate branch. The following quote illustrates this phenomenon:

“In Romania there is only a theoretical separation of power. The legislature tries to dominate the other branches and the executive tries to control the judiciary because he has the financial resource to do this. The judicial system has no power so it is like a small puppy that tried to make others happy to get a bone. The perspective of the politicians is different from the judges’ perspective. This is why the judges went on strike and try to bring on the public agenda that judges exist who have rights and responsibilities.”⁷ (Judge 10)

Magistrates note that the CSM could be progressive in improving independence and efficiency of the judiciary, but it is difficult without the cooperation of the other branches, and specifically they complained about the MoJ’s failure to provide resources.

Now the MoJ can decide only financial issues but MoJ has a lot of power because it has the money. This is a big issue and one of the causes of the judicial strike. It is a good thing to have the CSM. (Judge 1)

⁷ In September 2009, the Romanian judiciary went on strike (Pop, 2009). Judges indicated the lack of ability to control their finances was the main reason for the strike.

The MoJ decides on the number of judges and does not improve financing. The MoJ could get more funds from the EU to help the judiciary but does not. The MoJ could be much more proactive. The judges do not have much power. Not too much is up to them as there are systematic problems. (Judge 6)

Where change brought about as part of the conditionalities from an international body involves high politics and strong domestic veto players, compliance is less likely to occur (Magen & Morlino, 2008). Control of finances and judicial reform are, by nature, high politics and members of other branches who have an investment in the status quo will typically be strong veto players (Mendelski, 2011).

Magen and Morlino contend that veto players within a national government dilute the effect or subvert the goals of legal reform and the adoption of EU requirements and that there is “considerable evidence of deliberate ‘emptying of content’” (2008, p. 29). Some authors refer to the phenomenon as *de jure vs. de facto* implementation (Transparency International Global Index, 2008).⁸ Gallagher argues that countries that are resistant to compliance make superficial changes to appear to comply with EU accession (2005). In the Report of Progress under the CVM, the EC required Romania to “[e]nsure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of the Magistracy” (Europe Commission, July 22, 2009). Allowing for an independent judiciary with a separate oversight body, such as the CSM, without financial autonomy creates a situation where it appears as though the CSM is in control of the judiciary, (Magen and Morlino’s adoption stage) and thus responsible for its progress in judicial reform, without enough power to be entirely effective and produce results (Magen and Morlino’s implementation stage).

Consequently, because government officials are reluctant to turn over finances and control of the legal system from the executive branch to the judiciary, this area is typically met with resistance in post-communist governments. Overcoming neoinstitutionalism administration of the judiciary in Romania can be an uphill battle requiring continuous pressure by the EU. Some magistrates state that the most significant changes to the judiciary actually occurred at the beginning of the accession process to the EU, where Magen and Morlino opine the conditionalities are most credible (2008). Immediately after conditionalities are made is when progress is rigorously monitored and expectations are high (Magen & Morlin, 2008). Many of the magistrates were concerned that, now that Romania has joined the EU, pressure for judicial reform will lessen.

4.4 Media Pressure/ Pressure from Other Branches of Government

The magistrates universally complained about facing pressure from the media. However, upon greater inquiry, it appears that the media is used as a vehicle by the other branches of government to influence the population to discredit and put pressure on how judges decide cases (Mendelski, 2011).

Politicians do not want to accept a third power. That is why in the last two or three years politicians say there are problems with the judiciary. Politicians do not understand the role of the judiciary and the separation of power. They do not understand the independence of judges. (Judges 10)

It is unclear to what extent the creation of the CSM mitigates media pressure from other branches. However, after the creation of the CSM, the executive branch cannot actually terminate judges, so the mere existence of the CSM as an institution, does provide some insulation for the judges despite external media pressure.

5. Clarity and Quality of Jurisprudence

5.1 Standardization of Opinions

One area in which EU pressure has affected the Rational Choice calculus to decrease neoinstitutionalism is the increase in overall clarity of judicial decisions and improvement of jurisprudence.

[I]n the last few years the quality of arguments has improved a lot. Before the arguments were three or four pages. Now the arguments are much longer and more complex including all aspects of the decision, legal analysis, exceptions, comparative analysis and analysis of the legislation. Judge 11.

Now that the criteria for judicial opinions are more transparent, standardized and catalogued and these standards are used by the CSM to evaluate judges, the Rational Choice calculus is more likely to deter judges from neoinstitutional

⁸ See *de jure* implementation vs. *de facto* implementation in Transparency Index Global Index (2008). Mendelski, M. (2011), “Romanian rule of law reform: a two-dimensional approach.” In Ronald F. King & Paul E. Sum (Eds.) (2011), *Romania under Basescu: aspirations, achievements, and frustrations during his first presidential term*. Lanham, MD: Rowman & Littlefield.

behavior and favoritism in deciding cases. The CSM evaluates judges based on the quality of their decisions, using specific criteria. Now that judges are required to produce more standardized opinions, it is easier to determine which factors are involved in making the decisions (Alistar, 2007). Furthermore, protection from interference in court cases by the other branches of government has caused greater autonomy and provided for improved written opinions because judges feel less pressure from others in government and are less susceptible to interference with cases.⁹

Judges indicated that the computerized case catalogue system called ECRIS has created greater accountability in the judicial system (European Commission, 2011). ECRIS reduces the need for informal channels (neoinstitutionalism) to navigate the court system to be able to locate legal decisions and orders (i.e. having to know a court clerk to obtain information about a case). However, magistrates indicated that the ECRIS system leaves room for improvement because it is neither entirely user friendly nor complete (but it is important to remember that the cataloguing system is in progress).¹⁰

5.2 Citizenship

It is also notable that although the writing of cases has become somewhat clearer and the cases are now catalogued, vast discrepancies exist within the Romanian population in levels of civic education and computer literacy. Because Romania is a neoinstitutional society, many people may not trust what they see on the internet and only trust what they hear personally.

Further, magistrates indicated that an even greater level of discrepancy in civic education exists between urban and rural populations. One possible solution to citizens' distress in navigating the judicial system is to improve clarity by making the language of decisions more accessible, but, again, attaining this goal requires additional training, returning to the dilemma of control of judicial resources.

Furthermore, clean government requires active citizens (Karklins, 2005, p.72). However, for citizens to be active, they must understand what is occurring and the legal avenues to address their concerns. Consequently, in Romania, decreasing neoinstitutionalism not only requires improvement in the judiciary, but also public trust. Awareness and understanding are necessary for democratic legitimacy (Meyer 2008, p. 76). Thus, civic education, clearly written cases, a user friendly case catalogue system and citizens' confidence in the information that they receive are all necessary elements to increase the legitimacy of the judiciary.

Magen and Morlino's theory of when conditionalities from an international body (such as the EU) are likely to be adopted and implemented partially explains the increased clarity of judicial decisions. The format of judicial opinions is an area that is relatively low politics compared with judicial control of finances or promotion of judges to powerful positions (Magen & Morlino, 2008). Further, now that Romania is part of the EU, greater pressure exists for standardization of documents. However, magistrates believe that lack of judicial resources as a result of the MoJ refusal to turn over finances to the court has hindered the judiciary's ability to be efficient and effective in issuing clear decisions in a timely manner.

5.3 Clarity in Law

In a case law system, judges interpret statutes in written judicial opinions. Judges who encounter the same issues in the same jurisdictions are required to follow precedent (prior decision making rationale), so in the common law system, laws (statutes) may be more general and have enough flexibility to cover new circumstances that arise. However, in the code law system that exists in Romania and many European countries, numerous codes exist for every situation foreseeable to the legislature, and the judges apply these codes directly to the cases before them (Dagalita & Bogdan, 2007).

5.4 Code vs. Case Law System

Many magistrates mentioned that a lack of clarity in legislation is a significant obstacle to improving jurisprudence. Because Romania does not have a case law interpretation system, it is particularly important to have comprehensive and clear code law (Dagalita & Bogdan, 2007, p. 27). Magistrates explained that some ambiguity in legislation is a result of the change from communism to capitalism, and then, the changes necessary for Romania to comply with EU law

⁹ In addition to the creation of the CSM, many judges credit the ECHR for improving jurisprudence.

¹⁰ Many magistrates stated that the CSM is not responsible for the establishment of the ECRIS system-but some greater clarity of jurisprudence can be attributable to the CSM as judges are evaluated on specific criteria in the judicial opinions they write. Also transparency is generally increased with issuance and availability of public documents.

(Bogdan, 2008). Romanian judges are usually obligated to directly follow the code law system and have little discretion in these matters.¹¹

However, recently the practice of following code law has changed now that cases can be appealed to the ECHR and Romania is responsible for upholding the principles of the EC (Bogdan, 2008). The change in jurisprudence may lessen the judiciary's dependence on the legislature.

The ECHR required mandatory case law. Decisions are now better and more uniform. Romania was censured for not explaining reasons for decisions. There is now an overall improvement. (Judge 2)

In the area of improving the quality of overall jurisprudence, it appears EU conditionalities have made a difference, particularly criteria for decisions and random distribution and cataloguing of cases. Again, a lack of resources, as well as unclear legislation, hinder progress. However, to the extent possible within the control of the judiciary, implementation of EU mandates is starting to occur as transparency in the law increases.

Magistrates were also generally concerned about competency and training within the judiciary. Competency problems are often mistaken with corruption by members of the public. These competency issues in formal judicial proceedings are partially influenced by the history of neoinstitutionalism because Romania used to be a less formal society with less standardization. Again magistrates are concerned that power politics result in a lack of resources and in an insufficient number of judges to manage the case load.

6. Appointment and Promotion of Magistrates

6.1 Transparency in Appointments of Magistrates and Judicial Independence

It appears that the establishment of the CSM has reduced the neoinstitutional factors that occur in the appointment of magistrates to the judiciary at the entry level. The way in which one is appointed a magistrate is standardized as the result of an examination (administered through the National Institute of Magistrates under the CSM) (Dumitru & Ungureanu, 2011). Also magistrates stated that they have additional independence because they cannot be terminated from the magistracy by another branch of government.

6.2 Lower Political Value of Appointing Magistrates Equals Greater Compliance

By standardizing the assignment of magistrates to the judiciary, the CSM has implemented the adopted EU mandate of increasing transparency in the judiciary. Magen and Morlino's theory also explains how the adoption and implementation of international conditionalities has influenced the procedure for the appointment of judges (2008). Entry level judicial appointments are not extremely high stakes politics. Initial assignment of magistrates is probably of less concern to the domestic elites than the promotion of magistrates to the more powerful positions in the judiciary (Mendelski, 2011). Therefore, although transparency regarding promotions is less likely to be both adapted and implemented, it is significant that there is no need now to have connections to become a magistrate. Further, it is important to note some change has occurred given that Romania used to be a society of strong political patronage (Gallagher, 2005).

6.3 Lack of Transparency in Transfers and Promotions

Although the magistrates did not believe that punitive transfers occurred to influence how magistrates decide cases, some thought that decisions regarding which magistrates receive desirable transfers were not transparent, so favoritism could still occur.

Neoinstitutional factors greatly affect judicial promotions when magistrates seek to advance to the more powerful position of Court of Appeals Judge or High (Supreme) Court Judge. The criteria for the interview and the results of the exam for promotion are ambiguous and not transparent. Magistrates appear to have a unanimous view of transfers and promotions, but little hope of movement toward greater transparency.

6.4 Overall Effect of Conditionalities and Neoinstitutionalism on Magistrates' Careers

In neoinstitutional societies, rule of law measures may be adopted but not successfully implemented. Although transparent measures for appointment of magistrates appear to have been implemented, this implementation does not seem to have occurred for promotions (Toma, 2006). Thus the question "[H]ow real is the change?" is particularly relevant to Romanian procedures for judicial promotions (Magen and Morlino, 2008 p. 26). Magen and Morlino's theory

¹¹ Rather the judge is concerned with evidentiary matters (i.e. guilt or innocence) that are the responsibility of the jury in the U.S. system. The magistrates have much power in individual cases but not to reconcile ambiguity in laws.

explains this discrepancy between fairness in appointment and promotion. Who is promoted to the Court of Appeals and the Supreme Court is high politics and of great importance to the political elites in the country. Consequently, strong domestic veto players exist in the domestic elite. Transparency requirements for promotions to higher level judicial positions conflict with political culture and vested interests in Romania. Thus, although adoption of EU standards has occurred, the more contentious implementation stage, requiring transparent promotion rules has not occurred. Returning to the Rational Choice analysis, it appears that the EU conditionalities for transparency in the judiciary are not severe enough in relation to the pull of neoinstitutionalism to tip the Rational Choice calculus in the area of judicial promotion transparency. Compliance with judicial reform mandates has occurred to the point where the judges are initially appointed and magistrates are protected because they can only be evaluated or terminated by the CSM. However, Romania is not complying with implementation of standards for judicial promotions because political concerns could make it more “rational” not to comply with transparency standards.

Magen and Morlino argue that whether or not institutions may be effective enough to change culture depends on sustained enforcement and costs to the interest of those in power (2008). The interviews revealed magistrates were concerned that, now that Romania is in the EU, enforcement may lessen confirming Magen and Morlino’s assertion regarding conditionalities.

6.5 CSM and Anti-Corruption Measures Within the Judiciary

Magistrates expressed mixed views about whether the CSM plays a role in anticorruption measures within the judiciary. It appears that the CSM improved judicial integrity because the judges are able to evaluate cases without fear of political interference (cases involving prosecuting corruption of other members of government). Within the judiciary (corruption from the judges themselves) the CSM’s primary way of lessening corruption is evaluating magistrates based on how the opinions are written. Thus to a degree, monitoring occurs with standardized criteria for decisions and greater transparency. Consequently, although the CSM does not have a formal role in reducing judicial corruption, these standards for judicial decisions may reduce the pull of neoinstitutionalism.

7. Factual and Theoretical Conclusions

7.1 Factual Conclusions

Despite the establishment of the CSM to oversee the courts, the other branches of government often do not treat the judicial branch as autonomous and refuse to give up power. In particular, the MoJ, under the executive branch, continues to control the court budget. Although the judges have petitioned to have the judicial branch oversee court finances, the MoJ refuses to make this concession. Furthermore, the media has also been used by the other branches of government to weaken and undermine the judiciary, demonstrating the strength of neoinstitutionalism and power grabbing politics. Moreover, the CSM does not take on the role of publically protecting judges, illustrating the limitations of domestic institutions formed in response to EU conditionalities. However, now that only the CSM is responsible for judges’ careers and the judges cannot be terminated or demoted by the executive branch, the effects of neoinstitutionalism are mitigated. EU pressure has influenced Romania in the area of transparency of judicial decisions, so there are clear criteria for judicial opinions. These decisions are categorized and publically posted on a computerized system called ECRIS. This transparency is also likely to tip the Rational Choice calculus of the judges away from neoinstitutionalism, steering the judges from favoritism to more objective decisions. Random distribution of cases also helps to reduce the effects of neoinstitutionalism as people are less likely to receive preferential treatment from certain judges (Toma, 2006). Some magistrates attribute this change to the CSM, others attribute them to the ECHR. However, many magistrates also complained that ECRIS needs improvements and that the public is distrustful of the judiciary and in need of greater civic education.

One aspect in which the CSM does not have much control for improving jurisprudence is in the clarity of law. Romania is a code system rather than a case law system, so judges do not have as much power to reconcile discrepancies. Sometimes the legislature drafts laws to interfere with corruption cases. Here neoinstitutionalism influences government actors more than the effect of EU conditionalities. (However, many judges are influenced by EU practices and are taking court practices from other countries back to Romania, which is beginning to counter balance court practices developed in the communist era in Romania) (Mendelski, 2011).

In the career track of judges, the effect of neoinstitutionalism is mixed. For the initial appointment of judges, the CSM has reduced the effect of neoinstitutionalism as there is a standard procedure and test for hiring magistrates. However, judges felt that there are no standard procedures for transfers and that favoritism can occur. There is little transparency for promotions to the more powerful positions such as the Court of Appeals and the Supreme Court, where the promotion process involves an interview without standardized criteria. Where the issue is high politics, EU conditionalities are less

likely to be effective (Magen and Morlino, 2008). Because these more powerful judicial positions involve high politics as opposed to the initial judicial appointments, the effect of EU conditionalities are not strong enough to counter balance the effect of neoinstitutionalism.

Although the CSM does not generally actually take on the role of preventing corruption because only the CSM oversees the career of judges, there is greater independence for magistrates to make decisions in anticorruption cases and less fear of political interference and retaliation from other branches. Consequently, the effect of neoinstitutionalism has been reduced.

7.2 Affirmation of Magen and Morlino's Hypothesis

This study focused on the performance of a particular institution, the CSM, created in response to large scale international efforts to increase integrity and the rule of law. The data gathered from the interviews appears to support Magen and Morlino's assertion that for conditionalities to be effective, sustained enforcement needs to occur, particularly where the area involves high politics.

The results of this study also tend to support Magen and Morlino's argument that it is more difficult to change areas of high politics where there are greater costs to the elites. For example, impartiality of initial appointments of magistrates is lower politics, so change was possible with more limited conditionalities. However, the higher level judicial appointments and the MoJ's control of the finances are high politics, and thus conditionalities have not shifted practices in these areas.¹² The cost-benefit analysis to elites may not have favored compliance with EU conditionalities in the area of promotions. Magen and Morlino discuss the notion of empty compliance where laws to comply with international mandates are adopted by creating implementing national bodies, but these agencies are not allowed to function properly (2008). This "empty compliance" has occurred in some ways with the creation of the CSM. The CSM has made progress in oversight of the judiciary, but the MoJ still controls the finances. This situation strains the legitimacy of the courts to function in a democracy (Meyer 2008). Thus, Romania's partial success in judicial oversight demonstrates the point at which the effectiveness of conditionalities ceases to overcome the power of high politics to elites.

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¹² Whether conditionalities are sustained with the EU putting pressure on Romania may be questioned as the European Commission extended the reporting period (Commission, Interim Report February 18, 2011).

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