This article was downloaded by: [Archives & Bibliothèques de l'ULB], [Ramona Coman]
On: 28 July 2015, At: 01:27
Publisher: Routledge
Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: 5 Howick Place, London, SW1P 1WG

Europe-Asia Studies
Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/ceas20

Quo Vadis Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe

Ramona Coman[a]
[a] Université libre de Bruxelles
Published online: 18 Jun 2014.

CrossMark
Click for updates

To cite this article: Ramona Coman (2014) Quo Vadis Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe, Europe-Asia Studies, 66:6, 892-924, DOI: 10.1080/09668136.2014.905385

To link to this article: http://dx.doi.org/10.1080/09668136.2014.905385

PLEASE SCROLL DOWN FOR ARTICLE

Taylor & Francis makes every effort to ensure the accuracy of all the information (the "Content") contained in the publications on our platform. However, Taylor & Francis, our agents, and our licensors make no representations or warranties whatsoever as to the accuracy, completeness, or suitability for any purpose of the Content. Any opinions and views expressed in this publication are the opinions and views of the authors, and are not the views of or endorsed by Taylor & Francis. The accuracy of the Content should not be relied upon and should be independently verified with primary sources of information. Taylor and Francis shall not be liable for any losses, actions, claims, proceedings, demands, costs, expenses, damages, and other liabilities whatsoever or howsoever caused arising directly or indirectly in connection with, in relation to or arising out of the use of the Content.

This article may be used for research, teaching, and private study purposes. Any substantial or systematic reproduction, redistribution, reselling, loan, sub-licensing, systematic supply, or distribution in any form to anyone is expressly forbidden. Terms &

Conditions of access and use can be found at http://www.tandfonline.com/page/terms-and-conditions

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

EUROPE-ASIA STUDIES
Vol. 66, No. 6, August 2014, 892–924

Routledge
Taylor & Francis Group

Quo Vadis Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe

RAMONA COMAN

Abstract

This article examines judicial reforms in the new member states of the EU in a comparative perspective. It explores the interactions between domestic and European actors in the Czech Republic, Poland, Hungary, Romania and Bulgaria and explains why the EU has had a differential impact on the way the principle of judicial independence has been implemented nationally. The differential impact of the EU is explained by considering both the nature of EU conditionality and the relationship between the judiciary and the political actors at the domestic level. The comparison reveals that the power of the EU is greater when tensions at the domestic level between judicial and political actors increase.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

JUDICIAL INSTITUTIONS TEND TO BE CHARACTERISED BY RELATIVE tranquillity punctuated periodically by phases of intensive, rapid and/or substantive change. In recent years, judicial institutions in Central and Eastern Europe witnessed an increasing number of reforms. Transition periods and EU accession have been times of accelerated procedural change, implying reforms of paramount importance in terms of polity, policies and politics. First, at the beginning of the 1990s, constitutional revisions led to a sanctioning of the separation of power. Second, throughout the first decade after the collapse of communism, political elites, judicial actors, civil society associations and international actors competed in providing policy solutions of judicial governance. Third, in the accession context, the former candidate countries tried to adapt to the EU's requirements. Thus, between 1990 and 2012, judicial reforms were born; they were institutionalised and then matured. However, there is vagueness concerning the outcomes of judicial reforms and a tendency to treat them as an 'unresolved puzzle' (Mendelski 2012, p. 24).[1]

Prior to EU accession, the former communist countries had already taken some steps towards reforming their judicial systems and institutions. One common priority was to adopt new laws on judicial organisation aimed at implementing the principle of the independence of the judiciary. This principle poses a variety of dilemmas to policy makers. How should it

[1]There is a considerable confusion about what 'judicial reform' means and what sort of problems and solutions it displays.

ISSN 0966-8136 print; ISSN 1465-3427 online/14/600892–33 © 2014 University of Glasgow
http://dx.doi.org/10.1080/09668136.2014.905385

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

be implemented? How much independence should be allowed, given that its implementation has implications for every aspect of a judge's career, from training to appointment and from promotion to disciplinary sanctions? The mechanisms by which independence is achieved are, above all, institutional (Domingo 1999, p. 154). A new actor was established—the generic name is 'judicial council'[2]—with the role of dealing with judicial politics.[3] Bulgaria first established such an institution in 1910. It was a consultative body to the Ministry of Justice on personnel policy (Melone 1996, p. 234). In Romania, the Superior Council of Magistracy—created in 1909—re-emerged in 1992. Poland and Hungary opted for a similar model of judicial governance in spite of the lack of institutional tradition in this respect. In contrast, no such institution ever developed in the Czech Republic.

The reforms accomplished prior to accession were not sufficient to meet the requirements attached to the countries' entry into the EU. On the one hand, the candidate countries had to deal with the problems of post-communism and, on the other hand, with the EU's requirements in terms of judicial and administrative capacity. Through its Regular Reports, the European Commission identified a number of dysfunctions and a series of goals to be reached. Among them, the independence of the judiciary and the need to reduce the power of the Ministry of Justice occupied a central place. Each country followed a different path to reform with a different outcome. In 1997, Hungary witnessed the most radical change in terms of judicial independence (Bobek 2007; Fleck 2011). It ensured full independence through the empowerment of the National Judicial Council (NJC). In Poland, the competences of the NJC were extended in 1997, 2001 and 2003, but without reducing the roles of the Ministry of Justice in judicial politics. The Czech Republic remained the 'black sheep' (Bobek 2007) because of its resistance to the tendency to create this kind of institution. Here, the traditional model of state administration of the judiciary has been maintained over time. Following accession, the two countries which apparently possess the most independent judiciaries in the region are Bulgaria (Schönfelder 2005, p. 61) and Romania, where in 2004 judges qualified the outcomes of the reform as being the 'paradise of the independence of the judiciary'.[4]

After accession, judicial reforms remain a challenging process not only for domestic actors—political elites, judicial actors, media and civil society—but also for a number of international organisations. The implementation of these reforms gave rise to mitigated results and opinions. The image of judicial councils, conceived as an institutional solution to solve the problem of the politicisation of the judiciary (Coman 2009), is deteriorating and the number of complaints concerning their lack of accountability is increasing. In recent years it has been argued that the radical reform undertaken in Hungary, Poland, Romania and Bulgaria moved power and undue influence from one bureaucratic institution (the Ministry of Justice) to another (the judicial councils) (Bobek 2007, p. 112; Parau 2011). Recent studies reveal that the 1997 Hungarian reform 'contained several dangers' such as a 'lack of efficiency, decline of trust in the judiciary, corruption and ideological bias' (Fleck

[2]Their degree of independence depends on a set of institutional features, including their composition, methods for choosing their members and the functions they discharge. See Pederzoli and Piana (2010, p. 100).

[3]They cover a variety of measures including the appointment procedures of judges, disciplinary sanctions against them, but also decent salaries and financial resources which can help to isolate the judiciary from undue political influence.

[4]Interview with Prosecutor at the Superior Council of Magistracy (*Consiliul Superior al Magistraturii*—CSM), Bucharest, 12 September 2006; interview with Judge 1, member of the CSM, Bucharest, 1 June 2012.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

2011, p. 797). In Romania, it appears that the Council 'no longer performs its mandate as the representative of judges but rather as someone who owns the judiciary, makes the rules for the judiciary and rules the judiciary' (Parau 2011, p. 647). In 2006, the European Union established a new policy instrument—the mechanism of cooperation and verification (MCV)—in order to address specific benchmarks in the areas of judicial reform and the fight against corruption in Romania and Bulgaria. The governments of the two countries were required not only to continue the reforms in order to enhance professionalism, accountability and efficiency, but also to take further measures to prevent and fight corruption. While Romania and Bulgaria continued to follow these benchmarks, Poland, Hungary and the Czech Republic witnessed new tensions between judicial and political actors. In these three countries, political parties tried to reassess their autonomy from EU judicial governance and conditionality and to empower the elected branches of power over the judiciary. Critics saw the measures promoted by the ruling coalition in Poland (2005–2007) and by Fidesz in Hungary (since 2010) as a deviation from democratic norms and EU treaties. In Poland (from 2005 to 2007) and in Hungary (since 2010 until now) political actors have tried to reduce the powers of the recently empowered judicial councils.[5] According to several MEPs and EU officials, 'no accession country would be allowed to join the EU if the situation was similar to the one in Hungary' in 2012 (Weber 2012).

How can the trajectories and the ups and downs of these reforms be explained? What precipitates these moments of change? The article focuses on one specific aspect of judicial governance, namely the role of the elected branches of power (in particular the Ministry of Justice) and of autonomous judicial bodies (judicial councils) in the administration of the judiciary. It examines the interactions between domestic and European actors in five cases (the Czech Republic, Poland, Hungary, Romania and Bulgaria) and explains why the EU has had a differential impact on the ways they implemented the principle of judicial independence.

By comparing these cases, the paper shows that they followed different trajectories to reform their judicial institutions and reached different outcomes.[6] The article identifies two paths of reform. In the attempt to examine the transformative power of the EU in the pre-accession, accession and post-accession stages, our assumption is that the Czech Republic, Poland and Hungary witnessed a bottom-up approach in implementing the principle of independence of the judiciary. In contrast, Romania and Bulgaria—which poses the most powerful judicial councils in the region—witnessed a top-down-up approach.[7] These two paths of judicial reform refer not only to the nature of EU conditionality but also to the constellation of the domestic actors and to their ability to evade internal and/or external pressure in implementing the principle of judicial independence. The comparison of the two groups of countries reveals that the power of the EU is greater when the tensions at domestic level between judicial and political actors increase. In Poland, Hungary and the Czech

[5]No concrete policy plans to reform them have materialised in Romania and Bulgaria.

[6]The outcomes of policy change have mainly been conceptualised in the literature on Europeanisation as inertia, absorption, accommodation and transformation (Börzel & Risse 2000). In the field of judicial independence, there is a limited consensus on how to measure the impact of the EU (Exadaktylos & Radaelli 2009; Coman 2009): 'what one researcher may classify as "adaptation" may look like "transformation" to another' (Radaelli & Pasquier 2008, p. 40).

[7]In this article, the comparative method is used as a method for discovering empirical relationships among variables (domestic and European), rather than a method of measurement or assessment of the effectiveness of the judicial reforms.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

Republic the outcomes of the reforms illustrate the limited power of the EU in promoting a specific model of judicial governance and reflect domestic preferences. In Romania and Bulgaria, the tension between the domestic political preferences and judicial independence is mainly solved by means of the European Commission.

The article makes use of data derived from policy reports, interviews conducted by the author from 2005 to 2012, political declarations and newspapers. The variety of European and international reports and evaluations—criticised from below and from above—cannot be used as evidence to compare outcomes, but offer an accurate picture of actors' preferences and provide more direct access to the motivations behind the reforms and reformers. They allow researchers to observe where the ideas come from and how domestic actors use them.

Divided into four main parts, this article is about who decides to reform the judiciary, and how, when and why these choices are made. The first section clarifies the theoretical arguments used in order to explain the trajectories and the outcomes of judicial reforms in the selected countries. In the following sections, the dynamics of policy change in judicial politics will be traced back to the choices (support and/or resistance) of domestic and European actors. Thus, the second section will show that at the beginning of the 1990s, the meaning of the independence of the judiciary and its institutional implications provoked fear and scepticism among politicians with regard to the expansion of judicial power within the state structure. The main political parties tried to maintain—to different degrees—the powers of the ministries of justice over the judiciary. The second section explains the differential impact of the EU, considering both the nature of EU conditionality and the relationship between the judiciary and political actors at the domestic level. The third section deals with new tensions between political and judicial actors and recent attempts to empower the elected branches of power over the judiciary.

Political analysis of judicial reforms: theoretical considerations on Europeanisation revisited

At the beginning of the 1990s, judicial reform was a relatively marginal topic in the emerging literature on democratisation and democratic consolidation. With the exception of some works devoted to the Constitutional Courts in the region, political scientists paid little attention to the transformation of judicial institutions. The theoretical approaches used in order to explain judicial reforms were scarce and hard to convert into empirically testable hypotheses (Magalhaes 1999, p. 45). Nevertheless, research on this topic was never carried out in a theoretical vacuum. A series of theoretical considerations inspired by the classical literature on democratisation and democratic consolidation have been put forward in order to conceptualise such complex processes of change and inertia. Scholars of democratic consolidation and specialists on the rule of law led these theoretical debates and contributed to the first theorisations (Morlino 2004, 2009; Schmitter 2004). Besides their attempts to explain the normative desirability of such reforms, these authors later integrated this promising research topic into a broader object of inquiry, namely the quality of democracy.

In the context of EU enlargement, interest in these processes increased, in particular when in some countries the independence of the judiciary became a *sine qua non* condition for EU membership. A growing body of literature developed exploring how emerging democracies build the rule of law and improve the quality of their democracies (Morlino 2004, 2009;

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

Hammerslev 2011). Since then, we have witnessed a surge of promising scholarship on judicial reforms in Central and Eastern Europe, including interpretative case studies (Bobek 2007; Hammerslev 2007), hypothesis-generating case studies, case studies that confirm existing theories (Magalhaes 1999; Dallara 2007, 2008; Piana 2007b, 2010), case studies that contradict existing theories (Coman 2009) and deviant case studies (Coman 2009; Delpeuch 2006). Monographs on these issues have recently been published (Ganev 2003; Schönfelder 2005). These valuable contributions constitute a prerequisite to the elaboration of comparative research designs on the independence of the judiciary in the new member states of the EU. The cumulative effect of such contributions can lead to fruitful generalisations. Even though their number remains small, these detailed case studies allow researchers to confront their results and to verify the independence of a cause from its effect. Put together, they can be used to sharpen and refine hypotheses and to see how temporal intersection or the duration of variables is decisive for outcomes. This essay is motivated by a concern that the first generation of studies on judicial reforms still casts too many shadows over the relationship between actors, institutions and outcomes.

The aim of this contribution is to explain two paths of judicial reforms: while the Czech Republic, Poland and Hungary witnessed a bottom-up approach in implementing the principle of independence of the judiciary, in contrast, Romania and Bulgaria—which possess the most powerful judicial councils in the region—witnessed a top-down-up approach. What triggers domestic change in the field of judicial politics? The two paths of judicial reform identified in the new member states of the EU refer to the ability of domestic actors (political or judicial) to evade internal and/or external pressure in implementing the principle of judicial independence and to nature of EU conditionality.

Judicial reforms have been analysed from different theoretical perspectives, which focus on the role of the actors, institutions and, more recently, the role of ideas. Each perspective adopts a different approach and seeks to capture and reflect the complexity of these processes of political and social change.

The first generation of studies on judicial reform formulated a number of hypotheses about when and how one should expect judicial reform to take place. Some authors—pluralists and elite theorists—have emphasised the capacity of actors to shape the course of events. The object of explanation was the empowerment of judicial institutions or their subordination to the political power, which is the outcome of a bargaining process between political actors (Magalhaes 1999; Dallara 2007). Several authors argued that the independence of the judiciary arises from the strategic choices of relevant actors. Judicial reform transformed parliaments into a battleground for opposed policy solutions to ensure the independence and accountability of judicial institutions. Therefore, some among the possible explanations focus on the variable of 'party competition' and offer a rational explanation of the outcome of the reforms. Political parties try to maximise the attainment of a set of goals given by a specific preference (Hall & Taylor 1997). In addition, it has been assumed that judicial independence is consolidated when no single actor or group of actors has sufficient power to dominate the policy debates. In this line of thought, party competition can foster an independent judiciary. When a ruling party foresees that it will remain in power indefinitely, the development of an independent judiciary is unlikely (Bill Chavez 2010, p. 156). When parties compete for power, rulers support judicial independence as a form of insurance in the face of a possible electoral defeat (Bill Chavez 2010, p. 156).

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

Alternative hypotheses have considered the role of Constitutional Courts and of judicial councils as players able to delay or to block judicial reforms. Delpeuch (2007), Hammerslev (2007, 2011) and Coman (2009) have drawn on their deep knowledge of the Bulgarian and Romanian cases to examine the role and the attitudes of judges in changing legal culture and in shaping judicial reforms in the region. In Central and Eastern Europe, courts and judicial councils have challenged politicians who attempted to subordinate the judiciary to the political power. Thus, judicial reforms depend also on the ability of judges to shape policy outcomes. Behaviour is not only strategic but also bounded by actors' worldviews (Hall & Taylor 1997). At least three hypotheses can be formulated here, borrowed from Woods and Hilbink (2009, p. 746):

> (1) courts cannot shape, influence, or constrain political outcomes unless judges are able to assert themselves in politically salient cases (see, for example, Epp 1998); (2) judges are unlikely to assert themselves in such cases unless they have the structural independence and formal legal tools that enable them to do so (MacCormick 1999; Russell and O'Brien 2001; Ríos-Figueroa 2006); and (3) the willingness of judges to engage in this type of judicial 'intervention' is not a given, even when they have substantial legal tools at their disposal with which to intervene.

Beyond interests and ideas, strategies and principles, socio-economic conditions should also be taken into account. The context and the problems of post-communism are important in order to understand the complexity of judicial reforms. At the beginning of the 1990s, judicial reforms did not occur on a *tabula rasa*. Several authors referred to the legacies of the past in order to designate the leftovers of communist ideology in the functioning of the institutions, the gaps between judicial culture in former communist countries and Western democracies, as well as the influence of the communist past on the behaviour of the actors, both political and judicial (Melone 1996; Magalhaes 1999; Kühn 2004; Schönfelder 2005; Hammerslev 2007). Twenty years later, the legacies of the past are still evoked at the domestic level in order to increase the legitimacy of reforms and to explain the rationales behind them.[8]

Policy change in the new member states of the EU was then explained by exogenous factors. The second generation of studies emphasise instead the limited autonomy of domestic actors and the extent to which they are constrained by international institutions. They may come to define logics of appropriate behaviour to which actors from the former communist countries—involved in the processes of democratisation and Europeanisation—conform. In the same vein, it has been argued that institutions provide cognitive or moral templates for interpretation and actions. They embody ideas about what is desirable and the means, tools and techniques appropriate to realise a given set of policies (Hall & Taylor 1997). A further series of studies tried to better understand the transformative power of the international institutions that became the greatest exporters of law and legal institutions to Eastern Europe (Ajani 1994; Hammerslev 2007, p. 135). Thus, embracing a more sociological and cognitive approach with regard to the external dimension of judicial reforms, Piana (2007a, 2009), Delpeuch (2007) and Hammerslev (2011) compared the strategies, motivations and incentives of a variety of international actors (the Council of Europe, the European Union, the American Bar Association, USAID) involved

[8]The legacy of the past has been used as an explanation in the recent reforms introduced by the Hungarian Prime Minister Viktor Orban. In 2010, it was put forward by the Czech Constitutional Court, which stated in its ruling that 'judges' communist past could influence their reasoning today'. The Constitutional Court ruled that people have the right to know which judges were party members before 1989 (Richter 2011).

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

in the promotion of judicial reforms. Particular attention has been paid to norm diffusion, learning and socialisation in explaining institutional outcomes in the region, but also to the asymmetry of power. Hammerslev (2011) shows that the US government had focused on weakening the strong political bureaucracies in Eastern Europe in order to oust former communists from the field of power. Several authors revealed that domestic NGOs, judicial actors and media supported by powerful international actors have worked alongside opposition parties to promote judicial reforms (Dallara 2007; Coman 2009; Hammerslev 2011). Later, within the literature on Europeanisation, it has been argued that the asymmetry of power between the EU and the new member states gives the EU more coercive routes of influence in domestic politics (Grabbe 2001, 2002; Schimmelfennig & Sedelmeier 2004).[9]

Designs for research on Europeanisation (Exadaktylos & Radaelli 2012; Börzel & Risse 2012) have proposed plausible key assumptions which seek to capture the complexity and the open-endedness of these processes (Goetz 2001; Schimmelfennig & Sedelmeier 2004), examining the interplay of actors and establishing conditions of the existence of mechanisms of evolution, inertia and transformation described (Grabbe 2001, 2002). Scholars of Europeanisation have identified mechanisms to show how the EU impacts on politics, policies and polities. Conditionality, benchmarking, monitoring, advice, twinning and technical assistance have all received ample attention in the literature (Grabbe 2001, 2002) and been used to understand how they shape judicial reforms (Coman 2009; Piana 2010). In order to explain outcomes, scholars of Europeanisation focused on the usage of European incentives for change (Coman 2009). Research designs and key assumptions tried to capture the ability of actors to realise their intentions, including for transformation, adaptation or resistance to change.

Following the top-down model of Europeanisation, scholars have opened the 'black box' of judicial reforms and revealed a number of shortcomings and methodological problems. However, the argument of this essay is that researchers have been too ready to see far-reaching Europeanisation. It has been too quickly assumed that the mere existence of mechanisms will lead to deep transformation. In judicial politics, Europeanisation—as a process of policy change—exhibits different outcomes, rhythms and temporalities. Recent case studies on judicial reforms and Europeanisation allow me to redefine and sharpen existing hypotheses concerning the role and the interplay of actors and institutions. These results can be summarised as follows.

First, when analysing judicial reforms, Europeanisation is a process rather than an outcome. Second, Europeanisation is not only vertical and unidirectional. Europeanisation can take the form of constant interactions between national, European and international actors and institutions (Palier & Surel 2007; Coman 2009). Thus, Europeanisation research needs to 'consider multiple feedback loops and complex causal relations' (Radaelli & Saurugger 2008, p. 297). Third, in the accession and post-accession contexts, the definition of conditionality related to judicial reforms gave rise to discussion, debate, deliberation and even contestation. Despite an almost universal consensus as to its importance to democratic rule and its normative value, it appeared that the independence of the judiciary is among 'the least understood concepts in the field of political science and law' (Larkins 1996, p. 607). To a lesser or greater degree, the independence of the judiciary became a disputed concept, leading to fundamental

[9]The former candidate countries represented a promising empirical field to test the hypotheses of Europeanisation, for a variety of reasons already extensively developed in the literature (Brusis 2005, p. 24; Juncos 2011, p. 372).

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

normative questions over which institutions have the authority to decide certain issues and in what ways (Coman 2009). Thus, conditionality concerning judicial reforms does not imply legally binding norms to be transmitted to the candidate countries (Coman 2009; Piana 2009, p. 824). During the accession stage, observers of the enlargement process and political elites from Central and Eastern Europe complained about the ambiguity concerning when criteria had been met, and what rule of law the Union required the candidate countries to adhere to (Kochenov 2004, p. 1). The EU failed to prescribe a specific blueprint with regard to the implementation of the principle of judicial independence (Coman 2009). The EU's *acquis* and experience provided little guidance for addressing these reforms (Grabbe 2001, 2002). Indirectly, the European Commission expressed the desirability of a normative model of judicial governance, which empowered new institutions such as the judicial councils (Coman 2009; Pederzoli & Piana 2010). The EU offered an 'important legitimizing force for "selling" these reforms to the CEEC's electorate' (Papadimitriou & Phinnemore 2004, p. 622); but the choice of tools and institutional models through which the conditions were to be achieved remained very much in the hands of domestic political elites. Thus, both in the accession and the post-accession contexts, the mechanisms of compliance in the field of judicial politics emerged from the interactions between institutions, through which actors tried to persuade each other about the validity of their claims and the legitimacy of norms.

On the basis of these revisited assumptions on Europeanisation, my explanation of the two paths of judicial reform in the new member states considers firstly the nature of EU conditionality and secondly the interplay of actors, institutions and outcomes.

The first wave of reforms: similar policy dilemmas and different institutional trajectories

In the 1990s, the former communist countries confronted very similar issues and structural socio-economic problems with important consequences for the functioning of the judiciaries. On the one hand, legislators faced a difficult choice between maintaining the stability of the former legal order and adapting it rapidly to the new social and economic conditions. On the other hand, lawyers and magistrates had 'to learn how to handle an entirely different legal system from what existed before the collapse of communism'. New legal areas, new legal grounds and new types of cases emerged. The new civil and criminal codes have been very long in the making, not only in Romania, but also in countries considered as being front-runners in the accession process, like the Czech Republic. It took about two decades to see them come to fruition.

In the transition context, law had acquired real significance (Schönfelder 2005, p. 74). The number of criminal and civil cases has increased, partly due to the incoherent policies adopted by the post-communist legislators,[10] and partly due to the open access to justice.

[10]For example, Verdery notes that in June 1994 in Romania, 6,236,507 claims had been filed, of which 4,897,573 were accepted as totally returnable land, representing two thirds of Romania's entire agricultural land surface (Verdery 2004, p. 101). In 1998, the Romanian Minister of Justice—Valeriu Stoica, member of the National Liberal Party (*Partidul Naţional Liberal*)—stated that the law on restitution 'had produced the largest number of court cases in the history of Romanian jurisprudence' (interview with former Romanian Minister of Justice, Bucharest, April 2005). In spite of this, in 2001, there were still 'whole villages in which not a single title had been given out' (Verdery 2004, p. 101). In 2010, over one million Romanians were still struggling for restitution. This situation was due to Romania's chaotic land reform and to the ambiguities of the legislation; interview with Judge 1 at the CSM, Bucharest, 12 September 2006; interview with the president of the Open Society Foundation at the Cotroceni Palace, Bucharest, 29 March 2005; interview with Judge 2, member of the CSM, Bucharest, 13 September 2006.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

The working conditions within the magistracy deteriorated (Coman 2009, p. 205). Judges deplored not only the increase in their caseloads, but also the poor material conditions such as the lack of administrative support, offices and staff (Bodnar & Bojarski 2011, p. 737). The modernisation of judicial institutions in terms of equipment and proper work conditions took several years. The lack of well-trained, experienced and motivated staff became one of the biggest problems in the region. Most of the countries witnessed a massive exodus of magistrates because of the application of lustration policies and of the attractiveness of better jobs. For example, the Czech Republic adopted one of the most thorough and complex lustration policies in the region (Nalepa 2010).[11] Several authors pointed out that young judges and prosecutors had opted for other professional activities (Bobek 2007, p. 127; Hammerslev 2007, p. 146; Coman 2009, p. 194), due to the attractions of the private sector, where experienced jurists were in great demand. In addition, the low salaries within the magistracy gave rise to a variety of forms of judicial corruption (Coman 2009, p. 208). These new issues presented a challenge to policy makers (Coman 2009; Voermans & Albers 2003, p. 83). None of the formerly communist countries in Eastern Europe has easily found solutions to these tasks. Reforming the judiciary in post-communist countries proved to be a very complex issue. The solution adopted in order to prevent a magistrates' exodus has been to increase judges' remuneration (Melone 1996; Coman 2009). The number of judges increased but trust in the judicial institutions dramatically decreased.[12]

Domestic debates in the region concerning the independence of the judiciary and the balance of power between branches of the elected government (Ministry of Justice) and judicial autonomous bodies (judicial councils) were quite lively. The ideas and arguments evoked in parliamentary debates at the beginning of the 1990s show that policy makers were familiar with recent reforms in Western Europe and their institutional and political implications (Coman 2008, p. 262). While Bulgaria and Romania established judicial councils in line with their institutional tradition, in Poland and Hungary their creation followed from the diffusion of the Mediterranean model of self-judicial governance (Fleck 2011, p. 795). Some authors argued that the diffusion of this model could be attributed to the Western constitutionalists who took part in the constitution-making process in Central and Eastern Europe (Piana 2010). Others showed that even before the collapse of communism, socialist and Western judges took part in joint conferences and debates on the superiority of the communist or Western legal

[11]The '*Lustracni zakony*' came into force soon after the collapse of communism, with the aim of preventing former communist agents and other people associated with the former regime from taking government and civil service posts (Asiedu 2005). According to judge Jan Vyklicky 'The first one was something like a wild purge … in the first few weeks in 1990, the former Minister of Justice, Mrs Buresova, asked some judges to leave the judiciary because of their behaviour before the revolution and some of them—perhaps dozens rather than hundreds—did so. During the second phase, the Committee for the Protection of Unjustified Investigated Persons had a list of judges with a problematic past from before 1989—some 25 people—and they were screened. Some of them had to leave the judiciary. During the third phase, I remember hundreds leaving for better-paid jobs outside the judiciary' (Asiedu 2005).

[12]In 2007, there was a total of 4,462 magistrates in Romanian judicial institutions (Coman 2008, p. 479), while the Czech Republic, in the same period, had one of the highest number of judges in the world: 3,028 judges in a population of over 10 million (Cameron 2007).

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

models (Coman 2009).[13] In their attempts to establish independent judiciaries, the five countries under study drew inspiration from the old member states and from a series of international organisations such as the Council of Europe (Coman 2009; Piana 2010), not from the EU *per se*. However, the division of competences between the political power and the judicial councils became a matter of political and constitutional debate.

In Poland, the National Council of the Judiciary (*Krajowa Rada Sędownictwa*—NCJ) was established as a result of the 'Round Table' talks, held in 1989. The new legislation on courts eliminated the supervisory powers of the Ministry of Justice and constrained the Minister's judicial appointment by making them dependent on proposals to be issued by judges. Nevertheless, after the first parliamentary elections held in 1991, the newly created Council became the object of criticism expressed in the Senate by anti-communist parties (Magalhaes 1999, p. 51). The government introduced a series of bills whose aim consisted of increasing the executive powers of judicial appointments (Magalhaes 1999, p. 54). But these reforms failed because of the high fragmentation within parliament, the divisions between parties concerning the pace of reforms, and the acute tension between President Walesa, the Prime Minister and the legislature. In 1992, Hanna Suchocka, the new centre-right prime minister, initiated a series of reforms along the main lines of the Balcerowicz plan concerning the internal structure of the judicial system. Unlike previous prime ministers, she 'had good working relations' with the President, who supported her programme in her fight with the legislature (Wiatr 1997, p. 446). In February 1993 her reform was adopted in spite of the opposition of the judicial council. Consequently, the new legislation re-empowered the Minister of Justice, giving him/her the power to appoint court presidents, nominate candidates for judicial posts and initiate disciplinary proceedings (Magalhaes 1999, p. 55).

Representatives of the Association of Polish Lawyers declared that the new reform was 'the end of a three branch system of authority in Poland' (Magalhaes 1999, p. 55). The legislation had been referred by the ombudsman to the Constitutional Tribunal, who struck down the amendment concerning the appointment powers of the Ministry of Justice. At that time, according to many, the Constitutional Tribunal was one of the most respected institutions and the majority of judges enjoyed excellent reputations (Wiatr 1997; Seleny 1999; Bodnar 2010, p. 30). Its decisions were 'highly independent and were contrary to the wishes of politicians' (Bodnar & Bojarski 2011, p. 668). As Garlicki pointed out, the country's transformation needs determined the nature of matters referred to the Polish Constitutional Tribunal. Therefore, 'the practical realization of those tasks required a considerable dose of judicial activism reflected in a relatively high number of judgments of unconstitutionality' (Garlicki 2002, p. 281).

[13]A series of articles published in the *Revue international de droit comparé* published between 1950 and 1995 support this argument. 'Réunion de la section des Pays de l'Est de la Société de législation comparée', *Revue internationale de droit comparé*, 16, 3, 1964, pp. 633–35; 'Première rencontre juridique franco-roumaine, Paris, Dijon, Lille, les 25–28 avril 1967', *Revue internationale de droit comparé*, 19, 3, 1967, pp. 709–14; 'Quatrième rencontre juridique franco-roumaine, Bucarest-Iassy, les 15–25 octobre 1974', *Revue internationale de droit comparé*, 27, 2, 1975, pp. 439–50; 'Cinquième rencontre juridique franco-roumaine, Montpellier, les 13–16 octobre 1977', *Revue internationale de droit comparé*, 30, 3, 1978, pp. 847–59; 'Huitièmes journées juridiques franco-roumaines, Bucarest-Sinaia, le 26 octobre–1er novembre 1992', *Revue internationale de droit comparé*, 45, 1, 1993, pp. 266–69; 'Dixièmes journées juridiques franco-roumaines, Bucarest-Iassy, les 4–8 juin, 1996', *Revue internationale de droit comparé*, 48, 4, pp. 928–38; 'Neuvièmes journées juridiques franco-roumaines, Bordeaux, les 22–24 septembre, 1994', *Revue internationale de droit comparé*, 47, 1, 1995, pp. 233–42.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

According to many, the Constitution adopted in 1997 has considerably strengthened the position of NCJ in the legal and political systems.[14] With the departure of Lech Walesa and the election of Aleksander Kwasniewski, a new chapter in the Polish legislative–executive relationship was opened (Wiatr 1997, p. 448) which facilitated preparation for accession negotiations. The NCJ played its role in judicial politics. Its representatives took part not only in the constitutional reform, but also in elaboration of the law concerning the organisation of the judiciary. Nevertheless, even if the Council had not been conceived as self-government of judges (Bodnar & Bojarski 2011, p. 670), the division of competences between the Polish Ministry of Justice and the NCJ remained a matter of debate. Through its decisions, the Constitutional Tribunal had to clarify its competences in this way to reduce the risk of tensions. Thus, the boundaries between the judiciary and the political branches were defined, thanks to the activity of the Ombudsman and the Constitutional Tribunal (Bodnar & Bokarski 2011, p. 668). Nevertheless, in its ruling from 1998, the Constitutional Tribunal reiterated the role of the Ministry of Justice in the administration of the judiciary: 'the administrative supervision over the judiciary exercised by the Ministry of Justice is necessary in order to verify how the court structures operated' (Bodnar & Bokarski 2011, pp. 669–79).

In Hungary at the beginning of the 1990s, the powers of the executive over the judiciary 'were fundamentally untouched by the transition' (Magalhes 1999, p. 55). The legal framework allowed the Ministry of Justice to retain its administrative and disciplinary powers over the magistracy (Piana 2010, p. 99). In March 1992, the Minister of Justice of the right-wing government appointed presidents for several courts without any recommendation (Magalhaes 1999; Fleck 2011, p. 793). In the face of criticism expressed by some domestic actors, the Constitutional Court had to clarify the competences of the institution. Thus, as in the case of Poland, in a judgement from 1993 it declared that the participation of the Ministry of Justice in the selection of judges was not in violation of the Constitution (Fleck 2011, p. 793). Nevertheless, the Constitutional Court highlighted that, according to the amended Constitution, the political influence on judicial selection could be neutralised by 'the substantive participation of the judiciary in this process' (Fleck 2011, p. 794). Here again, the role of the Constitutional Court is significant. The Constitutional Court became the main vehicle for ensuring compliance by State institutions. Its rulings were socially and politically significant (Pogany 1993, p. 352; Seleny 1999). In the context of transition, the Constitutional Court acquired veto rights and became a major check on the powers of the legislative and the executive. As Seleny pointed out, it established itself as 'one of the most authoritative in the world' (1999, p. 495). The institution rapidly gained international recognition through its case law and became a model in academic literature. As in Poland, the Hungarian constitutional judges vigorously defended citizens' social rights (Richardson 2006, p. 136; Seleny 1999, p. 493). In several fields, constitutional judges forced political actors to negotiate. Throughout the 1990s, the Constitutional Court 'practically ran Hungary' and 'it was the strongest body of State throughout the 1990s' (Scheppele 2003, p. 222). Some of its decisions forced government to alter their political programmes (Pogany 1993, p. 349; Scheppele 2006, p. 1776). The 'invisible Hungarian Constitution' not only allowed the Court to interpret its

[14]Lech K. Paprzycki, President of the Supreme Court of the Republic of Poland, Head of the Criminal Law Chamber, October 2005, available at: www.at.gov.lv/files/docs . . . /L[1].Paprzycki_2.doc, accessed 10 June 2012.

provisions, but also 'to write it' (Scheppele 2006, p. 1778). However, through its activity, the institution exposed itself 'to charges of interfering in the political process and with formulating policies under the mantle of constitutionalism' (Pogany 1993, p. 355). Because of its critical attitude towards the legislative branch, some politicians accused it of disrespect for legislative sovereignty and tried to amend the Constitution so as to deprive it of its review powers (Sajo 1995, p. 257).

Unlike Poland, in 1997 Hungary turned more towards a model of self-administration of the judiciary. According to Pal Solt, former President of the Supreme Court, the essential point of the Hungarian reform comprised the application of full and complete self-management for the judiciary.[15] The core was put in place at the end of the electoral mandate of the Hungarian Socialist Party (1994–1998). The Minister of Justice, Pal Vastagh, founding member of the Hungarian Socialist Party (*Magyar Szocialista Párt*), presented judicial independence as a governmental priority. By proposing to create the National Council of Justice (*Magyarország Bíróságai*), Vastagh's aim was to reduce the powers of the executive over the judiciary and to consolidate the guarantees of independence of judicial institutions (Magalhaes 1999). A comprehensive reform of the judiciary took place, with the passage of the Act on the Organization and Administration of Courts and the Act on the Legal Status and Remuneration of Judges (OSI 2001, p. 195). On the basis of this, the National Council of Justice was established to oversee the promotion, appointment and evaluation of judges (Fleck 2011, p. 795).

Unlike Poland and Hungary, the Bulgarian constitution adopted in 1991 established a 'powerful Supreme Judicial Council (*Vissh sudeben suvet*—SJC) in charge of promoting, assigning and dismissing magistrates' (Magalhaes 1999, p. 50). According to Schönfelder, 'anyone who reads the sections of the Bulgarian constitution which concern the judiciary and the judiciary act of 1994 is bound to be impressed by the accumulation of institutional safeguards protecting the judicial system' (2005, p. 62). The Bulgarian post-communist Constitution provides that the SJC elects, promotes, demotes, reassigns and dismisses justices, prosecutors and investigating magistrates. Initially, both in Romania and in Bulgaria the former communists supported the independence of the judiciary but argued that 'the most desirable solution for the management of the judiciary included the appointment of all members of the SJC by parliament and the Minister of Justice' (Magalhaes 1999, p. 57; Coman 2009). After consultation with judges, prosecutors, lawyers and members of the SJC, President Zhelev vetoed the legislation (Magalhaes 1999, p. 57). The Constitutional Court ruled that the bill was unconstitutional. As a consequence, the role of the Minister of Justice has been formally reduced in judicial governance. He or she has had the right to serve as the chair of the meetings of the SJC, but without voting privileges (Melone 1996, p. 234). The difference to the Romanian case is that in Bulgaria, according to Schönfelder, these rules related to the independence of the judiciary have been largely respected since the mid-1990s (2005, p. 61). Like in Poland and Hungary, the Bulgarian Constitutional Court challenged politicians on many occasions (Ganev 2003, p. 600; Smilov 2010), and most of its rulings were perceived as 'reasonable and won wide acclaim' (Schönfelder 2005, p. 65). Unlike the Romanian Constitutional Court, in Bulgaria, the institution remained

[15] 'The Guarantees of the Independence of Judges—Evaluation of Judicial Reform', multilateral meeting organised by the Council of Europe in collaboration with the Association of Judges of Hungary, Budapest, 15 May 1998.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

'uncaptured by particular political forces' (Ganev 2003, p. 600) and became a central actor in domestic politics.[16]

The Romanian Constitution adopted in 1991 re-established the Superior Council of Magistracy, a traditional institution created in 1909 with the task of guaranteeing the independence of the judiciary. In June 1992, the Social Democrat Ministry of Justice initiated a 'grand' consultation with judges and prosecutors concerning the law on judicial organisation.[17] According to the executive, the draft represented a consensus of judges and prosecutors. The first parliamentary debates gave rise to lively debates opposing different institutional models of judicial governance. While the ruling party tried to maintain the control of the Ministry of Justice over the administration of the judiciary—arguing that this was the only solution due to the complexity of the legal, economic and social transition—parties from the opposition claimed that the Minister of Justice, who is a politician, cannot make independent decisions concerning the magistracy. Several social democratic members of the parliament and the executive argued that, in case of the empowerment of the CSM, the elected branches of government would find themselves in a situation where future governments would no longer have anything to do in the field of judicial governance. By its amendments, the Democratic Union of Hungarians (*României Magyar Demokrata Szövetség*—UDMR) invited the executive to ensure 'a real independence' (Coman 2008, p. 262). The representatives of the UDMR argued that the Ministry should have a very limited role, meaning that 'it should take care only of buildings, typewriters, the auxiliary personnel and nothing more'.[18] *De jure*, the Constitution provided legal grounds for the empowerment of the CSM. However, the legislation passed in 1992 contained many ambiguities with regard to the competences of the Ministry of Justice and of the CSM. *De facto*, the establishment of the CSM was delayed for several years. Its members met only twice a year in the buildings of the Ministry of Justice.[19] From the beginning of the 1990s until 2003, the CSM was nothing more than an empty structure, without any power and visibility in the administration of the judiciary. In spite of the critical attitude of the opposition parties in the parliamentary debates, the Social Democrats did not encounter any difficulty in maintaining a weak CSM. Moreover, the Romanian Constitutional Court did not engage in open conflict with the ruling party.

In Romania in 1997, like in Poland and Hungary, the new Minister of Justice, a member of the National Liberal Party (*Partidul Naţional Liberal*), tried to clarify the attributions of the Ministry and to improve the independence of the CSM. The executive's initiatives were supported and inspired by collaboration with a series of new NGOs involved in promoting the rule of law and human rights in the country. At that time, both in Romania and in Bulgaria, NGOs and professional associations were providing material resources and

[16]As mentioned previously, the independence of the judiciary is not only about norms and principles, but also about financial resources and salaries. In this respect, the Bulgarian Constitutional Court ruled against the political parties and challenged them to increase the budget of the judicial branch (Ganev 2003, p. 603). Another example which supports the above argument is that in 1994 the institution blocked the attempts of the Videnov government to dismiss the members of the NJC before the end of their mandate (Smilov 2010, p. 112).

[17]Romania Parliamentary Debates, Chamber of Deputies, Ordinary session, 24 June 1992, *Monitorul Oficial*, second part, An III, no. 128, 25 June 1992.

[18]Csiha Tamas Ernestin, representative of the Democratic Union of Hungarians from Romania, Chamber of Deputies, Ordinary session, 24 June 1992, *Monitorul Oficial*, second part, An III, no. 128, 25 June 1992.

[19]Interview with Judge 1 at the Ministry of Justice, Bucharest, 18 March 2005.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

support for the assessment of judicial independence and capacity (Piana 2007, p. 38; Delpeuch 2007). Nevertheless, the attempts of the liberal Romanian Minister of Justice to enhance the role of the CSM failed because of the lack of political support within the governmental coalition *Convenţia Democratã Românã* (CDR). According to his declarations, he was preparing a 'great reform'.[20] But it remained only an intention and the Minister failed to meet the expectations of ordinary judges, who were calling for a real judicial reform (Decean 2006).

Compared to the countries discussed above, the Czech Republic appears as a deviant case. In spite of the diffusion across Europe of the model of judicial governance, the Czech Republic followed a completely different path. As Bobek pointed out, the Czech Republic remained the 'black sheep' because the judicial council announced in the reform proposals of 1999 'remained on paper only' (Bobek 2007, p. 112). The Czech Republic did not follow this tendency. From the beginning of the transition to democracy until recently, the Czech Republic retained a model of judicial administration based on the prominent role of the Ministry of Justice, which appoints and dismisses judges and prosecutors (Sticka 2007, p. 199; Kosar 2010a). In 1999, under the recommendation of the European Union (Voermans & Albers 2003, p. 88), Czech political elites initiated a series of debates on this matter. Yet, the judicial council has still not been established.

To what extent has the EU been decisive in reshaping judicial councils in the former communist states? The next section will show how these five countries adapted to the EU requirements in the accession stage.

The second wave of reforms: the differential impact of the EU

In 1993, for the first time in the EU's history, the Copenhagen summit laid down conditions that countries aspiring to membership would have to meet. They were conceived so as to ensure that enlargement would not threaten the functioning or continuing development of the EU but also in order to guide the internal reforms in candidate countries.

Enlargement was a new and challenging experience for all the EU institutions. By evaluating their progress, the aim of the European Commission was to verify whether new member states had appropriate and sufficiently strong legal frameworks and enforcement mechanisms to meet the requirements of membership. The Commission warned that judicial reforms in the region were far from being complete. Its recommendations concerned both the written laws concerning the organisation of the judiciary and their day-to-day implementation and enforcement. The European Commission praised the candidate countries for their progress in adopting basic legislation, but emphasised the need to strengthen the human resources of the judiciary, to improve working conditions, the mechanisms of due enforcement of court decisions, and citizens' access to justice (Kochenov 2004, p. 21). The Commission encouraged them to create public confidence in the judicial system, which had remained relatively low before accession. The European Commission emphasised that the judiciary should be independent and well-staffed. Judges must be well-trained, well-paid, efficient, respected and accessible to people. These recommendations were not new. They were extensively discussed at the domestic level by politicians and judges (Coman 2009, pp. 95–98).

[20]Interview with Valeriu Stoica, former Minister of Justice, Bucharest, 24 March 2005.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

How conditionality is defined in this field deserves attention. At the beginning, the European Commission's regular reports did not allocate much space to the discussion of judicial reform in the candidate countries (Kochenov 2004, p. 21). The EU's *acquis* and experience provided little guidance for addressing these reforms (Grabbe 2004, p. 77). It was a new task for the European Commission, which possessed less experience in this field than the Council of Europe. The recommendations concerning the functioning of the judiciary varied usually between three short paragraphs and around three pages. Conditionality related to judicial reform has been defined progressively, according to the gaps perceived by the Commission between a set of standards (Piana 2010), and the functioning of the judicial institutions. The European Commission tried to identify where matters were proceeding satisfactorily and where they were not. Through its regular reports, it defined goals—but it did not (always) provide guidelines on how to reach them, and this for at least three main reasons.

First, during the 1990s, several international organisations initiated debates about the self-administration of the judiciary. They all revealed that there was no clear format for the balance between the institutional factors, nor a universal consensus on their designs (Domingo 1999, p. 155). Conditionality in this field did not imply legally binding norms to be transmitted to the candidate countries (Coman 2008, p. 326; Piana 2009, p. 824). The separation of powers, judicial review, and checks and balances are general principles in European political regimes, but they can take very different forms (Wolczuk 2007, p. 229). There is no uniform matrix of institutional design in Europe with regard to their implementation. In any field related to political criteria and democratisation, the common feature of the EU's conditionality is the lack of models around which to converge (Grabbe 2002, p. 253; Pridham 2006). For this reason, the European Commission relied upon the expertise, standards and legitimacy of other institutions such as the Council of Europe. Most of them have been produced in the context of the Eastern enlargement. Fundamentally, the European Commission recommended that the self-governance of the judiciary should be real, including non-interference of the other branches of power in the training of judges, the work of their self-governing bodies, their appointment as well as the work of courts (Kochenov 2004, p. 21). Indirectly, the European Commission expressed the desirability of a normative model of judicial governance which empowers the judicial councils. This became clear when in its regular reports it made reference to the 'excessive powers' of the ministries of justice and the need to reduce them.

Second, to compensate for its inability to explain how the principle of independence should be implemented and why a model is positively evaluated in one country and negatively in another one, the European Commission designed the twinning programmes as new policy instruments through which civil servants from the old member states would support the administrative and political elites from the candidate countries in reforming their judicial and administrative structures. If political conditionality set the aims to be reached, the twinning programmes became the main 'instruments of policing the EU's conditionality' (Papadimitriou & Phinnemore 2004, p. 624). The twinning programmes therefore gave rise to competing conceptions and institutional models on which the candidate countries could base their attempts to improve the guarantees of independence of their judiciaries (Coman 2008; Piana 2010). In several fields, the absence of an EU model became a reflection of the strength of national traditions across the old EU member states (Papadimitriou & Phinnemore 2004, p. 623; Coman 2009, p. 156).

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

Scholars who examined the impact of the EU on judicial reforms pointed out mitigated results with regard to its transformative power. The five countries under study depict different trajectories of judicial independence. EU accession did not bring major alterations to the institutional framework, either in Hungary (Uitz 2010, p. 47) or in the Czech Republic (Sticka 2007, p. 199) and also not in Poland. The Romanian and Bulgarian cases depict a contrasting picture. In what follows we will examine this differential impact of EU conditionality.

In Poland, the empowerment of the Council had been gradual and concerned co-decision making with regard to the budget of the judiciary and the duty to prepare a set of professional ethical rules for judges. However, the Ministry of Justice remained a powerful actor.

Prior to accession, the creation of the National Council of the Judiciary (*Krajowa Rada Sędownictwa*)—in charge of the self-administration of courts, selection, promotion and evaluation of judges—consolidated the separation of the judiciary from the executive (European Commission 2001, p. 16). Nevertheless, there was still a gap between norms and behaviours. The principle of independence may have been introduced *de jure*, but did not change the situation *de facto*. In spite of the creation of a Judicial Council and the entry into force of a series of laws in 1997, several domestic actors deplored the lack of a truly independent judiciary and the interference of the political power in the administration of the judiciary. According to the experts of the Open Society Institute, Orban's government (1998–2002) diminished 'accountability and openness, increasing politicisation of appointments to key institutions' (OSI 2002, p. 236). Following this negative evaluation, in 2003 the Commission criticised the lack of transparency and discretion left to officials in the process of selecting and promoting judges in Hungary (European Commission 2003, p. 13).[21] Concerning the Czech Republic, the first attempt to establish a judicial council failed since 'politicians did not consent to the transfer of such broad powers to the judiciary' (Kosar 2010a, p. 17). The European Commission encouraged the establishment of such an institution but this option did not find any overwhelming support at the domestic level. A detailed report on the Czech judicial system by the Open Society Institute concluded that judges were 'not subject to undue pressure through the supervision of their decisions or through the assignment of cases' (OSI 2001, p. 143). The judicial branch has been able to maintain its independence to a remarkable degree (Smith 2008, p. 89). Nevertheless, in 2002, the Act on Courts and Judges introduced the so called 'judicial boards', with advisory powers in personal and administrative issues of the functioning of a given court (Kosar 2010a, p. 17). While many observers saw this piece of legislation as 'a first step towards self-government of the judiciary' (European Commission 2002, p. 22; Piana 2009), for others 'these bodies do not qualify as judicial councils' and 'cannot be considered even as a precursor to a countrywide High Judicial Council' (Kosar 2010a, p. 17). The creation of a judicial council remained an open question in the country. In the Czech Republic, the independence of the judiciary was secured by two different means: the rulings of the Constitutional Court and the decisions of the Supreme Administrative

[21]In 2002, the Hungarian Socialist Party (*Magyar Szocialista Párt*) won parliamentary elections and adopted new measures aimed at consolidating the independence of the judiciary. The new government increased judges' salaries and courts' budgets.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

Court (Bobek 2007; Kosar 2010a, p. 7).[22] If these three cases reveal the limited influence of the European Commission, the Romanian and Bulgarian cases depict another picture. The aim of this part is to explain why, and to better document the differential impact of the EU.

Starting with 2001, the politicisation of the judiciary appeared to be the main shortcoming in the functioning of the Romanian judiciary. From 2002 to 2004, the number of European and domestic reports revealing cases of politicisation of the judiciary increased (Smith 2008). Romanian journalists began to ironically compare the 'effective working' of political and economic corruption with the 'blindness, lack of validity and confusion of the judicial institution' (Coman 2007, p. 164). In Bulgaria and Romania, corruption was perceived as extending even into the upper echelons of the judiciary (Schönfelder 2005, p. 61). In Romania, as in Bulgaria, journalists ironically claimed that 'law works', it does matter, but only sometimes (Schönfelder 2005, p. 61; Coman 2009, p. 177). The allegations of political and judicial corruption were a matter of concern for both European and domestic actors. The dilemma was one of how to fight against political corruption with corrupted judges (Hammerslev 2007; Coman 2009, p. 177).

In 2002, ensuring the independence of the judiciary became a *sine qua non* condition of EU accession. In Romania, the ruling party (the Social Democrats—*Partidul Social Democrat*) pushed for the empowerment of the Ministry of Justice, seen by the executive as the only institution able to fight against the widespread political and judicial corruption. Consequently, the Social Democratic government tried to maintain a model based on shared competences between the Ministry of Justice and the CSM. The Romanian government worked in close collaboration with a French expert to prepare a new series of laws on the independence of the judiciary and the delimitation of competences between the Ministry of Justice and the CSM. In the meantime, the CSM was involved in a twinning programme with the participation of a German expert.[23] For them, the only way to solve this dilemma was to empower the CSM. Thus, the CSM—an old institution in Romania but long ignored even by judges and unknown to the general public—suddenly found itself on the centre stage of judicial politics. The independence of the judiciary and the real empowerment of judicial council became a kind of panacea, a miracle solution able to solve all the problems of post-communist transition. In spite of the prestigious collaboration of the government with experts from France, the European Commission remained strict on its recommendations and suggested the empowerment of the Romanian CSM. The Romanian authorities asked the European Commission to explain why one model should be acceptable in one country (such as Poland and the Czech Republic) and unacceptable in another (Coman 2008, p. 391). They claimed that what was perceived as an unimaginable intrusion into judicial independence in one country (in this case Romania) was common institutional practice in another one. The European Commission had to settle (indirectly) this domestic tension between political and judicial actors and experts and their competition to impose

[22]'The Czech Constitutional Court held that the President of the Czech Republic cannot assign any judge to the Supreme Court without the consent of its Chief Justice, that the salaries of judges cannot be reduced under any circumstances, and that an obligation to follow continuing education cannot be imposed upon the judiciary' (Kosar 2010b).

[23]Interview with the President of the CSM, Dan Lupascu, the Romanian coordinator of this twinning programme, Bucharest, 13 September 2006; interview with G. I., Executive Director of the Centre for Legal Resources, Bucharest, 20 March 2005; interview with S. T., Delegation of the European Commission in Bucharest, 19 September 2006.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

different institutional models. In the end, for the European officials, dealing with the independence of the judiciary became more a question of trust (Coman 2009, p. 213),[24] rather than the ability of domestic actors to pass laws and reforms.

The European Commission failed to provide an explanation for the normative desirability of a specific institutional model. The explanation came later. It was given by the Council of Europe which explained in a short report why the former communist countries were encouraged to empower their judicial councils. Thus, in 2004 the Romanian political parties passed three laws which empowered the Superior Council of the Magistracy and limited political control over the judiciary. One way to explain this outcome is to confirm the transformative power of the EU's conditionality. But this interpretation would be misleading. A more fruitful analytical strategy in order to assess this impact may be to try to comprehend the interaction between the European institutions and the national actors in identifying the shortcomings of the judiciary.

The Romanian case allows researchers to reshape the initial hypotheses related to the impact of the EU on domestic reforms. It shows that conditionality is neither something emanating from the top, nor is it 'a clear-cut independent or intervening variable and does not fit narrowly in a positivist framework' (Sasse 2006, p. 295). What is generally considered as a 'European source of change' with regard to the independence of the judiciary is in reality the result of the interaction between European, (international) and domestic actors or the institutionalisation at the EU level of specific domestic claims (Coman 2009, p. 230). Domestic actors, ranging from interest groups to national executives, may have had a role to play in this process. The Romanian case in particular and the judicial reforms in general clearly confirm this path.

The European Commission evaluated the progress in this field on the basis of a variety of sources of information delivered by international organisations, embassies, governments and domestic and transnational NGOs. EU experts met with representatives of civil society, magistrates and journalists in Bucharest.[25] The EU officials were well-informed about the state of the judiciary, not only because the common practice was to organise meetings between EU experts and practitioners,[26] but also because citizens used to send complaints to the Delegation of the EU.[27] In parallel, a series of international associations and NGOs

[24]The recent decision to approve Romania's and Bulgaria's accession to Schengen on the basis of the results achieved in the field of the judiciary is considered as an additional sanction. As in 2004, when several European officials declared that the reform of the judiciary in Romania was a question of trust, in 2011 and 2012 the Dutch immigration minister—who vetoed the Schengen accession of the two countries—argued that 'it is also a matter of trust and confidence that our collective external borders will be safe and secure'. Even if the technical requirements for Schengen were fulfilled in Romania and Bulgaria, the heads of the old member states from France, Germany, Sweden, Belgium, Finland and the Netherlands argued that Romania and Bulgaria 'could not be trusted with guarding the EU external borders'. See 'Romania and Bulgaria—The Winding Road to Schengen', 2 November 2011, available at: http://www.thenewfederalist.eu/Bulgaria-and-Romania-The-winding-road-to-Schengen,04586, accessed 3 July 2012. See also 'Europe Denies 2 Nations Entry to Travel Zone', *New York Times*, 22 September 2011, available at: http://www.nytimes.com/2011/09/23/world/europe/romania-and-bulgaria-are-denied-entry-to-schengen-zone.html?adxnnl=1&adxnnlx=1390064773-WdXGS0E6EIzxbQ0a9Bh4VQ, accessed 18 January 2014.

[25]Interview with S. T., Delegation of the European Commission in Bucharest, 19 September 2006; interview with civil servant, Ministry of Interior, Bucharest, 1 June 2012.

[26]Interview with Judge 1 at the Ministry of Justice, Bucharest, 18 March 2005; interview with S. T., Delegation of the European Commission in Bucharest, 19 September 2006; interview with G. I., Executive Director of the Centre for Legal Resources, Bucharest, 20 March 2005.

[27]Interview with S. T., Delegation of the European Commission in Bucharest, 19 September 2006.

evaluated the progress made by the former candidate countries in their attempts to improve the functioning of the judiciary and to fight against corruption. The Romanian officials considered these evaluations as 'attacks against the Romanian Social Democratic Party' (Alexandru 2004, pp. 178–93). They deplored the poor quality of data used by the external experts in assessing the functioning of the judiciary and argued that most reports were based on a couple of articles published in newspapers and on some interviews conducted with a few journalists, judges and NGO leaders (Coman 2008, p. 389). Put differently, representatives of the Social Democratic Party deplored the ideological bias of international reports and the actions of domestic judges, journalists and experts who were accused by the party of damaging the country's image and reputation. In Bulgaria, too, according to Primatarova, 'less reform-minded representatives' of the judiciary sometimes complain that they 'have the feeling that the reports are written by Bulgarian NGOs' (2011, p. 70).

In 2003 and 2004, several EU officials deplored the lack of credibility of the Romanian elites. In February 2004, Emma Nicholson (MEP) proposed suspending negotiations with the Romanian government until improvements were made in the judicial system, which was 'still weak and open to corruption' (Beatty 2004). The report published in 2004 by the European Parliament stated that becoming a member in 2007 would be impossible unless Romania fully implemented 'the independence and functioning of the judiciary, especially limiting the powers of the Ministry of Justice and providing more resources to the judiciary' (European Parliament 2004, p. 6).

Judicial reform in Romania cannot be explained without taking into account the forms of judicial mobilisation. Compared to the four other countries, it took more than one decade to hear judges publicly talking about 'the reform' (Coman 2009, p. 210). Starting in 2003, they began denouncing the poor working conditions within the magistracy, the variety of forms of political pressure, and the 'fear' of speaking out about the internal problems of the judiciary, including judicial corruption. A few of them established contacts with NGOs and established a coalition (Alliance for a European Justice—*Alianţa pentru o justiţie europeanã*) whose aim was strictly to promote the 'true independence of the judiciary in Romania'.[28] Against the political elites and supported by some NGOs and a few journalists, they demanded the real empowerment of the CSM. They seized a window of opportunity created by a combination of factors: at the European level, officials were worried about corruption in the new member states and how they would spend the money they would receive from the EU budget; at the domestic level, judges were frequently asked by citizens, civil society associations and even the media to go beyond their constitutionally prescribed duties in order to find solutions for specific social needs, to create new constitutional rights, to amend existing ones, to restore confidence in domestic institutions and to protect values within society (Coman 2009, p. 188). This explains why and how the independence of the judiciary and the real empowerment of the CSM became a kind of panacea, a miracle solution able to solve all the problems of post-communist transition. The empowerment of the CSM became possible in a context in which, on the one hand, Romanian officials had lost their credibility at EU level and, on the other hand, when within society a new group of actors had begun promoting the consolidation of the prerogatives of the CSM and tried to explain the meaning of 'independence of the judiciary'. With the support of the European

[28]The author conducted interviews with all the representatives of the Alliance for a European Justice in 2005 and 2006.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

Commission,[29] they coerced the government into following a specific institutional model of judicial independence.

The main difference between the Romanian and Bulgarian experiences is due to the different role played by the Constitutional Court of the former. Prior to accession, the case of Bulgarian judicial reform was similar to the Polish and Hungarian experiences, given the role played by the Constitutional Court in securing the independence of the judiciary. The Bulgarian government adopted a strategy to reform its judiciary in 2001, three years before the Romanian government. The strategy aimed to improve the administrative capacity of the Supreme Judicial Council and to clarify the 'split of roles between the SJC and Ministry of Justice' (Commission européenne 2001, p. 18). Unlike the Romanian experience, where the CSM was a weak and almost non-existent actor before 2004, in Bulgaria, the Supreme Judicial Council 'was active in helping the Ministry of Justice to prepare the strategy' and it even 'raised concerns where it considered reforms did not fully respect judicial independence' (Commission européenne 2002 p. 23). In Romania in 2003, the cooperation between the Social Democratic Minister of Justice and the president of the CSM was made impossible because of the personal animosity between them.[30]

In addition, the Bulgarian story of judicial reform was less about the improper influence of the Ministry of Justice. Here, one of the main concerns was the immunity of MPs and of judges. In its regular reports, the European Commission required that judges' immunity needed to be clarified (European Commission 2000). This competence was in the hands of the SJC but the requests to the Council to lift the immunity were rare (Primatarova 2011, p. 35). Thus, while in Romania the CSM was seen as a possible agent of change, in Bulgaria it was mainly seen as a conservative actor. The government drafted new laws in order to satisfy the EU requirement but in 2002 the Constitutional Court declared them unconstitutional. Judges argued that many provisions in the amendments to the Law on the Judicial System promoted by the government of Prime Minister Simeon Saxe Coburg Gotha violated the principle of judicial independence (Smilov 2010, p. 114). According to the interpretation of the Court, there were too many amendments to the Constitution (Primatarova 2011, p. 36). The justices argued that such reforms have to be carried out by a special constituent legislature (Smilov 2010, p. 115; Primatarova 2011). This decision provoked a wide debate at the domestic level. Some argued that a further reform of the judiciary was not possible without the amendment of the Constitution. Others claimed that this argument was only an excuse to maintain the *status quo* in the Bulgarian judicial system (Primatarova 2011, p. 49). There was tension between the willingness of the political elites to close this negotiation chapter with the EU and, on the other hand, the legal interpretation given by the Constitutional Court. In this case, the hypothesis according to which the EU empowers Constitutional Courts or other domestic actors (like in the Romanian case) is not verified.

If in Romania the 'final push' was the resignation of the Social Democratic Minister of Justice, Rodica Stanoiu, and the adoption of a series of laws which partly fulfilled reformers' expectations, in Bulgaria, the press conference given by Commissioner Verheugen in Sofia in spring 2003 sounded like 'a threat' (Primatarova 2011, p. 36), and made the revision of

[29]Interview with S. T., Delegation of the European Commission in Bucharest, 19 September 2006; interview with Lucian Augusting Bolcas, Member of the Parliament, representative of the Greater Romania Party, Bucharest, 18 September 2006.

[30]Interview with the President of the CSM, Dan Lupascu, Bucharest, 13 September 2006.

the Constitution possible.[31] Following the consensus of all the Bulgarian political parties represented in Parliament, an *ad hoc* parliamentary commission was created in April 2003 to elaborate a proposal for amendments to the constitution.

Our data show that in Romania and Bulgaria, the consolidation of judicial councils was the result of a series of overlapping factors due to the radicalisation of public debates and discourse on the widespread political, judicial and economic corruption. Political and judicial corruption was a matter of concern in the three other countries, too. But, unlike the Romanian and Bulgarian experiences, where cases of corruption can take years, in the Czech Republic several cases of maladministration and political corruption have been brought before courts. A qualitative analysis of Czech newspapers published from 2002 until 2012 shows that most politicians resigned when accused of corruption.[32] Contrary to the Romanian and Bulgarian cases, where 'law works' but only sometimes, in the Czech Republic the fight against political and judicial corruption was not merely a vague fight of judges against politicians or vendettas orchestrated by political enemies. Not only have politicians resigned or been dismissed, but also judges and prosecutors involved in disciplinary proceedings established by the Supreme Administrative Court.

To sum up, the Romanian and Bulgarian cases confirm the assumption that gate-keeping is the most powerful mechanism of Europeanisation (Grabbe 2002). The EU has been successful in opening up a critical juncture for reform and in maintaining the principle of the independence of the judiciary on the political agenda. The outcomes, though, depend on the policy preferences of domestic actors. Certainly, conditionality proved to be effective when the EU coerced the countries reluctant to compliance with the threat of exclusion and postponing accession. Gate-keeping remained the main mechanism through which the EU clearly sanctioned non-compliance with its standards and rules. The decision to postpone the accession date in the Bulgarian and Romanian cases or the menace of cutting financial support reinforced this argument in the literature. There is no doubt that the European Commission sanctioned inertia and rewarded any form of absorption and accommodation. Nevertheless, these examples show the primacy of material incentives in producing rapid and formal outcomes. Even if they offer evidence to assess the causal role of the EU in rapidly changing politics, they undermine constructivist claims about the power of norms and socialisation, extensively used as explanatory factors in the literature.

The third wave of reforms: excessive independence or politics as usual?

Judicial reforms are never-ending; they are a 'surface law', susceptible to perpetual reform (Febbrajo 2010, p. 44). During the 1990s, when most of the judicial reforms were discussed at the domestic and European level, only a minority of experts and political actors evoked the risks of considering the independence of the judiciary without taking into account the principle of accountability (Bobek 2007; Di Federico 2010). Scholars with practical experience in judicial reforms warned that judicial independence should not be an aim in

[31]The amendment introduced in September 2003 is known under the name 'the Verheugen amendment'.

[32]For this I explored 1,839 articles published in English by *Radio Prague*, the *Prague Post*, *Cesky Noviny*, *Prague Daily Monitor* and *Prague Tribune*. I conducted this analysis in 2012 in the framework of a research project devoted to the state of democracy in Central and Eastern Europe. The aim was to explore how corruption and the functioning of the judiciary were framed in the region. The results of the project are not yet published.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

itself (Di Federico 2010). On the contrary, according to them, the ideal path is to find a balance between independence and accountability in order to ensure that no institution is beyond politics (Friedman 2004, p. 96), and to achieve an optimum rather than a maximum degree of independence (Domingo 1999, p. 154). Today, scholars and practitioners argue that 'many politicians and judges themselves, heavily supported by foreign experts and the "rule of law industry" of NGOs and international organizations, pushed for the creation of a self-administrative body of the judiciary but did not take into account' (Kosar 2010a, p. 1) the question of accountability (Fleck 2011).

After accession, judges and judicial councils faced new media campaigns (Schönfelder 2005, p. 64) and attacks from politicians and even judges accusing them of incompetence and party bias (Bodnar & Bojarski 2011). Media and NGOs are very eager to fuel those debates. In spite of the successive waves of reforms, several surveys published in recent years show that judges are still perceived as 'unreliable, inefficient and corrupt' (Schönfelder 2005, p. 61). The number of complaints received by the heads of state, ministries of justice, ombudsmen and judicial councils also increased (Seibert-Fohr 2011). They generally refer to the content of judgements, the length of proceedings and the execution of judgements (Coman 2009; Bodnar & Bojarski 2011, p. 712; Fleck 2011, p. 813). Judicial councils and associations of magistrates try to shed light on this avalanche of criticism.

In the Czech Republic, public debates concerning the functioning of the judiciary focus on similar issues: political and judicial corruption which is frequently deplored by political parties, members of the judiciary, NGOs and journalists. In September 2011, the civilian intelligence agency (*Bezpečnostní informační služba*—BIS) issued a report on malpractice and criminal activity within the Czech justice system.[33] According to this report, the judicial system appears to be burdened by corruption. It accused 'judges and state prosecutors of a litany of shortcomings from sluggishness to connections to organised crime'. The leader of the Czech association of judges took a sceptical position and argued that 'the report was phrased with the standards of some tabloid newspaper (. . .) it is very damaging to the entire justice system'.[34] As in other countries, the President of the Republic, Vaclav Klaus, attacked the judiciary on many occasions, accusing it of 'wanting to be a state within a state'.[35] For example, in 2006, both President Klaus and the Minister of Justice, Pavel Nemec, attempted to dismiss the President of the Supreme Court for her alleged 'poor performance in office'.[36] They lost before the Constitutional Court, which ruled that the president of the country violated the strict separation of the executive power and the judiciary. As in the Polish experience, when in 2008 the Constitutional Tribunal had to deal with the refusal of President Kaczynski to appoint new judges, the Czech Constitutional Court had to establish who had the right to recall the head of the Supreme Court. Many other examples of clashes can be provided to illustrate this tension between the elected branches of power and the judiciary. Against the role played by the Constitutional Court in protecting

[33]*Radio Prague*, 8 September 2011, available at: http://www.radio.cz/en/section/curraffrs/bis-slams-justice-officials-for-corruption-and-criminality, accessed 18 January 2014.

[34]*Radio Prague*, 8 September 2011, available at: http://www.radio.cz/en/section/curraffrs/bis-slams-justice-officials-for-corruption-and-criminality, accessed 18 January 2014.

[35]*Radio Prague*, 13 September 2006, available at: http://www.radio.cz/en/section/curraffrs/clash-of-wills-between-president-and-judiciary, accessed 18 January 2014.

[36]*Radio Prague*, 13 September 2006, available at: http://www.radio.cz/en/section/curraffrs/clash-of-wills-between-president-and-judiciary, accessed 18 January 2014.

the principle of independence of the judiciary, politicians and in particular President Klaus threatened to reduce its powers. He contended there would be the risk of the Constitutional Court functioning as a third chamber of the Parliament.[37]

In 2004, the Polish NJC began debating how to deal with widespread mistrust in the functioning of the judiciary. The NJC deplored 'vulgar' attacks on judges and courts in press articles, and 'the increasing number of unreliable press articles' depicting the malfunctioning of courts and the work of judges, and put forward the view that the judiciary 'is not afraid of criticism which results from the well understood social interest'.[38]

With or without the involvement of the European Commission, judicial councils and their reform remained a controversial domestic issue. For example, in 2005, Law and Justice (*Prawo i Sprawiedliwość*—PiS) obtained 27% of the votes in the Polish parliamentary elections and the Civic Platform (*Platforma Obywatelska*) 24%.[39] PiS made its name by promising to fight against corruption and the establishment of the political regime 'against the old system'. The party came to power with a populist political discourse, blaming elites and glorifying the virtue of the people. It emphasised the extreme crisis of Polish democracy, the moral decay and widespread corruption within society. Still attached to past issues such as collaboration with the secret police (Nalepa 2010, p. 18), the new President Kaczynski demanded a purge of former communists from power and a concentration of power in the hands of the President. 'Law' and 'order' were the key words in its political programme: 'there will be law and order because this is in the interest of ordinary Polish citizens. And Law and Justice is a party of ordinary Polish citizens' (Wysocka 2009).

From 2005 to 2007, the relationship between the executive and the judiciary was tense. Attempts to reform the judiciary have to be understood in a context in which the PiS was trying to introduce an extensive lustration law (Nalepa 2010, p. 17); its key provisions had been struck down by the Constitutional Tribunal. During his term, the President of the Republic never missed a chance to express his hostility towards judges (Bodnar & Bojarski, p. 729), and started organising a coalition to amend the Constitution. The Constitutional Tribunal in particular and the judiciary in general became the subject of constant attack from the new ruling coalition. Thus, a number of legislative amendments concerning the judiciary have been introduced. The wish of the executive was to empower the Ministry 'to appoint temporary presidents, to create vacancies and nominate judges to those vacancies, thereby reducing the role of the NCJ in those appointments and giving the Minister of Justice greater influence over the composition of the judiciary' (International Bar Association 2007, p. 24). Another controversial point formulated in the reform programme introduced by the Minister of Justice, Zbigniew Ziobro, concerned disciplinary proceedings. The main claim of the ruling party was to say that 'judges were irresponsible because of the low penalties awarded'. In a speech given by the President of the Republic in 2007, judges were accused of taking into account 'the interest of their corporation over moral principles' (Bodnar & Bijarski 2011, p. 730).

[37]*Radio Prague*, 7 September 2010, available at: http://www.radio.cz/en/section/news/news-2010-09-07#2, accessed 18 January 2014.

[38]National Council of the Judiciary of Poland, available at: http://www.krs.pl/main2.php?node=info&mnu=15&lng=2, accessed 29 March 2012.

[39]While most of the observers expected that the two parties would form a governmental coalition, in April 2006, Law and Justice (PiS) agreed to govern with Self Defence (*Samoobrona Rzeczpospolitej Polskiej*), the political party led by Andrzej Lepper. Even though the party did not win an absolute majority, it emerged as sufficiently strong to lead a cabinet.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

According to several international associations, some of the amendments introduced by Law and Justice constituted a threat to the independence of the judiciary and a breach of the Polish Constitution. The European Commission remained silent with regard to these developments. In contrast, the experts of the International Bar Association Human Rights Institute pointed out that 'these pieces of legislation could be viewed as involving only small increases in executive power over the judiciary' (International Bar Association 2007, p. 6).

According to the representatives of the NCJ, who participated actively in a public hearing in the *Sejm* in 2006, the amendments to the National Council of the Judiciary Act proposed by the ruling coalition were 'a threat not only to constitutional values (independence), but also a restriction of judicial sovereignty as well'.[40] Representatives of numerous courts, the '*Iustitia*' association of Polish judges or the Supreme Council of the Attorneys unanimously arrived at the decision that the majority of the proposed amendments were unnecessary and their significant part was contradictory to the Constitution. In a position paper issued in February 2006, the 'Council severely criticized activities of some members of the government, the Minister of Justice in particular, for interfering into authority of the administration of justice and infringement of judicial independence'.[41] In the same vein, in February 2006, the Constitutional Tribunal's chairman at the time, Marek Safjan, published a commentary in *Gazeta Wyborcza*, criticising President Kaczynski's statements about the Constitutional Tribunal, calling the President's words 'astonishing and disturbing to a great degree' (Uitz 2007, p. 1). In 2008, for the first time in the history of the country, the President of the Republic refused to appoint judges nominated by the NCJ. In this context, in October 2008 the National Council of the Judiciary organised the Second Congress of Polish Judges in Warsaw. For many, it was the 'most important assembly of judges for nine years'. Judges took the opportunity to discuss important issues such as mutual relations between the legislative, executive and judicial powers and the lack of respect shown for the judiciary as an apolitical and independent power.[42] Even if these attempts to reform the judiciary in Poland gained little attention at the European level and even if they failed because of the evolution of the political situation in the country, they invite both decision makers and judges to consider seriously the claims concerning the malfunctioning of the judiciary.

EU officials lamented the difficulty of maintaining pressure on accession states to continue with reforms, especially when all the negotiating chapters had been closed (Haughton 2007, p. 240). Thus, in 2006, in order to maintain pressure on Romania and Bulgaria to continue implementation of the reforms, a mechanism of cooperation and verification (MCV) was introduced. The EU reserved itself the right to impose safeguard clauses in the area of Justice and Home Affairs for three years after accession. Like European conditionality in 1993, this mechanism was designed in order to reassure member states that the newcomers would fully comply with EU rules and standards. Several observers argued that the MCV was the extension of political conditionality beyond the accession moment. The European Commission proposed six benchmarks for Bulgaria and four for Romania. While Bulgaria had to 'continue the reform of the judiciary in order to

[40] *History of the National Council of the Judiciary*, available at: http://krs.pl/en/about-us/history/history-of-the-national-council-of-the-judici, accessed 18 January 2014.

[41] *History of the National Council of the Judiciary*, available at: http://krs.pl/en/about-us/history/history-of-the-national-council-of-the-judici, accessed 18 January 2014.

[42] European Network of Councils for the Judiciary, *Bulletin*, no. 2, 2009, p. 9, available at: http://www.encj.eu/images/stories/pdf/encj_bulletin2.pdf, accessed 18 January 2014.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

enhance professionalism, accountability and efficiency and to remove any ambiguity regarding the independence and accountability of the judicial system',[43] Romania was invited to 'ensure a more transparent and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy'.[44] According to the European Commission (2012), the reforms adopted have not yet delivered the changes expected.

Initially, officials in Bucharest and Sofia accused the European Commission of employing double standards and using the MCV as an additional political tool. In Sofia, the Stanishev government contested the MCV mechanism (Primatarova 2011, p. 26). After accession, Bulgarian observers of the path of reforms suggested replacing the metaphor of 'carrot and stick'. Ironically, some of them qualified the relationship between the EU and the domestic level as the 'Brussels sandwich game'. The expression means that 'corrupt governments find themselves pressed between angry publics and an uncompromising Commission' (Primatarova 2011, p. 66). Later, the government led by Boyko Borissov changed its critical attitude and began to cooperate with the European Commission and the member states on the fulfilment of the benchmarks mentioned above (Primatarova 2011, p. 27). While politicians deplored this new form of conditionality, at the domestic level it was considered useful by citizens and by some magistrates. In Romania, experts, journalists and practitioners strongly supported this new form of conditionality (Ghinea & Stefan 2011, p. 91). In June 2012, four members of the CSM in Bucharest declared that the MCV should be maintained in order to ensure the continuity of the reforms.[45] Bulgaria depicts a contrasting picture. In 2011, in the context of the SJC crisis, judges' associations came up with detailed proposals to reform the Supreme Judicial Council (Primatarova 2011, p. 53). Here, the 'Judges' Association made a revolutionary step by demanding the resignation of the Supreme Judicial Council, so that the model of this venal and incurable structure is completely re-examined and reconstructed'.[46] According to Margarita Ilieva, Attorney-at-law, Deputy Director of the Bulgarian Helsinki Committee, judges 'are fighting against corrupt lobbies within the judiciary system, whose epitome is the Supreme Judicial Council, so that we have access to quality jurisdiction by real magistrates'.[47]

After accession, the new member states tried to evade the influence of the EU in this field. Recent developments in Hungarian constitutional and judicial politics offer abundant evidence to question the outcomes of Europeanisation and the mechanisms of compliance through which the EU put member states under pressure to formulate their constitutional

[43]'Commission Decision of 13/XII/2006 Establishing a Mechanism for Cooperation and Verification in Bulgaria to Address Specific Benchmarks in the Areas of Judicial Reform and the Fight against Corruption and Organised Crime', C (2006) 6570 final, p. 5, available at: http://ec.europa.eu/enlargement/pdf/bulgaria/bg_accompanying_measures_1206_en.pdf, accessed 18 January 2014.

[44]'Commission Decision of 13/XII/2006 Establishing a Mechanism for Cooperation and Verification in Romania to Address Specific Benchmarks in the Areas of Judicial Reform and the Fight against Corruption', C (2006) 6569 final, p. 5, available at: http://ec.europa.eu/enlargement/pdf/romania/ro_accompanying_measures_1206_en.pdf, accessed 18 January 2014.

[45]Interview with Judge 3, Université libre de Bruxelles, 9 July 2012.

[46]'The Bulgarian Judges Association Wins the 2011 Human of the Year Award', *Bulgarian Helsinki Committee Press Release*, 13 December 2011, available at: http://www.bghelsinki.org/en/news/press/single/press-release-bulgarian-judges-association-wins-2011-human-year-award/, accessed 18 January 2014.

[47]'The Bulgarian Judges Association Wins the 2011 Human of the Year Award', *Bulgarian Helsinki Committee Press Release*, 13 December 2011, available at: http://www.bghelsinki.org/en/news/press/single/press-release-bulgarian-judges-association-wins-2011-human-year-award/, accessed 18 January 2014.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

politics in accordance with European norms and principles. A few years after its accession, Hungary became a serious source of concern at EU level in respect of the independence of its institutions. In 2010, Fidesz obtained a two-thirds majority of seats in the Hungarian parliament, which offered Prime Minister Orban the opportunity to implement a series of reforms aimed at 'rebuilding the rule of law' in the country (European Parliament 2011, 2012). When the Fidesz government entered into office, the country was hit by a 'triple crisis: economic, a crisis of political confidence and morals'.[48] The 'moral credibility' evoked by the government led it to review 'the institutional traditions formulated in 1989–1990' and to adopt a new Fundamental Law, which was 'a response to the institutional crisis'.[49] 'Rebuilding the rule of law in Hungary' and completing 'the political, institutional and intellectual renewal of Hungary'[50] became one of the priorities of the Orban government (European Parliament 2011). The logic of this argument follows from the conviction that all the 'partial solutions' introduced after the collapse of communism were 'not solutions', and that the economic and political situation of the country prior to the electoral success of Fidesz reflect their failure.[51]

Among the long list of recent reforms, some of them are of importance to the independence of the judiciary. The decision of the Hungarian government to recast the model of self-administration of the judiciary has been presented as a radical break with the past. By contrast, at the domestic level, the rationale behind the reform has been linked to past failures and a broader regional debate about the independence of the judiciary. The debates concerning the risks of undermining the independence of the judiciary followed from the governmental decision to retire a significant number of judges and to put a premature end to the mandate of the former president of the Supreme Court. In addition, the Hungarian executive reformed the National Judicial Council, empowered in 1997. A new institution was created—the National Judicial Office—in order to face some deficiencies in the functioning of the NCJ (European Commission for Democracy through Law 2012). The Hungarian reformers empowered the president of the National Judicial Office. According to the Council of Europe, under the new legal framework, the former NJC, whose statute is still uncertain, has scarcely any significant power at all.

Given that the European Commission's responsibility as guardian of the Treaties is to ensure that EU law is upheld, in January 2012 José Manuel Barroso launched legal action against Hungary. But once initiated, the procedure and the arguments advanced by the institution caused comments related to its legal basis. Even if the European Commission acknowledged that Hungarian democracy was in danger, the infringement procedure did not

[48]'Deputy Prime Minister Tibor Navracsic Gives an Account to Parliament of the Government's First Two Years in Office', *Website of the Hungarian Government*, 14 June 2012, available at: http://www.kormany.hu/en/ministry-of-public-administration-and-justice/news/deputy-prime-minister-tibor-navracsics-gives-an-account-to-parliament-of-the-government-s-first-two-years-in-office, accessed 20 August 2012.

[49]'Deputy Prime Minister Tibor Navracsic Gives an Account to Parliament of the Government's First Two Years in Office', *Website of the Hungarian Government*, 14 June 2012, available at: http://www.kormany.hu/en/ministry-of-public-administration-and-justice/news/deputy-prime-minister-tibor-navracsics-gives-an-account-to-parliament-of-the-government-s-first-two-years-in-office, accessed 20 August 2012.

[50]'Tibor Navracsic on Conservative Home: Hungary's Constitution and Cardinal Law', *Website of the Hungarian Government*, 10 January 2012, available at: http://www.kormany.hu/en/ministry-of-public-administration-and-justice/news/hungary-s-constitution-and-cardinal-laws, accessed 20 August 2012.

[51]'Zoltán Kovács: Partial Solutions are Not Solutions', *Website of the Hungarian Government*, 8 March 2012, available at: http://www.kormany.hu/en/ministry-of-public-administration-and-justice/news/zoltan-kovacs-partial-solutions-are-no-solutions, accessed 19 January 2014.

relate to the separation of power as a fundamental pillar of democracy, but to a breach of the EU legislation on equal treatment and the Hungarian decision to lower the pension age. In a series of resolutions adopted by the European Parliament, MEPs deplored that the Commission 'limits its own competence to scrutinize Hungary's compliance with the Charter of Fundamental Rights'.[52] In the face of these critics, José Manuel Barroso acknowledged that beyond the legal aspects, 'some concerns have been expressed regarding the quality of democracy'. According to him, 'these are matters where political judgement is more difficult and, sometimes (...) ideologically polarised' (Barroso 2012).

In spite of its experience in dealing with the complexity of judicial reforms and their normative content, the European Commission tried to adapt its actions, roles and actions to the legal foundations of the political system of the EU. As in the pre-accession and accession stages (Piana 2010, p. 62), we observe that EU pressure acts jointly with other international actors. Where EU conditionality is weak, the action of the European Union is supported by the Council of Europe and the Venice Commission. While the EU Commission's approach in examining the quality of democracy in Hungary is based on a legal and technical analysis, the European Commission for Democracy through Law expressed in detail its opinion of the new Hungarian Constitution and the reform of the NJC (European Commission for Democracy through Law 2011). Its recommendations go far beyond the European Commission's approach of examining the conformity of the Hungarian rules with the EU's *acquis communautaire* and treaties. For this reason, in the resolution adopted in February 2012, the European Parliament called on the European Commission to request the opinion of the Venice Commission on cardinal laws and constitutional provisions to ensure a fully independent judiciary. While within the EU Parliament the debates have been highly politicised,[53] at the Council level the issue has not been extensively discussed 'because the capitals are keen to keep the process as depoliticised as possible'.[54]

Like the cases of Romania and Bulgaria in the previous section, the Hungarian case shows that mechanisms of compliance in the field of judicial politics emerge from the interactions between institutions, through which actors try to persuade each other about the validity of their claims and the legitimacy of norms. The case also confirms the need to revise our approaches to Europeanisation. The reform of the judiciary in Hungary gave rise to contestation, discussion, debate and deliberation. Each institution involved discussed the nature of the mechanisms of compliance available and acted in order to maximise the outcome. First, the European parliamentary debates (from January 2011 to June 2012) increased the publicity of the case and emphasised the complexity of the issue, dividing the assembly between promoters of compliance and its antagonists. Within parliamentary debates, the question was raised as to whether or not it is legitimate to formulate judgements

[52] 'European Parliament Resolution of 10 March 2011 on Media Law in Hungary', available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0094+0+DOC+XML+V0//EN, accessed 19 January 2014.

[53] Guy Verhofstadt, leader of the ALDE, declared that 'the case of Hungary is not just about technical breaches of EU legislation, but a wider concern of gradual but persistent erosion of EU values, as spelled out in Article 2, concerning freedom of expression, of the media and of religion'. More critical voices were heard among Green/EFA group, whose leaders called for launching the infringement procedure under Article 7 of the EU Treaty, the measure adopted by the Hungarian Prime Minister being considered a 'persistent breach of the basic European values and rights' (European Parliament 2012).

[54] 'MEPs Voice "Serious Concern" on Hungary's Democracy', *EU Observer*, 16 February 2012, available at: http://euobserver.com/political/115286, accessed 19 January 2014.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

on such issues. They reflected diverging opinions and the complexity of the matter. At stake were not only the domestic situation and the quality of Hungarian democracy, but also a broader debate about 'polity' and 'regime' aspects of the EU (Bellamy & Castiglione 2003, p. 10). While some MEPs expressed their wish to increasingly expand the tasks of the EU in this field and to put in place mechanisms committed to common values, others argued that some issues, such as those related to Hungarian reforms, are more appropriately dealt with domestically. In essence, the main dividing line was among those who argued in favour or against the extension of the EU's political powers, putting forward the tension between internal and external legitimacy. The first arises from the electoral support for Fidesz at the domestic level; the latter from the contested compatibility of the reforms with EU norms. The variation between different constitutional traditions and institutional models has been put forward, reflecting again both the internal legitimacy embodied in the political culture of the country concerned and the external legitimacy of the EU, embedded in a series of criteria which do not determine what kind of regime should be put in place.

The European Parliament put pressure on the EU Commission to address the political dimension of the case, and transfer the source of legitimacy to the Council of Europe to guide the domestic reforms related to the independence of the judiciary which were, in the enlargement process, sectors of monitoring produced by the European Commission. The European Commission (as a single actor) maintains the legal and technical approach in actualising the mechanisms of compliance and invites the Council of Europe to play a more active role. The Hungarian case reveals, on the one hand, how difficult it is to assess compliance in fields which touch upon disputed principles and models such as the independence of the judiciary and, on the other hand, the limits of ongoing political and legal integration.

In response to those remarks and recommendations, the Hungarian government circulated a 100-page response to the EU Commission concerning the infringement proceedings and expressed its willingness to reach a compromise on the retirement age of judges. In its dialogue with the Venice Commission and EU officials and MEPs, Hungary was particularly vociferous in protesting against the incursions of the EU on domestic politics, but reassured EU officials that its government was not trying to expand political control over judges.

Conclusions

The aim of this article was to compare the waves of judicial reform in five new member states of the European Union and to arrive at a better understanding of the transformative power of the EU in this field. The article examined three countries considered as being front-runners in accession (Poland, Hungary and the Czech Republic) and two 'laggards' (Romania and Bulgaria). This analysis, supported by empirical data and a series of case studies, shows that the Czech Republic, Poland and Hungary witnessed a bottom-up approach in implementing the principle of independence of the judiciary. In contrast, Romania and Bulgaria—which possess the most powerful judicial councils in the region—witnessed a top-down path of reform.

The article argued that our understanding of the process of Europeanisation can be enriched if we focus more on the interplay between actors, institutions and outcomes. These two paths of judicial reform refer to the nature of EU conditionality and the ability of domestic actors to evade internal and/or external pressure in implementing the principle of

judicial independence. In Poland, Hungary and the Czech Republic, prior to accession, the tensions between democratic rule and judicial independence and between judicial and political actors have been resolved at the domestic level. In Romania and Bulgaria, the power of the EU is greater because the tension between domestic political preferences and judicial independence is mainly resolved by means of the European Commission. Domestic actors ask the European Commission to settle domestic disputes about alternative policy solutions to reform judicial institutions. In addition, unlike Poland, Hungary and the Czech Republic, Romania and Bulgaria have not built relationships with EU officials based on credibility and mutual recognition of political, judicial and administrative competences. It was the case in 2004; it was still the case in 2012, when the old member states vetoed their accession to Schengen.

The article shows that there are new attempts in the region to re-empower the executive. There is now a tension not only between the judicial and domestic actors, but also between the EU and the new member states which try to reassess their autonomy from EU judicial governance. These recent developments in judicial politics invite the European Commission to redefine its mechanisms of compliance to the democratic norms of the EU. This last section shows that Europeanisation through conditionality is not sustainable and needs new and stronger mechanisms of compliance. One solution would be to institutionalise the role the Council of Europe could play in such cases, and consequently to accept the limits of the Union. Another would be to strengthen the political Union and to make use of the existing legal basis concerning EU norms and values. The normative power of the European Commission in the field of judicial politics deserves further research. If European integration circumscribes the parameters of what is politically and economically possible, then our research designs should integrate the nature of mechanisms which may have an influence on the outcomes at the domestic level.

Recent developments summarised in the last part of the paper open a new research agenda for scholars of judicial reform, quality of democracy and Europeanisation. Judicial reforms have gone through several waves of research, from the early works on the Constitutional Courts and the rule of law promotion, to the second wave of studies on the changes of judicial institutions that can be attributed to European conditionality. The more recent third wave of reforms needs further examination. There are new attempts in the region to re-empower the elected branches of power over the judiciary. There is a tension between the independence and accountability already theoretically acknowledged in the literature but still empirically under-documented in the countries under study.

Université libre de Bruxelles

References

Ajani, G. (1994) 'La circulation de modèles juridiques dans le droit post-communiste', *Revue internationale de droit comparé*, 46, 4.

Alexandru, I. (2004) *Politică, administraţie, justiţie* (Bucharest, Editions All Beck).

Asiedu, D. (2005) 'Justice Ministry Examining Communist Past of Judges', *Radio Prague*, 15 August, available at: http://www.radio.cz/en/section/talking/justice-ministry-examining-communist-past-of-judges, accessed 18 January 2014.

Barroso, J. M. D. (2012) 'A Europe of Values and Principles', Speech 12/16, delivered at the Plenary debate on the situation in Hungary, Strasbourg, 18 January, available at: http://europa.eu/rapid/press-release_SPEECH-12-16_en.htm, accessed 19 January 2014.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

Beatty, A. (2004) 'Romania Hits Back at Critics', *EU Observer*, 5 February, available at: http://euobserver.com/enlargement/14341, accessed 18 January 2014.
Bellamy, R. & Castiglione, D. (2003) 'Legitimizing the Euro-Policy and its Regime: the Normative Turn in EU Studies', *European Journal of Political Theory*, 2, 7.
Bill Chavez, R. (2010) 'The Quest for Justice in Latin America', *Latin American Politics and Society*, 52, 1.
Bobek, M. (2007) 'Iudex Ex Machina: Institutional and Mental Transitions of Central and Eastern European Judiciairies', in Coman, R. & De Waele, J. (eds) (2007) *Judicial Reforms in Central and Eastern European Countries* (Baden-Baden, Vanden Broele).
Bodnar, A. (2010) 'Poland: EU Driven Democracy?', in Morlino, L. & Sadurski, W. (eds) *Democratization and the European Union. Comparing Central and Eastern European Post-Communist Countries* (New York, Routledge).
Bodnar, A. & Bojarski, L. (2011) 'Judicial Independence in Poland', in Seibert-Fohr, A. (ed.) *Judicial Independence in Transition* (New York, Dordrecht & London, Springer).
Börzel, T. & Risse, Th. (2000) 'When Europe Hits Home: Europeanization and Domestic Change', *European Integration online Papers*, 4, 15.
Börzel, T. & Risse, Th. (2012) 'From Europeanization to Diffusion: Introduction', *West European Politics*, 35, 1.
Brusis, M. (2005) 'European Union Enlargement and the Europeanisation of Eastern Europe: Research Puzzles and Policy Issues', in Mansfeldova, Z., Sparschuh, V. & Wenninger, A. (eds) *Patterns of Europeanisation in Central and Eastern Europe* (Hamburg, Krämer Verlag).
Cameron, R. (2007) 'Government Unveils Ambitious Reform of Justice System', *Radio Prague*, 20 November, available at: http://www.radio.cz/en/section/curraffrs/government-unveils-ambitious-reform-of-justice-system, accessed 18 January 2014.
Coman, R. (2007) 'Media, Justice and Politics or How the Independence of the Judiciary Became an Issue on the Romanian Political Agenda', in Coman, R. & De Waele, J. (eds).
Coman, R. (2008) *La carrier publique de la consolidation des garanties d'indépendance de la justice. Un phénomène social et politique dans la Roumanie post-communiste* (Brussels, Université libre de Bruxelles).
Coman, R. (2009) *Réformer la justice dans un pays post-communiste. Le cas de la Roumanie* (Brussels, Editions de l'Université de Bruxelles).
Coman, R. & De Waele, J. (eds) (2007) *Judicial Reforms in Central and Eastern European Countries* (Baden-Baden, Van Broele).
Coman, R. & Dallara, C. (eds) (2010) *Handbook of Judicial Politics* (Iasi, Editura Institutul European).
Commission européenne (2001) 'Rapport régulier 2001 sur les progrès réalisés sur la Bulgarie sur la voie de l'adhésion', SEC(2001) 1744, available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2001/bu_en.pdf, accessed 19 January 2014.
Commission européenne (2002) 'Rapport régulier 2002 sur les progrès réalisés par la Bulgarie sur la voie de l'adhésion', SEC(2002), available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2002/bu_fr.pdf, accessed 19 January 2014.
Dallara, C. (2007) 'Challenges to the Democratic Judicial Reform in Serbia: Legacy of the Past, Political Actors Interests and the EU Vagueness', in Coman, R. & De Waele, J. M. (eds).
Dallara, C. (2008) 'Serbia: Borderline Democracy?', in Morlino, L. & Magen, A. (eds) *International Actors, Democratization and the Rule of Law: Anchoring Democracy?* (Abingdon, Routledge).
Decean, M. (2006) *Mărturiile unui naiv corigibil sau singur printre securişti* (Timişoara, Editions BrumaR).
Delpeuch, T. (2000) 'Le système pénal bulgare: un Etat de droit bricolé avec des éléments d'Etat policier', *Les Cahiers de la sécurité intérieure*, 41.
Delpeuch, T. (2006) 'La coopération internationale dans les domaines du droit et de la justice au prisme du courant de recherche "droit et développement"', *Droit et Société*, 62.
Delpeuch, T. (2007) 'Evaluation of Sociological Critiques of International Legal Reforms Transfers Based on an Analysis of American Judicial Assistance in Bulgaria', in Coman, R. & De Waele, J. M. (eds).
Di Federico, G. (2010) 'Political Relevance, Independence and Accountability of the Judiciary', in Coman, R. & Dallara, C. (eds) *Handbook on Judicial Politics* (Iasi, Editura Institutul European).
Domingo, P. (1999) 'Judicial Independence and Judicial Reforms in Latin America', in Schedler, A., Diamond, L. & Plattner, M. F. (eds) *The Self-Restraining State. Power and Accountability in New Democracies* (Boulder, CO, Lynne Rienner Publisher Inc.).
European Commission (2000) 'Regular Report from the Commission on Bulgaria's Progress towards Accession', 8 November, available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/bg_en.pdf, accessed 18 January 2014.
European Commission (2001) 'Regular Report from the Commission on Hungary's Progress towards Accession', SEC(2001) 1748, available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2001/hu_en.pdf, accessed 22 January 2014.

European Commission (2002) 'Regular Report from the Commission on Hungary's Progress towards Accession', SEC(2002) 1404, available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2002/hu_en.pdf, accessed 22 January 2014.
European Commission (2003) 'Comprehensive Monitoring Report on Hungary's Preparations for Membership', available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2003/cmr_hu_final_en.pdf, accessed 22 January 2014.
European Commission (2012) *Romania: Technical Report*, Commission Staff Working Document, COM(2012)410 final, 18 July, p. 25, available at: http://ec.europa.eu/cvm/docs/swd_2012_231_en.pdf, accessed 18 January 2014.
European Commission for Democracy through Law (2011) 'Opinion on the New Constitution of Hungary Adopted by the Venice Commission at its 87th Plenary Session, Venice, 17–18 June 2011', opinion 621/2011, available at: http://www.venice.coe.int/webforms/documents/CDL-AD(2011)016-E.aspx, accessed 19 January 2014.
European Commission for Democracy through Law (2012) 'Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, Adopted by the Venice Commission at its 90th Plenary Session, Venice, 16–17 March 2012', opinion 663/2012, available at: http://www.venice.coe.int/webforms/documents/CDL-AD(2012)001-e.aspx, accessed 19 January 2014.
European Parliament (2004) 'Report on Romania's Progress towards Accession', Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy COM(2003) 676-C5-0534/2003-2003/2203(INI), 24 February, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P5-TA-2004-0182+0+DOC+PDF+V0//EN, accessed 18 February 2014.
European Parliament (2011) 'Debates of the European Parliament', 19 January, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+CRE+20110119+SIT+DOC+PDF+V0//EN&language=EN, accessed 19 January 2014.
European Parliament (2012) 'Recent Political Developments in Hungary (Debates)', 18 January, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20120118+ITEM-021+DOC+XML+V0//EN, accessed 18 January 2014.
Exadaktylos, T. & Radaelli, C. (2009) 'Research Design in European Studies: The Case of Europeanisation', *Journal of Common Market Studies*, 47, 3.
Exadaktylos, T. & Radaelli, C. (eds) (2012) *Research Design in European Studies. Establishing Causality in Europeanization* (Basingstoke, Palgrave Macmillan).
Febbrajo, A. (2010) 'Legal Cultures in Transition: A System-theory Approach', in Febbrajo, A. & Sadurski, W. (eds) *Central and Eastern Europe after Transition. Towards a New Socio-legal Semantics* (Farnham, Ashgate).
Fleck, Z. (2011) 'Judicial Independence in Hungary', in Seibert-Fohr, A. (ed.).
Friedman, B. (2004) 'History, Politics and Judicial Independence', in Andras, S. (ed.) *Judicial Integrity* (Leiden & Boston, MA, Martinus Nijhoff Publishers).
Ganev, V. (2003) 'The Bulgarian Constitutional Court, 1991–1997: A Success Story in Context', *Europe-Asia Studies*, 55, 4.
Garlicki, L. (2002) 'The Experience of the Polish Constitutional Court', in Sadurski, W. (ed.) *Constitutional Justice, East and West* (Dordrecht, Kluwer).
Ghinea, C. & Stefan, L. (eds) (2011) *EU Approach to Justice in Southeastern and Eastern Europe* (Bucharest, Romanian Center for European Policies).
Goetz, K. (2001) 'Making Sense of Post-communist Central Administration: Modernisation, Europeanisation or Latinisation?', *Journal of European Public Policy*, 8, 6.
Grabbe, H. (2001) 'How does Europeanisation affect CEE Governance? Conditionality, Diffusion and Diversity', *Journal of European Public Policy*, 8, 6.
Grabbe, H. (2002) 'European Union Conditionality and the Acquis Communautaire', *International Political Science Review*, 23, 3.
Grabbe, H. (2004) 'What the New Member States Bring into the European Union', in Nugent, N. (ed.) *European Union Enlargement* (Basingstoke, Palgrave).
Hall, P. & Taylor, R. (1997) 'La science politique et les trois néo-institutionnalismes', *Revue française de science politique*, 47, 3.
Hammerslev, O. (2007) 'Reform Strategies around the Bulgarian Judicial Branch: Social Struggles Converted into Struggles about Court Reforms', in Coman, R. & De Waele, J. M. (eds).
Hammerslev, O. (2011) 'The European Union and the United States in Eastern Europe: Two Ways of Exporting Law, Expertise and State Power', in Dezalay, Y. & Garth, B. G. (eds) *Lawyers and the Rule of Law in an Era of Globalization* (London, Routledge).
Haughton, T. (2007) 'When Does the EU Make a Difference? Conditionality and the Accession Process in Central and Eastern Europe', *Political Studies Review*, 5, 2.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

International Bar Association, Human Rights Institute/Council of Bars & Law Societies of Europe (2007) 'Justice Under Siege: A Report on the Rule of Law in Poland', available at: http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/newsletter_20_enpdf1_1209980014.pdf, accessed 18 February 2014.

Juncos, A. (2011) 'Europeanisation by Decree? The Case of Police Reform in Bosnia', *Journal of Common Market Studies*, 49, 2.

Kochenov, D. (2004) 'Behind the Copenhagen Façade. The Meaning and the Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law', *European Integration online Papers*, 8, 10, available at: http://eiop.or.at/eiop/pdf/2004-010.pdf, accessed 22 January 2014.

Kosar, D. (2010a) 'Judicial Accountability in the (Post)Transitional Context: A Story of the Czech Republic', in Czarnota, A. & Parmentier, S. (eds) (2010) *Transitional Justice, Rule of Law and Institutional Design* (Antwerp, Intersentia Publishers).

Kosar, D. (2010b) 'Judicial Accountability and Democratic Transition: Visegrad Story', paper presented at the 8th World Congress of Constitutional Law, Mexico City, December, available at: http://www.juridicas.unam.mx/wccl/ponencias/16/288.pdf, accessed 18 February 2014.

Kühn, Z. (2004) 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement', *The American Journal of Comparative Law*, 52, 3.

Larkins, C. M. (1996) 'Judicial Independence and Democratisation: A Theoretical and Conceptual Analysis', *The American Journal of Comparative Law*, 44, 4.

Magalhaes, P. C. (1999) 'The Politics of Judicial Reform in Eastern Europe', *Comparative Politics*, 32, 1.

Mendelski, M. (2012) 'EU-driven judicial reforms in Romania: A Success Story?', *East European Politics*, 28, 1.

Melone, A. P. (1996) 'The Struggle for Judicial Independence and Transition Toward Democracy in Bulgaria', *Communist and Post-Communist Studies*, 29, 2.

Morlino, L. (2004) '"Good" and "Bad" Democracies: How to Conduct Research into the Quality of Democracy', *Journal of Communist Studies and Transition Politics*, 20, 1.

Morlino, L. (2009) 'Qualities of Democracy: How to Analyze Them', *Studies in Public Policy*, 465.

Morlino, L. & Sadurski, W. (eds) (2010) *Democratization and the European Union. Comparing Central and Eastern European Post-Communist Countries* (New York, Routledge).

Nalepa, M. (2010) *Skeletons in the Closet. Transitional Justice in Post-Communist Europe* (Cambridge, Cambridge University Press).

OSI (2001) *Monitoring the EU Accession Process: Judicial Independence* (Budapest, Open Society Institute).

OSI (2002) *Monitoring the EU Accession Process: Minority Protection* (Budapest, Open Society Institute).

Palier, B. & Surel, Y. (eds) (2007) *L'Europe en action. L'européanisation dans une perspective comparée* (Paris, L'Harmattan).

Papadimitriou, D. & Phinnemore, D. (2004) 'Europeanization, Conditionality and Domestic Change: The Twinning Exercise and Administrative Reform in Romania', *Journal of Common Market Studies*, 42, 3.

Parau, C. (2011) 'The Drive for Judicial Supremacy', in Seibert-Fohr, A. (ed.).

Pederzoli, P. & Piana, D. (2010) 'The Governance of the Judicial Systems in Europe', in Coman, R. & Dallara, C. (eds).

Peter, J. (1998) *Analysing Public Policy* (London, Continuum).

Piana, D. (2007a) 'Judges and Legal Experts in the European Policy of the Rule of Law Promotion', in Coman, R. & De Waele, J. M. (eds).

Piana, D. (2007b) 'Unpacking Policy Transfer, Discovering Actors: The French Model of Judicial Education Between Enlargement and Judicial Cooperation in the EU', *French Politics*, 5, 1.

Piana, D. (2009) 'Building Capacities Abroad to Solve Conflicts at Home. Preliminary Remarks on the European Policy of Legal Education and Judicial Training in CEECs', *Journal of Law and Conflict Resolution*, 1, 2.

Piana, D. (2010) *Judicial Accountabilities in New Europe. From Rule of Law to Quality of Justice* (Burlington, Ashgate).

Pogany, I. (1993) 'Constitutional Reform in Central and Eastern Europe: Hungary's Transition to Democracy', *The International and Comparative Law Quarterly*, 42, 2.

Pridham, G. (2006) 'Assessing Democratic Consolidation in Central and Eastern Europe: The European Dimension', *Acta Politica*, 41, 4.

Primatarova, A. (2011) 'Country Report Bulgaria', in Ghinea, S. & Stefan, L. (eds) *The EU Approach to Justice Reform in Southeastern and Eastern Europe* (Bucharest, Centrul Roman de Politici Europene).

Radaelli, C. M. & Pasquier, R. (2008) 'Conceptual issues', in Graziano, P. & Vink, M. P. (eds) *Europeanization. New Research Agendas* (Basingstoke, Palgrave Macmillan).

Radaelli, C. M. & Saurugger, S. (2008) 'The Europeanization of Public Policies: Introduction', *Journal of Comparative Policy Analysis: Research and Practice*, 10, 3.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015

Richardson, J. T. (2006) 'Religion, Constitutional Courts, and Democracy in Former Communist Countries', *Annals of the American Academy of Political and Social Science*, 603.
Richter, J. (2011) 'Top Courts Enable Inquiry into Judges' Communist Past', *Radio Prague*, 10 January, available at: http://www.radio.cz/en/section/curraffrs/top-court-enables-inquiry-into-judges-communist-past, accessed 18 January 2014.
Roberts, A. (2005) 'The Quality of Democracy', *Comparative Politics*, 37, 3.
Sajo, A. (1995) 'Reading the Invisible Constitution: Judicial Review in Hungary', *Oxford Journal of Legal Studies*, 15, 2.
Sasse, G. (2006) 'The European Neighbourhood Policy: Conditionality Revisited for the EU's Eastern Neighbours', *Europe-Asia Studies*, 60, 2.
Scheppele, K. L. (2003) 'Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe', *International Sociology*, 18, 1.
Scheppele, K. L. (2006) 'Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe', *University of Pennsylvania Law Review*, 154, 6.
Schimmelfennig, F. & Sedelmeier, U. (2004) 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe', *Journal of European Public Policy*, 11, 4.
Schmitter, P. (2004) 'The Quality of Democracy. The Ambiguous Virtues of Accountability', *Journal of Democracy*, 15, 4.
Schönfelder, B. (2005) 'Judicial Independence in Bulgaria: A Tale of Splendour and Misery', *Europe-Asia Studies*, 57, 1.
Seibert-Fohr, A. (ed.) (2011) *Judicial Independence in Transition* (New York, Dordrecht & London, Springer).
Seleny, A. (1999) 'Old Political Rationalities and New Democracies: Compromise and Confrontation in Hungary and Poland', *World Politics*, 51, 4.
Smilov, D. (2010) 'Bulgaria: Discontents and Frustrations of a Newly-Consolidated Democracy', in Morlino, L. & Sadurski, W. (eds).
Smith, B. C. (2008) 'Models of Judicial Administration and the Independence of the Judiciary: A Comparison of Romanian Self-management and the Czech Executive Model', *Public Administration and Development*, 28, 2.
Sticka, M. (2007) 'Top-down Control Slows Czech Judicial Reform, Despite EU Impetus', in Transparency International, *Global Corruption Report*, available at: http://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CEEQFjAC&url=http%3A%2F%2Fwww.u4.no%2Frecommended-reading%2Fglobal-corruption-report-corruption-and-judicial-systems%2Fdownloadasset%2F2353&ei=pnEDU8KhILLOyAPmkoHwDA&usg=AFQjCNHADPja6VV95UU3p3p3qqOmygj6Kw&bvm=bv.61535280,d.bGQ, accessed 18 February 2014.
Uitz, R. (2007) 'Constitutional Courts in Central and Eastern Europe: What Makes a Question too Political?', *Juridica International*, 13, 2, available at: http://www.juridica.ee/juridica_en.php?document=en/international/2007/2/132526.PRN.pub.php, accessed 1 March 2014.
Uitz, R. (2010) 'Hungary: High Hopes Revisited', in Morlino, L. & Sadurski, W. (eds).
Verdery, K. (2004) *The Vanishing Hectare: Property and Value in Postsocialist Transylvania* (Ithaca, NY, & London, Cornell University Press).
Voermans, W. & Albers, P. (2003) *Councils for the Judiciary in EU Countries*, available at: http://www.coe.int/t/dghl/cooperation/cepej/textes/CouncilOfJusticeEurope_en.pdf, accessed 19 January 2014.
Weber, R. (2012) 'Fighting for Respect of Democracy in Hungary = Fighting for Respect of Democracy in EU', 18 January, available at: http://www.renateweber.eu/en/detalii_media/389, accessed 18 February 2014.
Wiatr, J. (1997) 'Poland's Three Parliaments in the Era of Transition, 1989–1995', *International Political Science Review*, 18, 4.
Wolczuk, K. (2007) 'Constitutional Politics', in White, S., Batt, J. & Lewis, P. G. (eds) *Developments in Central and East European Politics* (Basingstoke, Palgrave).
Woll, C. & Jacquot, S. (2004) *Les usages de l'Europe: acteurs et transformations européennes* (Paris, L'Harmattan).
Woods, P. & Hilbink, L. (2009) 'Comparative Sources of Judicial Empowerment: Ideas and Interests', *Political Research Quarterly*, 62, 4.
Wysocka, O. (2009) 'Populism in Poland: In/visible Exclusion', *Institute for Human Sciences*, available at: http://www.iwm.at/publications/junior-visiting-fellows-conferences/vol-xxvi/populism-in-poland/, accessed 18 January 2014.

Downloaded by [Archives & Bibliothèques de l'ULB], [Ramona Coman] at 01:27 28 July 2015