Explaining judiciary governance in Central and Eastern Europe: external incentives, transnational elites

and Parliament inaction

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Abstract

What made democratic politicians in Central and Eastern Europe exclude themselves from judiciary governance? Judiciary institutional change is investigated through a diachronic study of the Romanian judiciary which revealed a complex causal nexus. The classical model of the ‘external incentives’ of EU accession, while explaining a general drive toward revision, played an otherwise marginal role. An institutional template prevailed, promoted by an elite transnational community of legal professionals whose entrepreneurs were steering the revision of judiciary governance right after 1989. The parliamentarians disempowered by this revision offered no resistance – a ‘veto-player dormancy’ that stands revealed as pre-conditional to such transnational influences.
Introduction

Research on the judiciary in Central and Eastern Europe (CEE) has tended to focus on the design and powers of Constitutional Courts (Ginsburg 2002, Sadurski 2008, Scheppele 2006, Sólyom and Brunner 2000). Contrastingly little effort has been invested in investigating the waves of institutional (re)design which, sweeping the region after 1989, revised the judiciary as a whole. The few explanations that have been offered have featured as main driver either the external, conditional incentives of membership of the European Union (EU) (Magen and Morlino 2009), or else the self-interest of merely domestic actors such as incumbent parties maximising their own power (Magalhães 1999). The role of transnational policy communities and networks has been touched upon (Piana 2010, 2009), yet the nature of their influence over judiciary revisions in CEE has remained obscure.

The earliest efforts to redesign judiciary institutions in CEE were driven by concern over judicial independence supposed to be a pre-condition for the rule of law. Later revisions, made under the impetus of accession to the EU, embodied an additional concern: to ensure that CEE judiciaries have the institutional capacity to enforce the EU’s body of legislation, the *acquis*, when this comes into conflict with domestic law. Indeed, the EU itself owes its existence in its current form to court rulings both domestic and supranational (Alter 2001, La Pergola 1993, Stein 1981). Eastern enlargement, however, threatens court-driven integration. Inured to its subservience to the Party-state under Communism, judges in post-Communist CEE appear to lack *inter alia* the personal and institutional autonomy prerequisite to upholding supranational legal norms against the national State in case of conflict with domestic legislation (Cápeta 2005).

It should surprise no one then that institutional designers have focused on empowering the CEE judiciary, endowing it with the institutional autonomy that consists both of insulation from the elected branches’ checks and balances and of self-governing competences. The Judiciary Council is an institution of the latter type, having evolved from the original French *Conseil Supérieur de la Magistrature* of 1948, wherein the Executive and Legislative branches played important roles in judiciary governance, to the Italian *Consiglio Superiore della Magistratura*, set up in 1958, whence participation by democratically elected representatives was removed. But for an anomaly or two (like the Czech Republic1), Judiciary Councils which resembles the Italian rather than the French model have been adopted throughout the CEE region (Table 1). This poses a puzzle: Why do self-interested, power-maximising politicians would adopt judiciary institutions that entail a transfer of power over

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1 Even in the Czech Republic judiciary governance operates as if a Judiciary Council did in fact exist (author’s interview with Supreme Administrative Court Judge, 12 April 2010, Brno, Czech Republic).
the governance of the judiciary branch from themselves to judges?

The Judiciary Council in Romania is a typical instance of this judiciary template. The first democratic Constitution of 1991 created the Consiliul Superior al Magistraților (CSM), or ‘Superior Council of Magistrates’, a body composed exclusively of ‘magistrates’ (i.e. judges and prosecutors) with an open-ended mandate to govern judiciary affairs, from training and appointments to promotions and discipline. By 2004 when EU accession negotiations wound up, the judiciary had achieved a maximal degree of autonomy in relation to the elected branches. Although at its creation Parliament had elected the Council, this power had been given up to election exclusively by ‘peers’, i.e. other magistrates. At least on the formal level Romania’s judiciary had been exempted from all democratic accountability, an arrangement that renders it a self-perpetuating institution more like the Harvard Corporation (Levinson 2006) than an ordinary branch of government that checks and balances other branches yet is checked and balanced in its turn.

This outcome matters, as its redistribution of power from the elected branches to the judiciary is fraught with ramifications that may prove as detrimental as constructive. Although this article will attempt no detailed normative evaluation, it is worth noting here that judicial autonomy is a double-edged sword. On the one hand it insulates judges from undue political interference; on the other it removes democratic constraints, empowering judges to substitute their policy preferences for those of elected politicians, without the latter being able to intervene if necessary. In a socio-political context where democracy is shallowly rooted, this raises the question whether such reforms might undermine democratic consolidation in the long run.

This article explains three interrelated issues: (1) why judiciary institutional revisions happened at all in post-Communist Romania and in other, similar EU candidates which transferred power over judiciary governance from elected politicians to judges; (2) why the template of an autonomous and insulated Judiciary Council was preferred to alternative designs; and (3) why the details of the Judiciary Council template, and with it the exact degree of judicial autonomy and self-governance, have fluctuated from government to government throughout the revisionary process. It is argued that the incentives for integration into the Euro-Atlantic structures motivated the revision of the judiciary generally, throughout the period studied (1990-2004). The motive for adopting the Judiciary Council template in particular, however, derived from the influence of a transnational community of legal professionals, into which like-minded elites in CEE became integrated after the fall of Communism. Fluctuation over time in the degree of judicial autonomy and self-governance is explained by the drive towards self-empowerment of certain domestic elites, members of the transnational legal community. Finally, the quiescence of the mass of elected politicians, who could have vetoed their own disempowerment,
emerges as pre-condition to the other causal factors. Preliminary evidence from countries such as Croatia, Moldova and the Czech Republic suggests that a comparable complex of causes is in play throughout the region. Testing such an induction in the context of other countries is beyond the scope of this article, however, although it is hoped that it will motivate future research.

Following this introduction is a brief review of extant causal explanations of judiciary revisions in CEE, showing how this article addresses some of their deficiencies. A brief methodology section follows, which justifies the case study of Romania’s Judiciary Council and the author’s actor-centred, bottom-up approach. The causal nexus that resulted in a maximal degree of judicial autonomy and self-perpetuating judiciary governance is then examined diachronically through key stages of the reform process, with emphasis on the first, post-Communist Constitution of 1990-1992, and the constitutional and statutory revisions of 2003-2004. Although not advancing judicial autonomy (if anything, rolling it back temporarily), the conjunctures of 1997 and 2005 are also discussed, as they bear on explaining the chronic variation over time in the degree of autonomy.

1. Theories of judiciary institutional design in CEE: critique and contribution

A wave of institutional revisions swept the CEE region after 1989, affecting the design of the whole judiciary branch and not merely Constitutional Courts. Causal explanations of this phenomenon as a whole have been rare (Magalhães 1999, Parau 2011, Piana 2010, 2009, Sedelmeier 2011). The literature yields three explanations of institutional change pertinent to the CEE judiciary: EU external incentives, transnational network influence, and ruling-party power-maximisation. All of these models ignore the dimension of time, capturing only snapshots of the revision process. If one study addresses judiciary change immediately after the demise of Communism (Magalhães 1999), another features revisions during the EU accession period (Magen and Morlino 2009). Studies that track institutional change longitudinally, allowing us to observe patterns in causality, are missing. Besides this, another common shortcoming of the extant explanations is their reductionism: seeking to explain everything through just one causal factor. The result is too often unconvincing. It will be shown herein that only a nexus of interacting causal factors yields a comprehensive and satisfying explanation.

**External incentives and accession conditionality**

Most explanations of judiciary institutional change in CEE attribute it to ‘external incentives’ for accession to the EU and their ‘conditionality’. According to this ‘top-down’ model, EU accession moulds CEE candidates’ behaviour by conditioning membership upon compliance with EU institutions, rules and norms (Dimitrova 2004, Grabbe 2006, Schimmelfennig and Sedelmeier 2005b). Not without reason, it has been found that ‘the credible promise of large material and symbolic benefits – particularly the golden carrot of full EU membership,
as Romania displays – is generally effective in persuading national governments formally to adopt rules and institutions they would otherwise resist’, including self-governing judiciary institutions (Morlino and Magen 2009, p.229). Accession conditionality plays this causal role by putting ‘pressure’ on the candidates to give the judiciary more autonomy (Piana 2010).

But external incentives and accession conditionality are insufficiently explanatory by themselves, as its originators have admitted (Schimmelfennig & Scholtz, 2008; Sedelmeier, 2011). For one thing, in terms of the accession process, the design of judiciary institutions falls under ‘democratic’ rather than ‘acquis’ conditionality (Schimmelfennig, et al. 2003). This means that the governing norms exist only as ‘Criteria’ promulgated at the Council of Copenhagen (requiring adherence to the rule of law) and of Madrid (requiring sufficient judicial capacity to implement the acquis) (European Council 1995, 1993). The Criteria define neither ‘rule of law’ nor ‘judicial capacity’; and the acquis, the body of EU legislation, is silent on judiciary institutional design. Democratic conditionality is thus fraught with uncertainty; compliance, hence the satisfaction of conditionality, is thought to depend on the ‘clarity’ of the conditions or criteria (Schimmelfennig, et al. 2003, Schimmelfennig and Sedelmeier 2005a).

This article shows that external incentives, although no doubt an important structural cause, is only one of the causes of the institutional revisions of judiciary governance. External incentives are shown to have begun exerting influence on marginal countries like Romania immediately after 1989, well before the EU accession process began. Accession conditionality mattered, too, once the negotiations process did begin. Nevertheless, accession conditionality never played the all-determining role the literature claims (Piana, 2010, pp.121-158). It was decisive only in the last stages of the revision period, when the ambiguity rather than the clarity of democratic conditionality was exploited by certain transnational political entrepreneurs. By then, however, other causes had taken the candidate government most of the way.

Transnational networks

Transnational networks feature as explanation of judicial governance reforms, particularly in the work of Piana (2009, 2010), who found that transnational ‘epistemic communities’ and ‘policy networks’ had integrated judges, scholars and ‘legal experts’ in Poland and Hungary, conferring on them (somehow) ‘legitimation’, ‘credibility abroad’ and ‘leadership at home’ (Piana 2009, p.834). These actors exercised an undefined ‘soft power’ which caused changes to judicial institutions (Piana 2009, p.834).

Piana has pointed out an important causal factor overlooked in the usual external incentives model. But it remains unclear how precisely such networks exert influence. Only correlations are alleged; a clear and
unbroken chain of cause and effect has been left inside a black box. This article picks up to some extent where Piana left off, asking more specific questions of the data, such as, What does ‘soft power’ consist of? Do networks synergise with other factors known to be in play, like accession conditionality or domestic attitudes to reform? Piana has indeed noted that judicial reforms continued along the trails blazed by the first constitutions set up after the fall of Communism. But what role, if any, did transnational networks play in setting the judiciary in CEE on just those paths? Wanting is a joined-up explanation as to why the Judiciary Council, an institution so remote from the tradition of so many CEE countries, was adopted in the first place, and so soon after the fall of Communism.

This article shows first of all that the Judiciary Council institutional template has been promoted by a certain transnational community of legal professionals who share a common identity and have reached certain consensual understandings of the role of courts in a democracy. This presupposes a maximal degree of judiciary empowerment. Institutional designs embodying this consensus are being promoted by entrepreneurs from the community whose empowerment of the judiciary is not entirely disinterested. In empowering judges, especially at the highest levels, they are empowering the transnational legal community to which they themselves belong. The entrepreneurs themselves are thus much more likely to be called upon to exercise power themselves, viz. train judges, be appointed to judgeships in elite courts or in other key positions in the institutions they create, draft pivotal documents like Constitutions and organic statutes. In this they are disseminating their own shared policy preferences much more widely that they could acting alone. Empowering the whole community entails empowering oneself as a member of this community. Thus these entrepreneurs act not out of a purely emotional or sentimental attachment to this community with which they identify but are increasing the chances of their own concrete self-empowerment.

The community consists of multiple networks interlocked with supranational organs of the Council of Europe (CoE), especially the Legal and Human Rights Directorate of its General Secretariat, its European Court of Human Rights (ECtHR), and its Venice Commission (a Strasbourg-based think tank of constitutional law experts). Members are highly mobile between nations, levels of governance, and fields of practice (cf. Cohen 2010). The networks connect up legal elites not only in the member-States but also increasingly in post-Communist CEE; viz. high court judges, top academics specialising in constitutional and human rights law, and legally trained policy practitioners and political dignitaries. Also participating are legal professionals working inside civil society organisations concerned with human rights and the rule of law such as Transparency International, the Soros Foundation, and the Helsinki Committees for Human Rights (Consultative Council of
European Judges 2008). The community contains but a fraction of elected politicians at any given time. Revealed herein is also how the transnational community reaches inside the European Commission. Certainly at the time of Romania’s accession, the Commission relied on the transnational legal professional community for all of its ideas on the design of judiciary institutions.

Entrepreneurs arising from this community were discovered to have exerted a determining influence over CEE constitutional framers, who instituted the Judiciary Council throughout the region, even in laggard countries like Romania, immediately after the fall of Communism. This finding exposes as factually inaccurate the claim in the literature that transnational network influence over judiciary governance and its revision had no role to play in marginal candidates like Romania and Bulgaria, where only accession conditionality was supposed to have effected changes (Piana 2010).

The entrepreneurs are also found to be able and willing to exploit the ambiguity of EU accession conditions to pressurise candidates reluctant to empower the judiciary maximally. Excepting the *acquis*, EU accession conditions are notable for their indeterminacy (Parau 2010). The principals of the European Council, having legislated notably indeterminate accession conditions at the Councils of Copenhagen (1993) and Madrid (1995), delegated enforcement to the European Commission as agent. This opens the door to agent drift and exploitation not only by the Commission but also by transnational entrepreneurs in the legal community whose networking reaches into the Commission. Out of the accession criteria ambiguity, these actors constructed an ‘extra-conditionality’, that is, accession conditions notably in excess of what is required of the member-States and thus far in excess of what the Council of Copenhagen or Madrid required (*cf.* Parau 2010). This they used to force the Romanian government to maximise the judiciary governance template and endow the Romanian judiciary with an autonomy in excess of what any government would have preferred. Notwithstanding that it is a mere discursive construction, extra-conditionality exerts real pressure on candidates made vulnerable by their own uncertainty over the eventuality or timetable of accession (*cf.* Parau 2010). Finally, this article reveals that the transnational legal community is not neutral from a politically partisan standpoint. Actors within the community

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2 Author’s interview with the Political Affairs Directorate of the General Secretariat of the Council of Europe, 14 March 2011, Strasbourg.

3 The recent creation of DG Justice might have changed this (Author’s interview with Senior Official, DG Enlargement, European Commission, 5 April 2001, Brussels). From the very beginning of European community, the European Commission has relied on the transnational legal professional network so as to drive European integration (see Vauchez, 2010).
are shown ready to act so as to strengthen their preferred domestic partisan faction and restrain the opposition.

*Power maximisation and electoral uncertainty*

It has also been theorised, based on studies of electoral and presidential system design in CEE as well as of the American experience, that the Judiciary Councils adopted immediately after the fall of Communism were outcomes of the incumbent political party’s drive to maximise its own power. Magalhães (1994, p.43) predicts that if in the first stage of revision, the Communist Party continues dominating politics and expects to win the next elections, they adopt judiciary institutions that ‘maximize the congruence of the judiciary with their interests’, by for example allowing them to pack the judiciary with loyalists. On the other hand, if they expect to lose the elections, then they will ‘insulate the judiciary from future legislatures, executives and presidencies’ by instituting autonomous Judiciary Councils in hopes of preventing their successors from purging the judiciary of Communist loyalists (p. 47). In stage two of the revision, which begins when the Communist Party is ousted from power, the new incumbents will either purge the judiciary then pack it with their own loyalists, or else change the rules of judiciary governance so as to ‘increase the responsiveness of judges to the political branches they now control’ (p. 48). Finally, in stage three, if the opposition purged and attempted to insulate the judiciary from politics, and the Communists return to power, they too will purge and pack. But if the opposition did not succeed in changing the composition of the judiciary, the Communists will ‘reinforce its insulation by all means available when they return to power’ (p. 48).

The empirical evidence presented here confirms some of Magalhães’s logic: all of the political parties in Romania did tinker with the organic law of the judiciary so as to pack it with loyalists once in power. Too little is explained beyond that by Magalhães’s model, however: the tinkering observed consisted of minor variations in a transnational template about which Magalhães is silent. Moreover, some of Magalhães’s predictions are falsified herein. The party of the ex-Communists dominated the aftermath of 1989 in Romania, yet they ceded sweeping power to a Judiciary Council. That they should have given away any power at all, let alone as much as they did by creating such a Council, is paradoxical: in this first stage of institutional revision, the party in power maximises self-interest by keeping a tight rein over judiciary governance, not by delegating it to judges as actually happened. Yet the transnational template of the Judiciary Council was accepted virtually unanimously across the partisan political spectrum right from the beginning of the constitutional and organic legislative revision process, and well before any party could have had reliable information about their electoral fortunes at the next elections. In general, Magalhães attributes to political actors far less imperfect information about their electoral prospects than is realistic.
Finally, the key players in judiciary institutional design are not ‘political parties’ as assumed by Magalhães. The drafters of the original Romanian Judiciary Council were legal academicians who were networked in to the transnational community of legal professionals, and who cared little about electoral politics but much about rights, Constitutional Courts and judiciary institutions in general. Once in place, these institutions were altered over time by a small minority of legally-trained holders of key public offices (e.g. Ministry of Justice), members too of the transnational community. Although they remain committed to the shared preferences embodied in the templates of the transnational community they prove willing to tinker with certain details of the template so as to empower themselves personally in their capacity as Ministers just as Magalhães predicts.

The dormancy of Parliament

Neither Piana (2009, 2010) nor Magalhães (1999) discuss the causal role of veto players. They are mentioned in the Europeanization literature only to be dismissed as too weak or few to matter (Dimitrova 2002, Schimmelfennig, et al. 2003, Schimmelfennig and Sedelmeier 2005c). Yet the success or failure of EU accession conditionality and the transnational legal community at influencing domestic institutional designs is shown to depend on the reaction of the key domestic veto player, in the present case Parliament. The research reported in this article reveals potential veto players to be numerous and strong enough to contest external influence over domestic judiciary reforms. The Romanian Parliament might have been expected to contest its own disempowerment via the transfer of power to govern the judiciary from itself to judges. However, in practice, Parliament’s reaction declined from desultory resistance to outright quiescence as its disempowerment proceeded apace. The dormancy of the mass of elected politicians emerges as pre-conditional to the effectiveness of both EU and transnational influence.

2. Methodology: the case of the Judiciary Council in Romania

To explore and reconstruct causality is the aim of this study. Causality in the context of Europeanization is complex inasmuch as EU incentives and conditionality interact with other transnational and domestic causal factors (cf. Anderson 2003). The ‘bottom-up’ research design deployed here is more conducive to discovering complex causation than the linear approach embodied in the ‘top-down’, deductive, external incentives model (Dyson and Goetz 2003, Radaelli and Franchino 2004). An actor-centred perspective is also adopted, again in contrast with the existing literature, which focuses on abstract causal mechanisms.

Out of all the changes to judiciary institutions wrought by the waves of institutional revisions (author’s publication), this article focuses on the exemplary case of the Romanian Judiciary Council or CSM. The CSM is in many ways a microcosm of the causative cross-currents that empowered the judiciary not only in Romania
but across the CEE region. The article is confined to the CSM’s formal institutional design, as the entrepreneurs, both domestic and transnational, believed this to be essential to separation of powers and thus to an independent judiciary upholding the rule of law. The CSM was created *ex nihilo* in 1991 as a body elected by Parliament to govern the judiciary jointly with the Justice Ministry. Institutional revisions made at the peak of Romania’s EU accession negotiations (2003-2004) expanded the CSM’s autonomy, excluding both Parliament and the Justice Ministry from any share in judiciary governance. The article will explain both the drive behind these revisions, and why they took just the form they did. Since their implementation, the CSM has sustained intense criticism, even by the very reformers who supported judiciary autonomy; who complain that the CSM has done little to reform the judiciary from within, and may in fact have entrenched the endemic corruption of Romania’s judges (Commission of the European Communities 2009; see also Parau 2012). This suggests that their revision of the formal institutions of judiciary governance, upon which so many reformers both domestic and transnational placed their hopes, have proved essentially cosmetic. Such a line of inquiry, however, lies outside the scope of this article.

Romania constitutes a ‘hard case’ for the empowerment of the judiciary, in that the political conditions were so hostile to such a development that if could happen in Romania then *a fortiori* it could happen elsewhere in CEE. Institutional entrepreneurs faced many obstacles owing to Romania’s exceptionally despotic Communist and Ottoman legacy. Of all CEE accession candidates Romania broke with her Communist past the least. In the formative years of her post-1989 transition, anti-Communist elites exerted the least influence (Maxfield 2008, Tismaneanu 1993). The 1991 Constitutional reforms purged Romania’s legacy institutions of none of the ‘old guard’. Under these circumstances one might expect far more resistance to judiciary empowerment in Romania, compared with neighbouring countries. Yet surprisingly, a CSM was adopted right from the beginning, under transnational influence and in the teeth of Romania’s reputation as a ‘bad boy’ that the West had little prospect of reforming (Phinnemore and Light 2001). Romania’s historical marginality to the West is mirrored in other candidates and aspirants to EU membership. Understanding what brought about judicial empowerment there will help us understand current judicial reform efforts in Western Balkans, *e.g.* Croatia and Montenegro, and farther east, *e.g.* Turkey (Hicks 2001, Trauner 2008), as well as help us revisit existing explanations of institutional change in CEE.

Evidence has been drawn from a wide range of documentary sources: the text of the Romanian Constitution and ancillary organic statutes; records of Parliamentary debates; speeches and biographies; official documents of the CoE and the European Commission. To gain further insight into actors’ motives and beliefs, the author
interviewed more than 50 domestic and transnational elites who were directly involved in institutional change. The interviews were semi-structured. The author triangulated interviewees’ testimony with other sources, both documentary and testimonial. Moreover, the quotations of interviewees adduced herein have been selected for their representativeness; none of them have been cherry picked to support the author’s thesis in the teeth of other evidence to the contrary. Indeed the author’s thesis emerged inductively from the convergence of all sources of evidence. Elite informants were expressly offered anonymity and confidentiality; accordingly, some names have been withheld by request.

3. The first wave of judiciary revisions (1990-1992): the template is adopted

Before the 1989 revolution Romania had lain prostrate under CEE’s possibly harshest, most arbitrary regime. A totalitarian Communist Party overmastered all other public and private institutions (Almond 1992, Linz and Stepan 1996). The Procuracy, an integral part of the Party’s repressive apparatus, overawed the judiciary (Macovei 1999). Judges were ‘subject to political commands’ and ‘telephone justice’ was normal (Demşorean, et al. 2008, p.95). As members of the nomenklatura, they were vetted for appointment on the basis of loyalty not competence (Gallagher 2009). Judges’ acts were scrutinised by Securitate, the most dreaded secret police in CEE. In politically consequential cases, Securitate dictated both verdict and punishment (Gallagher 2009). Subjugation to the Party-state was aggravated by Ceausescu’s sultan-like caprices: ‘Even the top nomenklatura were hired, treated, mistreated, transferred, and fired as members of the household staff’ (Linz and Stepan 1996, p.347). It was hostility to this legacy of abject corruption of justice that was to smooth the path for the entrepreneurs who were relied upon to overhaul judiciary after the 1989 Revolution.

External incentives drive the first revisions

The 1989 revolutionary National Salvation Front or Frontul Salvarii Naţionale (FSN) that followed Ceausescu’s demise, eager to speed Romania’s ‘return to Europe’, believed ratification of a new Constitution would signal a conclusive break with the Communist past (Iorgovan 1998, p.66-8). A Constitutional Committee chosen by the first Constituent Assembly elected only months after the Revolution, and consisting of the foremost of Romania’s few competent jurists, was swiftly convened. These experts turned to European legal authorities and allies to help them craft a polity conformable to ‘European constitutionalism’. This, they hoped, would facilitate Romania’s integration into the Euro-Atlantic structures, a priority that featured on the FSN’s first Proclamation drafted only days after Ceausescu’s demise. As the Committee President, Antonie Iorgovan, asserted:

Romania’s road towards the CoE passed through the Constitutional Committee ... The contacts that we
established then, and without exaggeration the friendships that emerged, were of great help in the ‘battle’ which we led at the time of convincing the CoE that we are capable of adopting a democratic Constitution, and that Romania is heading towards a state with the rule of law (Iorgovan 1998, p.67).

External incentives were thus in play well before the formal process of EU accession began, and they contributed to motivating the Romanians’ first constitutional and judicial reforms.

*The influence of the transnational community of legal professionals*

The professional identity of the legal experts charged with drafting the new Constitution enabled them to become integrated at once into a long-standing transnational community of like-minded jurists, which recent scholarship has discovered to have influenced if not driven European integration from its beginnings in the late 1940s (Cohen 2007, 2010, Cohen and Vauchez 2007). Sharing a ‘common judicial identity’ (Slaughter 1994, p.102) and a sense of belonging to ‘the legal family’, this transnational community has been in existence for at least half a century and well before the fall of Communism. As far back as the immediate aftermath of World War II it had reached consensus on the proper role of courts in democracy entailing a policy agenda to empower judges at the expense of politicians (cf. Cohen and Vauchez 2007, Vauchez 2008). First instantiated as supranational tribunals and Constitutional Courts of self-defining, self-expansive jurisdiction transcending even traditional common law, the policy agenda was supplemented by the invention of the Judiciary Council in the bleak aftermath of Fascism and its disasters. The first such Council was instituted in France in 1948 in hopes of fortifying the rule of law (Bancaud 2006). The Conseil Superieur de la Magistrature was imitated by Italy in 1949, then by Portugal in 1974 and Spain in 1978. Germany considered it in the 1950s, but its strongly decentralised federalism ultimately thwarted adoption (Conseil Superieur de la Magistrature 2010, p.175, Guarnieri 2004). By 1989 the French Conseil had become the prototype of an evolving institutional template designed to embody judicial self-governance. This template as it then stood, though still evolving and not yet fully formalised in official documents, dominated the drafters of the first post-Communist constitutions in Eastern Europe (Vasilescu 2010).

Key policy entrepreneurs in the transnational legal community influenced the Romanian drafters at this paradigmatic level. The first provisions on judicial governance, drafted before contact with the transnational community, had looked to France for inspiration. The prototype Romanian CSM bore a striking resemblance to

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4 Author’s interview with Eberhard Desch, Head of the International Law Department, German Federal Ministry of Justice, President of the European Commission for the Efficiency of Justice, CoE and Chairman of the Committee on Legal Co-operation, CoE, 10 March 2011, Berlin.
the 1946 Conseil, which had appointed both political branches as partners in judicial governance (Constitution du 27 octobre 1946, Titre IX). Comprising twelve magistrates and six Members of Parliament (MPs) elected by the plenary, the President of the Romanian Republic was to preside, with the Justice Minister as Vice-President (Table 2 column 1) (Iorgovan 1998, p.123).

This first draft did not last long, however. The Constitutional Committee were networking intensely with the transnational legal community (Iorgovan 1998, p.66-70), which implicates an influence prompting the Romanians toward pushing elected representatives out of judiciary governance. A majority of the Committee consisted of ‘legal professionals’, counting both elected politicians with legal training and constitutional law academicians brought in to serve as ‘independent experts’. Politicians with no legal background were a small minority thereof. It was the independent experts who networked with transnational counterparts like themselves. Politicians with legal training, both on and off the Committee, networked to a far lesser extent, while the median MP in Parliament did no networking at all (Iorgovan 1998). These networked-in academicians absorbed the teaching of their transnational peers, indeed, coming to regard them (especially the Venice Commission) as keepers of the ‘Holy Grail of European law’ (Iorgovan in Parlamentul Romaniei 2003). The drafters themselves admit to such influence: Iorgovan notes that a meeting on 1 October 1990 between the Romanian delegation he led to Italy and Antonio La Pergola ⁵ (1931-2007) – member of the Consiglio Superiore della Magistratura, Justice of the Corte Costituzionale and of the ECJ, and founder of the Venice Commission – profoundly influenced the Romanians’ output. In that meeting ‘we established the fundamental strategic directions of the constitutional edifice in order to make it agreeable to the Council of Europe’ (Iorgovan 1998, p.67). The CSM was revised accordingly by some of the more activist constitutional law academics at the Law Faculty in Bucharest so as to weaken political participation in the CSM (Table 2 column 2) (Iorgovan 1998, p.74).

**Elected politicians offer no resistance to the template**

⁵ One of the most influential transnational norm entrepreneurs as well as a committed European federalist (La Pergola, 1993). He held senior offices in several Italian and EU judicial institutions: Member, Italian Supreme Council of the Judiciary (1976-1978); Justice and President, Italian Constitutional Court (1978-1987); Member of the European Parliament (1989-1994); Advocate-General and Judge, European Court of Justice (1994-2006); and Member, Committee of Wise Persons on the Restructuring of the Council of Europe. He founded the Venice Commission in 1989, probably the main forum in Europe for the design of judiciary institutions. He was educated at Harvard Law School, perhaps America’s (and thus probably the world’s) foremost nursery for incubating the theory and practice of the judicialization of politics (cf. Tate and Vallinder, 1995:3).
The Constituent Assembly consisted mostly of established political actors who lacked any experience of or expertise in judiciary institutional design. They exhibited essentially no interest at all in judiciary institutions, a pervasive fact that contradicts the assumption in the literature, that politicians will pay the judiciary as much heed as they will electoral systems or Presidential powers (cf. Magalhães 1999). Having just experienced the novelty of being elected, they were soon preoccupied with designing the institutions that would foreseeably affect their own future prospects: whether the Parliament they might sit in should be bi- or unicameral; how much power to give the President compared with the Prime Minister; what powers Parliament must wield over the Executive. They posed no resistance to the CSM put forward, right from the beginning, by the legal professionals as the solution for effecting a proper ‘separation of powers’ between the judiciary and the political branches. The Assembly plenary even objected to the inclusion (after the French model) of politicians in the CSM, overwhelmingly supporting an Italianate model that would consist of magistrates only, lest ‘the legislature interferes with the judiciary power’ (Senator Predescu speech in Iorgovan 1998, p.302). *Prima facie* it seems surprising that an Assembly dominated by the FSN, so many of whom were ex-Communists used to micro-managing State institutions, never questioned the idea of a Judiciary Council in general or the cession of power this entailed. This lack of resistance is explained by the mutual distrust and suspicion that pervaded the Assembly. Iorgovan notes the Constitution was drafted in a ‘state of tension and permanent anxiety’ which, ‘beyond the ambitions, envy and passions arising from the act of scientific creation’, was rooted in the ‘older resentments’ of all the betrayals and intimidation common under a police State (Iorgovan 1998:22, see also Tismaneanu 2003:244).

The Assembly members reacted fiercely and perhaps overreacted against ‘political meddling’ in the judiciary, the fresh memory of which they so much feared. They ‘threw the baby out with the bath water’, swinging far toward the opposite extreme of insulation from accountability. This fear will continue to percolate for years to come: ‘In Romania there has always been a dread of political interference in the judiciary, which, however, has led to perverse results – to the idea that over the judiciary no check and balance ought to be exercised’. The fresh trauma of Communism operated to subdue the mass of elected politicians, the key veto player; a phenomenon noted in other countries that have undergone similar experiences, like France in 1946 and Italy in 1948, when their self-governing judiciaries were also first set up (cf. Bancaud 2006, p.373, Erdos 2010).

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6 Author’s personal communication with member of the Constitutional Committee and Law Professor in Romania, 2 May 2010.

7 Author’s telephone interview with Senior Adviser to ex-Justice Minister Valeriu Stoica, 5 August 2010.
A handful of MPs did offer some resistance, arguing for Parliamentary participation inside the CSM, lest the judiciary becomes a ‘closed body’ raised above ‘the sovereign power of the people’ (Senator Predescu speech in Iorgovan 1998, p.302); but the overwhelming majority voted to abolish their own representation on the CSM (Table 2 column 3).

Nevertheless, by contrast with reforms that were to come later, the maximal judicial empowerment conceivable in 1991 still submitted the CSM to some parliamentary and ministerial accountability. The holders of each magistral seat were to be selected by the Parliamentary plenary, while the Justice Minister was CSM President ex officio except in disciplinary proceedings – a transfer that deliberately weakened the President of the Republic (Iorgovan 1998, p.77), but admitted Executive participation nonetheless (Table 2 column 3).

The drive behind this first wave of judiciary reforms was thus the Romanians’ need to be accepted into Euro-Atlantic structures. The adoption of the Judiciary Council template in preference to alternatives is explained, however, by the influence of entrepreneurs in the transnational legal professional community into which like-minded domestic elites had become integrated. Had the sundry transnational networks become rivals instead of forging a community, or had the Romanians become isolated or alienated from it and/or indifferent to Europe, Romanian judicial governance would have turned out differently. However, transnational influence, even without means of coercion, succeeded only because the veto players, pervaded by distrust of each other and of politics, posed no resistance.

Refining the template to maximise power

The new Constitution was ratified in 1991 and a general election held in 1992, after which a governing majority was formed by the Frontul Democrat al Salvării Naționale (DFSN), a splinter of the FSN, and three smaller parties, one of which was the direct descendent of the Communist Party and the other two extreme nationalist. The new government proceeded to fill-in the constitutional framework by Statute 92/1992 on the Organisation of the Judiciary, which imposed seniority criteria (Table 2 column 4 and Table 3 column 2). To be promoted to President or Vice-President of a court of appeal required 15 years of judicial experience – a hurdle which only ‘legacy’ judges could meet a mere two years after the revolution (Parlamentul Romaniei 1992). The judiciary’s organic rules had been fine-tuned so that it would be packed with judges whose character had been formed under the Communist system of ‘telephone justice’. Elected from among such court Presidents and Vice-Presidents, the first CSM was predisposed to subservience to this governing coalition (Parlamentul Romaniei 1998). This proceeding effectively neutered and stultified the institutional purpose of the CSM vindicating Magalhães’s theory that if the Communist Party remained dominant in politics they will adopt an institutional
design that ‘maximizes the congruence of the judiciary with their interest’ (p. 43). Nonetheless the creation of
the CSM had set the stage for future transformation at a later date.


The template is compromised at the margin

The 1992 revisions, together with other problems, left the Romanian judiciary debilitated by incompetence at
the top and legal anarchy in the practice of lower courts, and contributed to disorder at home and loss of
confidence abroad. This, and other shortcomings, set back Romania’s Euro-Atlantic integration. Romania and
Bulgaria were the only active applicants excluded from accession when the European Commission issued its
July 1997 Opinion on applications (European Commission 1997).

As a result, Convenţia Democratică or the Democratic Convention, a fractious coalition of parties opposed to
the DFSN, which itself had already devolved into Partidul Democraţiei Sociale din România known after 2001
as Partidul Social Democrat (PSD), was swept into power by the election of 1996 on a platform advocating
reforms supposed to repair the situation. The new Justice Minister was Valeriu Stoica, an eminent barrister and
professor of civil law at Bucharest University, who had also served the CoE on its Commission against Racism
and Intolerance. He strove to bring the Romanian judiciary up to European quality standards by concentrating
on edifying the judiciary within its own domain through rigorising training and selection procedures in hopes of
substituting truly professional formation for legacy cronyism (Parlamentul României 1997).

Stoica’s changes, however, did not empower the judiciary in relation to the political branches of government; to
the contrary, he curtailed the CSM’s (and therewith the PSD loyalists’) powers (Table 3 column 3). Between
1997 and 2000, whilst the Convention was in power, the CSM was obliged to consult the Justice Ministry on all
proposed judicial nominations, promotions and reassignments; no candidate had any realistic chances without
the Justice Minister’s consent.⁸ The CSM was reduced to a mere “appendix of the Justice Ministry”.⁹

The Justice Minister packs the courts

Stoica’s 1997 changes had a strategic goal: to alter the rules governing the CSM to enable the Convention to
‘counter-pack’ the judiciary with its own loyalists. The seniority requirement for promotion to commanding
positions in the judicial hierarchy was immediately abolished to allow the influx of a younger generation of
jurists who had been trained abroad and were far more networked into the transnational legal community, yet

⁸ Author’s interview with ex-President of the CSM, 13 October 2009, Bucharest.

⁹ Ibid.
had been relegated to insignificance at home by the legacy judges.\(^{10}\) The amended Judiciary Organisation Statute also mandated that six months after its promulgation, the Justice Minister should ‘make proposals to the CSM for new leadership positions in all courts’ (Parlamentul Romaniei 1997). This new leadership then formed the pool of candidates whence a new CSM was elected in 1998. This and similar lustrations were expected not only to bring about ‘both moral and professional change’ within the judiciary, but also to break the PSD’s control over the CSM (and implicitly the judiciary) (Parlamentul Romaniei 1998).

\textit{Transnational elites turn a blind eye}

The Convention’s electoral victory in 1997 credibly signalled that Romania had now decisively broke with the Communist past heading in the direction that ‘Europe’ approved. This galvanised the European Commission to revive its dormant Delegation office in Bucharest to steer Romania’s reinvigorated EU candidacy. But in recruiting into the Delegation the Romanian experts it would have to rely on, the Commission eschewed the defeated PSD’s brain trust: ‘[I]n 1997, when PSD people might have been available ... their EU-related credentials were pretty slim to non-existent’.\(^{11}\) By contrast, the Commission was not so hesitant about the PSD opposition: after the Convention’s 2000 electoral defeat, many key advisers to ex-Minister Stoica, newly unemployed – and as will be shown below, members of the transnational legal community, – were recruited into the Delegation. These opposition experts were to oversee the judicial redesign undertaken by the PSD just a few years later. Indeed, the Delegation had ‘from the beginning developed consistently strong links’ with these and other elites, perceiving in them ‘values which are too often lacking in Romanian society in general and in the Romanian political class‘.\(^{12}\) Both the Commission and its transnational elite allies became interlocked with certain domestic ideological tendencies, and the political parties that embodied them, and not others.

An example was a certain circle of Romanian civil society elites active in the field of human rights and the rule of law – \textit{viz.} the Soros Foundation, the Helsinki Committee Association for the Protection of Human Rights in Romania, Transparency International – also advocates of an autonomous judiciary, who even expressed mild disappointment at the ‘halfway’ changes Stoica managed in 1997 (\textit{cf.} Piana 2010). Likewise motivated to rid Romania of its Communist legacy, they were interlocked with the partisan opposition to the PSD, but also

\(^{10}\) Author’s telephone interview with Senior Adviser to Valeriu Stoica, 5 August 2010.

\(^{11}\) Author’s email communication with ex-Senior Official, European Commission Delegation in Bucharest, 19 August 2010.

\(^{12}\) Author’s email communication with ex-Senior Official, European Commission Delegation in Bucharest, 19 August 2010.
networked with the CoE and the transnational legal community, in addition to the Commission and its
Delegation in Bucharest.

All of these transnationally networked elites were content to tolerate this transient deviation from the template
they preferred because they shared similar goals and preferences with the Convention: ‘Stoica was an
authoritarian and curtailed in practice the powers of the CSM ... He argued that the CSM was a restraint on the
reform. If somebody like Stoica does things like this, it is OK ... Stoica was an enlightened King’. 13 Similar
behaviour a few years later by Stoica’s PSD successor, Justice Minister Stanoiu, was considered intolerable by
the same transnational elites, notwithstanding that both Ministers had acted on the same self-empowering logic.

*Domestic legal professionals pursue the maximal template*

Stoica and his advisers, legal professionals from the Law Faculty in Bucharest, were nonetheless committed to
the transnational consensus on judiciary governance that empowered legal professionals like themselves. As
soon as the revision of the 1992 statute had made way for Democratic Convention loyalists to succeed to the
CSM in 1997 – and years before the Convention’s fortunes in the 2000 elections could have been realistically
foreseen – Stoica and his advisers had already begun drafting a comprehensive organic statute of 400 articles
that would have overhauled the Judiciary from top to bottom. The statute would have abrogated Parliament’s
prerogative of electing the CSM, while simultaneously concentrating in the Council all competences pertaining
to judiciary governance, even that of proposing and administering the budget (a Ministry of Justice prerogative).
The drafters believed that any less power given to the CSM would be only a ‘halfway’ step to reform. 14
However, Parliament’s chronic gridlock under the fractious Democratic Convention and the coalition’s dramatic
electoral defeat in 2000 precluded timely enactment of the overhaul. 15

The evidence presented in this section reveals that the Democratic Convention’s professional legal elites
behaved just like their ex-Communist predecessors whom they succeeded in key Cabinet posts. They so varied
the judiciary organic statute as to realign it with their own interests (cf. Magalhães 1999). The European
Commission and the transnational legal community, who might have been expected to oppose this, did little or
nothing in 1997, tacitly concurring with domestic partisans that the CSM’s loss of autonomy to Justice Minister
Stoica was the ‘right’ manoeuvre. Stoica was likely understood to be laying plans to raise up a judiciary

13 Author’s interview with former ex-Senior Adviser, European Commission Delegation in Bucharest, 29
January 2010, Brussels.

14 Author’s telephone interview with Senior Adviser to Valeriu Stoica, 5 August 2010.

conformable to the transnational template that in empowering judges empowered the whole legal professional community.

5. The second-wave of reforms (2003-2004): maximising the template

The desire for accession moves constitutional revision

The next great inroad toward the goal of maximal judiciary autonomy was made in 2003 under the PSD government who had won the elections of 2000. Romania’s accession negotiations with the EU began in 2000; by 2001-02 the demands of transposing and enacting a voluminous acquis had exposed debilitating weaknesses in the constitution of Parliament, the gravest of which was chronic gridlock (Parlamentul Romaniei 2002b). Determined to transform the PSD into the mould of a European social democratic party (Parau 2010), and to see Romania integrated into the EU as soon as possible, the new PSD leadership, President Ion Iliescu and PSD General Secretary and Prime Minister Adrian Nastase, initiated revision of the Constitution, to which nearly all party leaders in Parliament consented. To be revised were not only the Constitutional Court and the regular judiciary as such, but also their power relations with the elected branches.

The transnational legal community moves in

By now the integration of Romanian legal-political elites with Europe’s transnational legal community, which had begun in 1991 with their collaboration on the Constitution, had progressed far.16 This included the rising legal professional elites of the PSD, which now eschewed its ex-Communist legacy. As far back as the mid-1990s Rodica Stanoiu, Nastase’s Justice Minister and a key player in the 2003-2004 reforms, had been inducted into both the Venice Commission and Romania’s Permanent Delegation to the CoE (Romania Online 2000b). Between 1996 and 2000 during the PSD minorityship, PM Nastase himself, a human rights lawyer of pan-European orientation, had served in the CoE Parliamentary Assembly as Secretary of its Committee on Judicial Problems and Human Rights (Romania Online 2000a). This socialisation is reflected in Nastase’s and Stanoiu’s nearly unqualified support for the transnational judiciary template, which they adjusted only marginally in their own favour as Executive officers, as detailed below.

Like other CEE elites, they would have perceived the CoE as the ‘antechamber to EU integration; as the ‘nursery’ in which one learned how the European structures work.17 This opinion of Eastern elites is

16 Author’s interview with Romanian Constitutional Court Judge, 7 September 2010, Bucharest.

17 Author’s interviews with Programme Assistant, Policy and Institutional Affairs, CoE Delegation, 29 October 2010, Chisinau, Moldova and with Alexandru Burianu, ex-Moldovan Delegate to the CoE Parliamentary Assembly, 28 October 2010.
corroborated by CoE officials themselves:

We speak very often about ‘the Strasbourg promotion of political leaders’, because many, many prime ministers, presidents of new democracies ... have been members of the Parliamentary Assembly of the CoE, and that creates a certain solidarity between [them] ... Strasbourg has been important in the formation of the political elite in the new democracies of CEE ... they learn about the others by exchange of experience, they learn about standards, the values, the norms and ... how these ... are being implemented in other countries. It’s ‘comparative law’ in action.\(^{18}\)

Thus, when they took office in 2000, both Stanoiu and Nastase had been socialised for years inside this transnational community, absorbing its ideology of the judiciary. Stanoiu in particular regarded herself as possessed of expertise on judiciary matters superior to the European Commission’s by virtue of her membership of the Venice Commission: ‘the Venice Commission has more expertise on matters of judiciary reform than the European Commission’.\(^{19}\) The content of the 2003 revision had practically been determined already.

The revision engaged legal experts from all political parties represented in the Romanian Parliament. Some of them had helped draft the 1991 Constitution (\(e.g.\) Iorgovan); others had more recently risen from the ranks of the legal profession to become party leaders, many having been taught and/or mentored by the 1991 drafters (\(cf.\) Tate and Vallinder 1995, p.2-3). Inevitably, they staffed the Constitutional Committee commissioned in 2002 to brainstorm actual revisions, bringing their transnational consensus on the design of judiciary institutions with them. Atop the agenda was an insulated judiciary governed by a powerful CSM staffed with professional peers with whom they identified: ‘Yes, I consulted them [judges] as colleagues. I know many of them. They are generational colleagues. Yes, we discussed this [judicial reform] with them. It was a discussion between professionals.\(^{20}\)

Legal professional elites inside the PSD, too, took judicial empowerment and the transnational networks’ templates for granted. From ‘what [she] had seen abroad’ and ‘observed at home’, Justice Minister Stanoiu, for example, had become severely disillusioned with the ‘partisanism’ of Romanian politics. Herself being one, she

\(^{18}\) Author’s interview with Jean-Louis Laurence, Director of the Political Affairs Directorate of the CoE’s General Secretariat, 14 March 2011, Strasbourg.

\(^{19}\) Author’s interview with Rodica Stanoiu, ex-Romanian Justice Minister (2001-2004), ex-member of Romania’s Permanent Delegation to Strasbourg, 10 October 2009, Bucharest.

\(^{20}\) Author’s interview with Augustin Bolcas, Member of the Romanian Parliament, ex-President of the Greater Romania Party and Attorney-at-law 12 October 2009, Bucharest.
implicitly believed that judges *qua* ‘professionals’ are morally as well as intellectually superior to politicians and ought to be insulated from politics:

> All organs appointed by Parliament become noxious ... because all candidates go on a list, and the parties bargain between themselves ... ‘you vote mine and I will vote yours’. And this kind of bargaining governs everything ... President Iliescu understood and agreed with me. And this is how the idea prevailed ... whereby the CSM became electable by their peers.\(^{21}\)

Still stauncher advocates were the anti-PSD politicians, themselves members of the transnational legal community (Parlamentul Romaniei 2003a). So broad was the professional consensus that it even included the ‘right-wing extremist’ Greater Romania Party (Popescu 2003). Party leader and jurist Augustin Bolcas believed that a judiciary insulated from all democratic accountability was ‘a key principle of the separation of powers’.\(^{22}\)

With even ‘reactionary’ elites in tow, it had become unthinkable that judges, legal professionals like the drafters themselves, were not above politics, deserving protection from its taint.

The draft constitution was submitted for review to the Venice Commission, whom Romanian jurists held in the highest esteem: ‘[It] is made of first-rate experts ... it is the Holy Place of European law’ (Antonie Iorgovan, speech in Parlamentul Romaniei 2003c). The Romanians were seeking their transnational mentors’ approbation and patronage, which was duly forthcoming (Comisia Europeană de Democratie prin Lege 2001, 2002).

*The PSD counter-packs the judiciary before proceeding*

As the PSD’s new Justice Minister, Stanoiu was positioned to exploit the hand in judiciary governance that her predecessor Stoica had ‘repatriated’ from the CSM. By the time they undertook Constitutional revisions in 2003, the PSD had packed the judiciary with their own loyalists. All Romanian parties, not merely the PSD, treat State institutions not as *res publica* to be held in trust but as *terra nullius* to be colonised and occupied for their own advantage, a process which the PSD had begun directly after their 2000 electoral victory (Parvulescu 2004). And like the Democratic Convention, the PSD were quite prepared to bestow on the judiciary (once packed) the formal autonomy of the transnational template. No evidence was found that would have suggested that fear of losing the next elections in 2004 played any role in motivating the PSD to broach their own judicial revisions as early as 2000 (*cf.* Magalhães 1999). By early 2004 it had become clear that the ever-fractious opposition, after so miserably losing the 2000 elections, could expect marginally better prospects in 2004. The polls were

\(^{21}\) Author’s interview with Rodica Stanoiu, ex-Romanian Justice Minister (2001-2004), ex-member of Romania’s Permanent Delegation to Strasbourg, 10 October 2009, Bucharest.

\(^{22}\) *Ibid.*
predicting PSD would win over 50% of the vote (Parvulescu 2004:16). Thus, by the time anyone could have predicted the parties’ electoral fortunes, the PSD’s judiciary revisions were already well advanced; falsifying the claims that the incumbent’s electoral expectations play a causal role in the design of judiciary institutions.

*The Executive opts-out of maximal judiciary autonomy*

Although committed transnational legal professionals, the PSD Constitution drafters were ready to manipulate the Judiciary Council template so as to conserve their Executive prerogatives over the judiciary while at the same time disempowering their fellow MPs. Being in a dominant power position they could afford to ignore the opposition’s calls for the Executive’s total exclusion from the CSM (Parlamentul Romaniei 2003a, 2002a, pp.1618, 1649). Some Executive membership with voting rights was conserved *(viz.* Justice Minister and General Prosecutor). The PSD elites thus empowered the judiciary in comparison to previous arrangements, but ‘left some doors open so that some political influence over it could have been exercised’. They stopped short of maximal empowerment that would have fully insulated the judiciary and transferred away all of their power over the judiciary.

Thus the 2003 revision consolidated and elaborated the 1991 CSM’s control of the judiciary, ceding to it powers previously shared with the Ministry of Justice over judicial appointments. Parliament’s power to elect the CSM membership was also abolished in favour of local magistrates’ assemblies (Parlamentul Romaniei 1997). Senate ‘validation’ of the constitutionality of their proceedings was (except for budgeting) the lone concession to accountability before Parliament (Parlamentul Romaniei 2004a); a practice that has proved a ‘mere formality’. The Justice Minister and the Prosecutor General remained members *ex officio* and two ‘civil society representatives’ were added, but these four were to prove easily outvoted by the magistrates. From a somnolent committee of part-time advisors the CSM was transformed into a command and control centre with its own budget, administrative apparatus and President, and charged with ‘guaranteeing’ judiciary independence (Table 2 column 6). Even transparency was forestalled by the provision that CSM decisions ‘shall be taken by secret ballot’, which ‘shall be final and irrevocable’ (Constitution of Romania, Arts. 133-5 and 133-7).

*The legal professionals dominate Parliament*

23 Author’s interview with Peter Eckstein-Kovacs, ex-Member of the Constitutional Committee (2002-2003), Attorney-at-law, Adviser to the Romanian President Traian Basescu, 7 September 2010, Bucharest.


25 Author’s interview with Laura Kövesi, Romania’s General Prosecutor (2006 - ), 2 October 2009, Bucharest.

26 except for disciplinary decisions, which may be contested before the Supreme Court.
Traditionalist leaders and backbenchers of all parties in Parliament might have been expected to resist what was, after all, their own disempowerment. No evidence was found that the legal professionals in the PSD Cabinet had to bargain hard with either class. President Iliescu, for example, an engineer by profession, ranked the urgency and importance of judiciary revision far below legislative gridlock; it was merely ‘supplementary’, noteworthy only as sending the ‘right signals to Europe’ (Ion Iliescu speech in Parlamentul Romaniei 2003c).

The Parliamentary record likewise contains no evidence that backbenchers engaged with the 2003 revisions. The same legal professionals drafting the new amendments also dominated the debates in plenary, merely continuing the technical deliberations ongoing inside the Constitutional Committee, where all substantive decisions had already been taken. The few backbenchers who did occasionally speak up complained that the professionals were monopolising the process:

> It would be good for MPs who are not jurists to intervene in the debates, argumentations and clarifications of the Constitutional text. The Constitution is not only the Constitution of lawyers; they do not have a monopoly over the fundamental truth, although they might play an essential role in drafting the text (Sever Meşca, Independent MP, speech in Parlamentul Romaniei 2003a).

The political dominance of lawyers in Parliament stands out in other post-Communist CEE countries as well. It suggests a more widespread phenomenon with implications for deliberative democratic processes. The ascendency of a new, transnationally-oriented legal elite driving European integration over the old elites of mass democracy may well be a larger trend affecting all ‘new’ Europe.

*Transnational entrepreneurs construct extra-conditionality*

Although Constitutional reform was driven by the desire to speed EU accession, the European Commission then negotiating EU accession with the PSD government did not involve itself at all in the 2003 constitutional revision. A year later, however, after the government had implemented most, but not all the elements of the transnational template, the Commission did bring accession conditionality to bear on Romania to take the last step to maximal judicial autonomy.

The Commission had been charged with overseeing accession candidate compliance with the Copenhagen and Madrid Criteria ‘for lack of anybody better’. But the Commission lacked both experience and expertise to

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27 Author’s interview with Vladimir Šeks, President of the Croatian Parliament, 29 January 2011, Zagreb.


fathom exactly what ingredients constituted the rule of law, or how to conjure them where wanting, except they supposed it related to judicial independence somehow:

On judicial reform the Commission is not particularly well qualified […] the OECD provided specialism on public administration reforms. But on the judicial side it is much more difficult, because we’ve got different legal systems in different parts of the EU … the judiciary is not like a normal branch of the *acquis* where you can say, ‘you should do this and this and this’.  

The transnational legal community intervened to remedy this defect; the relevant senior officials in the Commission overseeing judicial reforms were themselves networked-in, having undergone formative experiences working within the CoE and the ECtHR. Most Commission accession negotiators of the Justice and Home Affairs Chapter were lawyers who either relied on CoE standards or on the expertise of jurists from the member-States: ‘What is the main guiding light in this field? It is the European Court of Human Rights and the work of the Venice Commission and other CoE formations and study groups and associations’.  

These functionaries in Brussels believed Romania could not meet Copenhagen conditionality unless the ‘weak powers’ of her judiciary were cured. The cure was thought to be a maximally empowered judiciary hermetically insulated from politics. In this the Commission followed the transnational legal community in its (arguably) simplistic equation of judicial independence with judicial empowerment, and separation of powers with insulation from the *reciprocity* of checks and balances (*cf.* Madison 1788, Montesquieu 1777).  

The transnational legal community also encompassed the Commission Delegation in Bucharest. The Delegation had hired domestic Romanian experts schooled by more senior jurists themselves now integrated into the transnational community. They were the ones who oversaw the 2004 revisions of the CSM. One Delegation expert and advocate of maximal CSM empowerment had been a Romanian representative to the ECtHR. Another came from the ranks of human rights activists and Transparency International, a transnational NGO that collaborates with the CoE General Secretariat. Eager for Romania’s soonest possible accession and believing judiciary weakness stood athwart her path, these domestic actors were determined to overcome in the way they knew best, by resort to the template of the transnational legal community they belonged to.  

In 2004, when the organic statute detailing the CSM’s powers was drafted, it was these Romanian legal

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31 Author’s interview with Senior Official, DG Enlargement, 5 April 2011, Brussels.

32 Author’s telephone interview with ex-Head of Unit, DG Enlargement, European Commission, 22 August 2010.
professions in the Delegation who pushed Romania’s version of the transnational template to the maximum. Being interlocked with the European Commission they used their superior bargaining power to overcome the PSD Executives’ resistance to insulating the judiciary from all accountability to either political branch.

Two competing versions of the CSM’s organic statute existed at the drafting stage. One was the creation of PSD Justice Minister Rodica Stanoiu, aided by Pierre Truche, a highly respected jurist and former President of the French High Court of Cassation and PM Nastase’s hand-picked ‘long-term adviser on judiciary problems’.33 Inspired by France, Stanoiu wanted to conserve all Executive power not ceded in the Constitutional revision of 2003, especially the power to draft and administer the entire judiciary budget and to initiate disciplinary proceedings against judges (Table 3 column 5). Truche considered these essential checks and balances, without which ‘the CSM will be transformed into a clone of the Justice Ministry and a state within the state ... into an uncontrollable caste’.34 This evidence argues that both Stanoiu and Nastase had become socialised in the new transnational orientation by this point and were genuinely committed to the reforms. Those who have questioned their bona fides on grounds of their subsequent entanglement in corruption scandals probably underestimate the degree to which human behaviour may be compartmentalised. As Nastase himself put it, ‘Judiciary reform was no compromise [on my part] except with regard to creation of a National Agency for Anti-Corruption’.35

The rival draft was funded by the European Commission and crafted by Lupascu, the then-President of the Romanian CSM, who was advised by a German jurist supplied by the Commission under a PHARE project.36 Inspired by yet surpassing the Italian and Spanish models, this version united in the CSM virtually all powers formerly shared with the Justice Ministry but not transferred in 2003, including those of training magistrates and appointing Presidents of courts and even General Prosecutors (formerly appointed by the Justice Minister exclusively); controlling career-paths; initiating disciplinary proceedings; and vetoing the Justice Minister on matters such as court organisation and even the budget (Table 3 column 6).

Having effectively allied itself with the transnational legal community, the Commission made its version an extra-condition for closing negotiations on the Justice and Home Affairs chapter, even though the two versions

33 Author’s email correspondence with Adrian Nastase, 3 October 2009.
34 Author’s interview with Rodica Stanoiu, Romanian Justice Minister (2001-2004) and ex-member of the Romanian Permanent Delegation to Strasbourg, 10 October 2009, Bucharest; and letter communication with Pierre Truche, Premier Président de la Cour de Cassation, France (1996-1999), 29 June 2009.
35 Author’s email correspondence with Adrian Nastase, 3 October 2009.
36 Author’s interview with ex-President of the CSM, 13 October 2009, Bucharest.
differed only on the seemingly minor point of whether disciplinary proceedings should originate with the judiciary or the executive branch, and whether the Ministry of Justice should conserve its power to administer the judiciary budget. Given that the French judiciary is indisputably independent and Truche’s advice of the highest quality, the choice was not between an independent judiciary and a dependent one, but between the kind of independence the Commission wanted and the kind it did not want. This in itself implies that the Delegation had constructed an extra-conditionality.

The Commission proved determined to get its way. Three elections loomed in 2004: the local, the parliamentary and the presidential. Public offices were hotly contested at all levels, and the opposition, though fragmented, was not to be ignored. At this critical moment, supranational officials, including Emma Nicholson, rapporteur for Romania, demanded suspension of negotiations on several grounds, including ‘lack of progress on judicial reform’ (Radio Free Europe, 4 February 2004). These interventions reawakened the PSD’s uncertainty over the accession timetable. PM Nastase reluctantly dismissed Stanoiu, who continued to resist a totally self-governing judiciary, replacing her with a more malleable appointee. In Stanoiu’s words, ‘I left, and Mr. Truche left too ... and then Diaconescu [her successor] came. He passed everything just as it was wanted by the Commission. He did not care, as his mandate only ran for a few months [before the elections].’ The CSM, and through it the judiciary, was thus transformed into a self-perpetuating body much like the Harvard Corporation or the Academie Française (Levinson 2006), wielding nearly absolute power over the judiciary (Tables 2 and 3, column 7). Combined with life tenure for magistrates and other important changes, the nett result assimilated Romania to the judicial self-governance of Spain and Italy rather than the UK or Germany (Guarnieri 2001).

When in the end the Commission-sponsored version prevailed, advocates of judicial empowerment tellingly perceived it as a ‘turning point’ that ‘reversed’ the balance of power between judiciary and Executive. The only accountability left consisted of ‘informal pressures’ exerted by professional peers or the media (Levinson 2006).

The construction of extra-conditionality by legal professional experts in the European Commission stands revealed as a last-minute intervention pushing Romania ‘the last few meters’ towards maximal judicial

37 Author’s interview with ex-Senior Adviser European Commission Delegation in Bucharest, 27 January 2010, Brussels; and with Rodica Stanoiu, ex-Justice Minister, 19 October 2009, Bucharest.
38 Author’s interview with Rodica Stanoiu, Romanian Justice Minister (2001-2004) and ex-member of the Romanian Permanent Delegation to Strasbourg, 10 October 2009, Bucharest.
39 Author’s telephone interview with the American Bar Association, 2 April 2009.
autonomy. The Commission itself proved a blind driver, guided by networked-in transnational and domestic entrepreneurs; its ‘conditionality’ only explains the outcome of the endgame, and only in the exceptional circumstances of a candidate government’s uncertainty and electoral vulnerability.

The transnational community is enmeshed in domestic politics

Both Stanoiu and Lupascu’s versions of the CSM statute were variations of the same transnational template. Why did the relatively small difference between them should have stirred the European Commission to threaten Romania with delayed accession?

The Delegation’s legal professional experts were not only members of the transnational legal community but also domestic political actors in their own right. Some had been recruited into the Delegation back in 1999, after the Democratic Convention lost the general election to the PSD.40 Thus, some of ex-Minister of Justice Stoica’s key advisers ended up overseeing the judicial governance revision undertaken by their PSD opponents in 2003 and 2004.41 Through them, the transnational legal community became interlocked with the PSD opposition. Justice Minister Stanoiu confessed she found it difficult to work with a Delegation dominated by protégées of her political rival.42

In pursuing the maximal template, the domestic political faction interlocked with the Commission and the transnational legal network was looking to ‘strategic’ ends. One Delegation expert, for example, a former adviser to Stoica, freely admitted aversion to the PSD government: his ‘main concern was ... to restrain ... Stanoiu; empowering the judiciary was the solution’.43 Determined to break the PSD’s perennial grip on power, the Delegation experts counted on a judge-elected CSM to supplant the PSD’s legacy judges. Some of the Delegation’s top officials even made rounds of the Courts of Appeal in person, exhorting the younger cohort to

40 No such consideration had been extended to the PSD brain trust, similarly unemployed in 1997 after electoral defeat: ‘In 1997, when PSD people might have been available ... their EU-related credentials were pretty slim to non-existent’ (author’s interview with ex-Senior Official, European Commission Delegation in Bucharest, 19 August 2010).

41 Author’s interviews with ex-Senior Advisers, European Commission Delegation in Bucharest, 25 January 2010, Brussels.

42 Author’s interview with Rodica Stanoiu, ex-Justice Minister, 19 October 2009, Bucharest.

stand for election to the new CSM. The election ended up entrenching the old-timers (Senatul Romaniei 2004). The younger and ideologically more compatible judges declined to oppose their own court Presidents, upon whose evaluations, until then, their careers had depended. Deeply disappointed, the Delegation even toyed with the idea of calling for a re-run, but backed off when the anti-PSD Coalition unexpectedly won the 2004 general election.  

The networking of Commission officials with Romanian partisans in the transnational legal community placed the PSD opposition in a strategic position from which to steer the incidence of accession conditionality against Executive veto players (cf. Parau 2010). This completes the explanation as to why the 2004 reforms pushed the judiciary a step further towards maximal autonomy against Executive resistance.

**Accession reinforces Parliament’s incompetence**

The incompetence of Parliament is ultimately what empowered elements of the transnational legal community to steer the Romanian government towards giving the judiciary a greater autonomy in 2004 that they would have otherwise done. The EU accession process exposed that incompetence and reinforced that default. Parliament had to cede as much discretion to the Executive as the latter demanded to close negotiations ahead of the 2004 general elections. The Commission was conditioning closure upon enactment of the 2004 judicial reforms. The few backbenchers who took any interest felt they had no choice: the CSM organic statute was discussed in emergency procedure; MPs had less than 24 hours to read it. The same jurist MPs debated only technical details (Parlamentul Romaniei 2004b). The plenary baulked at just one detail: it refused to relinquish control of the judiciary budget, excepting the CSM’s own and the training academy’s sub-budgets (Parlamentul Romaniei 2003b). By contrast, Czech veto players never fell dormant, and in 1999, when Parliament resisted attempts by the Supreme Court Judge (now the Justice Minister) to institute a CSM (Bobek 2008:5), it prevailed against the transnational legal community’s preferences and templates. Perhaps a more self-confident accession candidate is less prone to taking extra-conditionality seriously. This question, however, must be left to further investigation.

6. **The game starts again**

Only a few months after the 2004 statutory revision, but also after the electoral defeat of the PSD who had

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45 Author’s interview with ex-Senior Official, European Commission Delegation in Bucharest, 1 October 2009, Oxford.

46 Author’s interview with Senior Official, DG Enlargement, 5 April 2011, Brussels.
enacted it, the new Justice Minister, Monica Macovei, a former human rights activist and CoE expert, amended the CSM’s organic statute yet again to transfer back to the Justice Ministry powers to draft and administer the judiciary budget and to appoint high prosecutors (Table 3 column 8). Allied with her political faction, neither the European Commission nor the transnational legal community raised any alarms over Macovei’s move (Parlamentul Romaniei 2005); although on the evidence just presented, similar steps if taken by Stanoiu just months before would have been found intolerable. This evidences once again that the Commission and the legal community it relied on had indeed let themselves be drawn into domestic partisanship.

Also immediately after the 2004 elections, the Alliance that had just defeated the PSD called on the other political parties to ‘begin reflecting on the Constitution’ with the aim of revising it (Juridice.ro 2009). This task again devolved to a commission of legal professionals, mostly constitutional law academicians drawn from the ranks of a new generation of legal elites who had had no hand in drafting the 1991 Constitution, but had been educated and/or had taught abroad (Comisia Prezidenţiala de Analiză a Regimului Politic şi Constituţional din România 2009). Revisions to the Judiciary Council were proposed, though there is little to indicate that elected politicians gave it any priority. President Băsescu’s priorities, for example, were to bestow greater powers, including that of dissolving Parliament and triggering new elections, on his own office of the Presidency; to change from a bi- to a unicameral parliament; to undo the strong immunity regime for elected public officials in criminal cases; and to curtail some of the enormous powers that had been transferred to the Constitutional Court in 2003, e.g. that of resolving all political conflicts of a constitutional nature between public authorities (Juridice.ro 2009).

The low priority given to the Judiciary Council opened up for these legal professionals yet another opportunity to promote changes favouring themselves and their profession. By the same self-empowering logic that guided all previous legal professionals involved in drafting Romania’s constitution, they drafted an increase in the number of the CSM’s ‘civil society’ members, knowing that these nearly always end up being law school academicians like themselves. This was meant as a check and balance on the CSM’s ‘excessive’ autonomy. They also proposed ‘forbidding the nomination of Constitutional Court judges from amongst experienced politicians who have served as elected representatives in the past’ in favour of experts of ‘recognised professional reputation’ like themselves (Comisia Prezidenţiala de Analiză a Regimului Politic şi Constituţional din România 2009:64). These constitutional revisions were never implemented, because the governing coalition succeeding the PSD lacked the requisite super-majority in Parliament. The current Social Liberal Union government, wherein the PSD is the major player, is still working on yet another constitutional revision.
Parliament will ultimately decide which of the various revisionary projects to enact, but the legal professionals involved in all of the revisionary episodes documented herein have made it evident that all actors involved in the design of judiciary institutions, whether successful or not, are self-interested in self-empowerment.

Conclusions

Two of the merits of this article have been to trace the several causes of revisions of the institutional design of the judiciary over time, and to synthesise these causal factors into a coherent explanation. Given the scarcity of research in the field, this may be regarded as a significant contribution. Previous explanations of judiciary institutional change in CEE tend to attribute it to single causal factors; the research herein reported, however, has found at least three distinct factors simultaneously in play, explaining not only what motivated the push for institutional revision, but also why the revisions took just the form they did. The three factors are: (1) the external incentives of EU accession; (2) the influence of a transnational legal professional community; and (3) the dormancy of the mass of elected politicians who could very well have acted as veto players. External incentives explain well enough the general drive for judiciary revision, but explaining the template of a self-governing, autonomous Judiciary Council that was adopted both initially and finally – not only in Romania but nearly everywhere else in CEE, according to pilot research undertaken by the author – necessitated inclusion of a further causal factor, the influence of transnational elite networks, which was discovered to have reached even into the European Commission itself. Once implemented, the template constrained the options available to politicians for manipulating the terms on which they relate to the judiciary power. Those who sought to manipulate these terms nonetheless were key Cabinet members – themselves legal professionals integrated into the transnational community and committed to its templates – who sought merely to appoint judicial personnel aligned with their own political preferences.

The outcome of maximal judiciary autonomy did require the supervention of the European Commission, which behaved as if it were exercising classical accession conditionality. However, it was discovered that, lacking significant expertise in the field, the Commission was driven to interlock with the elite transnational community in question – which in turn became interlocked itself with partisan political factions on the domestic scene. This concatenation of agents adrift from their principals’ moorings constructed their own preferences as an extra-condition of accession; a gambit that might well have failed, even with a dormant Parliament, had the incumbent government’s veto not been undermined by uncertainty over the timetabling of accession – just before an election susceptible of being inflamed by the threat of delays to the accession timetable. That transnational elites should have sided with one faction on the partisan spectrum bespeaks preferences perhaps better classed as
ideological than professional or legal. Whether this is a more general phenomenon merits deeper research, and the European Commission Delegations in the several current candidates would be a good testing ground.

The role of Parliament was pivotal; its veto could easily have brought the working of all other causes to an abrupt halt. Yet the ordinary politicians who might have been expected to resist their own disempowerment were puzzlingly dormant. The limited opposition to maximal empowerment of the judiciary inside the PSD Cabinet came from bona fide members of the transnational legal community, who merely disliked their own relative disempowerment. Parliamentary dormancy stands revealed as pre-conditional to the efficacy of all other causes. Because it is ‘invisible’, however, the dormancy of veto-points has been overlooked as a cause in the standard explanations of judiciary institutional change in CEE. Some of the causes of Parliamentary dormancy have been explored herein, but it is nevertheless a question that calls for deeper inquiry.
Table 1
Composition of Judiciary Councils in selected countries (Source: European Network of Councils for the Judiciary, 2010)

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*Square brackets enclose year when founded
Round brackets enclose year of last reform
In practice the CSM is chaired by its Vice-President, an elected CSM member
Table 2  
The constitution of the CSM in Romania

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<td>Total</td>
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<td>Recruitment</td>
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<td>Judicial peers</td>
<td>Self (2 by professional assoc)</td>
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<td>Judicial peers</td>
<td>Self (2 by professional assoc)</td>
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<td>4 renewable</td>
<td>6 renewable</td>
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<td>MoJ\textsuperscript{a}</td>
<td>MoJ\textsuperscript{a}</td>
<td>CSM President [President of the Republic]\textsuperscript{c}</td>
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<td>MoJ</td>
<td>CSM Secretariat</td>
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\(\text{aMinister of Justice presides appointment meetings but has no voting right}\)
\(\text{bSupreme Court Presidents presides disciplinary meetings}\)
\(\text{cThe Romanian President chairs the meetings he chooses to attend}\)
\(\text{dOccupied by High Dignitaries on par with the State’s highest officials (viz. President of the Republic, Prime Minister, General Prosecutor)}\)

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<td>Who nominates</td>
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<td>MoJ (CSM)(^d)</td>
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\(^a\)Of Romania  
\(^b\)In the case of High Prosecutors, the MoJ nominates with the advice (but not necessarily consent) of the CSM  
\(^c\)Appointed by the CSM since 2004  
\(^d\)CSM drafts and administers the budget for itself and the Judicial Training Academy. MoJ / SCt drafts and administers the budget for all other purposes
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