SPPS
Edited by
Andreas Umland
Soviet and Post-Soviet Politics and Society
Vol. 208

Peter H. Solomon Jr., Kaja Gadowska (Eds.)

Legal Change in Post-Communist States

Progress, Reversions, Explanations

ibidem

Soviet and Post-Soviet Politics and Society (SPPS) Vol. 208

ISSN 1614-3515

Soviet and Post-Soviet Politics and Society (SPPS)

ISSN 1614-3515

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LEGAL CHANGE IN POST-COMMUNIST STATES

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ibidem Verlag

Bibliografische Information der Deutschen Nationalbibliothek
Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

Bibliographic information published by the Deutsche Nationalbibliothek
Die Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available in the Internet at http://dnb.d-nb.de.

Cover picture: ID 39446908 © Vecarla | Dreamstime.com

ISBN-13: 978-3-8382-7312-9

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Acknowledgements

This book began its life as a special issue of the journal *Communist and Post-Communist Studies,* designed and proposed by us, its coeditors Peter Solomon and Kaja Gadowska. In bringing this publication to fruition, we benefited immeasurably from professional, devoted and even inspired help of the journal's managing editor Lucy Kerner. We are pleased to acknowledge her role in nurturing and improving the various contributions. We are also grateful to the editors of the journal for granting permission for the publication of the issue's contents as a book.

The idea for the book came from Andreas Umland, who proposed publishing it in the distinguished series he edits at ***ibidem***-Verlag, "Soviet and Post-Soviet Politics and Society". The book's editors and contributors readily accepted the proposal, agreeing that the subject of their special issue—legal change in post- communist states-- deserved the added visibility and coherence that the book form would provide.

Working with the publisher ***ibidem*** has also been a very positive experience, and we are grateful to its editor Valerie Lange for her role in improving individual chapters and seeing to the publication and marketing of the book.

Legal Change in Post-Communist States: Contradictions and Explanations

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Reformers had high hopes that the end of communism in Eastern Europe and the former Soviet Union would lead to significant improvements in legal institutions and the role of law in public administration. However, the cumulative experience of 25 years of legal change since communism has been mixed, marked by achievements and failures, advances and moves backward. This volume documents the nuances of this process and starts the process of explaining them. This introductory essay draws on the findings of the articles in this issue to explore the impact of three potential explanatory factors: regime type, international influences, and legal (or political) culture. Regime type matters, but allows for considerable variation within authoritarian and democratic states alike and the possibility of reversals. The influence of international organizations (like the European Union) is also far from predictable, especially once states have joined the organization. Finally, legal cultures and political traditions play a large role in explaining developments in individual countries, but there is nothing inevitable about their impact.

Keywords: Post-communist legal change, Legal reform, Authoritarian law, Democracy and judicial power, The European Union and legal reform, Legal culture and tradition

In the quarter century since the collapse of communist regimes in Eastern Europe and the USSR almost every country in the region has tried to reform its legal institutions and enhance the role of law in public administration. According to conventional wisdom, both democratization and the creation of market economies required the creation of law-based states (or *Rechtsstaat*), which assured that government officials (including politicians) would be subject to le-

gal restraints, and that citizens could defend their rights and interests in impartial and effective courts (Linz and Stepan, 1996). Accordingly, most countries did make efforts to produce independent and empowered courts and police that served society (Seibert-Fohr, 2012; Kuhn, 2011; Solomon and Foglesong, 2000); and struggled to make public administration more rule-based and less corrupt (Inkina, 2018; Dmitrova, 2009; Meyer-Sahling, 2009; Gadowska, 2018). Before long it became clear that the goals of reformers were fulfilled only in part, in some countries more, others less, and that some achievements had proven short-lived and subject to reversal (Solomon, 2007, 2015b; Hendley, 2017). Differences emerged between authoritarian regimes in the post-Soviet space and democratic ones in central Europe that were part of the European Union. But events of recent years have shown that empowered and independent judiciaries could be threatened even in the countries that had apparently made successful legal transitions—Hungary and Poland, for example (Bugaric, 2015; Bugaric and Ginsburg, 2016; von Bogdandy and Sonnevend, 2015; Scheppele, 2018).

The cumulative experience of post-communist legal change within Eastern Europe has turned out to be mixed, marked by achievements and failures, advances and moves backward. The challenge to be addressed in this special issue of Communist and Post-Communist Studies is determining and documenting the nuances of these developments and starting to explain them. The contributors to this issue are all scholars who pursue socio-legal research on Eastern European countries—political scientists and sociologists—who are also members of a new collaborative research network of scholars who share an interest in this subject. We, the co-editors, should stress that the papers are not the product of a conference or directed inquiry but represent the ongoing research of the several contributors. We are pleased that the topics cohere, and that the sum of them will likely prove greater than their parts.

The paper topics range across the region and focus on both the former Soviet Union and Eastern Europe proper. The topics fall nicely into two groups—papers that deal with legal institutions, es-

pecially courts but also police; and papers that address law and legal accountability in public administration, including efforts to fight corruption and complaint mechanisms. The extent to which legal reform has improved the accountability of government officials is one broad concern that unites all the papers, including those on legal institutions. Two of these papers deal at least in part with administrative justice (holding individual officials to account) and other two with the accountability of police and the role of supranational tribunals in holding domestic officials to account.

The authors of the articles share a concern with the role and impact on their findings of at least three potential explanatory factors: regime type, international influences, and legal (or political) culture. Most observers assume that the achievement of independent and empowered courts is easier in democratic than in authoritarian regimes. Probably so, but it may well be that democratic government is a necessary but insufficient condition. The impact of political competition also turns out to be variable (Finkel, 2008; Popova, 2012). Just what can be achieved within authoritarian states is another open question (Ginsburg and Moustafa, 2008; Solomon, 2015a). International influence, especially through the processes of linkage and leverage may make a difference (Levitsky and Way, 2006). A prime example is the impact of the European Union and its demands, whether addressed to would-be members or actual ones. It turns out, however, that there have been limits to the impact of the EU, whether in the shaping of legal institutions or the struggle with corruption (Kochenov, 2008; Gadowska, 2010; Boerzel et al., 2012; European Commission, 2016). Finally, as one country or another moves backward and counter-reforms prevail, observers increasingly turn to cultural explanations (Krygier, 1999; Kurkchiyan, 2003; Bobek, 2008). One country lacks a legal tradition or a strong role for law in public life, perhaps because informal relations trump formal institutions; another country has a long heritage of illiberal impulses, which facilitate attempts by leaders to curtail legal accountability.

In the first article Mihaela Serban documents the extraordinary growth of the use of courts in post-communist Eastern Europe,

for both litigating conflicts and pursuing rights claims, what she calls a process of legal mobilization. She explores the sources of this mobilization, including the opportunities provided by new courts on the domestic and international levels, and goes on to probe its consequences. While paying special attention to developments in Romania and with the European Court of Human Rights, she demonstrates that the expanded use of the law has involved all the countries of the region. Finally, she argues that the explosion in litigation and the version of an adversarial culture that it represented may temper the effects of the rejection of liberalism that has affected the seemingly most developed democracies, Hungary and Poland, which has resulted in the subjugation of their judiciaries including their constitutional courts.

In their contribution Kriszta Kovács and Kim Lane Scheppele analyze the process and consequences of the illiberal turn for the courts of Hungary and Poland. They start by analyzing and comparing the legal mechanisms used to subjugate the judiciary (including the constitutional courts). These turn out to have been tools that are available to many autocrats. But what distinguishes the situation in Hungary and Poland is the presence of an external check in the form of the European Union. Sadly, the EU failed to take the appropriate measures, and in the process signaled that it would tolerate the changes. In so doing, it conveyed a message that there is such a thing as "autocratic constitutionalism", which it would not oppose.

The terms "autocratic" or "authoritarian" constitutionalism may sound ominous when used to characterize developments within the context of democracies like Hungary and Poland, but they carry a more positive valence when characterizing a constitutional court within an authentic authoritarian state. Alexei Trochev and Peter H. Solomon Jr. see the Russian Constitutional court operating in a dual state, where for some matters the needs of the political leaders have priority and on other issues the Court is free to exercise its discretion. Both the Court and its Chairman Valerii Zorkin have succeeded in making the right choices and following a pragmatic approach. The authors demonstrate that this pattern has

been in place for a long time and that loyalty of judges has become the norm where expected. Moreover, by asserting Russia's autonomy from the ECHR in Strasbourg, Zorkin has made the Court even more useful to the regime. At the same time, in the past decade the Court has decided many cases on the merits, gained more respect, and does much better than before in getting its decisions implemented. In short, by adapting to the needs of leaders the Court has gained autonomy and power on some matters.

Not only courts but also police in Russia have had to adjust to changing political priorities and dispositions. Olga Semukhina uses interviews with police officials to track the ups and downs in their self-conception and confidence, which reflected their attitudes toward different rounds of reform. In the 1990s organizational changes, decreased funding, corruption, rising crime rates, and a new emphasis on service led to demoralization. But in the 2000s the situation gradually changed, first with new funding, then with a further round of reforms, which did not achieve most of its goals but did foster a return to paternalistic values. The revived mission of protecting society on behalf of the state gave police officers a renewed sense of value and self-respect. For the short run at least, continuity trumped change.

To what extent prosecutors and judges succeed in holding politicians to legal standards of conduct represents another important aspect of the post-communist legal order. In their contribution Maria Popova and Vincent Post examine the prosecution of government ministers across Eastern Europe, drawing on a data-based that they constructed. This enabled them to uncover significant variations in both levels of corruption and rates of conviction. However, explaining these variations did not prove easy, as none of the likely factors had had a consistent effect—not EU conditionality or membership, party politics, or the existence of specialized anticorruption prosecution or a relatively independent judiciary.

Holding leaders to account is also a concern in the post-Soviet world, and in both Russia and Ukraine special anticorruption programs are a staple. The Marina Zaloznaya, William B. Reisinger and Vicki Hesli Claypool's article uses interviews with anti-corruption

practitioners in these countries to ascertain the role of the participation of civil society members. While conventional wisdom assumes that this involvement is positive, the authors discovered that this need not be the case. Their findings about Russia and Ukraine suggest two models of civic engagement in the struggle against corruption that produce negative outcomes—what they call false collaboration and a non-collaborative presence.

At least in democracies the role of law in public administration should extend beyond accountability of leaders to the mode of operation of the bureaucracy itself. Weberian standards of recruitment and promotion of officials, that is, the manifestations of legal rationality, are near universal goals for post-communist efforts to create politically neutral civil services. In her article Kaja Gadowska examines the theory and practice of the filling of key positions in the tax administration of Poland. She chronicles an evolving process that starts with promising legal regulations, to be sure with loopholes that politicians in power increasingly utilized, and culminates in new laws that effectively undermine competitive and non-partisan recruitment. In so doing, she illuminates another domain (besides judicial power) where political considerations trump legal principles in the post-communist world, even in democracies.

Ideally, law and legal institutions not only hold leaders accountable but also provide ways that members of the public can find redress for illegal actions on the part of government officials. The availability of courts or quasi-judicial tribunals is the norm in Western democracies and not surprisingly the development or expansion of administrative justice became central to judicial reform in many post-communist countries, including the Russian Federation. But, according to Elena Bogdanova's research, Russia continues to rely on a variety of alternatives to courts, especially mechanisms of complaint. In the Soviet period, when the possibilities of challenging official actions in court were limited, complaints (for example to party bodies like the Central Committee) were the primary means for obtaining redress and holding officials accounta-

ble. In post-Soviet Russia complaints to the President and other centers of power remain commonplace, the establishment of administrative justice notwithstanding.

What insights come to light from a reading of these eight articles as a group? To begin, these studies confirm the generalization that states embarking on a transition from authoritarian (and communist) regimes have not had an easy time creating modern legal order (*Rechtsstaat* or rule of law) and with it courts that are autonomous and powerful. But the papers do more than this. They also shed light on the influence of the three potential explanatory variables that we identified earlier—regime type, international influences, and culture.

The relevance of regime type for the state of law and courts is self-evident, but the relationship is not a simple one. Many of the countries of the former Soviet Union sooner or later ended up with authoritarian states, and the nature of their law and legal institutions reflects this. In the case of the Russian Federation a constitutional court was established at a time of democratic expectations. That it managed to adjust to an increasingly authoritarian context, and find a pragmatic approach that enabled it to satisfy political leaders while maintaining integrity and self-respect is remarkable. It may supply a model for one variety of authoritarian constitutionalism.

At the same time, some countries of the former Soviet Bloc did succeed in creating democracies, at least for a generation, and most of them also became members of the European Union. While these facts may have helped the role of law and legal institutions in the short run, they proved insufficient to prevent a serious backsliding to the point where courts in both Hungary and Poland were no longer independent and their formerly progressive constitutional courts lost much of their power (through loss of jurisdiction and discretion). At the same time, at least in Poland, efforts to entrench recruitment of government officials handling taxes on a non-partisan basis also failed as politicians manipulated loopholes and gained the confidence to restore a system of patronage.

The role of international influences in promoting law and legal institutions also turns out to be variable. The European Union did exercise influence over legislation in some countries during the accession phase, but evidently its influence on member states has been less predictable. The growth of illiberalism in some countries and the failure of the EU to punish countries that departed from what were previously thought to be pan-European norms left some member states without adequate legal institutions. Few observers had anticipated the emergence of authoritarian leaders through elections and their aspirations to cripple the role of courts as alternative centers of power. Perhaps, the actions of transnational courts like the European Court of Human Rights will continue to temper the sharp edge of the domestic trampling on rights, but it is unlikely that such bodies can compel national leaders to change their ways.

When all is said and done, cultures (legal and political) and traditions end up playing a large role in explaining the limited development of law and legal institutions in the post-communist world. Russia has a long tradition of law serving the interests of the state more than the individual or society, and this was reflected in not only the pragmatism of the Constitutional Court but also the evolution of policing and its reform. Moreover, many members of the public feel more comfortable complaining to state leaders about misconduct of lower officials than to the courts. Hungary and Poland had multiple periods of authoritarian rule where the role of courts was limited. Of course, these countries and others also had more positive forerunners, and there was nothing inevitable about the revival of a one tradition or another. Contemporary actors draw on and foster traditions to suit their purposes, but it is helpful when useful ones are available.

Finally, the failure of anti-corruption activities in most countries of the former communist world may also be overdetermined. With some exceptions authoritarian states of today feature corruption; international influences rarely reduce it; and the political cultures even of new democracies may support it. The studies of anti-

corruption activities in this issue say more about the ways politicians can manipulate the corruption fight than documenting (or explaining) its impact.

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I. Legal Institutions

Stemming the Tide of Illiberalism? Legal Mobilization and Adversarial Legalism in Central and Eastern Europe

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This paper explores the rise of rights-based regulation through litigation as a distinctive feature of legal culture in Central and Eastern Europe post-1989. This type of adversarial legalism was born at the intersection of post-communist, European integration, and neoliberal discourses, and is characterized by legal mobilization at national and supra-national levels, selective adaptation of adversarial mechanisms, and the growth of rights consciousness. The paper distinguishes Eastern European developments from both American and Western European types of adversarial legalism, assesses the first quarter century of post-communism and represents a first step towards constructing a genealogy of the region's legal culture post-1989.

Keywords: Legal mobilization, Eastern Europe, Public interest law, Rights

1. Introduction

A populist billionaire with authoritarian tendencies is the current prime minister of the Czech Republic, Poland's Law and Justice Party has been steadily chipping away at the rule of law and human rights since 2015, and Hungary has become the poster child of illiberal democracy under Prime Minister Viktor Orban. In both Poland and Hungary, the ruling parties have targeted the judiciary at all levels. In Poland, the battle over controlling the membership, internal functioning, and powers of the Constitutional Tribunal has been ongoing since 2015 (Human Rights Watch, 2017), while in Hungary the government essentially gutted the Constitutional Court's pow-

ers with the 2012 Constitution and the 2013 amendment. Both Poland and Hungary have also attacked civil society and human rights, and have refused to comply with the EU requests to restore the rule of law. Both countries stand now as warnings of emerging global authoritarianisms.

And yet not all is lost. I argue in this paper that the groundwork for countering authoritarianism has been laid out since 1989 and the outcomes, specifically a growth in legal mobilization and adversarial legalism, have been valuable for fighting current rule of law and human rights battles. The explosion of litigation in Central and Eastern Europe (CEE) post-1989 is a clear indicator and striking development, even when considering the low 1989 baseline. Since its establishment in 1959, for example, more than half of the judgments delivered by the European Court of Human Rights (ECtHR) concerned only six states: Turkey, Italy, the Russian Federation, Romania, Poland, and Ukraine, four of them from Eastern Europe (European Court of Human Rights Overview 1959-2016, 2017). Their litigiousness stands out even more considering that they became members of the European Convention on Human Rights (ECHR) only after the fall of the Berlin Wall. The Court, in return, has both opened its doors more widely to claimants (in 1994) and has become increasingly more involved in policy-making for these countries and the region at large,[1] most recently through the creation of pilot judgments (addressing repetitive cases arising from structural problems at the national level). Across the board, we see citizens who are willing to defend their rights and challenge their states, and courts, whether domestic (national) or supranational (at the European level), eager and willing to take on the challenge.

This litigiousness is indicative of broader trends in the legal culture(s) of the newest members of the European Union, one that is distinctive compared to Western European trends and European legal mobilization (Conant et al., 2017). This rise in litigation is also visible at national levels and contributes to a significantly more adversarial legal culture compared to pre1989. Courts and litigation have become central to policy-making in CEE countries in ways

1 "Region" refers to countries of Central and Eastern Europe.

that are reminiscent of Kagan's argument about adversarial legalism—regulation through law and litigation in the US (Kagan, 2001). Nonetheless, CEE trends are distinct from both the US and Western European countries.

If American adversarial legalism is driven by commerce, individualism, egalitarianism and anti-statism (Kagan, 2001), and Western European developments are driven endogenously by political fragmentation and neoliberal deregulation and reregulation (Kelemen, 2011), the adversarial legal culture in CEE is fueled by the massive expansion of its legal mobilization infrastructure over the past twenty-five years in a post-communist neoliberal context. The result is a specific type of adversarial legal culture and regulation through litigation characterized by active and politicized courts (in particular constitutional courts), mobilization of supranational courts (such as the ECtHR), selective adaptation of adversarial mechanisms (such as public interest law litigation), and the growth of litigation and rights consciousness at domestic levels. These key features have risen in a discursive terrain dominated by neoliberal, post-communist, and European integration discourses, which partially converge (primarily in a rights-based discourse), as well as backlash to them, evident most recently in post-recession illiberal developments in Poland and Hungary.

I focus here primarily on CEE countries that are also EU members, as well as signatories of the ECHR: Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Romania, Slovenia and Slovakia. I chose countries that belong to different accession waves, from the earliest—Hungary, Poland, Czech Republic, Slovakia, Slovenia in 2004, to the latest—Romania, Bulgaria in 2007, and Croatia in 2013. There are significant differences among CEE countries both pre-1989 and since then, but for the purposes of this paper I consider the commonalities are stronger than the differences. The paper takes 1989 as its starting point. I do not aim to compare specific countries here, but rather to identify and explore common patterns at a regional level (individual countries therefore serve here as illustrations of broader developments).

The paper uses a legal mobilization framework to introduce the emerging adversarial legal culture in the region and the factors that contributed to it. The next section presents some key indicators and causes of this adversarial legalism, while the third section discusses building the legal mobilization infrastructure over the past quarter century, focusing on discourses, resources, institutions, expertise, and public interest litigation. The last two sections explore some consequences, primarily the rise of rights-based regulation through litigation at the national and supranational levels. I conclude by touching upon the recent anti-judicial and anti-democratic backlash in some of the CEE countries.

2. Legal mobilization in Central and Eastern Europe

Almost two decades ago Charles Epp, focusing on common law countries, argued that their recent "rights revolutions" were less a matter of judicial activism and more of broadened access to justice and increasing legal mobilization, in particular highlighting the role and importance of material support and resources. Legal mobilization refers to the process by which individuals claim their rights and pursue those claims in court (Epp, 1998). Since then, legal mobilization theory, drawing from law and society, political science, and sociology, has both de-emphasized litigation and underscored the importance of other factors, such as material, legal, and political resources, promises of rights and rights consciousness, support networks, and broader politics and opportunities for mobilizing law through litigation and otherwise, towards eventually achieving social change (McCann, 1994; Cichowski, 2016; Vanhala, 2012).

From this broadly defined legal mobilization perspective, the legal opportunity structure (LOS) approach emphasizes the extent to which legal systems are open and accessible for both individual and collective actors along various dimensions, such as procedural variables (for example, standing, costs, time limits), material resources, legal resources and existing legal stock, judicial receptivity, cultural frames, presence of allies or counter-mobilizing forces

(Vanhala, 2012). Obstacles include in particular blocking or limiting access to justice (for example, funding)—what can be litigated, by whom, where, when, and how.

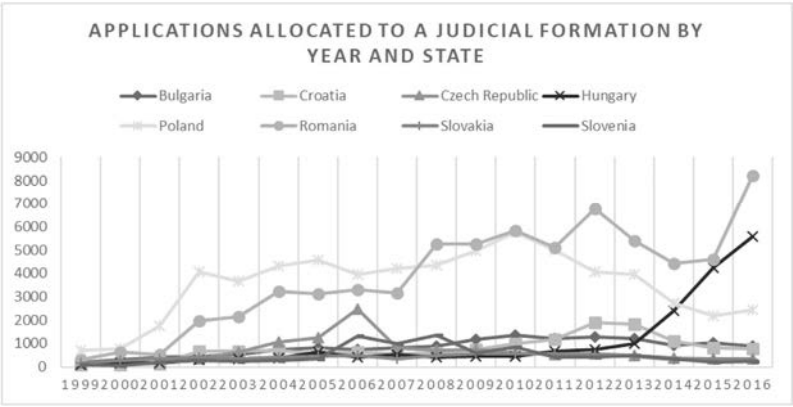
The legal mobilization theory and legal opportunity structure approach help frame CEE developments by identifying key factors that contribute to its specific adversarial legal culture. There are four factors that shape the legal opportunity structure in the region studied: political and ideological changes, resources and expertise, a new institutional landscape, and a litigation-friendly environment. Political and ideological changes include four distinct types and phases: the fall of communism, the European Union accession process, the EU integration (positives and disenchantment), and the post-recession fragmentation of the region and shifts to illiberalism. Second, the creation of a new institutional landscape includes not only the establishment of constitutional courts, but also of other types of institutions that play a role in legal mobilization, from Ombudsmen to anti-corruption agencies (I am setting aside for now their effectiveness or capture). Third, there was massive outpouring of resources from external sources, both the US and the EU, from funding to expertise. The fourth and final key factor is the creation of an overall litigation-favorable environment, consisting primarily in expanding access to justice rules and resources at all levels, judicial attitudes (for example, how constitutional judges understand their role), explicit expectations that higher courts play a policy-making role, and the numbers and roles of legal experts and support networks.

3. Indicators of legal mobilization and adversarial legalism in the region

Clear signs of mobilization and adversarial legalism in the countries studied are high rates of litigation at supranational and national levels. Low levels of trust in domestic courts compared to Western European countries partially explain the turn to supranational courts (although CEE citizens truly mobilize at both domestic and supranational levels). Despite variations both on north-south

and east-west axes among European countries, three-quarters of Western countries trust their justice systems, with Finland and Denmark as high as 85-percent. The exceptions are Italy, Spain, Cyprus, and Portugal, but even there, Italy with 33-percent is still more trustful than the last four countries, all from CEE. By contrast, less than half of the population in all CEE countries studied here trust their courts, with Slovakia and Slovenia as low as 25 and 24-percent, respectively (Flash Eurobarometer, 2013). The distrust of national courts is at the heart of the specifically post-communist context across the region. While there are differences among these countries, there are also some common trends: state capture or attempted capture of judiciaries (for example, Hungary), corruption (for example, Romania and Bulgaria), path dependency at the institutional level, and questions about judicial independence have all fueled the turn to the supranational. CEE countries have thus flooded the ECtHR with applications, entrusting it to regulate key areas where national courts failed (See Chart 1).

Chart 1. Claims by country and year.

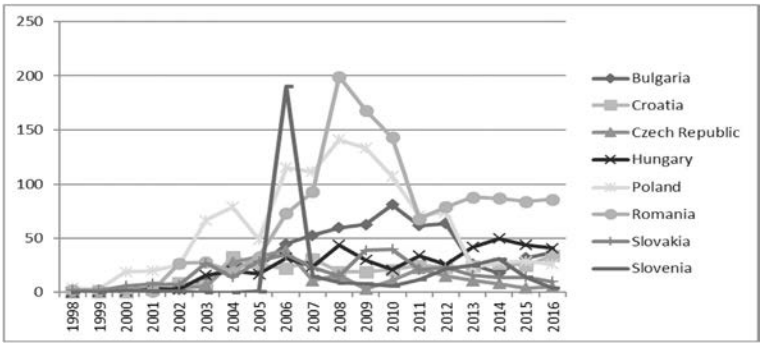


Sources: Data compiled from ECtHR Annual Reports.

The years 2010–2013 recorded the highest number of applications before the ECtHR in general (65,800 in 2013), but Croatia is the only country here that mirrors that broader trend. Only Bulgaria and Slovakia overall show a somewhat even path, while the spike in

Hungary's numbers is sharp and correlated with its turn towards authoritarianism. The number of decisions over time tell a more interesting story, as the number of decisions per country has been levelling off as the ECtHR increased using pilot judgments (See Chart 2):

Chart 2. Number of judgments per country, 1998–2016.



Sources: Data compiled from ECtHR Country Statistics and Annual Reports.

Romania and Poland have the highest number of applications and judgments overall, not surprisingly given their populations (although Poland is twice the size of Romania). The top areas of litigation before the ECtHR for the eight countries include liberty and security, length of proceedings, effective remedy, privacy, and, for Romania only, property.

At the national level, there is significant variation among constitutional courts from a caseload perspective, and there is some correlation between the moment a country joined the EU and a decrease in its constitutional court's caseload. The Romanian Constitutional Court, for example, has been increasingly active. At its lowest, the Court issued 49 decisions in its first year (1992), and at its highest 1,751, a year before joining the European Union. Since its inception, the Court issued 18,071 decisions, finding a constitutional violation in 631 cases. The overall number of petitions before the Court is 40,450, and 97percent of them were raised in concrete review (Romanian Constitutional Court, 2017). The Court's load

dropped significantly after 2011, with changes in procedure allowing for the continuation of regular court proceedings while the constitutional complaint was before the Court.

From a caseload perspective and comparatively speaking, the Romanian Court has been very busy. Only the original Hungarian Court comes close to it (remember that Hungary has half the population of Romania). The Bulgarian Court, for example, averages only about ten decisions per year, and was particularly active in the 1990s in the area of privatization and especially restitution of agricultural land and urban property (Smilov, 2016). Examining the Hungarian Constitutional Court's caseload, we see a steady increase in the number of decisions (up to 631 in 2012), which is mirrored by a steady increase in the number of applications, before the 2012 restrictions on the Court's jurisdiction and powers (Venice Commission, 2013). Since 2012, the number of decisions has been falling to 258 decisions by 2016 (Hungarian Constitutional Court statistics, 2016; Solyom, 1994).

The trend of steep rises followed by a slight decline is also indicated by the number of new cases brought before constitutional courts. New cases before the Slovenian Constitutional Court, for example, have seen a steady increase after the country joined the EU, from 1271 new cases in 2004 to 1877 in 2005, 3053 in 2006, and 4354 in 2007 (Ribicic, 2008), followed by a decrease, but still showing a large number of complaints: 1324 in 2016 (Slovenian Constitutional Court, 2016). Slovenia is a country of 2 million people, so ten times smaller than Romania and five times smaller than Hungary.

Increases in applications and decisions are only one indicator of legal mobilization and adversarial legalism. Similar trends can be observed at national levels in terms of increased funding for legal services, litigation rates in non-criminal cases, and expanding numbers of lawyers, judges and mediators. Surprisingly perhaps, Romania is the most litigious EU country for civil and commercial cases, with almost 7 cases per 100 inhabitants and a significant jump from 2010 (5 cases per 100 inhabitants) to 2014. Not far behind are the Czech Republic (third most litigious), Croatia, and Poland—sixth and seventh, respectively (EU Justice Scoreboard, 2016). The

clearance rates, moreover, are quite good across the board for non-criminal cases for most of these countries. Alternative dispute resolution mechanisms exist in all of these countries, and Hungary, Slovenia, Croatia, and Romania promote their use well above the European average.

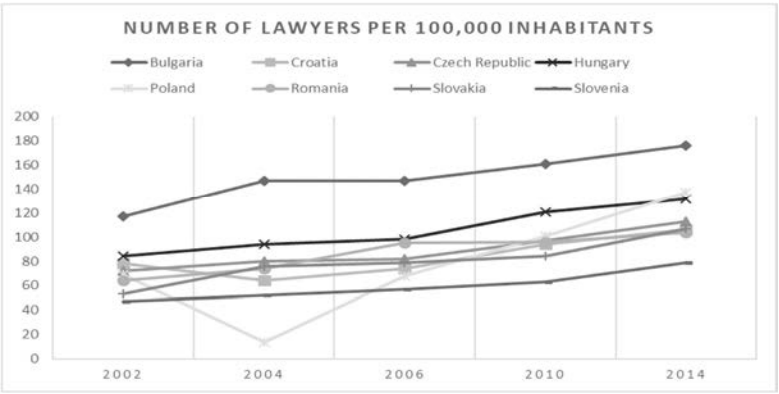
While the budget dedicated to courts (per inhabitant) is not comparable to Western European countries, it has been slowly going up. Poland takes the lead here among the countries studied, with almost €60/inhabitant, while Romania is last, at half the amount. Luxembourg, for example, has the highest amount, at almost €180/inhabitant (EU Justice Scoreboard, 2016). As a percentage of the GDP, however, CEE countries have the highest rates on the continent, with Bulgaria first at almost 0.7-percent.

Other indicators of increased mobilization and litigation include increases in the number of lawyers, judges, and courts. In 1990, for example, the lower courts system in Poland included forty-four district and 282 lower level courts (Curtis, Library of Congress, 1994, p.196). By 2002, there were 705 courts, and by 2010, 827 courts (court reorganization can result in lower numbers, of course). With the exception of Romania, all of the CEE countries are above the EU average for number of judges per 100,000 inhabitants, with Slovenia leading by far at 47 judges per 100,000 inhabitants (compared to the EU average, at 21 judges). The number of judges in Romania is at the EU average as of 2014, having tripled from 1513 in 1990 to 4310 in 2012. Yet despite this substantial increase for a country whose population has slightly decreased since 1990, there is a constant backlog crisis in Romanian courts: in 2012, for example, there was a backlog of approximately 1 million case files. It took a year just to get a court date … (Neacşu, 2013).

Interestingly, while the number of lawyers has also been going up steadily since 1990, all of the CEE countries are below the European average (166 lawyers per 100,000 inhabitants), with Bulgaria the closest at about 165 lawyers per 100,000 inhabitants. In absolute numbers, Poland stands out again, as it saw an increase from 29,469

lawyers in 2002 to 44,082 lawyers by 2010 (CEPEJ, 2008–2014) (See Chart 3).[2]

Chart 3. Increases in the numbers of lawyers per 100,000 inhabitants.



Source: Data compiled from CEPEJ, 2004–2016.

Other indicators of regulation through litigation, such as access to justice policies, procedures and institutions, including legal aid, litigation costs, litigation delays, enforcement of decisions, and harmonization of civil procedure (for example, the new code of civil procedure in Romania), show unmistakable upward trends. The litigation-favorable environment includes, inter alia, simplified procedures for small civil disputes (CEPEJ, 2014), and legal aid for criminal and non-criminal matters. In Romania, Slovakia, and the Czech Republic, for example, electronic submission of claims is permitted in all courts, while Poland, Hungary, and Slovenia allow for electronic submissions in about half the courts, and Bulgaria and Croatia in none (EU Justice Scoreboard, 2016).

Looking specifically at legal aid, while the CEE countries trail by far the rest of the continent in terms of resources, they all have a legal aid system in place. Led or initiated by the Open Society Insti-

2 The increase in Poland is largely due to the partial deregulation of the profession (CEPEJ, 2016). The increases in the numbers of lawyers generally do not necessarily reflect access to legal services.

tute (OSI), the national Helsinki Committees, and the Public Interest Law Initiative (PIL.net) over the years, legal aid discussions have been framed within a broader access to justice effort. In Bulgaria, for example, the Bulgarian Helsinki Committee and OSI documented for years the shortcomings of the justice system, which led to the Legal Aid Act of 2006, steady increases in funding and in the numbers of cases benefitting from legal aid—primarily criminal law (Cape and Namoradze, 2012). Croatia adopted a Free Legal Aid Act in 2009, Poland the Act on Free Legal Assistance and Legal Education in 2015, but Hungary still does not have a unified legal aid system. Less friendly measures are that all of these countries require court fees to start a non-criminal proceeding in a court of general jurisdiction, that lawyers' fees are freely negotiated (although there are differences in other respect), and that legal aid services are not necessarily fully functional.

4. Building the legal mobilization infrastructure in CEE

The emergence of adversarial legalism in CEE is a result of both endogenous and exogenous factors. The specificity of the region emerges from the juxtaposition (and partial success) of a neoliberal discourse in a post-communist context dominated by the European Union and its multidimensional system of dependence and disciplinary mechanisms (Böröcz, 2001). The ideal-type neoliberal model stresses the supremacy of the market logic and the rise of the disciplinary market-based state (Jessop, 2002). The neoliberal ideology, while dominant, has both competed with and taken advantage of other ideological discourses, such as the immediate post-1989 "return to normalcy" and "restoration" discourses, and more recently anti-globalization and anti-EU sentiments. Neoliberal policies supported unmaking state socialism, including reversing communist nationalizations and expropriations, which in turn prompted significant litigation. Civil society, the site of much rights-based resistance, has also been remade in a neoliberal image. Civil society in CEE post-1989 struggled initially with a legacy of