2 Defining the rule of law

Minimalist definitions of the rule of law distinguish between thin and thick, formal or substantive concepts of the rule of law. Thin or formal conceptions follow a narrow understanding of the rule of law. In his classic work The Road to Serfdom, Hayek argues that rule of law exists when the “government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge” (Hayek 1944:72).

Which criteria should be considered when assessing the strength of the rule of law? Scholars have expressed their skepticism toward the construction of an “ideal” model of rule of law by arguing that:

“The rule of law is unattainable. Communities never achieve it completely. It requires, among other things, that government officials conform to the law. But they may not do so, and presumably there is no large community in which they always do so. To the extent that officials do not conform to the law, the community fails to attain the ideal of the rule of law. Perhaps no community has even got very close to the ideal” (Endicott 1999:1).

Drawing on the democratization literature, I consider that in the transition period, minimal conditions of the rule of law are fulfilled (Merkel et al. 2003; Gunther et al. 1995; O’Donnell and Schmitter 1986). Such conditions include the process of constitution-building, the stipulation of the rule of law as a constitutional principle or, as Przeworski puts it, “[a]lmost all normative desirable aspects of political life [...] representation, accountability, equality, participation, dignity, rationality, security, freedom - the list goes on” (Przeworski et al. 2000:14; Przeworski 1992:122; Lauth 2001). Scholars argue that the beginning of the transition phase plays a central role in laying the foundation for democratic consolidation, since transitions create “fairly durable legacies that affect the post transitional regime and politics” (Munck and Leff 1997:343). Furthermore, since both justice and democracy mean “different things to different people” (Shapiro 1999:17), it remains a challenge to determine exactly which elements define which phase. While some scholars argue that the consolidation phase starts when
“a democratic transition has been brought to completion” (Linz and Stepan 2010:3), others consider democracy to be less visible and comprised of “multi-layered” phases (Magen and Morlino 2009:13).

For post-communist countries it remains difficult to trace a clear start and end between the transition and consolidation phases. This is the result of an intertwined mixture of blurry processes which have dominated the democratization process and have not allowed for a clean break with the communist past or the removal of the old rationale of the communist state apparatus. Concepts and democracy related “adjectives” describing the democratization processes in former communist systems have exploded in the literature (Collier and Levitsky 1997). Oft-cited concepts intended to illuminate the shadows in the democratization literature carry names such as “defect” or “illiberal democracies” (Merkel and Croissant 2000:4; Bendel et al. 2002; Croissant and Thiery 2001). As Di Palma states with regard to Eastern Europe’s democratization process, the picture should not be viewed in such a negative light: “[m]ost analyses of post-communist Eastern Europe have dwelt more on doubts and fears than on the grounds for hope. It may be useful, therefore, to balance the picture by taking a second and more hopeful look” (Di Palma 1991:3).

Although rule of law in the transition must fulfill minimal democratic conditions, concepts of democratic consolidation have focused on capturing a more complex interconnection between several democratic dimensions. For instance, Merkel’s oft-cited model of democratic consolidation, which draws on Juan Linz, encompasses four dimensions of consolidation (Merkel 1999; 2007; 2008):

- Institutional Consolidation
- Representative Consolidation
- Behavioral Consolidation
- Consolidation of Civic Culture.

While scholars further developed this model (Beichelt 2002; Puhle 2005), there is a lack of specific indicators addressing specific institutional developments in Eastern Europe. The fulfillment of the minimum democracy conditions, for instance, can take place at different points in time (e.g. institutional creation could occur before free elections) (Lauth et al. 2000).

Drawing on O’Donnell and Schmitter, the transition period begins when “authoritarian incumbents, for whatever reason, begin to modify their own rules in the direction of providing more secure guarantees for the rights of individuals and groups” (O’Donnell and Schmitter 1989:6). Scholars argue that transition is complete “once free elections, universal suffrage and basic liberties are formally secured, that is an anchored constitution, and an elected, unconstrained govern-
ment is in office” (Plasser et al. 1998:8; Dahl 1989). In the conceptualization of democratic consolidation, consolidation is considered a synonym for the firm establishment and stability of the institutional setting (Huntington 1984; Merkel et al. 2003; Di Palma 1990; Schedler 1998; 2010). Further, a consolidated democracy should “safeguard democratic institutions under conditions of democratic competition and thus reduce insecurity” (Plasser et al. 1998:9). In accordance with scholarship that conceptualizes the democratic consolidation as a continuous development, this study explores the consolidation process as a “graded phenomenon” (Teorell 2010:31), which starts only after a second round of “free” elections (Beichelt 2002:187).

Institutional insecurity remains one of the constant features of the transition phase due to a multitude of factors, such as shifts in power and institutional change. In contrast, the consolidation phase is characterized by the establishment of firm institutional workings. According to Colomer, veto players are inclined to maximize their profits in times of insecurity, while showing little respect for the rule of law:

“political institutions--electoral systems, constitutional provisions governing relations between the legislative and executive branches, and degrees of decentralization--often get chosen more because of calculations made during the process of change in a given country than because certain versions of these institutions are somehow uniquely appropriate to the economic structure, social patterns, or political tastes of that country and its citizens” (Colomer 1995:74, own emphasis).

Particularly in post-communist societies, the process of maximization is also reflected in constitution-building: “[g]iven the power prerogative of the communist parties, […] it comes as no surprise that all post-communist constitutions unequivocally take precautions against any kind of privileged access of any group” (Elster et al. 1998:93). Further, the post-communist transitions in Eastern Europe have been dominated by the influence of external models of constitutions and foreign institutional settings. Hence it remains essential to test the institutional framework during the transition period in order to identify the degree to which the adopted frameworks are reflected in the political reality. Rose-Ackerman et al. stress that “new institutions may be designed to be democratic – but they are untested and there is no assurance that institutions imported from abroad will work in a new context” (Rose-Ackerman et al. 1998:45).

The analysis of the rule of law reform must address the domestic challenges of implementing the formal requirements stipulated in constitutions and legal frameworks. Scholars agree that while the new post-communist constitutions have provided an institutional framework that establishes the workings of institutions, the implementation and respect for the rule of law has remained a constant
challenge in post-communist democracies (Kaldor and Veyvoda 2002:9). In the uncertain transitional settings of Eastern Europe, this challenge often follows a pattern of mixed democratic and authoritarian features, such as free and fair elections with weak or “formally ill-defined” separation of powers (Rüb 2002:106, quotation marks and emphasis in original).

In the consolidation phase, all significant political elites must prove that their commitment to the rule of law matches their concrete actions, showing that they have “become habituated to the rule of law” (Przeworski 1992; Linz and Stepan 2010:7). Considering that a break with the political past did not occur in most of Eastern Europe, this task remains particularly difficult to accomplish. For instance, Schmitter and Karl point out cases such as Romania, in which “it was at first unclear as to whether the old regime had indeed been deposed and whether the ensuing elections were conducted under fair enough conditions” (Schmitter and Karl 1994:179, footnote 7). Taking into account the continuity of old political elites in the Eastern European post-communist context and their tendency to keep the judiciary under political control, one must ask: “[h]ow can the very power that creates and enforces the law be limited by the law?” (Tamanaha 2004:115).

As the next section will reveal, the stability of the judiciary relies mainly on the political will to respect the law and the acknowledgment that no one can be above the law.

2.1 Judicial performance

The wide-reaching impact of a consolidated judiciary on the quality of democracy and the rule of law has been acknowledged in both political science and legal studies. Nevertheless, its conceptualization continues to be work in progress (Larkins 1996; Smithey and Ishiyama 2002; Magen and Morlino 2009). Due to the complex and multidimensional character of judicial performance, legal scholars have split the concept into several categories. In line with legal studies literature, I choose to focus on four dimensions of judicial performance: independence, accountability, efficiency and integrity (Beer 2006; Staats et al. 2005, Bumin et al. 2009; Dallara 2007).

2.1.1 Judicial independence

The subtle character of corruption targeting the judiciary and its judges makes it challenging to assess judicial independence. According to Rose-Ackerman, the
vast majority of studies attempting to conceptualize judicial independence have failed to explain how and why pressure occurs. Most of these studies have also not defined the link between external pressures and court decisions (Rose-Ackerman 1992:372).

Judicial independence should be first delimited by asking: “Independent from whom, with respect to what?” (Trebilcock and Daniels 2008:30). I focus on judicial independence from political influence and argue that judicial independence must be defined first and foremost through a strict delimitation of the interference of the executive in judicial matters (Saez Garcia 1998).

The stipulation of the separation of powers principle in the post-communist constitutions has become a formal standard in Eastern Europe. It is a first step in the “return to Europe” process, which corresponds to the Western European idea of democracy and upholds the belief that power cannot be concentrated in the hands of a privileged group. The formal distinction between the executive, the legislature, and the judiciary, along with the presence of an effective system of checks and balances, is considered to correspond to the standard requirements of the post-communist constitutions. However, empirical data shows that formally defining these standards does not automatically result in their achievement.

**Structural, institutional, and personal separation of powers**

Drawing on Vile, I differentiate between three dimensions of the separation of powers: structural, institutional, and personal separation (Vile 1967).

**Structural separation.** First, “each branch of the government [executive, legislative and the judiciary] must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches” (Vile 1967:13). Vile argues that this represents an ideal institutional structure, which creates a system of checks and balances “where the mere existence of several autonomous decision-taking bodies with specific functions is considered to be a sufficient brake upon the concentration of power” (ibid. 1967:18).

**Institutional separation.** Second, a division of the governmental functions must exist, so that “all government acts […] can be classified as an exercise of the legislative, executive, or judicial functions […] which should be entrusted solely to the appropriate, or ‘proper’ branch of the government” (ibid.1967:16).

**Separation of persons.** The third element emphasizes that it does not suffice for the institutions to be separate and independent of each other, but the persons managing the institutions must uphold “separated” functions, i.e. one person cannot maintain multiple positions in different institutions (ibid.1967:7). While respecting the separation of persons seems to be one of the core elements of
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judicial independence, it is important to underline that, in practice, complete separation and isolation is not possible to attain. Threats to the personal independence of judges find particularly fertile ground in corrupt political contexts in which judges fear that they will be removed when their decisions threaten important veto players. Guaranteeing judges life tenure and irremovability may reduce their dependency on those electing them. Securing their position can also improve their impartiality (Tate and Vallinder 1995).

The difficulty of separating the executive branch and the judiciary can be further observed in the overlapping function of prosecutor, which finds itself at the intersection between the judiciary and the executive branch. Although they do not officially belong to the judicial branch, the impartiality and independence of prosecutors must be guaranteed when receiving orders from the government. Likewise, judges of constitutional courts, who are politically appointed and in many cases have served as politicians in national parliaments, face similar challenges. Leaving the political past behind in order to ensure full impartiality and objectivity might prove to be a difficult endeavor under these circumstances.

The judicial independence of the judiciary from external pressure can be sustained if judges receive an attractive remuneration package. Without a dignifying remuneration, judges could be vulnerable to judicial corruption. By remunerating judicial personnel properly, the judicial system reduces the vulnerability caused by dependence on additional financial sources and may also be able to attract competent judges who would otherwise choose a career in law firms or in the private sector.

Scholars consider qualification requirements to be another important component of safeguarding judicial independence. Qualification requirements have a double function. First, if the judiciary selects its personnel through competition, it increases the quality of the judicial act by bringing the best prepared candidates into judicial careers. Second, it also decreases the dependence on external actors who could otherwise exploit the lack of knowledge and promote judges based on other reasons, such as loyalty rather than meritocracy (Bumin et al. 2009:131).

2.1.2 Judicial accountability

While judicial independence relates primarily to the separation of powers, judicial accountability targets the judicial system itself and its own understanding of what it means to obey the rule of law (Staats et al. 2005:8). According to Rose-Ackerman, even in cases where judicial independence is formally guaranteed, independence alone does not suffice because “an independent judiciary might
itself be irresponsible or corrupt” (Rose-Ackerman 2007:16). Are independence and accountability mutually exclusive in this case? Scholars and practitioners answer this question with a clear “no” and argue that while judicial independence must be safeguarded, judges must be held accountable for their actions (Ciparick and King 2010:9). Likewise, Trebilcock and Daniels argue that “absolute independence is a chimera and it is neither attainable nor desirable and would entail unaccountable mini-autocracies” (Trebilcock and Daniels 2008:30).

What is the difference between judicial independence and judicial accountability? Staats, Bowler and Hiskey make the following important distinction:

“A justice system, for example, may be entirely subservient to the executive branch of government in legal cases involving the executive, while at the same time systematically engaging in the taking of bribes from private litigants in cases not involving the government. In such circumstances, the judiciary would lack both independence and accountability” (Staats, Bowler and Hiskey 2005:80).

The vulnerability of the judiciary to external threats could be diminished if judicial autonomy were stipulated by the constitution, implying both financial and administrative autonomy. Ideally, judicial autonomy is guaranteed through the existence of independent procedures of external groups (Dallara 2007:5). These are managed through an independent body, such as a judicial council, which is responsible for the task of administering the budget and judicial careers (Magalhaes et al. 2006:139). In order to prevent external influence, the selection, promotion, evaluation and removal of judges has been undertaken in many post-communist countries through the creation of so-called judicial councils, independent bodies comprised of state officials, prosecutors and judges (OSI 2001:42).

In the administration of the judiciary, it is important that the judicial council accomplishes its tasks in a fair, meritocratic and transparent manner (TI 2007). Depending on the tasks assigned and their independence, judicial councils can play an important role in assuring judicial accountability by detecting the abuse of power and corruption within the judiciary. Keeping track of judicial wrongdoings through efficient sanction mechanisms could increase judicial accountability, provided judicial councils are able to act independently (Pepys 2007:7). Sanctioning judges on grounds of misconduct should not occur simply as an example or as a means of intimidation for future potential misconducts. Rather, sanctions should be the result of a fair and just response to corrupt practice. A lack of efficient sanctioning mechanisms can create opportunities for judicial corruption and increase fear of retribution, since misdemeanors are reported but not sanctioned. In such cases, even if judges observe misconduct among their peers or colleagues, they prefer not to report it (Danileț 2009).
Scholars emphasize the conservative character of judicial councils and their reluctant approach to reform (Chávez 2007:35). Cappelletti questions “the watchmen” and points out the perils of independent, non-accountable bodies in cases where judicial independence is not guaranteed and the judiciary and its judges are controlled by the executive branch (Cappelletti 1988). In such cases, it appears puzzling that an “undemocratic” institution is trusted “to safeguard [...] our liberties against the abuse of powers, and thus, against undemocratic perversions” (ibid. 1988:91).

Scholars and practitioners alike have observed that formal guarantees meant to protect judicial independence (e.g. life tenure, attractive remuneration) can be converted into lack of accountability and lack of responsibility. As a result the judiciary can turn into an “uncontrolled power” (Cappelletti 1988). The challenge to overcome is in determining when the judiciary itself is responsible and accountable enough to apply its “independence” from other branches in a proper way. Without a sense of responsibility, even “reformed” judiciaries can become more opaque and politicized than without autonomy and independence.

2.1.3 Judicial efficiency

As outlined above, judicial independence and accountability are essential elements of judicial performance. They should enable the judiciary to be efficient in enacting the rule of law. Based on Beer, elements of judicial “effectiveness” will be integrated into the conceptualization of judicial efficiency, which allows for a comprehensive approach (Beer 2006:34).

Judicial efficiency refers to “the ability of a judicial system to process cases without unreasonable delays and backlogs” (Staats et al. 2005:79). The authors differentiate between delays, which are considered normal due to workloads, and “those that arise from systemic distortions” (Staats et al. 2005). Scholars emphasize the important role of judicial capacity in ensuring judicial efficiency. Without sufficient resources, which include modern computerization, sufficient staff and constant training, an efficient judicial institution cannot be created (Mendelski 2012). However, as described below, a lack of judicial resources might pinpoint weaknesses in the judiciary:

“Across every institution, individual actors in many developing countries have been underpaid and undertrained. Underpaid staff tends to be more vulnerable to corrupt behavior, a phenomenon observed particularly in the judiciary [...]”. Expertise in a variety of fields, such as budgeting or information technology is lacking in multiple contexts [...]” (Trebilcock and Daniels 2008:333).
Further, I draw on Larkins, who focuses on channels of dependency rather than strictly assessing judicial independence from external pressure (Larkins 1996). Since the linkages of the judiciary’s dependence on political dimensions exist in “virtually every political system,” (Larkins 1996:618) the obstacles to achieving the independence and political insularities of the judges are much easier to identify (ibid.1996:616).

2.1.4 Judicial integrity

Along with the aforementioned dimensions of judicial independence, accountability and efficiency, integrity is an additional form of protection against external threats. While structural guarantees are needed in order to ensure judicial performance, these dimensions do not offer sufficient protection unless the judges demonstrate personal integrity and responsibility, in terms of “doing things right.”

Judicial integrity refers to a certain moral value which should act as a shield against pressures of all kinds, since “a judiciary of undisputed integrity is the bedrock institution essential […] even when all other protections fail” (Corrin 2009:191). Ideally, even if “cross-pressured,” judges can massively increase the judiciary’s trust through a consistent system of values (Stone 2000:141). Hence judicial integrity remains the last bastion for the impartiality of judges and the just enactment of the rule of law:

“In opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matter, and […] particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court” (Becker 1970:144).

An aspect worth noting is that, in some cases, political pressure can exploit judicial integrity, which is formally attached to the profession of the judge and not to his or her private or personal life.¹

Building integrity is a difficult task. If not sustained by a legal system with a tradition of moral values, integrity can be constructed through ethical codes of conduct, and reasonable, transparent sanctions aimed at differentiating between professional integrity and the private lives of judges (Danilet 2009). Professional integrity takes time to develop and must successfully pass the politicization test.

¹ I am thankful to Judge Cristi Danilet for suggesting this distinction between personal (private) and professional integrity and the way it can be misused in practice.
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of the interaction between the judiciary and the executive branches. Scholars argue that judicial integrity is particularly difficult to construct in cases where judges who served under an authoritarian regime continue to serve. How dependent is the judiciary on external factors when judges selected by old elites are still active?

Are judges who have been socialized in an authoritarian regime a factor of disruption in matters such as reforming the judiciary?

Mechanisms of dependency such as loyalty or fear may prove powerful and still effective even after regime change, particularly if a genuine change in political elites has not occurred (Magalhaes et al. 2006:139). Fiss (1993) suggests that judges who were active in the old authoritarian regime should be removed in the new democracy to ensure a fresh start. However, this clear-cut approach can have complex consequences. Larkins, for example, has a similar opinion to Fiss and argues that “the rule of law is not secure when the body for its enforcement is composed of judges who either fear challenging the government or are already predisposed toward declaring its deeds legal” (Larkins 1996:609). However, Larkins warns against such a “regime relative” approach, since it could “injure the long-term functional independence of the judiciary as an institution” (Larkins 1996:623).

Prado offers a more balanced solution for dealing with judges who are associated with the previous authoritarian regime. Prado suggests that the judges’ attitudes toward the ideal of an independent judiciary can be changed by mixing the composition of the judges. By integrating younger judges into the system as older ones retire, “the balance may start tipping in favor of greater accountability even within groups inside the judiciary with younger judges” (Prado 2010:575). Nevertheless, Prado recognizes that this process of “replacement” takes time, since young judges do not have great powers in hierarchical institutional constructs such as the judiciary (Prado 2010).

2.2 Threats to judicial performance: Judicial corruption

Defining or measuring corruption is difficult and research thus lacks a common working definition. Corruption is defined as a “behavior that deviates from formal duties because of private gains” (Mishra 2005:349). According to Buscaglia, judicial corruption can be more specifically defined “as the use of public authority for the private benefit of court personnel when this use undermines the rules and procedures to be applied in the provision of court services” (Buscaglia 2001:235).