

# RULE OF LAW AND REGULATORY QUALITY IN CENTRAL, EASTERN AND SOUTH EASTERN EUROPE DURING THE TRANSITION

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## **Abstract**

The previous rounds of European Union (EU) enlargement have reaffirmed the transformative power of the EU integration in fostering socio-economic development, political stability, and democratic consolidation of the candidate countries. The EU accession is a merit-based process, conditioned by the country's objective progress in the adoption of the EU's body of law i.e. the *acquis* as well as in the achievement of the agreed benchmarks for implementation of society-wide policy and institutional reforms. We investigate the development of rule of law and regulatory quality across several country groupings with a special emphasis on the periods before and after the EU accession to draw policy-relevant conclusions.

Key words: rule of law; regulatory quality; EU membership.

## **1. Introduction**

Rule of law and regulatory quality remain among the most important challenges of modern societies. Stronger rule of law is needed for a country to enhance its policy effectiveness and realize its full social and economic potential. In Europe, the membership in the European Union (EU) is also conditioned on a satisfactory progress in setting the principles for ensuring an orderly and just society. Surprisingly, it is still a policy issue of major concern in some of the latest EU member states from Central and Eastern Europe. Even though rule of law and regulatory quality are elusive concepts, there has been some progress in their definition, empirical characterization and monitoring. For instance, the internationally comparable and reputable data sources – such as the World Bank's Governance Indicators and the World Justice Project – offer some valuable insights in the evolution of rule of law and its various dimensions / aspects.

The central objective of our paper is to examine the evolution of rule of law in the formerly socialist countries from Central, Eastern and South Eastern Europe and assess the main determinants driving these trends. The more specific research goals are: (1) to investigate the existing body of academic literature and policy research devoted to empirical mapping of the rule of law and regulatory quality; (2) to identify group-specific differences or idiosyncrasies among the formerly socialist European countries; (3) to assess their driving forces, and (4) to formulate policy relevant conclusions. As the aggregate pattern would mask substantial heterogeneities, we differentiate these countries along geographical lines (Central and Eastern Europe vs. South Eastern Europe) and along the institutional proximity to the Union (EU member states vs. non-members). In empirical terms, we analyze four groups of European countries: (1) non-EU countries from South Eastern Europe (Albania, Bosnia and Herzegovina, Montenegro, Macedonia and Serbia); (2) EU member states from South Eastern Europe (Bulgaria, Romania, and Croatia), and (3) Central and Eastern European countries (the Czech Republic, Slovakia,

Slovenia, Latvia, Lithuania, Estonia, Poland, Hungary), and (4) the average for the EU-28 member states. Our implicit underlying assumption is that the EU membership does play a role in promoting rule of law and regulatory quality.

The structure of the paper is as follows. In the next section we examine the existing body of the academic literature and policy research on the formulation of workable definition of the elusive concepts of rule of law and regulatory quality. The third section elaborates recent empirical attempts to monitor progress in rule of law and regulatory quality across countries and over time. We examine the main trends in the evolution of rule of law among the formerly socialist European countries in the fourth section. The next section critically evaluates and elaborates the main driving forces behind the descriptive statistical analysis of trends in rule of law in Europe. The final section contains policy-relevant conclusions.

## 2. Towards Workable Definitions

Is there such a thing as *the* correct specification of Rule of Law and Regulatory Quality? Commonly used definitions in the academic literature and policy-related research appear to be either too maximalist or too minimalist (e.g., Munck and Verkuilen, 2002; Tamanaha, 2004; Carothers, 2006; Sellers and Tomaszewski, 2010; Merry et al. 2015) indicating that these concepts are notoriously difficult to define and measure. Their ambiguity puts them in a danger of becoming useless (e.g., Emmert, 2008). In empirical terms, the Rule of Law is a contested concept that can mean “different things to different scholars and can therefore be measured through different methods” (Mendelski, 2018).

“Thin” or shallow versions of rule of law have largely given way to “thicker” versions. The thin versions are traditionally focused on the procedural aspects, whereas the thicker versions focus on the broader adherence to normative standards of rights, fairness, and equity. In other words, the “thick” conceptions include other dimensions, such as democracy or fundamental rights, to the thin core. For instance, the celebrated Lon Fuller’s (1969) *The Storrs Lectures* contains a list of traits that rules should have: (1) general; (2) publicly promoted; (3) prospective (i.e., not retroactive); (4) clear; (5) consistent; (6) practicable; (7) constant over time, and (8) congruent with the actions of officials. Another example of a thick version of the rule of law definition is the United Nations definition stating that it is “a principle of governance in which all persons, institutions and entities [...] are accountable to laws that are publicly promulgated, equally enforced and independently resolved, and which are consistent with international human rights norms and a principle of standards.”

For these reasons, the concept is difficult for empirical mapping and monitoring across countries and over time. It is not surprising therefore that the World Bank has produced a perception-based measure along the following definition: “Rule of law reflects perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.” In this context, the empirical work by Kaufmann, Kraay, and Mastruzzi (2010) has provided internationally comparable and reputable assessments of the rule of law developments across the globe for the 1996-2019 period.

The World Justice Project (WJP) has made another attempt to disentangle the Rule of Law concept into eight categories. It defines the rule of law a framework of laws and institutions that embodies eight factors: (1) constraints on government powers; (2) absence of corruption; (3)

open government; (4) fundamental rights; (5) order and security; (6) regulatory enforcement; (7) civil justice, and (8) criminal justice.

The regulatory quality as a concept is even more elusive and less understood. As argued by Radaelli and De Francesco (2004), it captures “the extent to which impact assessment, consultation, simplification, and access are embedded in the wider regulatory policy process.” In empirical terms, the World Bank has again adopted a subjectively assessed measure of regulatory quality as capturing “the perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development.”

### 3. Measurement Attempts

The theoretical problems in defining rule of law and regulatory quality have not discouraged academic endeavors for their measurement. Why are rule of law and regulatory quality being measured? There are a number of reasons. Firstly, they are used to confront conclusions based on subjective assessments, which are often prone to stereotypes, biases, intuitions, and prejudices. For instance, some Macedonian citizens still have doubts about the assessed progress of rule of law in Bulgaria and Romania. Secondly, the empirical measures of rule of law and regulatory quality provide a quantitative tool for monitoring progress across countries and over time. Thirdly, if constructed in a sounder and analytical manner, these measures or indices enable a more detailed assessment of progress in the various dimensions of rule of law.

Table 1 contains some of the most comprehensive and reputable data providers and their constructed indicators on a worldwide scale. Among the international inter-governmental organizations, the World Bank regularly publishes initially bi-annual, and later, annual data on indicators of the rule of law and regulatory quality. The handicap of having only an aggregate measure has been overcome by the World Justice Project, which publishes an overall Rule of Law Index as well as the status across eight dimensions. Other providers of internationally comparable data on rule of law include the Freedom House (United States), Global Integrity (United States) and the Bertelsmann Stiftung (Germany). Skaaning (2010) offers an excellent overview of the existing quantitative representations of the rule of law.

Table 1. Existing Data Providers and Indicators

<b>Data Providers</b>	<b>Name of the Index</b>
<b>International Inter-Governmental Organizations</b>	
World Bank	Rule of Law Index Regulatory Quality Index
<b>International Non-Profit Organizations</b>	
World Justice Project (United States)	Rule of Law across Eight Dimensions
Freedom House (United States)	Rule of Law Index
Global Integrity (United States)	Rule of Law and Access to Justice
Bertelsmann Stiftung (Germany)	Rule of Law; Bertelsmann Transformation Index
<b>For-Profit Organizations</b>	
The PRS Group	Law and Order (PRS)

This study primarily relies on the World Bank's assessments as well as the World Justice Project's empirical characterization of the provoking concepts of rule of law and regulatory quality.

#### **4. The Evolution of Rule of Law in Central, Eastern and South Eastern Europe**

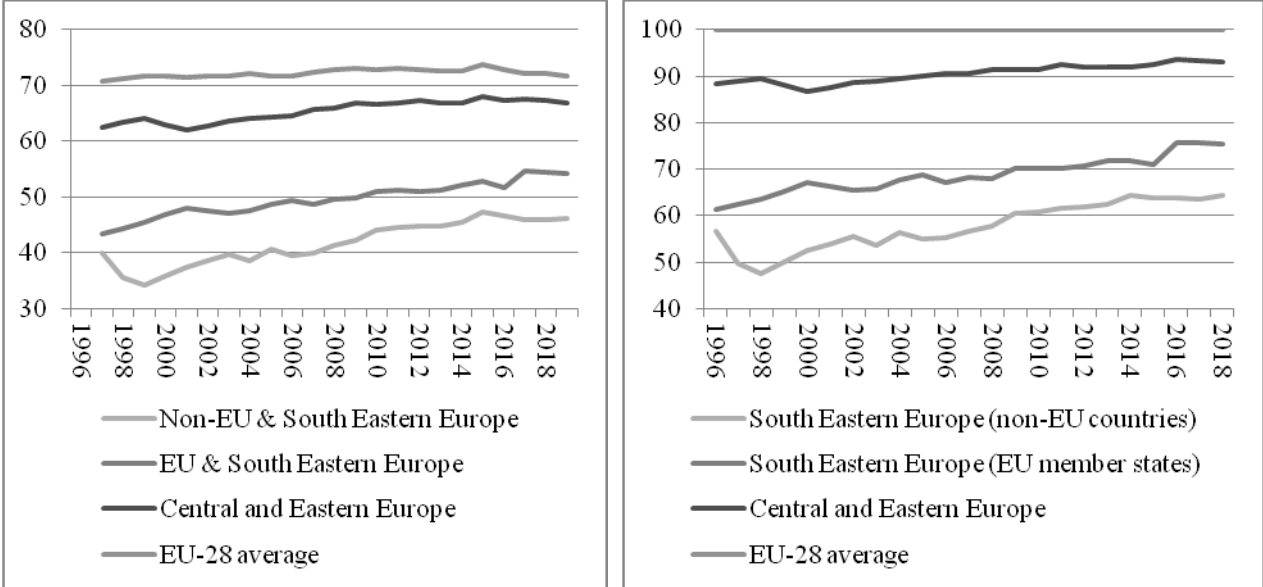
The creation of internationally comparable quantitative assessments of the progress in rule of law and regulatory quality opens several research avenues. In this study, we analyze the evolution of rule of law across four groups of European countries: (1) Non-EU countries from South Eastern Europe (Albania, Bosnia and Herzegovina, Montenegro, Macedonia and Serbia); (2) EU member states from South Eastern Europe (Bulgaria, Romania, and Croatia), (3) Central and Eastern European countries that are EU member states (the Czech Republic, Slovakia, Slovenia, Latvia, Lithuania, Estonia, Poland, Hungary), and (4) the average for the EU-28 member states. Except for the EU-28 countries, the remaining three groups are rather homogenous and at a similar level of institutional, economic and legal development. The non-EU countries from SEE are either EU candidate or potential candidate countries, some of which have already started the EU accession negotiations (e.g., Montenegro, Serbia and Macedonia). Bulgaria and Romania joined the EU in January 2007, whereas Croatia became EU member state in July 2013. In contrast, the Central and Eastern European countries joined the EU within the enlargement wave in May 2004 and enjoyed 16 years of EU membership. The country differentiation follows both geographical lines (Central and Eastern Europe vs. South Eastern Europe) and the institutional proximity to the EU (members vs. non-members). The implicit underlying assumption is that the EU membership may play a prominent role in promoting rule of law and regulatory quality.

We initially use the Rule of Law index published by the World Bank in order to observe group-specific patterns and trends. As presented in Figure 1, there is a moderately upward trend in rule of law in the three groups of countries. Over time, however, these systematic differences between the groups of countries remain and the gaps with respect to EU28 average are still significant. At an individual country level, the largest progress is observed in Romania and Croatia.

Figure 1. Evolution of Rule of Law across Europe, 1996-2018

*Panel A*

*Panel B*

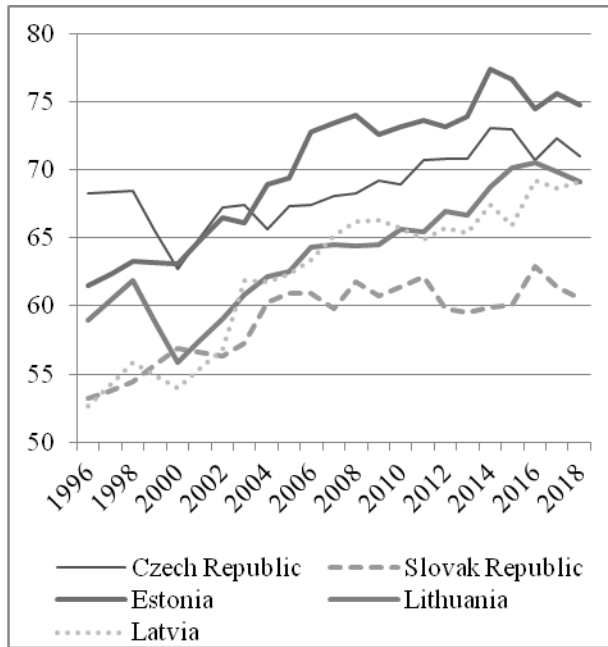


Source: Authors' calculations based on World Bank's World Governance Indicators (2020).

4.1.1. Trends in Central and Eastern Europe

Central and Eastern Europe is a rather heterogeneous group of countries, implying that the aggregate pattern masks substantial cross-country differences. The front-runners in this group are the Czech Republic, Slovakia, Estonia, Latvia and Lithuania (*Panel A* of Figure 2). They have observed significant upward trends in the rule of law indices. However, the World Bank's assessments indicate hesitant progress and even some backsliding in the case of Hungary and Poland (*Panel B* of Figure 2).

Figure 2. Evolution of Rule of Law in Central and Eastern Europe, 1996-2018  
*Panel A: Significant progress (Front-runners)*      *Panel B: Hesitant progress and backsliding*



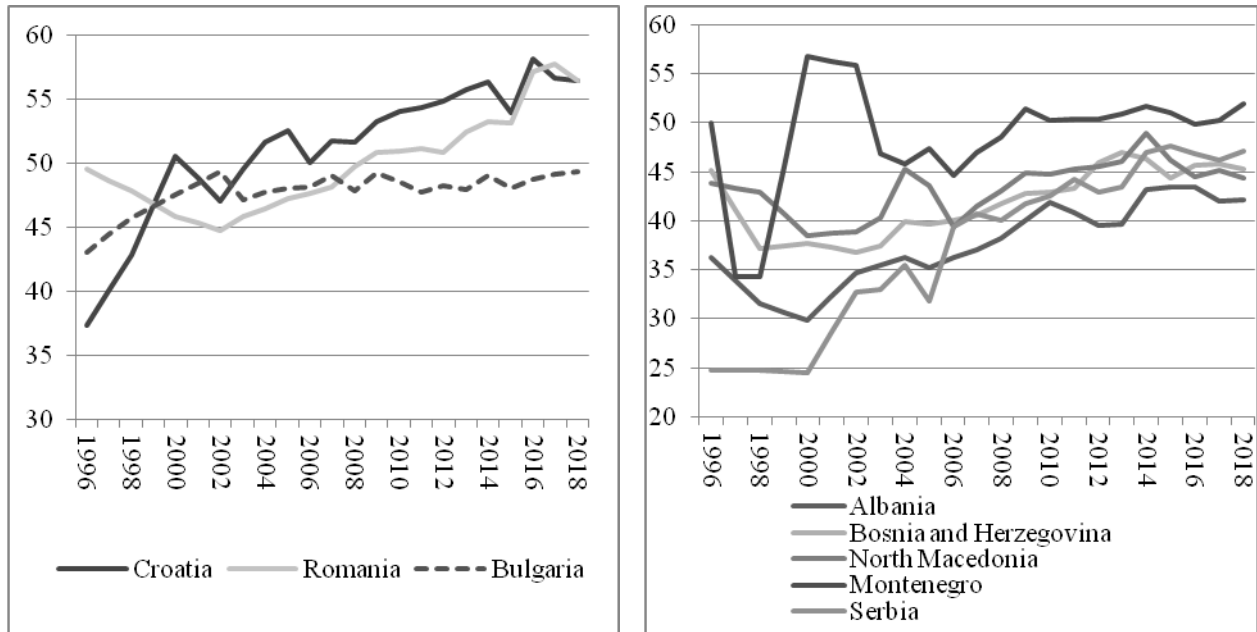
Source: Authors' calculations based on World Bank's World Governance Indicators (2020).

#### 4.1.2 Trends in EU Member States from South Eastern Europe

As already noted, the most impressive progress in promoting rule of law is observed in Croatia and Romania. Their citizens appear to have enjoyed substantial gains from the EU accession in terms of elevated rule of law (Figure 3). Yet we tackle this issue more in depth in the fifth section which is investigating the potential driving forces behind these trends. In contrast, Bulgaria demonstrated moderate progress, mainly observed in the pre-accession period.

Figure 3. Evolution of Rule of Law in the EU member states from South Eastern Europe, 1996-2018

Figure 4. Evolution of Rule of Law in EU member states from South Eastern Europe, 1996-2018



Source: Authors' calculations based on World Bank's World Governance Indicators (2020).

#### 4.1.3 Trends in Non-EU Countries from South Eastern Europe

The group of non-EU countries from South Eastern Europe contains EU candidate and potential candidate countries. Not only did they witness an upward trend in the rule of law indices, but also between-country differences in rule of law narrowed over time. One can safely conclude that the non-EU countries from South Eastern Europe have become a more homogenous group over time (Figure 4).

As already noted, aggregate patterns can mask substantial heterogeneity across dimensions of rule of law. The World Bank's Rule of Law indices do not provide a more detailed assessment of the current state. This serious limitation is partly overcome by the Rule of Law Index published by the World Justice Project, an independent, multidisciplinary organization working to advance the rule of law worldwide. The assessments rely on more than 110,000 household and expert surveys to measure how the rule of law is experienced and perceived in practical situations.

Table 2 contains the main conclusions from the analysis of WJP (2019) estimates so that the darker the field, the more pronounced the problem in an individual dimension is. According to these assessments (column [1] of Table 2), the major challenges for South Eastern European (non-EU) countries are: high incidence of corruption, lack of democratic constraints on government powers, ill-functioning of the criminal justice system, and poor regulatory enforcement. The main problems in rule of law in the EU member states from South Eastern Europe appear to be the criminal justice system and corruption (column [2] of Table 2). Finally, the EU member states from Central and Eastern Europe are still experiencing difficulties in the criminal justice system, government openness and civil justice system (column [3] of Table 2). Emerging Europe – or the new EU member states from the Central and Eastern Europe – is still behind the EU-28 averages across all factors, except for *Factor 5: Order and Security*.

Table 2. Country Averages for the Rule of Law Index by the World Justice Project in 2019

Factors	South Eastern Europe (non-EU)	South Eastern Europe (EU)	Central and Eastern Europe	EU-28 average
	[1]	[2]	[3]	[4]
<b>WJP Rule of Law Index</b>	<b>0.52</b>	<b>0.60</b>	<b>0.68</b>	<b>0.73</b>
Factor 1: Constraints on Government Powers	0.45	0.55	0.64	0.74
Factor 2: Absence of Corruption	0.42	0.53	0.67	0.73
Factor 3: Open Government	0.48	0.59	0.64	0.71
Factor 4: Fundamental Rights	0.58	0.65	0.72	0.77
Factor 5: Order and Security	0.78	0.81	0.89	0.84
Factor 6: Regulatory Enforcement	0.47	0.56	0.65	0.71
Factor 7: Civil Justice	0.50	0.59	0.64	0.70

Note: The black-and-white color scheme differentiates the countries with weak rule of law (darker field) and strong rule of law dimensions (white fields) in ten shades. Source: Authors' design based on data from the *Rule of Law Index 2019*, The World Justice Project.

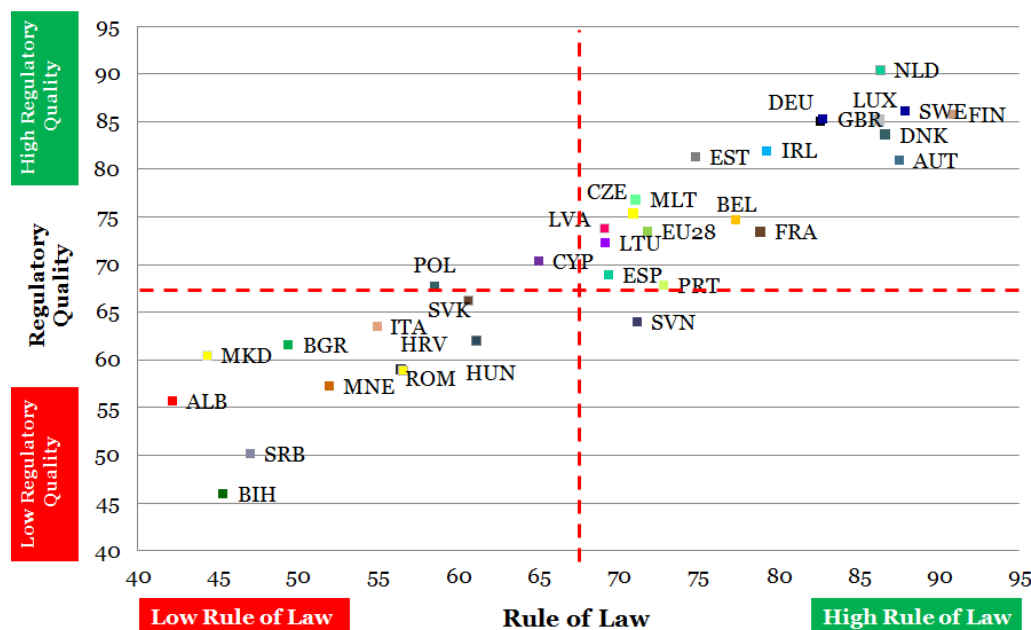
The more specific (dimensional) conclusions from the WJP (2019) assessments are as follows:

- Government powers are not sufficiently limited by the legislature, the judiciary and the state audit;
- The government officials are not (always) sanctioned for their misconduct;
- The government officials in the judicial, legislative and executive branches often use public office for private gain;
- Most governments are not sufficiently transparent (i.e., they are semi-open);
- The complaint mechanisms do not work properly;
- The freedom of opinion and expression is not effectively guaranteed;
- Freedom from arbitrary interference with privacy not guaranteed;
- Order and Security are strong pillars of rule of law in South Eastern Europe and in Central and Eastern Europe;
- A due process is not respected in the administrative proceedings;
- The government regulations are not effectively enforced;
- the civil and criminal justice systems are prone to corruption;
- The civil and criminal justice systems are subject to improper government influence, and
- The correctional system is not effective in reducing criminal behaviour.

In conclusion, we also find a strong and positive correlation between rule of law and regulatory quality in Europe (Figure 5). The group of high rule-of-law and high regulatory-quality countries comprises the advanced European countries, or to use the old-fashioned classification, primarily the “old” EU member states.

Figure 5. Rule of Law and Regulatory Quality in Europe (2019)





Source: Authors' design based on data from World Bank's World Governance Indicators (2020).

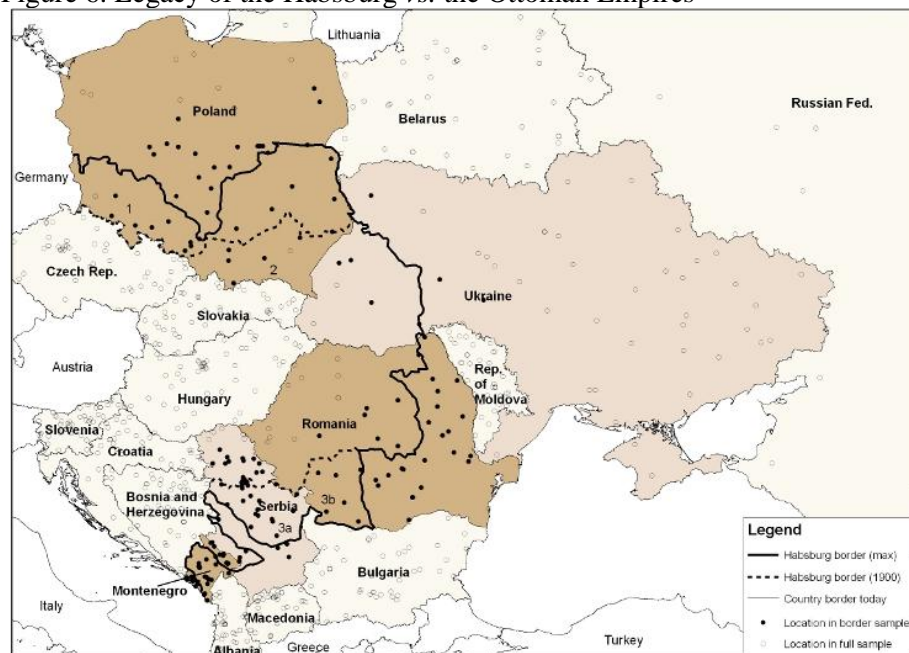
Not surprisingly, the non-EU countries from South Eastern Europe occupy the third quadrant, i.e. the group with the unpleasant combination of weak rule of law and low regulatory quality.

## 5. The Main Driving Forces

There are several major explanations of these descriptive statistics and trends in rule of law and regulatory quality in Europe.

*Historical Legacies.* The existing body of the academic literature finds that different initial positions matter (Coman and De Waele, 2007; Prado and Trebilcock, 2009; Mendelski, 2013, 2018; Dallara, 2014). For instance, the empires that ruled over centuries on the European soil (the Habsburg and the Ottoman Empires, in particular) have had enough time to build up formal and informal institutions that have lasted to the present day (e.g., Becker et al. 2011). Hence, political and judicial institutions that were in effect a long time ago (Figure 6) have most likely formed cultural norms that prevail today, which therefore constitute a link through which distant history affects the present. Historical legacies, therefore, explain the path-dependent nature of rule of law. While we do not formally test this claim, there is qualitative and anecdotal evidence that historical legacies still explain a portion of the systematic differences across country groupings in Europe.

Figure 6. Legacy of the Habsburg vs. the Ottoman Empires



Source: Reproduced from Becker et al (2011).

*The Level of Economic Development.* Rule of law is strongly correlated with high-income levels. However, there seems to be a bi-directional causality: rule of law significantly contributes to economic development, rather than being just a consequence of it. Haggard and Thiede (2001) find that the empirical relationship between distinct components of the rule of law in a sample of 74 developing and transition economies indicates that measures of property rights, checks on government and corruption are correlated much less tightly than is often thought. Moreover, the correlation among rule of law indicators for the advanced industrial countries is much higher than among developing and transition countries, underlining the need for carefully drawn inferences from global samples.

*Democracy.* The American macroeconomist famous for his work in the area of economic growth, Robert Barro (1999) failed to provide evidence that the rule of law and democracy are causally linked. In contrast, Rigobon and Rodrik (2005) find some evidence that rule of law and economic growth are mutually reinforcing. Gutmann and Voigt (2018) also examine the impact of different forms of governments and find that, on average, parliamentary systems reach significantly higher levels of the rule of law than presidential systems. Nevertheless, they find compelling evidence that democracies (presidential, semi-presidential and parliamentary) outperform autocracies in terms of promoting the rule of law and regulatory quality.

*The Quality of the Reform Process.* The insufficient progress in rule of law in some European countries is often explained by the limited national ownership of the donor-driven reforms, via agencies or inter-governmental organizations such as the United States Agency for International Development (USAID), the World Bank Group, the European Union (e.g., Jensen and Heller, 2003; Carothers, 2006; Channell, 2006; Kleinfeld, 2012; Mendelski, 2015). Although with good intentions, the lack of coordination among international donors sometimes fails to create a critical support for the reform process. Mendelski (2018) also underscores the defective or insufficient implementation of reforms and the excessive focus on the formal and institutional means rather than the ends, which is in line with previous findings by Jensen and Heller (2003)

and Kleinfeld (2012). Other studies blame the top-down elitist approach to reforms without taking into account the institutional capacities and administrative bottlenecks (e.g., Mendelski, 2013; 2018). The quality of the reform process might be unsatisfactory due to obstructions or very limited cooperation by reform-opposing veto players (Pridham, 2005; Bozhilova, 2007; Magen and Morlino, 2009; Fagan and Kopecky, 2018). In semi-liberal political regimes, the law was used as a powerful tool of those seeking to resist favorable changes (World Bank, 2017).

*The Role of EU Conditionality.* One of the surprising conclusions from the literature review is the ambiguous and context-dependent impact of the EU conditionality on the rule of law (Pridham, 2005; Bozhilova, 2007; Magen and Morlino, 2009; Morlino and Sadurski, 2010; Dallara, 2014; Pech, 2016). These studies outline that the promotion of rule of law and legal transplantation can be problematic, if elitist or technocratic approach is adopted. Other authors conclude that the EU conditionality works better for rule adoption, but the impact on rule implementation and internalization was muted (Magen and Morlino, 2009). The main methodological shortcoming of these studies is the absence of quantitative methods to support the arguments. Moreover, even the EU conditionality has evolved over time, which makes the comparison more problematic.

*Reform Champions.* On average, numerous reforms of the legal system have contributed to consolidation of the rule of law in already advanced countries, such as those from Central and Eastern Europe. The impact in South Eastern Europe has more depended on the strength of reform change agents and their sincere intentions. Countries where the rule of law is weak are unlikely to use the EU pre-accession funds effectively and lawfully. Hence, the EU conditionality might be reinforcing, i.e. it tends to reproduce the respective social order in which they are embedded and thus, fortify the post-socialist divergence in the rule of law (Mendelski, 2018). Our descriptive statistical analysis demonstrated that the largest progress in rule of law had been observed during the EU accession period, from the date of opening of the EU accession negotiations to the official entry into the Union. Admittedly, there is some progress during the early years of EU membership, but not it is not that significant.

*Post-Accession Backsliding.* In some new EU member states (e.g., Hungary), there has been backsliding in certain policy areas, notably the rule of law, corruption and economic governance. Several countries met the criteria for accession to the EU, but the legislative changes they had made were often cosmetic, focusing more on the quantity rather than quality of the laws passed (e.g., Slapin, 2015). For instance, on average, Croatia was adopting three laws per day in the period between 2008 and 2010, but has since been criticized for its failure to protect the rule of law and for a systemic corruption (Šelih, Bond and Dolan, 2017). The issue of post-accession or early membership backsliding is an issue of concern for the European Commission. It is fair to conclude that such developments will have an impact on the enlargement prospects of the EU candidate countries that already started the accession negotiations.

## **6. Conclusions**

Although rule of law and regulatory quality appear to be elusive concepts, there has been some progress in their definition, empirical mapping and monitoring. The theoretical problems in defining rule of law and regulatory quality have not discouraged academic endeavors for their measurement. There are several reasons behind their research efforts. Firstly, they are used to confront conclusions based on subjective assessments, which are often prone to stereotypes, biases, intuitions, and prejudices. Secondly, the empirical measures of rule of law and regulatory quality provide a quantitative tool for monitoring progress across countries and over time.

Thirdly, if constructed in a sounder and analytical manner, these measures or indices facilitate a more detailed assessment of progress in the various dimensions of rule of law. For instance, the internationally comparable and reputable data sources – such as the World Bank’s World Governance Indicators and the World Justice Project assessments – offer valuable insights in the evolution of rule of law and the progress along various dimensions across countries.

Not surprisingly, the countries from Central and Eastern Europe are closer to the EU-28 average and are much more advanced in promoting the rule of law than those from South Eastern Europe. We find that the initial systematic group-specific differences in rule of law – observed at the outset of the transition – still exist and matter. This is in line with the existing studies identifying a strong path-dependent nature of rule of law and centurial influence of medieval Empires (The Habsburg and the Ottoman Empires, in particular).

The individual countries’ progress in rule of law is similar across different dimensions, with the notable exception for order and security. Put differently, order and security are strong pillars of rule of law in South Eastern Europe and in Central and Eastern Europe. Within South Eastern Europe, the EU member states perform better than the non-EU countries. The EU membership is obviously a strong incentive for improving and promoting the rule of law, but the membership *per se* is not a guarantee for high standards in rule of law. For instance, Hungary has still serious problems in various dimensions of rule of law.

The more specific (dimensional) conclusions from the assessments are as follows: government powers are not sufficiently limited by the legislature, the judiciary and the state audit; the government officials are not (always) sanctioned for their misconduct; the government officials in the judicial, legislative and executive branches often use public office for private gain; most governments are not sufficiently transparent (i.e., they are semi-open); the complaint mechanisms do not work properly; the freedom of opinion and expression is not effectively guaranteed; the freedom from arbitrary interference with privacy is not guaranteed; a due process is not respected in the administrative proceedings; the government regulations are not effectively enforced; the civil and criminal justice systems are prone to corruption; the civil and criminal justice systems are subject to improper government influence, and the correctional system is not effective in reducing criminal behavior.

The non-EU countries from South Eastern Europe can significantly raise living standards by rule-of-law reforms and improved governance. However, there are numerous reform-opposing veto players that despise the idea of detailed screening and regular monitoring by the European Commission. It is advisable therefore that the European Commission conducts regular and very thorough assessments of the progress in rule of law in all member-states and the EU candidate countries. Moreover, a significant part of the Instrument for Pre-Accession Assistance (IPA) (IPA III, 2021-2027) should be allocated to rule-of-law reforms. The lack of progress in rule of law may simply wipe out the benefits of the financial support for the other components. To rephrase a famous quote by the Nobel Prize Winner Paul Krugman, the rule of law isn’t everything, but, in the long run, it is almost everything.

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