

Institutional Change After Socialism and the Rule of Law

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The rule of law has been studied by political philosophy, law, political science, sociology and economics. The representatives of these social sciences have used various approaches (including various mixtures of conceptual and empirical analyses), for the study of this important problem. This also applies to research on post-socialist transformation which provided a unique and powerful natural experiment for students of institutions. In this paper I attempt to place the rule of law within a broader context, that of institutional change after socialism. This is why I start with a stylized description of this system and of what has happened to it after the collapse of socialism in the former Soviet bloc (second section). Then I try to link institutional change after socialism to the rule of law (third section). This requires a minimal clarification of this concept. In the fourth section, I discuss the rule of law after socialism in the light of empirical studies, mainly by economists. The final section sums up the main findings: changes in the legal framework take less time than institutional changes, including the transformation of the enforcement apparatus. As a result, widespread implementation gaps have emerged even in the most reformed transition countries.

INTRODUCTION¹

The rule of law has been studied in political philosophy, law, political science, sociology and economics. The representatives of these social sciences have used various approaches (including various mixtures of conceptual and empirical analyses), for the study of this important problem. This also applies to research on post-socialist transformation which provided a unique and powerful natural ex-

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periment for students of institutions. In this paper I attempt to place the rule of law within a broader context, that of institutional change after socialism. Accordingly, I start with a stylized description of this system and of what has happened to it after the collapse of socialism in the former Soviet bloc (second section).

Then I try to link institutional change after socialism to the rule of law (third section). This requires a minimal clarification of this concept. I find it important to define it not as an all-or-nothing phenomenon, but as a variable assuming various alternative states which can be ranked, so that one can speak of different levels of the rule of law. Equally important, in my mind, is to distinguish between the procedural and extended (substantive) dimensions of this variable, as they were likely to display different dynamics after socialism. The former is higher, the lower the level of uncertainty produced by the state's law; the latter is defined by the extent of classical individual rights.

In the fourth section, I discuss the rule of law after socialism in the light of empirical studies mainly by economists. This is not only because of my professional limitations and preferences, but – more importantly – because I feel that there has been perhaps too much theoretical speculation, often linked to fragmented or anecdotal evidence, in the discussion of the rule of law after socialism – and not enough careful empirical research. The available empirical studies show a wide variation in the various dimensions of the rule of law after socialism, which defy easy generalizations and call for more empirical research.

The final section sums up the main findings: Changes in the legal framework take less time than institutional changes, including the transformation of the enforcement apparatus. As a result, widespread implementation gaps have emerged even in the most reformed transition countries. After the initial breakthrough, substantial instability of legislation emerged in some CEE countries, potentially reducing the level of procedural rule of law. Some evidence points to a large amount of clearly unconstitutional legislation and to the legislative bodies' neglect of the rulings of constitutional tribunals.

The aggregate indicators of the rule of law in the economy and of political rights show that the CEE countries do not differ from mature democracies on the latter, but are below the best performers on the former. However, there is a substantial variation in the extent of economic rights among the CEE countries. There is also a substantial variation among them in the protection of property rights. However, crime appears to have peaked in the 1990s and then declined. This suggests that the implementation gap in the criminal justice system might have first increased and then fallen.

The empirical studies show that more progress was made in courts' independence than in their efficiency. However, on the measure of the speed of contract

enforcement, the laggards among the CEE countries performed as badly as Greece and Italy, while the leaders performed no worse than the leaders in the OECD on overall economic rights.

INSTITUTIONAL CHANGE AFTER SOCIALISM: AN OVERVIEW

Institutions are usually defined as humanly devised factors that structure social interactions.² Every country has an institutional system, i.e., a set of interconnected institutions which influence the interactions of individuals that live there. Each system of this kind has three interrelated components:³

1. The legal framework,
2. The organizational system,
3. The mechanisms of mass and regular human interactions.

The legal framework determines, *inter alia*, what types of organizations can legally exist, while some parts of a country's organizational system support a given legal framework. Both the legal framework and the organizational system shape the mechanisms of mass human interactions, especially the extent and types of market transactions. Institutional change after socialism refers in this paper to what has happened to the socialist institutional system in the countries of the former Soviet bloc since the turn of 1989 and 1990. I will focus on the Central and Eastern European Countries (CEE) which turned out to be the most reformed along most dimensions relative to the former republics of the USRR, except for the Baltics. However, I will draw some comparisons with Russia and with China so as to shed some light on differences in institutional trajectories after socialism.

There were some differences among the institutional systems in the countries of the crumbling Soviet empire in the late 1980s.⁴ In Poland, Hungary and the Soviet Union the Communist rulers legalized private ownership, i.e., extended individual economic rights, shortly before losing political power. One could say that – consciously or inadvertently – they entered the Chinese institutional trajectory: capitalism yes, democracy no. But it was too late for them, and the institutional breakthrough that occurred during 1989-1991 in these countries also included political liberalization, and further market reforms. In other countries of the region, socialism survived in a more rigid, 'classical' form. In what follows I will

² Douglas C. North, 'Institutions', in 1 *Journal of Economic Perspectives* (1991), p. 97.

³ Leszek Balcerowicz, *Socialism, Capitalism, Transformation*, 1995, pp. 4-5.

⁴ Anders Åslund, *How Capitalism Was Built. The Transformation of Central and Eastern Europe, Russia, and Central Asia*, 1997.

disregard the differences between early economic reformers and other countries, as the institutional similarities at the end of the the 1980s were by far more important,⁵ and the period of early economic reform was too short to produce any substantial deviation from a common institutional model.

Table 1 presents a concise stylized description of this model, as well as that of the institutional system which prevailed in the CEE countries in 2009. The table illustrates the enormous scope of institutional change after socialism.

Table 1. Institutional change after socialism

| <i>The socialist system</i> | <i>Institutional system in 2009</i> | <i>Institutional change</i> |
|--|---|---|
| I. THE LEGAL FRAMEWORK | | |
| <i>1. Classical (negative) rights</i> | | |
| Fully and extensively suppressed. Attempts to exercise these rights legally were recognized as crimes | Full catalogue, as in Western democracies | Liberalizing legislation |
| <i>2. Welfare (positive) rights</i> | | |
| Extensive catalogue | In most countries: extensive catalogue, similar to that in some West European democracies | Post-socialist legislation, including constitutions, entrenched welfare rights in most countries |
| <i>3. Economic laws</i> | | |
| – Secured monopoly of ‘social’ (i.e., state) ownership and the operation of central planning – Little legal basis for market transactions | – Full catalogue of laws supporting market transactions | – Eliminating ‘command’ regulations – Massive legislation in support of the expanding markets. |
| <i>4. Civil laws</i> | | |
| Prohibitively strong restrictions on setting up independent foundations and associations. | Regulations which ensure the freedom of association, i.e., the basis for the development of civil society | Substantial legislative effort in support of civil society |
| <i>5. Laws regulating political process</i> | | |
| Electoral laws which ensured the monopoly of the socialist party and made elections and parliaments into facades | Electoral laws which enable political pluralism | Substantial legislative effort to support democracy |

⁵ This is true of other differences, too. For example, Poland introduced a constitutional court, administrative courts and the office of Ombudsman before the breakthrough. These innovations were not capable of changing the nature of the system. They were truly ‘activated’ only after 1989.

Table 1. Cont.

| <i>The socialist system</i> | <i>Institutional system in 2009</i> | <i>Institutional change</i> |
|-----------------------------|-------------------------------------|-----------------------------|
|-----------------------------|-------------------------------------|-----------------------------|

II. THE ORGANIZATIONAL SYSTEM

6. *The party system*

| | | |
|--|----------------------|---|
| A monoparty holding power in an oppressive (antiliberal) state | A multi-party system | The transformation of the inherited parties and the development of new ones, based on liberalizing legislation and electoral laws |
|--|----------------------|---|

7. *The parliament*

| | | |
|--------------------------|--|---|
| Rubber stamp institution | The Parliament reflects the political pluralism. Varying regulations and practices governing the legislative process i.e. quantity, quality and (in)stability of legislation | From rubber stamp to democratic Parliament. Different changes in regulations and practices governing the legislative process |
|--------------------------|--|---|

8. *Public administration*

| | | |
|---|---|--|
| Controlled by the party apparatus and grouped into many ministries to suit the needs of the command economy | Basically apolitical and grouped into far fewer ministries. Specialized regulators, e.g., in telecommunication, energy, media | Elimination of party control, reorganizations of public administration. Creation of new regulatory bodies, modeled on the West |
|---|---|--|

9. *Local government*

| | | |
|--|-----------------------------|--|
| Centralized state – no room for local autonomy | Autonomous local government | Dividing the state power along the central – local dimension |
|--|-----------------------------|--|

10. *The security apparatus*

| | | |
|--|---|---|
| Very extensive and dominating over the police in order to block attempts to use classical rights | Radically changed in line with liberalizing legislation and in order to deal with new threats (e.g., terrorism) | Dismantling the old apparatus, building the new one |
|--|---|---|

11. *The army*

| | | |
|---|---|--|
| Controlled by the Party and occasionally used as an ultimate tool to maintain its overall control | De-linked from the party system, subject to a different form of civil control | Different extent of restructuring and re(training) |
|---|---|--|

12. *The police*

| | | |
|---|---|---|
| Varying efficiency in preventing and dealing with ordinary crime. Weak due process constraints. Controlled by the Party and easily used against opponents of the regime | Variable efficiency. Stronger due process constraints. De-linked from the Party system. | Different extent of restructuring and (re)training. |
|---|---|---|

Table 1. Cont.

| <i>The socialist system</i> | <i>Institutional system in 2009</i> | <i>Institutional change</i> |
|---|---|--|
| | <i>13. The procuracy (prosecutors)</i> | |
| Controlled by the Party and thus easily used for prosecuting 'socialist' crimes. Dominated the judiciary | <ul style="list-style-type: none"> – Largely de-linked from the party system. Focused on prosecuting ordinary crimes – Most of the legal dominance removed. Judges have legal controls over the key prosecutors' decisions, e.g. on temporary arrests – Variations in efficiency | Variable extent of restructuring and retraining |
| | <i>14. The courts</i> | |
| Subject to ultimate Party control and thus potential tools of political prosecution | Legally independent. Varying efficiency | <ul style="list-style-type: none"> – Legal independence granted during the breakthrough period – Variable extent of reforms dealing with accountability and efficiency |
| | <i>15. Organizations to enforce the courts rulings</i> | |
| <ul style="list-style-type: none"> – Penitentiaries weakly constrained by human rights. – Few, if any, specialists enforcing court decisions, say, in insolvency issues (bailiffs) | <ul style="list-style-type: none"> – Stronger constraints in relation to human rights, but situation differs across countries. – Expanded number of bailiffs, etc., but situation differs across countries. | <ul style="list-style-type: none"> – Different extent of restructuring. – Development of new professions and organizations. |
| | <i>16. The media</i> | |
| Politically controlled by formal and informal censorship | Free from political control, possibly except for the public media | Dismantling of political controls. Spontaneous growth of private media thanks to revenues from advertising resulting from the growth of a market economy |
| | <i>17. Civil society</i> | |
| Suppressed by the legal framework, the security apparatus and Party control. Official 'social' organizations, e.g., trade unions, youth organizations, subject to Party control | <ul style="list-style-type: none"> No legal restrictions. Varying extent of development. Restructured and reduced in size | <ul style="list-style-type: none"> Spontaneous growth of foundations and associations related to the growth of market economy. Restructuring |
| | <i>18. Organizations of the economy (narrowly defined)</i> | |
| <ul style="list-style-type: none"> – In the financial sector the main organization was the mono-bank – Non financial organizations: overwhelming dominance of state firms compulsorily grouped in monopolistic, branch-based associations | <ul style="list-style-type: none"> Independent central bank. Competing commercial banks – Many competing, mostly private firms | <ul style="list-style-type: none"> Separating the central bank from the mono-bank and granting it independence Privatization of the inherited state banks, entry of new ones. Creating institutions of the capital market Dismantling of compulsory associations. Privatization of the inherited SOE's; entry of new private firms. |

Table 1. Cont.

| <i>The socialist system</i> | <i>Institutional system in 2009</i> | <i>Institutional change</i> |
|---|---|--|
| | <i>19. Elementary and secondary education</i> | |
| State monopoly of supply and finance. Party-control over sensitive subjects (social sciences) | Limited share of non-public schools, privately financed. On the whole, little socialist ideology in the education programme | Limited entry of the private sector Different extent of changes in the teaching programmes. |
| | <i>20. Higher education and research</i> | |
| Monopoly of the public sector Education and research in the social sciences subject to ideological interventions and constraints, and largely isolated from the West. | Substantial share of the private sector in higher education. Education and research in social sciences largely free of ideological influence and constraints and open to contacts with the West. | Substantial entry of the private sector. Some restructuring of the public universities. Liberalizing education and research in the social sciences |
| Research and development in technical sciences subjected to anti-innovative constraints and influences of the command economy. | Different extent of the remnants of the R+D organizations inherited from socialism. New R+D organizations in the private sector, linked to technology transfer. | Different extent of restructuring of the inherited R+D organizations. Gradual development of new R+D organizations in the private sector |
| | <i>21. The welfare state</i> | |
| – Extensive pay-as-you go pension system. No private pension schemes. – Extensive catalogue of other transfers in cash, but no unemployment benefits as open unemployment did not exist under socialism – Dominance of the state in the supply and financing side of the health sector. | Basically preserved but in some countries increasingly supplemented by a funded system. – Basically preserved. Unemployment benefits available. – Financing largely private, more private provision | Different extent of reforms – Relatively little reform of inherited transfers – Introduction of unemployment benefits and of the related labour offices. – Some reforms which enlarged the role of the private provision and changed the organizational form of the public payer. |
| III. MECHANISMS OF MASS AND REGULAR INTERACTIONS | | |
| 22. Central planning | Markets | Dismantling of command mechanism, and largely spontaneous development of markets. |
| 23. Collective bargaining as an autonomous mechanism non-existent as both employers' and employees' organizations were controlled by the party | Increased role of collective bargaining due to emergence of autonomous trade unions and employers' organizations | Dismantling of command mechanism, and largely spontaneous development of markets. Variable extent of change. |

Table 1 shows that the collapse of socialism was followed in relatively short time by an enormous, historically unprecedented extent of institutional change. This is clearly seen when one compares the scope of institutional change after socialism in CEE with that of other major transformations, e.g., gradual democratization in Western Europe in the 19th century, economic reform in the non-socialist world or the Chinese economic transition in the late 1970s. In all these instances only some parts of the overall institutional system were transformed while in CEE practically all institutional sub-systems were subject to change.⁶

Each sectoral reform, e.g., in the justice system, in the financial sector, civil society, the media, the health service, etc., consisted of two interacting parts: legislative and organizational. It is beyond the scope of this paper to inquire why reforms in certain sectors, for example, in the welfare state, have in most countries advanced less than those, say, in the economy or in the party system. However, let me offer a few comments following the ‘horizontal’ distinction between the legal framework and the organizational system.

The fundamental, defining characteristic of the socialist legal framework was the suppression of the classical, ‘negative’ individual rights to life, liberty, and property, to religious freedom, freedom of speech, and the like. As Jon Elster and Claus Offe stress – with reference to Jellinek – ‘they are negative not because they do not require positive state action (...) but because they protect (...) the status negativus of an individual, i.e., his or her status as an independent person who makes the claim on the society not to be disturbed.’⁷ Attempts to exercise these rights, for example, to set up an independent association or develop private productive activity, were legally recognized as crimes against socialism; this is why I call them ‘socialist’ crimes. Socialist crimes were dealt with by specialized organs of the party-state, especially by the security apparatus, supervised by the Party. However, other organizations, e.g., ordinary police, the procuracy, the tax administration or even economic employers could be called upon to punish the perpetrators of socialist crimes.

The breakthrough years, 1989-1991 produced a massive wave of *liberalizing legislation*. Interestingly, the inherited, extensive catalogue of welfare (positive) rights was relatively little changed.⁸ Another change in the legal framework that also started during the breakthrough period but lasted longer could be called *enabling legislation*. This provided the more specific legal basis for the development of the market economy, civil society and the democratic political system, e.g., statutes dealing with insolvency, privatization, securities trading, associations and foundations, elections, etc. The natural complement to liberalizing legislation was the

⁶ See Balcerowicz, *Socialism, Capitalism, Transformation*.

⁷ Jon Elster and Claus Offe, *Institutional Design in Post-Communist Societies*, 1998, p. 81.

⁸ *Idem*.

restructuring laws, which created the legal foundation for the liquidation or transformation of core organizations of the party-state: the party and the security apparatus, the police, the procuracy, the branch ministries, etc.

As I already emphasized, the change in the legal system was unprecedented in its scope. However, the related organizational change was not only equally radical but, in addition, involved many more people and took more time, as it included massive change in organizational structures, the development of new organizations, large changes in personnel and enormous amounts of training and learning. These processes, from the very nature of things, are more time consuming than the preparation and passing of new laws. And organizational change, which requires a new legal foundation, cannot start before this foundation is provided. It should not, therefore, be surprising that changes in the legal framework have been followed by widespread *implementation gaps* in the sense of the low quality of application and enforcement of new laws. However, the size and the dynamics of the implementation gaps may – and did – differ across countries and sectors. In other words, the actual implementation gaps were likely to diverge from the minimal ones, as determined by the maximum feasible speed of implementation.

Organizational change after socialism has had three components:

1. The dissolving of some inherited organizations,
2. The transformation of other inherited organizations,
3. The setting up of new ones.

The socialist party-state was specific in the extent of the suppression of the classical individual rights. This required an extensive system of special organizations: the Party apparatus, the security apparatus, the censorship, the compulsory associations of enterprises, etc. All these organizations, in a sort of process of ‘creative destruction’, had to be dismantled.⁹

However not all inherited organizations, even those which were ‘contaminated’ by socialism could be dissolved, for fear that this would have fundamentally disrupted some vital functions necessary in every society, such as those dealing with ordinary crimes and dispute resolution, health services, national defense, education, elementary coordination of economic activity.¹⁰ Another factor, besides this

⁹ The differences in the scope of this operation may serve as a good indicator of the depth of the overall post-socialist transformation in the respective countries. It appears that there has been much less dismantling of the special organizations of socialism and much more use of its personnel in Russia, not to mention Belarus, Uzbekistan, Turkmenistan, than in the CEE.

¹⁰ The country that came the closest to dismantling the inherited organizational system was East Germany, obviously because of the effective take-over of this country by the larger and more prosperous West Germany. The East German case sets, therefore, the empirical maximum for organizational dismantling after socialism. Other CEE countries, supported only by international financial institutions and Western advisors, had to perform much below this maximum.

justified fear, was the resistance of the people working in these organizations. Coupled with the limited scope of attention of every policy-maker, this certainly has led to a situation in which some inherited organizations which could have been dissolved without the risk of disrupting any socially vital functions, survived – at least for some time – even under the most reformist governments.¹¹

Organizations that for some reason were not dissolved have to be *transformed* (restructured), based on the appropriate legislation. This was largely the job of the new governments, except for the privatized enterprises – they were restructured by their new owners. The transformation included not only change in their legal nature and the formal structures but also change in and training of their personnel. The list of transformed organizations is very long and comprises large parts of the state apparatus: public administration, army, police, procuracy, schools, hospitals, and the largest employer: state enterprises.

The extent of the required restructuring varied, depending on the extent of ‘contamination’ by socialism. For example it was certainly much larger in the procuracy than in courts dealing with family affairs.¹²

Finally, the creation of the new organizations had two parts: top-down (i.e., done by the new governments) and bottom-up or spontaneous. The first component consisted in setting up the public organizations considered necessary for the operation of the new institutional system: e.g., Constitutional Tribunals, Ombudsman offices,¹³ electoral commissions, banking supervision and other financial regulators.

The liberalizing legislation and the related enabling laws which restored freedom of associations, of the media and of private entrepreneurship, released massive spontaneous creation of new private organizations, which underpinned the development of democracy, civil society, the free media and the private market economy. The share of the new to inherited organizations (including those which were transformed) grew over time, which meant that more and more people worked in organizations the cultures of which were not infected by socialism.

¹¹ I am sure that every CEE country has had such organizations. For example, in Poland they included the branch-based R and D centers that were doing little useful work after collapse of socialism and were largely financed by the revenues from renting their premises

¹² The difference in the extent of restructuring of the organizations inherited from socialism constitutes another interesting topic, on which – to my knowledge – there is little empirical research.

¹³ In Poland the first two institutions were created before the collapse of socialism.

LINKING THE INSTITUTIONAL CHANGE AFTER SOCIALISM TO THE RULE OF LAW

As is the case with all important concepts, the rule of law is subject to widely different interpretations.¹⁴ As a matter of fact, there are various concepts of the rule of law. I will limit my remarks on them to the minimum required by the empirical operation.

1. It is useful to conceptualize the rule of law as a variable, i.e., a factor which can be achieved to varying degrees. They can be ranked so that one can speak of higher or lower levels of the rule of law, and some states of this variable may be – and are – denoted as ‘the absence’ of the rule of law.¹⁵
2. There are different, albeit overlapping, sets of features which are proposed in the literature to define the level of the rule of law. Following that literature I would group them into two categories: procedural and extended (substantive).
3. Under the procedural version of the concept, the larger – within the state’s overall actions – the role of law in shaping individuals’ behaviour in ways that allow them to plan their actions,¹⁶ the higher the level of the rule of law. This presupposes a familiar set of features: promulgation, no retroactive rules, clarity, no contradictory rules, no impossible prescriptions, stability, consistent application.¹⁷ By varying the extent to which these definitional requirements are met we can speak of different levels of the rule of law, or of changes in its level. The higher the level, the less arbitrary is the power to which individuals are exposed, if ‘arbitrary’ means ‘depending on individual discretion’ or a ‘capricious act of will’.¹⁸ In other words, the higher the level of the procedural rule of law, the less uncertainty is produced by the state and faced by the individuals. On this interpretation, high levels of the rule of law should not be confused with a large extent of classical liberties and – the related – limited government. And indeed, the proponents of procedural definitions stress that ‘rule of law is also compatible with oppres-

¹⁴ Martin Krygier, ‘The Rule of Law. Legality, Teleology, Sociology’, in Gianluigi Palombella and Neil Walker (eds.), *Relocating the Rule of Law*, Oxford, 2009, pp. 45-69; Ian Shapiro (ed.), *The Rule of Law*, 1999.

¹⁵ Such a conceptualization is analytically much more useful than the typical dichotomy: ‘rule of law – no rule of law’ as the cases grouped under the rule of law are far from homogeneous. There are nowadays attempts to measure the rule of law (see, e.g., Freedom House, the World Bank, the Frazer Institute, the Heritage Foundation). All of them conceptualize the rule of law as a variable that can be achieved to varying degrees.

¹⁶ I have stressed this Hayekian requirement because unpredictable laws also influence human behaviour, e.g., make individuals more risk-averse.

¹⁷ Andrei Marmor, ‘The Rule of Law and its Limits’, 23 *Law and Philosophy* (2004), p. 1.

¹⁸ *Webster Ninth New Collegiate Dictionary*, 1988.

sion.¹⁹ Some despots were systematic and predictable, say, the rulers of the former GDR, while other despots were capricious, e.g., Mao in China. And some prisons are well ordered and, thus, the inmates perceive both little uncertainty but also little hope that they may escape. However, liberal democracies also differ, though, not so widely as dictatorships, in the stability and predictability of their policies. This is why the procedural definitions of the rule of law logically allow that some non-democratic regimes can have a higher level of this variable than certain democracies.²⁰

4. The extended definitions accept the procedural requirements of the rule of law but go beyond them by demanding that the law's content and enforcement should ensure a certain range of classical individual rights. The larger the range of these rights, the closer the extended versions of the rule of law come – directly or through their logical or empirical implications – to constitutional (limited) government, capitalism, and – if the required range includes political rights – to democracy, as defined by regular and competitive elections.

What range of individual rights should define the expanded notion of the rule of law is obviously a matter of definitional convention, and that is not very likely to arise. At the minimum we should bear in mind, that the more expanded this range, the larger the overlap between the conceptual domain of the rule of law and those of other important concepts. If one wanted to go further one should look at what was meant by the rule of law in the historical contexts when this concept was formed.²¹ My impression is that the range of individual rights required by the privileged groups of barons or noblemen from their monarchs covered the requirements of due process (guarantees against arbitrary arrest, etc.) and the legal and factual recognition of their (private) property rights, which included guarantees against arbitrary taxes. However, there was no mention of mass political rights that would radically shift political power from the monarch to the popularly elected government. We may call the concept the *original expanded version of the rule of law* and use it as an anchor in the further discussion.

5. Finally both the procedural and expanded concepts of the rule of law denote complex variables, with various components. One important conceptualization structures them according to the spheres of individuals' lives to which the laws apply. Correspondingly, one can speak of the rule of law with respect to eco-

¹⁹ Stephen Macedo, 'Rule of Law, Justice and the Politics of Moderation,' in Ian Shapiro (ed.), *The Rule of Law*, at p. 149.

²⁰ The distribution of various political regimes along the dimension of policy instability is an empirical, not a conceptual issue. It appears that the non-democratic systems include examples of much more extreme and damaging policy swings than is the case with democracies. And this is one of the important arguments in favour of democracies.

²¹ This is similar to one of the methods of the interpretation of constitutions.

conomic, civil and political life. This poses an interesting and important question of what are the possible and actual combinations of the levels of the rule of law, in these spheres.

In what follows I will use the procedural concept of the rule of law and that extended one which is close to its original version. After this clarification let me turn to the question about the empirical links between various processes of institutional change after socialism and the level of the rule of law. Some general remarks are here in order.

One should distinguish, on the one hand, between the impact of the process itself and that of its outcome, and, on the other hand, between two concepts of the rule of law. It may well be that the very process of change lowers the level of the procedural rule of law, but increases that of the extended one. The outcome – if positive – would later increase the levels of both variables. In other words, they can display various dynamics after socialism; this is related to the problems of implementation gaps.

In what parts of the inherited socialist institutional system should changes be considered as affecting the level of the rule of law? The typical approach in the relevant literature is to focus on those parts which, if sufficiently changed, would *directly* affect that level. This includes, first of all, the changes in the basic legal framework, i.e., liberalizing legislation, and related changes in the organizational system, i.e., the dissolving or restructuring of the security apparatus, the transformation of the police, the prosecutor, the courts, etc. These are certainly very important changes, especially for raising the level of the extended rule of law, and they are sometimes justly called rule of law reforms.

However, there is the question why should we limit our attention to those factors which directly affect the level of the rule of law. Some more distant forces may have a powerful *indirect* impact on that level. Take the privatization of the inherited socialist economy, i.e., the processes which increase the share of the private sector. These processes include the spontaneous growth of the new private firms thanks to the liberalizing legislation and to the transfers of assets from the SOEs because of the resulting competition and tougher financial constraints. However, this is not enough to get away from socialism. As I have argued elsewhere, the inherited dominating sector of the SOEs had to be privatized via what I have called ‘transformational privatization’, lest the privatization of the whole economy get stuck.²²

Privatization outcomes are of fundamental importance for the rule of law, though this is, to my knowledge, largely disregarded in the relevant literature. With-

²² Balcerowicz, *Socialism, Capitalism, Transformation*, at pp. 186-201.

out privatization, the socialist economy would be preserved, and there is no single empirical example of a socialist system with a high level of the rule of law, at least in its extended sense. The people are deprived of economic rights under such a system, and the control of the ruling politicians over the economy, via ownership rights with respect to the dominating state sector, is incompatible with a high level of effective civil rights, the other portion of the rights which define the extended concept of the rule of law. In addition, the direct political control over the economy cannot be lastingly combined with political rights, i.e., democracy.²³ It is, therefore, not an accident that all the post-socialist countries that stuck to the state-dominated economy (Belarus, Turkmenistan, and Uzbekistan) display low levels of the rule of law²⁴ and are non-democratic.

Obviously, there have been some capitalist economies that displayed low levels of the various measures of the extended rule of law, although none of them as low as the worse socialist regimes. Privatization of the socialist economy is, therefore, a necessary condition for achieving a high level of the rule of law, but not a sufficient one.

This brings me to the problem of the nature of the link between the respective determinants of the rule of law – and the level of this variable. It is another important question in need of more research. It is clear that none of these – sufficiently narrowly and precisely defined – factors can guarantee a high level of the rule of law, while at least some of them – if they take an appropriately bad form – are sufficient to guarantee a low level of the rule of law. For example, the independence of the judges is a necessary condition for achieving a high level of this variable, but if they are incompetent, lazy or politicized, that level will be low.²⁵ The rule of law, like other important outcomes (e.g., economic growth), depends on the states (forms, values) of the whole set of factors which are considered to be its determinants. Much more research is needed on what states of the respective determinants are sufficient to block the improvement in the rule of law under various initial conditions and what combinations of changes in what factors can – given alternative initial conditions – produce large improvements in this variable.

RULE OF LAW AFTER SOCIALISM IN THE LIGHT OF EMPIRICAL RESEARCH

The purpose of this section is to review the empirical research on the rule of law after socialism. I will focus on two main issues: the changes in the legal frame-

²³ For more on these incompatibilities, see Balcerowicz, *Socialism, Capitalism, Transformation*; Milton Friedman, *Capitalism and Freedom*, 1962.

²⁴ See, e.g., Freedom House, Frazer, Heritage.

²⁵ Martin Krygier, 'The Rule of Law: An Abuser's Guide', in András Sajó (ed.), *The Dark Side of Fundamental Rights*, 2006, pp. 129-161.

work, and in the implementation (enforcement) of this framework, which are linked to the problem of the transformation of the inherited state's apparatus.

The liberalizing legislation enacted in the breakthrough phase meant a massive change in the legal framework but went basically in one direction: enlarging individual rights by scrapping the category of socialist crimes. It did not need, therefore, to reduce legal certainty, i.e., the level of the procedural rule of law, and it certainly fundamentally increased that of the extended rule of law. However, what about the legislative changes in later years after the collapse of socialism?

In a pioneering piece of research Klaus H. Goetz and Rodosław Zubek (2005) demonstrate – confirming widespread popular criticism – that legislation produced in Poland is excessive, plagued by many amendments that contribute to its instability and burdened by excessive specificity.²⁶ These related deficiencies, especially instability, are incompatible with a high level of procedural rule of law, as they are likely to produce much uncertainty with respect to the affected individuals. And the excessive detail is likely to lower the level of the extended rule of law (overregulation). Bruno Schönfelder documents the instability of legislation in Croatia stressing that ‘even civil legislation continues to be amended with irritating frequency.’²⁷ As I do not know of any empirical cross-country research in the extent of instability of legislation, I am not able to formulate strong general conclusions regarding this phenomenon and its sources. Limited evidence suggests that there are some important differences among the post-socialist countries in the respect. K.H. Goetz and R. Zubek show, for example, that the number of statutes passed between 1999 and 2004 increased in Poland from 126 to 242, in the Czech Republic from 71 to 159 and in Slovakia from 101 to 182, while it was basically stable in Hungary. The share of amendments during the same period in the total legislation amounted to 60 percent in the first three countries but equaled 40 percent in Hungary. More comparative research is needed on the instability of legislation in the post-socialist countries relative to other states.²⁸ Such investigation should also determine the relative role of the potential causes, e.g., rules governing the legislative process, political instability, the balance of various pressure groups, the strength of constitutional constraints, etc.

The last issue includes the role of the constitutional courts which have been established in all the CEE countries to perform judicial review of legislation. Again, the limited available evidence with respect to Poland and Croatia suggests two

²⁶ Klaus Goetz and Radoslaw Zubek, *Law-making in Poland: Rules and Patterns of Legislation*, 2005.

²⁷ Bruno Schönfelder, ‘Post-Communist Judicial System: Deep-Rooted Difficulties and Overcoming Communist Legacies – with Special Regard to Croatia’, 65th anniversary conference of the Institute of Economics, Zagreb, 2004.

²⁸ There are many complaints about the instability of the legal framework in the developed economies, too. See Goetz and Zubek, *Law-making in Poland*, at p. 5.

problems: many statutes that are clearly unconstitutional are passed by the Parliaments, and many laws that have been ruled unconstitutional by the constitutional courts remain on the books.²⁹ These developments may, again, be thought of as lowering the level of the procedural rule of law, and – if the contested legislation narrowed economic and civil rights – also that of the extended type. It would be useful to know from further research, whether other post-socialist countries display similar developments and what were their dynamics, i.e., if they were growing, stable or declining over time.

Let us now turn to the problem of the application and enforcement of the changing legal framework. This is a huge subject, very unevenly covered by empirical research. I will focus on the rule of law in the economy, as it is in this sphere that the most extensive legislative, organizational and economic change has occurred. Also, there are some interesting comparative studies on this issue.

I will start with reiterating that legislative change requires more time than organizational change, and – as a result – some implementation gaps are unavoidable. To deplore any deficiency in law's enforcement after socialism is, therefore, like complaining that the snow does not melt faster during springtime in Siberia. The organizational change related to the implementation of the changed legal framework is time-consuming, because, *inter alia*, progress depends on learning among the prosecutors and the judges, on the accumulation of the body of precedents reflecting the newly emerging economic reality, on the establishment of credit registries, on the proportion of new versus old officers of the law, etc. This is cumulative change that is a function of time. The real issues are, therefore, not the mere occurrence of implementation gaps, but their size and dynamics.

Let me start with some aggregate measures of economic rights and political rights. The former, taken from the Heritage Foundation (Index of Economic Freedom, 2009), combine procedural and substantive aspects of the rule of law and measure the degree to which the country's laws protect private property rights and the degree to which its government enforces these laws. They also assess the likelihood that private property will be expropriated and analyze the independence of the judiciary, and the ability of the individuals and businesses to enforce contracts.³⁰ The indicator varies between 0 (the worst score) and 100 (the best). The indicator of political rights, taken from the Freedom House (Freedom in the World,

²⁹ *Roczna Informacja*, Trybunał Konstytucyjny, Warszawa, 2006; Bruno Schönfelder, 'Post-Communist Judicial System: Deep-Rooted Difficulties and Overcoming Communist Legacies – with Special Regard to Croatia', 65th anniversary conference of the Institute of Economics, Zagreb, 2004.

³⁰ It should be stressed that the indicator discussed ignores the level of taxation and the intensity of administrative regulations, both of which are usually regarded as reducing economic freedom.

2009) includes both measures of political competition as well as an extensive list of related civil rights, e.g., freedom of expression and belief and associational and organizational rights. It varies between 1 (the best score) and 7 (the worst).

Table 2. Economic and political rights, 1996-2005

| <i>Country</i> | <i>Economic rights^a</i> | <i>Political rights^b</i> |
|---------------------------------|------------------------------------|-------------------------------------|
| <i>The leaders</i> | | |
| Denmark | 90-95 | 1 |
| Finland | | |
| New Zealand | | |
| Switzerland | | |
| <i>The transition countries</i> | | |
| Bulgaria | 50 → 30 | 2 → 1 |
| Czech Republic | 70 | 1 |
| Estonia | 70 → 90 | 1 |
| Hungary | 70 | 1 |
| Latvia | 50 | 1 → 2 |
| Lithuania | 50 | 2 → 1 |
| Poland | 70 → 50 | 1 |
| Romania | 30 | 2 |
| Slovakia | 50 | 2 → 1 |
| Slovenia | 50 → 60 | 1 |
| Belarus | 50 → 20 | 6 → 7 |
| Russia | 50 → 25 | 4 → 6 |
| Ukraine | 30 | 4 → 3 |
| China | 30 → 20 | 7 |
| <i>Other OECD comparators</i> | | |
| Greece | 70 → 50 | 1 |
| Italy | 70 → 50 | 1 |
| Portugal | 70 | 1 |
| Spain | 70 | 1 |

^a Heritage Foundation, 'Index of Economic Freedom', 2009

^b Freedom House, 'Freedom in the World', 2009

Measures of institutions are a valuable complement to verbal descriptions, often based on fragmented or anecdotal evidence, and to detailed case studies. However, these indicators are unavoidably crude approximations of the underlying reality and display a large margin of error. This is why I have ignored outlier observations (i.e., those which sharply deviate from other annual values) in the avail-

able time series and I disregard in my comments small differences in numbers. When there was a sufficiently strong tendency in these series, I have indicated the direction of change by an arrow.

Table 2 suggests the following observations:

- The CEE countries share with other OECD economies the highest scores on political rights. In that they differ from Belarus, Russia, Ukraine and China, all of which have been assigned low or very low levels of these rights. It is interesting to note that Russia converges in this regard to China.
- There is substantial variation in the measures of economic rights assigned to the CEE countries. They range from 30 in the case of Romania to 90 in the case of Estonia. Except for Estonia and Slovenia there is no improvement, and Bulgaria and Poland registered a decline. This may suggest that the implementation gaps have not been overwhelmingly reduced during 1996-2008. The other transition countries, except Ukraine, have recorded a decline in the indicators of economic rights to levels much below the average for the CEE. This is especially true in the case of Belarus, Russia and China. In other words, the democratic transition states display substantially higher levels of the rule of law in the economy than non-democratic ones, and the latter seem to be increasingly poorer protectors of economic rights.
- The CEE countries, except for Estonia, are assigned lower levels of economic rights than the world leaders. However, the former do not differ very much from Greece, Italy, Portugal or Spain. In addition, the first two states registered declines in the measures of the rule of law in the economy.

Let me now turn to two more specific issues: the protection of the newly introduced private property rights (and the related problem of economic crime) and contract enforcement linked to the efficiency of the courts. Both are fundamentally important to the growth and structure of the market economy. Higher levels of protection of private property rights lead, among other things, to larger private investment,³¹ and especially of that kind which is closely linked to innovation and, therefore, is particularly important for long-term development of the economy.³²

Better contract enforcement contributes to the expansion of the more complex market transactions and – via the classical mechanism described by Adam Smith – also generates economic growth.

³¹ Richard E. Messick, 'Judicial Reform and Economic Development: A Survey of Issues', in *The World Bank Observer* (1999), p. 117.

³² Fransico Gonzales, 'Insecure Property Rights and Technical Backwardness', in *Economic Journal* (2005), p. 703.

Protection of private property rights depends, on the one hand, on how well the state performs its constitutive function as a protection agency against ordinary crime, and on the other, on the extent to which its own agents engage in predatory behavior against the holders of private rights via excessive regulation, corruption, etc. It should be remembered that the state's performance in its first role is influenced not only by the characteristics of the public enforcement apparatus but also by other factors.³³ And some of these forces are very relevant in the discussion of crime after socialism.

Economic liberalization expanded not only the scope of ordinary market transactions but also that of the new types of crime, e.g., financial fraud.³⁴ It also led to a rapid growth of private property, especially cars, with the related hugely increased opportunities for theft. The speed of these processes was unavoidably faster in the short-run than that of restructuring of the police and other protection agencies. In other words, some implementation gaps were inevitable again. To what extent the actual gaps differed (as they surely did) from the minimal ones is a matter for empirical research. What is known from some studies is that crime, including property crime, in the CEE countries peaked in the mid-1990 and then declined, 'as police and state authorities became more adept at dealing with crimes.'³⁵ This pattern applies, among other countries to Hungary, where the overall number of crimes per one hundred thousands of population fell in 2002 to a level which was lower than in the EU-15 (The National Strategy for Community Crime Prevention, October 2003, p. 10). There were important differences in the dynamics and the level of crime across the transition economies. For example, in 1993 Ukraine recorded 1,032 crimes per 100,000 of population, while Russia produced 1,890. However, one should not rush to the conclusion that this difference reflects some particularities of transition in both countries as in 1971 the crime coefficient in Russia was twice as high as that in Ukraine, and this differential is difficult to explain by factors usually considered in criminology.³⁶ In discussing crime after socialism it should be remembered that it was hugely underreported under socialism³⁷ and that due to the newly liberalized media the perceived extent of crime was much higher than its time level. The same is likely to be true of

³³ They include, *inter alia*, the demographic structure of the population, e.g., a higher share of young males is likely to increase the level of violent crimes. Also the country's location matters. For example being the producer of narcotics contributes to crimes.

³⁴ Janusz Bugajski, 'Old and new threats for business in Poland', in *Journal of Money Laundering Control* (2007).

³⁵ Marina Caparini and Marenin Otwin, 'Crime, Insecurity and Police. Reform in Postsonant CEE', *The Journal of Power Institutions in Post-Soviet Societies* (2005), p. 1, at p. 5.

³⁶ Peter H. Solomon and Todd S. Fogleson, 'The Two Faces of Crime in Post-Soviet Ukraine', US Department of Justice, 2000.

³⁷ Caparini and Otwin, 'Crime, Insecurity and Police Reform'.

corruption.³⁸ This should warn us against making strong statements about various pathologies in the post-socialist countries solely on the basis of popular perceptions.³⁹

Some authors try to measure the level of protection of property rights in various locations. For example, Frey surveyed 115 managers of small businesses in Warsaw and Moscow in 1998 and found that shopkeepers in Warsaw faced a significantly more benign regulatory environment than those in Moscow: In the former, taxes were inspected on average 3 times per year, while in the latter 20 times.⁴⁰ Inspections provide fertile ground for corruption because they allow inspectors to request payments to grant relief from regulations. In addition, shopkeepers in Warsaw only needed to go to – on average – 4.2 agencies to open their shops, while shopkeepers in Moscow had to visit 6.7 different agencies (p. 237). More than twice as many shopkeepers in Warsaw felt the courts could protect them against gross violation of their property rights by the local government (62 versus 24 percent). In an earlier study done in 1996 it was found that 76 percent of shopkeepers in Moscow believed that one cannot operate a store without private protection while only 6 percent of the shopkeepers in Warsaw were of the same opinion.⁴¹ Still another survey of small private manufacturing firms in 1997 found that the percentage of respondents who said firms made extralegal payments for government services was 20 in Poland and Romania, 38 in Slovakia, 91 in Russia and 87 in Ukraine.⁴² These studies suggest that large differences existed in the extent of the government officials' infringement of private property rights across the post-socialist economies, at least in the 1990s. However, one should not lose sight of the fact that after socialism, even under the worse regulatory environment, however deplorable it was, the level of the rule of law in its extended sense substantially exceeded that under socialism, as socialism totally suppressed private economic activity.

As some of the discussed studies already suggested, important links existed between the regulatory environment of firms and the behavior of private entre-

³⁸ Anderson, Bernstein, and Grey, 'Judicial System in Transition Economies'.

³⁹ These perceptions are a much weaker base for formulating conclusions about the underlying reality that in the mature democracies, where freedom of the media existed for a long time. In the former Soviet bloc, the pathologies which existed under socialism were hidden from the public by the political control over the media. Once liberalized, the media quite naturally focused on the pathologies after socialism. This 'visibility effect' must have led many people to believe that all kinds of social ills erupted only after socialism collapsed.

⁴⁰ Timothy Frey and Ekaterine Zhuravskaya, 'Rackets, Regulation, and the Rule of Law', in *Journal of Law, Economics and Organization* (2000), p. 478.

⁴¹ Timothy Frey and Andrei Shleifer, 'The Invisible and the Grabbing Hand', in *American Economic Review* (1997), p. 354.

⁴² Simon Johnson, John McMillan and Christopher Woodruff, 'Carts and Relational Contracts', in *Journal of Law, Economics and Organization* (2002), p. 221.

preneurs. This relationship was investigated more deeply with respect to three cities in Russia: Ulyanovsk, Moscow and Smolensk, which differed in the economic strategies chosen by their post-socialist local governments. As of 1996 Ulyanovsk had few private shops, price controls were still in place for many goods and it was viewed as a stronghold for the Communist Party. Moscow relied on liberalized markets, but maintained close ties between the city government and private business. In some respects Smolensk employed an even more liberal strategy. Most prices had been liberalized and the privatization of small shops proceeded at a rapid pace.⁴³ It was found that shopkeepers in Ulyanovsk need more permits to open a shop than their counterparts in Moscow and in Smolensk and they had to wait longer till they could open a shop.

The shopkeepers in Ulyanovsk were also inspected more frequently than those in Moscow and Smolensk. These differences in the regulatory environment of private firms were accompanied by important differences in the firms' attitudes. It was found that shopkeepers who rated the role of local governments as negative were significantly more likely to have contact with a private protection racket than those who had a more positive view of the local government. The study suggests that predatory government regulation goes hand in hand with weak courts, and that both push business into the informal economy, where they have to use the services of private protection in order to defend their property and resolve commercial disputes. This empirically-based view of the underdevelopment in public law enforcement in Russia contrasts with theoretical speculations which ascribed the main role to the rich allegedly favoring poor protection of property rights.⁴⁴

Let me finally move to contract enforcement and the related role of courts. It should be stressed that public courts are not the only mechanism of dispute prevention and resolution. There are various non-public arrangements too, e.g., reputation-based and other relational contracts, arbitration, mediation and other private institutional devices.⁴⁵ It is, however, generally agreed that independent, impartial, competent and efficient courts not only constitute one of the fundamentals of a high level of the rule of law (in its procedural and extended sense) but also

⁴³ Frey and Zhuravskaya, 'Rackets, Regulation, and the Rule of Law'.

⁴⁴ Konstantin Sonin, 'Why the Rich May Favor Poor Protection of Property Rights', in 31 *Journal of Comparative Economics* (2002), p. 715; Karla Hoff and Joseph E. Stiglitz, *The Transition Process in Post-Communist Society: Towards a Political Economy of Property Rights*, 2004.

⁴⁵ See Juan Carlos Botero, Rafael La Portal, Florencio López de Silanes, Andrei Shleifer, Aleksander Voloka, 'Judicial Reform', in *The World Bank Research Observer* (2003), p. 61. They also stress that studies of the juridical systems tell us little about the invisible mass of cases that settle before even seeing the court room and '... even less about the possibly larger mass of cases that never develop because potential litigants are discouraged by procedural problems, a substantive law, distrust of the accuracy or honesty of the judicial system, or simple ignorance of their legal rights.'

make an important contribution to economic growth, as state courts are the locus of ultimate enforcement.⁴⁶

History in the CEE countries did not provide them with the option of preparing the courts to deal with the newly emerging market economy before it started thanks to economic liberalization. And to delay its start would have been irrational, as important economic benefits would have been postponed⁴⁷ and there would be less pressure to reform the courts.⁴⁸ In addition, as is the case with other instances of organizational change, judicial reforms unavoidably take more time than the early expansion of the scope of market transactions and that of related disputes. As a result some implementation gaps were unavoidable. Therefore, the problem was again not their mere emergence but their size and their dynamics. And implementation gaps were likely to differ in both these dimensions, depending on the field of law the courts were dealing with. They were bound to be much smaller, say, in family law than in commercial law, and within the latter – smaller with respect to simple trade disputes than in the sphere of financial or privatization transactions.

The available empirical resources dealing with the courts' enforcement of the commercial law confirms that – on average – large implementation gaps emerged in transition economies. J.H. Anderson, David S.S. Bernstein and Cheryl W. Grey used a survey of a large group of enterprises in these countries and found that in those firms' opinions the progress in courts' independence was substantially larger than that in their efficiency. Also improvements in the courts were found generally to lag behind some other reforms, e.g., reduced crime, corruption, tax burden, tax administration. However, careful reading of this study should discourage hasty generalizations as it shows large and sometimes surprising cross-country variation in the assessment of the courts. For example, courts are believed to be much quicker in Uzbekistan, Azerbaijan, Hungary, Tajikistan, Moldova and Romania than in Estonia, Bulgaria, Slovak Republic, Czech Republic, Slovenia, Poland, Kyrgyz Republic and Croatia. A much higher percentage of firms in Hungary, Estonia, Uzbekistan, Slovenia, Latvia, Poland and Romania was of the opinion that courts are fair than in Lithuania, Belarus, Ukraine, Georgia and Russian Federation. On the honesty dimension, much higher scores were given to courts in Estonia, Hungary, Slovenia, Uzbekistan, Poland, Romania and Croatia than in Lithuania, Ukraine and Russia. The ability of the courts to enforce the decisions was scored the highest in Belarus and the lowest in Russia. The top performers also included Hungary, Bulgaria, Uzbekistan, Slovenia, Estonia, Azerbaijan, Ukraine

⁴⁶ Simon Johnson, John McMillan and Christopher Woodruff, 'Courts and Relational Contracts', in *Journal of Law, Economics and Organization* (2002), p. 221.

⁴⁷ Leszek Balcerowicz, 'Institutional Systems and Economic Growth', in Anders Åslund and Marek Dąbrowski (eds.), *Challenges of Globalization. Imbalances and Growth*, 2008.

⁴⁸ Anderson, Bernstein and Grey, 'Judicial System in Transition Economies'.

and the worst – Lithuania and Kyrgyz Republic. These findings defy easy interpretations and call for more empirical research.⁴⁹

To enrich the debate and to provide a check on the reported findings let me present Table 3, which draws on the research done by the Fraser Institute and the World Bank.

Table 3. The court’s independence, impartiality and efficiency

| <i>Country</i> | <i>Judicial independence^a</i> | <i>Judicial impartiality^b</i> | <i>Contract enforcement – days^c</i> | <i>Contract enforcement – cost (% of debt)^d</i> |
|---|--|--|--|--|
| <i>Leaders in political and economic rights</i> | | | | |
| Denmark | 9 | 9 | 380 | 23 → 24 |
| Finland | 9 | 8,5 | 235 | 10 → 11 |
| New Zealand | 9 | 8,5 → 9 | 216 | 22 |
| Switzerland | 8,5 | 8,5 | 417 | 21 → 23 |
| <i>Transition countries</i> | | | | |
| Bulgaria | 3 | 3 | 564 | 24 |
| Czech Republic | 5 | 4 | 820 | 33 |
| Estonia | 7 | 6,5 | 425 | 19 |
| Hungary | 5,5 → 6 | 5 | 335 | 13 |
| Latvia | 4,5 | 4,5 | 279 | 16 |
| Lithuania | 4 | 4 | 210 | 24 |
| Poland | 4,5 | 4 | 980 → 830 | 12 |
| Romania | 3 | 3 | 537 → 512 | 20 |
| Slovakia | 4 → 4,5 | 4 | 565 | 26 |
| Slovenia | 5 → 6 | 5 → 6 | – | 19 |
| Belarus | – | – | 250 | 23 |
| Russia | 2,5 | 2,5 → 3 | 281 | 13 |
| Ukraine | 2,5 | 3 | 354 | 41,5 |
| China | 4 | 4,5 | 406 | 11 |
| <i>OECD comparatives</i> | | | | |
| Greece | 5,5 → 6 | 5,5 → 6 | 819 | 14 |
| Italy | 4,5 → 5 | 3,5 → 4,5 | 1390 → 1210 | 30 |
| Portugal | 7,5 → 8 | 5 → 5,5 | 577 | 14 |
| Spain | 4,5 → 5 | 5 → 5,5 | 515 | 17 |

^a and ^b: Fraser Institute, ‘Economic Freedom of the World: 2008 Annual Report’

^c and ^d: World Bank

⁴⁹ B.A. Hamilton, USAID (2007), ‘Modernizing Contract Enforcement, Lessons from Russia’, in *Doing Business 2007: How to Reform Case Study: Enforcing Contracts – Russia* finds that the number of

As one can see, the CEE countries' scores with respect to judicial independence and impartiality are rather stable during 1996-2008, which may suggest little improvement during this period. They are also quite varied, ranging from 3 (Bulgaria, Romania) to 6 (Hungary, Slovenia). They are much below those assigned to the leaders in economic and political rights but not very different from the scores given to Italy, Greece and Spain. The CEE countries fare better than Belarus, Russia and Ukraine, but – surprisingly – not much better than China. A related surprise is that China performs better than Russia.

The situation is more mixed regarding the speed of contract enforcement. The laggards among the CEE perform equally as badly as Greece. However the leaders in this respect (Latvia, Lithuania) perform no worse than those among developed economies (Finland, New Zealand). Besides, the variation in the CEE countries is large and similar in size to that displayed by reported developed countries. This finding militates again against easy generalization about the transition countries, derived – as is usually the case – from assumptions about their common socialist legacy. Clearly other factors have played an important role, including the unequal pace of judicial reforms after socialism. It also demonstrates that there was no strong path-dependence in this field. Similar observations can be made regarding the costs of contract enforcement which is one of the measures of courts' affordability. The leaders in the CEE (Hungary, Poland) are as good as Finland and Greece – the top performers among the developed countries. And the laggards in the first group (Czech Republic, Slovakia) do not differ from the second group (Italy, Denmark).

To conclude: the empirical studies, even though very incomplete, are sufficient to falsify widespread claims about highly similar and negative developments in the CEE countries after socialism, allegedly stemming from a common legacy. They show, for example, that crime peaked in 1990. True, the available research suggests that there has been little improvement in the level of law enforcement and court efficiency since the middle 1990's. However, they also demonstrate a wide variation of the achieved levels within the CEE, which obviously requires an explanation. Also, although even the better performing CEE countries are substantially below the top performers in the OECD group along the most measures they do not differ much from Greece, Italy, Portugal or Spain.

cases filed in the Russian commercial courts increased steadily by about 20 percent between 1991 and 2005. And Kathryn Hendley, 'Reforming the Procedural Rules for Business Litigation in Russia: To What End', in *Demokratizatsiya* (2003), p. 363, finds that the inherited commercial courts have been successfully transformed.

CONCLUDING COMMENTS

It is analytically useful to define institutional change in a broad sense, i.e., as including both change in the legal framework and in its organizational system. Such a broad definition highlights an enormous amount of institutional transformation in the CEE countries after socialism and points to important links between both components of institutional change.

The minimal clarification of the concept of the rule of law includes, in my opinion, its structuring as a variable that can take various states which can be ranked, so that one can speak of various levels of this variable. Also, it is important to distinguish the procedural dimension of the rule of law which increases with the reduced uncertainty produced by the actions of state agents, and the extended (substantive) type, which is determined by the extent of effective economic and basic civil rights.

There are also some fundamentally important parts of the overall institutional transformation after socialism that can be usefully discussed under the heading of the rule of law. It is an empirical challenge to determine which of the various processes of institutional change after socialism contributed to the dynamics of this variable after the collapse of the socialist regime – and to what extent and how. In that regard, one should look not only to direct determinants but also to the important indirect ones, e.g., privatization, the emergence of free media and the organization of civil society.

There are some unavoidable differences in the maximum possible speed of various processes of institutional change. In general, changes in the legal framework take less time than those in a country's organizational system including those in its law enforcement apparatus. It should not, therefore, be surprising that widespread implementation gaps emerged even in the most reformed transition countries. One should rather focus on cross-time and cross-country differences in these gaps. And this again calls for empirical research.

The available studies suggest that, after the initial breakthrough, substantial instability of legislation emerged in some CEE countries, potentially reducing the level of the procedural rule of law. Some evidence also points to a large amount of clearly unconstitutional legislation and to the legislative bodies' neglect of the rulings of the constitutional tribunals. More research is needed on the spread, dynamics and sources of these two phenomena.

The aggregate indicators of the rule of law in the economy and on political rights show that the CEE countries do not differ from the mature democracies on the latter but are below the best performers on the former. However, there is a substantial variation in the extent of economic rights among the CEE countries and – on average – they do not differ much from Greece, Italy, Portugal and Spain

and are above those in the non-democratic transition countries, such as Russia and China.

There is also substantial variation among the transition countries in the protection of private property rights, and the related levels of economic crime. However – contrary to many reports – crime appears to have peaked in the 1990s and then declined. This suggests caution in relying on media reports and related measures of popular perception while discussing crime – and other pathologies – after socialism. It also suggests, that the implementation gap in the criminal justice system might have first increased and then fallen.

The available empirical studies of contract enforcement and the related performance of the courts also show substantial variation across the CEE countries. In general, it appears that more progress was made in courts' independence than in their efficiency. This may be interpreted as indicating that implementation gaps regarding the second dimension have stabilized – compared to the best performers in the OECD countries. However, on the measure on the speed of contract enforcement the laggards among the CEE countries perform equally as badly as Greece and Italy while the leaders perform no worse than the leaders on overall economic rights in the OECD. This again defies easy generalization and demonstrates that – despite the common socialist legacy – large differences emerged in an important dimension of courts' efficiency in the CEE countries. Clearly, other factors than this legacy were at play here.

The above remarks point to a number of important gaps in our knowledge of the rule of law after socialism: they refer to the cross-country variation and dynamics of the instability of legislation, to the position of constitutional courts, to the independence and efficiency of ordinary courts, etc. The list can be easily extended. For example, efficiency and accuracy of the police and of the prosecutors constitute an important but hugely under-researched subject. More generally, much more attention should be dedicated to the reasons for the various dynamics and levels of the rule of law in the post-socialist economies compared to other countries. I will only note that they cannot be reduced to the common legacy of socialism as important differences emerged in the various dimensions of this variable after socialism. Nor can they be reduced to the fact that some transition economies had the option to enter the EU and they have to adopt the *acquis communautaire* while other countries did not have this opportunity and related obligation. For important differences emerged among the new Member States too, including in institutional changes which were not required by the EU.

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