Reforms and judicial cooperation in the European policy of promotion of the "rule of law"

***A comparative analysis of new members*[1]**

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Introduction: research design and empirical field

The judicial systems of the new European member States have been affected by two processes of transformation. First, after the breakdown of communism, a massive reform was aimed at de-politicising the judicial branch. This has paved the way for a rejection of that previous tradition in which the judiciaries had been used as political tools to mobilise and transform society, instead of institutional tools that apply the law *erga omnes* (Dietrich, 2002).

Second, the pre-accession negotiations have entailed a widespread transfer and diffusion of normative inputs from the European Union level to the national level. Through the diffusion of legal and formal norms and of organisational and administrative practices, the judicial systems have been reformed in order to make them conform to the European Union criteria agreed upon in Copenhagen. Therefore, in these countries the process of democratisation and the process of Europeanisation have both had an impact on the role that the judiciary plays in the new democracies and on the interaction that the social system has with the administration of justice (Gargarella, 2004; Sadurski, 2004). [3]

In this paper I will address the impact[4] that the Europeanisation process has had on the judicial policies adopted in Poland, the Czech Republic and Hungary. The analysis covers three dimensions of the judiciaries: the system of governance, the organisation of the court system,[5] and the management of judicial offices and judicial services.[6] I have relied on three sources of data: the reports drafted by the international observers, in particular, the Open Society Institute and the Council of Europe, the reports of the projects financed by the Phare programme that were issued between 1998 and 2004,[7] and the official documents from the European Commission.[8] The analysis of these data has been completed with the results of two groups of semi-structured interviews, with civil servants and bureaucratic personnel of new and old member States and with the members of the Committees related to the Directorate-General of Legal Affairs of the Council of Europe.

In this paper I will argue that Europeanisation has impacted the judicial policies of the candidate countries differently, because of the different conditions prevailing in the countries that began to transform their policies in the pre-accession period. These differences can be attributed to three factors: a) the relationship between the executive and the judicial branches, in particular, the role played by the High Judicial Council; b) the agents who have acted as policy entrepreneurs in the field of the judicial reforms; c) the national heritage with reference to the legal culture (Piana, 2005; Wyrzykowski, 2000), especially the role of judges (Guarnieri and Pederzoli, 2002).[9] Europeanisation has influenced judicial reform through the necessity of adapting national laws and organisational structures and through the exchange of ideas, best practices and arguments that have created new policy windows (Kingdon, 1984) to "anchor" (Morlino, 2002, p. 7) national reforms to international standards.

Therefore, after the systemic changes that influenced institutions and the pattern of political relations in the 1990s, Europeanisation has created the conditions that make changes possible in the judiciaries at the *meso-level*. These changes have affected policy systems, the capacity to act and the ideas used by various advocacy coalitions, and the opportunities faced by policy-makers and the beliefs used by the latter in designing and arguing for the reforms. The final transformation has brought about a different pattern of Europeanisation in each country, which has modified each one's political institutions[10] from within. It has introduced, through both micro- and meso-changes, many new normative strictures, which have slowly shifted the equilibrium existing between judicial independence and judicial accountability in favour of a more visible accountability, so that the judicial branch is now aimed at efficiently and transparently delivering justice to its citizens.

The mechanisms of Europeanisation in the judicial sector

When pre-accession negotiations started in 1997, the normative strictures that the European Commission was allowed to employ to promote the rule of law had a vague and undetermined meaning (Kochenov, 2004), and differed a great deal with respect to their compulsory force. This is relevant with respect to the degree of coercion used by the European Union to put pressure on the candidate country in promoting the rule of law in general and judicial reforms in particular (Schimmelfenning, 2005).

First, candidate countries were forced to adapt their criminal and civil codes and procedures. In this field the European Union was acting legitimately, because of the compulsory force of the normative strictures that cover judicial cooperation and the exchange of data and information relating to security and justice. The regulations adopted by the European Council are to be integrated into the legislation of both existing member States and candidate countries.[11] Indeed, they allow the European Union to pursue the objectives of judicial cooperation agreed upon in Tampere in 1999 and finalised in the principle of common acknowledgement of judicial decisions in civil, commercial and criminal matters[12] settled in 2000.[13] Because of the compulsory force of the normative strictures covering the areas of freedom, security and justice, political conditionality has been used as leverage (Vachudova, 2005, p. 106) to push forward the adaptation of national norms and their convergence towards the European Union *acquis*.[14] Through political conditionality, the European Commission in a way acted as an "agent" on behalf of the member States (Nicolaides, 2003). Indeed, the objectives, agreed upon through an intergovernmental approach in Tampere, can be attained only if the judicial procedures can be trusted and are known across borders (Moore and Chiavario, 2004).

Second, the candidate countries were forced to reform their judicial systems. Thus, the normative strictures related to judicial administration and to the organisation of the judicial branch are a kind of by-product of different normative strictures and best practices coming from different normative sources and authorities. They differ with respect to their legitimacy and their prestige as well. More precisely, the normative strictures applied to the candidate countries and aimed at influencing their judicial policies are not grounded in a well-defined set of agreements from the *acquis communautaire*. This means that the European Commission has not been able to apply political conditionality or to steer the process of reform towards a specific and well-defined set of organisational or institutional tools.

To be sure, the communist legacy (Kubicek, 2000), according to which the judicial branch should be a part of the executive branch, explains the very attentive screening undertaken by the European Commission of the institutional guarantees of judicial independence for the branch and for the judges as well. The complete absence of any professional criteria for selecting the judges during the previous regimes explains why the European Commission has strongly advocated a system to train judges and clerks and impart technical and legal competence to them (Mattina, 2004, p. 96). Nonetheless, the European Commission has enacted a policy to promote judicial independence and judicial capacity, based on a transnational discourse embarked upon within the bodies of experts and the policy networks concerned with judicial reforms (Haas, 1992; Dimitrov, 2004). This discourse is the outcome of the policies aiming to promote the "rule of law" and the screening used by the think tanks[15] and by international organisations[16] in the period of democratic transition – that is, therefore, well before the start of pre-accession negotiations. These policies have been designed following a rigorous procedure of screening and advising aimed at assessing to what extent the ex-communist countries were moving towards the principle of the rule of law.[17]

The chapters of the Regular Reports drafted by the European Commission between 1999 and 2004,[18] which assess the governance, the administrative capacity and the procedures of the judiciaries, quoted from writings of the World Bank, the Open Society Institute and the Council of Europe. Nonetheless, while the International Convention and the reports from international observers have set out the concepts of judicial independence and of judicial capacity, so that the advisors can assess the reforms according to a common set of indices and dimensions, the Regular Reports have failed to translate these concepts into a set of well-defined criteria. Therefore, the screening of the European Commission has been much less effective.[19] Some suggestions have been more frequently included in the Regular Reports: an adequate system of judicial training (European Commission, 1999 and 2000), a strong administrative capacity and an efficient management of the judicial offices. These dimensions relate mostly to the backlogs and the overloading of the courts. According to the European Commission and to the international observers, the delays in the delivering of justice are indeed due to

the lack of professional competence in judges and to the absence of administrative capacity within the courts (European Commission, 1999 and 2000).[20]

Therefore, in this area, the European Commission can rely upon soft law and non-coercive instruments. First, screening provides governments with a means of anchoring their reforms, even if they are not provided with a well-defined set of solutions to solve their national policy problems. Second, the European Commission finances the reforms, through the Phare programme, with the allocation of funds for projects aimed at providing consultation and legal assistance (Grabbe, 2001). Through administrative twinning, for instance (Papadimitriou and Phinnemore, 2004), the European Commission creates a kind of market for exchanging models and best practices. Indeed, these are projects agreed upon between the public administration of an existing member State and the public administration of a candidate country (European Commission, 1998). The objective of the project is to provide the candidate country with an organisational model or a best practice based on the findings of experts, who are usually linked to think tanks or NGOs that are active in the field of legal reforms and judicial cooperation among existing members.

The influence of the European Union is exercised through new policy windows, which provide new opportunities for political officials to interact with the legal representatives of existing members. These interactions are sometimes based on discussion and argumentation (Checkel, 1999; Franck, 1990) and sometimes on lesson-drawing (Rose, 1993). In either case, the patterns of interaction are created within the international arenas where bodies of experts operate (Haas, 1992).

Because of the different kinds of normative strictures that the European Union applies to the candidate country (Grabbe, 2001), and because of the different kinds of political and technical legitimacy supporting a European Union action, Europeanisation proceeds through different patterns and with different mechanisms. From this perspective, the diffusion of norms in judicial cooperation and in the reforms of the system of governance and of the judicial administration occasioned the taking of different logical approaches towards the planning on and taking of action. Policy-makers and legal experts do not only act according to their assessment of the costs and benefits created by political conditionality; they also evaluate reforms and models to organise and manage judicial systems on the basis of the ”cognitive and normative appropriateness” that they have with respect to the national legal culture (March and Olsen, 1989; Schimmelfenning, 2002). Ministries and advocacy coalitions act to promote their interests and to adopt policy solutions that are perceived as more likely to be adequate and appropriate in their countries (Piana, 2005).

A comparative analysis of this process of change in Poland, the Czech Republic and Hungary will enable us to isolate the role played by the several factors that have influenced Europeanisation with respect to judicial policy.

The initial conditions in Poland, Hungary and the Czech Republic

The judicial reforms carried out in ex-communist countries first followed the normative strictures of the Council of Europe. They have been applied to the Central-Eastern European countries through the promotion of the “rule of law” (Council of Europe, 2005) and through the consulting activities of the Venice Committee. This committee has controlled the drafting of the new democratic constitutions and has pushed the Central-Eastern European countries to go further in the development of standards for constitutional justice. Moreover, the influence of the Council of Europe has been exercised through the screening of the civil and penal codes adopted in the Central-Eastern European countries. In particular, the right to due process and the principle of *nullum crimine sine lege* represent the two guidelines to follow when reviewing and amending the codes during the transition to democracy.[21] Nonetheless, in each country, the checks and balances and the application *erga omnes* of the law have been established with different institutional tools. Indeed, political power has been differently organised and structured in each of the new democracies.

In Poland the transition has not entailed a radical rupture with the former regime (Osiatinsky, 1986). The political elite and the civil service of the new regime have brought in people who were appointed during the communist period and integrated them within the new system, and, generally speaking, political changes have been introduced through a process of legislative and regulatory *bricolage*. First, the constitution of 1952 was amended in order to introduce guarantees of judicial independence,[22] and second, the final constitution of 1997[23] formalised the role of the High Judicial Council, which was established in 1989 by statute.

The system of governance of the Polish judiciary is characterised by a diffuse organisation of power. There are many players who can intervene in the governance of the judiciary, and at different levels many of them have the power of veto (Tsebelis, 1990).[24] The Ministry of Justice was in charge of the budget process after the transition, and thus was capable of greatly influencing the administration of the judicial offices and the behaviour of the presidents of the courts. These presidents are appointed by the Ministry of Justice with the advice of the High Judicial Council, and represent the first administrative level under the supervision of the Ministry of Justice (European Commission, 1999). Not only are the presidents the first level at which the Ministry of Justice can influence the judicial administration, but they can also play an informal role in the selection, promotion and evaluation of judges, because of the informal relationships that they have with the Ministry of Justice (Open Society Institute, 2002).

The High Judicial Council was introduced after the transition as a purely advisory body; however, lacking real authority, it could not guarantee the administrative independence of the judiciary. It is allowed to attend meetings of the Committee of Justice within the Sejm (Parliament), and is consulted in the budget process. Still, the judiciary did not benefit by any guarantee of administrative independence. This is one reason why the bureaucratisation and centralisation of the interests within the branch remained weak during the transition. Furthermore, the control exercised by the Ministry of Justice over the judicial offices is tempered by the presidents of the courts, who had at the beginning of the democratic regime a kind of "local" power over their own courts. Finally, the judges endorsed an interpretation of legal behaviour whereby judicial independence was viewed as the right to act alone, in which judges were seen as isolated units (Open Society Institute, 2001, p. 327).[25] This attitude derives from the Polish legal culture and from the commonly held belief that any discussion or criticism is an attempt to limit the independence of the judge (Open Society Institute, 2001; Morawski, 1999).[26] The same attitude seems to be responsible for the recent delays in judicial procedures (Maitrepierre, 2002).

The weakness of a kind of *esprit de corps* in the judiciary was also related to the absence of a national system of judicial training. Judicial training was one of the tasks of the Ministry of Justice. The lack of resources and the absence of a standard programme of training had weakened and undermined the development of professional judicial standards and the capacity of the judicial offices to respond effectively to the increase in court cases following the democratic transition.[27]

These objective conditions joined the subjective perception of citizens who did not trust either the judicial system or the judges. The attention paid by the media and the citizens to the judicial branch is diffuse. Poland is, so to speak, characterised by a pattern of accountability[28] where civil society and academia have played a prominent role. For instance, in the last period of the communist regime, academics – almost all from Catholic universities – guaranteed the continuity of scientific research and represented the one place where independent thought was accepted. This cultural tradition has remained within the departments of law and has transmitted the heritage of a prior liberal tradition. This tradition – which is present in Poland much more than in almost any other ex-communist country – explains why the academic community can have a relationship with legal and other experts in Western countries. Together with Polish legal experts, the Union of Judges ("Iustitia")[29] has also interacted with Western communities, in particular with professional organisations, such as the American Bar Association. Civil society has therefore played the role of facilitator in the process of Europeanisation, and many channels to transfer norms have been established among NGOs and scientific experts, in addition to the channels opened up by the government.[30]

After the transition, the Hungarian system of governance developed a hierarchical and bureaucratic structure. Administrative and jurisdictional mechanisms of control became hierarchical and centralised. In 1991, the High Judicial Council was established, with administrative competency and an almost exclusive power in the appointment, selection, promotion and evaluation of judges. [31]

The independence of the judiciary did not, however, guarantee the independence of each judge (Larkins, 1996).[32] Indeed, the presidents of the courts came to maintain a prominent role even at the informal level, which is due to the fact that many procedures are not clarified and formalised by statute. Procedures to evaluate judges and to promote them also depend on the discretionary power of the president.[33] Furthermore, in 1997, vacancies in the courts were still announced through the bulletin of the High Judicial Council ("Bírósági Közlöny"), which has a very limited circulation. Finally, many channels for lawyers to become judges remained open, but they lacked formalisation.[34]

While the courts were well staffed because of the availability of a high number of legal practitioners even in previous regimes, the professional competence of judges was not so high. The High Judicial Council was in charge of judicial training but had no obligation to formulate a national programme for the judiciary as a whole.

In the Czech Republic the administrative efficiency of the judiciary was emphasised more than judicial independence. The system of governance designed after the transition was centred on the Ministry of Justice, which was in charge of all administrative tasks.[35] Since there was no High Judicial Council, the Ministry of Justice was responsible for the selection and promotion of judges. These tasks were managed together with the presidents of the courts, who were appointed directly by the Ministry of Justice.

The statutes issued in 1991 only partially defined the sharing of power between the Ministry of Justice and the presidents of the courts. Many arrangements were made through praxis and informal rules, so that the Ministry of Justice has maintained a high degree of interference with the administration of the courts and the behaviour of the presidents.[36] Over the years the Ministry of Justice usually accepted the advice of the presidents on the appointment of judges, and many judges were also experts appointed by the Ministry of Justice. These structural conditions limited the independence of each judge and undermined the independence of the judiciary.

The Czech judiciary also experienced a sharp break with the past, characterised by a long process of lustration (Open Society Institute, 2001, p. 116), in which half of the bench was dismissed. Many judges appointed after the transition were young and inexperienced. The lustration has, furthermore, given rise to an open debate on the process of state-building (Priban, 2002). The media and public opinion were highly critical regarding the impartiality and the capacity of the new structures. Both have also played a monitoring role relating to the influence of public institutions on the judiciary (Open Society Institute, 2001, p. 117). Some cases of corruption that occurred within the judiciary have been at the heart of a public debate, and acute attention has been paid to the competence and the professional expertise of the new bench.

The search for legitimacy by the public has also focused the attention paid by public institutions on the efficiency of judicial procedures. In due time, respect for the right of due process was addressed as one of the main concerns of judicial policy after the transition. This has also weakened the legalistic approach of the Kelsenian tradition in the Czech Republic dating back to the 1920s. The external legal culture (Cotterrell, 1997, p. 19) has pushed forward a policy aimed at enforcing human rights in the administration of justice.

Since the judges did not share an *esprit de corps* based on shared experience and seniority – only 30% of the judges remained on the bench after the transition – they have searched for a new legitimacy through the activity of the Union of Judges. This Union was created in 1999 but was not allowed to take part in drafting the reforms (Open Society Institute, 2001). Instead of putting pressure on the executive, the judges interacted with the media, public opinion and the international community. They would become one of the most active players in the reforms after 1997.[37]

TABLE. 1. *The* status quo *before the pre-accession period in Poland, Hungary and the Czech Republic*

Country	Civil and penal codes	System of governance	Judicial training	Administrative capacity of judicial offices
Poland	Amended.	Shared competencies between the HJC and the MoJ. The HJC with broad responsibility (representative power).	Competency of the MoJ; the training is scattered and decentralised. Main role of the Judicial Academy.	Shared competencies between the judges and the clerks; few IT devices; no database for the cases; limited spread of legal knowledge through the internet.
Hungary	Amended.	Administrative autonomy of the judicial branch. The HJC with nearly exclusive authority.	The HJC provides for judicial training.	Reasonably good availability of human resources; no database for the cases; no availability of electronic devices in the courts; the courts are managed by

				judges.
Czech Republic	Amended.	There is no HJC; the MoJ has exclusive administrative authority over the judicial branch and the courts.	The MoJ is responsible for judicial training; no standard national system; the Judicial Academy organises many courses autonomously.	The presidents of the courts have judicial and administrative tasks; few IT devices; few well-staffed courts because of the lustration (only 30% of the judges appointed in the previous regimes have kept their places).

Source: Author's elaboration from Open Society Institute, 2001 and 2002; Greco, First evaluation, 2003; European Commission, 1998.
Key: MoJ = Ministry of Justice; HJC = High Judicial Council; IT = Information Technology

Table 1 presents an overview of the *status quo* of the judiciaries when the pre-accession process started. From a formal point of view the three countries analysed show a common trend in the adaptation of the civil and the penal procedures. They have changed the codes according to the standards developed at the international level. From an administrative point of view, almost all the courts are provided with few human and material resources. This is a common feature, even in the Czech Republic, where administrative efficiency is emphasised more than it is in other countries. One can argue that reforms have entailed so many costs that the modernisation of the courts has been a highly challenging objective for the governments. With respect to judicial training, the main difference resides in the identity of the agent who is in charge of the training. In Hungary, training is quite centralised, while in Poland and in the Czech Republic, it is much more decentralised. In Poland and the Czech Republic, many seminars and training programmes are organised apart from the executive branch. Finally, with respect to the system of governance, institutional choices have been influenced by the legal culture. Therefore, national institutions are sensitive to the differences that exist between the three countries with respect to their cultural heritage and the strategies that they have adopted in order to come to terms with the past.

The effects of Europeanisation: national differences and common trends

During the pre-accession period, the process of transfer and diffusion of norms from the European Union level to the candidate level touched upon three dimensions: the adaptation of the civil and penal codes to European Union standards, the enhancement of the administrative capacities of the judicial offices, and the introduction of a pattern of rules and programmes to reinforce the technical competence of judges, so that the enforcement of the law is based solely upon impartial, objective and formalised criteria. Corruption and bribery were excluded. As I have stated, the effect of European Union pressure, in terms of its binding force, varies according to which of these aspects one considers.

With respect to civil and penal codes and procedures, the obligation to conform to international conventions and to bolster the legal and institutional structures required to take part in European Union judicial cooperation explains why the reforms were adopted by the three countries from 1997 to 2004. In Poland, civil and penal procedures were amended in 1998 and again in 2003 (European Commission, 1999 and 2003). In Hungary, they were amended in 2000 and then again in 2002 (European Commission, 2001 and 2003). In the Czech Republic, the civil and penal procedures were redefined in 2000 and then were amended in 2002 in order to solve the problem of delays in the processes and to respect the right of due process, established in the European Convention on Human Rights (European Commission, 1999 and 2000). The international conventions are close to being ratified.

From an organisational point of view, Europeanisation has mattered. In Poland, it has resulted in an ad hoc department to manage the competency linked to judicial cooperation. In all three countries the representatives for EuroJust and EurPol have been chosen (Greco, 2002 and 2003). Finally, the executive branch of government has decided to create the structures needed to exchange information and data at the European Union level: in Poland, this has meant the creation of the National Court Register, a tool to gather data concerning pending cases and the dossier of past cases, while in the Czech Republic, the Penal Register was created in 2000 (Open Society Institute, 2002).

While the structures required for the implementation of the regulations concerning judicial cooperation seem to exhibit a common trend (Pridham, 2000),[38] the policies aimed at managing the judiciaries highlight national differences. This differentiation is due not only to the players who have been

involved in the reforms or in the projects for change, but also to the fact that the international standards of judicial independence and judicial capacity have been put into effect in each national policy system. Therefore, Europeanisation follows different patterns in the three countries and delivers different outcomes,[39] also because of the differences in the capacity for action and for advocacy that the actors involved in the policy process have.

Table 2 shows the changes introduced through the statutes and the projects of reforms in the judiciary, addressing the dimensions of the judiciary screened by the Regular Reports.

TABLE. 2 *Changes introduced between 1997 and 2004 in Poland, Hungary and the Czech Republic through legislative instruments and international cooperation projects (Phare)*

Country	Penal and civil procedures	System of governance	Judicial training	Administrative capacity
Poland	Amended in 1999.	2001 Acts on Ordinary Courts; 2001 Act on National Judicial Council.	Judicial Training Centre within the MoJ.	2001: Introduction of: a) court director; b) court manager; c) huissier de justice.
Hungary	Amended in 2001 and 2003.	A further jurisdictional level is introduced.	Judicial Training Centre governed by the HJC.	2002: Introduction of IT in the court of Budapest and in 19 district courts.
Czech Republic	Amended in 2001 and 2003.	The HJC is introduced.	Judicial Academy (autonomous institution).	2002: Introduction: a) manager of courts; b) assessment procedures based on performance and skills (blocked by the Constitutional Court); c) huissier de justice.

Source: Author's elaboration from Open Society Institute, 2001 and 2002; Greco, First evaluation, 2003; European Commission, 1998.
Key: MoJ = Ministry of Justice; HJC = High Judicial Council; IT = Information Technology

If one addresses the national statutes, one notes some similarities between the three countries. In Poland and the Czech Republic, the judicial administration was changed by the legislature in the second half of the pre-accession period. In Hungary, the legislature has adopted an increase in the budget of the judiciary, so that 18 courts and the court of Budapest have been provided with IT devices and material resources. This common trend would seem to confirm the hypothesis that political conditionality has been a driving force in fuelling the Europeanisation process. Nevertheless, if one looks behind the legislative changes and tries to understand who the players are and what strategies and instruments are used to effectuate the reform, one sees that differences exist between the countries. It is true that the capacity of the Ministry of Justice to play the role of policy entrepreneur is very weak. Often the financial and economic priorities are so urgent that the issues linked to the administration of "justice" are, when introduced in the agenda of the governments, only accorded marginal status. Since the Ministry of Justice should rely on the approval of the Parliament and on the availability of public resources, players who are able to push forward the reforms advocate them from the outside, for instance, from the judiciary itself or from the civil society. Internally driven mechanisms still matter even if the statutes seem to converge towards a common core of ideas.

Concerning judicial policies, the European Commission has supported a national approach. Indeed, it has created the financial instruments to fund projects that national players have put forward. The European Union funds and the bilateral cooperation established within the bodies of experts and the networks of experts have been employed when designing the arenas where the strategies and the instruments adopted in the judicial policies have been chosen.

In the Czech Republic in 2001, the government adopted the New Act on Courts and Judges.[40] The reform introduces a change in the procedures to select, promote and assess the judges, although the power of the presidents of the courts has been maintained. According to the logic of appropriateness, the reform also provides for a "court director" and a "court manager". To deal with administrative tasks, "judicial councils" have been established in courts with more than 15 judges. All these measures are aimed at dealing with the shortcomings in the administrative capacity of the courts. The system of governance remains the same. The Ministry of Justice maintains its competency in the administration,

so that the international criteria of judicial independence are hardly respected (Open Society Institute, 2002). The explicit requirement of the Regular Reports to enhance the independence of the judiciary is not respected either. Actually, the reform has been only partially implemented. Sharing the position of the Union of Judges, the Constitutional Court has declared the reform unconstitutional, because of the attack on the judicial independence of the individual judge derived from the procedures of evaluation and disciplinary control. Indeed, the reform tightens the procedures for evaluating judges, and establishes a clear relation between the evaluation and the training, the latter being expected to be compulsory and implemented by a new institution, the Judicial Academy. The Academy should have been created the year after that, but the reform became deadlocked and the decision went back to the Parliament.[41] Nevertheless, the way to change has already been paved, and the advocacy for a new training institution has been created within the Union of Judges. They have not only succeeded in designing a project of international cooperation to enhance the Academy, but have also drawn up a project to bolster the High Judicial Council, which was not included in the statute of 2002.[42] The project is ongoing and is expected to be finalised in 2006.

The meaning of the strategic position of players and the influence of the legal culture are the main factors in the policy formulation process that occurred in Hungary. The Constitutional Court,[43] in accordance with an activist pattern of behaviour consolidated in the transition, has pushed the reform forward, although this has been delayed by an executive cut in the budget.[44] The reform would have established a fourth level of jurisdiction designed to solve the overload of the Court of Cassation.[45] In 2003, the executive complied and adopted the regulation to implement the reform. As the European Commission required, a national system for judicial training was established. This choice enhanced the centralisation of competency in the High Judicial Council, which is the only institution with the capacity to push the project forward. This is indeed the only institution that is able to reduce the autonomy of the presidents of the court, who were in charge – *de facto* – of the training of judges.

The new system of training establishes more cohesion among the judges and reinforces the bureaucratisation of the Hungarian judiciary. This institutional choice is exactly the opposite of the choice made in Poland, where, even if the training has been centralised, the actual role of the judiciary as a system still remains weak. [46] Indeed, the Ministry of Justice is in charge of providing the training, and the power that the Ministry of Justice has in the budget process allows the executive to cut the budget and the resources for the training, too.[47] This strategic position of the executive and the judiciary provides an opportunity for international experts and international NGOs to give judicial training, with several initiatives that are not regular in time and not systematic or proceduralised. The introduction of a national system of training in Poland is therefore only a superficially compliant decision. It meets the requirements of the European Commission (European Commission, 1999 and 2000), but it leaves the present distribution of power in place (Open Society Institute, 2002).

International judicial cooperation is driven by the supply of models and best practices. Within the networks of experts and the NGOs, the models and best practices of existing member States are transferred, scattered and exchanged. The European Union has influenced this activity of exchange through the funds delivered for the twinning projects, while the Council of Europe has enhanced the capacity for cooperation, holding meetings and conferences within the framework of the European Committees of the Directorate-General of Legal Affairs. Networking with these arenas is a very promising activity for the national think tanks,[48] which can advocate reforms and innovative projects based on two standards: the *acquis communautaire* and the Conventions of the Council of Europe (Schimmelfenning, 2005).

Therefore, the process of Europeanisation is driven by two mechanisms. The first is social learning (Risse and Sikkink, 1999) and argumentation (Checkel, 1999; Dimitrov, 2003), which is bolstered by the European Union pressure for adaptation; the second is lesson-drawing (Rose, 1993), which relies upon the patterns of cooperation demanded from within. National legal experts and national NGOs seek the cooperation of international experts, so that part of the Europeanisation process is domestically driven.[49]

Table 2a. *Partners in judicial cooperation projects financed by the Phare programme in Poland.*

Target	Western partner	Domestic partner	International arena reached through the project
System of governance	Spain	MoJ	None
Judicial training	France	Iustitia	Lisbon Network
Administrative capacity	France; Spain	MoJ	Intergovernmental Committees of Council of Europe; Commission Européenne pour l'efficacité de la Justice

Table 2b. *Partners in judicial cooperation projects financed by the Phare programme in Hungary.*

Target	Western partner	Domestic partner	International arena reached through the project
System of governance	None	None	None
Judicial training	France	HJC	Lisbon Network
Administrative capacity	Germany	HJC	Commission Européenne pour l'efficacité de la Justice

Table 2c. *Partners in judicial cooperation projects financed by the Phare programme in the Czech Republic.*

Target	Western partner	Domestic partner	International arena reached through the project
System of governance	Netherlands, NHL	Union of Judges	European conference of judges of the Council of Europe; Helsinki Foundation for Human Rights
Judicial training	France	MoJ	Lisbon Network
Administrative capacity	Austria; Netherlands	Union of Judges	International Association of Judges

Source: Author's elaboration from the archive of the Directorate-General for Enlargement; European Commission, 1999-2003; Greco, 2002-2003; Open Society Institute, 2001 and 2002.
Key: MoJ = Ministry of Justice; HJC = High Judicial Council; NHL = Netherlands Helsinki Committee

The French model for judicial training has proven to be dominant in the project touching upon the programmes and the organisations of the institutes for training judges. The three countries rely on the Ecole nationale de la magistrature, at least from the point of view of the programmes. The Ecole nationale de la magistrature is a dominant player in judicial cooperation. Bilateral cooperation between France and the candidate country is often driven by the search for a tested and consolidated model (domestic perspective) and by the entrepreneurial and organisational skills of the Ministry of Justice and the Ministry of Foreign Affairs in France, which are both committed to judicial cooperation at the international level (Piana, 2005).

While dramatic change in the legal culture does not appear to be present,[50] the convergence of the contents of training seems to indicate a willingness to imitate external models. Yet the autonomy of the training institutions remains a national priority. In Poland, for example, while a model of national training has been adopted, hierarchical control of the budget and the administrative capacity of the training department still remains within the competency of the relevant ministry. The introduction of judicial training institutions allows entrance into the Lisbon Network, which is an arena created at the European level to foster the exchange of experiences and ideas.[51] The Lisbon Network is much more important now that attention has been paid to it by the Directorate-General of Justice and Home Affairs. A communication delivered by the Commission in 2004 and in the Action plan resulted in an agreement in 2005, when the European Union stressed the importance of this network for the enhancement of European judicial cooperation (European Council, 2005).

With respect to praxis and administrative models, the projects entail the introduction of IT devices, the creation of managers at the level of the judicial offices,[52] and the introduction of performance-oriented

criteria for the evaluation. Financial managers are also created, as we have seen in the Czech Republic.[53] The lesson-drawing mechanism is used to determine which existing member State will be chosen as a partner: Germany and the Netherlands have been the most active in the projects dealing with administrative capacity.[54] The introduction of micro-innovation at the meso-level has been carried out according to the standard assessed at international values. The quality of judicial administration also acquires more importance in the candidate country (Langbroek, 2005).

Cognitive appropriateness and lesson-drawing explain the decision of the Czech executive to create a High Judicial Council. Since previous projects have been developed in cooperation with the Netherlands,[55] and because of the importance acknowledged in the two countries of the efficiency of the judicial administration, the Dutch model has been imitated. The final outcome is a High Judicial Council designed with a prominent administrative competency, as in the Dutch system of governance (Fabri, *et al*., 2005, p. 96; Yein Ng, 2005, p. 303).

Tables 2a, 2b and 2c give an overview of the projects concerned with judicial cooperation in each of the three countries. The coherence of the configuration of capacities and strategic positions that emerged from the pre-accession period confirms our hypothesis, according to which, even in the presence of common norms, the capacity to act and to advocate micro-changes within a given system of governance truly matters.

The tables also highlight the links with the international networks opened by the European Union funds and project-differentiated and multi-layered patterns of judicial cooperation. The patterns reveal that the three nations are strongly committed to the normative authority of the Council of Europe, which is an arena where national governments can come to agreements in very sensitive fields, such as the control of borders and the fight against corruption and organised crime. The more domestic players are able to participate in international arenas, the more the size and range of the inputs will be transferred and disseminated.

However, the capacity of social learning, argumentation and lesson-drawing to redistribute power and to change the structure of the judicial governance is very weak. The presence of players with the power of veto and the existence of a well-established national heritage explain the resistance to change of the national system, such as in Hungary. Conversely, in Poland and in the Czech Republic, the existence of many players involved in the judicial administration and dealing with the issue of justice – even outside the judiciary – has meant an open attitude to the exchange of ideas and practices with international players. While in the Czech Republic the final outcome still seems to result in reasonable coherence, in Poland, thus far, the overall result still produces only a vague definition of competency and many instances of informal praxis in the system.

The three countries seem to be resistant to giving up their own heritages. It is likely that they are searching for a minimum standard, one that fulfils the demands of the European Commission, but does not deny their national legal cultures.

The European judicial space between transnational common trends and national features

In this paper I have reconstructed the process of diffusion of norms that has occurred within the field of judicial policies endorsed in Poland, Hungary and the Czech Republic in the pre-accession period. In this process, the European Union has brought different pressures to bear, depending on the binding force of the *acquis communautaire*. The degree of semantic vagueness of the normative strictures applied to put pressure on the candidate countries has been taken into account as well.

The norms are legally binding and determined within the field of judicial cooperation. The adoption of the 24th chapter of the *acquis communautaire*, and the national strategies to adapt to the Justice and Home Affairs set of policies, are driven by external factors. The European Union and the Council of Europe have successfully managed the process of transfer and diffusion of norms and standards. Criminal and civil procedure codes have been adapted to meet the requirements imposed on the prospective members of the European Union. The three countries exhibit a common trend towards convergence in using the European Union's legal framework as a source from which to draw up new codes. Respect for Article 6 of the European Convention on Human Rights (ensuring the right to a fair trial) and of Article 7 (ensuring that there should be no punishment without law) is fully established.

Concerning judicial administration, the process of change follows a differentiated pattern according to the national context. In that field, the European Union cannot issue legally binding norms and can only give suggestions and advice to improve the system of governance of the judiciary and of the judicial offices. It remains true that, even in the presence of national differences, the three countries analysed have reformed their judicial training systems and the administrative structures of their judicial offices. The targets of the innovative processes – even if they have mostly occurred at the meso- or micro-level – are chosen to guarantee the impartiality and the effectiveness of the judicial administration. The search for domestic legitimacy joins the search for international acceptance and fosters the efforts to feature measures aimed at solving the problem of delays in trials.

However, one must not overestimate the importance or extent of convergence. Indeed, the institutional *bricolage* and the introduction of piecemeal models, best practices and know-how have created three national systems where the old and the new exist side by side. The structures designed during the transition have been mostly changed from within, without a comprehensive and systematic reform.

Some elements will remain in the future, after the accession (Agh, 2005). To be sure, the mechanism of coercion used in the pre-accession period will no longer be used. The new members will be bound by the European law issued in the area of Justice and Home Affairs. But the capacity of the European Commission to enter into the design of new codes and new procedures will stop at the national border of each country. Nevertheless, concerning judicial policies, social learning, argumentation and lesson-drawing will be mechanisms still in effect after the accession. These mechanisms can operate within the networks created through judicial cooperation developed during the pre-accession process. Funds from the European Commission may have many unintended consequences with respect to the patterns of exchange of ideas and practices between international legal experts, who have entered into contact with each other thanks to twinning projects. Therefore, one can expect that the importance of peer review and benchmarking will be fostered, since judicial cooperation at the international level will be deepened. [56]

It is still an open question whether or not Europeanisation has improved judicial administration in the three countries analysed in this paper. The quality of the overall result will depend on how the innovations introduced will interact with each other. At times, one can expect that the changes introduced will be annulled by the system of governance that is already in place. For instance, where the court manager has been implemented but the ministry concerned has maintained competency over the budget process, it is unlikely that the administration will be driven by the logic of efficiency and effectiveness. This is, for example, the case in Poland. More generally, in the three countries a culture of evaluation (Langebroek, 2005) has not been fully endorsed, even within the judiciary. The judiciary seems driven by a bureaucratic logic, which is reinforced by the High Judicial Council. The comparative paucity of opportunities to control the system from the outside means that the accountability of the judicial administration to the public is weak (Hilson, 2002; Rekosh, 2002).

In conclusion, Europeanisation has diffused normative and cognitive tools that can be used to improve the judiciaries. They will be used according to the national will of the political elite and civil society. Finally, I would argue that, after the overall democratic transition, new members are facing, and will continue to face, the same problem shared by mature democracies: how to figure out a trade-off between the independence of judges and the accountability of judicial systems, not only to the law, but also to the democratic governance (Di Federico, 2004).

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Endnotes

[1] A preliminary version of this paper was presented at the annual conference of the Italian Association of Political Science, held in Cagliari, 21 – 23 September 2005. I am grateful to Leonardo Morlino for his remarks and comments on that preliminary version.

[2] daniela.piana@unifi.it; DISPO; Via delle Pandette, 21 – I - 50127 Florence.

[3] The judicial systems play a role in the process of state-building in the political systems where a democratic transition and a democratic consolidation are under way (Priban, 2004). Indeed, the state-building process entails the (re)building of public administrative structures and of the institutions aimed at delivering justice. This process should be designed according to the principles of equity and transparency of rules and of procedures.

[4] I follow the distinction proposed by Borzel, Hofmann and Sprungk, 2003, p. 14. In this context the term "impact" refers to the outcome. We cannot at this time assess the changes that have taken place with respect to the cultural, organisational and procedural aspects of the judiciaries. Indeed, the actors and structures influenced by this change can differ from the actors and the structure targeted in the policy process (and the term "outcome" refers to this last one). The outcome is likewise not assessed in the Regular Reports drafted by the European Commission.

[5] I do not include in the empirical field the constitutional courts. For a comparative analysis of the constitutional courts in Central-Eastern European countries, see Sadurski, 2004.

[6] The distinction among these levels of policy is taken from Fabri, 2005, p. 70.

[7] For a specific analysis of the twinning projects in the judiciary sector, see Piana, 2005*a*, forthcoming.

[8] Sources: European Commission, Directorate-General for Enlargement, archive of twinning unit; www.coe.int for the documents of the Council of Europe and in particular for the documents from the Directorate-General of Legal Affairs; www.soros.org for the reports from the Open Society Institute.

[9] Our position confirms the conclusions reached by comparative political studies as applied to democratisation in Latin America and southern Europe (Linz and Stepan, 1996, p. 55; Morlino, 2001, pp. 101-102; O'Donnell, Schmitter and Whitehead, 1986). The shortcomings of this view when applied to Eastern and Central Europe are well developed in Agh, 2005. The author shows that the approach based on the concept of Europeanisation is much better able to make sense of the dynamics of change, both before and after the accession. Therefore, this approach enables us to understand the process of change, using the same analytical apparatus for pre- and post-accession.

[10] From this perspective, the hypothesis according to which policies modify politics is empirically pertinent. On this point, see the proposal of Falkner, 2003.

[11] These are the regulations Bruxelles I, II, the regulation on the enforcement of judicial procedures and the regulation on the enforcement of judicial decisions across borders.

[12] Decisione del Consiglio dei ministri di Giustizia e dei ministri degli Interni del 30 novembre 2000.

[13] http://europe.eu.int/comm/justice_home/fsj/enlargement/fsj_enlarge_intro_en.htm. After the European Council held in Tampere in 1999, the European Union action was designed in order to widen the field of freedom, security and justice, and to enhance the mechanisms of judicial cooperation among the member States. See, with respect to that, the Action Plan drafted by the European Commission on 2 June 2005.

[14] The adoption of the 24th chapter of the *acquis communautaire* is screened in the Regular Reports. In the same section where the countries' adherence to or adoption of the standards set out in this chapter is assessed, the evaluation of the capacity of each state to participate in judicial cooperation can also be found.

[15] Many examples exist. The most prominent for its targeted activity on the judicial reforms is the Eumap programme, financed by the Soros Foundation and managed by the Open Society Institute of Budapest. The reports drafted for the Eumap programme have been circulated among European civil servants and policy-makers. Many events have been organised in Brussels to that purpose. Interview with Miriam Anati, Deputy Program Director of Eumap, June 2005, and with a civil servant of the Directorate-General for Enlargement, June 2005.

[16] The World Bank is the main player in this field. The reports of the World Bank have been drafted by the "Legal and Judicial Reform Practice Group", headed by Maria Dakolias. The country profiles are available for 2000 on the website www.worldbank.org.

[17] These policies are mainly linked to financing from the US. They represent the first source of resources in the judicial reforms. The USA is still present in the Central-Eastern European countries, for instance, through NGOs, professional organisations and think tanks. One of the main actors in the Central-Eastern European countries is the American Bar Association, which has organised many activities with the bar associations and the judges' associations in the Central-Eastern European countries. The programme agreed upon by the ABA is called CEELI (see www.abanet.org/ceeli).

[18] The Regular Reports are available on the website of the Directorate-General for Enlargement, section archive. The Regular Reports for Bulgaria, Romania, Turkey and Croatia are available on the website link to the country profiles. http://europe.eu.int/comm/enlargement .

[19] The reports from the Open Society Institute have explicitly quoted the international standard and are very critical with respect to the vagueness of the standards used by the European Commission. On the same point and with an opinion, see Andras Sajo, expert within the Eumap, Budapest, June 2005. He has stressed the fact that the Regular Reports are quite ineffective as a means of guiding the national reforms.

[20] The Commission relies upon the interpretation delivered by the Open Society Institute (Open Society Institute, 2001 and 2002).

[21] The Czech Republic, which is the last country among the ones that I analyse, in adopting a new constitution in 1993, decided to include the right to due process in the Charter of Fundamental Rights, also adopted in 1993.

[22] Act on Ordinary Courts, 1990.

[23] Art. 186 (1) of the constitution defines an institution that aims to protect the independence of judges and of the courts, not necessarily the judiciary as such (Open Society Institute, 2001, p. 321).

[24] The hypothesis according to which a larger number of veto players renders the fulfilment of EU requests more difficult is here confirmed. For more on this, see Giuliani, 2004.

[25] Interview with a member of the scientific committee of the Eumap. Interview with Miroslaw Wyrzikowski, judge of the Polish Constitutional Tribunal, Warsaw, January 2003.

[26] Interview with Laurent Gravière, expert appointed to a twinning project formulated by the French Ministry of Justice and the Polish Ministry of Justice. This view is also confirmed by Eric Maitrepierre, vice-director of the international programme of the Ecole nationale de la magistrature in an interview held in Paris, January 2005.

[27] The Court of Strasbourg has noted many cases where a delay in the delivering of a sentence has meant a denial of the right of due process, mainly in the jurisdiction of Warsaw. See www.echr.int

[28] O'Donnell, 1999.

[29] Open Society Institute, 2001. See www.iustitia.pl.

[30] The Batory Foundation is one of the most active players in this field (www.batory.org).

[31] Act LXVI of 1997, Article 26 (1)) stresses the judicial independence of each judge. The cases are assigned in a random procedure, so that outside interference with judicial decisions has been eliminated (GRECO, 2002).

[32] Before 2000 many judges were appointed as experts within the Ministry of Justice (Open Society Institute, 2001, p. 43).

[33] Act on the Legal Status and Remuneration of Judges, LXVII/1997, Art. 8 (2) and 11.

[34] Act on the Legal Status and Remuneration of Judges, LXVII/1997, Art. 3 (1), cited in Open Society Institute, 2001.

[35] The constitution does not provide for the judicial independence of the judiciary as a system.

[36] Act on Ordinary Courts, 1991.

[37] Interview with a member of the Scientific Committee of the Eumap, June 2005.

[38] I do not subscribe to the hypothesis according to which Europeanisation also means institutional convergence towards European Union standards. On this point I accept the criticisms put forward by Radaelli, 2003 and Giuliani, 2004.

[39] Cf. infra n. 3.

[40] Act on Courts and Judges No. 6/2002 Coll.

[41] Phare CZ-00-07-05. Constitutional Court decision on 18 June 2002. (http://www.aspi.cz/cgi-bin/jus/aspi_lit_4?WVCNC+300+jus-2.)

[42] Phare, CZ 9810-03-01.

[43] Boulanger, 2003, and Schwartz, 2000.

[44] Solyom, 2003.

[45] Decision delivered by the Court on 22 November 2001.

[46] Interview with Laurent Gravière, Paris, January 2004; Intermediate report on Phare PL02/IB/JH-04.

[47] New Act on Courts, 2001.

[48] See the Council of Europe website, www.coe.int, with the link to the Directorate-General of Legal Affairs.

[49] See the Ecole nationale de la magistrature website (www.enm.fr) and of the German Foundation for Legal Cooperation, www.irz.de

[50] Intermediate Report Phare PL02/IB/JH-04.

[51] Interview with Eric Maitrepierre.

[52] In Poland, the Act on Ordinary Courts, 2001, items 1070 and 1082; in the Czech Republic, the Act on Courts and Judges, 2002, sec. 60.

[53] Phare CZ03-JH-01 and CZ00/IB-JH-05.

[54] Phare CZ03-JH-01 and CZ00/IB-JH-05.

[55] Phare CZ 04 – JH-01.

[56] I should also mention the fact that the Constitutional Treaty dismantles the pillars and includes the Justice and Home Affairs within the field where the communitarian method will be used. On the overall effect on European integration, see Moore and Chiavario, 2004.