Can Legal Institutions Protect the Rule of Law?

Evidence from Poland and Estonia

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ABSTRACT

The economic literature is clear that transparent and impartial rule of law is crucial for successful economic outcomes, including growth. This empirical regularity has been demonstrated amply in the real-life laboratory known as transition economies, where fashioning a modern approach to rule of law from the ashes of Soviet jurisprudence has been a challenging feat. Indeed, it has brought to the forefront a basic question, namely: how does one guarantee rule of law? This paper uses the contrasting examples of Estonia and Poland to frame the importance of institutional context in determining both rule of law and the path of legal institutions. Whereas starting *tabula rasa* for a legal system is difficult, it worked well for rule of law in Estonia in the post-communist transition. Alternately, Poland is known for its shock therapy approach in economic stabilization but pursued a much more gradualist strategy of reform of formal legal institutions; this approach meant that justice institutions, slow to shed their legacy and connection with the past, became relatively weaker institutions and were susceptible to attack from more powerful (political) ones.

JEL Codes: K40, K15, P26

Keywords: legal institutions; rule of law; Poland; Estonia; transition; institutions

This version: August 30, 2019

ACKNOWLEDGEMENTS: The authors wish to thank Timur Kuran, Gerhard Schnyder, and participants at the "Rule of Law in the 2030 Sustainable Development Agenda" Conference organized by Loyola University Chicago, Rome, in January 2019.

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I. Introduction

Legal institutions have been generally recognized in the growth and transition literature as crucial for economic development. Defined as "distinct systems of legal rules within the overall legal system that purport to meet with general acceptance" (Ruiter 2004:209), at a more practical level, legal institutions typically comprise the judiciary, an independent legal profession, and formal and informal enforcement mechanisms such as administration, conventions, and standards (Clement and Murrell 2001). As the executors of carefully crafted legislative frameworks and the impartial arbiters of legislative intent, legal institutions have the function of sustaining the law "through [this] interaction between private agents, courts and the legislative apparatus" (Deakin *et al.* 2017:188).

The reality that laws need an institutional framework in order to be actualized was an animating factor behind reforms of the legal system during the transition from socialism in Central and Eastern Europe and the former Soviet Union. As Chen and Deakin (2015:123) note, the building of legal institutions was a crucial aspect of transition which went hand-in-hand with building other economic institutions, as "respect for the sovereign legal power of the state… requires the coevolution of impersonal market exchange with effective state capacity to constitute and regulate markets." And while there has not been a uniform development of legal frameworks and institutions across the transition space, the empirical evidence has overwhelmingly pointed to a correlation between deeper reforms and better economic outcomes. For example, Pistor *et al.* (2000) show how legal institutions more than laws were crucial for guaranteeing financial flows from abroad, a point confirmed by Bevan *et al.* (2004), while Havrylyshyn and van Rooden (2003) link legal institutional reform to growth. In the most systematic approach, Hartwell (2013) provides details on the extent of legal institutional reform in each transition country, demonstrating econometrically that an independent judiciary was important for increasing domestic savings and foreign direct investment (but with relatively less impact on growth in the longer-term).

While the building of legal institutions around a brand-new legal framework appeared to assuage markets and promote growth in the short-term, were they enough to ensure the survival of the law itself? Implicit in the approach towards building legal institutions in transition was the assumption that these institutions themselves were a way in which to guarantee the rule of law; that is, that functioning legal institutions could help to transition away from an anarchic or arbitrary application of power towards the creation of an atmosphere of trust in the impartiality of the state to apply the law fairly and predictably. As Gray (1997:15) put it, "the best formal legal systems operate only at the margin, leaving most standards in a society to be internalized and 'self-enforced' by society itself." In an environment where the tenets of rule of law were only starting to come into existence, could these institutions help with the process of internalization?

Unfortunately, like other institutions, legal institutions such as courts, tribunals, and their supporting organizations are both chaotic and complex. In terms of chaos, legal institutions are highly dependent upon initial conditions and cultural norms, but institutional change can be revolutionary, and crises can shift their evolutionary path abruptly. The transition from communism to capitalism provided just such a crisis to alter the evolutionary path of legal institutions, if the attraction of capitalist institutions proved strong enough.

On the other hand, legal institutions are also "complex," in the sense that they are sensitive to external stimuli, follow non-linear paths, are self-organizing and may have multiple equilibria, and are comprised of agents acting on the basis of locally (not globally) available information. Most importantly, legal

institutions are ensconced in a complex web of other institutions which can alter their evolution in crucial ways. In the extant literature, there is a focus on defining the rule of law by *de jure* indicators such as judicial independence, a concept which is profoundly influenced by underlying currents of accountability, effectiveness, and trustworthiness of the judicial branch of government. However, judiciaries can never be said to be "independent" as external institutions, and paramount amongst these, political institutions, are instrumental in shaping their evolution. It is perhaps more important to focus on the *de facto* performance of the legal system within a political framework to understand the true relationship of the institutional order with the rule of law (Pistor *et al.* 2000; Anderson *et al.* 2005).

This paper uses a case study approach as recommended by Havrylyshyn (2006) to contrast two of the "star performers" of economic transition, Estonia and Poland, and attempt to understand this relationship between legal institutions, political institutions, and the rule of law. While both achieved both high rates of growth and other impressive economic achievements as a result of their similar economic transition strategy, the two countries have diverged substantially in the development of their legal institutions and, subsequently, the respect for rule of law. In particular, the upheaval of the Polish judicial system over the past three years, contrasted with the placid functioning of Estonia's formal legal institutions, leads us to investigate the differences in the formation of these institutions.

Through our analysis, we conclude that the answer to the question of our title is "it depends" if legal institutions can protect the rule of law. Indeed, we assert that legal institutions are a necessary but not sufficient condition for ensuring rule of law, as political institutions can shape whether or not legal institutions function as intended. In Estonia, legal institutions post-communism were built from a blank slate, an approach which is not generally recommended but which allowed for a measure of ownership by the nascent political class. Conversely, while Poland is thought of as the poster child for rapid transformation, it missed the chance for "shock therapy" in legal institutions, leaving weak and discredited institutions which were susceptible to political attack. In fact, the lingering political compromise which led to the fashioning of post-communist legal institutions in Poland never quite achieved the legitimacy which Estonian institutions appeared to attain. In Poland, thus, rule of law was threatened by the political process, which undermined legal institutions; in Estonia, the causality ran the other way, as legal institutions were accepted by the public and incentivized the governing and challenging parties to strengthen the rule of law.

II. Legal Institutions and the Rule of Law

What is the Rule of Law?

A key staple of the United Nations' 2030 "Sustainable Development Goals" (SDGs), there is unanimity that rule of law is a desirable component of governance. Indeed, as Tamanaha (2004:3) notes, "This apparent unanimity in support of the rule of law is a feat unparalleled in history [as] no other single political ideal has ever achieved global endorsement." However, as Chesterman (2008: 332) notes, "such a high degree of consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning." Indeed, there is a lack of precision across disciplines on just what "rule of law" means in a legal or political sense (Waldron 2002), and even less on how it would precisely translate into an institutional milieu (even the SDGs seem to focus on rule of law as primarily about "access to justice"). Can we recognize rule of law when we see it? And what does it look like as an institutional structure across traditions and cultures?

Not surprisingly, legal theorists have developed some of the most comprehensive approaches to understanding the rule of law. At its most basic, as Krygier (2015:780) notes, "the rule of law has to do with the relationship between law and the exercise of power, particularly public power," but putting this conception into practice gives no clue as to what the idea of rule of law "rules out, what it allows, what it depends on and indeed what it is [which] are all matters of disagreement." Craig (1997:467) provides three different dimensions along which the rule of law operates, namely *how* various laws are promulgated (a question of legitimacy), *how clear* is the ensuing norm ("was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life"), and *what time frame* does the norm cover (i.e. is it prospective or retrospective). Tasioulas (2019), delving even deeper into the question of implementation of rule of law, synthesizes these approaches and identifies two distinct conceptual strands: one, where rule of law encompasses conditions so that the law is *legitimate*, i.e. "actually morally binding on its purported subjects" (the so-called "thin" conception of rule of law, as noted by *inter alia* Kavanagh and Jones [2011]), and two, where it is equated to "good law," i.e. if the legal structure embodies desirable ends and incorporates process for substantive outcomes (the "thick" view of rule of law).

Regarding the first definition, many have noted that the prevailing approach in both development aid and in emerging markets is skewed towards the "thin" conception (van Veen 2017). As an example, Khan (2017:213) explicitly states that the accepted international definition as enshrined by the UN follows the International Development Law Organization in conceiving rule of law, which "contains procedural elements, such as legal supremacy, certainty and due process, but also important substantive elements, requiring an independent judiciary and laws consistent with international human rights norms." Similarly, O'Donnell (2004:33) notes that rule of law's "minimal (*and historically original*) meaning is that whatever law exists is written down and publicly promulgated by an appropriate authority before the events meant to be regulated by it and is fairly applied by relevant state institutions including the judiciary" (emphasis mine).

The economic conception of rule of is also often closer to the "thin" approach towards rule of law and its protection, believing rule of law to be "a system of rules and institutions to constrain the arbitrary exercise of power. Laws must be clear, prospective, and capable of being followed, impartially applied, and equally enforced by institutions" (Khan 2017:213).[2] In this sense, rule of law thus relates mainly to predictability, and institutional arrangements should be geared towards generating this predictability in order to guarantee the rule of law. In practice, the subordination to a constitution and clear and consistent legislation would come from legislative bodies, while an independent judiciary would execute these laws impartially without thought for broader societal goals.

This begins to take us to an institutional understanding of the rule of law, but critics have charged that a purely "thin" approach leaves out many of the surrounding environmental factors which may influence the development of these specific institutions. As van Veen (2017:10) argues, "the 'thin' approach to the rule of law does not take much account of the dense, interlocking and overlapping texture of social norms, beliefs and behaviors that the 'thick' version of the rule of law is implicitly imbued with." Indeed, conventional "thin" definitions of rule of law as universal institutions, driven by formal and procedural aspects, do little to illuminate why (and how) rule of law comes to be. In particular, focusing on the body

[2] Readers may be surprised to note that we, as economists, find the economic point of view particularly useful here.

of laws and processes excludes examining legal institutions as "institutions," avoiding the reality of institutional imperatives, incentives, and how the specific institutions themselves arise or are designed.

The application of complexity theory to both law and economics can offer insights here, as complexity theory recognizes that legal institutions exhibit the traits of complex adaptive systems (CAS). As Ruhl *et al.* (2017:1377) note, legal systems are "interconnected through stochastic processes… with feedback mechanisms… [and] embedded in hierarchical and nonhierarchical network architectures… that frequently produce self-organizing properties," all classic properties of a CAS. Moreover, legal institutions have a chaotic element to them, as they are highly sensitive to initial conditions (Rosser Jr. 1999), both their own and the state of the world around them. Scholars have incorporated some of these realities into their examination of legal institutions without necessarily acknowledging their provenance: for example, institutional reform in the legal sector is accepted to be "arduous and slow" (Carothers 1998:96), and would need to be predicated on the reform of several other institutions within society, both formal and informal. This need for the system to move many of its parts at the same time is crucial to understanding how the rule of law actually is created in a particular country.

What Determines the Demand for Rule of Law?

Having discussed what the rule of law *is,* it is important to understand, if it is so desirable, what actually determines the rule of law, that is *why* it has come to be. To tackle this question, we need to broaden our line of inquiry beyond legal institutions themselves to their wider environment, understanding legal institutions as complex adaptive systems rooted within a much larger complex adaptive system (that is, a country's political and cultural system).

Most of the work done on examining the genesis of legal institutions has come from political scientists rather than economists, who have instead focused on determinants of democracy and used "rule of law" interchangeably with "democracy" (as Hartwell [2018] noted, there is some overlap between the two concepts, but they are qualitatively different from an institutional standpoint). For example, if the key point underpinning the rule of law is constraining the executive from performing arbitrary actions, then, as Andrews and Montinola (2004) demonstrate, the number of veto players in a country can help to increase such constraints and thus increase the level of rule of law (Chavez [2003] shows this to be the case in Argentina). Similarly, Chen (2017) shows how both social polarization and lack of continuous independence can undercut rule of law, as lack of trust and inexperience (or both) impedes the development of impartial institutions.

To fashion an economic model of the determinants of rule of law, it is helpful to return to broader economic approaches to institutions in general (Demsetz 1967; North 1979), which posit that specific institutions arise in a society when their benefits outweigh costs. For the rule of law, this would mean that constraint of arbitrary executive power would be seen as a net benefit by society. While the discretion accompanying unconstrained executive power would be forsaken, and incur its own costs during, say, an emergency or an invasion, the benefits of predictability and impartiality would outweigh that loss. In this way, we can draw an analogy from the demand for rule of law to one of the common debates in monetary policy regarding "rules versus discretion" (Fischer 1990): in monetary policy, discretion often leads to suboptimal inflationary outcomes even as it gives policymakers the tools (in theory) to deal with a crisis,

while rules may not be able to cover every situation but can create predictability and moderate expectations.

The theoretical framework introduced in the seminal work of Greif (2006) also helps to focus on the internal mechanisms of these institutions which would contribute to their functioning. Indeed, Greif's work allows us to frame and account for institutional dynamics, a necessary exercise which is difficult to implement following other frameworks which lack a systematic treatment of the temporal dimension of institutional change. Greif's framework relies heavily on the notions of institutional *self-enforcement* and *self-reinforcement*, with an institution as *self-enforcing* if, "responding to the institutional elements implied by others' behavior and expected behavior, each individual behaves in a manner that contributes to motivating, guiding, and enabling others to behave in a manner that led to the institutional elements to begin with" (Greif 2006:53).

However, as institutions embedded in a broader country institutional framework, legal institutions both rely on and influence the development of other factors in society, what Greif (2006) has termed "quasi-parameters." In order for an institution to *reinforce* itself, changes in these quasi-parameters must "imply that the associated behavior is self-enforcing in a larger set of situations – a larger set of other parameters – than would otherwise have been the case" (Greif: 2006: 167). That is, a self-reinforcing institution will "strengthen" itself with time, as the processes it triggers in turn contribute to its recurrence. The key supporting and enabling processes necessary to sustain legal institutions are undoubtedly formal political institutions. Indeed, as Chestermann (2008:341) noted, implicitly disputing the criticism of institutional approaches to building the rule of law, "any 'thin' theory must necessarily exist within a political context," and even the support of building rule of law institutions under a "thin" veneer implicitly supports a "thick" conception of desirable outcomes. As Lee *et al.* (2018:1) more explicitly describe it, legal institutions "provide a fundamental framework for political and economic structures… [but] as environments and societal norms change, laws are altered." Moreover, Lee *et al.* (2018) also note, in the context of Korea, that legal networks are themselves unique endogenous political regimes, ones which shift along with society but also have the power to act in a political manner to create change. However, political institutions are often responsible for the creation of formal legal institutions, and, as such, have the power to subvert the judiciary, bypass their rulings, pack the court or change the rules of the game, or, in an extreme example, disband the judiciary altogether.[3] Thus, to have effective legal institutions available to safeguard the rule of law, they must be embedded in political institutions which also perceive the net benefits of predictability and constraints (the idea of "institutional complementarity" put forth by Pagano [2000] in a legal context).

This scenario may be easier said than done, unfortunately, as the third major determinant of the genesis of legal institutions is societal attitudes towards rule of law. Put another way, in order for a political arrangement which supports the rule of law to arise, the benefits of rule of law must made apparent to the polity (alternately, the costs of lack of rule of law must be evident). Without a demand for rule of law made manifest to formal political institutions, these institutions will have little incentive to safeguard the institutions which are then charged with protecting the rule of law. Indeed, if a country's culture or its informal institutions are not aligned with the idea of a predictable, rules-based governance, it is unlikely that legal institutions themselves will be able to manufacture such a scenario (not least because the

[3] This is the mirror image of Hayo and Voigt's (2008) argument regarding central bank independence.

country's political institutions will not allow such an eventuality).[4] To understand this causal chain, we have to look even deeper at a society and understand its cultural (pre)disposition towards rule of law.

It has been acknowledged in the literature that cultural precepts shape laws (Djankov *et al.* 2003), but they also shape legal institutions: as Licht *et al.* (2007) argue, culture can drive the norms of governance, with cultural affinity for autonomy being correlated with a rule of law which provides a contextual source for guidance (including past legal traditions). Such a reality was at the heart of Hayek's (1973) argument against a dogmatic reliance on legislation and instead advocated for a common law-type model of predictability, with spontaneous emergence from precedence of principles and solutions. It also underpins Scalia's (1989:1177-1178) correct assertion that "every rule of law has a few corners that do not quite fit," and the "search for perfection" in a judicial ruling may need to balance against the competing interest of "the appearance of equal treatment." In short, the prevailing social norms and *informal* institutions found within a country have a key role in creating the country's *formal* legal institutional institutions (Ellickson 1998), as the country's political system should mirror these cultural norms and enable (or discourage) the development of legal institutions. How this reality has played itself out in Poland and Estonia is the subject of the next section.

III. Evolution of Rule of Law in Poland and Estonia, Part I: History

Economic convergence, legal divergence

The "Autumn of Nations," as the process of the post-1989 democratization of the former Soviet bloc was named, was virtually unanticipated and yet one of the most profound transformations witnessed throughout the 20th century (Kuran 1995, Åslund 2007). In the case of the majority of the countries involved, it entailed radical changes across the whole institutional space, with virtually all institutions being deeply reformed (e.g. the electoral systems) or created anew (e.g. parliaments in the formerly Soviet republics) (Hartwell 2016). Consequently, the post-1989 transition constitutes a "living laboratory" for conducting robust comparative analyses of the impacts of both economic policies and institutional reforms upon the subsequent economic performance and institutional evolution (Balcerowicz 2013).

Poland and Estonia stand out as the "star performers" of the post-transformation period (Norkus 2007), with both countries following a similar economic transition strategy of fast and deep reforms sometimes caricatured as "shock therapy." The radical reforms put in place in the early stages of transition paved the way for the rapid economic and institutional convergence to Western Europe which occurred in the years following the outset of transition (Gillies *et al.* 2002; Lehmann 2012 – see Table 1).

Somewhat surprisingly, reforms of legal institutions in the CEE countries have received much less attention, from both scholars and commentators, compared to economic issues (Anderson and Gray 2007; Kolosky 2014). While the economic strategies of the two countries were incredibly similar and resulted in nearly-identical economic performances over a quarter-century, the legal strategies and outcomes

[4] Hartwell (2018) has attempted to create an economic model of the determinants of rule of law as part of an econometric identification strategy, borrowing heavily from political science to delineate the drivers of rule of law. As part of this strategy, he includes a vector of political determinants of rule of law, finding that the Andrews and Montinola (2004) thesis holds, namely that political fractionalization leads to a better level of the rule of law.

pursued by the two countries have diverged substantially.[5] Indeed, the divergent performance of Estonia and Poland in the efficacy of the legal system (with the judicial branch of the government to the fore) and, correspondingly, the level of the rule of law has been particularity stark. As noted by Hartwell (2013), Estonia is the *only* country from the former Soviet bloc in which the protection of the property rights has increased throughout the post-transformation period, while Poland has seen a diminution of property rights in recent years.

Table 1. Summary of economic and development indicators for Poland and Estonia.

	Estonia		Poland	
	1993	2016	1990	2016
GDP per capita[a]	7,338.2	29,684.6	6,889.29	27,690.43
As a percentage of USA's GDP (USA = 100%)	28	52	30	48
Consumption per capitaa	3,034.9	9,789.7	3,275.4	8,875.4
Exports[b]	1,146	18,509	14,640	204,050
Human Development Index	0.708	0.865	0.712	0.855

Sources: FRED, United Nations Development Program, World Development Indicators, Eurostat.
[a] in current USD (PPP)
[b] in millions USD (nominal)

As an example of the differences between Poland and Estonia, Table 2 uses two proxies - the "Property Rights" and "Judicial Effectiveness" sub-indexes of the Heritage Foundation's Index of Economic Freedom – to illustrate a subjective interpretation of the level of rule of law in each country. Not surprisingly, Estonia boasts an exceptional level of both judicial effectiveness and the protection of property rights, compared with Poland, the Baltics and even other Eurozone countries. Estonia's judicial effectiveness score of 82.8 is indeed the highest in the Eurozone, 42% higher than the corresponding index for Poland and 26% higher than the average score for Lithuania and Latvia.

However, as noted above, it is the evolution of such measures rather than a static snapshot which is bound to be more telling in describing the divergence in the level of the rule of law. To this end, Figure 1 illustrates the "Legal System and Property Rights" sub-index of the Fraser's Institute Economic Freedom Ranking for the same countries. Here, Estonia again emerges as a leader of the CEE region. Clearly, one can see an upward trend is the Estonia's performance, with its score in 2015 being roughly one point higher than in 1995. In the case of Poland (as well as other Visegrad Group countries), much more volatile performance has been observed, with the score being lower in 2015 than in the mid-1990s.

[5] In fact, the similarities in transition strategies is why one cannot blame the subsequent divergence on "shock therapy," as both countries underwent substantially the same transition.

Table 2. Heritage Foundation's Index of Economic Freedom Scores

	Poland	Estonia	Baltic States [a]	Visegrad Group [b]	Eurozone
Overall Score	68.3	79.1	75.3	68.3	68.8
Property Rights	60.8	82.6	72.8	66.4	77.1
Judicial Effectiveness	58.0	82.8	61.1	48.5	66.7

Source: Heritage Foundation (2017).

[a] without Estonia – that is, the average for Lithuania and Latvia

[b] without Poland – that is, the average for Czech Republic, Slovakia and Hungary

While these illustrations use the subjective evaluations of experts, as in any market economy it is instructive to ascertain the perceptions of consumers; in this case, the general public's perception of judicial institutions. As the data in Table 3 show, trust in the judiciary has differed significantly in Poland and Estonia already in 1996/7, when 60% of the Estonians and only 48.3% of Poles trusted in the impartiality of the judiciary a "great deal" or "quite a lot".[6] Crucially, however, the difference grew with time: in 2011/2, these figures stood at 64.4% and 38.7% respectively. Indeed, in 2012 one in eight surveyed Poles had literally no trust in the judiciary whatsoever. The corresponding results for the employers, a subset of population with a vested interest in an effective and independent judicial system, paint similar picture: in 1996/7 only 28.7% of Estonian employers did not trust the judiciary (with no answer indicating "no" trust at all), with 57.9% of the Polish employers distrusting the judicial system.[7]

[FIGURE 1 HERE]

The popular stance on the impartiality of the judiciary, especially in the first decade after the transition, was to a great extent determined by the perception of corruption, with the latter being relatively more widespread in Poland (however, beginning in 2005 the series start to rapidly converge – see Figure 2). The low incidence of (perceived) corruption was one of the most important reasons why Estonia attracted substantial Foreign Direct Investment (FDI) far exceeding the inflows witnessed in Poland, but also Latvia and Lithuania, the latter two being similar in size, location, and willingness to attract investment. The inflow of investment, in turn, strengthened the protection of property rights (through the investors' influence and the incumbent parties' incentive structure) even more. In this set-up, the belief in the fairness of the judicial system and protection of property rights may be seen as a quasi-parameter which, with time, was "updated" and, indirectly, led to even better protection of property rights.[8]

A related characteristic of the democratic regime characterized by the rule of law is the stability and predictability of the legislation. The example of the Estonia administrative law reform described in above shows that, through the diligent law-making processes and aforementioned checks on the amount of legislation passed and regulations introduced, Estonia has managed to create a remarkably stable legal

[6] These results support the claim that Estonia managed to build a trustworthy and efficient judicial system relatively quickly.

[7] Other business surveys confirm the existence of this divergence (Anderson and Gray 2007).

[8] Using the framework proposed by Greif (2006), we may claim that the quality of the protection of the property rights in Estonia exhibited the „self-reinforcement" property.

environment. This is evidenced by the Index of Law Variability ("*Barometr Prawa*," shown in Figure 3). This stands in stark contrast to Poland, which, since the early 1990s has been plagued by the law that is "produced" in haste and often ad hoc manner – "ill-conceived, accidental regulations", in the words of Jasiewicz (2000: 115).

[FIGURE 2 HERE]

Table 3. Trust in judiciary for Estonia and Poland (in percent)

	Estonia		Poland	
	1996	2011	1997	2012
Great deal	7.9	13.9	10.9	3.4
Quite a lot	52.1	50.5	37.4	35.3
Not very much	29.3	23.1	33.7	39.6
None at all	8.0	9	9.8	12.9
Don't know	2.6	3.4	8.2	0.2
		Employers[a]:		
Great deal	22.2	-	10.5	-
Quite a lot	44.4	-	26.3	-
Not very much	28.7	-	52.6	-
None at all	0.0	-	5.3	-
Don't know	5.6	-	5.3	-

[a] "-"stands for not available data.

Source: World Value Survey.

[FIGURE 3 HERE]

IV. The Effects of Different Institutional Reform Strategies – the "Why" of Divergence

This divergence between Poland and Estonia is necessarily a product of several different factors, including historical legacy, cultural currents, and transition strategies. As we show in this section, each of these factors played a different role during the transition in terms of importance, resulting in political currents which were to influence rule of law and institutional development.

The Weight of History

Of course, as two very different countries, there were vast differences between Poland and Estonia in their historical legal legacies which conditioned the institutional starting points of the economic and political transformations. Poland, as a former power in Central Europe, boasts an indisputably richer tradition of its past legislation, dating back to the early modern times (XVI century), developing throughout the subsequent centuries, and culminating as a semi Western-type legal system established

during the first years of the Second Commonwealth (1918-1939) (Mańko 2013).[9] In contrast, Estonia's legal tradition is necessarily much less pronounced, given only one short period of independence (1919-1940) before the Soviet annexation. Indeed, as Havrylyshyn (2006: 226) notes, "Estonia [at the outset of transformation] had little in terms of its own legislative heritage and experience to draw upon."

These stark differences notwithstanding, it seems important to note the influence of the German legal tradition that has been exerted on both countries. The reasons were quite different, however. In the case of Poland, geographical vicinity seemed to have played a key role, as the Magdeburg Law was widely used (Hartwell 2016). In Estonia, the historical presence of German nobles on its territory resulted in partial cultural (and legal) "tricking down" (Taylor 2018). This has been the major reason why "Estonia's legal reform starting in 1991 drew on the laws of Germany, Austria, the Netherlands and Denmark." (Havrylyshyn 2006: 226). Furthermore, both countries have been under Soviet rule (directly in case of Estonia and indirectly in case of Poland) for around 45 years, in contrast with virtually all Soviet republics who have been subjected to Soviets for much longer, allowing the memory of the past institutional systems to be kept alive in both countries (O'Connor 2015, Hatwell 2016). This was one of the main reasons why the transitions of Estonia, as well as Latvia and Lithuania, resembled to the great extent the transition of the other CEE countries such as Poland, Czechoslovakia and Hungary, as opposed to other former USSR republics (Raun 2010).

What two countries also shared, although to a different degree, is the influence of the Soviet legal tradition. This asymmetry stemmed mostly from the fact that Poland, despite its presence in the Soviet sphere of influence, has maintained a separate statehood, allowing some, even if minor, degree of institutional flexibility and independence. It was due to the latter that as a consequence of a social turmoil in the late 1970s and early 1980s (with the rise of Solidarity as culmination point), institutions aimed at judicial review (Constitutional Tribunal) and combatting corruption (Tribunal of State) were created (Brzezinski 1993). Surprisingly, despite the fact that the notions of the separation of powers and judicial review were virtually absent from the communist political systems, these were not entirely "Potemkin" institutions, providing some (although very limited) autonomy to the judiciary and checks on the executive (Brzezinski 1991, Cole 1998, Kolosky 2014, Hartwell 2016). Hence, Poland has entered its transition period with already functioning (and partly independent) judicial system. In contrast, Estonia, who had a little autonomy as the Estonian Soviet Socialist Republic had to build such institutional mechanisms from scratch (Purs 2012).

Legal Institutions During the Transition Period in Poland

Before analyzing the legal institutional dynamics during the transition period in Poland, it seems worthwhile to underline once again the importance of the fact that Poland entered it with relatively active set of institutions meant to secure "horizontal accountability."[10] It was indeed specific to the Polish case

[9] With its firm appraisal of the idea of liberty, self-governance and the checks and balances within the executive the First Commonwealth is seen as one of the first embodiments of the Western, liberal democratic values. Nevertheless, the subsequent partitions of Poland, as well as the authoritarian coup of 1926 point to the complexity and multi-dimensionality of the Polish political and legal heritage. For a detailed discussion, see Hartwell (2016).

[10] According to O'Donnell (1996), democracy, although necessary, is by no means a sufficient condition for the establishment of the rule of law. What is needed as well, according to him, is the introduction of the "horizontal

that one of the preconditions for the successful construction of the *Rechtstaat* was, at least to some degree, institutionalized even before the democratic transition started. Apart from the aforementioned Constitutional Tribunal and the Tribunal of State, the establishment of the Supreme Administrative Court in 1980 (which constituted the first step in the direction of bureaucratic accountability) and the Ombudsman in 1987 have to be singled out in that respect as well (Antoszewski 2005).

The pre-existence of a relatively developed institutional and legal environment was one of the reasons why the first non-communist Polish Prime Minister, Tadeusz Mazowiecki, after the spectacular victory of opposition in the partly-free elections in June 1989, stated that his government would not scrap any existing laws and hence would lead a "legal revolution," albeit within the framework inherited from the former regime (Sabados 1998). Rather than "leapfrogging" (Laar 2014: 86), Poland chose to build on its already-existing structures in both institutional and (even more importantly) personal sense. Consequently, most of the legal reform during Polish transition period (and, at least to some extent, beyond it) that was aimed at laying the groundwork for the emergence of a Western-type *Rechtstaat*, consisted of a series of amendments to the existing acts and statues, with the Stalinist 1952 Constitution at the forefront (Brzezinski and Garlicki 1995).[11]

Crucially from the perspective of the rule of the law, judicial independence was formally introduced already in 1989, exactly through a series of such amendments to the most fundamental legislative acts in the Polish legal system (including the 1952 Constitution). However, this approach effectively prevented a comprehensive and internally consistent reform of this part of the state apparatus. Indeed, although judicial independence was referenced to explicitly in the Small Constitution (1992) – an interim act that concerned mainly the executive branch of the government - it was only the "full" 1997 Constitution that reorganized the Polish judiciary and reaffirmed the basic principles of the separation of powers and judicial independence, both in the individual and collective sense.[12]

The slow pace of reform (the 1997 Constitution was adopted a full eight years after the transition began) was caused by the variety of factors, the detailed discussion of which is beyond the scope of this work. However, two main obstacles to crafting a new Constitution should be mentioned: first, the heterogeneity of the post-Solidarity movement hampered the creation of a consistent set of basic constitutional principles, upon which a final statue could have been based.[13] Second, political turmoil (which brought post-communist back into the office in the wake of 1993 elections) and the deep social cleavages (e.g. between Catholics and non-Catholics) further impeded the effective conclusion of the constitution-drafting processes (Osiatynski 1995).

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accountability": "the institutionalized oversight of the state" which "renders the state legally accountable and protects people's rights and their equality before the law" (Sabados 1998:230).

[11] The famous December Amendments of 1989 (named after the month in which they were adopted) constitute a prime example of such an approach during the initial phase of the legal transformation. The Amendments included, *inter alia*, the elimination of the dominant role of the Communist Party in the Polish policymaking and the recognition of private property as a fully legitimate concept of ownership (Brzezinski and Garlicki 1995).

[12] Article 10 of the 1997 Constitution introduces the principle of separation of powers, while Article 173 further underlines the independence of the judiciary from the other branches of government. Finally, Article 178 provides that "judges, within the exercise of their office, shall be independent and subject only to the Constitution and the statutes" (Constitution of Poland 1997; Bodnar 2009: 33).

[13] For the extensive discussion of the ineffectiveness of the workings of the Constitutional Committee, see Sabados (1998).

Despite the relatively slow pace of the legal reform, some institutional changes were implemented quickly. Importantly, the Roundtable talks of 1989 resulted in the creation of the independent National Council of the Judiciary (pol. *Krajowa Rada Sądownictwa* – KRS), which was formally set up via the constitutional amendment in April 1989. Playing the key role in the appointment and representation of the judges, its main duty was to recommend on the judicial nominations to the President. Crucially, the members of the KRS were to be chosen not only by the judges themselves (Magalhaes 1999), but also by a number of key political institutions, including both chambers of the Polish parliament and the President. It was exactly that division (which guaranteed the presence of the representatives of all three branches of power) that was meant to secure its independence and shield it from the excessive influence of any of the aforementioned political bodies (Bodnar 2009).[14]

In addition to the KRS, there were other (institutional and legal) reforms during the initial phase of institutional transition that were aimed at strengthening judicial independence post-1989. These included limiting the Ministry of Justice's oversight over courts and strengthening the role of judges themselves (through the KRS and otherwise) in the appointment and representation of judges. All these reforms allowed Bodnar (2009: 34) to conclude that two decades after the 1989 regime change, "the analysis of the daily practice of the judiciary shows that it is highly independent."[15]

Beyond the institutional arrangements, the reality of the post-communist transition was that judicial independence was also inextricably linked to personnel within the judiciary and Polish state institutions in general, and in particular the replacement of communist-era judges with new ones. In Poland, the view prevailed that purging the judiciary would compromise its independence and that, eventually, the judiciary will purge itself (Magalhaes 1999). In one sense this approach was "efficient," in that continuity prevented paralysis in the judiciary and reduced the possibility of public unrest related to judicial institutions. However, once the moment of shock therapy passed, so too did the sense that continuity was the most important factor in legal institutions, but the subsequent attempts to purge the judiciary, directly (1992) and via institutional means (1993) failed, with the relevant acts eventually being declared unconstitutional by the Constitutional Tribunal (Walicki 1997). In later years, and especially after the post-communist coalition won the 1993 elections, no further direct attempts were made to purge the judiciary; the period of "extraordinary politics" (Balcerowicz 1995: 311) ended and "normal" politics set in.

The view that the judiciary was left virtually untouched by the institutional transformation in Poland in the wake of 1989 transition hence remains strong, both in the public opinion and among some scholars (see e.g. Antoszewski 2005:96, who noted that judges have been "shielding themselves with the newly-established independence"). However, closer examination of this issue proves that it is much less clear-cut. Despite the lack of an institutionalized top-down purge of the judiciary and state agencies, the personnel turnover within the common courts still equaled 10-16% annually in the few years after the transition, as the "old guard" voluntarily went into retirement (Sabados 1998). Furthermore, in the wake of the Roundtable talks, half of the Constitutional Tribunal judges were replaced with the Solidarity-nominated ones. Even more radical was the personnel shift in the Supreme Court, where no less than

[14] As we show below, this is exactly why PiS, in order to gain control over the KRS post-2015, set out to change the rules of the game and elected the "new" KRS purely through the lower chamber of the Polish parliament (*The Sejm*).
[15] Nevertheless, in 2007 then-president Lech Kaczynski refused to appoint one of the judges recommended by the KRS, creating a mini-constitutional crisis (Bodnar 2009). This may be seen as a warning sign of the post-2015 attack on judicial independence, including the politicization of the KRS.

75% of the judges were replaced (which happened both due to the political decisions and as a consequence of the changing role of this institution).

Finally, although no purge of the judiciary took place, lustration (*lustracja*) was chosen to be the main tool for "dealing with the past" in Poland and securing at least "minimal transitional justice" (David 2003:394).[16] Unsurprisingly, however, and due to the reasons outlined above (*vide* legal continuity, unstable political situation etc.) this process proved "lengthy, unregulated and wild" (David 2003:391): although Poland was the first country to overthrow communist rule via formal political means, it was the last to adopt a lustration law, which happened in 1997 alongside the Constitution. However, the law came into force only in 1999 and was watered down in 2002, when post-communist parties regained power. The vast controversies that arose over the issue of lustration also had a significant impact on the public opinion views of the transformation, and have contributed to political instability (lustration issues have directly led to the overthrow of Olszewski's government in 1992) and a general unwillingness to use these provisions on legal institutions.

Legal Institutions During the Transition Period in Estonia

The Polish experience stands in stark contrast to the Mart Laar's repeated explicit affirmation of the primacy of building the *Rechtstaat* in a swift manner as a compliment to the radical economic reform (Laar 2014). Indeed, despite sharing a similar socialist legal legacy as Poland, both the transition and outcomes of Estonia's legal transformation were different. In the mind of Estonia's reformers, the re-creation of Estonia's legal system, if meant to be successful, had to be enacted quickly (Laar 2002). This belief was translated into prompt actions; Estonia's constitution has been drafted within only 6 months after regaining independence and has been adopted already in 1992, being the first in the all former Soviet republics (Parna 2005, Purs 2012).[17] The 1992 Constitution drew heavily from its 1938 predecessor, although certain features of the latter, with the strong presidential power to the fore, have been amended (Raun 2010). Consequently, Estonia, alongside Latvia (and in contrast to virtually all former Soviet republics), chose to adopt the parliamentary model of government (Auers 2015). The 1992 Constitution stressed the importance of the individual rights, provided the general principles guiding the functioning of the country, at the same time avoiding the risk of limiting the scope for the development of the future legal solutions (Constitution of Estonia, Merusk 2004).

Not only was the reform of the legal system in Estonia quick, but it was also profound. Here, a number of factors seem to have played a role, with the aversion to the Soviet past to the fore (). Indeed, Mart Laar (2014: 76), the first Estonian reformist prime minister that held the office from October 1992 to November 1994, openly admits that it was their "national sentiment [that] made them focus more on the reform of the state than most other radical reformers".[18] More specifically, they stressed the importance of the personnel exchange, with bureaucracy and judiciary to the fore (Laar 2014). Consequently, in 1992 only, roughly 70% of the judges were effectively replaced. The immediate effect was predictable: the vast

[16] Interestingly, however, the parliamentary debates on lustration in Poland were dominated by the issues of public safety, rather than transitional justice. This stands in stark contrast to e.g. the Czech experience (David 2003).
[17] Furthermore, in order for the privatization of land to be conducted transparently, Law of Property Act has been adopted in 1993, with other important laws regarding property rights to follow in the subsequent years (Parna 2005).
[18] It is not difficult to guess that one of these "radical reformers" that Laar had in mind was Poland.

majority of new judges were inexperienced, resulting in the general inefficiency of the judicial system (Gallagher 2003). However, prompt measures (such as two-year re-training program conducted by the invited German judges and lawyers) has mitigated the problem relatively quickly (Gallagher 2003; Abrams and Fisch 2015). Finally, wage raises for the judges attracted young law graduates and decreased the extent of corruption (Gallagher 2003).

Furthermore, it seems utterly important to notice that Estonia's leaders did not believe in the ability of the state to construct and impose the optimal set of legal institutions in a top-down fashion (Merusk 2004). Consequently, in both institutional reform and legal policies they have focused mainly on credibility of the reforms and simplicity and coherence of the law (as exemplified by a simple, flat income tax), both of these features being mainly motivated by the willingness to establish a favorable business environment (Padam 2007, Laar 2007). Parna (2005: 221) confirms this view, noting that "no attempt was made to create a unique private property law system, rather lawmakers set modern rules that reflected European attitudes and were comprehensible to investors", stressing also the mechanisms introduced to counter the excessive regulation.

Another telling example is the reform of the administrative law (post-1994). Merusk (2004) highlights the fact that the Estonia, though historically belonging to the German legal culture, did not blindly copy the solutions from German law (nor naively followed the advice of Western experts), specifically adjusting the solutions to fit into the specificity of Estonia's legal, economic and societal structure. Furthermore, strong conviction about the necessity of the law to be clear and understandable ("by everyone who deals with it") prevailed (Merusk 2004: 57).

V. How Did Transition Strategies Matter? The Experience of 2015

The clear divergence in outcomes related to the rule of law in Poland and Estonia can be, we assert, traced back to the transition strategies pursued by the two countries. In particular, one of the most difficult issues to overcome in transition has been expectations: without an expectation that reforms were to be permanent, incentives for institutional change were muted and encouraged participants to take a "wait and see" approach (a reason for institutional hysteresis in the former Soviet Union). With regard to the legal institutional transition in CEE, Estonia's "big bang" altered the incentive structure at once while also altering the mechanisms by which those incentives were intermediated. By contrast, Poland's continuity with a system forged under an entirely different political and economic milieu meant that its transition was incomplete, and old incentives lingered.

This is most apparent in an intangible portion of institutional functioning, namely the lingering legal Soviet "mentality" across legal institutions, most prominently displayed in overt formalism in adjudication (Mańko 2013). Matczak *et al.* (2010) name two reasons why this formalist approach flourished under communism: first, the impossibility of applying legal acts of higher order in the adjudication process drastically limited the need to refer to the fundamental principles, such as equality or liberty. Second, the literal approach to the law (and treating the law in the narrow sense as a mere "set of rules") allowed the

judges to avoid incorporating "public values" into the adjudication process, to some extent shielding them from the accusations of direct support for an authoritarian regime (Matczak *et al.* 2010: 83).[19]

This reliance on formalism has continued post-1989 and indeed remained pervasive: surveying 500 administrative court judgements from the period 1999-2004, Matczak *et al.* (2010) note that Polish judges used "internal values of law" (the proxy for the formalist approach) 81.5% of the time, with "values external to the law" and "constitutional law topics" referred to only in 10.2% and 7.4% of cases respectively. As the administrative court is supposed to protect the people (with entrepreneurs to the fore) from the arbitrary and unjust acts of the government and bureaucracy, the lack of a frequent reference to the general principles such as the importance ("sacredness") of property rights, as well as the concept of proportionality, is rather telling. More recently, the 2013 Constitutional Court's ruling denying the private status of the Open Pension Funds accounts (and allowing the government to effectively deny part of its former pension obligations) can be seen as the most radical example of the literal application of the law, with no reference to the aforementioned principles and consideration of wider social and political consequences.

By contrast, the Estonian approach may have mitigated somewhat against the prevalence of legal hyperpositivism as in Poland. Although we lack comparable hard data from Estonia, it seems justified to say that hyperpositivism, despite being present to some degree, has not gained a firm foothold (Varga [2014] points to the case of the Estonian supreme court's approach to preliminary questions addressed to the European court). In particular, the replacement of over 70% of the judges at the outset of the transformation, as well as vast legal consultations conducted with the top legal scholars and institutions in Europe and the US (e.g. Georgetown University) seems to have countered the positivist tendencies in the Estonian legal system (Gallagher 2003, Byrne and Schrag 1994*)*

While the mentality of legal institutions, shown in the use of adjudication, is a key consequence of divergence of legal transition strategies, a much more important one concerns the divergence since 2015 in the legal profession's ability to protect the rule of law in Poland and Estonia. Indeed, nowhere has the importance of strategy of legal institutional reform been more apparent than in the recent moves in Poland to alter the legal system and its institutions. The political turmoil that Poland has been witnessing from 2015 onwards (with varying degrees of intensity) came to many external observers as a surprise. Indeed, Poland, held in high regard for its continuous economic expansion and relatively well-functioning political institutions, was seen as an increasingly stable and mature liberal democracy (Wiatr 2018). However, despite virtually all socio-economic indicators improving, the Law and Justice party (Prawo i Sprawiedliwość or PiS) embarked on a determined attempt to change the core institutions supporting the widely-supported definition of rule of law (Kelemen 2017).

In its earlier turn in power in Poland (from 2005 to 2007), PiS had many of its policy designs thwarted by the Constitutional Tribunal (including striking down a new lustration law, see Uitz [2007]) and spent a large portion of its time threatening the independence of this institutions (Markowski 2008). Upon ascending to power in 2015, this disapproval of the functioning of the judiciary immediately resumed, and PiS' super-majority allowed it to effectively paralyze the Constitutional Tribunal. In the first instance, the

[19] This phenomenon has been elsewhere referred to as "hyperpositivism", which "insists on a preference for linguistic and 'logical' interpretation, with other methods (such as functional or systemic interpretation) treated as subsidiary ones, which may be resorted to only if the literal interpretation patently fails" (Mańko 2013: 6).

government sought to greatly enhance the power of the Minister of Justice over the appointment (and dismissal) of regional court judges, severing their independence from political appointees.

The institutional dynamics of the Constitutional Court seems especially informative. Despite the indirect threat of bias (as the Tribunal is entirely chosen by the Sejm, giving the majoritarian coalition a possibility to appoint their own candidates), the Tribunal has been widely considered as independent, especially after seeing its power and independence extended by the 1997 Constitution (Kolosky 2014). However, the demise of its independence began when Civic Platform, during the last session of the parliament on October 8th, 2015, appointed five instead of three judges to the Tribunal (the tenure of the two was elapsing one month after the parliament's end of term). Despite the undisputed legality of the appointment of the three judges, PiS made a use of its newly-acquired parliamentary majority to declare all five judges unconstitutionally appointed and to elect their candidates to replace them (Rytel-Warzocha 2017). This started a full-fledged constitutional crisis, which escalated even more when, although the Tribunal declared the three judges appointed by PiS unconstitutional (claiming that their seats were already taken), President Andrzej Duda, despite being bound by law to swore in the judges that were lawfully appointed by the parliament, did so only in the case of the ones elected by PiS, including the three "quasi-judges" (Sadurski 2018). Initially, due to the opposition from the then President of the Tribunal Professor Rzepliński, the "duplicate judges" did not take an active part in the work of the court. This situation changed immediately after the (itself legally dubious) appointment of Julia Przyłębska as the President of the Tribunal in December 2016. The sum total of these moves was to create a state of ambiguity regarding the impartiality and legality of the Tribunal itself.

This ambiguity was exacerbated by two processes, outlined in detail by Sadurski (2018), which followed: (a) a "legislative bombardment" meant to effectively paralyze the functioning of the Tribunal and hence to shield the constitutionally objectionable (or outright unconstitutional) reforms of PiS from judicial review (the most acute example being the proposed requirement of the Minister of Justice's (Prosecutor General) presence during the Tribunal's proceedings, giving him a de facto veto power in a certain types of cases); and (b) the government's rejection of publishing the Tribunal's judgements (including the aforementioned judgment declaring the election of the two judges in October 2015 unconstitutional). Not surprisingly, the legislative bombardment was nearly entirely abandoned when PiS gained a majority in the Tribunal (while the Tribunal's judgements from late 2015 and 2016 remain unpublished as of January 2019). This, however, marked a shift in the Tribunal's role as a check on executive power to act effectively an enabler, as its active role in the effective destruction of the independence of the National Council of Judiciary testifies (Sadurski 2018). The second offense, the refusing to publish judgments, has continued to this day; most egregiously, this action contravenes the direct requirement of the Article 190(2) of the Polish Constitution, which states that the government should publish judgements "immediately" with no discretion or ambiguity whatsoever

The Constitutional Tribunal was only the first of several legal institutions which have been the target of the government reforms, with others "captured by the PiS sinecural entrepreneurs and loyal apparatchiks, a phenomenon coupled with selective, yet widespread nepotism and corruption" (Markowski 2018: 10). The scale of damage to the rule of law inflicted by the PiS' "legal blitzkrieg" (Bugaric & Ginsburg 2016: 74) is staggering given its slight majority (51%) in the lower chamber of the parliament, the Sejm. Indeed, as Markowski (2018) demonstrates, these changes, with the determination to change Poland's legal institution *in toto,* have not been motivated by widespread public demand for such actions. However, if PiS' policies have been on the one hand widely supported by only a small fraction of the general populace

while simultaneously being aimed at comprehensively changing (if not paralyzing) the core of the Polish legal system, a follow-on question arises, namely: how did the government manage to sustain such reforms so rapidly and face only relatively muted popular protests? Furthermore, why have countries such as Estonia not witnessed similar processes, and, quite to the contrary, have strengthened their protection of the rule of law with time (especially, as Bugaric and Ginsburg (2016) claim, when legal institutions are "weak and underdeveloped, as they are in CEE countries, there is always the potential danger of a drift toward 'illiberal democracy,' and even authoritarianism")?

As far as the first question is concerned, there are several (distinct, yet intertwined) explanations. What the majority of them have in common, however, is that they point to the evolution of informal institutions as the process that, although to a limited extent, popularly legitimized the attack on the judiciary (or at least dampened the resistance to these reforms). As Bucholc (2018) remarked, the demise of the Constitutional Tribunal in Poland happened due to its lack of ability to "defend itself as an institution (…) it failed, because the only valid defense it could mobilize was the constitution itself." Nevertheless, this explanation merely shifts the fundamental question one level up, with the question now becoming: why was the constitution itself the only defender of the Constitutional Tribunal in Poland? Bucholc (2018:2) does not leave this question unanswered, however, claiming that the "answers must be sought in culture, and more specifically in the interplay between norms, institutions and cultural resources, in particular the resources of collective memory." In her insightful work, she demonstrates that most of the debate surrounding the changes imposed on the judiciary (including the mentioned curbing of the judges' independence) has been framed into the rhetoric of "restorative justice, abolishing the legacy of post-communism supposedly embodied by the Tribunal." Furthermore, Bucholc (2018: 13) points to the weak popular awareness of the role of the Constitutional Tribunal, as well as the fact that "constitutional provisions and norms failed to anchor themselves in any project of collective identity" since the transformation of early 1990s (Hałas 2005). Finally, and in apparent contrast to what has been described above, Bucholc (2018) highlights the fact that Poland did not have any "modern indigenous rule of law tradition (…) as an alternative" to copying the German Rechtstaat model, which hampered the popular identification with the legal system installed.

Furthermore, Markowski (2018) stresses the importance of the mode of transition from authoritarianism to a liberal democracy, claiming that:

> *The classical assumption that the "pacted" transitions are more likely to be conducive to successful consolidation of democracy might overlook however that the lack of a clear "critical juncture" that separates the ancient regime from the new one causes confusion among the population as to the rules of the new game, creates a mood of temporariness, rules flexibility and consequently instrumentalization of politics that easily translates into volatility of institutions and disrespect for constitutional norms.*

All of these accounts, at least to some extent, support our thesis that the Polish continuous mode of transformation that granted the "safe passage" to the virtually all legal institutions (with the important exception of the Supreme Court) coupled with deficiencies in other supporting institutions (such as high corruption rates and emergence of a limited yet relatively influential class of political capitalists), made the Polish legal institutions perceived as less trustworthy by a sizable portion of the population, especially

in the run up to 2005 elections. The subsequent improvement in the judicial accountability and effectiveness, however, proved insufficient to boost the moderate levels of popular association with the core legal insitutions or notions, such as the rule of law, to generate robust resistance to the post-2015 "reforms." On the other hand, the aggressive rhetoric of the PiS directed at the judiciary, coupled with the radicalization of their electorate and their lack of "moral approval" (Tworzecki 2018: 114) of the post-1989 stance of the Polish judiciary, paved the way for the Polish post 2015 "authoritarian backsliding" (). Quite paradoxically, it was the relatively high level of judicial independence left in place at the end of communism which prevented deep-seated reforms of the judiciary under capitalism in the early 1990s. In particular, the reliance on hyperpositivism and lack of defense of broader values of executive constraint via judicial institutions paved the way for legal institutions themselves to be subverted. The rapid dismantling of the Polish Rechtstaat and the gradual erosion of both independence and effectiveness of the judicial branch of Polish government is supported by the data, as Figure 5 shows the chosen indices and sub-indices of the World Justice Project's Rule of Law Index (see Appendix A for a full comparison of these scores).

By contrast, and despite a wave of similar "reforms" of legal institutions across the region (Bugarič and Ginsburg 2016), Estonia appears to have been impervious. Indeed, recent indicators point to Estonia's unparalleled success in establishing a truly mature political system with the most trustworthy and efficient judiciary in the EU (World Justice Project 2018). As we have argued throughout, this should be ascribed to the radical, personal and institutional changes in the judicial branch of government that have been carried out at the onset of the transition. The latter constituted a "critical juncture," as it prevented the mental legacy of Soviet legal system to creep into the Estonian law and legal practice.

The early moves taken by Estonia had a much more important effect, however, which led to an inoculation of sorts against political maneuvering which could threaten the rule of law. Of course, and as noted earlier, there is a huge measure of endogeneity as regards the functioning of institutions, and legal institutions can influence democratic processes as much as democratic processes can influence legal institutions. While in Poland the causality appeared to run from democratic processes to legal institutions, in Estonia the causality ran in the other direction. In particular, the strategy pursued by Estonia created a virtuous cycle of a fair and effective legal system, leading to the increased trust and popular association with it (as well as attracting foreign capital); by promoting legal institutions associated with the rule of law and which had broad popular support, there was a huge incentive for governing and challenging parties to strengthen, rather than weaken, the level of the rule of law in Estonia.[20]

Indeed, as of 2018, Estonia ranks first out of 18 Eastern European Economics in the Democracy Index compiled by the Economist Intelligence Unit (2019), with an overall score of 7.97 (this figure stands at 6.67 for Poland, which comes only 7th). It boasts the highest regional scores in the "Electoral process and pluralism" and especially "Functioning of government" sub-indices, in the latter category beating the runner-up, the Czech Republic, by a substantial margin (8.21 to 6.79, with Poland scoring a mere 6.07). This success points to the unidirectionality and consistency of the economic and political reforms that effectively started in 1992 and have never been, even partly, reversed, despite a number of changes of incumbent parties (Laar 2014). Indeed, it was the consistency between the reforms across the economic

[20] The irony is that this precise strategy worked in Poland with regard to economic reforms, where the rapid success of radical reforms led to an ironclad constituency for the reforms, with just tweaks around the edges.

and political spaces, through the number of channels we discussed above, that laid the foundation for the Estonian virtuous cycle of sound policies, liberal popular beliefs and ever-stronger rule of law.

As a final point can be made to demonstrate the success of the Estonian legal strategy, we can also observe how Estonia has fared in the populist atmosphere post-2015. Despite an increasing share of the European countries witnessing the electoral successes of their populist parties, there is virtually no Estonian populist party that would stand any chances in the parliamentary elections (Adam 2017). As populist parties are famous for being anti-elite and anti-established institutions (Albertazzi and McDonnell 2008), creating a popular and legitimate legal order had helped to protect the rule of law in Estonia.

VI. Conclusions

This paper has examined the link between legal institutions and development of respect for the rule of law, focusing on two specific high-performing transition countries. The divergent paths of Estonia and Poland, detailed clearly in Section IV, can be attributed to different institutional legacies but also clearly to the different policy approaches taken in the transition (which, themselves, may have been informed by cultural and historical legacies). Whereas Poland eschewed rapid change in its judiciary in favor of continuity, the relatively blanker slate that Estonia faced allowed for "leapfrogging" older institutional arrangements in favor of building a legal system from the bottom-up. More importantly, the Estonian experience shows a continued strengthening of the rule of law after the transition period, where (using Greif's [2006] terminology), the institution of the rule of law has proven to be self-reinforcing. This occurred through a variety of mechanisms, notably the public's views on the judiciary and the willingness of politicians to maintain a favorable business climate; in reality, rule of law also gradually affected the quasi-parameters connected with the institution such as public opinion which, in turn, strengthened the institution itself.

In Poland, on the other hand, the rule of law has proven much more fragile. However, its demise was by no means linear: although there were clear signs of a lack of deep trust in the judiciary, the outright attack on the basic principles of the *Rechtstaat* seemed unimaginable even a few years ago. Quite paradoxically, this non-linearity can also be captured by Greif's (2006) framework, in that the institution of the rule of law in Poland was self-enforcing, but it was not immune to *shocks* to the quasi-parameters (i.e. the formal political process) surrounding the institution. Indeed, in the Polish case, the ongoing dismantling of the *Rechtstaat* has had a significant formal dimension, but this is only half of the story: these formal institutional moves would not be possible had informal mechanisms (such as public opinion) voiced its disapproval strongly enough. In understanding why was it so comparatively easy for PiS to steamroller legal institutions it is important to remember that, even meta-rules such as the Polish Constitution (the ultimate quasi-parameter that determines the evolution of the stance of the rule of law) have shifted in the anti-*Rechtstaat* direction in Poland, especially within the electorate. Extreme polarization among political parties, breaking the elite consensus which existed since 1989 (Baylis 2012) has only assisted this process.

The extensions to this research are many and varied and include, first and foremost, an econometric test of our thesis. Using various subjective and objective indicators to measure the functioning of legal institutions versus actual levels of rule of law (as shown in Section IV), we could see the strength of the relationship between policy choice and subsequent performance in defense of the rule of law.

Alternatively, the case study approach employed here can be deployed for other transition economies to understand what other institutional imperatives were necessary for the protection of rule of law. We do not purport to be the last word on this topic; instead, we hope to be the first word, opening up a potentially fruitful line of examination which cuts across economics, law, and political science.

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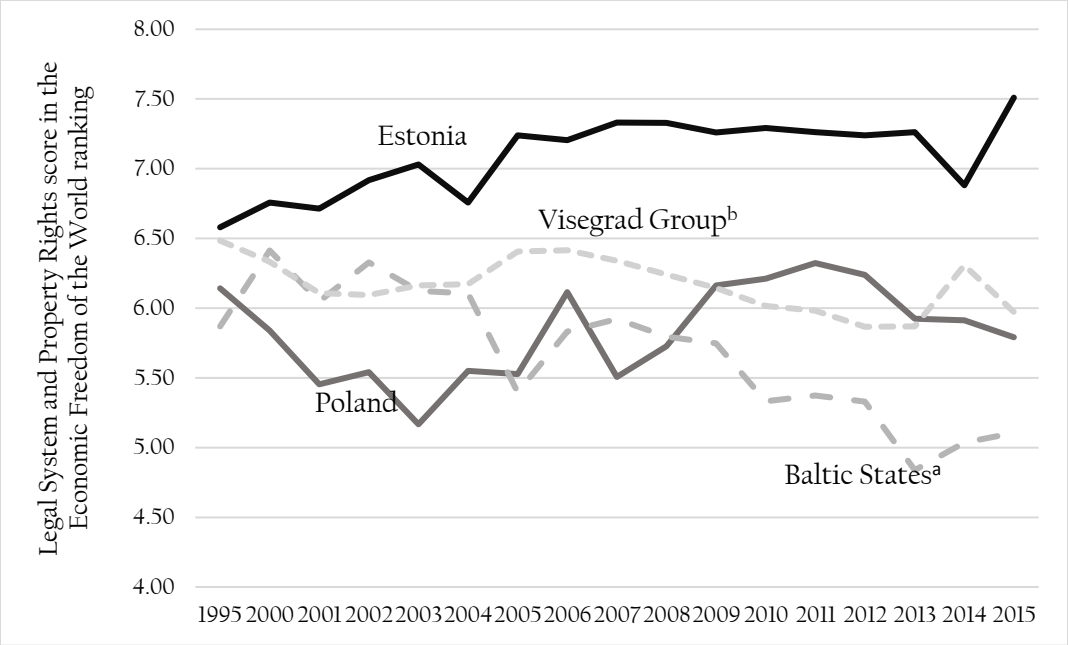
FIGURES

Figure 1. Legal System and Property Rights score in the Economic Freedom of the World ranking

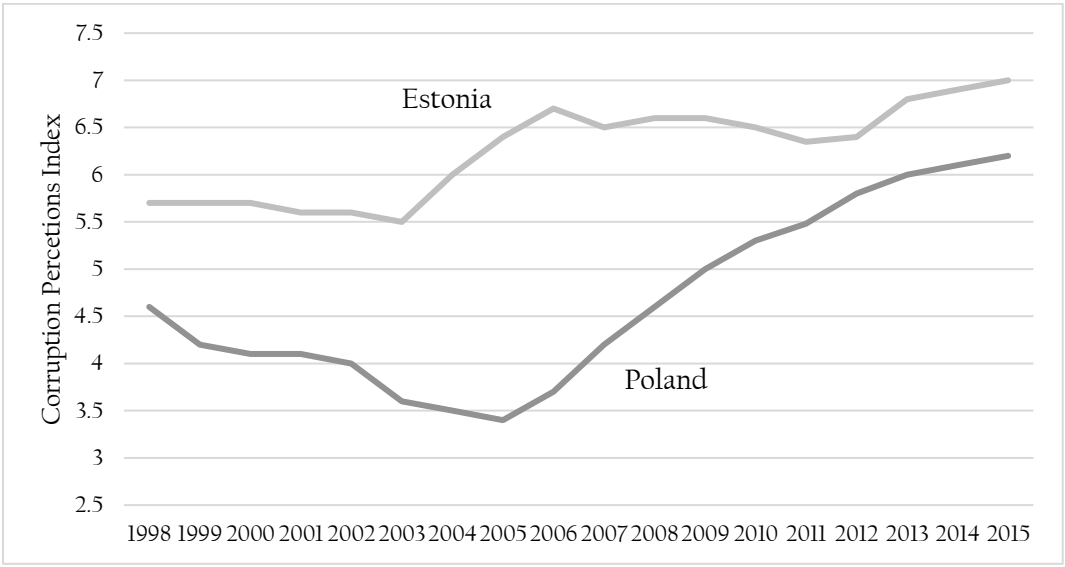


Source: Fraser Institute (2017).

[a] without Estonia – that is, the average for Lithuania and Latvia.

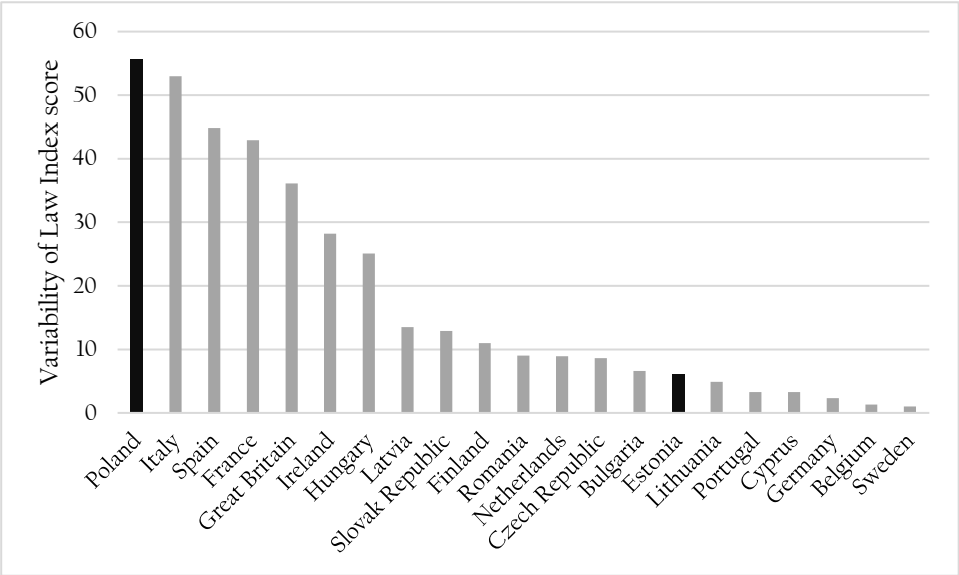
[b] without Poland – that is, the average for Czech Republic, Slovakia and Hungary.

Figure 2. Corruption Perceptions Index for Estonia and Poland, 1998-2016.



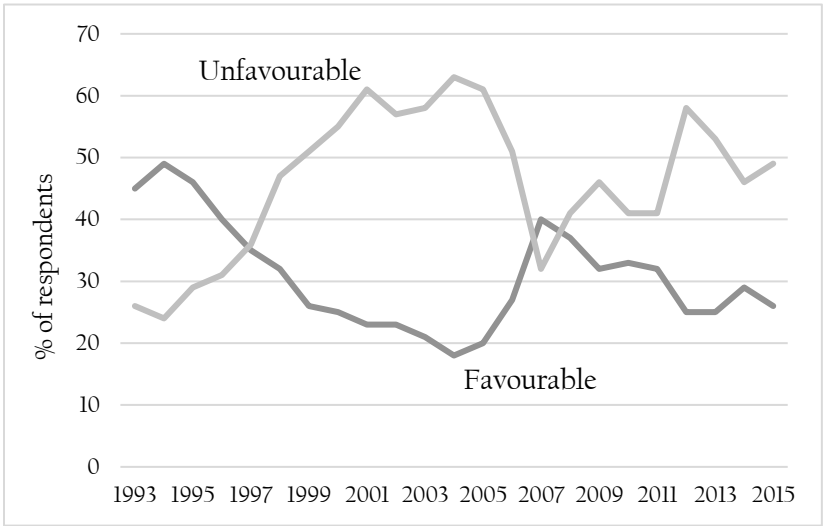
Source: Transparency International (2017).

Figure 3 - Variability of law in selected European countries



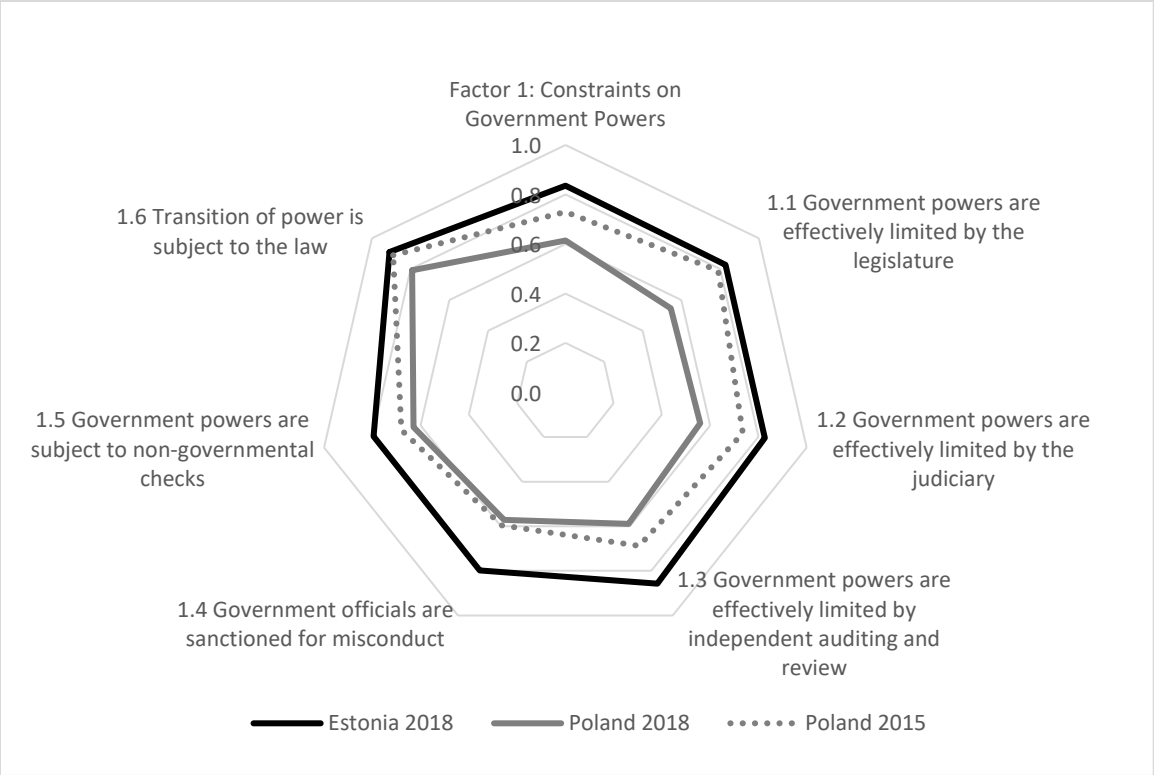
Source: Grant Thornton (2017).
Notes: the higher the score, the more variable the law.

Figure 4 - Public opinion and the view of the Polish judiciary



Source: Center for Public Opinion Research (CBOS 2016).

Figure 5 - The Rule of Law Index scores for Factor 1: Constraints on Government Powers



Appendix A – World Justice Project Scores, Estonia v. Poland

		Estonia (2018)	Poland (2018)	Difference	change 2015-2018 (PL)	change 2015-2018 (EST)
1	**Limited Government Powers**	0.84	0.61	0.17	-0,16	0,01
	1.2 Government powers are effectively limited by judiciary	0.77	0.76	0.01	-0,22	0,00
	1.3 Government powers are effectively limited by the judiciary	0.81	0.72	0.09	-0,10	0,00
	1.4 Government powers are effectively limited by independent auditing and review	0.73	0.71	0.03	-0,11	-0,04
	1.5 Government officials sanctioned for misconduct	0.81	0.63	0.17	0,01	0,03
	1.6 Government powers are subject to non-governmental checks	0.78	0,74	0.04	-0,12	0,01
	1.7 Transition of power is subject to the law	0.88	0.90	-0.02	-0,11	0,01
2	**Absence of Corruption**	0.78	0.69	0.09	0,01	0,01
3	**Order and Security**	0.77	0.69	0.08	-0,09	-0,01
4	**Fundamental Rights**	0.77	0.75	0.02	-0,03	0,01
	4.2 The right to life and security of the person is effectively guaranteed	0.85	0.80	0.05	-0,24	-0,05
	4.3 Due process of law and rights of the accused	0.87	0.87	0	0,02	0,14
	4.4 Freedom of opinion and expression is effectively guaranteed	0.76	0.73	0.03	-0,14	-0,02
	4.5 Freedom of belief and religion is effectively guaranteed					
	4.6 Freedom from arbitrary interference with privacy	0.81	0.70	0.11	-0,04	-0,05
	4.7 Freedom of assembly	0.77	0.82	-0.05	-0,19	0,02

5	**Open Government**	0.70	0.67	0.03	-0,05	0,14
	5.1 The laws are publicized and accessible	0.80	0.80	0.01	0,11	0,01
	5.2 The laws are stable	0.86	0.84	0.02	0,18	0,20
	5.3 Right to petition the government and public participation	0.92	0.89	0.02	0,37	0,07
	5.4 Official information is available on request	0.70	0.59	0.11	0,43	0,34
6	**Regulatory Enforcement**	0.75	0.61	0.14	0,06	-0,05
7	**Civil Justice**	0.74	0.64	0.10	0,03	0,06
	7.4 Civil justice is free of improper government influence	0.84	0.73	0.11	0,00	0,02
8	**Criminal Justice**	0.72	0.71	0.01	-0,04	-0,05
	8.4 Criminal system is impartial	0.68	0.76	-0.08	-0,28	-0,02
	8.6 Criminal system is free of improper government influence	0.87	0.85	0.01	-0,03	-0,14
	8.7 Due process of law and rights of the accused	0.88	0.73	0.03	-0,15	0,00

Source: World Justice Project (2018).

[a] note that the scores in the table represent the average for 2012-2016