‘One Hand Washes the Other’ in EU’s Eastern Neighbourhood: What Policy Response?

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Abstract
The institutions of patronage, clientelism and nepotism are resilient and obstruct political liberalisation and democratic consolidation. This paper draws on historical (neo)institutionalism, democratisation research and studies in economic history to understand the reproduction mechanisms of informal institutions in EU’s Eastern neighbourhood, and to propose a policy response, which could have the potential to disrupt these mechanisms. Outsourcing national judiciary systems from EU’s Eastern neighbourhood to external rule of law missions might offer one solution as long as they satisfy at least two conditions: (1) they need to have a targeted executive mandate; and (2) they must be deployed with the support of an authoritative international actor, such as the EU or UN, under conditions of concerted international efforts and significant financial assistance. Local actors might oppose this infringement of national sovereignty. External rule of law missions should therefore be proposed during a democratic transition when reformers rely on external support.

Policy Implications
• Outsourcing national judiciary systems to external rule of law missions, having a targeted executive mandate and the support of concerted international action, might prove to be one solution against the reproduction of informal institutions.
• The EU could make use of EUROPOL, OLAF and other specialised bodies to identify, track, expose and combat the money-laundering activities many patrons are involved into, while using EU firms, banks and offshore companies. Imposing targeted sanctions on such individuals can also be considered.
• The EU could also offer more support, inter alia via the European Endowment for Democracy, to local organisations, mass media and NGOs which specialise in investigative journalism.
• Finally, Western actors should maintain close ties to reform-minded politicians and civil society representatives. These actors crucially depend on Western support to fight the uphill battle of institutional reforms.

‘Without justice, no realm may prosper’
Greek philosopher and mathematician Pythagoras was remarkably visionary when observing that: ‘Without justice, no realm may prosper’ (Baldwin, 1908, p. 132). Indeed, the rule of law regime might well be a necessary condition in the transition process from natural states to ‘open access orders’ (North et al., 2009). The rule of law has historically been the result of elite agreement to move from personal to impersonal relations and to turn privileges into rights. In the first stage, the agreement concerning the scope of rule of law regime was confined to elites. In the subsequent stage of ‘transition proper’ to open access orders, the scope was extended to the general population via access to formal institutions and ‘perpetually lived organisations’ (North et al., 2009, p. 152).

Establishing the rule of law in post-communist countries after 1989 has been nothing but revolutionary. Under communism, the rule of law existed in name only. Ultimately, the leadership of the Communist Party determined what was right and what was not. A formal division of power and judicial independence did only exist as long as it did not conflict with the goals of the communists who did not succumb to the rule of law, but ruled by law. Furthermore, in many communist and especially in the Soviet countries corruption had become systemic and favourable verdicts could be bought for an appropriate bribe. After at least two generations of communist rule (longer in Soviet countries), it was almost daring to declare that all citizens independent of political position and material resources were suddenly equal in front of the law. It meant to empower the powerless at the expense of those who relied on informal networks and norms to enrich and empower themselves.

The lack of appropriate conditions that promote the rule of law has been a key reason for a deficient consolidation of democracy and free markets in EU’s Eastern neighbourhood. At the same time, informal institutions appear to be critical roadblocks on the way to liberal judiciary systems, which
would guard against particularistic privileges and protect political and civil rights indiscriminately. Therefore, careful attention to informal institutions is critical to understanding durable institutional outcomes and persistent negative consequences, which remain difficult to eradicate (Helmke and Levitsky, 2004). They have a long evolutionary trajectory, as they represent the most natural form of social organisation, and tend to be highly resilient (Fukuyama, 2015). Informal institutions are reinforced by reproduction mechanisms, including high costs anticipated by incumbent elites with genuine political liberalisation and democratic consolidation.

Transcending political science’s focus on describing and explaining, rather than prescribing, the article draws on historical (neo)institutionalism, democratisation research and studies in economic history to propose a policy response, which could have the potential to disrupt the reproduction mechanisms of informal institutions. It suggests that robust rule of law regimes play a critical role in this process and suggests that outsourcing some functions of national judiciaries to external rule of law missions following the model of UN-sponsored International Commission against Impunity in Guatemala (CICIG) might have disruptive effects for informal local networks and practices in EU’s Eastern neighbourhood.

The article proceeds in three steps. First, it reviews the theory of historical (neo)institutionalism, emphasizing the resilience of formal and informal institutions and the ways in which they interact. Second, the paper provides empirical evidence based on the case study of Prosecutor General election in Moldova, which confirms that reproduction mechanisms make informal institutions highly persistent. The final section draws on existing theoretical knowledge and suggests a policy response against the reproduction mechanisms of informal institutions in EU’s Eastern neighbourhood.

The teaching of historical (neo)institutionalism

There are only few law-like findings in political science. One of these robust findings has been generated by historical (neo)institutionalism. The defining proposition of this theoretical paradigm has become quasi-axiomatic: institutions tend to reproduce themselves and thereby demonstrate remarkable resilience. Institutions in this understanding are the norms, rules and conventions that constrain and enable the behaviour of societal actors (North, 1991; North et al., 2009). New institutional choices open in the wake of critical junctures, which significantly relax structural constraints on actors, allowing them to pick new, sometimes radically different, institutions. Critical junctures are often the outcome of historical events that shift power relations between major actors and thereby destabilise existing institutional equilibria and engender the emergence of competing institutional alternatives. The role of actors in these critical junctures is not minuscule though. Actors can accelerate historical conjunctures, and they are indispensable to advance these institutional alternatives. The Glorious Revolution of 1688 in England serves as an example, which was, by and large, the result of increased Atlantic trade, the emergence of a new rich class of merchants and the conflict between this empowered class and the absolutist extractive institutions of the Stuart dynasty (Acemoglu and Robinson, 2009, 2012).

Historical (neo)institutionalists argue that once an institutional choice is selected, it becomes ‘locked-in’ due to reproduction mechanisms (Pierson, 2000, 2004; Thelen, 1999). Institutions thereby put societies on durable paths (Stefes, 2019). For instance, once winner-takes-all election systems have caused the emergence of two dominant parties, as these electoral systems usually do, a shift to a more proportional system is unlikely. The two dominant parties would prevent such an institutional change, as it would undermine their predominant positions in the political system. In short, institutions redistribute power and thereby enable winners to defend the institutions that made them powerful in the first place.

The reproduction mechanisms, known in the literature as ‘positive feedback’ effects or ‘increasing returns’, can also stabilize institutional choices (Pierson, 2000, 2004). The logic of choice reproduction is suggested by the example of the QWERTY keyboard. It has been documented that alternative keyboards, such as the Dvorak keyboard patented later in 1936, could have been more efficient in terms of typing speed and effort, but nevertheless the QWERTY keyboard prevailed. It was the interest of millions of QWERTY typists, typing teachers, typewriter manufactures and salesmanship that reinforced and stabilised the use of QWERTY keyboard (Diamond, 1999). The same reproduction mechanisms were at work again in the second half of the twentieth century with the adoption of QWERTY keyboard by the computer industry sector (Thelen, 1999).

Similarly, certain formal rules are not without flaws in the political realm, but they tend to be persistent, because relevant actors adjust to and invest into a given institutional equilibrium. An electoral rule may be sub-optimal, but adjusted structures of electoral administration, party organisations and the habits of voters may reinforce this rule. In the transport field, the rule of left-hand traffic may also be sub-optimal, but car manufacturers, road infrastructure, established habits of drivers and pedestrians reinforce this rule. Habit as well as concerns for sunk costs, less so than the quest for power, might thereby serve as reinforcing mechanisms.

However, despite various reproduction mechanisms, institutions can and do change. Another critical juncture may offset the extant institutional equilibrium, create a new opening and make alternative institutional choices feasible. When selected, the institutional choice in question would tend again to be persistent. Akin to the biological principles of variation and selection, institutions are thus selected from various institutional alternatives and have their durability tested in the course of their interaction with the physical environment (Fukuyama, 2015; cf. Campbell, 1965). Furthermore, unintentional gaps between institutions and the behaviour they prescribe as well as the tireless efforts of opponents to undermine institutional arrangement might lead to incremental institutional shifts that might overtime.
add up to considerable, institutional changes (Hacker, 2004; Mahoney and Thelen, 2010; Streeck and Thelen, 2005).

‘One hand washes the other’

Historical (neo)institutionalism focuses on formal institutions, but its main proposition about institutional resilience is even more valid with regard to informal ones. What Western actors involved in the industry of democracy promotion tend to overlook is that formal democratic institutions are relatively recent institutional innovations. On the other hand, informal institutions have a millenary evolutionary trajectory, representing the most natural form of social organisation and, therefore, tend to be more resilient than the former. Stefes (2006) observes that it is not natural for humans to run free and fair elections, but it is highly natural for them to favour their friends and relatives, and to reciprocate acts of altruism.

As formal institutions do, the informal ones tend to become ‘locked-in’ as well. Reproduction mechanisms, including high costs anticipated by (semi)autocratic incumbent elites with genuine political liberalisation and democratic consolidation reinforce them as the default form of institutional organisation (more below). They remain pervasive in states, which did not fully develop impersonal organisations and, though providing some basic public services, display a chronic deficiency to respond to a wider category of social needs. When states fail to respond to broader social needs, individuals find it natural to revert to the default informal networks and practices. In some historical cases, including from EU’s Eastern neighbourhood, prolonged foreign occupation was also responsible for high distrust in central state authority, fostering loyalty circumscribed around the immediate family.

One should note however that as not all formal rules undermine autocratic regimes, not all informal institutions are inimical to democratisation (Helmeke and Levitsky, 2004). Hale (2015) documents at length how formal presidentialist constitutions signal the locus of authority around which elites pivot their expectations and tend to promote single-pyramid informal networks in the post-Soviet space. On the other hand, fullyfledged democracies benefit substantially from informal norms and rules, without which social bond and empathy would hardly be possible. However, the resilience of some peculiar informal institutions, such as patronage, clientelism and nepotism, does impede democratisation and the development of liberal markets (Stefes, 2006).

Patronage, clientelism and nepotism are widespread and entrenched in EU’s Eastern neighbourhood. Patronage is about single or multiple pyramids of authority with patrons at the top and their clients at different layers of the administrative system. The latter consent to offer loyalty for and subordination to the patron in exchange for rents and favours they can extract while using their administrative positions in ministries, agencies, courts, law enforcement institutions and state-owned enterprises. Patrons are well aware about the misbehaviour of their clients, but in return for loyalty, subordination and often a contribution from the rent they may turn a blind eye to and offer protection when misbehaviour becomes exposed. When clients cease to be obedient, law enforcement bodies are quick in charging them with embezzlement of public funds, abuse of power or corruption, as happened in 2005 in Azerbaijan, when within a week 16 high-ranking officials, including former ministers, were fired or arrested because they were suspected of plotting against Ilham Aliyev (Valiyev, 2006). Rewards and punishments may constitute thus the menu of personalised exchange made possible through patronage (Hale, 2015).

Clientelism has a long history and remains pervasive in politics, which imported democratic institutions, but are still underdeveloped to operate fully by democratic rule. Compared to patronage where the exchange between reward and loyalty is often confined to two individuals, clientelism involves exchanges of favours and distribution of benefits to large constituencies through complex political machines, such as political parties (Fukuyama, 2015). Given the role of party organisations in channelling public goods to particularistic constituencies, clientelism is also a common practice in democratic countries. Greece and southern Italy in the second half of twentieth century are two cases in point. Ruling elites in EU’s Eastern neighbourhood have also learned to use clientelist practices to their advantage and engage in systematic efforts at buying off the support of their clients.

Nepotism is a narrower type of patron-client relationship, where the main distinctive element is the family bond between the patron and client. The exchange here follows the same pattern: the client offers loyalty and subordination to the patron in return for the possibility to extract favours in a given sector and for protection. A widespread practice is for the patron to designate a family member in a management position in public or private sectors, so that the latter extracts rents less for himself, but rather for the patron. The logic of patronage, clientelism and nepotism explains well how patrons in EU’s Eastern neighbourhood, while earning several hundred dollars a month in the public sector, can afford exclusive vacations, premium cars, trips with private jets and luxury estate properties in London, Miami and Geneva.

Deviating from established informal institutional trajectories imply high costs anticipated by (semi)autocratic incumbent elites with genuine political liberalisation and democratic consolidation. Therefore, anticipation of these costs makes patrons and their clients to invest into the exis tent institutional equilibrium, where informal institutions occupy a central place. The causal loop that may reinforce informal institutions and impede genuine democratisation is illustrated in Figure 1.

The causal loop reinforcing informal institutions can be described as follows: (1) the stronger the informal institutions, the higher the rents extracted by the elites; (b) the higher the rents extracted by the elites, the higher their personal material gains; (3) the higher the material gains of the elites, the higher the costs they anticipate with genuine political liberalisation and democratic consolidation; and (4) the higher the potential costs anticipated by these elites,
the higher is their resistance to any reform process aiming at democratisation and their determinance to reinforce the existent informal institutions.

The relationship between strong informal institutions, high rents, high gains and high costs anticipated with genuine democratisation is not necessarily linear. The mechanism does not imply symmetric proportionality between its four constitutive elements. However, what the causal loop suggests is to expect generally for high illicit rents to be extracted in polities where informal institutions play a central role in the access to and exercise of power; for high personal gains to be distributed in those contexts where high unlawful rents are ubiquitous; for high personal costs to be anticipated with genuine democratisation in polities where illicit practices generate high personal gains for (semi)autocratic incumbent elites; and for informal institutions to be reinforced in those contexts where these elites seek to avoid high personal costs, such as exile, expropriation, imprisonment and, in some ill-fated historical examples (Nicolae Ceaușescu in Romania, Saddam Hussein in Iraq and Muammar Gaddafi in Libya), death.

Therefore, anticipation of high costs expected with genuine political liberalisation and democratic consolidation explains the sophistication of rent extraction schemes, which became highly complex with illicit funds being circulated through dozens of obscure firms, local and foreign banks, from where they land in offshore accounts. From there, the assets may be brought back to the country of origin in highly lucrative sectors of the economy under the guise of foreign direct investments (FDI). The return may sometimes be accompanied by triumphalist reports in local partisan media about the ability of ruling elites to attract FDI. The EU member state Cyprus resurfaces often in the documents of national statistical bodies form EU’s Eastern neighbours as a key FDI player, but it became ‘the secret of Polichinelle’ that Cyprus is not the real country of origin of FDI, but a reliable transition point on the route home of laundered money.

Well before the leak of ‘Panama Papers’ in 2015 (ICIU, 2016), it was possible to infer from publicly available and open sources that fiscal heavens were not only used by corrupt individuals to conceal their assets, but also for money laundering and return of embezzled funds to the country of origin. One way through which suspect assets were brought back to the countries of origin was by the means of fictive trade contracts. Here are some perplexing examples.

Belize, a micro-state with a population of only 335 thousand, was among the top 20 export destinations of Armenia in 2010-2013. Compared to 2009, exports to Belize in 2010 climbed 139 positions in the ranking of Armenian export destinations. In 2011, the volume of Armenian exports to Belize was comparable with the volume of its exports to Ukraine or France. In the same vein, Azerbaijan appears to have exported in 2014 more goods to Gibraltar than to China or its neighbour Iran. In 2011, Georgia exported on paper a comparable volume of goods to Trinidad and Tobago and to the United Kingdom. In the same year, more Moldovan exports went to Panama than to either China or India. Ukraine has a larger economy and, therefore, such fiscal eldorados are not among its top export destinations, but they are still used for suspect trade deals. In 2012, the volume of Ukrainian exports to Belize has reached US$225 million, which exceeds 16 times the volume of Armenian exports in 2012 to the same destination and which means US$0.67 million of Ukrainian ‘goods’ for every thousand people living in Belize (IMF, 2016). This evidence suggests that an entire array of domestic and foreign firms and banks, tax and custom agencies, as well as law enforcing authorities, may participate directly or indirectly in these complex exchanges made possible by the existence of informal practices. Complex networks of powerful political and economic actors underpin the feedback mechanisms, which reinforce patronage, clientelism and nepotism in EU’s Eastern neighbourhood.

The case study of the election of Prosecutor General in Moldova provides additional evidence on the resilience of informal practices. All nominally pro-European governing coalitions in Moldova since 2009 emphasised the imperative need to reform the judiciary (Government of Moldova, 2009, 2013, 2015). The EU has stepped into this reform initiative with a comprehensive assistance package, totalling 70 million EUR for the period 2011-2016. In January 2013, the office of the Prosecutor General became vacant after Prosecutor General Valeriu Zubco had stepped down due to his participation in an illegal hunting party, where one businessman has been shot dead from what appears to be sheer imprudence.

Corneliu Gurin, a promising representative of civil society, was shortly designated by the Parliament speaker Marian Lupu to lead the commission tasked to elect via an open competition the new Prosecutor General of Moldova. Lupu
soon made a surprising U-turn and proposed Gurin, the very head of the election commission, to be approved by the Parliament as the new Prosecutor General of Moldova. Gurin was voted in by the ruling Alliance for European Integration, assumed the office of Prosecutor General in April 2013 and made the reform of the Law on Prosecution the cornerstone of his five-year term.

In February 2016, minutes before the new Law on Prosecution was approved by the Parliament, Gurin announced his resignation, justified with the accomplishment of his main reform: the new Law on Prosecution. This new law, assessed by Gurin as being ‘one of the most advanced in Europe’, establishes among other things a new election procedure of the Prosecutor General by the Superior Council of Prosecutors (Parliament of Moldova, 2016). In line with the new Law on Prosecution, the Superior Council of Prosecutors, headed by Mircea Roşioru, selected in December 2016 Eduard Harunjen as the new Prosecutor General of Moldova. Harunjen served previously as First-Deputy Prosecutor General and his advancement to the Prosecutor General post has been anticipated by local mass media. In March 2017, three months after his election as Prosecutor General of Moldova, Harunjen designated Mircea Roşioru, the very head of the Superior Council of Prosecutors tasked by the new Law on Prosecution to select the Prosecutor General, as one of his deputies. The procedure of electing the new Prosecutor General in Moldova ended as a farce. To summarise the farce, before the reform the head of election commission became himself Prosecutor General, whereas after the so-called reform the head of the new election body became Deputy Prosecutor General. 70 million EUR of European taxpayers have been buried in an essentially irrelevant reform process, which kept the network firmly in place and in the same strict subordination to the de facto leader of the ruling Democratic Party of Moldova. The Moldovan judiciary system resembled in the aftermath of a ‘Potemkin village’, which may look attractive to the uninformed observer, but it remained built on the same vicious informal practices and at least as corrupt as before the reform (Transparency International, 2019).

The most dangerous phenomenon patronage, clientelism and nepotism create and maintain is systemic corruption. What policy response can undermine the reproduction mechanisms of informal institutions in EU’s Eastern neighbourhood?

**Tackling informal institutions**

One should underline from the onset that there are no miraculous solutions against the reproduction mechanisms of patronage, clientelism and nepotism. They represent natural modes of social organisation and, therefore, tend to be persistent, unless their use is strongly disincentivised. One could, however, envision several long-term solutions against the vicious exchange brought about by these informal institutions.

Historical (neo)institutionalism teaches us some policy-relevant lessons. First, a critical juncture between a favourable international context and democratically committed domestic forces may open up new institutional choices and set the course on a path with dominant formal democratic institutions that can undermine informal institutions. Alternatively, incremental institutional shifts might add up to substantial changes in the long run. However, human crafting of democratically minded domestic actors would be necessary, but not sufficient to successfully eradicate the negative effects of informal institutions and endemic corruption in EU’s Eastern neighbourhood. Broader international conditions would also need to be on the side of domestic progressive forces, but they are highly contingent on a multitude of factors, which are difficult to anticipate and predict.

Another long-term solution could be derived from the teaching of modernisation theory. The theory argues that increased levels of economic development led to urbanisation, technological progress and industrialisation, a growing density of communication, higher levels of education, a stronger middle class, which in exchange for greater social contribution has demanded more accountability and political participation in the political sphere (Lipset, 1959, 1981; Lipset et al., 1993). This was the path taken by Britain and the US, where economic modernisation brought about social change, which created the conditions for the elimination of patronage and clientelism (Fukuyama, 2015). Likewise, a powerful middle class and civil society in EU’s Eastern neighbourhood could successfully oppose patronage, clientelism and nepotism. Yet the question to be asked here is how can economic modernisation be achieved under highly extractive informal institutions? Acemoglu and Robinson (2012) show convincingly that extractive institutions represent a formidable impediment to prosperity and might cause state failure.

Playing a waiting game does not do justice to the ordinary people in EU’s Eastern neighbourhood who require and deserve more immediate solutions. Long-term solutions may appear compelling, but as the British economist John Maynard Keynes (1923, p. 80) emphatically observed ‘[i]n the long run we are all dead’. Indeed, the current generations from EU’s Eastern neighbourhood cannot wait decades for the right critical junctures, institutional equilibria or the slow-moving process of socioeconomic modernisation to take place. What can be done now against the reproduction mechanisms of informal institutions in EU’s Eastern neighbourhood is not just a theoretical question; it is first and foremost a practical one.

The central piece in this existential puzzle is the rule of law (North et al., 2009; cf. O’Donnell, 2004). North et al. (2009) underscore that the rule of law was the first doorstep condition necessary, but not sufficient in the transition process from limited to open access orders. This transition is partly similar to what Ferdinand Tönnies (2018) calls the shift from Gemeinschaft (community) to Gesellschaft (society). In the first step of transition from natural states to open access orders, elites have found in their interests to move from personal to impersonal relations and to secure their impersonal rights through the establishment of proper formal institutions and perpetually lived organisations, among
which the rule of law and courts had a prominent role. In the second step, elite impersonal rights have been extended to a broader segment of the population through access to political and economic institutions and organisations, designed to reinforce open access (North et al., 2009).

An independent and democratically committed judiciary can gradually neutralise the vicious effects of informal institutions and significantly minimise corruption. However, the extraordinary challenge is that judiciary systems in EU’s Eastern neighbourhood are themselves deeply affected by the same informal institutions. *Manus manum lavat* is rather the rule, than the exception in this field. The locus of patrons in the case of this vicious exchange is both outside and inside judiciary. Outside the sector are patrons who are active in politics or business and are themselves part of or have strong connections with the political establishment. Patrons inside the system are in most cases high-ranked officials with administrative roles in the court infrastructure or prosecutor office. Often patrons inside the system are subordinates of the patrons located outside judiciary. The exchange here follows the usual pattern. Subpatrons inside judiciary systems offer their loyalty and services in return for possibilities to extract favours and for protection. The reproduction mechanisms of this vicious exchange are again a function of patron-client and family ties. Patron-client ties in Georgia, Moldova and Ukraine are most often based on party affiliations, while in Armenia and Azerbaijan they are based on a mixture of party and regional group affiliations. Family ties are based on kinship, but also on family alliances resulting, due to a conservative culture, from marriages.

If reproduction mechanisms reinforce and reproduce informal institutions, it follows then that any effort at combating patronage, clientelism and nepotism should be directed against their reproduction mechanisms, which are based on party-group affiliations, kinship and family alliances. The central argument of this paper is that party-group affiliations, kinship and family alliances can be disrupted by external rule of law missions, led and supported by authoritative international actors, such as the EU or UN.

We are aware of recent scholarship that shows the limited reach of foreign intervention. Susan Woodward (2017), for instance, argues that foreign intervention in failed states is often futile. Likewise, Anna Meyerrose (2020) argues that international organisations through their democracy assistance programs might not halt, but accelerate backsliding. Ulrich Sedelmeier (2017) also shows that the EU’s use of material sanctions is rather ineffective. Rebuilding states from the outside is indeed a formidable task. Yet our focus is not on failed states writ large. Furthermore, Meyerrose’s study implies that strengthening judicial checks could reverse democratic backsliding. Likewise, Sedelmeier points towards the European Commission’s Rule of Law Framework as a venue to strengthen democracy. In short, even sceptics of foreign intervention could agree that strengthening the rule of law through outside intervention might be an effective way to bolster new democracies from the outside.

The idea of outsourcing public services of a given country to foreign entities is not new. In pre-modern Europe, this idea took the form of inviting foreign monarchs to the throne of one’s country. A famous historical example is the invitation of William of Orange from the Netherlands to take the throne of England in what remains to be known as the Glorious Revolution of 1688. Unlike James II from the Stuart dynasty, William of Orange had fewer links to the local conservative landowning elite and could accept the idea of a constitutional arrangement embodying the principle of ‘no taxation without representation’, which marked the transition to a more Parliament-centred rule in Britain (Fukuyama, 2015). In Prussia, the ruling Hohenzollern family invited Dutch and Huguenot Calvinist coreligionists to take various posts in local administration. Two effects of this invitation have been increased professionalisation and autonomy of central bureaucracy, whose efficiency would emerge later instrumental in the process of German unification (Fukuyama, 2015). In a more recent historical context, in order to curb the discretionary power of corrupt custom officials, the Indonesian executive decided in the 1960s to outsource to the Swiss company Société Générale de Surveillance (SGS) the function of pre-inspecting all commercial cargo containers entering the country (Hotoko, 2004).

Outsourcing public services becomes gradually a standard practice in the developed world and it should not be impossible to conceive also outsourcing particular public services in EU’s Eastern neighbours. As techno-giants Google, Microsoft, Apple, Amazon and Facebook outsource as a standard practice the talent they need, democratically committed elites from EU’s Eastern neighbourhood might consider outsourcing the integrity of national judiciary systems to external rule of law missions. Outsourcing partly domestic judiciary systems to external rule of law missions would undermine the reproduction mechanisms of informal institutions for the very reason that foreign personnel of such missions would not be linked to local informal networks.

One international actor which is well placed to support the deployment of such missions to the region in question is the EU. Brussels is still regarded as a legitimate external actor and has acquired experience in supporting judiciary reforms in its Eastern neighbourhood. In 2004, the EU deployed the rule of law mission EUJUST THEMIS to Georgia, which was in operation until July 2005 and had a limited mandate to assist Georgian authorities in developing a coordinated approach concerning the reform process in the criminal justice system (Council of the EU, 2004). EUJUST THEMIS in Georgia had a moderately positive role, but it did not have the potential to disrupt the reproduction mechanisms of informal institutions in the justice sector.

Why was it so difficult to undermine the informal institutions of clientelism and corruption in Georgia? In 2003, Georgia’s civil society and the newly found National Movement of Georgia under the leadership of former Justice Minister Mikhail Saakashvili toppled the government of Eduard Shevardnadze in the wake of falsified parliamentary elections. As the new government’s foremost goal was the eradication of systemic corruption, it deserved widespread popular support. Yet Saakashvili who became Georgia’s new president was not a democrat, but a moderniser. For him,
Georgia belonged to the club of Western nations, and his mission was to propel the country towards modernity. His government would tolerate the rule of law and democratic institutions such as a critical press as long as they did not stand in the way of modernisation. When they did, they were ignored and undermined. For instance, the prosecution of former officials who had served under Shevardnadze rarely followed the principle of a law-based state. And when judges and journalists criticised the government, they were marginalised. Western governments, especially the US government, largely ignored Saakashvili’s disdain for his critics and formal institutions, and they turned a blind eye on the personal enrichment of some of Saakashvili’s top government officials. Instead, the West supported Saakashvili’s radical reform program with hundreds of millions of dollars and diplomatic support. Georgia was too good a posterboy for Western democratisation efforts to demand adherence to the rule of law. In the end, a great opportunity was squandered to create a solid foundation of formal democratic and rule of law institutions, as later developments in Georgia have demonstrated (Mitchell, 2008; Stefes, 2006; Way, 2015).

A relevant example of partially outsourcing the domestic judiciary system was the UN-sponsored International Commission against Impunity (CICIG) operating in the period 2007–2019 in Guatemala (UN, 2007). CICIG received a clear executive mandate, allowing it to launch its own criminal investigations, and had at its disposal personnel from about 20 countries, who worked alongside Guatemala’s Prosecutor General office. What CICIG has accomplished in a short period of time, was hardly imaginable in a country ravaged by an enduring civil war from 1960 to 1996. Several former presidents, a vice president, members of the congress, the heads of the central bank, customs and tax agency, high-ranking representatives of several political parties, to name just a few, have been prosecuted on corruption-related charges (Krylova, 2018; Kuris, 2019; Luhnow, 2015). For a country where almost nobody was held responsible for the tens of thousands of people perished during the civil war, bringing to justice a long list of high-ranking officials on corruption-related charges was highly remarkable. The level of trust in CICIG exceeded that in other national public bodies and, at times, even that in the Catholic Church (Luhnow, 2015). Since the launch of CICIG in 2007 until 2015, the rate of impunity fell from an extraordinary 95% to 70%. These results became possible as CICIG could disrupt the reinforcing mechanisms of local informal networks, which also have ramifications in the justice sector. Reassuring in this regard is how Iván Velásquez, commissioner of CICIG, explained agency’s achievements in Guatemala: ‘You can’t influence us [...] We aren’t linked to the business class, or military, or judges or lawmakers. That gives us enormous freedom’ (Luhnow, 2015).

Another example of partly outsourcing the functions of the judicial system is the EULEX civilian mission deployed by the EU to Kosovo. EULEX was launched in 2008 with the overall mission of assisting Kosovan authorities in ‘establishing sustainable and independent rule of law institutions’. However, though being more generously staffed and resourced than CICIG, EULEX underperformed in dismantling local informal networks and practices (Kuris, 2019). In contrast to CICIG, EULEX has a broader mandate concerned also with state-building, creating a tension between competing stabilisation and democratisation objectives and encountered less committed domestic counterparts in the host country. In addition, whereas CICIG was staffed with judges, prosecutors and law enforcement officers with relevant experience in combating informal networks (Krylova, 2018), EULEX’s personnel has a more diverse professional background, which often has little relevance for the fight against impunity and corruption (Kuris, 2019). The experience of the leadership of CICIG and EULEX epitomises the asymmetry in the professional background of both missions’ personnel. Whereas all three commissioners of CICIG were highly experienced judges or prosecutors with relevant successful experience in combating impunity in their own countries, all six heads of EULEX mission are, without exception, either military men or career diplomats. In short, the tension between competing stabilisation and liberalisation objectives of the EU, the lower commitment of Kosovan counterpart state authorities, as well as the lack of relevant professional experience explain the more modest track record of EULEX in disrupting the reinforcing mechanisms of informal practices in Kosovo.

The experience of CICIG in Guatemala and partly that of EULEX on building local capacity through peer-based learning could be considered as an example for the rule of law missions to be deployed to the EU’s Eastern neighbours. Such missions would be expensive undertakings, but they should not be more expensive than the amounts the EU has already spent without much success for judiciary reforms in these countries. External rule of law missions deployed to interested EU’s Eastern neighbours should have a targeted executive mandate focused on combating vicious informal practices and corruption. The missions shall be staffed with highly experienced multi-national judges and prosecutors, selected through a rigorous international competition, who would work alongside their local colleagues in courts and prosecutor offices. Because it would be difficult for such a mission to cover the entire court system and prosecutor offices of a country like Ukraine, international judges and prosecutors might work alongside their local colleagues in the highest supreme courts and central prosecutor offices.

The question is whether national governments in EU’s Eastern neighbourhood would be interested to host such rule of law missions? Current elites at the helm of political establishment in Azerbaijan would reject such an idea outright, though representatives of Azeri civil society and ordinary citizenry could welcome it. Patronage, clientelism and nepotism are here well entrenched and local elites would resist giving up the use of highly extractive and profitable habits. Moreover, the EU has almost no leverage over Azerbaijan, which is not dependent on Western financial assistance and has enough oil reserves to impose the terms on which to interact with the EU. The average annual volume of assistance provided by the EU to Azerbaijan over the period 1991–2014 is comparable with the amount Azerbaijan
could earn in few days from oil revenues (Buscaneanu, 2016).

Segments of national elites and civil society from Armenia, especially after the 2018 Velvet Revolution, could prove to be more open to an external rule of law mission. However, though Yerevan is dependent on Western financial support, the amount of leverage the Western democratic community can exert over Yerevan is severely constrained by Moscow (Babayan, 2015; Levitsky and Way, 2010; Way, 2015).

The governments in Georgia, Moldova and Ukraine might dislike rule of law missions like CICIG, but segments of civil society would very much welcome the deployment of such missions. In addition, the EU possesses a reasonable leverage over Georgia, Moldova and Ukraine. Georgia and Moldova are leading in terms of received assistance per capita from the EU (Buscaneanu, 2016). The cut in EU assistance to Moldova as a result of the mega-fraud in the banking sector has perturbed budgetary planning, as inflows from EU sources were anticipated at the point of public budget approval. Apart from financial assistance, Georgia and Moldova count also on Western support in their territorial disputes with Russia. Until recently, the EU had little leverage over Ukraine, which was one of the least recipients of EU aid per capita in the region (Buscaneanu, 2016), but since 2014–2015, Ukraine became also increasingly dependent on Western financial assistance and strategic backing.

When conceiving rule of law missions similar to CICIG for partners from EU’s Eastern neighbourhood, the EU would need to coordinate its offer with relevant international and European organisations such as the UN, International Monetary Fund (IMF), World Bank (WB), Council of Europe, etc. A joint offer of these actors to support the deployment of rule of law missions to interested EU’s Eastern neighbours could be made at the point of power transfer to democratically committed domestic forces, as it was the case of Georgia in 2003–2004, Moldova in 2009, Ukraine in 2004 and 2014, and should be tied with conditional substantial EU, IMF and WB macro-financial assistance, on which concerned countries are heavily dependent. The deliberate offer at the point of power transfer to committed democratic forces and under conditions of concerted international efforts and significant macro-financial assistance could make the acceptance of such external rule of law missions realistic.

However, if hosting such rule of law missions were to be rejected by incumbent elites in Chișinău, Kiev, and Tbilisi, the EU and like-minded international actors could conceive alternative ways of combating patronage, clientelism and nepotism. The EU could consider the following possibilities. First, Brussels could offer more support, inter alia via the European Endowment for Democracy, to local organisations, mass media and NGOs which specialise in investigative journalism. RISE Project, for instance, has been successful in documenting and exposing several salient cases in which informal practices have been used for illegal purposes in Moldova (Sanduța, 2017). Second, the EU could make use of EUROPOL, OLAF and other specialised bodies to identify, track, expose and combat the money-laundering activities many patrons from EU’s Eastern neighbours are involved into, while using EU firms, banks and offshore companies. Imposing targeted sanctions on such individuals can also be considered.

Third, the promise of the membership perspective for the democratically minded Eastern neighbours does not imply significant costs for the EU. Yet it will provide impetus for liberal rule of laws regimes, anti-corruption campaigns, and the consolidation of democratic institutions. One could object that the promise of a distant membership perspective might not be credible enough to incentivise local elites to switch course. However, the remaining alternative is the current institutional status-quo, which makes EU’s Eastern neighbours inhospitable places for their own citizens, forced to migrate en masse or to remain, but to live in sub-optimal human conditions.

Finally, Western actors should maintain close ties to reform-minded politicians and civil society representatives. These actors crucially depend on Western support to fight the uphill battle of institutional reforms. Under the semi-authoritarian regime of Eduard Shevardnadze, this coalition had achieved partial, but not inconsequential reforms that reduced corruption in at least some sectors (Stefes, 2006). When a critical juncture emerged in 2003–2004, Georgia’s new rulers could quickly implement widespread reforms, relying on the technical, diplomatic, and financial support of Western governmental and non-governmental actors. Yet while the West had maintained close contacts to the opposition and civil society before 2003, after Saakashvili’s rise to power, it concentrated its efforts on somewhat uncritically supporting the new regime. The lesson is that critical junctures appear suddenly and unexpectedly. The ground needs to be prepared for local reformers and the West to take advantage of the situation. The goal thereby is to strengthen formal institutions and eradicate informal networks and norms. This task however has not been achieved after the mass uprisings in Georgia, Ukraine and Moldova, because the West too often turned a blind eye on would-be allies trying to cement their power at the expense of the rule of law and democratic institutions.

Conclusions

Patronage, clientelism and nepotism are entrenched and tend to be persistent in EU’s Eastern neighbourhood. Reproduction mechanisms, including high costs anticipated by (semi)autocratic incumbent elites with genuine political liberalisation and democratic consolidation reinforce these informal institutions. Systemic corruption is fostered by these informal networks and practices in the region. Any meaningful action against the reproduction mechanisms of informal institutions in EU’s Eastern neighbourhood should involve the judiciary. A professional and independent judiciary would have the potential to neutralise the vicious effects of informal institutions. Alas, judiciary systems in this region are themselves affected by the same informal practices.

The central aim of this article was to advance a policy solution against the reproduction mechanisms of informal
institutions. The article argues that these reproduction mechanisms can be disrupted by external rule of law missions, which could be deployed to interested countries in EU’s Eastern neighbourhood.

The idea of deploying external rule of law missions to countries in EU’s Eastern neighbourhood is not new. Such a mission has been deployed in 2004 to Georgia, but it had a limited mandate to assist Georgian authorities in reforming the criminal justice system and it was not sufficient to disrupt the reproduction mechanisms of patronage, clientelism and nepotism at higher levels of government. What could be in the position to challenge the reproduction mechanisms of informal networks and practices can be inspired by and modelled on the UN-sponsored CICIG deployed in 2007 to Guatemala. Similar external rule of law missions could be supported by the EU, but also assisted by a consortium of international actors and linked to substantial macro-financial assistance. The critical junctures at which such missions could be introduced are power transfers to committed democratic political forces, as it was the case of Georgia in 2003–2004, Moldova in 2009 and Ukraine in 2004 and 2014.

It is highly probable that corrupt ruling elites from EU’s Eastern neighbours would reject the idea of external rule of law missions on various grounds, such as preserving sovereign rights and the necessity of home-grown democratic processes. They excel at hypocrisy when their stakes and personal costs are high. In response, the EU could consider actions aiming at dissuading corrupt incumbent elites from the use of informal institutions and practices. Finally, the EU needs to provide incentives for reformers in the region, and be ready to support incremental institutional shifts as well as radical departures from existing paths in the wake of a critical juncture.

Data availability statement

The data that support the findings of this study are available from the corresponding author upon request.

Notes

1. We are grateful to an anonymous reviewer for raising this point.
2. Two additional necessary doorstep conditions were: perpetually lived organisations in the public and private spheres and consolidated control of the military (North et al. 2009).

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