Evidence-Based Law: Using Data to Design and Implement Ethics-Related Administrative Law

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Contents

Abstract

The prosecution of high profile multi-national corporations (MNCs) over the past decade for bribery of public officials acting in their official capacity has raised the need for drafting ethics-related administrative law. So, how should countries draft ethics-related administrative law? Should such law be driven purely by normative ethics based on how one ought to act? Or, should we take into account empirical data in drafting ethics-related administrative law? A related question is who should oversee these ethics-related laws? This paper discusses the role of empirical data in deciding which provisions to include in ethics-related law and when deciding on the division of competencies between agency directors, ethics officers, human resource directors, internal auditors and others. We describe how to draft subsidiary legislation (mainly executive agency regulations) based on explicit or implied competencies given by national legislation. We then discuss how to conduct the organisational, legal, economic and audit analysis needed to allocate ethics-related rights and obligations across-government and within the Agency. This paper serves as a lone counter-weight to the principles-based approaches flooding the literature. We illustrate our discussion largely using examples from Romania and Hungary.

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Introduction

The importance of ethical behaviour on the part of public officials and the need for a code of conduct to govern their behaviour has taken on a new urgency as a result of some high profile corruption cases and the adoption of regional and international anti-corruption conventions. The prominent international anti-corruption convention, United Nations Convention against Corruption 2003 (UNCAC) in Article 8 (1)[1] expects that States Parties shall promote integrity, honesty and responsibility amongst their public officials. Article 8 (3) further states that States Parties may find the International Code of Conduct for Public Officials helpful in formulating their codes. The language of Art 8 is not mandatory in character unlike other provisions within the Convention.[2] Nevertheless is a useful starting point for the introduction of ethics-related rules for public officials.

Many countries lack a whole-of-government code of conduct. Indeed, not all countries haveethics-related (or code of conduct specific) laws. For instance, the Member States of the Organisation for Economic Co-operation and Development (OECD) exhibit wide variation in the way they regulate public officials' ethics and implement governmental codes of conduct. Such variation (mostly) reflects each administration's optimal organisational response to its ethics-regulatory needs. In other words, OECD Member States (usually) give authority over ethics-related rulemaking to the official and agency which can make the most impact on government probity. In some cases like in the US, rulemaking powers focus strongly in the Office of Government Ethics and centers around very legalistic methods. In other cases like Sweden, very decentralised ethics-related rulemaking occurs at the agency (or sub-agency) level-- with rather loose codes of conduct. The optimal public sector ethics programme "fits" with the public sector's needs.[3]

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[1]Article 8 reads:

1.   In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.

2.   In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.

3.   For the purposes of implementing the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take note of the relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996.

4.   Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

5.   Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measuresand systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

6.   Each State Party shall consider taking, in accordance with the funda- mental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.

[2] See for example Arts 15 & 16.

[3] Such a contingency-based view of government's adaptation of ethics-related laws and regulations reflects only one possible view of regulation in OECD Member State government agencies. We adopt the

This paper describes a method for deciding where competencies for creating and enforcing ethics-related administrative law should reside. We argue that data can help law drafters determine the best division of public sector mandates based on ethics-related needs. So, if the data show that ministry-level ethics officers would help prevent unethical behaviour across government more effectively than having such competencies placed in a separate ethics oversight department, then legal drafters should follow these data's recommendations. The first section of this paper provides an overview of such evidence-based ethics-regulation – and provides the evidence leading to our recommendation. The second section describes the method of drafting agency-level regulations around existing legislation (using the Hungarian Public Servants Act, 2012 as an example). This section also describes the link between observed data and the optimal locus for ethics-related rulemaking authority and provides specific elements needed for Hungarian rulemaking (again to make the method concrete). The third section dicsusses the institutions involved in ethics-related law – showing when data call for the role of each institutions and reviews drafting issues. The final section four concludes.

We should however like to highlight a couple of caveats before we begin. First, we structure the paper like an instruction guide rather than a balanced consideration of the arguments. First, we have approached the topic from a pragmatic perspective highlighting the importance of empirical data for drafting ethics-related rules. We have not engaged in a theoretical debate of the need for public ethics since there is ample literature on this subjectmatter and we did not wish to provide yet another overview of the literature.[4] However we do review some of the literature in footnotes – and leave the reader to decide for themselves if they believe our polemic. Second, we are aware of the limits and dangers of using data – to guide policy and law.[5] Empirically-designed ethics regulations ignore the vital role of ethical leadership – a downside which we readily accept.[6]

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contingency-based view as such an approach provides a clear method of analysis allowing for clear recommendations related to regulatory drafting and desired administrative conduct.

[4] See for instance Joel L Fleishman, Lance Liebman and Mark H Moore (eds) (1981) Public Duties: The Moral Obligations of Government Officials, Harvard University Press;Mark Moore (1990) Ethics in Government: The Moral Challenge of Public Leadership, Prentice Hall; Patrick J Sheeran (1993) Ethics in Public Administration, Greenwood Publishing; Sara r Jordan and Phillip W Gray (2011) The Ethics of Public Administration: The Challenges of Global Governance, Baylor University Press; Michael E Milakovich and Georg J Gordon (2013) Public Administration in America, Wadsworth.

[5] Because so few legal scholars have actually written about using data in crafting law, even fewer have come out with academic critiques of the approach. Law has traditionally been focused around principles – making the discipline antagonistic to the empiricist's approach. See Jeffrey Rachlinski, *Evidence-Based Law*, 96 CORNELL L. REV. 901, 2010.

[6] *See* Andrew Kakabadse, Nada Korac-Kakabadse and Alexander Kouzmin, *Ethics, Values and Behaviours: Comparison of Three Case Studies Examining the Paucity of Leadership in Government*, 81 PUB. ADMIN. 3, 2003

I. Using Empirics to Define the Ethics Programme

The older OECD Member States have used empirical methods to guide their public sector ethics programmes.[7] Experience earned through decades (and sometimes through centuries) of debate, administrative conflict and adjustment have served as the basis for an evolutionary approach to public sector ethics-related rulemaking.[8] In contrast, the new democracies of Central Europe have not had the time to engage in such learning-by-doing.[9] Their legislation, regulation, and ways of working in the office represent clear breaks with their pre-1989 administrations.[10] Yet, by gathering statistics about existing ethical norms and preferred behaviours, Central European governments (like Hungary) can bypass the years of data-collection-through-experience of their Western European peers.[11] Such data can answer three questions: First, how much agreement is there among public officials on specific aspects of public sector ethics? Second, how much regulation should be done at the central level versus local (or agency) level? Third, how general (non-specific) should ethics-related legislation, regulation and non-binding admonitions (like codes of conduct and posers on walls) be?[12]

A simple example shows the importance of gathering statistics before engaging in any ethics-related lawmaking.[13] Figure 1 below provides an example of simulated survey results across Hungary to the question "do you have direct experience with a conflict of interest as a civil servant?"[14] We provide simulated data because OECD governments do

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[7] Empirical work, particularly data from surveys, has served more as a separate research topic rather than a practical managerial tool in many public sector administrations. *See* Atefeh McCampbell and Tina Rood, *Ethics in Government: A Survey of Misuse of Position for Personal Gain and Its Implication for Developing Acquisition Strategy*, 16 J. OF BUS. ETHICS 11, 1997.

[8] Huberts *et al.* (2008) provide an excellent overview of ethics in codes of conduct, administrative law and in practice across government and in specific agencies (like the police) in a variety of countries. *See* Huberts, Leo, Jeroen Maesschalck and Carole Jurkiewicz. (2008) Ethics and Integrity of Governance: Perspectives Across Frontiers. Edward Elgar.

[9] To that end, many administrations have organised ethics training – in order to jump-start the ethics development process. *See* Erakovich, R., D. Kavran, and Wyman, *A Normative Approach to Ethics Training in Central and Eastern Europe*, 29 INT'L J. OF PUB. ADMIN. 13, 2006.

[10] For a description of such a break in a range of countries, *see* OECD, ETHICS TRAINING FOR PUBLIC OFFICIALS, 2013, available online.

[11] Legal scholars tend to be more comfortable with empirical method as embodied in case studies and recorded experiences (experimentation). We hope to convince our colleagues that the use of data represents another and useful empirical method to add to collecting evidence from historical cases. See Frits van den Berg, Gyorgy Jenei, and Lance LeLoup, EAST-WEST CO-OPERATION IN PUBLIC SECTOR REFORM: CASES AND RESULTS IN CENTRAL AND EASTERN EUROPE, 2002.

[12] These questions have generally bedevilled scholars for decades. For a somewhat recent rehashing of the issues, see Calvin Mackenzie, SCANDAL PROOF: DO ETHICS LAWS MAKE GOVERNMENT ETHICAL?, 2004.

[13] While academics have increasingly accepted policymaking based on data, legal scholars and public administrators alike still shun data as a font for determining what to include in legal provisions. For example of the use of data in drafting law, see Teresa Sullivan, Elizabeth Warren and Jay Westbrook, *The Use of Empirical Data in Formulating Bankruptcy Policy*, 50 L. & CONTEMP. PROB. 2, 1987.

[14] As previously mentioned, we discuss Hungary to keep this article from becoming to abstract (and thus un-engaging). Such an article hopefully also contributes to the literature – as Hungary represents an understudied jurisdiction in the field of administrative ethics. For the rare example we could find of such an analysis for Hungary, *see* Gyula Pulay, *Preventing Corruption by Strengthening Organisational Integrity*, 2 PUB. FIN. 1, 2014, available online.

not share the results of their survey work and analysis of their ethics-related regulation in the public domain.[15] The wide variance of experiences shown in the Figure leads to two possible (and conflicting) conclusions. First, the Hungarian parliament (and/or Prime Minister),to take our hypothetical example, should devolve authority to engage in ethics-related regulation to the local level. In that way, local agency directors can adopt regulations appropriate for the level of conflict of interest in their administration.[16] Second, such disparity signals the need for a strong, central law in order to reduce the variance of outcomes shown in the data.[17] An analyst with advanced training in organisational theory will be able to present the best outcome based on further data collection and analysis.[18] We present this example to help convince the reader that policymakers considering legislative, regulatory and other work on public sector ethics should base their analysis on data before deciding questions like where to place the authority for ethics-related rulemaking.[19]

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[15] Simulated data help to illustrate how proposed legal changes might affect a region. Several notable examples exist of this general statement. The OECD has produced a one-time survey of the ethics infrastructure, which includes some data. However, such an exercise represents a rarity. See OECD, TRUST IN GOVERNMENT ETHICS MEASURES IN OECD COUNTRIES: ETHICS MEASURES IN OECD COUNTRIES, 2000.

[16] Demmke and co-authors show the results of other governments' deliberations on these questions. In all likelihood, they have not used data to same extent we propose. It would be interesting to see if such data would have improved the design of these regulations. *See* Demmke, C. M. Bovens, T. Henökl, K. van Lierop, T. Moilanen, G. Pikker and A. Salminen. *Regulating Conflicts of Interest for Holders of Public Office in the European Union: A Comparative Study of the Rules and Standards of Professional Ethics for the Holders of Public Office in the EU-27 and EU Institutions*. European Institute of Public Administration. Available online.

[17] Other studies have documented such variation – albeit without the use of data. Clark's article clearly shows that summary statistics would make understanding these differences far easier than a lengthy narrative. *See* Kathleen Clark, *An Overview of Government Ethics Standards*, WASH. U. LEG. STUD. RES. PAP. 12-04-09, 2012.

[18] We can not teach the reader how to conduct an organisational analysis in this policy brief anymore than we can teach how to analyse regulation. At this point, the senior policymaker only needs to know that ethics-related policymaking requires these skills in many OECD administrations. For the curious reader interested in learning the basics of organisational analysis, we recommend Mary Jo Hatch's *Organization Theory: Modern, Symbolic, and Postmodern Perspectives*, Oxford University Press, 2006.

[19] Most scholars agree that ethics in the public sector is something that must be managed. *See*Muel Kaptein, Leo Huberts, Scott Avelino, and Karin Lasthuizen, *Demonstrating Ethical Leadership by Measuring Ethics: A Survey of U.S. Public Servants,* 7 J. PUB. INTEGRITY 4, 2005.

Figure 1: Simulation of Survey Results: Geographical or Function Heterogeneity Can Determine Optimal Allocation of Rulemaking Competencies

- 10%-20% frequency
- 5%-10% frequency
- < 5% frequency
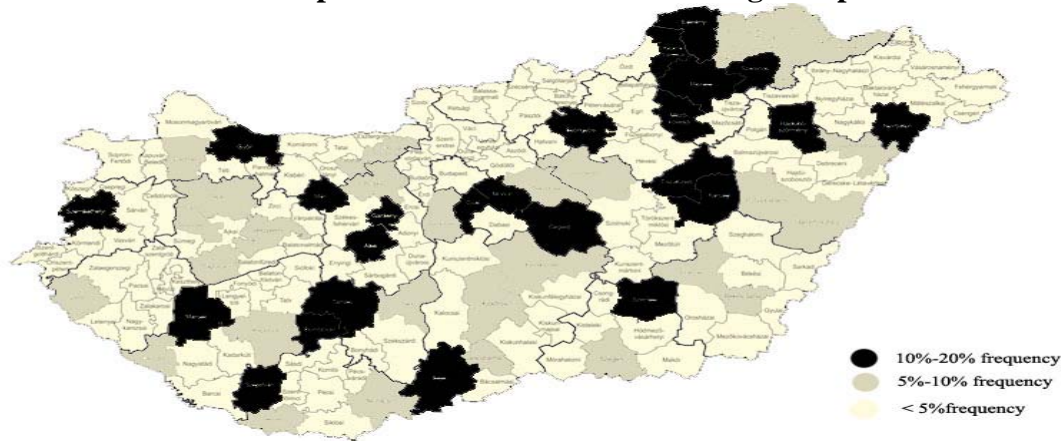
The data suggest that senior policymakers craft their ethics-related regulations and practices in response the environments they work in. Figure 2a shows the relationship between the extent of unethical behaviour in a country's public administration and the extent of formal ethics-related law and rulemaking. This figure shows the extent of unethical behaviour (on the *y*-axis) as measured by the practice of 12 unethical practices in EU member states. A score of 1 means the practice virtually does not exist while a score of 4 means the practice represents "a major problem."[20] The *x*-axis represents an index of the extent to which EU Member States have adopted formal measures to reduce unethical behaviour.[21] No relationship appears in these data to suggest that using formal ethics-related regulations increases the extent to public officials behave ethically.[22] Figure 2b shows the relationship between the extent to which governments in the EU rely on formal rules for regulating ethics as opposed to informal practices.[23] The reader will notice that this charts also looks like a cloud – that no discernable pattern existing in these data. Further statistical analysis can help find correlations and other patterns in

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[20] The specific types of misconduct Moilanen and Salminen (2006) look at include sexual harassment, ethnic discrimination, gender discrimination, private misconduct, abuse of information, fraud, grand corruption, improper lobbying, conflict of interest, petty corruption, waste, and favouritism.

[21] These formal measures include introducing disciplinary mechanisms, penal sanctions, formal reporting procedures, informal reporting procedures, existence of ethics bodies, protection of whistle-blowers and confidential integrity counsellors. A score of 1 means the country's administrative agencies use such a measure and 3 means they do not use that measure. Thus, lower average country scores means that a country employs more formal measures.

[22] These cross-countries finding differ from micro-level studies showing a relationship (both positive and negative) depending on the country. *See* Donald Menzel, *State of the Art of Empirical Research on Ethics and Integrity in Governance*, In George Frederickson and Richard Ghere, ETHICS IN PUBLIC MANAGEMENT, 2005

[23] The authors look at informal practice like the use of leadership, training, communication, recruitment, and mobility.

these data.[24]Ethics-related legislation, regulation and practice responds (in part) to the externally imposed needs of the administration.[25]

Figure 2a: Different Governments Adapt Differing Levels of Formal Ethics Regulations
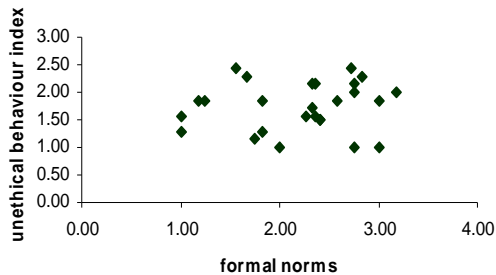
Source: Moilanen and Salminen (2006). See text for description.

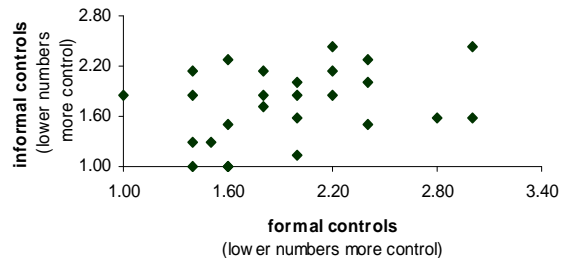**Figure 2b: No Relation Between Formal and Informal Ethics Measures**

Source: Based on a Index from Moilanen and Salminen (2006).

We provide one more example to help show how data can help guide policymakers in their design of ethics-related law. Figure 3 shows the correlation between the number of administrative levels of government and a country's reliance on formal and informal ethics-related rulemaking. For example, EU Member States with one level of government averaged 2.05 on the index of unethical behaviour (the lowest and thus best score out of the three groupings of countries).[26] These single-tier governments did not seem to rely excessively on either informal ethics regulations and practices, or on codified formal ethics-related laws. Governments with three (or more) levels of administration had the most unethical governments (according to these data) and the most extensive use of informal ethics regulations.[27] These data do not suggest that informal ethics regulations provide the least protection against unethical behaviour. Instead, these data suggest that factors – like the number of levels in government – importantly determine the best mix for formal and informal ethics-related regulation.[28]

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[24] The reader who has followed the literature will immediately see that data can help answer a long-standing debate about the relative effectiveness of formal versus informal regulation in public sector ethics. For an overview of this debate, *see* Jeroen Maesschalck, *Approaches to Ethics Management in the Public Sector: A Proposed Extension of the Compliance-Integrity Continuum*, 7 PUB. INT. 1, 2004.

[25] Ashkanasy and co-authors show how the use of data helps public administrators use ethics codes and regulations. In Australia, data show the public officials follow codes of conduct only if their peers do. Such data thus militate for universal adoption, rather than department or unit-specific adoption. *See* Neal Ashkanasy, Sarah Falkus, Victor Callan, *Predictors of Ethical Code Use and Ethical Tolerance in the Public Sector*, 25 J. OF BUS. ETHICS 3, 2000.

[26] We provide these indices to show the importance – and potential usefulness – of statistical data in guiding decisions about the design of national-level ethics rulemaking. Our consolidation and averaging of Moilanen and Salminen's data suffers from the usual drawbacks. For example, we take unweighted arithmetic averages of scores these authors assigned to various aspects of each EU Member State's ethics-related laws and practices.

[27] de Vries argues that differences in local values explain such data. *See* Michiel S. de Vries, *Can you Afford Honesty? A Comparative Analysis of Ethos and Ethics in Local Government*, 34 ADMIN. & SOC. 3, 2002.

[28] Data also help show when certain regulatory responses fail. Doig and Skelcher, in their outstanding study in the UK context, of the effect of centralisation and increasingly repressive ethics regulations from the centre of government, find these centralised regulations performed worse than local government self-regulation. Fording *et al*., in the US context, come to a similar and counter-intuitive finding. *See* A. Doig &

Figure 3: Two-Tier Governments in EU Tend to Rely on Formal Ethics Regulations and Multi-Tiered Governments on Informal Ethics Regulation

	Index of Unethical Behaviour	Index of Extent of Informal Regs.	Index of Extent of Formal Regs.
	lower numbers "better"		
one level government	2.05	1.96	1.85
two levels	2.27	2.07	1.61
three levels	2.32	1.76	1.76

Source: Based on analysis from Moilanen and Salminen (2006). Our indices represent arithmetic averages of each country's informal ethics regulations (from Table 10) and formal regulations (from Table 9).

We argue for evidence-based (empirically-based) whole-of-government ethics regulation over other methods. First, data – such as those shown in Figure 3 – provide insights that simple focus groups and "participative methods" cannot find. The fad of "participative-methods" greatly influenced the ethics programmes of the early 2000s (when many Central European countries designed their public sector ethics programmes).[29] Such programmes included organizing workshops, writing ideas on white-boards and simply throwing all ideas presented into a code of conduct. The resulting ethics programmes reflected the most active (loud) workshop members and members who read the same literature as the experts writing up the workshop results into codes of conduct. These workshops would never find the deeper linkages between well-designed ethics programmes and actual needs which data find. Second, survey data reduce disputes over the best type of ethics programme to implement. Data serve as an objective basis for rulemaking (though the interpretation of those data will still remain highly subjective).[30] Third, empirically-based ethics regulations prevent the wide spread practice of simply copying other countries' codes of conduct and ethics laws. In early 2000s, many public administrations engaged consultants to help them write their ethics regulations and codes of conduct. These consultants usually copied similar codes from their own countries – or

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C. Skelcher, *Ethics in Local Government: Evaluating Self-Regulation in England and Wales*, 27 LOCAL GOV. STUD. 1, 2001. See also Richard Fording, Penny Miller and Dana Patton, *Responses to State-Mandated Ethics Reform in Kentucky,* 33 PUBLIUS 2, 2003.

[29] For a preachy overview, see UN, *Towards Participatory and Transparent Governance: Reinventing Government*, DESA ST/ESA/PAD/SER.E/117, 2005, available online. For an academic overview and evidence, *see* Bryane Michael, *Explaining organizational change in international development: the role of complexity in anti-corruption work*, 16 J. OF INT'L DEV. 8, 2004.

[30] The downside of such a consensus-by-data approach – as we have previously mentioned -- lies in its inability to account for leadership. Many case studies (like Kolthoff and co-authors) find that leadership plays a pivot role in the drafting and implementation of ethics-related regulations. Maybe a drafting approach centred on data would decrease the importance of such leadership? *See*Emile Kolthoff, Rodney Erakovich, Karin Lasthuizen, *Comparative analysis of ethical leadership and ethical culture in local government: The USA, The Netherlands, Montenegro and Serbia*, 23 INT'L J. OF PUB. SECT. MANAGE. 7, 2010

used "toolkits" provided by the UNDP, USAID and other donors.[31] Few commentators can claim that these approaches have resulted in positive outcomes.[32]Countries whose public officials exhibit harmful behaviours clearly have a more pressing need to adopt ethics-related legislation, regulation and codes of conduct than countries that do not.

II. Designing Ethics Legislation, Regulation and a Primer for Legal Drafters

According to our logic, Hungary needs to engage in a directed programme of ethics rulemaking because its public administration does not have time to wait decades for these norms to emerge spontaneously through evolution.[33]OECD Member States – like the US, France and the UK – have developed their ethics-related administrative law over centuries.[34] The Americans have opted for a highly legalistic approach to regulating public sector ethics.[35] The French have relied on principles in administrative law (enforceable through internal and external tribunals).[36] For some governments in Central Europe, they do not have the time to evolve these ethics-related regulations. OECD Members like the Czech Republic and to a lesser extent Hungary --- and particularly countries like Bulgaria and Romania -- lose millions of euro every year due to unethical behaviour.[37]For example, if unethical behaviour cost the Hungarian government even 1% of its annual operating budget, the amount lost would equal €350 million.[38]

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[31] For one such toolkit, *see* Stuart Gilman, *Ethics Codes And Codes Of Conduct As Tools For Promoting An Ethical And Professional Public Service: Comparative Successes and Lessons*, 2005, available online. Even in the US, such copying took the form of "model ethics laws." See also MarkDavies, *Keeping the Faith: A Model Local Ethics Law*, 21 FORDHAM URB. L.J. 61, 1994.
Keeping the Faith: A Model Local Ethics Law - Content and Commentary;,

[32] Lawton and Doig provide one of the more balanced views from the literature. *See* Alan Lawton and Alan Doig, *Researching Ethics for Public Service Organizations: The View From Europe*, 8 PUB. INT. 1, 2006.

[33] Authors like Goss have argued that ethics in the public sector differs from the private sector in the public sector's reliance on codified norms (rather than unwritten ones). Bureaucratic methods tend to permeate every part of the administration – including the setting of ethics. See Robert Goss, *A distinct public administration ethics?* 6 J. OF PUB. ADMIN. RES. & THEO.4, 1996.

[34] Such an approach – recently called "experimentation" in legal scholarship – has rightly come under intense criticism. In the experimental approach, legal analysts obtain empirical evidence through pilot laws (as experiments). Such pilot projects' results then serve to compare with the status quo. For a review of the experimentation literature, *see* Sofia Ranchordas, *The Whys and Woes of Experimental Legislation*, 1 THEORY & PRACT. OF LEG. 3, 2013.

[35] For a recent overview, *see* Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. OF ILL. L. REV. 57, 2012.

[36] For an overview, see Klaus Decker, *A Guide to the Laws Governing the Conduct of French Public Servants*, 2003, available online.

[37] For a discussion of such costing, *see* B.A. Rosenson, The Costs and Benefits of Ethics Laws, In Denis Saint-Martin and Fred Thompson, Eds., PUBLIC ETHICS AND GOVERNANCE: STANDARDS AND PRACTICES IN COMPARATIVE PERSPECTIVE, 2006.

[38] We provide this simple example to show the scale of losses due to unethical behaviour. We did not present a more rigorous cost analysis of unethical behaviour because we do not want to detract attention away from our main point – how to implement ethics programmes. For an example of a more rigourous estimation (for the particular ethics-theme of corruption), *see* Ani Matei and Lucica Matei. (2010). Assessing the Anti-corruption Strategies: Theoretical and Empirical Models, *Journal of Management and Strategy 2*(1):23-40.

In general, OECD Member States – particularly at the Agency level – engage in one of three approaches to ethics rulemaking. Figure 4 shows these approaches as soft-law ethics programmes (including non-binding codes of conduct), moral reasoning and the hard law approach.[39] The soft ethics approach basically uses advertising methods.[40]Codes of conduct, posters, and other information material remind public officials of their ethical and moral obligations as agents of the electorate.[41] The moral reasoning approach aims to move beyond the typical good-and-evil view of ethics.[42] The moral reasoning approach tries to show that ethical dilemmas have two sides and that no right answer often exists to moral problems.[43] Instead, the solution to moral problems involves finding creative middle-way or out-of-the-box solutions. The hard law approach starts from the premise that all relationships – whatever the level or agency – revolve around rights and obligations. Rights and obligations however do not exist unless enforced by tacit or explicit means. The hard law approach lets public agency directors focus on contractually and administratively founded rights and obligations to help support even the vaguest of codes of conduct and ethical admonitions.[44]

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[39] Literally hundreds of typologies and taxonomies exist for categorising public sector ethics programmes. We chose these descriptions to keep our analysis simple. For a description of the way different ethics laws might evolve overtime, see Nathalie Behnke, *Public Trust, Path Dependence, and Powerful Interests: A Model for the Emergence of Ethics Measures*, 10 PUB. INT. 1, 2007. For the reference from the figure, see Jacques Van Blijswijk, Richard van Breukelen, Aimee Franklin, Jos Raadschelders, and Pier Slump, *Beyond Ethical Codes: The Management of Integrity in the Netherlands Tax and Customs Administration*,64 PUB. ADMIN. REV. 6, 2004.

[40] A number of authors – like Sossinand Smith -- criticise soft law approaches to regulating government ethics on the grounds that public officials using soft law do not face the same scrutiny from legal scholars, courts and other administrators face. *See*Lorne Sossin and Charles Smith, *Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government*,ALBERTA L. REV. 40, 2003.

[41] Many authors have questioned the effectiveness of anti-corruption propaganda. For one discussion, *see* Patrick Meagher, *Anticorruption agencies: Rhetoric Versus Reality*, 8 J. OF POL. REF. 1, 2005. Not all soft law needs revolve around non-binding codes of conduct. Political declarations and other "legal surrogates" can take the place of soft law in some systems. *See also* Ting Gong, *More Than Mere Words, Less Than Hard Law: A Rhetorical Analysis Of China's Anti-Corruption Policy*, 27 PUB. ADMIN. QUART. 1/2, 2003.

[42] Authors like Stevulak and Brown call this an integrity-based approach. See Catharine Stevulak and M. Paul Brown, *Activating Public Sector Ethics in Transitional Societies: The Promise of Integrity*, 13 PUB. INT. 2, 2011.

[43] Many gurus and management consultants publish guides for public officials – showing them how to take ethics-related and moral decisions. For a review from the academic (rather than practitioner) literature, see Kernaghan Kenneth, *Integrating Values into Public Service: The Values Statement as Centerpiece*, 63 PUB. ADMIN. REV. 6, 2003.

[44] Differences in understandings of soft law norms can make the need for such hard law even stronger. *See* Eleanor Glor, *Codes of Conduct and Generations of Public Servants*, 67 INT'L REV. OF ADMIN. SCI. 3, 2001.

**Figure 4: Three Major Approaches to Implementing a
Public Sector-wide Ethics Reform**

Description	Conditions	Suggestive data
Soft Law ethics		
Uses traditional advertising approach to ethics by 'selling" ethical behaviour through posters, radio ads, and so forth. Also consists of codes of conduct taped to walls.	Little knowledge of requirements Little agreements on definition of ethics	Survey results show low understanding of ethics requirements. Survey data show low agreement on limit for defining something "unethical."
Moral Reasoning		
Understanding both sides of an ethical dilemma Teaching to find constructive third-solutions rather than simply see right-and-wrong.	1. Cultural homogeneity 2. Inability to use administrative rewards and/or sanctions 3. Non-legalistic culture	1. Excessively high or low variance in data about what is ethical course 2. Importance attached to relationships rather than law
Hard Law Approach		
Uses legislation, executive orders and director-level instructions to regulate on ethics. Computer-programmer mentality – focus on behaviour rather than mindsets or deeper ethics.	1. Diffuse cultural norms made common ethical understanding impossible 2. Rights and obligations only definable in law 3. Available institutions for asserting and disputing rights. 4. Flexibility of common law to create ethical doctrines	1. Importance of formal regulations in behaviour 2. Ability to control from centre or to delegate rule-making coherently.

Source: authors – based on Van Blijswijk *et al.* (2004).

For countries engaging in the hard law approach, legal drafters must consider two simple questions. First, what provisions should ethics-related rulemaking contain? Second, who should have the competency for ethics-related lawmaking? Policymakers in Central Europe tend to prefer the hard law approach when deciding these questions.[45] Such an approach matches their administrative system – whereby civil servants are assumed not to possess a right unless explicitly granted in law.[46] We have already talked about the first

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[45] Such a hard law approach has come to replace anti-corruption activity led by senior officials. In the new approach, specialised units – established in administrative law – take the lead for enforcing ethics-related formal norms. *See* Moshe Maor, *Feeling the Heat? Anticorruption Mechanisms in Comparative Perspective*, 17 GOVERNANCE 1, 2004.

[46] Such an approach contrasts with a system like the UK – where public officials exercise considerable discretion over the operation of their department. As long as they work in the interests of their agency, they

question – how to match data about ethics-related needs with popular ethics-related provisions.[47] Regarding the second question, Figure 5 shows the major levels for assigning competency for ethics regulation.[48]Legislation (laws passed by parliament) will create and impose certain rights and obligations on public officials – such the obligation to treat citizens equally or the right to decide which citizens may receive preferential treatment based on need or other factors.[49] Agency directors interpret that law in light of their administrative traditions and create secondary (or delegated) legislation according to the principles contained in the relevant legislation and their national administrative legal traditions.[50]Even at the agency-level, public officials already possess administrative rights and obligations given by legislation and (sometimes like in the UK) tradition. Codes of conduct, ethics regulations and disciplinary actions revolving around administrative ethics should merely reflect those pre-existing rights and obligations.[51]

Figure 5: Levels of Ethics-Related Lawmaking

Level of rulemaking	Description
Legislative level	National law passed by the legislature – such as the US ethics law and recently Romanian law. Legislation should (in theory) conform to the values enshrined in the Constitution and in country's jurisprudential tradition.[52]
Executive agency (ministry or department level)	These regulations reflect explicitly (or implied) delegated rulemaking powers. Each section of the agency instruction, regulation or order refers to the article in legislation defining the relevant rights and obligations.

do not need to formally pass instructions and orders. Such a difference has led to numerous frustrations among British consultants working in Central Europe!

[47] Increasingly, legal scholars have started to grapple with data motivated rulemaking under the rubrique of "evidence-based lawmaking." *See* Ann Seidman and Robert Seidman, *ILTAM: Drafting Evidence-Based Legislation for Democratic Social Change*, 89 B.U. L. REV. 435, 2009.

[48] For a discussion of the optimal allocation of competencies across levels of government (in a federal setting), *see* Kai Konrad and Benny Geys, *Federalism and Optimal Allocation Across Levels of Governance*, WZB MARKETS AND POLITICS WP SP II 2010-09, 2010, available online.

[49] Such legislation changes constantly – as countries copy others' legal drafting practices and as various scandals signal a need for change. For a review of these changes in the Commonwealth, see Simon King, *Regulating the Behaviour of Ministers, Special Advisers and Civil Servants*, UCL CU WP, 2003, available online.

[50] In many cases, they need to reinterpret these principles as values and technologies change. Finland provides a superlative example of using data to alter an existing ethics regulations for civil servants. *See* Finnish Ministry of Finance, *Civil service ethics: A study of the grounds of civil service ethics, its present state and areas of development*, 2000, available online.

[51] For a discussion -- in the US context -- of the way that rights and obligations flow from black letter law to punishments for ethical (rather than substantive administrative, civil or criminal) violations, see Vincent Johnson, Ethics in Government at the Local Level, 36 SETON HALL L. REV. 715, 2005.

[52] Contrasting France and the US provides a clear illustration of how basic Constitutional values translate into low-level ethics regulations. US Constitutional values place strong emphasis on the rule of law and individual rights. As such, ethics has evolved into a highly legalistic system based on rights and obligations. In contrast, the French constitution focuses on equality and reflects the idea of society and the body politic. These core values have translated into much stronger protections for civil servants acting in the public interest.

Independent agency (like customs) and sub-national level	Because these agencies already have devolved competencies assigned under national law, aw drafter can refer to these competencies when drafting ethics regulations.
Work unit, division level	Even vague codes of conducts pasted on walls contain implicit rights and obligations. Agency directors have a range of rewards and punishments they use to enforce implicit norms.

Source: authors.

Legal drafters – particularly at legislative level – need to link ethics-related provisions to data. Figure 6 shows the example of Romania's Code of Conduct Law 2004.[53]We choose the law from a non-OECD Member because the US law is too complex for the simple example we want to provide.[54] Other countries' ethics law lie mostly in administrative law rather than in a single Act. Article 5 of the Romanian Code of Conduct Law focuses on providing high quality services. Yet, survey data by McGee shows – in the case of tax payers – that they consider tax evasion completely unethical (on a scale of 1 to 7).[55] Such evidence suggests that Romanian tax collectors impel tax payers to avoid taxes through coercion. As such, loyalty to public authorities should have been a higher priority – and received more legislative attention.[56] In some cases, issues like loyalty to the law seem completely misplaced.[57] A survey question like "do you think its important to obey the law" would have shed some light on the importance (or lack of importance) of Article 6 of the Romanian Code of Conduct law.

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[53]Code of Conduct for the Civil Servants (Law 157/2004) [hereinafter the Code of Conduct Law], available online.

[54] Many authors bemoan the complexity of US law. See

[55] Robert W. McGee, *The Ethics of Tax Evasion: A Survey of Romanian Business Students and Faculty*, available online.

[56] We do not want to make any strong claims about Romania or its tax collection practices. We want to provide a public and easy-to-understand example to the reader so he or she will learn how to do this type of analysis for him or herself.

[57] We have always been amused about provisions in ethics laws requiring public officials to obey the law. Such a tautological provision in effect creates a law which requires civil servants to follow laws. If they ignore other laws, why would they suddenly decide to obey the ethics law?

Figure 6: Law on Civil Servants' Code of Conduct

Chapter I: Field of Application and General Principles
Article 1: Field of Application   Article 2: Purpose
Article 3: General Principles   Article 4: Terms

Chapter II: General Norms of Moral and Professional Conduct for Civil Servants
Article 5: To provide a high quality public service   Article 6: Loyalty to the law
Article 7: Loyalty to public authorities and institutions   Article 8: Freedom of opinion
Article 9: Public activity   Article 10: Political activity
Article 11: The use of image   Article 12: Relationships
Article 13: International relations   Article 14: Restrictions on gifts
Article 15: Participation in decision making   Article 16: Objectivity
Article 17: The use of political prerogatives   Article 18: The use of public resources
Article 19: Restricted participation in public contracts

Chapter III: Institutional Arrangements
Article 20: The public institution in charge   Article 21: Notification
Article 22: Settling the case   Article 23: Publicity on reported cases

Chapter IV: Final provisions
Article 24: Accountability rules   Article 25: Harmonization of internal
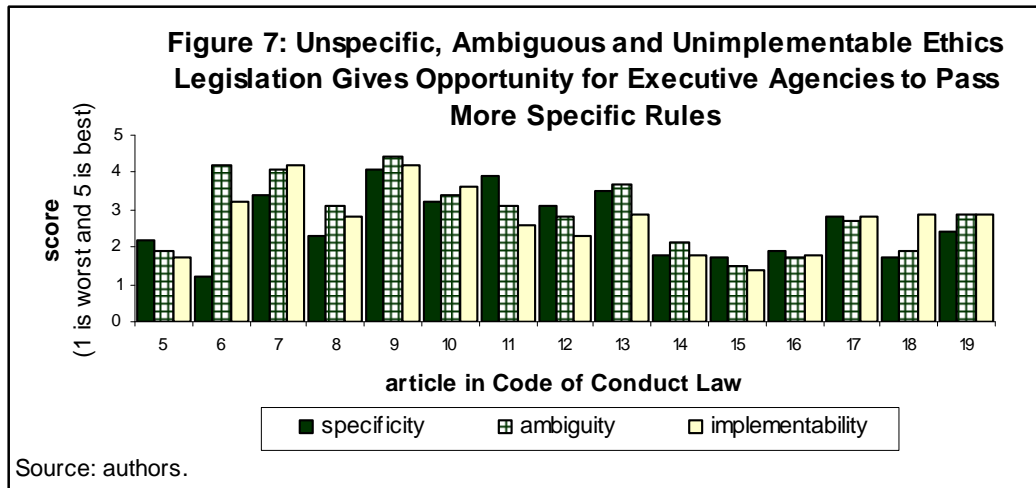Article 26: Publicity   Article 27: Enforcement

Source: Romanian Code of Conduct Law

Legal drafters at the legislative level would also need to decide on the ambiguity and specificity of provisions which create certain rights and obligations – choosing the level of ambiguity based on the amount of subsidiary rulemaking legislators want.[58] Figure 7 shows the specificity, ambiguity and implementability of each article in Romania's Code of Conduct law (which we use because the Romanian law has more public commentary and analysis than other ethics-related laws in the region).[59] Vague provisions (like those in 5, 6, 15 and so forth) may provide a large amount of discretion or manipulation for agency-level rule-makers. In practice, leaving articles ambiguous may not result in regulation if agency-level regulation drafters do not consider that ambiguity provides the administrative right to engage in regulation to clarify the legislative provision.[60]

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[58] We assume that administrative law drafters purposely (or "rationally" in economics language) choose to leave some provisions ambiguous and non-specific – either to allow for discretion or devolution. As we describe in various footnotes, sloppy and poor drafting contributes to such ambiguity far more than rational design. Yet, bad legal writing affects OECD countries as much as non-OECD ones. For a discussion, *see* Susan Duncan and David Ritchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. OF LEG. ED. 1, 2003.

[59] For a description of this method of jurimetrics, see Bryane Michael, *Drafting Implementing Regulations for International Anti-Corruption Conventions*, QEH WP150, available online.

[60] Even if agency-level directors do take-up rulemaking, differing interpretations may result in very different regulations. For a discussion and quantification of this in an OECD country (Sweden), see Goran Svensson and Greg Wood, *Codes of ethics best practice in the Swedish public sector: A PUBSEC‐scale*, 17 INT'L J. OF PUB. SECT. MANAGE. 2, 2004.

Figure 7: Unspecific, Ambiguous and Unimplementable Ethics Legislation Gives Opportunity for Executive Agencies to Pass More Specific Rules
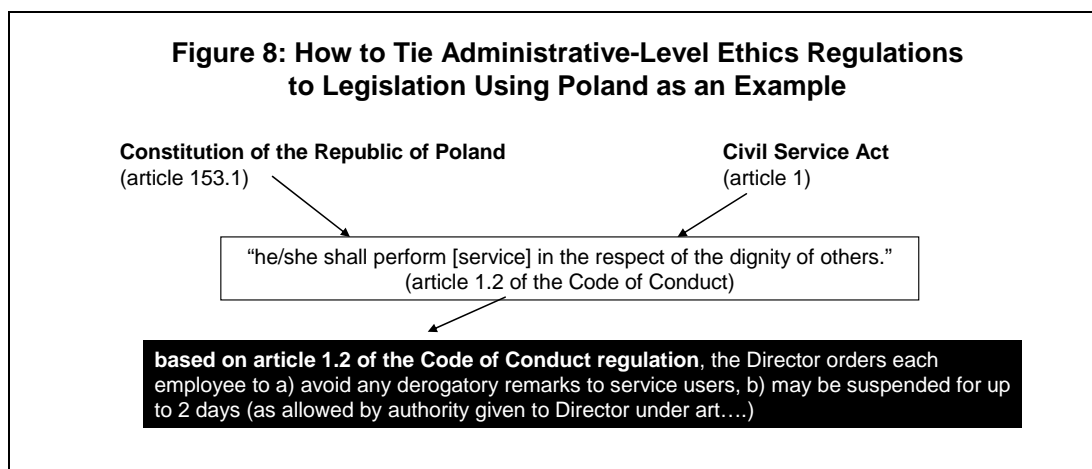

Source: authors.

Legal drafters **at the executive agency level** need to "tie" provisions in legislation to provisions they write in their regulations. Figure 8 shows how advisors to an agency-level director would tie these regulations to legislation. For instance, in the case of Poland,[61] the Code of Conduct's drafters explicitly "tied" the authority for article 1.2 of the executive order to article 153.1 of the Constitution and article 1 of the Civil Service Act. Similarly, lower-level regulators would tie the authority of their agencies' ethics-regulations to the relevant article from the Code of Conduct Law (article 1.2 in our example shown in Figure 8). The agency-level executive order would instruct staff how to "respect the dignity of others" in their specific agency. For example, they may ask for permission to enter a person's premises.[62] They may require public service users to queue in an orderly fashion and so forth. Notice "respect for dignity" represents a legal principle defined across the law and contains a clusters of rights and obligations. Likely places to look for the legislative basis for passing agency-level codes of conduct and ethics regulations include the anti-corruption law (or prevention of corruption law), conflict of interest law, civil service law, constitution (for emerging nation-states), and/or organic regulation of the executive government. Public officials' advisors use the same legal drafting skills that they use for regulating other government activities.[63]

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[61] Lawyers and legal scholars will be extremely familiar with these basic drafting techniques. We present them for non-lawyers reading this piece. For the law we cite in the figure, *see The Civil Service Code of Ethics*, Prime Ministerial Order 114/2002, available online.

[62] In Montenegro's civil servant code of conduct, "respect [for] the personality and dignity of customers" represents a bullet-point, a seeming after-thought which omits any respect for work colleagues. In a seeming change of heart several years later, a new code of conduct seems require respect for citizens (though their duty to foreign visitors remains a mystery). *SeeMontenegrin Code of Ethics of Civil Servants and State Employees*, MIN. OF JUST. REG. 02-200/05, 2005, at 6, available online. *See alsoMontenegrin Code of Ethics of Civil Servants and State Employees,* REG. 06-476/6, 2012, at 6, available online.

[63]Azerbaijan's law shows how these laws seem copied rather than based organically in the country's own law. *See* Law on Rules of Ethics Conduct of Civil Servants, date unknown, available online. In this Act – and the Croatian executive order we mention below, these legal instruments also reference a superiour legal instrument on whose authority subsidiary rulemaking (legislating) has been done.

Figure 8: How to Tie Administrative-Level Ethics Regulations to Legislation Using Poland as an Example

Constitution of the Republic of Poland (article 153.1)

Civil Service Act (article 1)

"he/she shall perform [service] in the respect of the dignity of others." (article 1.2 of the Code of Conduct)

based on article 1.2 of the Code of Conduct regulation, the Director orders each employee to a) avoid any derogatory remarks to service users, b) may be suspended for up to 2 days (as allowed by authority given to Director under art….)

Writing an entire code of conduct or ethics regulation entails tying the relevant articles from law to agency-level procedures. Figure 9 shows an example of an ethics regulation for a customs agency.[64] In this example, the Customs Director issued an instruction aimed at implementing the Conflict of Interest Law, the Prevention of Corruption Law and the World Customs Organisation's Model Code of Conduct.[65] The regulation cites (in every single article) the legislative provision that provides the right to regulate. The regulation describes what actions customs officials must perform in implementing the ethics-related policy, their rights and obligations and sanctions for non-compliance. Agency-directors can not simply "make up" codes of conduct or ethics they want.[66] Their public administration must work according to the rule of law. Directors must tie ethics admonitions in administrative law – otherwise they will not have recourse to disciplinary/enforcement actions and may become liable in an administrative court for *ultra vires* action.

Figure 9: Example Regulation of the Customs Agency Director in Implementing the Ethics-Related Measures Contained in National Law and International Recommendations

ANTECEDENTS

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[64] We provide these abstract examples because OECD (and other governments) tend to treat matters of ethics as extremely confidential. Such confidentiality stems from fear of political consequences if survey data became public and director's uncertainty about whether they possess the authorities they used in some of their rulemaking. While we can crate generalisation based on survey data and regulations we remember, we can not provide names and places. We strongly encourage public agencies to publicly share information about their ethics programmes so that analysts like us do not need to provide general, abstract examples.

[65] We are unable to provide details about the identity of the country due to confidentiality. We hope more customs directors – and agency directors – make information like this public in the future.

[66] Such a line of reasoning shows why model ethics regulations, like the one the UN offers, make for such poor regulatory models. They lack reference to legislative acts to which ethics-related rulemakers can "tie" provisions to. In this respect, the Moldovan Code of Conduct for Civil Servants represents particularly bad practice. See UN Resolution 51/59, Action Against Corruption (A/RES/51/59, 82nd plenary meeting, 12 December 1996), available online. *See also Moldovan Law on the Civil Servants' Code of Conduct*, 2008, available online.

IMPLEMENTATION OF WCO MODEL CODE OF CONDUCT

MEETINGS OF THE ETHICS DISCIPLINARY COMMITTEE

PROCEDURES FOR COLLECTING AND DISSEMINATING DATA ON ETHICS ENVIRONMENT

TYING ETHICS INTO THE HUMAN RESOURCES DEPARTMENT

The quality of regulatory drafting matters for the success of agency-level ethics regulations.[67] Legal drafters need to keep several principles in mind when drafting ethics-

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[67] Naturally, the quality of legal drafting alone does not determine the extent to which public officials follow the substance of ethics regulations and codes of conduct. The design of the legal system in general

related regulations. As modern ideas from economics, legal theory, and public administration filter into legal drafters' attentions, the performance of their regulations has increased. The "carrot and stick" approach works well.[68]For every stick (obligation, punishment or negative admonition), regulation drafters should define a "carrot" (a right, reward or positive ability to perform). Ethics regulations should provide incentives to public officials to follow these regulations without relying on expensive inspectors, enforcement officers and checks.[69]

Which level should Hungarian law focus on? In our example of Hungary, we find that the Hungarian Ministry of Public Administration and Justice should prepare an executive order (regulation) from the Prime Minister which specifically gives government ministers, agency directors, and regional mayors (governors) the right and obligation to engage in ethics-related regulation. We refer to four pieces of information which provide a flavour of the way that empirical analysis links into organisational strategy. First, we assume that the government will not pass another piece of legislation. Thus the Public Service Act 2012 must provide the relevant rights and obligations. Yet, the provisions remain so broad that only regional-level directors can provide the necessary details for any code of conduct or ethics-related regulation. Second, the Hungarian civil service ranks relatively well in terms of ethical conduct (and corruption). Thus, informal norms work relatively well already. As such, formal rules should add-to, rather than replace, existing norms. Third, Hungarian public administration delegates a fair amount of competencies to the regional level. Thus, regional level work will prove more effective than work centred in Budapest or at the city level. Fourth, Hungarian public administration thrives on democracy – though performs relatively poorly.[70] Thus, a fair amount of consultation suggests a devolved approach to ethics-related rulemaking. Of course, we would prefer more rigorous and complete data.

III. The Institutions In Charge of Implementing Ethics-Related Law

No model ethics arrangement or categorisation of ethics institutions could ever exist. Over 7,000 possible configurations of ethics-related institutions exist in a small country like Hungary alone.[71]If the roughly 10 ethics-related topics reflected in Figure 6 generate

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will affect such rule following and enforcement. For a discussion, *see* Gillian Hadfield, *The levers of legal design: Institutional determinants of the quality of law,* 36 J. OF COMP. ECON. 1, 2008.

[68] For an overview of the pros and cons of looking at the financial and other incentives which regulation gives to civil servants, see Patrick Francois, *'Public service motivation' as an argument for government provision*, 78 J. OF PUB. ECON. 3, 2000.

[69] Recent reforms in the UK seek to strike the delicate balance between leaving professional norms in place and putting incentives in place for civil servants to act ethics. *See* UK Committee on Standards in Public Life, *Ethics in Practice: Promoting Ethical Conduct in Public Life*, 2014, available online.

[70] Richard Wike, *Hungary Dissatisfied with Democracy, but Not its Ideals*, Pew Research, available online.

[71] The formula for combinations Q(n!/(n-r)!r!) where *n* equals the number of institutions to choose from (such as installing ethics related obligations in an Ombudsman, an agency director, civil service agency, and the other institutions listed in the Figure). The variable *r* represents the number of possible institutions each institution works with (for example, a ministry relying on the civil service agency and courts would represent a total of three institutions). If we include each possible sub-national government institution, ministry and agency, we have *Q* organisations. For even a small estimate of the number of these

the creation of one right and one obligation, and legal drafters could assign these rights and obligations to each of the 7 institutions listed in Figure 11, then law drafters would have 120 possible divisions of rights and obligations to choose from. Some particular patterns seem more prevalent among OECD countries than others – particularly those leaving ethics-related regulation to the agencies involved.[72] However, the actual – rather than possible -- combinations of ethical arrangements in OECD member states have made any generalisations about the "best" ethics regulations impossible. Appendix I shows the way that EU Member States have allocated the responsibility for regulating ethics between the central and agency-level.

In general, legal drafters at the legislative and regulatory levels have 7 institutions to choose from. Figure 11 presents and describes these institutions. Across the OECD Member States, anecdotal evidence suggests that certain types of public sector organisations choose certain arrangements over others. For example, law enforcement agencies – like the police and customs – tend to regulate members' ethics more strictly.[73] Directors of these agencies spend considerable more amounts of time overseeing the ethical behaviour of their sub-ordinates. Human resource departments often screen applicants based on ethics considerations and place notes about unethical conduct in employees' files.[74] Internal affairs units often conduct investigations on ethics related matters – for offences that sometimes do not engender administrative, civil or criminal liability. These ethics-related investigations pertain to professional ethics. Judiciaries and parliaments often impose ethical standards on themselves through standards-setting committees. Public service oriented ministries and agencies often oversee employees' ethics by collecting complaints from the public via hotlines.

Figure 11: Generalisations about the Legal Mandates of Various Agencies in Creating and Enforcing Ethical Norms

Institution	Potential Role	Target agencies
Ombudsmen	Accepts complaints – usually related to human rights. However, in some jurisdictions, also takes complaints about government's actions generally. Unethical behaviour usually not illegal, so naming-and-shaming only recourse.	Law enforcement (with more coverage in Scandinavia).
Agency Director	Serve as *de facto* ethics legislators, judge, and jury in most jurisdictions. They pass decisions	Most Ministries and

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organisations (roughly 200), we would have roughly 2,000 unique ethics arrangements enshrined in their own ethics-related rulemaking.

[72]*See* OECD, *Trust in Government: Ethics Measures in OECD Countries*, OECD, 2000, available online.

[73] For a discussion of the organisational issues involved, see Terrance Johnson and Raymond Cox, *Police Ethics: Organizational Implications,* 7 PUB. INT. 1, 2004. See also See Maximilian Ederbacher and Sanja Ivkovic, *Ethics and the Police: Studying Police Integrity in Austria.* In Carl Klockars, Sanja Ivkovic, Maria Haberfeld. THE CONTOURS OF POLICE INTEGRITY. 2004.

[74] For an overview, see Evan Berman, James Bowman, Jonathan West, Montgomery Van Wart, HUMAN RESOURCE MANAGEMENT IN PUBLIC SERVICE: PARADOXES, PROCESSES, AND PROBLEMS, 2012.

	and instructions related to ethical (and operational) topics. Main deciders of ethical dilemmas. Ultimately accountable (in theory) for ethical breeches.	Agencies(wider coverage in Continental Europe, Japan)
Civil Service Agency	In countries with stronger civil service agencies, they can pass ethics related instructions. They also can hear cases involved in ethical dilemmas. In practice, they rarely play a strong role (except in jurisdictions with stronger civil service unions).	Focuses often on disputes or wide-spread problems. France and some former FSU
Legislatures	Pass laws on ethics, codes of conduct and specific pieces of legislation (like in US) within their jurisdiction.	More important for multi-tiered small countries.
Administrative Courts	In jurisdictions like US, UK and France, these cases set important precedents and examples. Resolution of fuzzy gray ethics clashes become codified into administrative law.	Important in common law jurisdictions (US, UK, not Hong Kong).
Standards-Making Body	These professional bodies regulate behaviour in general. Important for parts of the State like the judiciary, state-regulated press and even state-owned enterprises.	Most all OECD countries.
Press (with freedom of information law)	The press is where disagreements about ethics are given vent. Attracts attention of legislatures and usual way ethics change across whole-of-government.	US and EU.

Source: Based on OECD (2000) and other sources where available. The summaries we provide represent very broad generalisations because of the high variety between institutions even in a single country.

Most legislatures will not create administrative relations between these organisations from a *tabula rasa*. In many of the Western OECD Member States, relations between agencies have rigidified into very strict (and sometimes very complex) relationships. In Central Europe, many of these administrative relationships remain fluid and ill-defined. If senior policymakers and parliamentarians accept our line of argument, they can "mix and match" the organisations presented above into a coherent system, relying on four techniques.[75]First, senior policymakers can accept the economic losses from inefficiency concomitant with an evolutionary approach. Such an option basically accepts the status quo – and hopes for change later.[76]Second, ministries and agencies enter into Memoranda of Understanding (within the executive itself). Such an Memorandum – for example

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[75] Croatia appears to have taken this approach, setting up an institutional framework for the function of ethics commissioners. See Croatian Prime Minister, *Code of Ethics for Civil Servants*, REG. 5030106-11-1, available online.

[76] If organisational relations between government agencies can determine the location and content of ethics-related law, then such law can also affect the development of public sector organisations themselves. For a statement of such reverse causality, *see* Patrick Dobel, *Public Management as Ethics*, In THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT, 2006.

between a National Institute of Public Administration, the Civil Service Agency, a Ministry and a national standards-setting (self-regulating) body -- can set out the services that the body and civil servants agencies will provide to the Ministry (such as conducting surveys on ethics). The Ministry – for its part – can agree to consider recommendations and codify them as director's instructions or orders (where allowed). The third technique involves using tribunals, administrative courts and even Ombudsman and Civil Service Agencies to create ethical doctrine.[77] Each agency creates policies and practices – some of which employees and citizens disagree with. They challenge these policies in tribunals or courts (depending on the jurisdiction). Judgements over time accumulate and form the basis for creating a broader jurisprudence in administrative ethics (especially in the common law jurisdictions).[78] The fourth (and most broad) technique revolves aroundinvolving parliamentarians, senior politicians and senior civil servants in a big bang style reform. These senior politicians negotiate on defining legal relations between the legislative, judicial and executive branches through the country's political process.[79] These relations allocate rights and obligations to each organisation for specifying ethical standards as well as monitoring and enforcing them. Some issues – like bioethics – lend themselves to such a whole-of-government approach.[80] Yet, for governments in Central Europe still struggling with ethics and corruption problems, such a fundamental rethink of the basic constitutional law hurriedly made in the early 1990s may be just what the doctor ordered.[81]

Using our framework for Hungary provides several specific recommendations for drafting ethics-related regulations. Hungarian officials should adopt an organic, evolutionary approach (with each agency making its own ethics-related regulations) due to the fractionalisation of the Hungarian political process.[82] Hungary has the greatest political polarisation among the advanced economies.[83]The optimal allocation of rights

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[77] For a big-bang approach the ethics development, based on the non-organic (spontaneous) development of Ombudsman offices, see Coalition of Federal Ombudsmen, A Unified Model for Developing an Ombudsman Function, date unknown, available online.

[78] Ethics-related regulations thus represent the "accretion" of previous solutions and compromises to past administrative disputes and debates. See Walter Powell, Paul DiMaggio, THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, 2013.

[79] For examples of countries which have engaged in such multi-stakeholder agreements, *see* Petter Langseth, Rick Stapenhurst & Jeremy Pope*, The role of a national integrity system in fighting corruption*, 23 COMMONWEALTH L. BULLET. 1-2, 1997.

[80]For example, *see* European Group on Ethics, available online at http://ec.europa.eu/bepa/european-group-ethics/index_en.htm.

[81] For a description of this process (and a foreshadowing of many of the institutional compromises made at the constitutional level), see Darina Malova and Tim Haughton, *Making Institutions in Central and Eastern Europe, and the Impact of Europe*, 25 W. EURO. POL..2, 2002.

[82] We do not dispute that factors in government's organisational environment play a determining role. However, we focus on politicisation as this factor represents a key determinant of change in Hungary. For an empirical assessment of the organisational environmental factors driving ethics regulation, *see*Svensson, Goran and Greg Wood, *Public sector ethics in Sweden: a 4P-model of internal and external determinants in codes of ethics*,4 CORP. GOV. 3., 2004.

[83] Political scientists use a Polarisation Index which (like a standard deviation) measures the extent of party fractionalisation. For more on these data, *see* Russell Dalton, *The Quantity and the Quality of Party Systems: Party System Polarization, Its Measurement, and Its Consequences*, 41 COMP. POL. STUD.7, 2008. See Appendix II for the data on political fractionalisation.

and obligations inherent in ethics-related regulation follows four principles. First, assigning authorities and obligations must conform to constitutional values, legislation and existing administrative law.[84]Tracing the way rights translate from legislation into agency-level regulation requires expert legal drafting.[85]Second, legal drafters – particularly when writing national legislation – allocate rights and obligations to each tier of government and agency -- based on empirically-assessed needs.[86] Such work requires the skills of organisational theorists who know how to match the needs from the organisational environment to the creation of formal institutional rules. Third, drafters should engage in ethics-related rulemaking – and allocate responsibilities for the enforcement of those rules – based on the social costs and benefits. A half-decent economist can determine the optimal allocation of responsibilities which would generate the greatest amount of social benefits (in most amount of ethical behaviour) at the least cost (in terms of salaries, disputes and monitoring). Government agencies in countries like Hungary can probably design a set of effective ethics laws with a four person team comprised of an organisational theorist, a legal drafter, an economist and an auditor. In this way, they can assess performance using hard empirical evidence rather than abstract advice and principles.[87]

Conclusions

The design and implementation of ethics-related regulations mirrors the design of any regulation. Important skills in organisational theory, legal drafting, economics, and audit serve to design and implement ethics-related regulations in exactly the same way they serve to implement other kinds of agency-level regulation. Such an insight will disappoint the clients of ethics gurus selling nostrums for managing ethics in the public sector.[88] In this paper, we have looked at the way legislators and regulators can draft ethics-related law. We have also discussed how to choose and draft particular provisions in national and sub-national legislation and in agency-level regulation. Our discussion represents a new incarnation of the evidence-based law (or jurimetric) approach to law – with all its advantages and drawbacks. We have argued for – and shown how to draft –

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[84] For a discussion of the process and the difficulty of settling regulations (including ethics regulations) across borders, *see*Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EURO. J. OF INT'L L. 1, 2006. *See also* Karen Yeung, *Better regulation, administrative sanctions and constitutional values*, 33 LEG. STUD. 2, 2013.

[85] Like with the example from organisational theory, we can not teach drafting skills in this short brief. For the curious reader looking to learn a bit more about interpreting legislation, regulation and the rules of drafting, we highly recommend James Holland and Julian Webb's *Learning Legal Rules: A Student's Guide to Legal Method and Reasoning*, Oxford University Press, 2003.

[86] For an incipient discussion along the lines of the method we propose, see European Institute of Public Administration. (2004). Survey for the 42nd Meeting of the Directors-General of the Public Service of the European Union Member States: *Ethics in the Public Services of the European Union Member States*. Dublin, Ireland, 27-28 May 2004. Available online.

[87] For one example of such assessment, *see*Isabel Garcia-Sanchez, Maria-Luis Rodriguez-Dominguez and Isabel Gallego-Alvarez, *Effectiveness of Ethics Codes in the Public Sphere: Are They Useful in Controlling Corruption?*34 Int'l J. of Pub. Admin. 3, 2011.

[88] These pundits don't necessarily need to come from self-stylized consultants working for international organisations. Many governments have their own in-house gurus who publish regularly on the subject. These gurus provide no empirical data for their advice, other than non-scientifically repeatable case studies and quotations from others.

empirically-based ethics regulations. Hopefully such an approach will save developing countries – like Hungary – hundreds of years of trial-and-error.

Appendix I: The Choice of Administrative Level for EU Codes of Conduct

In this paper, we described each of the steps from transforming national law into Agency-level ethics or code of conduct regulation. We mentioned that the optimal division of ethics-regulating depends on the costs and benefits of having central level as opposed to agency-level regulation. Some EU administrations prefer to regulate ethics at the agency-only level (at least in 2006). These countries include Estonia, Romania and Ireland (for value declarations) and Finland, France, Germany, Hungary, Latvia and Lithuania (for codes of conduct). We hope readers will consider the costs and benefits, fit with their legal system and the others factors we mentioned, instead of choosing a method of ethics regulation based on popular perceptions about the model country.[89]

Figure 29: Comparison of Level of Ethics Regulation in EU Countries' Administrations

	Core values declarations	Code of Ethics
Agency only	**EST, RO, IE**	**FI, FR, DE, HU, LV, LT**
General Only	BE, FR, GR, HU, LV, NL, SLO, SE, UK	CZ, DE, GR, IT, PL, SLO, ES,UK, BG, RO.
General and Agency	AU, FI, DE, LT, MT, BG	EST, IE, MT, NL
Neither General or Agency	CY, CZ, DE, IT, LU, PL, PT, SK, ES.	AU, BE, CY, LU, PT, SK, SE.

Source: Moilanen and Salminen (2006). The authors provide a third category called the branch-level. Some of the countries with neither general nor agency-level ethics regulations may have branch-level regulations.

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[89]Moilanen, Timo and Ari Salminen. (2006). Comparative Study on the Public-service Ethics of the EU Member States. *EUPAN Human Resources Working Group Report*. Available online.

Appendix II: Data on Political Fractionalisation

Political heterogeneity reflects differences in values and preferences between sub-groups in a nation-state. Political heterogeneity reflects many differences – including differences over ethics (or behaviours that groups find acceptable and/or unacceptable). We show these data in order to provide a glimpse at the kinds of data that organisational theorists use when assessing the design of an administrative structure for implementing ethics-related policies. As shown, Hungary has the highest amount of political polarisation of any of the countries listed. Such polarisation suggests significant disagreement over basic political and ethical values and norms.

Figure 30: Political Polarisation in Select Countries

Country	score	Country	score
Australia	1.96	Mexico	2.10
Belgium	2.46*	Netherlands	3.64
Brazil	2.00	New Zealand	3.35
Bulgaria	4.37	Norway	3.75
Canada	2.06	Peru*	0.84
Czech Republic	5.43	Philippines	0.46
Denmark	3.57	Poland	4.92
Finland	2.85	Portugal	3.44
France	3.29	Romania*	2.13
Germany	2.70	Russia*	4.01
Hungary	**5.85**	Slovenia*	2.15
Iceland	4.08	Spain	4.33
Ireland	2.20	Sweden	4.07
Isreal	2.20	Switzerland	4.01
Japan	3.30	Taiwan	1.14
South Korea	3.55	UK	2.37
Lithuania*	3.41	USA	2.43

The Polarisation Index (which ranges between 1 and 10) represents a measure similar to a standard deviation – such that higher figures represent more polarisation. Data for latest time period available. Countries with asterisks denote older measurements.
Source: http://www.cses.org/datacenter/download.htm