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# The EU's Pathological Power: The Failure of External Rule of Law Promotion in South Eastern Europe

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## Abstract

What impact does the European Union (EU) have on the development of the rule of law in South Eastern Europe (SEE)? The author of this article argues and shows that the EU has: 1) a positively reinforcing (healthy) effect with regard to judicial capacity and substantive legality, i.e. the alignment of domestic legislation with international standards, and 2) a negatively reinforcing (pathological) effect with regard to judicial impartiality and formal legality (the inner morality of law). The author explains the pathological impact of EU-driven rule of law reforms by referring to the EU's deficient reform approach and to unfavorable domestic conditions, which in their interplay reinforce certain reform pathologies (legal instability, incoherence, politicization) that undermine the rule of law. The main argument is supported by a mixed method study. A quantitative indicator-based analysis measures rule of law development across four key dimensions on the basis of a variety of data (e.g. survey-based indicators, CEPEJ data, and a unique dataset on legislative output). Additionally, the author draws on a number of qualitative interviews that he conducted with magistrates from SEE and representatives from the EU, the European Court of Human Rights, and the Council of Europe. The author concludes from these findings that external rule of law promotion in weak rule of law countries is not transformative, but rather reinforces systemic deficiencies that undermine the rule of law.

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\* I dedicate this article to all devoted and hardworking EU officials who try to make the world a better place. Unfortunately, as my research shows, their honourable goals (including democracy and rule of law building) are undermined, both by the EU's internal deficits and the unconstrained nature of the domestic reform process, resulting in "pathologies of Europeanization" and the increasing loss of the EU's legitimacy. I acknowledge the useful comments from two anonymous reviewers and the participants of the RRPP conference which took place in Ohrid in May 2015. In particular, I thank Robert Harmsen, Adam Fagan, Slobodan Tomic, Soeren Keil and Dimitar Bechev.

## Keywords

Rule of law – EU conditionality – Pathologies of Europeanization – Western Balkans – Romania – Bulgaria

### 1 Introduction

What impact did the European Union (EU) have on the development of the rule of law in South Eastern Europe (SEE)? Why did the rule of law (as measured by the BTI rule of law indicator or the FH judicial framework and independence indicator) not improve in the past ten years, despite millions of Euros spent on judicial reform in the Western Balkans and beyond?<sup>1</sup> I argue that EU-driven rule of law reforms are not transformative and even have pathological power, that is, a negatively reinforcing effect. Thus, rather than strengthening the rule of law, the EU and domestic reformers (change agents) contribute paradoxically to its overall weakening. The EU's pathological power, though, is an indirect effect, as its outcome depends on a country's domestic conditions, and in particular on the already existing level of its rule of law and the way in which reforms are conducted.

This argument and finding, however, has so far been almost completely absent from the Europeanization literature (e.g. Schimmelfennig and Sedelmeier 2005), which has dealt with the effects of EU integration on domestic change in Central and Eastern Europe. When analyzing the EU's impact on democracy and the rule of law, a first group of the Europeanization scholars has contended that the EU's impact is mainly positive, i.e. that the EU has democratization and transformative power (Ekiert et al. 2007; Vachudova 2005; Grabbe 2006; Levitz/Pop-Eleches 2010). This optimistic view is not surprising given the mostly favorable domestic conditions in first-wave accession countries from Central Europe and the Baltics. Some authors argued additionally that even the laggards (Romania and Bulgaria) from the first accession wave would catch-up and become successful (Noutcheva and Bechev 2008). More recently, however, a second group of scholars has begun discussing the 'limited impact' of the EU or the limits of the EU's transformative power (e.g. Pridham 2005; Dimitrova 2002; Elbasani 2013). This view on the limited impact was also

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1 Freedom House's judicial framework and independence rating did hardly change between 2002 and 2014 for SEE (Albania Bosnia, Bulgaria, Croatia, Kosovo, Macedonia, Montenegro, Romania and Serbia), receiving scores in the median range (on scale from 1=best to 7=worst). The Bertelsmann Stiftung's Index rating on the rule of law decreased slightly from 7.7 to 7.1 between 2004 and 2012 for SEE (on scale from 1=worst to 10=best).

echoed by scholars studying rule of law reforms (Bozhilova 2007; Magen and Morlino 2009; Piana 2009; Mendelski 2012, 2013a, 2013b; Dallara 2014; Parau 2015), anti-corruption reforms (Börzel and Pamuk 2012; Mungiu-Pippidi 2014), and democratization (Sadurski 2004; Fagan 2005). In sum, clear and consistent conclusions on the EU's impact in Central and Eastern Europe are missing. Whether the EU's impact is negative (pathological) or positive (healthy), seems to depend on the domestic conditions (see Pridham 2005).

This article, accordingly, analyzes the EU's impact on the rule of law under difficult or less favorable domestic conditions, as found in weak rule of law countries from SEE. Quantitative and qualitative evidence is provided that demonstrates how EU-driven rule of law reforms lead, under the conditions of an already weak rule of law, to some selective progress, but overall to further deterioration in the rule of law. Consequently, the article will show that EU conditionality has under certain conditions the opposite effect of what it intends to achieve. External conditionality as applied by the EU (and other international donors), rather than establishing the rule of law, can actually reinforce the existing modes of governance and result in a lack of progress or even a deterioration of certain crucial rule of law aspects. In particular I argue that EU conditionality, while improving substantive legality and judicial capacity, weakens formal legality and judicial impartiality. In other words, the EU-driven reforms generate more substantive laws that are adapted to international/European standards, but as a result domestic laws become more instable and incoherent (contradictory). Furthermore, while reforms improve judicial capacity, they do not improve judicial impartiality and even undermine it through increased politicization and the instrumentalization of newly transplanted laws and judicial structures. As a consequence, the rule of law is not established and is even weakened. The policy implication of my contribution is that rule of law reforms can do more harm than good, and that the pathological effect of reforms is especially harmful under adverse domestic conditions (e.g. when reformers are not constrained by horizontal accountability institutions).

The main argument of the article is supported by quantitative and qualitative evidence. Methodologically, I apply a mixed methods research design (Creswell 2009), using a variety of quantitative data (indicators) and insights from qualitative interviews. I conducted more than fifty interviews between 2011 and 2013 with representatives from different European institutions (European Commission, Council of Europe, the ECtHR), with national judges, prosecutors, and lawyers from Romania, Bulgaria, Serbia, and Bosnia and Herzegovina, as well as with international legal experts and NGO representatives. The article is structured as follows. First, I present

my four-dimensional rule of law concept in a conceptual framework. In a second step I trace back the development of the rule of law along its four key dimensions by relying on diverse quantitative indicators. In a third step I explain rule of law development in SEE and the EU's role in it, by relying on qualitative evidence. Finally, I establish a causal explanatory pathway (cycle) which depicts the EU's pathological power under unfavorable domestic conditions.

## 2 Conceptual Framework: A Multi-dimensional Concept of the Rule of Law

I propose a multi-dimensional concept of the rule of law, consisting of two main qualities and four distinct dimensions. In particular I distinguish between the *de jure* rule of law (quality of laws), which consists of 1) formal legality and 2) substantive legality, and the *de facto* rule of law (quality of the judicial system), which consists of 3) judicial capacity and 4) judicial impartiality. The *de jure* rule of law reflects the quality of formal rules and the way how these rules are created. It can be assessed both in terms of formal legality, that is, the technical or formal quality of laws, and in terms of substantive legality, for instance, whether laws are good laws, whether they promote certain values such as justice and fairness, etc. The *de facto* rule of law, on the other hand, reflects the quality of the judicial system, and in particular the impartial enforcement by a third-enforcement party (i.e. the judiciary, prosecution). Let me elaborate on the four key dimensions of the *de jure* and *de facto* rule of law and their underlying sub-components in more detail below.

### 2.1 *Formal Legality*

*Formal legality*, which Lon Fuller called the "internal morality of law", requires that laws need to be promulgated, clear, non-retroactive, non-contradictory, possible to perform, relatively stable, and enforced (Fuller 1969: 46ff). The main focus in this article will be on the stability and coherence of rules. Stability of laws implies that laws remain stable or unchanged over a longer period of time to provide the necessary constraints and predictability for decision making. Coherence of laws reflects clear and non-contradictory laws that enable citizens to follow them and for judges to apply them consistently.

### 2.2 *Substantive Legality*

Scholars who advocate a thick concept of the rule of law look at the substantial quality of rules (*substantive legality*), i.e. the presence of good laws that ensure

certain principles (e.g. justice, equality before the law) and certain rights (civil, political, and socio-economic human rights) (Tamanaha 2004). These principles and rights are commonly associated with international human rights norms and best-practices of governance (e.g. UN basic principles on the independence of the judiciary). The adherence and alignment with these international rules has been called (legal or treaty) embeddedness (Simmons 2009), which denotes that countries are embedded in the broader international legal system. Alternatively, embeddedness can be called legislative or legal approximation, i.e. the alignment with EU and international standards and best-practices, a concept which is less focused on human rights and is employed by Europeanization scholars (e.g. Magen 2007).

### 2.3 *Judicial Capacity*

The *judicial capacity* dimension focuses on the inputs, means, and resources required to establish a capable judicial system (see Mendelski 2012). It is associated with the ability of a professional judiciary to enforce legislation in an efficient, timely, and effective way. In particular, judicial capacity reflects the quantity and quality of financial, technical, and human resources, which are required to establish a capable judicial system. Judicial capacity can be broken down into several sub-components: 1) human resources (e.g. the number of professional judges, prosecutors, and judicial staff, the quality of their education and training); 2) financial resources (e.g. the judicial budget, the salary level of magistrates); 3) level of Computerization (e.g. the number of computers, availability of internet); and 4) level of automation (e.g. the quality of the administration and management, the presence of a case registration system, etc.). Higher judicial capacity does not lead automatically to the rule of law, especially if we consider that more resources (e.g. new computers, more prosecutors) can be misused to further particularistic interests. This suggests that the last dimension of judicial impartiality is crucial.

### 2.4 *Judicial Impartiality*

The *judicial impartiality* dimension of the rule of law refers to the unbiased and impersonal enforcement of law. It focuses on the outcomes (ends) of the rule of law, which include impartial judicial verdicts made by independent, non-corrupt, and accountable magistrates. The sub-components belonging to the judicial impartiality dimension include the following principles, which can be justified theoretically (see Mendelski 2012): 1) judicial independence; 2) separation of powers; 3) judicial corruption; 4) accountability towards the law (a broader concept that is related to the more specific notions of horizontal and vertical accountability and the concept of 'government bound by law');

5) judicial accountability; and 6) citizens' trust in justice, which can be regarded as an indicator of the fairness and impartiality of the judiciary.

Finally, all four dimensions of the rule of law are interdependent and influence each other. First, good laws (both in terms of their formal and substantive quality) are normally made by good legislatures and enforced by capable and impartial third enforcement parties (judiciary, prosecution, law-enforcement agencies). Second, the quality of the judicial structures (including horizontal accountability mechanisms) depends in turn on the quality of the existing laws. Thus, in order to function well, the judicial system requires both formal and substantive legality, i.e. stable, promulgated, and coherent laws. Otherwise, bad laws can result in non-uniform jurisprudence (i.e. different verdicts in similar cases), which in turn can negatively affect the overall systemic judicial impartiality. In addition, instable and incoherent legal frameworks increase the discretionary power of judges to interpret legislation. However, where monopoly and discretion occur and no accountability exists, the possibility of judicial corruption arises (Klitgaard 1998), which can in turn undermine judicial impartiality and the rule of law. Third, the dimensions of judicial capacity and judicial impartiality influence each other. On the one hand, capacity-building measures can be undermined by a lack of impartiality, for instance when increasing human resources (the selection of judges) is done in a politicized, non-meritocratic way. On the other hand, judicial impartiality can be undermined by a lack of judicial capacity, for instance when overburdened or inadequately trained judges do not guarantee the right to a fair trial.

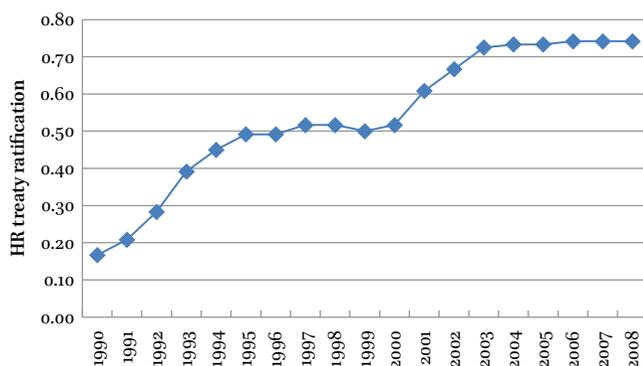
In sum, creating capable but not sufficiently impartial judiciaries (and vice versa) will not result in a better overall rule of law. The same is true for creating more substantive laws (which are legally approximated to international standards) that may nevertheless suffer from instability, incoherence, and lack of enforcement. Therefore, the next section will show that a combination of external and domestic factors, and principally externally (EU)-driven judicial reforms, reinforce judicial capacity and substantive legality, but at the same time reduce some crucial aspects of formal legality and judicial impartiality.

### **3 Empirical Evidence of Rule of Law Development in South Eastern Europe**

#### **3.1 *Quantitative Evidence: Tracing Back Trends in Rule of Law Development***

##### **3.1.1 Substantive legality: Considerable improvement**

Figure 1 presents the main indicator to measure the development of the substantive legality dimension for SEE, and in particular rule approximation,



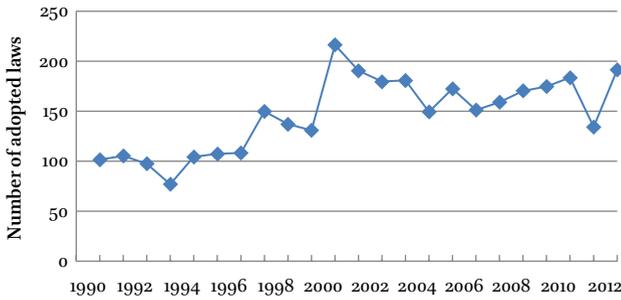
	1990	1992	1994	1996	1998	2000	2002	2004	2006	2008	Absolute change (1998-2012)	Relative change in % (1998-2012)
SEE	0.17	0.28	0.45	0.49	0.52	0.52	0.67	0.73	0.74	0.74	+0.23	+43.5

FIGURE 1 *Development of substantive Legality (rule approximation) in SEE*

SOURCE: DATA BASED ON SIMMONS 2009, PROVIDED TO THE AUTHOR BY BETH SIMMONS.

NOTES: THE INDICATOR CALCULATES THE PROPORTION OF 20 OF THE MORE IMPORTANT HUMAN RIGHTS (HR) RELATED TREATIES RATIFIED BY EACH STATE. THE SCALE RANGES FROM 0 (WORST PERFORMANCE) TO 1 (BEST PERFORMANCE).

which reflects legal embeddedness (Simmons 2009). This proxy indicator consists of the country-specific scores obtained on the ratification of the twenty more important human rights treaties. Two main observations can be made. First, there has been considerable progress in this dimension. Over the course of time, all countries have ratified more and more international human rights treaties. The overall positive trend in SEE (with the exception of Serbia under Milosevic) indicates that the ratification of *de jure* human rights is relatively unproblematic (Landman 2004). When looking at country level data, two groups can be identified: a frontrunner group (Romania, Bulgaria, Croatia, and Bosnia), which began to ratify treaties earlier and also ratified more treaties, and a laggard group (Macedonia, Albania, and especially Serbia), which ratified treaties later and also ratified less treaties. Second, there have been two periods of acceleration in which the ratification of international treaties and conventions grew considerably. The first period (1991–1995) falls in the first years after the fall of communism, and the second period (2000–2004) can be associated with the pre-accession period to the EU.



	1994	1996	1998	2000	2002	2004	2006	2008	2010	2012	2013	Relative change 1994-2013 (in%)	Relative change 2000-2013 (in%)
SEE	77	107	150	131	221	219	196	186	210	159	232	+202	+78

FIGURE 2 Development of formal legality (legislative output) in SEE

3.1.2 Formal Legality: Pathological Developments

The indicator in Figure 2 is based on a new dataset containing information on the national legislative outputs in all parliaments from SEE. The indicator is used here as a proxy indicator for measuring the stability of laws, which is a crucial aspect of formal legality. This decision can be justified by the very common practice that most of the newly adopted laws are in fact amendments to the existing legal framework. Two main patterns can be observed during the period between 1990 and 2013. First, the legislative output increased in all countries, except for Bosnia. Second, while legislative output has been growing quite steadily, there have been two periods of accelerated growth: first around the year 2000, and more recently in 2013. When looking at country-level data, it is useful to distinguish between two groups and two periods of accelerated legislative growth. The first group includes Romania and Bulgaria, the front-runners in SEE, which joined the EU in 2007. These countries experienced their waves of accelerated legislative growth relatively early. In Bulgaria, legislative output increased from 60 to 121 adopted laws (between 1994 and 1995) and reached its climax with 210 adopted laws/year in the year 2006, i.e. shortly before EU accession. Similarly, Romania's legislative growth increased from 135 to 215 adopted laws between 1996 and 1997, reaching its peak level in the year 2001 with 782 adopted laws and slightly decreasing its legislative output afterwards. The second group includes all other countries from the Western Balkans. These countries saw rising legislative growth mainly after 2005, with the exception of Albania, which had a significant increase already in 1998, as well as

Table 1 Development of judicial capacity in SEE

	2002	2004	2006	2008	2010	absolute change (2002–2010)	relative change in % (2002–2010)
Judicial budget p.c. (EUR)	14.2	17.0	20.1	27.6	26.1	+11.9	+83.4
Number of judges per 100.000 inhabitants	26.7	27.1	28.0	28.8	29.5	+2.8	+13.3
Number in public prosecu- tors per 100.000 inhabitants	10.4	11.5	11.8	11.8	12.5	+2.2	+20.9
Number of court staff per 100.000 inhabitants	81.8	99.9	92.1	95.6	101.7	+19.9	+24.4
Direct Assistance to the judge/ court clerk (scale from 1–4)	n/a	2.4	2.9	3.6	3.6	+1.2	+49.5
Administration and management (scale from 1–4)	n/a	1.7	2.2	3.0	3.2	+1.5	+92.5

SOURCE: OWN CALCULATIONS BASED ON DATA FROM CEPEJ 2004; 2006; 2008; 2010; 2012. SEE <[HTTP://WWW.COE.INT/CEPEJ](http://www.coe.int/cepej)>. NOTE: A. DIRECT ASSISTANCE TO THE JUDGE/COURT CLERK INCLUDES WORD PROCESSING, ELECTRONIC DATA BASE, ELECTRONIC FILES, E-MAIL, INTERNET CONNECTION (4=HIGHEST LEVEL). B. ADMINISTRATION AND MANAGEMENT INCLUDES CASE REGISTRATION SYSTEM, COURT MANAGEMENT INFORMATION SYSTEM, FINANCIAL INFORMATION SYSTEM. (4=HIGHEST LEVEL).

Bosnia, which on the other hand experienced a decline. Country-level data indicates that legal instability was most pronounced in Romania during the pre-accession period to the EU, as well as more recently in Croatia (a new EU member since 1 July 2013) and Serbia (which experienced a high legislative output in the year 2009 when several reform packages were adopted).

### 3.1.3 Judicial Capacity: Progress Across the Board

Table 1 presents selected indicators to measure the development of judicial capacity in SEE. On the whole, considerable progress can be observed among

all countries from SEE, thus suggesting an overall beneficial potential impact of EU-driven reforms. Three main observations can be made regarding the development of judicial capacity indicators. First, in terms of financial resources, judicial budgets p.c. (+83.4%) increased in almost all countries, especially until 2008, experiencing afterwards only small backslidings. Second, there has been a positive trend in human resources. The number of judges was raised by 13.3%, the number of prosecutors increased by 20.9%, and the number of court staff by 24.4%. Third, there has been an overall progress with regard to computerization (e.g. IT instalment of computer hardware, IT systems), as well as in the establishment and improving of court management and information systems (automation). SEECs also experienced strong absolute and relative progress with regard to the 'direct assistance to the judge' indicator (+1.2) and the 'administration and management' indicator (+1.5). Overall, then, the comparison of the different sub-indicators (sub-components) at the judicial capacity dimension suggests a considerable progress in judicial capacity between 2002 and 2010.<sup>3.1.4</sup> **Judicial Impartiality: No Improvement**

Table 2 shows the development of several judicial impartiality indicators for the SEE group for the period between 2002 and 2012. At first glance, two important observations can be made. First, the indicators of judicial impartiality did not experience a similar progress as at the judicial capacity dimension. Development of the sub-components has been mostly negative, with the exception of judicial independence. Second, there have been opposing trends in terms of judicial independence and judicial accountability indicators. SEECs experienced an increase in judicial independence and a decrease in judicial accountability, as well as in terms of corruption. This suggests that the judiciary was empowered through formal legislation and the creation of judicial councils but became also less accountable. A more detailed look at the indicators gives the following picture. Judicial independence (+0.4) and judicial accountability (prosecution of office abuse) (+0.2) improved slightly, while all other indicators decreased: judicial corruption by -0.2, judicial accountability by -0.3, separation of powers by -0.6, and citizens' trust in justice by -14.3%.

Overall, the rule of law developed unevenly across its four dimensions, suggesting a differential/uneven impact of the EU on the rule of law in SEE (see Table 3). With regard to the *de jure* rule of law, SEE experienced progress in substantive legality and a regress in formal legality. Thus, while laws became more similar to European and international standards, they became at the same time less stable. As regards the *de facto* rule of law, judicial capacity was considerably improved but this was not reflected in indicators of judicial impartiality, which mostly stagnated or declined. These uneven trends suggest that the EU had a differentiated and reinforcing impact. On the one hand, EU-

TABLE 2 *Development of judicial impartiality in SEE*

	2002	2004	2006	2008	2010	2012	absolute change	relative change in %
Judicial Independence WEFEOS, Scale from 1–7	n/a	2.6	2.9	2.9	3.1	3.0	+0.4	+17.2
Corruption in the legal system/judiciary, TI, scale 1–5	n/a	2.2	1.9	2.0	2.0	2.0	-0.2	-10.9
Irregular payments in judicial decisions (judicial accountability) WEFEOS, Scale from 1–7	n/a	3.8	3.7	3.4	3.4	3.4	-0.3	-8.8
Separation of powers, BTI, scale 1–10	n/a	7.7	8.3	7.9	7.7	7.1	-0.6	-7.8
Prosecution of office abuse (accountability towards the law, horizontal accountability), BTI, scale 1–10	n/a	6.1	6.4	6.0	6.0	6.3	+0.2	+3.1
Citizens' trust into justice/ courts, EB (%)	37.2	25.8	25.6	18.0	22.9	n/a	-14.3	-38.5

SOURCES: WORLD ECONOMIC FORUM'S EXECUTIVE OPINION SURVEY (WEFEOS); FREEDOM HOUSE (FH); BERTELSMANN TRANSFORMATION INDEX (BTI); TRANSPARENCY INTERNATIONAL (TI); EUROBAROMETER (EB).  
Note: Original FH and TI scales were inverted so that higher values reflect better performance.

TABLE 3 *Trends in the rule of law and the reinforcing impact of the EU in SEE*

	Development of the <i>de jure</i> rule of law		Development of the <i>de facto</i> rule of law	
	Substantive legality	Formal legality	Judicial capacity	Judicial impartiality
Trend in the rule of law	positive	negative	positive	negative
Impact of the EU	Positively reinforcing	Negatively reinforcing	Positively reinforcing	Negatively reinforcing

SOURCE: AUTHOR.

driven reforms had a positively reinforcing (healthy) impact on substantive legality and judicial capacity, but on the other hand it had a negatively reinforcing (pathological) impact on formal legality and judicial impartiality.

How is one to evaluate the overall potential impact of the EU on the *de jure* and *de facto* rule of law in SEE? From a selective perspective in which an additive concept of the rule of law is assumed (i.e. in which the values of each dimension compensate each other), it could be argued that the EU had a mixed impact on the rule of law. However, if we assume that formal legality and judicial impartiality are more crucial dimensions than substantive legality and judicial capacity, then the negative trends trump the positive trends and the overall trend (as well as the EU's potential impact) looks more dismal. Thus, from a comprehensive or systemic perspective, the potential impact of EU-driven reforms was not simply mixed but predominantly pathological (negatively-reinforcing). This result is unexpected, as a relatively detailed and specific EU conditionality for semi-liberal states from SEE did not lead to transformative change in the rule of law, as assumed by the Europeanization literature. To determine to what degree external conditionality or domestic factors are responsible for the deterioration in the rule of law they must be analyzed in detailed case studies based on process-tracing. Due to space constraints, however, this is not possible here (I have done this partly elsewhere, see Mendelski 2012; 2013a). Therefore, the next section briefly presents the most plausible qualitative evidence to explain rule of law development across the four key dimensions. The focus will be on relative changes over time, as absolute levels in the rule of law are often the result of structural, i.e. path-dependent factors (see Prado and Trebilcock 2009; Mendelski 2009; Mendelski and Libman 2014).

### 3.2 *Qualitative Evidence: Explaining Trends in the Rule of Law Development*

#### 3.2.1 Substantive Legality

Figure 1 showed that substantive legality developed positively, exhibiting two main periods of acceleration. What explains the relative increase in substantive legality? The general positive trend, including the periods of accelerated HR treaty ratification (1991–1994; 2000–2004), can be most convincingly explained by the demand and pressure from international organizations (including the EU) to change and adapt domestic laws to comply with European and international standards. The periods of accelerated formal ratification reflected increased legal transplantation and borrowing from abroad, which resulted in improved *de jure* protection of human rights and an overall stronger embeddedness of the domestic legislation in international norms (Simmons

2009). The second accelerating period of treaty ratification (2000–2004) can be linked in particular to the pre-accession demands of the EU, i.e. the EU's active leverage (see Vachudova 2005). The main driver behind increased ratification was the EU integration process, which required an alignment of domestic legislation with European standards (including those from the ECtHR and CoE) and the more specific EU-relevant adoption of the *acquis communautaire*. In order to fulfill membership demands (both for EU and the Council of Europe), as well as the Stabilization and Association Agreements with the Western Balkan States, SEECS were obliged to transplant *acquis*-related legislation, as well as sign and ratify conventions and treaties on human rights, on good governance and organized crime. The joint pressure from abroad resulted in more signed international conventions, altered Constitutions, penal and civil codes, and the introduction of several *de jure* provisions to guarantee (at least on paper) judicial independence (e.g. laws on judicial councils), a fair judicial trial, and respect of human and minority rights. Europe's strong and aligning impact was additionally reinforced by non-European international organizations (e.g. USAID, ABA/CEELI, UN), legal experts, and bilateral donors.<sup>2</sup> Thus, it is most sensible to argue that EU and external donor conditionality were complementary, having basically the same goal: that is, to implement change through legal reforms and legal transplanting. To conclude, the qualitative interpretation of the quantitative trends strongly suggests that substantive legality improved (at least on paper) in most SEECS due to the adaptation to EU, European, and international standards.

### 3.2.2 Formal Legality

What explains the regress in formal legality (i.e. an increase in legal inflation/instability) over time, and above all during the two periods of acceleration, one culminating in 2001 and the other in 2013? In principle, declining trends in the formal quality of legislation can be attributed to increased legislative growth during the pre-accession period (see Goetz and Zubek 2007). The pre-accession period was especially characterized by speedy reforms and fast-track formal legal changes (for instance in the form of multiple legislative packages), leading to the deterioration of formal legality (and in particular legal stability) in many countries from SEE. This was particularly the case in Romania, Bulgaria, Croatia, and Serbia.<sup>3</sup> As in earlier enlargement rounds, the Europeanization process triggered executive-driven legislating, with few debates and accelerated

<sup>2</sup> Interviews with international legal experts, representatives from the ECtHR, the Council of Europe, and the EU.

<sup>3</sup> Interviews with high-ranking judges from Serbia, Croatia, Bulgaria, and Romania.

procedures (Sadurski 2004; Risteska 2013). However, while Central European and Baltic countries had enough legislative capacity and independent accountability institutions to check reformers, EU demands for legal reform in SEE overburdened domestic administrative and judicial structures and resulted in more rapid, superficial, and incoherent changes in the legal framework. Bosnia and Herzegovina, which experienced a decline in legislative growth, stands out as an exception to raising overall legal inflation. This surprising result can be best explained through the domestic political framework, which was imposed by the Dayton Peace agreement in December 2005. Accordingly, Bosnia's political system provided considerable opportunities for vetoing new legislation in a common parliament by representatives from the different autonomous entities (Federation of Bosnia and Herzegovina, Republika Srpska, the Brčko District). On the one hand, veto possibilities have therefore blocked reforms, but on the other hand the political deadlock resulted in a lack of legislative inflation, which was positive for formal legality.<sup>4</sup> Overall, however, it could be argued that legal instability may be explained by a pathological way of legislating, which was directly and indirectly initiated and sped-up by the EU, international donors, and domestic change agents. Thus, these transnational 'reform coalitions' (Jacoby 2006) contributed to the improvement of substantive legality but at the same time reinforced legislative growth and instability, thereby deteriorating an important aspect of formal legality.

### 3.2.3 Judicial Capacity

There are two potential explanations for the identified trend of increased judicial capacity, with the first related to domestic factors (e.g. economic growth) and the second to external funding by the EU and other international donors. Let me elaborate on these two potential explanations with regard to the development of the judicial budget. First, in most countries from SEE the judicial budget p.c. correlates strongly with GDP growth p.c. ( $R=0.89$ ), suggesting that judicial capacity is reflected in better economic performance. Thus, the improvement in the judicial budget between 2002 and 2009 can be explained by beneficial economic conditions (coupled with external financial support). Similarly, the decline of the judicial budget after 2008 could be attributed to worsening economic conditions resulting from the 2009 worldwide economic crisis. Nevertheless, despite a sharp decline in GDP p.c. in most SEECS, judicial budgets have continued to stabilize. A plausible explanation for this may be the continued pressure for reforms by the EU (and other international donors) and the need of domestic governments to maintain legitimacy abroad.

4 Interview with a high-ranking Bosnian judge.

The second most probable explanation for overall increased judicial capacity is indeed the impact of the EU and other international donors, who have pushed for reforms and provided financial support (see Mendelski 2013a). In many instances, increasing judicial budgets reflected the general trend towards higher salaries or infrastructural reforms (e.g. court building and refurbishment), which more than often resulted from demands by transnational reform coalitions (between the EU, international donors, and domestic actors). The demand for reform was especially pronounced in laggard countries from SEE, which had much smaller absolute judicial budgets (including lower judicial salaries). Similarly, one could explain the enhancement of computerization and automation by the influence of external donors, who financed new investments in IT equipment and automation systems and who provided the bulk of equipment, software, and training.<sup>5</sup> Finally, the quantitative increase in human resources in most countries can be attributed to structural reforms (e.g. creation or liquidation of new courts) and capacity building, two requirements that were often demanded by international donors. In most cases, such externally demanded reforms introduced new court and prosecutorial structures, such as anti-corruption agencies, specialized courts (e.g. for combating organized crime), and new positions (e.g. court managers). In sum, qualitative evidence suggests that the considerable improvement of judicial capacity over time can be attributed to improved economic conditions and increased external funding by the EU and international donors. Thus, we can conclude that EU conditionality had a positively reinforcing effect on this dimension.

#### 3.2.4 Judicial Impartiality

How can we explain the lack of progress – and even declining trends – in the dimension of judicial impartiality? The slightly increased judicial independence in most SEE countries may be attributed to the *de jure* empowerment of the judiciaries through formal and structural changes, a process that only started in the late 1990s. The empowerment of the judiciary was advanced by international donors and especially the EU, which recommended and insisted on strengthening legal safeguards and establishing or empowering judicial councils (see Kochenov 2008; Bobek and Kosar 2014; Coman 2014). Unfortunately, this empowering was not sustainable in most countries, and since 2008/2009 most SEECS have been experiencing declining trends in the *de facto* judicial independence. The backsliding in several countries from SEE (e.g. Romania, Albania, Montenegro, Serbia, Bulgaria) reflects reform failure and has been explained in the literature by the disempowerment of the judiciary by politi-

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5 Interviews with judges and international legal experts.

cians. In most cases, moreover, attempts to regain control over the judiciary (judicial accountability) turned into increased politicization of judicial structures (Mendelski 2012; 2013a, 2013b; Seibert-Fohr 2012: 1325; Coman 2014). The deficient functioning of judicial councils in most SEE countries also reflects the perverse mutation of institutional transplants, a pathological effect that occurs in environments of weak governance and accountability, but also when newly created structures or transplants are both empowered and captured by domestic reformers and anti-reformers.

A similar argument can be employed to explain the lack of progress in judicial corruption levels. Transplanting anti-corruption agencies into poorly and badly governed states has been perceived as “generally ineffective, if not actively harmful” (Meagher 2005: 69). In SEE, most anti-corruption reforms resulted in the politicization of anti-corruption agencies, which were instrumentalized by pro-EU change agents and anti-EU veto players in a harmful political struggle.<sup>6</sup> In addition, EU accession as a heavily bureaucratic process led to unintended consequences, such as opacity, more regulations, and increased discrepancy between formal rules and informal practice, as well as more opportunities to engage in corruption and rent-seeking (due to increased material resources in the form of EU funds) (Mungiu-Pippidi 2014). Anti-corruption reforms failed most likely because they were abused or not seen as legitimate by a large part of the domestic elite, provoking strong domestic resistance (Mendelski 2012; see Börzel and Pamuk 2012). This overall failure of judicial independence and anti-corruption reforms in most countries from SEE has been reflected in survey data on citizens’ trust in justice/courts, which on the whole has declined for the region. The lower trust levels, despite considerable judicial and anti-corruption reforms, suggest that the benefits of reform did not reach ordinary citizens, who eventually lost trust in political reformers and in the judicial system. The growing distrust in national courts is also reflected in a high demand for *appellate* litigation (culture of appeals), a phenomenon that is on average more pronounced in countries that lack impartial and capable judiciaries. In other words, litigants in SEE tend to appeal national court verdicts and often seek justice at the ECtHR in Strasbourg, a phenomenon that is also reflected in growing numbers of ECtHR cases for this region.<sup>7</sup>

6 Interviews with EU Commission representatives, as well as Bulgarian, Romanian, Serbian, and Moldovan judges, prosecutors, and lawyers. See Börzel and Pamuk 2012. See also the available National Integrity System Assessments published by Transparency International for Kosovo, Bosnia & Herzegovina, Romania, and Bulgaria. See <<http://www.transparency.org/whatwedo/publications/doc/nis/>>.

7 Interviews with national judges, ECtHR judges, and CoE representatives.

In sum, the selective qualitative evidence from the interviews and secondary literature referred to suggests that rule of law development can be explained both by domestic and external factors. This is not a surprising result and has already been acknowledged in the literature (see Pridham 2005; Sedelmeier and Schimmelfennig 2005). However, the evidence also points to unexpected results, suggesting that the rule of law did not improve, and in some crucial areas even deteriorated because of externally driven reforms. The reasons for this unexpected outcome will be explored in the next section, which will show how external and domestic factors are causally linked. In particular, the focus will be on the pathological process of reforming and the negative dynamics of external rule of law promotion under unfavorable domestic conditions.

#### 4 The Pathological Reform Cycle: Towards a Causal Explanation

Why did most countries from SEE not establish the rule of law despite considerable reform efforts and financial aid from abroad? Why were EU-driven rule of law reforms mainly pathological in the case of SEE? The main argument of the paper explains rule of law development by highlighting the interplay between domestic structures, external and domestic agency, and the reform process. In particular I argue that it matters how reforms are conducted. Thus, in contrast to most scholars from the Europeanization literature, I assume that reforms are context-dependent, i.e. that they are either beneficial (healthy) or detrimental (pathological) for the development of the rule of law. In other words, reforms can result not only in virtuous but also in vicious reform cycles that undermine the rule of law. The pathological reform cycle reflects the vicious development in SEE, denoting an inadequate way of reforming that has been the result of unfavorable domestic conditions, under which the EU's impact becomes detrimental. While domestic reform pathologies (e.g. legal instability, legal incoherence, politicization) might have diverse and country-specific causes, I claim that they are reinforced by the deficient reform approach of transnational coalitions (between the EU and domestic reformers). In other words, the "twin forces of domestic and EU influence" (Spendzharova/Vachudova 2012) reinforce each other in a negative way. The main causal relationships underlying the argument here can be summarized as a logic of circular cumulative causation (Myrdal 1957), i.e. reinforcing negative dynamics, which creates a vicious reform cycle: (1) Unfavorable domestic conditions (weak rule of law) → (2) Pathological reform approach of

domestic reformers, which involves excessive politicization and instrumentalization → (3) Pathological power of the EU, which is partisan and inconsistent → (4) Creation/reinforcement of pathologies such as legal instability, legal incoherence, and increased politicization → (5) Decline of formal legality and judicial impartiality, thus undermining of the rule of law → (1) Weak absolute rule of law. Let me now describe each step of this vicious circle in more detail.

(1) At the start of EU-driven rule of law reforms, SEECs had relatively unfavorable domestic conditions, characterized by weak absolute rule of law levels and relatively low levels of economic development (except for Croatia). Most SEECs had a low state, reform, and judicial capacity. Most countries were also characterized by a low level of impartiality, reflected in a lack of impersonal decision-making and an absence of an independent judiciary, as well as weak and politicized horizontal accountability and oversight institutions. These initial unfavorable preconditions were probably the result of pre-communist and communist legacies, as well as the mode of post-communist transition (e.g. Agh 1998; Grzymala-Busse 2002; Pop-Eleches 2007; Ekiert/Hanson 2003; Mendelski 2009). In short, the structural preconditions for actor-driven reforms were bleak and, as argued below, not overcome by reforms from abroad.

(2) Given these unfavorable conditions in SEE, the domestic reform approach became pathological. Thus, rule of law reforms were conducted in an *ad hoc*, politicized, and instrumentalized way. This was reflected in the instrumental (mis)use of legislation (e.g. emergency ordinances) and in the politicization of existing and newly created agencies or bodies (e.g. anti-corruption agencies, specialized courts, judicial councils). In many SEECs anti-corruption and rule of law reforms were captured and instrumentalized by domestic elites in order to advance EU-imposed reforms, to maintain the status quo, or to weaken domestic opposition, critical journalists, and independent judges (Bozhilova 2007; Mendelski 2013a). In several countries, governments also used efficiency-related and structural reforms (e.g. reforms of the court network in Serbia) or anti-corruption reforms (e.g. Romania and Serbia) to dismiss non-loyal and critical judges. Reforms, furthermore, were characterized by the fight over key positions and by increased politicization. EU-driven reforms and the external empowerment of change agents resulted in a bitter struggle for controlling key positions in accountability institutions (e.g. High courts, Constitutional Court, and the Ombudsman) and newly created or empowered structures (e.g. anti-corruption agencies, judicial councils, specialized courts, prosecution). Reform-opponents, once in power, resorted to similar means of politicization. The struggle between

reformers and reform-opponents thus resulted in the polarization, politicization, and instrumentalization of judicial structures and horizontal accountability institutions (see Mendelski 2013b; Coman 2014; Capussela 2015; Beširević 2014; Kuzmova 2014).

The domestic pathology of increased politicization was also reflected in the inadequate functioning of newly introduced bodies, such as judicial councils. Judicial councils were (re)introduced in many SEECS as a magic solution to improve judicial independence. Unfortunately, this universally promoted 'Euro-model' of the court administration has not lived up to its promises, and has in fact worsened the situation where it was established (Bobek and Kosar 2014: 1258). Rather than being guarantors of judicial independence and the rule of law, most judicial councils from SEE evolved into politicized, unaccountable, and non-transparent bodies that tended to undermine the rule of law (see Seibert-Fohr 2012; Coman 2014; KIPRED 2011; OSCE 2009, 2012; Sigma Montenegro 2012: 5). It could be argued that judicial councils, rather than improving judicial independence, just opened up a different channel of political influence. A similar development had occurred some decades ago in Italy, Spain, and Portugal, where judicial councils merely altered the way in which political influence was exercised.

Similarly, law was increasingly instrumentalized during rule of law reforms. The instrumentalization of law was for instance reflected in the continual amendments of anti-corruption legislation or in legislation on the organization of the judiciary.<sup>8</sup> The legislative output (including the number of emergency-ordinances) grew in many countries. Rather than being a constraint, law was employed instrumentally to empower change agents and to advance reforms speedily, often without critical oversight and accountability. Important decisions were therefore based on fast track legislating, emergency ordinances, or presidential decrees. Such decisions included the selection of the heads of the anti-corruption agency and the prosecution in Romania (Mendelski 2012), the creation of a specialized criminal court in Bulgaria (Kuzmova 2014), and the restructuring of the court system in Albania (Peshkopia 2014: 123). Accordingly, when the Constitutional Court in Bulgaria declared the constitutional amendments on the Judicial Council as unconstitutional, *ad hoc* parliamentary committees were set up to bypass the Constitutional Court's decision, only to fulfil EU-required demands (Bozhilova 2007: 8). Often, then, legislative changes were made according to the principle of 'who is in which position' and aimed to place loyal protégés in key posi-

<sup>8</sup> Interviews with several judges from SEE.

tions.<sup>9</sup> Amending laws to promote change agents or reformist prosecutors and judges in key positions reflects the instrumental use of legislation, a highly problematic practice for legal stability and the rule of law.

(3) The domestic pathological way of reforming was reinforced, moreover, by the pathological power of the EU, which was mainly reflected in a partisan and inconsistent approach. First, EU conditionality, although designed to be technocratic and apolitical, became partisan, most visibly in the biased treatment of change agents and veto players, and the partial and *ad hoc* evaluation of reform progress. The inconsistent and selective application of EU conditionality towards countries or domestic governments during the evaluation and monitoring process has already been noticed and empirically documented by several scholars (see Kochenov 2008; Schimmelfennig 2012; Parau 2015; Dimitrov et al. 2014). It has also been argued that the EU focuses on political election outcomes rather than on a (depoliticized) process of rule of law and democracy promotion (Stewart 2009).

This focus on the outcomes and not on the process has been visible during rule of law reform. The EU tended to support reformist change agents, no matter how pathologically they conducted reforms or how undemocratically they behaved. This is especially true for some former Soviet Union countries (e.g. Ukraine, Georgia, and Moldova), but also for countries from SEE, where the EU supported or cooperated with clientelistic and corrupt elites or even with members of governments that collaborated or were part of organized crime (e.g. Kosovo).<sup>10</sup> The EU (including its missions and delegations) not only empowered its change agents but was tacit when the latter broke the rule of law, i.e. those rules and values that the EU tried to promote. This was most evident in Kosovo. Andrea Capussela, a former head of the economics unit of the International Civilian Office, has recently shown how international EULEX prosecutors from the Special Prosecution Office of Kosovo have refrained from investigating and prosecuting serious crime in Kosovo when members of Kosovo's elite or important interests were involved (Capussela 2015). This selective policy of passivity also reflects how the EU ignored elites' pathological behaviour during reforms. One of my interviewees admitted that after pro-EU elites came to power, the EU granted them 'honey moon' periods,<sup>11</sup> i.e. free rein to bolster their power. Unfortunately, this *carte blanche* or 'deal

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9 Interviews with Romanian, Bulgarian, and Moldovan judges.

10 Interview with a former German OSCE diplomat.

11 Interview with an anonymous EU delegation representative.

among friends' opened possibilities to undermine the rule of law as well as the fight against corruption (see Belloni and Strazzari 2014).

The inconsistent and partisan behavior of the EU is a double-edged sword and reflects the "dilemma of reform ownership" (Mendelski 2011: 244). Giving narrow reform ownership to few domestic political 'change agents' who, despite reform rhetoric, have vested interests in the status quo, and who are corrupt or who employ non-democratic means of reform (e.g. abusing law, judicial and anti-corruption structures or the secret service), can actually weaken the rule of law. According to Börzel and Pamuk:

Europeanisation can have unintended and negative effects on the domestic structures of states. EU policies and institutions not only empower liberal reform coalitions, to the extent that they exist in the first place, but can also bolster the power of incumbent authoritarian and corrupt elites...

BÖRZEL AND PAMUK 2012: 81

When we consider that even promising change agents rely on non-democratic means or on existing clientelistic networks because they are socially embedded in a limited access social order based on personal relationships (North et al. 2009), then the current agency-focused model of rule of law promotion from abroad becomes questionable. The cases of Kosovo and Bosnia even show that imported actors from abroad (e.g. foreign judges and prosecutors) tend to assimilate and are not immune to corruption, politicization, and intimidation (see OSCE 2012; Radin 2014; Capussela 2015).

Inconsistency and partisanship on the EU's side was also reflected in its biased monitoring and evaluation process. According to my the interviews conducted for this paper, the EU's evaluation methodology was not always applied consistently. To make pro-EU change agents look better, evaluations of reform progress were artificially refurbished, particularly by leaving out negative information from the more detailed and negative assessments of the Council of Europe's (CoE) GRECO or the OECD SIGMA reports.<sup>12</sup> Objective evaluation and a sound methodology were lacking, for instance, in the Romanian and Bulgarian case (see Dimitrov et al. 2014; Toneva-Metodieva 2014).<sup>13</sup> What can be reproached is that the EU's evaluation of the rule of law is not the result of an objective evaluation based on a sound methodology (see

<sup>12</sup> Interviews with anonymous GRECO and SIGMA representatives.

<sup>13</sup> <<http://www.nineoclock.ro/the-report%E2%80%99s-dangerous-omissions>>. See letter by former president Constantinescu to the European Commission: <<http://www.nineoclock>

Kochenov 2008), and instead, the critique raised in progress reports results often from the ringing of 'alarm bells' by Western-financed NGOs or the international legal community.<sup>14</sup> However, the EU's reliance on domestic NGOs and the transnational legal community can be problematic, as international (and domestic) experts are not always neutral, especially in SEE where they are polarized and depend on foreign money (see Parau 2015).

(4) The inadequate reform approach used by transnational reform coalitions has resulted in the reinforcement and creation of systemic pathologies ('pathologies of Europeanization'), which have undermined formal legality, judicial impartiality, and, in turn, the establishment of the rule of law. The first reform pathology was reflected in the increase of legal instability, as seen in the growing legislative output (see Figure 2). In many countries, the pathological reform approach, together with the EU's pressure for reforms, created a race towards EU membership and legal approximation. This, in turn, resulted in speedy legal/judicial reforms and higher legal instability and incoherence. The pathological impact of the EU was indirect, however, as empowered domestic reformers (mis)used emergency ordinances or fast track legislating procedures both to comply with EU demands and to advance their particularist interests. Nevertheless, the EU and other international donors reinforced deficient legislating practices by resorting to perverse quantitative indicators for evaluating reform progress (e.g. more laws and conventions) (see Channell 2006).

The second pathology was related to legal incoherence, i.e. contradictory and incoherent legislation. In most countries from SEE (mainly in Romania, Kosovo, Albania, Bosnia, and Serbia), legal reforms increased the incoherence of legal frameworks, which in turn lead to more inconsistent judicial decisions and diminished judicial impartiality. The pathology of legal incoherence had different external and domestic sources. The main domestic source was the poor legislative quality, which deteriorated due to an increasingly executive-driven, instrumentalized, and hasty legislating, and enhanced by the lack of independent checks on reformers (e.g. Legislative council, Constitutional Court, Supreme Court, Ombudsman, etc.). The main external reason for legal incoherence in the Western Balkans was the diversity of international donors and legal advisors from the US and Europe, who each promoted and transplanted their own diverse laws, legal styles, methods, and solutions from their host countries (Mendelski 2013b; Sigma Kosovo 2011: 11;

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.ro/former-president-emil-constantinescu-writes-to-ec-president-jose-manuel-barroso/>.

This was confirmed by the author's interview with an anonymous legal expert.

14 Interview with anonymous European Commission official.

Sigma Bosnia 2012). The EU's extensive outsourcing of intermediaries, foreign advisors, and legal experts (e.g. twinning) who had different legal backgrounds exacerbated the incoherence of legal and judicial systems. For instance, the introduction of plea bargaining (a common law element promoted by British and US lawyers) conflicted in practice with the traditions of the European continental system, which had been established earlier in this region. Thus, it can be argued that some legal transplants turned into 'legal irritants' (Teubner 1998), which undermined the functioning of the judicial/legal system (see Alkon 2010). Overall, it seems that "too many cooks spoiled the broth" (Mendelski 2013a, 2013b), producing incoherent and fragmented judicial and legal systems.

The third reform pathology was related to the increased politicization of judicial structures (as indicated above). The empowerment, but also misuse and politicization, of newly created judicial and prosecutorial structures (e.g. judicial councils, anti-corruption agencies, specialized courts, etc.) resulted in resistance to reforms by veto players (e.g. Romania, Bulgaria, Macedonia, Bosnia, Kosovo, Serbia). Resistance and backlash to politicized reforms were most visible after the replacement of 'reformist change agents', which occurred when (anti-reformist) opposition parties came into power and either tried to dismantle the politicized agencies and structures or simply replaced their heads with their own loyal people. When taking reform pathologies into account, the backsliding (dismantling of new structures, amendments and instrumentalization of legislation, dismissal of people in key posts) after Romania's accession was not simply a deliberate 'rule of law crisis' (as formulated by Commissioner Reding),<sup>15</sup> but reflected a systematic feature of a vicious reform cycle. In addition, the post-accession backsliding (which occurred also in more advanced countries such as Poland, Hungary, and Slovakia) can be seen as a reaction towards executive-driven pathological reforms, which were too radical, not inclusive enough, and instrumentalized. If we consider that judicial reforms can become sub-optimal, then resisting reforms or conducting counter-reforms can be seen as a cyclical reaction to an inadequate reform style. The EU's selective empowering of pro-reformist change agents and newly created structures is an example of a deficient reform strategy, which more than often lacks the necessary domestic consensus and legitimacy for the sustainability of reforms. This not only undermines the creation of 'perpetually lived organizations' (see North et al. 2009) but often results in counter-reforms, which reinforce politicization, polarization, and

15 <[http://europa.eu/rapid/press-release\\_SPEECH-13-677\\_de.htm](http://europa.eu/rapid/press-release_SPEECH-13-677_de.htm)>.

domestic conflict – a potentially dangerous scenario, especially for ethnically divided societies.

(5) Finally, the identified pathologies should not only be seen as short-term, temporary side-effects of externally and executive-driven judicial reforms, but also as long-term, systemic pathologies that are repeated in every new wave of reform by reformist change agents and anti-reformist veto players. Thus, despite going through several waves of reform, the systemic deficiencies of governing and reforming are mostly preserved. The constant pathological cycle of reform (and counter-reform) can therefore be seen as a vicious cycle that undermines the creation of judicial impartiality and formal legality, i.e. the most important elements of the rule of law. In sum, externally driven rule of law reforms cement the existing (closed-access) social order, i.e. a mode of governance that is based on a weak rule of law or its absence.

## 5 Conclusion

This study empirically measured the development of the rule of law in SEE and explored the EU's impact on it. The first finding is that the rule of law developed unevenly among its four key dimensions. While substantive legality and judicial capacity improved considerably, formal legality and judicial impartiality mostly regressed. On the one hand, laws have become aligned with European and international standards, but are also more unstable and incoherent. On the other hand, the judiciary has become more capable, but at the same time less accountable and also more politicized. Overall, rule of law did not improve despite the externally-imposed reforms and financial help from the EU and other international organizations.

The second finding is that the EU's impact is reinforcing and not transformative. The EU has contributed to the uneven development of the rule of law by positively reinforcing substantive legality and judicial capacity, and at the same time negatively reinforcing formal legality and judicial impartiality. The negatively reinforcing impact of the EU was termed the EU's 'pathological power', contrasting with earlier work that argued that the EU has 'transformative power' (Grabbe 2006). The pathological effect of externally driven reforms was explained by a toxic combination of structural, process, and agency-related factors, which reinforced each other in a vicious reform cycle. In particular, I underlined the deficient reform approach of domestic and external reformers, who reinforced systemic pathologies (legal instability and incoherence, as

well as politicization) that weakened the rule of law in already weak rule of law countries.

This article makes an original contribution to the 'dark side of Europeanization' (Börzel and Pamuk 2012), which has generally been neglected by the literature. Most scholars in Europeanization studies have hardly explored the detrimental effects of the EU, and EU conditionality was either portrayed as beneficial, having democratizing or transformative power, or more critically as having limits. This article, however, went one step further. It empirically demonstrated the negatively reinforcing or 'pathological power' of the EU under less beneficial conditions, i.e. in states with a weak rule of law.

The findings on the pathological impact of the EU have fundamental theoretical and policy implications for overly optimistic Europeanization scholars as well as reformers. They imply that, under certain unfavorable conditions, the EU and its domestic change agents can do more harm than good.<sup>16</sup> Externally driven judicial and anti-corruption reforms can be misused and instrumentalized, resulting in reform deficiencies that undermine the rule of law. The findings also imply that the EU's impact, rather than being transformative, is actually reinforcing. The EU can be seen as a reinforcing variable because its partisan and inconsistent application of conditionality in SEE contributes to the cementing of the existing mode of governance. Despite empowering change agents and newly created structures, the EU does not transform the fundamental logic of political and judicial behavior, and is thus unable to produce a 'paradigmatic change' (Hall 1993). If I am correct in my claims, and if the EU and domestic reformers do not revise their current defective approach to reform, then the laggard countries from SEE will not be able to catch up with the advanced countries from Central Europe and the Baltic States. In such a case, it is likely that the divergent trajectories between post-communist laggards and frontrunners will be maintained for the coming decades.

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<sup>16</sup> However, the context-dependent nature of EU conditionality implies that under more favorable domestic conditions the EU's impact can become beneficial. This is for instance the case when reform pathologies are mitigated by capable and independent horizontal accountability institutions.

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