The rule of law
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1. INTRODUCTION

Establishing the rule of law has been one of the key challenges (next to building capitalism and democracy) for post-communist countries. However, not all post-communist countries have overcome this challenge and transitioned to the rule of law. How can the rule of law be established? Practitioners have responded to this question by stressing different means (laws, judiciaries and enforcement bodies) and objectives (legality, equality before the law, law & order, predictability) of rule of law reform. Judges have argued that the rule of law requires above all judicial independence and the institutional and material safeguards to maintain it. Businessmen and economists have emphasised the importance of judicial efficiency to reduce the length of proceedings, the respect of property rights, and the enforcement of contracts. Politicians have used the rule of law as a buzzword with changing meanings, calling for judicial accountability, judicial independence, or the fight against corruption. Legal experts have advised building judicial capacity and adopting best practices (including “best” legal frameworks, international standards, anti-corruption agencies, judicial academies, etc.) to improve the rule of law. International donors, with their different priorities and agendas, have emphasised a plethora of issues to establish the rule of law, such as judicial capacity building (EU, USAID, and World Bank), respect for human rights and a fair trial (ECtHR), fight of corruption, improved judicial review, judicial independence, impartiality and training (Council of Europe and EU), law and order and minority rights (OSCE), and in general the adaptation to European and international legal standards through processes of institutional transplantation and approximation. What becomes obvious is the heterogeneity of means, goals, opinions, agendas, and priorities of diverse stakeholders, which makes rule of law reform a complex, expensive, and challenging issue.

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1 I conceive the rule of law as a socially, politically and historically embedded mode of governance which includes two main components: 1. Quality of laws, that is, clear, general, stable, coherent, and enforced laws; and 2. Quality of the judicial system, that is, a capable, independent, accountable, and impartial judicial system. Human rights are not included and not analysed in this chapter.
After more than two decades of legal and judicial reform, there is evidence that post-communist countries from Central Europe and the Baltic States (CEB) have tackled the challenge of rule of law reform better than countries from South Eastern Europe (SEE) and the Commonwealth of Independent States (CIS) (see Figures 1 and 2). Empirical evidence points to persisting differences in the rule of law, exhibiting an advanced group (CEB) and
two laggard groups (SEE and CIS). Despite several reform waves and despite the millions of dollars and euros spent on rule of law promotion from abroad, most of the countries from SEE and CIS seem not to have established the rule of law. Considering the different levels of the rule of law in post-communist countries (despite similar and continuous external pressure for legal and judicial reform), it can be stated that this region has experienced a transition towards a “varieties of the rule of law” (see Figure 1), which consists in systematic differences in the level of judicial capacity, impartiality as well in other aspects, such as judicial review, separation of powers, quality of laws, etc. (see Mendelski 2014).

How has the rule of law developed in Central and Eastern Europe (CEE) since the collapse of communism? What explains the dissimilar development of the rule of law among European post-communist countries? These fundamental questions have been addressed by legal and political science scholars dealing with the rule of law in CEE (for example, Schwartz 2000; Sadurski et al. 2006; Coman/De Waele 2007; Magen/Morlino 2009; Piana 2010; Dallara 2014; Mendelski 2014, 2015, 2016). The answers to these questions have been manifold. They reflect diverse methodologies to measure (for example, qualitative case studies vs. quantitative, indicator-based analysis) and different explanatory factors to account for rule of law development (for example, domestic and external, structural, actor-related and process-related variables). This chapter reviews the existing literature on the rule of law in CEE and focuses on the literature which has tried to account for uneven rule of law development across post-communist countries. It proceeds as follows. First, it identifies major trends and explanations of rule of law development in CEE. Second, it identifies the gaps in the existing literature and in particular the methodological and conceptual challenges for rule of law scholars. Third, it presents an integrated causal explanation for rule of law development and proposes a research agenda for the future.

2. THE RULE OF LAW: TRENDS AND EXPLANATIONS

2.1 Trends in rule of law development

How has the rule of law developed in CEE since the collapse of communism? This question is difficult to answer empirically, at least for the first decade of post-communist transition, for which valid and reliable rule of law indicators are not available (see Oman/Arndt 2008). Since the late 1990s and early 2000s, two commonly used rule of law indicators exhibit lack of progress and even decline. The Freedom House judicial framework and independence index
decreased between 1997 and 2014, from 3.4 to 3.0 for CEE on an inverted scale where 1=worst and 7=best. The Bertelsmann Stiftung’s Transformation Index (BTI) rule of law index decreased slightly between 2004 and 2014, from 7.1 to 6.9 on a scale of 1 to 10, where 1=worst and 10=best. These stagnating and even declining trends, despite the millions of euros spent on judicial reform and rule of law promotion, are puzzling and suggest that the rule of law is a sticky or path-dependent phenomenon (see Prado and Trebilcock 2009), and also that externally-promoted reforms are not able to change the dominant logic of governance. The BTI rule of law indicator from Figure 2 reflects this almost unchanged but persisting trend in the rule of law across three groups of post-communist countries. The indicator also shows that some countries (CEB) are better evaluated than others (from SEE, CIS) and that there is hardly a catching-up of the laggard groups. When we look behind the aggregated scores we can find only three countries which either considerable improved (for example, Moldova +1.8) or decreased (for example, Hungary -2.5, Azerbaijan -1.3) with regard to this indicator. All other countries from the region remained at a similar level, suggesting little impact of donor-driven rule of law reforms.

Figure 2: Rule of law development in CEE

Source: Bertelsmann Transformation Index 2016, http://www.bti-project.org/de/index/
Notes: CEB (Central Europe and the Baltics) includes the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia; SEE (South Eastern Europe) includes Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Kosovo, Macedonia, Montenegro, Romania, and Serbia; CIS (Commonwealth of Independent States) includes Armenia, Azerbaijan, Belarus, Georgia, Moldova, Russia, and Ukraine.

The persisting post-communist diversity in the rule of law is also identified in scholarly work. First, authors recognise several “success cases” from the advanced group (CEB), for example, Hungary, Poland, the Czech Republic, and Estonia, which managed relatively early to attain
high levels of judicial independence and constitutional review (Schwartz 2000; Seibert-Fohr 2012; Coman 2014), judicial capacity (Anderson et al. 2005), judicial accountability (Piana 2010), and judicial impartiality (Mendelski 2014). Also Slovenia, Latvia, and Slovakia (after 2000) were assessed as relatively successful cases with regard to judicial reform (Pridham 2008; Dallara 2014). Second, authors have identified “intermediate cases” from SEE, such as Romania, Bulgaria, Slovakia, or Serbia. These countries have progressed across some elements of the rule of law, such as judicial independence or judicial capacity but did not improve or even regressed across others elements of the rule of law, such as judicial impartiality, accountability, and integrity (see Magen/Morlino 2009; Mendelski 2012, 2013b; Schönfelder 2005; Bobek/Kosar 2014; Hipper 2015). Third, authors who dealt with countries from the CIS and partly from SEE, identified predominantly “cases of failure”, that is, country cases where judicial and legal reforms did not lead to the rule of law. The absence of the rule of law in the Western Balkans and post-Soviet countries is reflected in politicised judicial systems, defective constitutional review, weak separation of powers, weak or ineffective horizontal accountability institutions, insufficient judicial capacity, presence of (judicial) corruption, and a low quality of legislation (see Schwartz 2000; Trochev 2008; Popova 2012; Magen/Morlino 2009; Morlino/Sadurski 2010; Mendelski 2012, 2013a, 2013b, 2015; Natorski 2013; Dallara 2014; Radin 2014; Peshkopia 2014; Capussela 2015). In short, persistent diversity can be identified among post-communist countries.

When we analyse trends in the rule of law, we need to bear in mind that the rule of law as a contested concept can mean different things to different scholars and can therefore be measured through different methods, which might result in different evaluations of the rule of law in a particular country. This explains partly why one and the same country is sometimes evaluated as a success case and other times as a case of failure (for example, Romania and Serbia). In this regard, three methodological pitfalls of rule of law assessment in CEE can be observed.

First, most of the literature has relied on qualitative methodology (cases studies, comparisons of few cases) thus offering only restrictive, non-generalisable insights about rule of law development in the region. Second, several scholars have resorted to questionable indicators of the rule of law (for example, from the World Bank and Freedom House) which have been criticised for lack of objectivity, transparency, reliability, and replicability (see Oman/Arndt 2008; Giannone 2010; Høyland, et al. 2012; Steiner 2014; Cooley/Snyder 2015). Third,
assessment of the rule of law has been relatively narrow and unsystematic, focusing on the quality of the judiciary and Constitutional Courts, and above all on their degree of independence and power to exert review. Scholars as well as providers of rule of law indicators have barely measured the inherent quality of law (inner morality of law, see Fuller 1969), that is, the stability, coherence, generality, and enforcement characteristics of laws. Only recently was this lacuna filled by the World Justice Project, which provides indicators to assess the quality of laws. One problem with such a narrow and non-systematic assessment is that the notion of the rule of law is reduced to the empowerment of the judiciary (judicialisation of politics), a misguided best-standards recipe, which has resulted in several countries in independent but unaccountable judiciaries, judicial councils, constitutional courts, and a worrying trend towards “juristocracy” (Hirschl 2009; Mendelski 2016).

2.2 Explanations of differences in the rule of law

2.2.1 Judicial reform literature: structure and agency matter

Differences in rule of law development in CEE have been explained by a plethora of selective factors, such as historical institutional legacies, informal judicial culture, EU conditionality, reformist actors, and reform processes (see Coman and De Waele 2007). To explain rule of law variation, several authors have stressed the importance of structural preconditions and in particular of communist and pre-communist institutional legacies (for example, institutional legacy of the Habsburg and Ottoman Empires) which might have survived in some areas and impacted on the modes of judicial and administrative governance (Mendelski 2009, 2014; Mendelski/Libman 2014; Kühn 2011; Beers 2010; Dallara 2014). These legacy explanations were not meant as predetermined historical, institutional and cultural trajectories from which countries could not escape, but rather stressed the path-dependent nature of the rule of law (see Prado/Trebilcok 2009) alongside more recent explanatory variables (for example, impact of international organisations, formal institutional reforms, etc.). Besides structural preconditions, scholars emphasised the relevance of domestic agency. It was argued that (domestic political and judicial) actors and in particular their interests, strategic and short-term calculations and balance of powers between them matter for the success of judicial reform as well as effective constitutional judicial review (Magalhaes 1999; Schwartz 2000; Trochev 2008; Piana 2010).
2.2.2 The rule of law promotion literature: A defective reform process

Another explanation for differences in the rule of law was attributed to the quality of the reform process. In particular, the rule of law promotion literature (Jensen/Heller 2003; Channell 2006; Carothers 2006; Kleinfeld 2012; Mendelski 2014), has explained rule of law and reform failure by criticizing the badly designed reform strategies of international donors (for example, the World Bank, EU, and USAID) as well as their insufficient or defective implementation. Scholar and practitioners from this literature have identified a plethora of motives for reform failure such as “problems of knowledge” (Carothers 2006), wrong assumptions and incentives (Channell 2006), a focus on the formal and institutional means rather than the ends (Kleinfeld 2012; Jensen/Heller 2003), lack of capacity (Kleinfeld 2012; Anderson et al. 2005), a top-down elitist approach to reform (Mendelski 2012), donor heterogeneity which translate into legal and incoherent judicial systems (Mendelski 2013b), and too much focus on quantitative than on qualitative assessment of the rule of law (Mendelski 2016). Although the rule of law promotion literature has dealt only partly with CEE countries (see Mendelski 2014), its insights are relevant for understanding the defective reform approach of external donors (USAID, ABA/CEELI, World Bank, and EU).

2.2.3 The EU’s rule of law promotion literature: conditionality, capacity and empowered change agents

More recently, a growing number of scholars have analysed the role of the European Union (namely EU conditionality) in the development of the rule of law (Sadurski et al. 2006; Magen/Morlino 2009; Morlino/Sadurski 2010; Bozhilova 2007; Mendelski 2012, 2013a, 2013b, 2014, 2015, 2016; Coman 2006, 2014; Pridham 2007a, 2007b, 2008; Piana 2010; Kochenov 2008; Natorski 2013; Dallara 2014; Parau 2015; Hipper 2015). Two main insights can be drawn from this literature:

First, scholars find a weak, limited or mixed (differentiated) impact of the EU on the rule of law (Bozhilova 2007; Dallara 2014; Pridham 2007a, 2007b, 2008; Piana 2010; Magen/Morlino 2009; Sadurski/Morlino 2010; Mendelski 2012). For instance, most authors in the edited volume by Sadurski et al. (2006) discover an ambiguous impact of the EU. The reason is that while the goals of the EU’s rule of law promotion are honourable (“spreading democracy and the rule of law”), often the means and processes of this promotion and transplantation (which tend to be elitist, technocratic, instrumentalised and non-democratic) are highly problematic. Another edited volume by Magen and Morlino (2009), which analyses
the EU’s impact on the rule of law in hybrid regimes (Ukraine, Romania, Serbia, and Turkey) discovers that while EU conditionality works for rule adoption, rule implementation and internalisation are incomplete (Magen/Morlino 2009). Several single-country case studies on Romania (Coman 2006; Mendelski 2012; Parau 2015; Hipper 2015), Ukraine (Natorski 2013), Bulgaria (Bozhilova 2007), Latvia, and Slovakia (Pridham 2008) find that the EU is often able to push judicial, legal and, anti-corruption reforms but is not really effective in promoting the rule of law or only some selective aspects of it, such as judicial capacity, the establishment of formal judicial structures and formal rules. In short, this literature shows that the EU’s impact seems to be differential and highly context-dependent, that is, it varies across countries, country clusters as well as dimensions of the rule of law.

Second, scholars claim that this differential impact of the EU in CEE (and the divergent development in the rule of law) can be explained by three main factors. First, some authors attribute differences in EU conditionality effectiveness to diverse domestic conditions, including adverse and favourable structural conditions (historical legacies, political stability, high institutional and administrative capacity) and beneficial informal institutions which facilitate EU-driven reforms (Pridham 2005; Sadurski et al 2006; Magen/Morlino 2009; Mendelski 2009, 2014; Dallara 2014); Second, the differential impact of the EU is attributed to agency-related explanations which focus on the costs and benefits for self-interested reformers and on power struggles between reformist change agents and reform-resisting veto players (Pridham 2005; Magen/Morlino 2009; Mendelski 2011, 2014; Bozhilova 2007; Dallara 2014). In particular, several authors have highlighted positively the role of reformist “change agents” to push reforms and to bring about the rule of law, for instance in “semi-liberal countries” such as Romania, Slovakia and Serbia (Magen/Morlino 2009; Pridham 2005, 2008; see Kleinfeld 2012). Mendelski (2014, 2015, 2016) has in contrast argued and shown that liberal “change agents” often apply similar questionable reform methods as “illiberal” reform opponents. The reason is that both types of actors are (or become) embedded in the same particularist social order and therefore either assimilate or exit without meaningful results. Third, some researchers argue that the reform process (reflected in the EU’s approach to rule of law promotion and evaluation) matters (Sadurski et al. 2006; Mendelski 2014, 2015). In this regard, scholars argue that the consistency of external donor conditionality is important (Sadurski 2006; Dallara 2014) and that the EU (embodied by the European Commission) lacks a sufficiently well-elaborated methodology to allow a consistent and objective evaluation of the rule of law (Kochenov 2008; Dimitrov et al. 2014; Toneva-
Metodieva 2014; Mendelski 2015, 2016). On the domestic side, authors critically stress that the newly created judicial structures are often politicised, instrumentalised, or captured by change agents or veto players and thus undermine judicial independence and the rule of law (Mendelski 2013b, 2015, 2016; see Bozhilova 2007; Natorski 2013; Bobek and Kosar 2014; Radin 2014; Beširević 2014; Kuzmova 2014; Capussela 2015; Parau 2015).

In conclusion, after years of research we still do not know whether and under which conditions rule of law promotion and judicial reform (as advanced by the EU and international donors) establishes or rather undermines the rule of law. Reasons for this inconclusive finding can be explained by three main factors which will be addressed below.

2.3 Critique of the literature

There are currently three key problems which reduce the explanatory power of the literatures with regard to rule of law promotion and development in CEE. First, the main literatures propose a few selective explanatory variables to explain rule of law development, which are reflected in a variety of selective structural, agency, and process-related factors (for example, historical legacies, judicial culture, lack of domestic capacity, the nature of EU conditionality, power balance between domestic veto players and change agents, the reform strategy of donors, etc.). While some authors explained rule of law development through external-domestic and agency-structure nexuses (for example, Pridham 2005), we still have only little knowledge about how these diverse variables are causally connected (for instance through causal mechanisms) and whether the relationship between the interdependent variables vary across time and space. So far only few scholars (for example, Mendelski 2014) have provided a more integrated, causal explanation of how the deeper structural, the shallower agency-related explanations (Kitschelt 2003), as well as process-related factors are causally linked to each other.

Second, the methodology of most of the literature dealing with the rule of law in CEE can be criticised with regard to the research design. Most relevant studies are qualitative in nature, applying process tracing in few selected case studies or addressing few cases in geographically restricted regions (either CEB, SEE, or CIS). There is only one cross-regional mixed-method study (combing qualitative and quantitative methodology) which analyses rule of law development across all European post-communist countries (see Mendelski 2014). In order to overcome the restricted findings of single-cases and regional-specific studies, broader
and more systematic comparative studies with a larger number of cases are needed which would help to discover why some countries manage to establish the rule of law and others not.

Third, most of the extant literature assumes that rule of law reforms as advanced by pro-EU, reformist change agents lead to progress and implicitly that obstruction of reforms by reform-opposing veto players undermines the rule of law (for example, Magen/Morlino 2009; Pridham 2005). Authors suggest therefore to identify veto players and to reduce their number or their power (Magen/Morlino 2009; Kleinfeld 2012). While at first glance this argument makes sense, upon further investigation this assumption proves to be highly problematic as it does not consider that also change agents (mis)use the “rule of law as a political weapon” (Maravall 2003), for instance by politicising and instrumentalising the transplanted laws and newly created judicial and anti-corruption structures. Thus, under the conditions of an already weak rule of law, externally empowered and unconstrained reformist change agents may undermine the rule of law. This proposition makes sense if one moves beyond the assumption of a purely positive impact of external EU conditionality and domestic change agents. The implication is straightforward, rule of law reforms can result in different outcomes. They can improve, maintain but also undermine the rule of law. More reforms do not mean automatically more progress in the rule of law. What makes often the difference is the way how reforms are conducted and this depends on the social order in which reformers are embedded (Mendelski 2014).

In sum, most of the discussed literature on the rule of law in CEE proposes arguments and findings which remain restrictive and incomplete. What is needed is therefore a more comprehensive and integrated explanation which combines different methodologies, approaches, and literatures, and by so doing broadens the theoretical and methodological lens through which external rule of law promotion and reform can be analysed. The next section will briefly present such an integrated causal theory to explain rule of law development in CEE and the EU’s impact on it.

2.4 Healthy and pathological reform cycles: Towards an integrated causal theory
Mendelski (2014, 2015, 2016) has empirically analysed the EU’s impact on the rule of law in post-communist countries (CEB, SEE and CIS) and provided a more integrated, mechanism-based and context-sensitive explanation to account for rule of law diversity. His work shows that EU-driven rule of law reforms often result in a considerable increase of judicial capacity
and substantive legality (that is, the approximation to Western standards) but have a negatively reinforcing impact on judicial impartiality and formal legality, i.e. the “inner morality of law” (Fuller 1969), for instance by producing more unstable and incoherent and less enforced laws.

Mendelski (2014) argues and shows that the EU’s impact on the rule of law depends on the social order in which reformers and reform processes are located. Thus, whereas reforms consolidate the rule of law in already advanced rule of law countries (CEB) they undermine the rule of law in weak rule of law countries (SEE and CIS). This uneven development is for instance reflected in the degree of “legal pathologies” (for example, legal instability, incoherence, lack of enforcement, and politicisation) which tend to be reinforced negatively by EU-driven reforms in closed access social orders (in SEE and CIS). These pathological effects of Europeanisation occur when empowered but unchecked reformers instrumentalise judicial and anti-corruption reforms (including newly created anti-corruption agencies, judicial structures, and laws), as occurred for instance in Moldova and Romania. In contrast, the “pathological power” of the EU (see Mendelski 2015) is less harmful in consolidated, open access social orders (for example in Poland and Estonia) where it is constrained by reform-resisting and independent horizontal accountability institutions (for example, Constitutional Courts, Ombudsmen, and judicial councils). In short, reforms can both consolidate and undermine the rule of law. What makes the difference is the quality of the reform process which depends however on the underlying conditions in a country, in which domestic actors (reformers) are embedded.

To explain differences in the rule of law more systematically, Mendelski (2014) proposes an integrated causal theory of “healthy (virtuous) and pathological (vicious) reform cycles”, which combines structure, agency, and process-related variables and which links these different explanatory variables in a causally and cumulative way (see Myrdal 1957). The main implication of his “reform cycle theory” is that reforms in general (and EU conditionality in particular) are not transformative but reinforcing, that is, reformers tend to reproduce the respective social order in which they are embedded and thus cement the post-communist divergence in the rule of law.

The uneven effects of EU-driven reform in can be elucidated on the examples of judicial self-organisation and horizontal accountability institutions, such as judicial councils, constitutional
courts, and anti-corruption agencies. These newly created or empowered institutions have been established in this region as a general panacea to improve the rule of law. However, their functioning differed across countries. Whereas judicial councils, anti-corruption agencies and constitutional courts have worked relatively well (that is, in an impartial way) in well established democracies from most Visegrád and Baltic States, they became unaccountable, politicised and polarised in less advanced countries in SEE and CIS. Rather than being guarantors of judicial independence and the rule of law, most judicial councils, constitutional courts, and anti-corruption agencies in the region evolved into politicised, polarised, unaccountable, and non-transparent bodies that tended to undermine the rule of law (Schwartz 2000; Seibert-Fohr 2012; Börzel/Panuk 2012; Coman 2014; Bobek/Kosar 2014; Capussella 2015; Beširević 2014; Mendelski 2015, 2016). It could be argued that these transplanted judicial structures, rather than improving judicial independence, oversight, and constraints on the executive, simply opened up different channels of political influence and misuse. In contrast, in more advanced countries from CEB, such pathological reform effects were mitigated by reform-resisting inter-institutional institutions, which experienced a more healthy reform process (which was more gradual, less politicised, more coherent, and accountable) and resulted in the consolidation of the rule of law (Mendelski 2014).

3. CONCLUSION: CHALLENGES FOR FUTURE RESEARCH

The rule of law, as a contested theoretical concept, is difficult to measure empirically and difficult to create in the short-term. After decades of research and judicial reform, we still do not know how to transition to the rule of law, especially when reforms are being pushed from abroad. This rather pessimistic claim is reflected in the sobering findings in the academic literature and the empirical rule of law indicators, for example, from BTI or Freedom House indicators, which remain at a similar level despite considerable reform efforts in CEE. What can be concluded from the literature and the empirical data is that the post-communist division in terms of the rule of law has persisted. The rule of law has experienced a path-dependent development and there was hardly any long-lasting, transformative catch-up of laggard countries from SEE and the former Soviet Union. A second conclusion is that a there are plenty of explanatory factors which may account for uneven trends and levels in the rule of law, suggesting that there may be multiple paths and combinations how to get to the rule of law (that is, equifinality).
There are three main possibilities for future research to tackle existing lacunae in the study of the rule of law in CEE. The first challenge is to better integrate different explanatory variables in a causal theory that allows distinguishing between the different positive and negative as well as short-term and long-term effects of external rule of law promotion. This requires from scholars first of all devising an integrated concept of the rule of law (and its underlying dynamics) which pays attention to the interaction of its different dimensions and its components (see Mendelski 2014 for such an attempt). It equally requires taking into account the diverse interrelationships between explanatory variables (such as structural preconditions, external conditionality, reform strategy, and domestic reformist actors), and the effects these variables have under different domestic conditions. In short, we need a more integrated, systemic and context-dependent analysis of the rule of law in CEE.

A second challenge is to improve the research design and implicitly the measurement of the rule of law. First, the rule of law is a complex and emergent phenomenon which needs to be assessed from a comprehensive and systematic perspective that considers the interplay and balance between different rule of law elements/dimensions (for example, between judicial independence and judicial accountability). Scholars and practitioners should abstain from assessing the rule of law through a “more is better” mind-set which focuses on the selective performance of atomised rule of law aspects, such as constitutional review, judicial independence, and judicial capacity. It is the complementary combination of elements which leads to the rule of law, not their additive, atomised improvement (Mendelski 2016). Second, systematic assessment of the rule of law requires first of all a shift from small-n case-studies towards a medium or large-N research design, ideally combining qualitative and quantitative methodology in a mixed-method research design. Only by measuring the broad patterns and trends in the rule of law and discovering the causal processes and mechanisms behind them, will we gain more systematic insights into how to transition to the rule of law. The methodological challenge for quantitative scholars is then to measure rule of law development with the help of objective data and subjective indicators in a reliable, valid, and replicable way. Assessing the rule of law depends on the indicators one chooses (Skaaning 2010). Therefore, scholars should choose wisely or preferably employ better data to measure the rule of law and in particular the “inner morality of law” (that is, the stability, coherence, generality, and enforcement of rules), a key element which has been often disregarded.
A third challenge is to provide sound policy recommendations based on conceptually and empirically grounded findings, which take into account the diverse domestic preconditions of CEE countries. This challenge implies several things: First it implies refraining from transplanting first-best standards or solutions from abroad which do not work on the ground and more than often become “legal irritants” (Teubner 1998). Second, it requires reconsidering the mistaken assumption of the beneficial consequences of external rule of law promotion (and of reform) under difficult domestic conditions. In other words, reforms can under certain conditions undermine the rule of law and make things worse. Third, it requires assessing rule of law development in an impartial way (in order to avoid bias and double standards) as well as to pay attention to procedural quality of reform and law-making (in order to avoid pathological effects) (see Mendelski 2016).

Last but not least, there is considerable research potential to uncover the negative consequences (pathologies) of the EU’s rule of law promotion and assessment, as recently undertaken by several scholars (see Mendelski 2015, 2016; Slapin 2015; Pech 2016; Bobek/Kosar 2014; Dimitrov et al. 2014; Toneva-Metodieva 2014). In particular, it would be interesting to discover which combinations of domestic conditions and external (EU) conditionality result in unintended and pathological effects, such as lower quality of laws, political instability, more systemic incoherence, increased levels of politicisation and conflict, etc. Discovering reform pathologies, unintended consequences and analysing the “dark side of Europeanisation” (Börzel/Pamuk 2012) may help to improve the EU’s currently naive approach to rule of law promotion/assessment and its dwindling legitimacy in CEE.

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