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The EU's rule of law promotion in post-Soviet Europe: what explains the divergence between Baltic States and EaP countries?

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Abstract

The European Union (EU) and domestic "change agents" have promoted the rule of law in post-Soviet Europe with varying results. While the Baltic States (Estonia, Latvia, Lithuania) succeeded in establishing the rule of law, Eastern Partnership (EaP) countries (Ukraine, Moldova, Georgia, Azerbaijan and Armenia) did not. Why did EU-driven legal, judicial and anti-corruption reforms not produce the rule of law in the latter group? I argue that divided elites (reformers) in laggard EaP countries engage in detrimental political competition that creates incentives to misuse the law, the prosecution and judicial structures as "political weapons". The result of this power struggle is an erratic reform process which produces reform pathologies of Europeanization (e.g. legal instability and incoherence, reinforced fragmentation and politicization) that undermine the rule of law. Instead of serving as an external check on rule-of-law abusing reformers, the EU empowers reformist but unaccountable "change agents" in a partisan way, thus creating incentives for the accumulation and abuse of power, especially after regime changes. Reformers in the advanced Baltic States have avoided detrimental political competition, the fragmentation of the state and many reform pitfalls through de facto exclusion of ethnic Russians from the political and judicial system. This policy of partial exclusion allowed elites in Estonia and Latvia to build consensus, to create a unitary state, including strong, unified and independent horizontal accountability structures (e.g. judiciary, Ombudsman, Constitutional Court etc.) which in turn were able to check the executive. The argument is supported by an empirical, indicator-based analysis of the rule of law and several interviews with representatives in Brussels, Strasbourg and Chisinau.

Keywords: Rule of law, EU conditionality, detrimental political competition, Eastern Partnership, European Neighbourhood Policy, Baltic States, EaP Countries

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1. Introduction

The European Neighbourhood Policy (ENP) has been hailed by EU representatives as an effective strategy to bring about stability, democracy and the rule of law towards its neighbours. This initial (over)optimism was echoed by the Europeanization literature which argued that the EU has transformative and democratizing power (Schimmelfennig and Sedelmeier, 2005; Vachudova, 2005; Ekiert, Kubik and Vachudova, 2007; Grabbe, 2006). However, "in contrast to the success of enlargement…" (in Baltic States), "…the ENP has been seen as a failure" (Vachudova, 2015, p. 527). In 2015, the European Commission itself published a joint consultation paper with the title "Towards a new European Neighbourhood Policy" (European Commission, 2015). This document has identified the shortcomings of the ENP and the Eastern Partnership (EaP) and questioned the effectiveness and suitability of formal tools (e.g. action plans, monitoring) to bring about progress.

How effective was the ENP in promoting the rule of law? More than a decade after the Eastern enlargement from 2004 and the launch of the ENP shortly afterwards, key indicators on the rule of law suggest that the rule of law has not improved significantly and even deteriorated in most EaP countries (e.g. Armenia, Azerbaijan, Georgia, Moldova, Ukraine). The stagnating and even declining trends are reflected in the Freedom House judicial framework and independence indicator and the Bertelsmann rule of law index, both of which show no overall improvement, despite the millions of euros spent on judicial and anti-corruption reforms. Between 1997 and 2014, Freedom House's judicial framework and independence index decreased from 3.3 to 2.4 for EaP countries (Armenia, Azerbaijan, Georgia, Moldova, Ukraine) on an inverted scale where 1=worst and 7=best. Between 2004 and 2014, the Bertelsmann Stiftung's Transformation (BTI) rule of law index decreased slightly from 5.1 to 5.0 on a scale where 1=worst and 10=best. In contrast, the advanced group of Baltic States (Estonia, Latvia, Lithuania) improved their FH ratings from 5.7 to 6.3, while their BTI score decreased only slightly (-0.1). Overall, there seems to be a persisting divergence between the two groups of countries despite similar communist legacies and despite a similar pressure for reform by the EU and the international donor community.

What impact does the EU have on the rule of law in post-Soviet European countries (Baltic States and EaP countries) and why does the rule of law not improve in the latter group? The Europeanization and rule of law literature have provided inconclusive answers to this question. Some authors argued that the EU is able to bring about the rule of law in this region and, in particular, in the advanced Visegrad or Baltic States (Pridham, 2008; Mendelski, 2009). Several authors from edited volumes also acknowledge the limits of Europeanization with regard to the rule of law and suggest a mixed or ambiguous impact (both positive

and negative) of the EU (Magen and Morlino, 2009; Sadurski, Czarnota, and Krygier, 2006; Morlino and Sadurski, 2010). Others have been more pessimistic and argue that the ENP has failed to democratize the region (Nilsson and Silander, 2016), that the rule of law has not been established due to domestic hindrances by domestic "veto players" (Petrov and Serdyuk, 2009; Tudoroiu, 2015; Burlyuk, 2015; Kuzio, 2016a; Hale and Orttung, 2016) or due to the problems with the EU's rule of law promotion and assessment (Kochenov, 2008; Toneva-Metodieva, 2014; Dimitrov, Haralampiev, Stoychev and Toneva-Metodieva, 2014; Slapin, 2015; Mendelski, 2015; 2016; Pech, 2016). The scholarly controversy on the EU's impact reflects an unresolved puzzle which is also reflected in the divergent trends in the rule of law among the post-Soviet countries.

This article argues that the EU's impact is uneven. Rule of law reforms in general (and the EU in particular) have a context-dependent effect, which can be positive in more advanced countries (Baltic States) and negative (pathological) in less advanced countries (EaP countries). In particular, while EU-driven judicial reforms increase judicial capacity and align domestic legislation with European and international standards (substantive legality), reforms do not improve and in fact lead to a deterioration of judicial impartiality and formal legality, thus undermining the development of the rule of law. It is important to bear in mind that the "pathological power" of the EU (Mendelski, 2015) is stronger and more harmful in the laggard countries (EaP) than in the frontrunners (Baltic States), where pathologies of Europeanization have been mostly avoided.

The EU's pathological impact is attributed to its naive approach to reform, which is based on the partisan support of unaccountable reformers. To be more clear, the EU empowers and supports controversial "change agents" (e.g. controversial, pro-Western oligarchs), and grants them "honeymoon" periods of transition in which they are able to accumulate and abuse power. To support their pro-Western "change agents" of reform, the EU refrains from an impartial, objective and qualitative rule of law assessment and promotion. The reasons for partisanship are related to geopolitical, business and security motives (e.g. to counter Russia's influence and that of Eastwards-oriented oligarchs). The consequence of this partisan strategy is a deficient process of reform, the accumulation of unaccountable power in the hands of pro-Western change agents and the deterioration of the rule of law. Overall, the external empowerment of domestic elites in EaP countries (by the EU and Russia) has produced harmful competition between domestic oligarchs, increasing the politicization and fragmentation of state structures (e.g. judiciary, prosecution, accountability mechanisms) and a polarized society. The Baltic States, although ethnically fragmented, have avoided similar divisions among political elites and inside the state. By partially excluding a considerable part of ethnic Russians (including their political representatives) from state structures (including the judiciary) they have been able to avoid detrimental political competition and the partisan

empowerment and fractionalization of their elites from abroad, thus avoiding several reform pathologies (e.g. the fragmentation and instability of law, the politicization/polarization of the judiciary) which in turn facilitated the creation of the rule of law.

The next section briefly introduces my four-dimensional concept of the rule of law. Section 3 provides quantitative evidence on the trends in rule of law development in post-Soviet countries over the last 15 years. Section 4 provides a causal explanation for the lack of improvement in the rule of law in the EaP region and progress in the Baltic States. The paper concludes with some policy recommendations for the EU and for practitioners.

2. Theoretical framework: the rule of law, a four-dimensional concept

I propose a four-dimensional concept of the rule of law, consisting of four distinct dimensions: *Formal legality*, *substantive legality*, *judicial capacity and judicial impartiality* (Mendelski, 2014; 2015). While the two former dimensions refer to the quality of the formal rules (de jure rule of law), the two latter dimensions refer to the quality of the judicial system (de facto rule of law).

First, the *formal legality* dimension includes the formal and procedural aspects of the rule of law (i.e. the "internal morality of law") which require laws to be general, publically promulgated, clear, non-retroactive, non-contradictory, possible to comply with, relatively stable, and enforced (Fuller, 1969, p. 46). My main focus will be on the stability of rules. Stability of laws implies that laws remain stable or unchanged for a period of time long enough to provide the necessary predictability and constraints for decision makers.

Second, *substantive legality* reflects a thick and substantive concept of the rule of law (Hart, 1961) and requires the presence of morally "good" laws which comply with 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). International organizations, including the EU, promote alignment with international human rights standards and best-practices and, in so doing, try to legally embed countries in the universal rules of the European or international legal system (Simmons, 2009).

Third, *judicial capacity* includes the inputs, means and resources to establish a capable judicial system (Mendelski, 2012; 2014). 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 the financial, technical and human resources required to establish a capable judicial system. However, higher judicial capacity does not automatically imply a better rule of law: resources (e.g. new computers, more prosecutors) can be

misused to advance particularistic interests, such as political power, for instance in a politicized fight against corruption.

Fourth, *judicial impartiality* refers to the unbiased and impersonal enforcement of the law by independent, non-corrupt and accountable magistrates. The sub-components belonging to the judicial impartiality dimension include: 1. Judicial independence, 2. Separation of powers, 3. Accountability towards the law, 5. Judicial accountability.

Finally, all four dimensions of the rule of law are interdependent. In order to create the rule of law, international donors must seek to improve all four dimensions in a balanced way. Achieving progress in one dimension and regressing in others does not necessarily enhance the rule of law. For instance, aligning domestic legislation with international standards will not establish the rule of law if the new laws and regulations become unstable, incoherent or are not enforced. Similarly, creating capable but not sufficiently impartial judiciaries (and vice versa) will not necessarily improve the rule of law. The next section shows that the EU (together with its domestic reformers) had precisely such an uneven effect on the four dimensions of the rule of law during the EU pre-accession period:[1] while substantive legality and judicial capacity improved, formal legality and judicial impartiality stagnated and partially even deteriorated, especially in the less advanced EaP countries.

3. Empirical trends: comparative development of the rule of law in EaP and Baltic states

3.1. Empirical puzzle: divergence in the rule of law

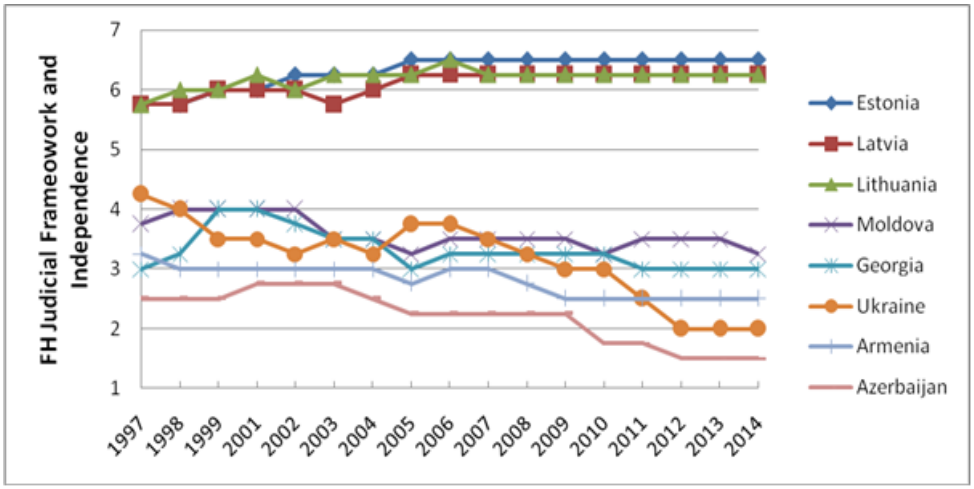
Empirical evidence suggests that post-Soviet countries can be grouped in a frontrunner, strong rule of law group (Estonia, Latvia, Lithuania) and a laggard weak rule of law group (Moldova, Georgia, Ukraine, Armenia, Azerbaijan)[2]. Both the Freedom House indicator Judicial Framework and Independence and the rule of law indicator from the Bertelsmann Transition Index (BTI) exhibit a persisting and even growing divergence between the two groups (see Figure 1 and Figure 2). This is puzzling because (1) all countries were part of the Soviet Union and thus

[1] The EU conditionality has begun to stimulate legal and judicial changes in the Baltic States since 1995/1998 (with the start of the pre-accession period to the EU) and in the EaP Countries since 2005, the official start of the European Neighbourhood Policy (ENP). However, legal cooperation, adaptation and approximation had occurred already since the 1990s.

[2] A brief note on case selection: I exclude several post-Soviet countries (Russia, Belarus, Central Asian Republics) from the comparative analysis as I intend to focus solely on the countries which have been subject to EU conditionality in the area of the rule of law. This was hardly the case for these countries and no Action Plans are foreseen for them.

have a common history (historical legacy) which affected the way justice is done and (2) all countries experienced similar pressure for reform from abroad (EU conditionality), albeit the timing of conditionality varied. Nevertheless, despite the external pressure for judicial and anti-corruption reform in the framework of the Eastern Partnership since 2005, rule of law indicators do not converge and there is no significant catching-up of the laggard countries. This puzzle of divergence will be answered in section 4, where I will argue that rule of law reforms (and EU conditionality) have a context-dependent and uneven effect, which can improve *or* undermine the rule of law. Thus, reforms do not automatically mean progress, but can, on the contrary, lead to deterioration. I will now analyze the development of the rule of law across its four dimensions (and the EU's potential impact). I rely on more specific indicators, which assess the internal and external quality of the law and the quality of the judiciary.

Figure 1. Freedom House judicial framework and independence in post-Soviet states



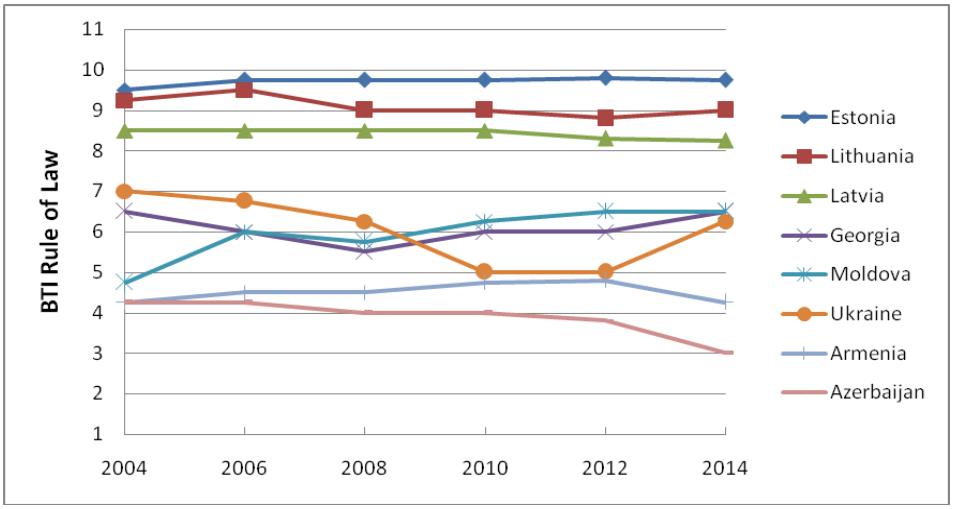
Source: Freedom House, Nations in Transit.
Notes: This indicator highlights constitutional reform, human rights protections, criminal code reform, judicial independence, the status of ethnic minority rights, guarantees of equality before the law, treatment of suspects and prisoners, and compliance with judicial decisions. Scale from 1 (worst) - 7 (best), original values were inverte.

3.2. Quality of law: the EU aligns domestic laws with international standards (substantive legality), but undermines legal stability (formal legality)

Has the EU improved the *de jure* rule of law, i.e. the quality of the law? Figures 3 and 4 exhibit a potentially uneven (i.e. both positive and negative)

impact of EU-driven reforms on the rule of law in Baltic States and EaP countries. While substantive legality increased in both groups (as reflected in the increased legal approximation to international human rights norms), formal legality, and, in particular, the output and stability of laws, deteriorated.

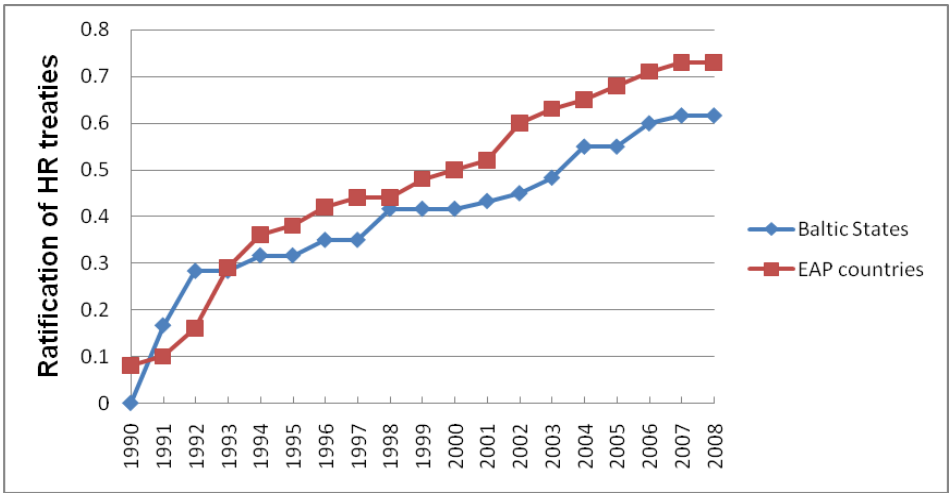
Figure 2. BTI rule of law in post-Soviet states



Source: Bertelsmann Transformation Index.
Note: Scale from 1 (worst) to 10 (best).

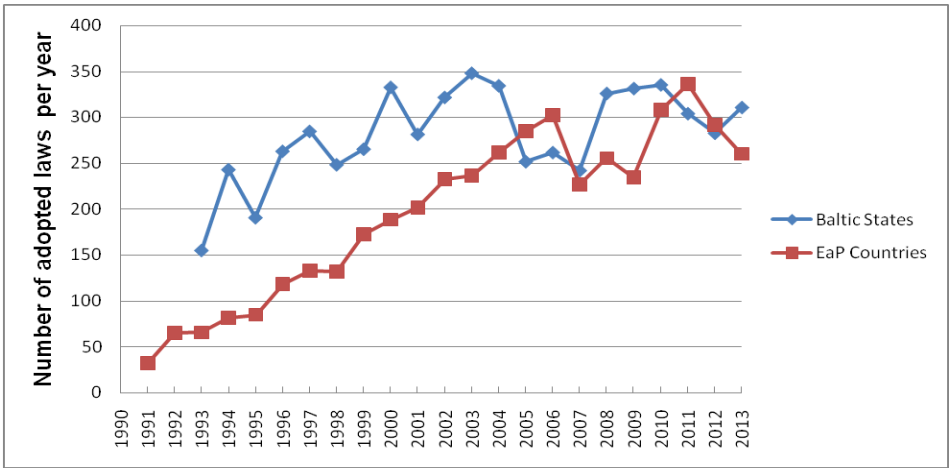
S*ubstantive legality* is measured by the number of ratified human rights treaties (see Figure 1). Two main observations can be made. First, there has been considerable progress in this dimension. Over the course of time, all countries have ratified more and more international human rights treaties. The overall positive trend in both groups indicates that the ratification of *de jure* human rights is relatively unproblematic (Landman, 2004). Interestingly, the average score of EaP countries suggests that they have, since 1993, outperformed the Baltic States by ratifying more international human rights treaties. Ukraine and Azerbaijan were particularly active in signing them, which is however not always reflected in the *de facto* respect of human rights. Second, there were two periods of acceleration in which the ratification of international treaties and conventions grew considerably. The first period (1990–1993) comprises the first years after the fall of communism, and the second period (1998–2004) can be associated with the EU pre-accession period. This later period of alignment of legislation with European laws (*acquis communautaire* and the case law of the ECtHR) resulted in considerable legal approximation and rule adoption in the EaP region (see individual country chapters in Van Elsuwege and Petrov, 2014).

Figure 3. Development of substantive legality (rule approximation) in CEE



Source: Data based on Simmons 2009, provided to the author by Beth Simmons.
Notes: The indicator is based on the concept of "legal embeddedness" which calculates the proportion of 20 of the more important human rights-related treaties ratified by each state. It additionally includes three regional agreements (Europe, Americas, and Africa). The scale ranges from 0 (worst performance) to 1 (best performance).

Figure 4. Development of formal legality (legislative output) in post-Soviet countries



Source: Own dataset compiled by the author.
Notes: The data is based on the information from the national parliaments of Eastern Partnership countries and the Baltic States. The legislative output is measured as the simple average of nationally adopted laws per year. Data for Azerbaijan is not included.

Formality legality (the internal morality of law) is measured by the number of adopted laws per year, i.e. the legislative output per year (see Figure 4). 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 Estonia which remained at a similar level. Second, on average, legislative output has been growing much more in the EaP countries than in the Baltic States. In the advanced Baltic States, the number of adopted laws per year during the pre-accession period to the EU (1995-2004) almost doubled. In Latvia, it rose from 191 to 343 adopted laws, in Lithuania from 264 to 434, and in Estonia, from 117 to 226 laws adopted per year. After EU entry, it remained at a relatively high level in Lithuania and Latvia (around 400), suggesting a persisting pathology, and considerably decreased in Estonia, suggesting a temporary pathology.

In the less advanced EaP countries, the legislative output has increased by approx. 400% since 1995, in the Baltic States only by approx. 100 %. This suggests that the potential impact of EU-driven reform (rule approximation) was more pathological in the former, laggard group. Moldova is a telling example. Here, the EU (and donor) pressure for judicial and prosecutorial reform, resulted in several reform waves and numerous amendments of legislation. For instance, Law no. 294 on the Prosecution[3] was modified 16 times between 2009 and 2016 (i.e. under the pro-Western Alliance for European Integration). Law no. 514 on judicial organization[4] was modified 18 times between 2002 and 2012. The penal code in Moldova was modified 61 times between 2010 and 2016[5]. Data on the number of adopted laws from the Ukrainian parliament indicates an escalating trend which peaked after the Orange revolution in the sixth convocation period (2007-2012) with 1165 laws. For instance, the economic code of Ukraine was amended 50 times between 2003 and 2012[6]. After the Euromaidan, the legislative output accelerated again, this time through increased mis(use) of accelerated procedures. Similarly, after the regime change in Georgia (Rose revolution in November 2003), the legislative output almost doubled from 230 adopted laws in 2003 to 453 laws in 2005.

When analysing changes in the legal framework (rule adoption) it is not sufficient to look at the outcomes, i.e. how many laws were adopted or transplanted from abroad. The legislative process, i.e. how rules were adopted is

[3] See http://lex.justice.md/md/331011/.
[4] See http://lex.justice.md/index.php?action=view&view=doc&id=312839.
[5] See http://lex.justice.md/md/331268/.
[6] See http://zakon2.rada.gov.ua/laws/show/436-15/ed20120524.

equally relevant, if not more. Unfortunately, external pressure for reforms and the zeal of domestic reformers (as well as competition between them) has resulted in a deficient rule-adoption process. Both in the Baltic States and EaP countries, fast-track legislating in the parliament, decisions and presidential decrees were used to meet the EU's (and other international donors') reform demands (Bates, 2010; Stewart, 2016; Pettai and Madise, 2006). Legislating was typically done by empowered reformist elites from the executive and undermined, in many instances, the stability of law as well as the democratic rule adoption process (Sadurski, 2004; Goetz and Zubek, 2007; Mendelski, 2015). Only in Estonia has the legislative process been of higher quality, reflected in more stable and coherent legislation and a well-functioning regulatory impact analysis (Laffranque, 2009; Staronova, 2010)[7]. By contrast, Ukraine and Moldova had a fragmented legal drafting process which resulted in less coherent and unpredictable legislation (Lucas, 2015, p. 316).

In sum, regime changes, the zeal for reform and legal approximation to European standards as well as domestic structural problems (e.g. state capture, fragmentation and low capacity of legal departments) have resulted in increased rule adoption and approximation, but also in legal instability, incoherence and lack of implementation[8]. The overall uneven development in terms of formal legality (which deteriorated) and substantive legality (which improved) reflects the mixed impact of the EU-driven reforms and a common dilemma for reformers: how to improve the substantive quality of (the rule of) law whilst not undermining its formal, procedural quality, i.e. its "inner morality"?

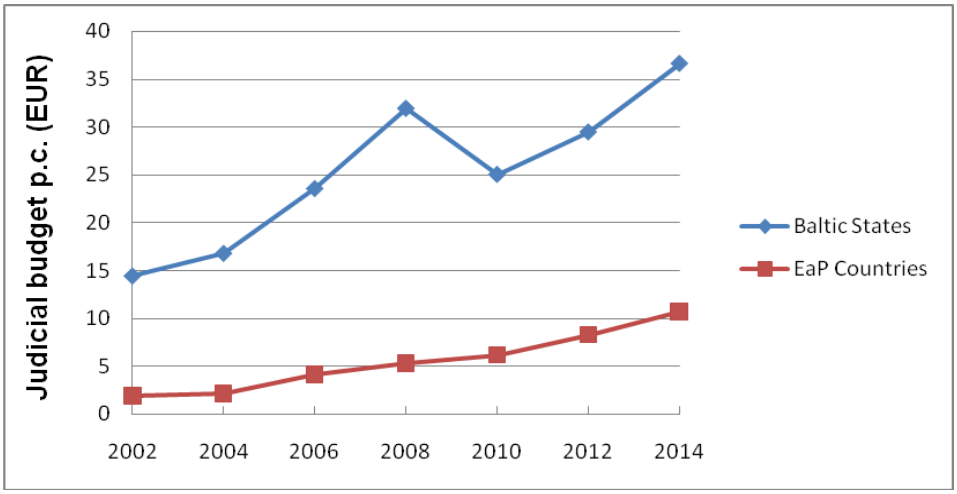
3.3. Judicial quality: the EU strengthens judicial capacity but undermines judicial impartiality

Figure 5 presents a selected indicator (judicial budget p.c.) to measure the development of *judicial capacity* in EaP countries and Baltic States. On the whole, considerable progress can be observed among both groups, suggesting a beneficial potential impact of EU-driven reforms. This positive trend in the judicial budget has been accompanied by increased computerization, automation (court management and information systems), increased training and partly also by more human resources. Alternative explanations certainly contributed to this positive trend, such as international donor conditionality, which focused on judicial capacity building as well as beneficial domestic economic conditions until 2008 (interrupted only briefly by the international financial crisis).

[7] Detailed reasons for the high quality of drafting and legislation can be found in the summary report Quality of Legislation: Estonian Perspectives, http://ec.europa.eu/dgs/legal_service/seminars/estonia_summary.pdf.

[8] Confirmed by judges from Moldova, Ukraine and Georgia.

Figure 5. Development of judicial capacity in post-Soviet states



Source: Own calculations based on data from CEPEJ 2004; 2006; 2008; 2010; 2012; 2014[9].

In contrast to this very positive trend, *judicial impartiality* experienced a mostly stagnating development (Table 1). Judicial independence remained more or less at a similar level, slightly increasing in EaP countries and slightly decreasing in the Baltic States. Most countries did not improve their judicial independence ratings, with the exception of Georgia (+2) and Moldova (+2), which, however, remain in the median range. The indicator "Irregular payments in judicial decisions" from the World Economic Forums Executive Opinion Survey (WEFEOS), which can be used to indicate judicial corruption and problems with judicial accountability, suggests that EU-driven reforms were not transformative. For most countries, this indicator rather stagnated or decreased, with the exception of Georgia which considerably improved its rating (+2.3). Without this significant progress, the average value of the EaP group in 2012 would have been only 2.5 (instead of 3.0). "Separation of powers" increased in the EaP group (+0.8) more than in the Baltic group (-0.3), which experienced a slight regression, admittedly from a very high level. "Prosecution of office abuse" (which is used here as a measure for accountability to the law) remained in both groups at a similar level. Overall, the lack of progress on the judicial impartiality dimension suggests that improving certain crucial values (judicial independence, accountability, integrity etc.) is a path-dependent and complex process, which is difficult to change in the short-term despite selective improvements (as occurred in the EaP countries). In sum, the EU's impact was potentially uneven across the four key dimensions of the rule of law: while substantive legality and judicial

[9] See http://www.coe.int/t/dghl/cooperation/cepej/evaluation/.

capacity improved, formal legality and judicial impartiality did not. The reasons for this uneven development and the continuing divergence across the two groups of countries are explored in the next section.

Table 1. Selected judicial impartiality indictors for post-Soviet states

	2004	2006	2008	2010	2012	2014	absolute change	relative change in %
Baltic states								
Judicial independence, BTI, Scale 1-10	10.0	9.0	9.0	9.0	9.0	9.0	-1.0	-10.0
Irregular payments in judicial decision, WEFEOS, scale from 1-7	4.6	4.6	4.1	4.3	4.4	n/a	-0.3	-6.9
Separation of powers, BTI, Scale 1-10	10.0	10.0	10.0	10.0	9.7	9.7	-0.3	-3.3
Prosecution of office abuse (accountability) BTI, Scale 1-10	8.3	8.3	8.0	8	8	8	-0.3	-4.0
EaP countries								
Judicial independence, BTI, Scale 1-10	4.6	5.2	5.0	5.0	5.0	5.2	+0.6	+13.0
Irregular payments in judicial decisions, WEFEOS, scale from 1-7	3.7	3.6	3.1	2.8	3.0	n/a	-0.7	-18.6
Separation of powers, BTI, scale 1-10	4.8	5.6	5.4	5.4	5.2	5.6	+0.8	+16.7
Prosecution of office abuse (accountability), BTI, scale 1-10	5	5.2	5	5	5	5	0.0	-3.8

Source: Bertelsmann Transformation Index (BTI); World Economic Forums Executive Opinion Survey (WEFEOS).

4. Explanation: what accounts for the divergence in EaP and Baltic states?

Differences in rule of law development have been explained by a mixture of domestic (e.g. historical legacies) and external factors (e.g. presence of external conditionality) (see Dallara, 2014; Mendelski, 2009, 2014). The puzzling question for the post-Soviet region is then why have similar historical legacies (communist rule during the Soviet Union) and similar pressure for rule of law reform by the EU resulted in divergent trends in the rule of law (and in particular in formal legality and judicial impartiality)? In particular, why were (EU-driven) rule of law reforms more effective (less pathological) in the Baltic States than in EaP countries? My main argument resorts to a chain of causally linked domestic and

external factors which reinforce each other in a circular and cumulative way (Myrdal, 1957), creating negative dynamics, and a *vicious reform cycle*. The vicious circle explains development in most laggard EaP countries and reflects the circular reinforcement between *structure*, domestic and external *agency* and the reform *process*: (1) Social heterogeneity/fragmentation (historical, regional, ethnic and ideological fractionalization, divided society) → (2) Divided domestic elites (reformers) → (3) Detrimental political competition between EU and Russia-oriented elites → (4) Partisan empowerment of domestic elites through EU conditionality (and Russian conditionality) → (5) Reinforcement of reform pathologies (instrumentalization of law, politicization of state structures) → (6) Lack of impartiality (including neutral and unitary accountability structures) and formal legality imply a lack of the rule of law → (1) Political and societal conflicts (divided state and society).

(1) *Social heterogeneity/fragmentation* is not solely related to ethnic fractionalization (Alesina, Devleeschauwer, Easterly, Kurlat and Wacziarg, 2003), which seems, at first sight, considerably high in most post-Soviet states.[10] Rather, this concept also includes other potential "dividing factors" among members of a society, such as socio-economic, historical, regional, cultural and ideological ones (e.g. pro-Western, pro-Russian). The set of dividing factors may also shift in time as the mobilization of heterogeneous groups varies with the change of legal, political, economic and geopolitical conditions that may alter the opportunity structure for certain groups and their representatives (e.g. integration into Euro-Atlantic or Eurasian structures, changing ratios between minorities due to emigration etc.). Furthermore, the distinct social dividing factors may be differently linked to the organization of the state and the economy. Access to political, legal and economic positions (and thus to power, status and capital) may be conditioned on ethnicity, kinship, political and ideological orientation, or regional factors. In addition, the nature of dividing boundaries may differ. For instance, ethno-national and linguistic dividing social factors may be reflected in a sharp, factional organization of the state (as in Latvia and Estonia) or may be blurred and permeable as in Ukraine and Moldova (Brubaker, 2011)[11].

Social heterogeneity and pluralism are not bad *per se* and do not have to result in the fragmentation of the state and society, including increased conflicts

[10] The considerable percentage of Russian and Russian-speaking minorities in post-Soviet States is reflected in the relatively high ethnic fractionalization scores of Latvia (0.58), Estonia (0.50), Moldova (0.55), Georgia (0.49), Lithuania (0.32), Ukraine (0.47), Azerbaijan 0.2), Armenia (0.13). The higher the score, the more ethnically fractionalized the society. See Alesina et al 2003.

[11] In Ukraine, "Political struggles over nationalizing policies have been articulated along regional and linguistic rather than ethnonational group lines; they have been intertwined with geopolitical and geoeconomic questions concerning the relations of Ukraine with Russia, on the one hand, and the EU, on the other." (Brubaker, 2011, p. 1806).

among societal/political groups (Lijphart, 1977). However, tensions and conflicts may arise when powerful domestic elites attempt to capture the state and state laws during reforms to promote the interests of one dominant group. In such situations, the law and state structures may be misused as a "political weapon" (Maravall, 2003). This tendency to undermine the rule of law through competing political elites may be higher in "divided societies" (Way, 2015a) or "cleft countries" (such as Moldova and Ukraine), i.e. countries which exhibit considerable historical, regional and political divisions (Katchanovski, 2006). Similar political struggles and misuse of the rule of law were discovered in the instable and heterogeneous Western Balkans (Mendelski, 2015). Interestingly, however, the considerable fractionalized "ethnic democracies", Latvia and Estonia, have been better able to regulate conflict inside the state (Smith, 1996). By partially excluding Russian minorities (and external Russian influence), they were able to mitigate detrimental political competition and fragmentation of the polity, which provided a basis for the rule of law. I will elaborate in more detail on this process below, but first, let me turn to the EaP countries and show how their fractionalized social structure has translated into divided domestic elites.

(2) *Divided elites:* Elites in EaP countries have been characterized as disunited, divided or fragmented (Higley, Bayulgen and George, 2003; Higley and Burton, 2006; Way, 2015a). The strong division of domestic elites in EaP countries is for instance reflected in the lack of a consensus on the general goals of development and transformation. The BTI "consensus on goals" indicator, which measures the extent to which "the major political actors agree on democracy and a market economy as strategic, long-term goals" suggests that domestic elites have been much more divided and conflictual in the EaP region (which are assessed with 5.5, a score in the median range), in comparison to the more united political elites in the Baltic States which obtained a relatively high average value of 9.0 for the period 2004-2014, on a scale from 1 (worst) to 10 (best). In his analysis of anti-corruption reform effectiveness, Kupatadze argues that "Successful reform effort in Estonia hence was led by a structurally- and ideologically-cohesive, integrated, and young political elite lacking a communist background. This guaranteed consensus over goals…" (Kupatadze, 2016, p. 16). By contrast, the lower elite cohesiveness in the EaP countries (especially in Ukraine, Moldova and partially also in Georgia), which was rooted in the polarization over core values and national identity (Way, 2015a), resulted in more frequent power struggles and harmful political competition over reforms and geopolitical orientation.

(3) *Political competition* is seen by some authors as beneficial, because it provides a guarantee and constraint on the governing parties, resulting in more independent judiciaries, constitutional courts and other oversight institutions (Grzymala-Busse, 2007; Ginsburg, 2003; Morlino and Sadurski, 2010). However, under certain conditions (e.g. of social fragmentation, weak institutional

constraints, geopolitical in-betweenness etc.), political competition can turn into *detrimental* political competition,[12] affecting judicial independence negatively. Maria Popova has argued (and shown) that in hybrid regimes (semi-authoritarian regimes and defective democracies), "competition has the exact opposite effect on judicial independence that it purportedly has in consolidated democracies: it hinders rather than promotes the maintenance of independent courts...The consequences are the politicization of justice, the subordination of the courts to the executive, and the failure of the rule of law project." (Popova, 2012, p. 3).

Intensified and detrimental political competition has been regularly observed in the EaP region (Ukraine, Moldova, Georgia), where pro-Western and pro-Russia (or nationally-oriented) oligarchs have engaged in harmful power struggles. These countries also experienced "revolutionary coup d'etats" (coloured revolutions) (Lane, 2010) which were followed by erratic reforms and counter-movements. Azerbaijan and Armenia, by contrast, avoided this kind of excessive instability and fragmentation, and turned into more authoritarian regimes that abused the rule of law. Thus, both too much centralization and too much fragmentation had pathological consequences the rule of law. Why? Under authoritarian regimes (Azerbaijan, Armenia), unchecked governments and presidents were able to instrumentalize externally-demanded rule of law reforms by centralizing control over the prosecution and anti-corruption structures. The empowered executive and presidential administration was then able to discipline political rivals and consolidate power (Börzel and Pamuk, 2012, p. 89). In more competitive and pluralistic political systems (Ukraine, Moldova), rival domestic political elites have instrumentalized the law (Lucas, 2015) and state structures (the prosecution, the judiciary, horizontal accountability institutions and regulatory agencies), thus transforming them into "political weapons" (Maravall, 2003) in struggles for power, influence and capital. Judicial and accountability structures therefore became polarized and fragmented in nature. They have learnt to shift their loyalties and to calculate strategically as a result of political pressure and intimidation. Thus, in EAP countries, horizontal accountability structures (e.g. Constitutional courts, Ombudsmen, judiciary) never acquired the necessary unity, independence and capacity as analogous oversight institutions in the Baltic States. In Ukraine (as well as in Moldova), weak and politicized constitutional courts were paralysed by the political struggles of competing oligarchs (Marlino and Sadurski, 2010, p. 191). Judges have often chosen a "strategy of survival" in an instable, competitive social and political environment in which "everything can be negotiated" through political deals, clientelism and corruption (Natorski, 2013, p. 365). This survival strategy of judges became even more necessary after the

[12] This qualitatively lower political competition, which Lucan Way calls "pluralism by default", is the consequence "…of a fragmented and polarized elite and weak state unable to monopolize political control" (Way, 2003, p. 463).

violent events from the Euromaidan when intimidation and violent attacks on judges increased[13].

In Ukraine (but also in Moldova and partly in Georgia), detrimental political competition resulted in frequent reforms and counter-reforms and (re)negotiation of constitutional arrangements (Fisun, 2016) to be able to preserve power and control over judicial and prosecutorial institutions. Petrov and Serdyuk argued that "The judiciary in Ukraine has been used to protect and promote political interests and objectives of both change agents and veto players" (Petrov and Serdyuk, 2009, p. 206), an important observation which shows that independently of who is in power, old governing practices die hard.[14] This persistence of former governance habits (including the resort to clientelistic and informal practices) can also be observed in Moldova (see Mendelski, 2014). State capture (Hellman et al., 2003), that is "the efforts of firms to shape the laws, policies, and regulations of the state to their own advantage by providing illicit private gains to public officials",[15] has become a persistent phenomenon in countries where competing oligarchs instrumentalized state institutions for their particularistic interests (Tudoroiu, 2015; Kupatadze, 2009). Law and accountability structures, which in the consolidated Baltic democracies function as constraints, became instruments in the hands of powerful party leaders, who were able to accumulate more unconstrained power. What about foreign checks on domestic reformers? This issue is addressed next.

(4) The *partisan empowerment* of pro-Western elites (in Ukraine, Moldova, Georgia) by EU and US representatives, on the one hand, and Russia's support of Eastern-oriented domestic elites, on the other hand, exacerbated detrimental political competition, intensified political (and violent) conflicts and societal divisions. Potential foreign accountability mechanisms, such as EU conditionality, which could have disciplined domestic oligarchs, became inconsistent, selective and ineffective (Schimmelfennig, 2015; Börzel and Van Hüllen, 2014; Kubicek, 2016). To counter Russia's geopolitical influence in the region, the EU (as well as the US) empowered and supported the most powerful "change agents", no matter how undemocratically they behaved (Mendelski. 2016). Giving reform ownership to domestic elites with vested interests (such as pro-European oligarchs in

[13] See http://www.coe.int/t/dghl/cooperation/ccje/textes/OP18_Ukraine.pdf.; http://www.coe.int/t/dghl/cooperation/ccje/textes/CCJE_GT_2015_4E.asp; http://www.coe.int/t/dghl/cooperation/ccje/Cooperation/Comments_Ukraine_May_2015.pdf.

[14] The statement of Vadim Cherny, an Odessa businessman is telling: "Yanukovych's people thought they would be around for years to come, so they would come and tell you they want half the company…. These new guys view themselves as transitory, so they try to steal as much money as possible from you in cash. They haven't got rid of corruption; they have just changed its form." https://www.theguardian.com/world/2016/may/25/mikheil-saakashvili-ukraine-government-has-no-vision-for-reform-odessa.

[15] See https://www.imf.org/external/pubs/ft/fandd/2001/09/hellman.htm.

Moldova and Ukraine, authoritarian leaders in Caucasus countries) (Börzel and Pamuk, 2012) can be highly problematic for establishing the rule of law. Change agents in weak rule of law countries often lack the appropriate incentives, norms and skills to conduct reforms in a non-politicised, inclusive and long-term oriented way. Instead of respecting the rule of law, many of the EU's reformist change agents from the EaP states, have (mis)used the law and the judicial system as a weapon against their political and economic competitors who, once in power, behaved in a similar way (Popova, 2012; Börzel and Pamuk, 2012; Natorski, 2013; Burlyuk, 2015; Mendelski, 2015). The results of these domestic power struggles are vicious cycles of reform and counter-reform with detrimental effects for the rule of law and, in particular, for legal stability, judicial independence and accountability. By empowering questionable and unaccountable pro-EU elites (e.g. Shaakasvili in Georgia, Filat and Plahotniuc in Moldova, Poroshenko, Tymoshenko and Yushchenko in Ukraine) and by giving them a free hand in conducting reforms without the necessary restrictions has created new possibilities of abuse of power and of rule of law reform. Reforms and support of pro-Western change agents do not automatically mean progress, especially under unfavourable conditions with insufficient institutional or democratic checks to control reformers (see Mendelski, 2015; 2016).

A telling example of the EU's partisan empowerment strategy with pathological consequences for the rule of law comes from Moldova (see Mendelski 2016). Here, the EU has supported reformist "change agents" from the Alliance for European Integration (AEI) who undermined the rule of law in practice. Transgressions of the rule of law of reformist Moldovan change agents were reflected in politicization, division,[16] and state capture (Tudoroiu, 2015), as well as in several criminal scandals that were related to the abuse of the rule of law (e.g. "Padurea domneasca", theft of one billion USD), misuse of courts in corruption scandals and "raider attacks" (fraudulent take-overs of companies and banks), and non-registration (elimination) of the main political competitor (the Patria party, led by Renato Usati), allegedly through pressure on the Central Election Committee and arbitrary justice[17].

The EU's tacit and active support (in particular the Commission and the EU delegation) contributed to this pathological development (Mendelski, 2016). Despite the instrumentalization of reforms and judicial structures, EU, US and IMF representatives continued to meet and support questionable reformist leaders (pro-

[16] The division of state structures among AEI leaders was documented in a secret appendix to the official alliance contract forming the political alliance.

[17] While the chief of the EC delegation in Chisinau expressed "deep concern" about the exclusion of the Patria party three days before the election, the EU's progress report from 2015 assessed this apparent abuse as a "deregistration", without any further comments. See http://imrussia.org/en/analysis/world/2121-moldova-eu-integration-at-all-costs and https://eeas.europa.eu/enp/pdf/2015/repulic-of-moldova-enp-report-2015_en.pdf.

Western oligarchs) from the AEI, for instance, former Prime Minister Vlad Filat (who was recently sentenced to 9 years of prison) and the controversial businessman and former first Deputy Speaker of the Parliament of Moldova, Vlad Plahotniuc[18]. According to my interview with a representative of the EU delegation, the EU granted and prolonged "honeymoon" periods. These were transitory periods after the regime change in 2009 during which leaders from the Alliance for European Integration (AIE) had free rein to bolster their power, which, however, turned some years later into too much unchecked power and abuse. The partisan support by the West of reformist AIE leaders was reflected, for instance, in the official meetings and support from EU and US representatives,[19] as well as in very close personal relations with EU and US diplomats,[20] allowing them to obtain a carte blanche or "deal among friends" (see Belloni and Strazzari, 2014). This, in turn, reduced accountability and opened up possibilities of undermining the objective assessment and promotion of the rule of law, as well as the fight against corruption. By praising the reform "success story" of the AIE, the EU has supported a pro-EU reformist group that used questionable means of governing and reforming and that experienced shrinking legitimacy and public support[21]. As a consequence, Moldova's "success story" has turned into the "EU's failed success story", or a "story of failure for the EU's Eastern Partnership", as admitted even by liberal voices such as Kalman Mizsei and Armand Gosu[22].

Partisan empowerment by the EU and the US was also practiced in Georgia after the Rose revolution in 2003. The new president Saakashvili, a US-educated lawyer, launched a zero tolerance policy towards crime and corruption which was hailed by the World Bank and liberal representatives in EU institutions as a constructed "success story" (Di Puppo, 2014) which hardly deserved this label.[23] Externally-driven reforms aimed, among other things, to liberalize the legal and judicial system by transplanting common law elements (e.g. plea bargaining). This reorientation of a predominantly continental legal system which, up to 2003, had been built through the collaboration between German and Georgian judges and with the help of the Deutsche Gesellschaft für Internationale Zusammenarbeit

[18] See http://www.trm.md/en/politic/premierul-vlad-filat-in-vizita-de-lucru-la-bruxelles/.

[19] See http://inprofunzime.md/stiri/politic/tot-mai-des-in-public-vlad-plahotniuc-a-participat-la-receptia.html; http://www.trm.md/ro/politic/premierul-vlad-filat-in-vizita-de-lucru-la-bruxelles/; http://www.romania.mfa.md/news/482405/; http://www.europalibera.org/a/24413712.html.

[20] Interview with a former advisor to the government of Moldova.

[21] Interview with Moldovan judges and civil society representatives, Chisinau 2011.

[22] See http://www.moldova.org/en/moldova-eus-failed-success-story/; http://www.hotnews.ro/stiri-opinii-20709654-analiza-republica-moldova-cosmarul-continua.htm. See also Kostanyan, 2016.

[23] Interview with an international legal advisor to Georgia.

(GIZ), became eroded and fragmentized when new, US-trained young judges and prosecutors were appointed in key positions and promoted the introduction of common law institutions.[24] For instance, the new "legal transplant" of "plea bargaining" (which was introduced to support the fight against corruption), turned into a "legal irritant" which did not function as intended (Alkon, 2010). Instead of improving justice, plea bargaining strengthened the role of prosecutors, increased incentives for torture and degrading treatment and turned into a means of extorting money from (wealthy, high profile) defendants who were forced to pay large sums to avoid torture and criminal conviction (Reichelt, 2004)[25]. The deficient application of plea bargaining also undermined the impartiality of the judicial system because solvent defendants received a more lenient punishment than insolvent ones. This lead former Supreme Court judge Tamara Laliashvili to conclude that plea bargaining, which has been introduced by reformers to fight corruption, has developed into a "corrupt institution" itself (Laliashvili, 2013, p. 240).

Given that the glorified fight against corruption and crime in Georgia under Saakashvili was subject to selectivity, abuse and politicization (Di Puppo, 2010; Beselia, 2013), to disciplinary proceedings[26] and dismissal of judges who refused to be docile executors (Laliashvili, 2013),[27] and an increase of prisoners by approx. 400% between 2003 and 2011 (including several hundred of political prisoners and incidents of torture) (Beselia, 2013), it is perplexing that this abusive reform policy has been tacitly backed by liberal US and EU representatives (as well as by the World Bank and numerous NGOs), who supported the authoritarian change agent openly. Thus, Georgia's "escape" from Soviet legacy through Europeanization (Kupatadze, 2012, p. 30) and particularly the fight against corruption was at best a partial success (in terms of outcomes) with severe limitations of the reform process[28].

Is there a systematic failure of the EaP due to partisan empowerment of questionable, pro-Western elites? Nowadays, there is more and more evidence that

[24] Telephone interview with a former high ranking judges from Georgia.

[25] By 2006, the Georgian State had recouped approx. 50 to 60 million USD through plea bargaining. The son in law of Ex-President Shevardnadze alone paid back 30 million USD. https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11100&lang=en#P407_73546.

[26] See http://www.civil.ge/eng/article.php?id=11305.

[27] See https://jamestown.org/program/judges-allege-that-saakashvilis-team-is-purging-georgias-judicial-bench/.

[28] In Ukraine, Shaakashvili was appointed governor with the task to "clean up Ukraine" of corruption and had to resign after several months in office due to resistance by domestic oligarchs, but also due to his erratic, selective and authoritarian reform style. http://www.nytimes.com/2016/11/17/opinion/why-ukraine-is-losing-the-war-on-corruption.html; https://www.theguardian.com/world/2016/may/25/mikheil-saakashvili-ukraine-government-has-no-vision-for-reform-odessa.

the so-called "successful cases" Georgia (under Saakashvili), Moldova (under the Alliance for European Integration) and Ukraine (under pro-Western oligarchs) were unsuccessful cases in which empowered pro-Western reformers abused their power and undermined the rule of law. This failure is reflected in a plethora of scandals and abuses of power on which the EU (and the US) has turned a blind eye: (1) the billion dollar theft and 20 billion money laundering scandal in Moldova under the AIE; (2) the dismissal of constitutional judges, prosecutors, police, through a controversial lustration law in Ukraine and the violent attacks and selective prosecution of judges, journalists and opposition members after the Euromaidan (Katchanovski, 2016); (3) the banning of opposition parties (Patria party in Moldova and communist party in Ukraine); (4) the embezzling of foreign (IMF) funds in Ukraine and individual corruption scandals of pro-Western oligarchs (in Moldova and Ukraine) (Kudelia, 2016); (5) the authoritarian and politicized fight against corruption/crime in Georgia under Saakashvili (including selective prosecution, abusive plea bargaining deals, torture scandals etc.). All these incidents reflect the pathological consequences of previous politicization and concentration of power in the hands of empowered pro-Western elites. Rather than preventing these abusive practices, the EU's positive and partisan assessment and support of change agents and its weakening of the opposition (as actors of oversight), has actually opened the way for abuse of power, including the instrumentalization of law, state structures and oversight institutions (see Börzel and Pamuk, 2012; Burlyuk, 2015; Tudoroiu, 2015; Kuzio, 2016a; Mendelski, 2016).

(5) As a consequence, partisan empowerment and assessment by the EU has resulted in the reinforcement of several *reform pathologies of Europeanization*:

1. Detrimental political competition has reinforced politicization and polarization of the judiciary and accountability structures (e.g. Constitutional Court), which were not able to act as neutral enforcement and oversight parties. This opened up possibilities for political abuse and resulted in a lower level of *judicial impartiality*.
2. *Formal legality* (stability, coherence, generality and enforcement of law) has been weakened by detrimental political competition between opposing and empowered reformist (pro-Western) and anti-reformist, Russian-oriented factions (oligarchs) which instrumentalized law to propagate the interests of their supporters from abroad. This domestic struggle for power (fuelled by external conditionality) has increased political instability, polarization, fragmentation of the legislating process and of the legal framework (Lucas, 2015). The EU's (and other donors') constant pressure for reforms and insistence on quantitative "track records" (outputs) has reinforced legal instability. The unintended pathological results of quantitative incentives were speedy and ad-hoc, legislating without a democratic, domestically legitimate debate. In

addition, the diverse backgrounds, agendas and priorities of external donors produced a fragmented and incoherent version of legal pluralism, with all its pathological effects for the functioning of the judicial system and business.

The process of legal fragmentation (incoherence) can be portrayed in the example of private law in Ukraine which has evolved into a dual and fragmented structure (due to historical and more recent geopolitical and political divisions) (Logush, 2011). The dual structure of private law basically means that similar issues are regulated by two different and incompatible codes: 1. the Western-modeled Civil Code of Ukraine and 2. the traditional Russian-inspired, Economic Code of Ukraine. This means in practice that judges from Western Ukraine tend to utilize the Civil Code (including Western-inspired manuals for interpretation), whereas judges in Eastern Ukraine make predominant use of the Economic Code.[29] Ukraine's dual nature of law and its non-unitary and parallel application has in turn produced conflict, duplication, contradictions (Shishkin and Drobyshev, 2007) and "serious difficulties in everyday legal practice" (Hoffmann, 2016). Rather than creating a unified Code, the dual and fragmented nature of private law is maintained and propagated by two different legal and political factions which cannot agree on a unified Code. This is lack of consensus and the polarization of domestic actors is exacerbated by partisan support and pressure from the West (US-Ukraine Business Council, OECD), which advocates for the abolishment of the Economic Code[30], and by Russia which tends to defend it.

Finally, the identified pathologies should not only be seen as short-term, temporary side-effects of externally and executive-driven judicial and legal reforms, but as long-term, systemic pathologies that are repeated in every new wave of reform by reformist change agents and anti-reformist veto players. Thus, by going through several waves of reform and counter-reform, the fragmented and instable structure of the polity, the economy and law (structural heterogeneity) becomes preserved as a systemic deficiency.

(6) Overall, many crucial aspects of the rule of law have not been improved in the EaP region. EU-driven judicial and anti-corruption reforms did not bring the rule of law. The backing of unaccountable reformers resulted in some selective positive but mainly pathological consequences. The domestic struggles over (politicized) reforms intensified political and societal conflicts and reinforced the fragmentation of the polity, society and economy. Thus, externally-driven reforms

[29] In Georgia (as well as in the Baltic States), this fragmentation of law and division of magistrates was initially avoided by replacing Soviet–inspired legal literature through Western and in particular German legal textbooks. However, a new generation of Americanized politicians, legal scholars and judges who promoted the common law system after the Rose Revolution and eroded German-inspired continental law reinforced legal pluralism and fragmentation. Interview with a former high-ranking Georgian judge.
[30] See http://www.usubc.org/files/White_Paper_Nov_18_15_ENG(1).pdf.

were not transformative. They have accentuated divisions and reproduced a fragmented and instable social order.

What remains to be explained is how the Baltic States avoided this detrimental vicious cycle and why some of them (especially Estonia) even produced a virtuous reform cycle that consolidated the rule of law? This better outcome is puzzling, as structural and historical preconditions were similar. Both groups of countries were part of the Soviet Union and thus affected by the communist legacy (Jowitt, 1992; Ekiert and Hanson, 2003). Both, the EaP and the Baltic states show considerable social and particularly ethnic fragmentation, which is even higher in Estonia and Latvia (approx. 25-30 % are ethnic Russians) than in most EaP countries. How did the Baltic States overcome detrimental political competition and fragmentation including its pathological consequences for the rule of law? The answer is unorthodox and goes against the popular liberal view of according minorities their political rights, thus being consistent with the work of Carl Schmitt (Schmitt 1932) who argued that a unitary state can (and should) be created (through the mobilization against an enemy) to overcome pluralist fragmentation and abuse of the pluralist party system.

Indeed, all three Baltic states managed to create stable, unitary states (in contrast to more fragmented and weak states in EaP countries), although strategies varied. On the one hand, Lithuania managed to build a relatively coherent and unitary state without excluding minorities. The state-building process was facilitated by its relatively homogenous nation, which included only a relatively small Russian minority (8.7% in 1993) which was granted full citizenship (Steen 2000). On the other hand, Estonia and Latvia achieved political unity and overcame ethnicity-based fractionalization, by pursuing a nationalistic, anti-communist, anti-Soviet strategy ("the enemy") which resulted in a high degree of elite replacement after the fall of communism (see Kalnins, 2015) and an exclusion of ethnic Russians and non-citizens from politics and state institutions (including the civil service, judiciary, prosecution etc.) (see ECRI, 2008, p. 33). Anton Steen, who has analysed the proportion of minorities represented in the parliament and the public sector, reports the following figures for the Baltic States in the 1990s:

In the state bureaucracy and judiciary, the indigenous elite has an overwhelming majority in all three countries, standing at between 90 and 100 per cent in 1993-94 and 1997. Regarding the basic democratic institution, in Estonia no Russians were elected to the first parliament, while five Russians out of 101 deputies were elected to the second parliament. In the Latvian parliament (the Supreme Council) elected in 1990, 28 per cent were Russophones (22 per cent ethnic Russians). The first ordinary parliament elected in 1993 had 12 nonindigenous deputies out of 100; in the next parliament, elected in 1995, the number decreased to eight, among whom five were ethnic Russians. In Lithuania's first parliament, elected in 1992, among 141 representatives there were three

Russians and seven Poles, amounting to eight per cent of the deputies (Steen, 2000, p. 74).

More recent data from Latvia and Estonia, my personal interview with an ethnic Russian judge from Latvia and several estimates indicate that the Russian minority continues to be underrepresented in almost all ministries (except the ministry of interior), the parliament, civil service, prosecution and the judiciary. In Latvia, for instance, out of 307 judges, only 18 (i.e. 5.9%) were Russians in 2001. A similar figure was reported for the Ministry of Justice (Pabriks, 2002). In 2008, approx. 12 % of all judges and 6 % of all prosecutors were non-Latvian (Buzayev, 2013, p. 143). Similarly low figures were reported for Estonia in 2001 (Open Society Institute 2002, p. 233). How could this disproportionality be explained and what about its effects?

The overrepresentation of indigenous elites inside the state can be attributed (among others) to a unifying nationalist strategy of "ethnic control" in Estonia and Latvia (Pettai and Hallik, 2002). This national ideology of "partial exclusion", which restricted in practice the fundamental rights (including the right to vote[31]) of many ethnic Russians through restrictive citizenship legislation from 1992 (Steen, 2010), which put the Russian parties in "eternal opposition", had (next to multiple negative) one main positive effect: it avoided detrimental political competition (Pettai, 2005) and limited the EU's and Russia's "fractionalization power"[32]. Hence, politicization, partisan empowerment and misuse of state structures by rival elites have been mostly avoided. The beneficial consequences were a more independent, unitary and accountable judiciary, prosecution and horizontal accountability structures (e.g. Constitutional Courts, Ombudsmen), which could in turn check the (potentially abusive) reformers from the executive, however not in an activist but more restrained way. The ensuing system of multiple mutual checks & balances opened up the way for non-politicized judicial and anti-corruption reforms and a steady and unipolar orientation towards the West, in contrast to the bipolar and erratic orientation of the EaP countries (Dragneva-Lewers and Wolczuk, 2015). In addition, there was also less instrumentalization of the law and the reform pathology of legal instability and incoherence was mostly avoided. Finally, coherent and steady political, legal and economic reforms in one direction were facilitated. Pettai argued that:

> "Estonia would have never been able to adopt such decisive political and economic reform in the early 1990s if power had not been so

[31] Pettai notes that "The first Riigikogu to be elected in 1992 was 100 percent ethnic Estonian, even though the population at large was only some 62 percent Estonian" (Pettai, 2005, p. 28).

[32] Note that in contrast to the unity of Estonians, the citizenship law from 1993 (new Aliens law) fragmented Russian-speaking people into Estonian citizens, Russian Federation citizens and stateless persons (Pettai and Hallik, 2002, p. 514).

> disproportionately in ethnic Estonian hands. Had Russian minority presence in Estonian politics been greater, there would have inevitably been more pressure to retain economic and political links with Russia…The aim to remove Estonia once and for all from Moscow's shadow would have been a dream. Rather, Estonia might well have ended up more like Moldova, wracked by inter-ethnic tension and caught in an ambiguous geopolitical gray zone." (Pettai, 2005, p. 29; Pettai and Hallik, 2002).

In EaP countries (above all, in Moldova and Ukraine), the in-betweenness and oscillation between the East and West (Korosteleva, 2016; Kuzio, 2016b) and the empowerment strategies of the EU and Russia's "managed policy of (in)stability" (Tolstrup, 2009) have produced divided domestic actors who pursued erratic political and rule of law reforms with pathological consequences for political stability, the rule of law, as well as the unity and strength of the state and society. Thus, by excluding a relatively large minority from political participation and representation in state structures, the Baltic States managed to overcome political fractionalization (Pettai, 2005) and factional organization despite their ethnic heterogeneity. The political leadership was thus able to mitigate polarizing conflicts inside the state and to establish political unity, which was followed by a consensus on EU and westward integration (i.e. in one direction).[33] This national unity and unipolar orientation avoided the polarizing and fractionalizing power of competing hegemons (EU, Russia) and facilitated the creation of the rule of law. In the words of Herbert Spencer, the Baltic States transitioned from "an indefinite, incoherent homogeneity toward a definite, coherent heterogeneity; through continuous differentiations and integrations" (Herbert, 1862, p. 216). They were able to build a consolidated and integrated state through partial exclusion and control[34].

5. Conclusion

The aim of the article was twofold: (1) To trace back empirically the impact of EU-driven reforms on rule of law development in post-Soviet states and (2) To explain rule of law divergence (including EU conditionality effectiveness) between the more advanced Baltic States and the laggard EaP countries. The findings suggest that the EU (together with the help of domestic reformers and international donors) had a positive impact on substantive legality (alignment of

[33] This better mitigation of ethnic conflicts in the Baltic States (in comparison to EaP countries) is reflected in the higher scores on the BTI Cleavage/conflict management indicator.

[34] How this relatively successful transition occurred has been subject to an international research project on anti-corruption (Kalnins and Mungiu-Pippidi, 2015; Kalnins, 2015; Kasemets, 2012).

legislation to international standards) and judicial capacity which increased, but undermined the inner morality of law (legal instability) and judicial impartiality. Rule of law divergence (and, in particular, the pathological effects of EU-driven reforms in the EAP countries) was explained through a vicious reform cycle in which structure, agency and the reform process reinforce each other in a circular way. In particular, I argued that social (structural) and ideological heterogeneity (in Ukraine, Moldova, Georgia) has produced divided and competing political actors (and fragmented state structures) which have instrumentalized legal, anti-corruption and judicial reforms (politicized the judicial system and accountability institutions) to defend their particular interests and those of their supporters from abroad. The partisan empowerment of these pro-Western reformers by the EU (and US) has resulted in the accumulation of misuse of power, numerous corruption scandals, the reinforcement of reform pathologies and in the overall undermining of the rule of law.

The Baltic States (in particular Estonia and Latvia) have escaped most of this kind of detrimental political competition and externally-reinforced divisions (by Russia and the EU) by creating a unitary, strong and coherent state (including independent judiciary) through the partial exclusion of ethnic Russians and their representatives from politics and state structures. This was done by a restrictive citizenship law which, among others, left a sizeable number of ethnic Russians stateless and constrained their rights to vote and to work in the civil service. This restriction of minority rights in Latvia and Estonia isolated the Russian-speaking minority from the polity, avoided legislative fractionalization and has, in turn, resulted in more united political elites. This consensual national political elite was then able to pursue a unipolar orientation (initially national, then European) which had one common vision (and not two as in most other post-Soviet countries). The absence of detrimental competition also allowed the creation of unified judicial and accountability structures which avoided being (mis)used as political instruments between different factions and could thus serve as constraints on reformers. As a consequence, the legal, political and judicial system in the Baltic States became more stable, coherent and functional. This contrasts with the bipolar aspirations (towards the West and Russia) of divided elites in EaP countries who seized reforms and state structures to advance their particular interests (and geopolitical interests of their foreign hegemonic powers). The politicized and erratic reform process (coupled with partisan external support) reduced accountability and the stability and coherence of law and state structures. Finally, a caveat must be acknowledged. The article did not deal with Russia's cross-conditionality and its impact on the rule of law. Future research should therefore explore Russia's influence (Tolstrup, 2014; Delcour and Wolczuk, 2015; Way, 2015b), including Russia's impact on the fragmentation of state structures, its partisan empowerment of domestic elites and the abuse of the rule of law by pro-Eastern oligarchs (Burlyuk, 2015; Popova, 2012; Kuzio, 2016b).

What implications does the study have for EU and domestic reformers? First of all, the examples of "ethnic democracies" (Estonia and Latvia) show that creating the rule of law may require sometimes unorthodox, non-liberal strategies, such as (1) building a unitary state by opposing a common enemy and (2) creating coherent and capable political and legal structures through the restriction of access to the polity of certain groups (minorities) with different political-economic ties, goals and interests. This *strategy of partial exclusion* creates (under certain circumstances) the necessary social identity and unity for a strong state (able to exert political control). A more unified state, without divided elites is then more able to avoid detrimental political competition, which is beneficial for the establishment of many aspects of the rule of law (except those of certain political rights). Thus, the transition towards the rule of law (understood mainly as formal legality and judicial impartiality) may entail measures that are not compatible with a liberal, pluralist and "thick" rule of law notion[35].

This does not mean that reformers should restrict the political rights of minorities and their representatives. It might be that the "successful" (peaceful) strategy of partial exclusion of Russians (as applied in Latvia and Estonia) was only possible during a short window of (national, geopolitical and historical) "opportunity" after the collapse of communism, i.e. during a unique constellation of circumstances which may nowadays not be replicable in EaP countries. In fact, under different social, (geo-)political and economic conditions, strategies of partial exclusion (and orientation away or towards one external hegemon) can backfire and lead to tensions and even violent, secessionist conflicts (as occurred in Transnistria, Gagauzia, Abkhazia, Nagorno-Karabakh, and more recently in Eastern Ukraine). The political elite in the Baltic States has avoided this violent outcome by offering their (Russian) minorities cultural rights as well as access to the (private) economic sector. Together with the relatively good economic development in the Baltic States (as compared to EaP States) the economic situation of minorities improved, assuring their acquiescence to exclusion from the polity.

The way towards a more consociational model of democracy (Lijphhart, 1977) based on a united and functioning state and the rule of law is however a challenging and gradual learning process. This transition process may require certain limits of alternatives, "beneficial checks" by accountability institutions on domestic and external reformers and adequate communication and cooperation structures that would be able to avoid the fragmentation of state structures and law and induce a more integrated political pluralism. I doubt that this transition

[35] The reason is that a broader, more liberal concept of the rule of law (which stresses democratization/pluralization) may lead (in divided societies) to detrimental competition of polarized elites that undermine the coherence of law and state structures. The outcome is then a persisting vicious cycle between structural/societal fragmentation, elite fractionalization and fragmented "bad governance".

process can be imposed from abroad by a strategy of partisan empowerment (especially if there are multiple competing hegemonic actors). Thus, I would advise the EU to become more consistent and non-partisan in its support and evaluation of governments. In particular, it should not grant "honeymoon periods" to pro-Western change agents after regimes changes (e.g. as in Moldova, Ukraine, or Georgia), particularly when they break or misuse the law, disrespect human rights, engage in corruption or instrumentalize anti-corruption and judicial reforms. Rather than focusing on regime change and a few selected liberal change agents, the EU should reward reformers who apply an impartial, depoliticised and inclusive reform approach, who foster domestic consensus and regard the law as a necessary constraint rather than a tool. While a rethinking of Western rule of law promotion is desirable, it is doubtful whether it is feasible under the current geopolitical circumstances. Do we have alternatives to the current strategy of rule of law promotion?

Instead of applying a fractionalizing strategy of partisan empowerment or risky partial exclusion, there is an alternative path towards the rule of law: A reform strategy of national political unity (absence of detrimental competition between elites) which would then potentially translate into a unitary, independent and impartial judiciary and non-fragmented, stable and impartially enforced rules. However, the individual transitional paths towards an integrated and coherent pluralism and the rule of law are considerably context-specific, due to their historical, political, socio-economic and geopolitical embeddedness. This implies that transplanting "best practices" from successful cases (Baltic States) may lead to unintended and even pathological consequences under different domestic conditions. Avoiding and mitigating reform pathologies, polarization and fragmentation should become the initial priorities of every reform. Only after building a unitary, stable and coherent core of legal, judicial and political structures (based on a common identity and generally accepted values), may an opening towards more pluralism be reasonable.

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