Rule of Law Diplomacy: Why the EU Needs to Become More Vocal in Georgia, Moldova, and Ukraine

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Rule of Law Diplomacy

Why the EU Needs to Become More Vocal in Georgia, Moldova, and Ukraine

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Supporting the rule of law has been central to the EU's Eastern Partnership (EaP) policy since 2009. There has been very limited success in this, however. The EU's core problem is what is usually its strength: addressing a highly politicized area through a technical approach. EU policymakers need to acknowledge that their political silence is permitting ruling elites in EaP countries to block progress in the rule of law and that the EU is failing to call out pervasive systems of informality there.

– **The EU should change its approach from focusing on the adoption of legal reforms to becoming more vocal about shortcomings in their implementation and holding ruling elites publicly accountable.**

– **To avoid being perceived as a lone actor in this, the EU should build coalitions with international partners such as the United States or the Council of Europe's Venice Commission as well as broadly defined local civil society.**

– **To ensure the legitimacy, appropriateness, and sustainability of progress in the rule of law, the EU needs to engage in a serious, transparent, public debate including the broader society beyond usual partners, including grassroots movements and whistleblowers.**

In recent years, the EU's eastern neighborhood has been marked by ongoing conflict with a more assertive Russia, the reemergence of Turkey as a power in the South Caucasus during the second Nagorno-Karabakh war, and democratic backsliding in almost every country. The coronavirus pandemic is another source of strain, with a strong socioeconomic impact on the region as well as on the EU's capacity to act. In this challenging environment, the EU is updating its policy for the Eastern Partnership[1] (EaP) again. This will culminate in a summit in late 2021.

One major area of concern for this update will be the rule of law (RoL), which, as a fundamental value of the EU, it has been a priority for the EaP since its initiation. The RoL is central to the EU's approach to the region not only in terms of its self-understanding and its conceptualization of democracy and human rights promotion, but also as a central principle of the Association Agreements it has concluded with Moldova, Ukraine, and Georgia or the Comprehensive and Enhanced Partnership Agreement with Armenia. The EU does not just see core RoL concepts – such as legality, the principle of judiciary protection, and an independent judiciary – as vital for a functioning system of checks and balances or ensuring fundamental rights; it also views them in terms of its economic interests, specifically to support "an investment-friendly business environment."[2]

In their 2020 Joint Communication, the European Commission and the European External Action Service acknowledged that progress in the RoL in the EaP countries has been unsatisfactory despite dedicating considerable resources this.[3] To move forward, the EU needs to understand why, despite progress on reforms, the RoL is still lagging. It should be ready to upgrade its efforts in Moldova, Georgia, and Ukraine, countries with which it has the closest relations in the region and where there is most potential considering their recent push for closer integration. To this end, evidence collected by DGAP during national consultations[4] in these three countries revealed that even though there are factors specific to each one of them, the political challenges that prevent meaningful progress on the RoL are shared. They are:

- *Insufficient political will and powerful veto players that stall implementation,*
- *Informality and weak institutions, and*
- *Lack of public trust in judicial and executive institutions as well as in political parties.*

These problems cannot be solved by the EU's current technical approach. Instead of trying to avoid the politics surrounding RoL reforms, the EU needs to become a vocal actor. This does not mean that its engagement with, for example, the judicial institutions of the EaP countries should be politicized, but that the EU should stop self-censoring and more boldly speak out about where the real obstructions lie.

It is clear that, in a region that is increasingly contested by powers such as Russia, China, and Turkey, the EU is careful to not push its closest partners away by publicly criticizing national elites. Therefore, it is important that the EU does not act alone but in coalitions with international actors such as the United States or the Council of Europe's Venice Commisson as well as with local civil society. The latter should be broadly defined as not only including civil society organizations (CSOs) and independent media but also grassroots civil society and the wider public. Working with a wide range of allies would add legitimacy to the EU's actions, avert allegations of dictating policies as a lone external actor, and develop a "sandwich effect" of simultaneous top-down and bottom-up pressure on elites. The RoL can be one of the EU's unique selling points to the broader public in the EaP countries, given that none of the competing powers there are credible in this area. Working with allies in vocally challenging the existing roadblocks would help raise the EU's visibility to this end.

1 Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.

2 European Commission, Rule of Law, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law_en (accessed June 16, 2021).

3 European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Eastern Partnership Policy beyond 2020: Reinforcing Resilience – an Eastern Partnership That Delivers for All, 2020, https://ec.europa.eu/info/publications/joint-communication-eastern-partnership-policy-beyond-2020-reinforcing-resilience-eastern-partnership-delivers-all_en (accessed April 23, 2021).

4 The national consultations were closed-door meetings of civil society actors, legal professionals, EU policymakers, and officials from national and international institutions, conducted in February 2021 as part of the Network of Think Tanks on the Eastern Partnership, supported by the European Union. The consultations form the main source of evidence for this policy brief.

DEADLOCKED IMPLEMENTATION DUE TO INSUFFICIENT POLITICAL WILL

Although the EU's push for reform motivated the EaP governments to commit to improving the RoL, to adopt relevant laws, and to create new institutions, none of them has showed sufficient drive for implementing systemic reforms.

While many of the key RoL processes are in place in Georgia, they suffer from the country's deep political and state capture by elites connected to the ruling Georgian Dream party.[5] The picture is similar in Moldova where the judiciary enjoys independence and accountability on paper, but governments have long failed to empower the relevant institutions. The discrepancy between what judicial and anti-corruption reforms seem to promise and the continued reality has been argued to be starkest in Ukraine.[6] While the country's legislation is generally viewed favorably, practices are worrying. One example was the dismissal of Ruslan Riaboshapka, a pro-reform prosecutor general, which was viewed by CSOs as a move to obstruct systemic changes.[7]

Political leadership on the RoL issue is lacking, and there is a lack of strong pro-reform legal elites that could advance implementation. At the same time, reforms primarily resulted from international pressure rather than domestic political drive and may put a gloss of legitimacy on an ineffective system. In short, the adoption of reforms says little about their actual application. There is no political drive behind implementing the necessary radical systemic changes. On the contrary, there is a consensus among elites that the RoL would weaken their grip on power. The absence of accountability stands at the core of the political system and promoting the RoL implies challenging this system.

To some extent, the lack of political will by governments in the three countries can be addressed by a stronger use of EU leverage and conditionality. This pressure is particularly valuable to push for the adoption of reforms but also in times of crisis. For example, earlier this year the threat of financial repercussions helped to at least temporarily freeze the political crisis that erupted after the last parliamentary elections in Georgia. The EU, as the largest donor in the three countries, can demonstrate to political elites that the significant benefits from cooperation with it are not unconditional. However, while the use of economic leverage by the EU and its member states will be important in the shorter term, it is unlikely on its own to resolve the underlying systemic issues that exist in the three countries.

INFORMAL SYSTEMS RESIST FORMAL SOLUTIONS

Lack of political will in the EaP countries arises at least in part from deep issues that encompass a large variety of veto players in judicial and economic elites. The countries continue to be marked by pervasive systems of informality – that is, activities beyond or circumventing state regulation[8] – such as oligarchic control and corruption.

Informal systems are most visible in the political circles of the three countries. Georgia has been characterized as a captured state under Bidzina Ivanishvili, the billionaire de facto leader of Georgian Dream.[9] The ties of former president Igor Dodon, the leader of the Party of Socialists of the Republic of Moldova to Russian oligarch Igor Chayka, among others, have been widely debated.[10] Ukraine's President Volodymyr Zelensky, while running for office by campaigning against oligarchs and working against oligarchs not favorable to him such as Viktor Medvedchuk, was supported by the funding and media power of oligarch Ihor Kolomoisky.[11] Oligarchic power networks and

5 Transparency International Georgia, *The State of the Judicial System* 2016-2020 (2020), https://transparency.ge/en/post/state-judicial-system-2016-2020 (accessed April 28, 2021).

6 Jonathan Katz and Olena Prokopenko, "Biden Administration Support for Ukraine Is Strong but Is There a Partner in Kyiv?", German Marshall Fund of the United States, https://www.gmfus.org/blog/2021/03/31/biden-administration-support-ukraine-strong-there-partner-kyiv (accessed April 23, 2021); Mykhailo Zhernakov, "It's Time to Start Treating Ukraine's Corrupt Judiciary as a Criminal Syndicate", Atlantic Council, https://www.atlanticcouncil.org/blogs/ukrainealert/its-time-to-start-treating-ukraines-corrupt-judiciary-as-a-criminal-syndicate (accessed April 23, 2021).

7 Vlagyiszlav Makszimov, "Ukraine Prosecutor Gets Sacked, Raising European Concerns", *Euractiv*, March 6, 2020: https://www.euractiv.com/section/europe-s-east/news/ukraine-prosecutor-gets-sacked-raising-european-concerns (accessed April 22, 2021).

8 Tom Goodfellow, "Political Informality: Deals, Trust Networks, and the Negotiation of Value in the Urban Realm", *The Journal of Development Studies* 56, No. 2, pp. 278–94.

9 David Aprasidze and David S. Siroky, "Technocratic Populism in Hybrid Regimes: Georgia on My Mind and in My Pocket", *Politics and Governance* 8, no. 4, pp. 580–89.

10 Oktawian Milewski, "Challenging the status quo in Moldova. What now after Maia Sandu's victory?" *NewEasternEurope*, December 1, 2020: https://neweasterneurope.eu/2020/12/01/challenging-the-status-quo-in-moldova-what-now-after-maia-sandus-victory (accessed June 17, 2021).

11 Matthias Williams and Natalia Zinets, "Comedian Faces Scrutiny over Oligarch Ties in Ukraine Presidential Race", *Reuters*, April 1, 2019,

corruption also extend into the judiciary. Hence, promoting the RoL seriously would mean encountering immense opposition from different oligarchic groups, as diverse elites see their vested interests and personal security threatened by a potential independent judiciary, state prosecution, and law enforcement.

Vested interests frequently have an influence over vetting processes within the judiciary. In Georgia, the appointment process for Supreme Court judges has been criticized in this respect.[12] In Moldova, informality still plagues judicial institutions, as central actors within the judiciary are too often connected with corrupt elites.[13] Even those selected on merit can later become integrated into the prevailing system of informality. In Ukraine, while reforms of the High Council of Justice (HCJ) used to look promising, it is unclear whether the Ethics Council that selects its members can be effective. In its May 2021 Urgent Joint Opinion, the Venice Commission of the Council of Europe criticized that the chairperson of the HCJ should approve members of the Ethics Council, even though they would themselves be subjected to its assessment.[14] In addition, while it can be anticipated that the international experts involved in the reform of the HCJ may block the most evidently unsuitable nominees, some who appear suitable on the surface but are controlled by current judicial elites could slip through the net. Further, while important anti-corruption institutions such as the National Anti-Corruption Bureau (NABU) have been established, the public prosecutor is often reluctant to take high-level corruption cases referred by NABU to court. This means the bureau's actions are in vain – and elites know this.[15]

The EU is currently not able to stimulate change on the lack of political will and the underlying systems of informality in the EaP countries. Its technical approach does not have an impact on these issues for the simple reason that their formal procedures have little grip on systemic informality. Conditionality and economic leverage, while important to push for the adoption of reforms or solving crises, alone cannot change these underlying systems, especially if the incentives the EaP offers are not upgraded to offset the pressure by the great variety of political, business, and judicial elites to block progress on the RoL.

The EU cannot continue to pursue a primarily technical approach. Rather than self-censoring due to its fear of weakening the states and driving its three closest partners in the neighborhood into the arms of competing powers, it needs to become a more overtly political actor that speaks out about these problems and addresses them through political channels or diplomatic engagement. For this, the EU will need to rely on information provided by whistleblowers and it should therefore provide assurances for their protection. At the same time, to avoid standing alone in criticizing ruling elites, the EU can draw on a network of like-minded partners to increase the legitimacy of its criticism. This could include the United States, which has announced a renewed focus on democracy promotion, although the extent of this remains to be seen. It could also include a stronger and better publicly communicated cooperation with the Council of Europe and its Venice Commission. This would also help build the EU's visibility on the RoL for the wider public.

THE NEED FOR PUBLIC DEBATE

Public mistrust in the judiciary in the three countries is severe and is made worse by fruitless rounds of reform. In Ukraine, only 10 percent of respondents to a 2020 survey said they trusted the courts[16] – although actual participants in court cases declared themselves comparatively satisfied.[17] Meanwhile, in Georgia only 26 percent of respondents said they trusted the court system.[18] In Moldova, participants in the DGAP's national consultations went so far as to argue that lack of trust in judicial institutions amounted to disappointment with the RoL altogether.

https://www.reuters.com/article/us-ukraine-election-zelenskiy-oligarch-idUSKCN1RD30L (accessed May 28, 2021).

12 European Commission for Democracy through Law (Venice Commission), Opinion No. 1039/2021 (2021), https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2021)007-e (accessed June 17, 2021).

13 Viorel Morari, Grand Theft Democracy, Emerging EUrope, https://emerging-europe.com/voices/grand-theft-democracy (accessed April 23, 2021).

14 European Commission for Democracy through Law (Venice Commission), Opinion No. 1029/2021 (2021), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2021)004-e (accessed June 17, 2021).

15 Roman Olearchyk, "Judge in Spotlight as Ukraine's Anti-Corruption Drive Hits Buffers", *Financial Times*, September 15, 2020, https://www.ft.com/content/6ae2cc18-3509-4b87-a850-663e4dd702cb (accessed April 20, 2021).

16 National Democratic Institute, "Opportunities and Challenges Facing Ukraine's Democratic Transition" (December 2020), https://www.ndi.org/sites/default/files/December_2020%20public%20fin.pdf (accessed April 27, 2021).

17 Cristina Gherasimov and Iryna Solonenko, "Rule of Law Reform after Zelenskyi's First Year", DGAP Analysis, German Council on Foreign Relations (May 2020), https://dgap.org/en/research/publications/rule-law-reform-after-zelenskyis-first-year (accessed April 27, 2021).

18 Caucasus Research Resource Center, "Caucasus Barometer 2020 Georgia" (2020), https://caucasusbarometer.org/en/cb2020ge/TRUCRTS (accessed April 21, 2021).

MAP OF EUROPE WITH THE 3 ASSOCIATED COUNTRIES

To rebuild this trust, civil society must be more close-ly involved in monitoring reforms. Certainly, the EU could encourage the monitoring of RoL reforms by CSOs and amplify their findings. But, importantly, re-sults need to be publicized not to an EU and donor audience with technical knowledge on the topic, but to the broader public. They need to be published in lo-cal languages and in a way that is easy to understand.

The technical language surrounding RoL debates are at the base of a severe communication deficit with societies in the eastern neighborhood as this strug-gles to rally a wider public.[19] Yet rallying the public is vital for increasing scrutiny of governmental (in)ac-tion as well as for the legitimacy of any future re-forms. At the same time as the EU and like-minded actors push for reforms and their implementation, civil society in its broadest sense needs to exert pressure on the governments of Georgia, Moldova, and Ukraine. This "sandwich effect" of bottom-up societal pressure and top-down international pressure proved effective in Ukraine's 2014 Revolution of Dignity, where the forces of civic activism and inter-national pressure reinforced each other.[20] It should therefore be encouraged more systematically.

Transparent debates with the broader public in a language people understand will be vital. Indepen-dent media, CSOs, and experts can help. In addition, there is room for EU delegations to engage in trans-parent public discussions; for instance, through cit-izens fora or village meetings on RoL challenges. Not only can this help to increase the understanding of problems and build pressure on elites, it can also to develop context-specific solutions. Only by engaging with voices from the ground level, rather than stick-ing to a one-size-fits-all technical approach, can RoL reforms be legitimized and thus be sustainable. Im-portantly, open consultation with the broader public will increase the EU's visibility as a power that is will-ing to listen and be engaged. In doing so, the EU will also provide what powers such as Russia

19 Elena Korosteleva, "Eastern Partnership: bringing "the political" back in", *East European Politics* 33, No. 3, July 2017, pp. 321–37.

20 Miranda Rivers, "To Curb Corruption and Violence, the 'Sandwich' Effect", United States Institute for Peace (2017), https://www.usip.org/blog/2017/11/curb-corruption-and-violence-sandwich-effect (accessed June 17, 2021).

and China will not offer, a (comparably) credible push towards the RoL, as well as the willingness to listen to and learn from local perspectives.

For any of the above to be successful, the EU needs to clean up its own house and lead by example when it comes to the RoL. It needs to work more effectively against the attacks on the RoL in Poland, Hungary, and elsewhere as well as to enhance its efforts against corruption, money-laundering, and tax avoidance. Only then can the EU exercise credible pressure on the elites in the EaP countries.

RECOMMENDATIONS

1. *It is vital that the EU stops censoring itself in pointing out the actors that obstruct progress on the RoL. Rather than primarily offering technical solutions, it could publicly highlight political deadlocks. Here, the EU ambassador in each of the three countries should have the backing of the high representative for foreign affairs and security policy to be vocal. There could also be a more coordinated approach between member states, their embassies, EU delegations, and EU institutions. To identify and publicly challenge elite actors that block reforms, the EU will also have to rely on local whistleblowers, and it should therefore offer them protection.*
2. *To help build the necessary sustainable consensus within the three countries, the EU can cooperate with other multilateral institutions and democratic countries. While the Council of Europe and its Venice Commission also have to address internal weaknesses, they remain key institutions in this field. The United States under the Biden administration has also showed some renewed, albeit still very limited interest in democracy promotion in the region and it could become another vocal partner.*
3. *The "sandwich effect" will be crucial not only to create political will but also to promote a deep-rooted RoL culture. Therefore, it is vital to include a wider range of civil society actors more systematically. The EU could involve professionalized and grassroots civil society in the monitoring of reform processes. For CSOs, better access to EU representatives and a platform for communication is important. At the same time, the EU delegations could foster transparent debates on the RoL within the wider public at a truly grassroots level and in local languages.*

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