

The Rule of Law in the Eastern Partnership

An input paper by Pavel Havlicek, Association for International Affairs (AMO)

Presented at

The Network of Think Tanks on the Eastern Partnership Workshop

Taking Stock and Thinking Ahead: The Eastern Partnership Beyond 2021

Organized by the German Council on Foreign Relations, DGAP

Executive Summary

- The rule of law is one of the weakest points and a long-term challenge for the reform effort of the six Eastern Partnership (EaP) countries. Even if the EU has extensively invested in this domain and member states, including above all Germany, have prioritized it, the EaP elites have not delivered sufficiently on their promises and the rule of law keeps suffering from problems and is contested daily. In its recent [Joint Communication](#), the European Commission has recognized this problem and marked it as a challenge for the future EU orientation and resilience of the EaP countries.
- Based on national consultations with representatives of civil society, legal professionals, and state officials from Armenia, Georgia, Moldova, and Ukraine, this input paper summarizes the most serious challenges across these four EaP countries. They are: lack of political will and the role of veto players; problems with institutional setup, independence and accountability; implementation of current commitments and progress monitoring; and limited impact and efficiency of EU engagement.
- Because these challenges are complex, the EU needs to develop tailor-made, country-specific solutions, as proposed at the end of this paper. Some of these will require deeper political and diplomatic engagement with the EaP governments with stronger conditionality. Others are of a more technical nature, based on knowledge-sharing and capacity-building measures. Overall, the EU will need to substantially enhance its involvement and develop a more sophisticated, long-term approach rather than outsourcing progress in the rule of law entirely to EaP national governments.
- Most importantly, it is essential to see that the rule of law is part of good governance and resilience, which cannot flourish while the EaP countries suffer from security-related problems and internal instability. Their current political turbulences make significant improvement in the rule of law immensely difficult to achieve. This will require a [strategic and long-term approach](#) by the EU and a degree of political consensus among national elites around their country's pro-EU orientation and EaP agenda.
- This input paper was written as part of the [Eastern Partnership Think Tank Network](#) project coordinated by the German Council on Foreign Relations (DGAP) to stimulate a more focused policy debate on the next steps, innovative ideas, and adjustments for the EaP.

Introduction

Together with good governance, democracy, and human rights, the rule of law (RoL) has been since 2009 one of the founding principles of the Eastern Partnership (EaP) policy of the EU. References to the RoL; to independent judiciaries, prosecution, and law enforcement; and to the fight against corruption can be found in all EU strategic documents as well as each of the EaP summit declarations and the [20 Deliverables for 2020](#) working document. Over the years, the EU has invested substantial political and diplomatic capital and technical resources in promotion of the RoL in the EaP countries, implementing concrete reforms, capacity building, and knowledge sharing. While clearly aware of the different levels of ambition and feasibility of implementation in each of the national contexts, last year the EU recognized that RoL reform has largely been [disappointing](#)¹ and that much more needs to be done for the EaP countries to meet existing targets and obligations. This is a worrying sign, especially taking into consideration the underpinning nature of the RoL for other areas, including foreign direct investment, post-COVID-19 recovery, or sustaining a liberal democratic order.

In 2020 the RoL was singled out as a priority by Germany's presidency of the Council of the EU and the Network of Think Tanks on the EaP was launched by the German Council on Foreign Relations (DGAP) and the European Commission. Georgia, Moldova, and Ukraine, which have Association Agreements with the EU, as well as Armenia, with which the EU has a Comprehensive and Enhanced Partnership Agreement, have seen more RoL [advances](#) than Azerbaijan and Belarus, where the RoL is completely [failing](#). Thus, the former four countries were chosen as the focus for this input paper. In February 2021, DGAP organized national consultations in the four countries. Participants included representatives from civil society, national institutions, legal professionals, and officials from EU institutions and international bodies, including the Council of Europe. Their discussions focused on the state of progress in the RoL from a national perspective and proposed new solutions to the problems.

While the RoL situation is strongly context-dependent and each of the four countries is at a different stage of the reform process, they share several key challenges. Four main sets of issues stand out:

- Lack of political will and role of veto players;
- Problems with institutional setup, independence and accountability;
- Weak implementation of current commitments and monitoring of progress; and
- Limited impact and efficiency of EU engagement in the reform process of the EaP countries.

Constitutional and legal [crises](#) emerged in the four EaP countries despite the RoL being one of the founding principles of the associated agenda and the deep and comprehensive free trade agreements, under Platform 1 of the multilateral track of the EaP. It is also a [prerequisite](#) for a closer Euro-Atlantic integration and is highly placed among the 20 Deliverables for 2020² to which all EaP countries subscribed.

Thus, the RoL situation in the EaP countries is mostly perceived in EU member states as not [living up to expectations](#), in which the EU investment largely disappears or produces only mixed results. The quality of the judiciary, prosecution, and law-enforcement institutions are too slow to improve; the situation regarding [corruption](#) has stagnated or worsened; and the

¹ The European Commission's communication of March 2020 stressed "the need to significantly improve results in the governance area, notably rule of law, the fight against corruption and organized crime, and the role of an independent media and civil society."

² "Strengthening the rule of law and anti-corruption mechanisms" (Deliverable 9): https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/eastern-partnership_en.

institutional setup remains inefficient and frequently paralyzed by political actors and veto players outside of the official decision-making process. On the other hand, there has been an [upward trend](#) in basic reform indicators, including in the RoL – unlike, for example, among the accession states of the Western Balkans.

Addressing these issues will be crucial for the EaP's future, which will be determined following its summit in October. As proposed by the European Commission, the RoL should be placed under the second priority of "[A Partnership that protects](#)" with accountable institutions and security. While the RoL is politically and nationally sensitive and [challenging](#) even for the EU and its members too, there is a general feeling that a serious rethink is needed for the strategy and working documents that will follow the 20 Deliverables for 2020 agenda.

A Reality Check from the Ground

The EU reform push and associated agenda have led the EaP countries to subscribe to a number of commitments and policy pledges, as well as to establish new institutions. At the same time, there has been a broad consensus on the political limits to what is possible and on the importance of political will when investing in independent in the judiciary, prosecution, and law-enforcement institutions that are key for the RoL. The issue of reform implementation and delivering on the associated agenda has been repeatedly identified as a serious obstacle for any meaningful improvement in the RoL. Finally, the EU has been described as playing a highly normative role and being instrumental in bringing resources and know-how, but also as lacking efficient tools for practical implementation other than putting pressure on the national authorities. The "sandwich effect" – pressure on national authorities from the EU and other international actors as well as from the citizens, independent press, and civil society of the EaP countries – has sometimes helped reform implementation, as was the case in Ukraine after the 2014 Revolution of Dignity.

The EU policy of limited engagement in RoL reform and relying on national authorities has produced mixed results. It has been too often stymied by the lack of political will and/or veto players who feel threatened by independent legal processes and investigations that could undermine their position. That is why even concrete and ambitious reform plans, such as Moldova's Strategy for Ensuring the Independence and Integrity of Justice Sector and its action plan, have proved difficult to put in practice. The same applies to Ukraine's judiciary reform, which has suffered from [enormous pressure](#) for a reversal, [undermining](#) one of the most significant transformational processes in the country after the Revolution of Dignity.

Country-specific Contexts

In **Moldova**, the government agreed to establish an advanced institutional structure but did not want to empower it to operate in an independent, accountable, and trustworthy fashion. There is a [high level](#) of public [mistrust](#) of judiciary, prosecution, law-enforcement bodies, and of other legal institutions too. Therefore, the RoL still [requires](#) a comprehensive, profound, and transparent reform and vetting of its actors, primarily judges, who are too often connected with [corrupt elites](#). It is essential to promote not only the [independence](#) but also the accountability of the whole system, and to bring in new people into legal institutions who would challenge the status quo. The recent [political](#) and [constitutional](#) crisis only made things worse so far, even if it might later offer a way out of the current political stalemate.

In **Armenia**, the RoL reform process has been largely inefficient and incomplete. Even if some progress has been made in restoring trust in public institutions since the [Velvet Revolution of 2018](#), the country's leadership struggled with the constitutional reform, the role of the Constitutional Court, and creating new, transparent public institutions. Socioeconomic factors and the low integrity of judges and other legal professionals played a negative role when it

came to promoting the RoL and increasing the still very low [public trust](#) in the legal system. It is therefore necessary to invest in a holistic reform of the whole RoL architecture, since reform remains fragmented and insufficient, especially due to ongoing [political turbulences](#) and the recent war with Azerbaijan.

In **Georgia**, many of the key RoL processes and institutions are in place but they suffer from political pressure, polarization, and state capture by political elites connected to the Georgian Dream party and its leader Bidzina Ivanishvili. From a formal institutional point of view, the country should be doing well, but looking at the content, quality, and transparency of decision-making or the independence of its actors, the situation is [much more complex](#). As in Moldova, there are question marks over the accountability of legal actors since institutional independence – the primary focus of the reform approach – was not achieved to a satisfactory degree, as seen in the cases of the prosecutor general's office, the Supreme Court, or law-enforcement bodies. The lifetime appointments of the members of the Supreme Court and High Council of Justice remain a long-term issue.

Ukraine has the [most experience](#) in RoL reform of the four countries, but it also experiences pressure to [derail](#) progress from inside and outside the [system](#). Increasing [political pressure](#) and the integrity of judges and other legal professionals have been key issues, which the reform process has not resolved. Even if President Volodymyr Zelensky has tried to restart the reform process and earlier efforts were made to clean up the legal system – as in the case of Supreme Court, the High Council of Justice, the High Qualification Commission of Judges and other self-governing bodies – people from [within the judiciary](#) have managed to largely [block](#) the vetting of new judges. The ongoing judiciary reform has so far delivered only mixed results and the system proved resistant to a more robust reboot, including against the recommendations of the international community and the [Venice Commission](#). The recent [firing of the head](#) of the Constitutional Court by President Zelensky, attacks against anti-corruption institutions including the Anti-Corruption Bureau (NABU), or the earlier replacement of the pro-reform prosecutor general are only some examples of the ruling elite taking power back. The lack of leadership and of a reform-oriented legal elite inside the system is still a burning issue. Even more than elsewhere, in Ukraine there is a discrepancy between laws and their implementation.

Solutions and Future Opportunities

Because the RoL challenges are complex and often country-specific, the EU needs to develop tailor-made solutions to tackle them in the four countries. Some of these will require deeper political and diplomatic engagement as well as stronger conditionality, while others will require a more technical, knowledge-sharing, and capacity-building approach that would respond to the current state of the reform process in the country. In any case, the EU will need to substantially enhance its involvement in RoL reform and develop a more sophisticated approach, including when cooperating with civil society, rather than just outsourcing this to EaP governments.

Most importantly, it is essential that RoL be seen as part of the wider issues of good governance and resilience, which cannot flourish while the four countries suffer from security-related problems and internal instabilities. Their current political turbulences make significant improvement in the RoL immensely difficult to achieve. Especially since this is a highly sensitive area, which requires a [strategic and long-term approach](#) and a level of political consensus among the elites, RoL reform should be ideally built around the Euro-Atlantic agenda and the *acquis communautaire*.

Solution 1: Political will and the role of veto players

To counter the lack of political will in the four countries, the EU should introduce stronger conditionality and better incentivization according to the more-for-more (and less-for-less) principle. But this might not be enough due to the enormous pressure of political and business elites to slow down or block reform altogether. Therefore, other parties – including pro-reform legal experts and practitioners, civil society, public intellectuals, and opinion-makers – should be engaged in the debate on the RoL, which must be demanded by citizens too to exercise public pressure on the elites. The sandwich effect produced some meaningful results in the four countries in the past, but it has largely stagnated recently. It would also be useful to divide the veto players, who are difficult to tackle all at the same time, into clusters in a gradual process.

Solution 2: Institutional setup, independence, and accountability

Concerning the institutional setup, independence, and accountability of the RoL actors, the EU needs to deal with each of the four countries individually since substantial differences remain in their degree of implementation of the RoL acquis. In Moldova, the issue is more about filling the institutional structure with strong pro-reform leaders and a new generation of experts and legal professionals. Elsewhere, such as in Armenia, the challenge is in pursuing a holistic approach that would change the whole existing structure. Ukraine suffers primarily from political pressure, the hijacking of judicial reforms by elites, and a weak vetting process for new judges. In Georgia, it is the political control of institutions and the quality of the decision-making process that are worrying.

Even more frequently than the independence of legal bodies, accountability was mentioned as a widespread issue. Legal actors often lack sufficient credentials and a clean track record, and the internal vetting processes by the judiciary do not work in practice due to particular interests. This is a challenging task when it is essential to respect the division of three branches of power and keep the system balanced. But in countries where the system needs a complex restart, radical actions might be the only way out of the stalemate. It is necessary to have a strategic approach and a strong national consensus when trying to make holistic and radical changes (for example, external vetting of judges) since this cannot be repeated soon again. Learning from the experience, including mistakes, the post-socialist East-Central European or Western Balkans countries might be relevant.

A new generation of judges, prosecutors, and other legal professionals needs to be trained and “injected” in the system for a complete change of mindset and day-to-day practice. In smaller countries such as Armenia, Georgia, and Moldova, a few hundred such professionals could change the status quo. Diasporas can be mobilized for recruiting new elites and for sharing know-how and practical experience to help to restart the reforms. However, socioeconomic factors must be in place to incentivize this kind of involvement. The EU’s role might be highly instrumental here since it has some of the best legal education programs in the world; it could offer scholarship, training, and internship opportunities to help legal specialists gain and/or enhance professional skills and competences. The EU could also bring good practices from other contexts and help with transfer of know-how, as well as facilitate contacts with the Council of Europe and other international institutions specializing in the RoL.

Solution 3: Implementation of the current commitments and monitoring progress

A more detailed and better elaborated methodology for measuring progress in the RoL needs to be developed and to become a part of the EU’s engagement with the EaP countries. The [EU Score Card system](#), called for by [civil society](#), must be put in place in order to have a better and more objective picture of the progress or regress in the four countries. A proper

comparative review in each one should take place first, just as the European Commission invested in RoL monitoring across the 27 member states. With such an analysis of the current state of play, the EU can help develop country-specific recommendations and action plans, which will then need to be accompanied with resources as well as concrete and transparent preconditions for other areas. A “democracy and RoL first” approach might help to focus on this underpinning area of mutual cooperation. To support this, the EU delegations in each of the countries need to develop stronger RoL expertise. This should not be only outsourced to third parties, national governments, or other international actors, such as the Council of Europe, even if better synergies should be sought there too.

Solution 4: The impact and efficiency of the EU's engagement in reform processes

The EU needs to put together its limited resources and have a strategic and coordinated discussion with member states on where and how to engage in support of the RoL in the four countries at the EU and/or member-state level. Only through a more efficient approach can the EU deliver more and prioritize the RoL agenda where necessary. The EU should partner with the Council of Europe and its Venice Commission as well as the Conference of Constitutional Courts, currently presided by the Czech Republic, which might help to unblock some of the impasses such as in the case of Armenia and Ukraine.

At the same time, the EU needs to keep its [house](#) in order to show its own determination, concrete results and to lead by example with efficient work against corruption, money laundering, and tax avoidance among other problems. If it is a role model, the EU's policies and proposals will be taken more seriously and its normative power will be fully exercised. The efforts to defend or and rebuild the RoL architecture in the EU would be of interest to the EaP countries too.

Recommendations

The EU needs to apply stronger political conditionality and pressure on national authorities in the EaP countries and look for new ways to incentivize implementation of the RoL agenda. The role of civil society, journalists, and wider society – as seen in the sandwich effect – is of crucial importance to promote a RoL culture next to concrete policy measures. The EU should therefore increase investment into the communication of RoL reforms, including showcasing positive cases and professionals with a pro-reform mindset who challenge the system from within. This might also mobilize public demand for change.

The EU also needs to think anew about how to counter the role of veto players, who play an increasingly negative role, including by increasing the political pressure, dividing, or sanctioning them.

Additionally, a new training, exchange, and knowledge-sharing program should be developed for EaP legal practitioners and professionals to enhance the quality of the decision-making process as well as bringing up a new generation of pro-reform-minded leaders.

The EU should further invest in a complex review process of the existing RoL reform efforts, modeled on its own process for member states. Future engagement should be based on measurable targets and indicators. The EU must develop a new monitoring system and implement the EU Score Card system, which would clearly and transparently capture the real nature of the problem. In addition, a comparative element and exchange of best practice and know-how among the EaP countries should be in place.

The EU should also better balance the independence and accountability components within its approach towards RoL reforms, given that current debates have clearly prioritized the independence vector, which cannot work without fully fledged accountability.

International corruption and other malign activities affect the EU and the EaP countries alike. Their law-enforcement bodies, judiciaries, Europol, and the European Public Prosecutor's Office should cooperate, share information, and facilitate close contacts to fight these problems together for mutual benefit.

Specific attention should be dedicated to constitutional courts and constitutional law. This is a politically sensitive topic that needs to be approached carefully by international actors with sufficient expertise, including the Council of Europe and its Venice Commission or the Conference of Constitutional Courts, which are authoritative in this field. A more efficient cooperation with these actors should be sought.

The EU should also find new and more efficient ways of cooperating with the United States, especially given that the new U.S. administration aims to [prioritize](#) democratization, human rights, the fight against international corruption, and the RoL agenda. A better synergy and division of labor between them in the region is desirable.

Finally, the EU should restore its reputation as a normative and credible international actor in the RoL. If it is a role model, its policies and proposals will be taken more seriously in the EaP countries, and its normative power can be fully exercised.

Appendix: Quotes from the national consultations

National Consultation on Rule of Law in the Republic of Armenia

“The government launched an initiative for new constitutional amendments that also covered the judiciary.”

“Reform of the judiciary is currently stuck because of the Nagorno-Karabakh war and political instability.”

“The Armenian judiciary is typical for a high level of workload. Armenia’s judges to population ratio is three times lower than EU average.”

“Currently, there is no holistic conception on how the rule of law concept should work.”

National Consultation on Rule of Law in the Republic of Georgia

“Despite some reform progress in Georgia, the reality is more complicated, especially regarding the rule of law area.”

“After a radical approach in the beginning, the reform strategy has been changed often with negative results concerning the rule of law.”

“The EU needs to understand the difference between formal and informal rules; informal rules undermine the legal system.”

“A political consensus to elect the heads of important institutions is important to strengthen legitimacy of these bodies.”

“The EU should apply more effective pressure and present concrete steps for progress, similar to Moldova.”

National Consultation on Rule of Law in the Republic of Moldova

“Moldova does not have sufficient funds to ensure adequate salaries for judges and prosecutors and thereby prevent corruption.”

“An external vetting process is the only option to break the circle – more radical approaches are the only way forward.”

“Real change will require a long period of time, as the political class and will change only incrementally and sufficient stability will not come soon.”

“It would suffice to replace 300 of the circa 700 prosecutors in Moldova with students who are prepared with basics and promoted with scholarships and EU support.”

“We should take a step back and evaluate previous efforts. Maybe the EU needs to change its approach and tailor it further to the national context.”

National Consultation on Rule of Law in the Republic of Ukraine

“The new draft [law] concerning the High Qualifications Commission of Judges – which is in charge of judicial selection and evaluation, and important to ensure its accountability – is a step back.”

“Experience shows that the power to reform should not be put in the hands of those who are supposed to leave because they lack the necessary integrity.”

“While Ukraine and other EaP countries adopted the standard of a majority of judges sitting in judicial councils, this proves ineffective as the independence of these councils cannot guarantee accountability.”

“There are only few independent judges and whistle-blowers, who suffer from attempts to undermine their independence, and very few ‘good’ judges who publicly defend their independence.”

“Surveys showed that the EU had a rather positive impact on the reforms and their implementation.”