

# Why Is Progress Towards Rule of Law So Challenging?

The Cases of Ukraine and Moldova



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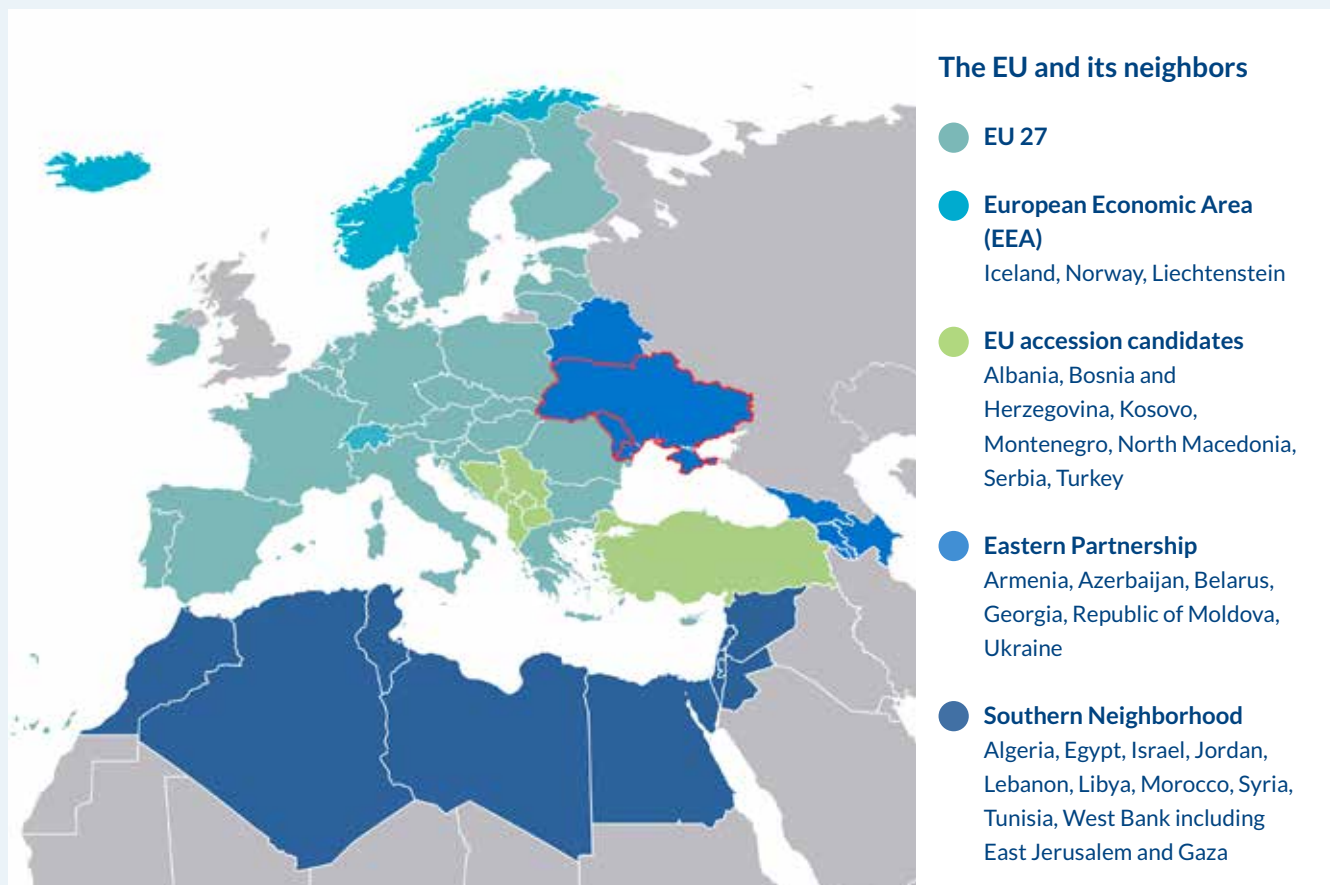
# 1. Instead of a preface: Why (read) this study?

... because it provides insight into how democratic spaces must be defended so that authoritarianism, injustice and corruption do not spread

In 2013/14, Ukraine found itself at a crossroads: Protests in the country's southern town of Vrdiyivka – ignited by the serious assault of a young woman, Iryna Krashkova, and the subsequent attempts by the state to shield the alleged perpetrators, who were civil servants – spread all the way to Kyiv. At that time, another appalling assault on another young woman, Oksana Makar of Myko-

layiv, was barely one year old. This case also exemplified the impunity enjoyed by members of the ruling class. The protestors' main demands were that civil rights should protect people from state authoritarianism and that those rights should apply equally to all Ukrainians.

Limited at first, the protests grew into the "Revolution of Dignity" after the Yanukovich government suspended the signing of an Association Agreement with the European Union and began using violence against the demonstrators. After all, many Ukrainians had



The Bertelsmann Stiftung project Strategies for the EU Neighbourhood focuses on countries bordering the European Union to the east and south

hoped that the institutionalized partnership with Brussels would make it possible to curtail the country's authoritarian tendencies and allow their country to become part of a democratic Europe.

This desire for Ukraine "to return to Europe" was the hallmark of the "Euromaidan" protests. Stung by the disappointments of the 2004 Orange Revolution, Ukrainian civil society became active as never before. Since 2014, it has exercised decisive influence over much of the reform agenda and has fought vigorously to keep the reforms on track.

2009 was a turning point for the Republic of Moldova when the four-party "Alliance for European Integration" came to power after disputed parliamentary elections by promising to introduce Western-style reforms. Here too the subsequent path has been tortuous and stony. As in Ukraine, however, Moldovan society did not back down and maintained the pressure to implement reforms.

### The unprecedented scale of the challenge and its meaning for Europe

Ukraine and Moldova are not only immediate neighbors of the EU member states Poland, Slovakia, Hungary and Romania, they are also part of the EU's Eastern Partnership (EaP). Adopted by the European Council in 2009 – initially in response to the European Neighbourhood Policy's other multinational initiative, the Union for the Mediterranean – the Eastern Partnership is now seen as "the most ambitious offer of cooperation within the European Neighbourhood Policy" (Federal Foreign Office 28.12.2020). It provides the framework for helping the six Eastern partners carry out political and economic reform based on European values.

The foundation for this "common endeavour" was the declaration by participants at the Prague Summit of their commitment to "the principles of international law and to fundamental values, including democracy, the rule of law and the respect for human rights and fundamental freedoms, as well as to market economy, sustainable development and good governance" (Council of the European Union 7.5.2009).

Following the conclusion of Association Agreements with Ukraine and Moldova in 2014, the EU concentrated its support for both countries on efforts to promote good governance, including judicial reform and anti-corruption measures. As we look to the decade ahead, it is fitting that we take stock of the current situation.

It is hardly surprising that transforming the governance model in Ukraine and Moldova is proving so difficult. Moreover, the Russian Federation's nefarious influence in both countries is a major

hindrance in this area. It is fair to say that the governance issue is at the center of the West's tug of war with Russia over the region's future.

### Key role of the judiciary and public prosecutors

Following our earlier country reports<sup>1</sup> on combatting and preventing corruption in the three South Caucasus republics, the country analyses presented here in the framework of the Bertelsmann Stiftung's work for "Strategies for the EU Neighbourhood" focus on the state of the judiciary in Ukraine and the Republic of Moldova. They show how the judiciary and public prosecutors in particular are instrumentalized and politicized in dealings with political opponents when democratic systems are not yet firmly in place.

Of course, judges and prosecutors also play a key role in the fight against corruption, a crucial undertaking in both countries. They and their representatives often become the targets of or actors involved in corrupt practices, for example when pressure is being exerted on political opponents or steps are taken to hide malfeasance behind a legal façade.

The comparison of Ukraine and Moldova provides insights into structural problems and typical challenges associated with promoting the rule of law and implementing essential judicial reforms. These are highly relevant at a time when the course that the Eastern Partnership will take in coming years is being adjusted.

Despite the different sizes of the two countries, they have shown similar development cycles in which considerable initial optimism gives way to deep disillusionment.

### Working together to defend democracy and the rule of law – reforms require robust civil societies and outside support

In addition to judicial reform and the creation of anti-corruption infrastructure, successful promotion of rule of law requires the strengthening and opening of democratic institutions so that society can broadly participate in political decision-making processes.

The issue of international partners interfering in a country's sovereign affairs is often a difficult balancing act. Opponents of reform know how to use this situation to their own advantage. A recent example is the resistance the EU's Ambassador to Moldova has been

1 Stöber, Silvia (30.10.2020). Combatting and preventing corruption in Armenia, Azerbaijan and Georgia. How anti-corruption measures can promote democracy and the rule of law. <https://www.bertelsmann-stiftung.de/en/publications/publication/did/combating-and-preventing-corruption-in-armenia-azerbaijan-and-georgia-en>

experiencing. However, 95 (!) NGOs have spoken out in a joint declaration clarifying their stance: “Cooperation with the EU and respect for European standards and values actually strengthens the sovereignty of the Republic of Moldova and its economic, social and democratic development” (National Platform of the Eastern Partnership Civil Society Forum 26.2.2021).

The two country reports demonstrate how societies can become overwhelmed when opponents of reform maneuver from a position of strength gained over decades. The imbalance of power between actors wanting to hinder a reform agenda and those pursuing it impedes the implementation of reforms aimed at strengthening the rule of law. Moreover, it is precisely the reformers’ achievements that galvanize opponents of reform: Without political support from outside, crucial reforms can fail right from the start unless, as is all too seldom the case, old power groups see an advantage in reorganizing state structures and creating independent institutions.

Coordination on the part of international donors is essential since governance, judicial and anti-corruption reforms benefit when they are developed simultaneously and financial support is tied strictly to progress in all three areas.

### **The Eastern Partnership beyond 2020**

The Council of the European Union in its conclusions for Eastern Partnership policy beyond 2020 reaffirmed the “strategic importance” of Eastern Europe and the “joint commitment to building a common area of shared democracy, prosperity and stability” while emphasizing the rule of law, judicial reform and anti-corruption measures (Council of the European Union 11.5.2020).

The country reports presented here are intended to help defend and strengthen the rule of law. I hope you find them engaging and insightful.

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## 2. Introduction

This study evaluates the justice sector reforms undertaken in Moldova since 2009 and in Ukraine since 2014 to identify the problems faced by reformers trying to move their countries towards rule of law.

2009 was a watershed year in Moldova when a four-party coalition, the Alliance for European Integration, wrested power from the Communists after disputed parliamentary elections and vowed to pursue western-style reforms. Similarly, the 2014 Revolution of Dignity in Ukraine led to an attempt by reformers to adapt its model of governance and move closer to Europe.

### 2.1 What is rule of law?

Rule of law is a culture based on democratic institutions providing legal certainty, safeguards against abuses of power and, above all, equality before the law. It provides citizens with the confidence that they can assert their rights effectively and is widely regarded as the foundation of successful economic growth. Protection of property rights is a key attribute. The core of a law-governed state is a judiciary that guards its independence and enjoys the trust of society.

Law-governed systems developed over time, in some cases centuries, as democracies consolidated themselves in different ways. Frustratingly for emerging democracies such as Ukraine and Moldova, there is no universally applicable model or roadmap for creating the institutional capacity that generates rule of law. Ultimately, it is the result of a delicate equilibrium that rests on the trust of elites and ordinary citizens alike in the ability of their institutions to protect their rights and interests.

### 2.2 The west's loss of allure

In the 1990s, western institutions provided a powerful example for reformers in many parts of the former USSR. However, since the 2008–2009 financial crisis, liberal democracy has been experiencing a crisis of self-doubt. Some western countries have found their institutional checks and balances under strain as their societies have questioned the ability of their political systems to deliver fair outcomes. In some countries, this distrust has begun to eat away at the fabric of rule of law.

In the US and the UK, where these tendencies have become most visible, governments that have suffered legal defeats have openly questioned the authority of the courts. President Trump blamed an “Obama judge” for ruling against his Administration’s decision to deny asylum to migrants crossing the southern border of the US (Reilly 21.11.2018). Similarly, after the UK Supreme Court ruled that Prime Minister Johnson had unlawfully suspended parliament in 2019, the British government convened a panel to review the process that allows the public to challenge government policy in the courts.

The Johnson government also indicated that if it could not agree a trade deal with the EU, it would violate international law by refusing to implement part of the Brexit withdrawal agreement. Its disregard for the principle of rule of law caused shock at home and abroad.

Events in the US in January 2021 created an even more discouraging background for reformers in emerging democracies trying to develop law-governed institutions. The storming of Capitol Hill by a mob allegedly incited by President Trump was the culmination of processes over years that had bred distrust in America’s institutions and enabled the election of a President with a pronounced disregard for both the truth and the law.

Mirroring these developments, Ukraine’s neighbors Poland and Hungary have mired themselves in a deep democratic “recession” spawning their own brands of nativism that are undermining judicial independence in both countries. Thirty years ago, these two were seemingly on a path to a successful democratic transition that in under fifteen years took them into NATO and the EU.

At the same time, other new EU member states such as Bulgaria, Romania and Slovakia all continue to face significant problems re-

lated to high-level corruption and the functioning of their judicial systems.

### 2.3 Scale of the challenge in Ukraine and Moldova

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These challenges that confront both old and new democracies in a “post truth” world are a stark reminder of the acute difficulties confronting countries such as Ukraine and Moldova in consolidating their fledgling democratic systems and developing norms of behavior associated with rule of law. In both cases, weak traditions of independence, polarized societies and poor-quality institutions have been a highly unfavorable starting point.

Deeply embedded crony capitalism in both countries has magnified these problems by creating a “shadow” state where decisions are made outside formal institutions for the benefit of powerful business groups and their networks that include friendly politicians and officials. In turn, this “shadow” governance has politicized the law enforcement agencies and the courts. Conflict with Russia and Moscow’s undermining of the territorial integrity of both countries have created internal divisions and added to the pressures of building societal consensus around democratic values that are central to the development of rule of law.

These handicaps have not deterred the EU and other international partners from investing significant effort and resources to advance the democratization process in both countries. Since 2004, the EU’s European Neighbourhood Policy has promoted rule of law and provided substantial support to both for this purpose. At the same time, the Council of Europe, USAID and other foreign assistance programs have focused on judicial reform and other anti-corruption initiatives.

After the conclusion of Association Agreements with Ukraine and Moldova in 2014, the EU prioritized support to both for good governance, including judicial reform and a wide range of anti-corruption projects to encourage greater convergence with the EU. In Ukraine, the EU established the EU Advisory Mission (EUAM) in 2014 to promote civilian security sector reform by providing strategic advice and support to the law enforcement agencies for the implementation of reforms.

In both Ukraine and Moldova, the results of these efforts have been disturbingly meagre despite the considerable efforts of some brave reformers. Each country has signally failed to gain the trust of its citizens in the courts. In Ukraine, a poll conducted in July 2020 showed that 77.5 percent of respondents distrusted the judicial system while 73 percent did not have confidence in the Pros-

ecutor’s Office. 70 percent of respondents said they distrusted the new High Anti-Corruption Court, the pinnacle of the anti-corruption reforms started in 2014 (Razumkov Centre 12.2020). According to a poll conducted in Moldova in October 2020, over 44 percent of respondents said they “highly distrusted” judicial institutions while a further 26 percent said they “somewhat distrusted” them (Republic of Moldova 10.2020).

Ukraine and Moldova also languish in low positions in international measurements of the quality of their investment environments. In the World Economic Forum’s 2020 Global Competitiveness Report, Ukraine ranked 85<sup>th</sup> out of 141 countries, but only 105<sup>th</sup> for judicial independence and 128<sup>th</sup> for property rights (World Economic Forum 2019: 571). Moldova came 86<sup>th</sup> overall but was in 132<sup>nd</sup> place for judicial independence and 108<sup>th</sup> for property rights. In the same index, Poland ranked 37<sup>th</sup> overall and Romania 51<sup>st</sup>. Similarly, Transparency International’s 2020 Corruption Perceptions Index listed Ukraine in 117<sup>th</sup> place out of 180 countries, and Moldova 115<sup>th</sup>. By contrast, Estonia, Latvia and Lithuania, also former Soviet republics, albeit for a shorter period and with a different history, ranked 17<sup>th</sup>, 42<sup>nd</sup> and 35<sup>th</sup> respectively.

In Ukraine, the failure of progress towards rule of law became spectacularly clear in October 2020 when Ukraine’s Constitutional Court ruled that entire swathes of the anti-corruption legislation adopted after 2014 were unconstitutional. Its controversial decision drove a stake through key parts of the anti-corruption infrastructure, cancelling the electronic asset declaration requirements for officials and effectively invalidating the existence of the National Anti-Corruption Bureau of Ukraine (NABU), the centerpiece of western efforts to develop new and reliable investigative agencies. Several of the Court’s judges who ruled had conflicts of interest. The Court’s decision unleashed a constitutional crisis and threatened to undermine relations with both the IMF and the EU. The Council of Europe issued a scathing opinion describing the Court’s reasoning as “flawed” (Venice Commission 9.12.2020: 7). Yet weeks earlier, its Presidents had written to the Chairman of the Rada arguing that terminating the mandates of the Constitutional Court’s judges as proposed by Zelensky was unconstitutional and a violation of the separation of powers (Buquicchio and Mrčela 31.10.2020). It did not raise the possibility that Constitutional Court judges might have violated the Constitution by abusing their office.

Despite numerous indications that a lack of lustration had left self-serving and heavily corrupted judicial bodies in charge of reform in Moldova, the Council of Europe's Secretary General noted in 2020 that the "perception of corruption" in its judiciary remained "high" (Council of Europe 22.1.2020), while the EU's report on the implementation of the Association Agreement with Moldova published in September 2019 stated only that "many is-

ssues related to the functioning of the judiciary" had "given rise to very serious concerns" (European Commission 11.9.2019). These included the Constitutional Court's dissolution of parliament in June 2019, a move that the Council of Europe interpreted as the Court exceeding its powers (Venice Commission 24.6.2019: paras 51–54). These bureaucratic understatements camouflage a disastrous failure of judicial reform in Moldova.

## 2.4 Serving leaders, not citizens

In recent years, reformers in Ukraine and Moldova supported by international partners have focused on anti-corruption reforms as the main path for accelerating the transition to rule-of-law governance. Bringing corrupt officials to justice and restricting the space for corrupt practices by government officials have been their preferred tools. While rule-of-law countries exhibit relatively low levels of corruption, the effectiveness of anti-corruption measures in emerging democracies depends on addressing much broader issues related to the nature of power and how it is exercised.

High-level corruption in Ukraine and Moldova is the symptom of systems geared to delivering benefit not to citizens at large, but to major business owners and the politicians and public servants who enable them to operate. Although they are inefficient and unfair, such systems found in emerging democracies sustain themselves by limiting society's capacity to develop genuinely accountable institutions that function in its interests. Typically, the main business groups exploit the democratic process by influencing elections through their own media and shaping legislation and government decision-making to their advantage. These arrangements contradict the fundamental principles of a democratic, law-governed state.

Rule of law is only possible when democratic institutions are staffed on a sufficiently meritocratic basis, are sufficiently competent in the exercise of their functions and are sufficiently accountable.

As the Canadian scholar Maria Popova has argued, intense political competition in consolidated democracies encourages accep-

tance of rule of law by incumbents while in emerging democracies it leads to the opposite result since incumbents are inclined to politicize justice to protect themselves because they fear retribution by their successor (Popova 2012). This is the trap in which Ukraine and Moldova find themselves. For both countries to develop rule of law requires systemic transformation that changes the operating environment for judges and prosecutors and allows them to act without interference.

Even if the comparison is unfair because of their different pre-Soviet history, the Baltic states led by Estonia have shown that it is possible to transition from a Soviet system of governance to a rule-of-law version. Of course, they had the advantage of not experiencing the same degree of crony capitalism nor did they lose control of part of their territory.

However, in the Baltic states as well as the former Soviet satellites in Central Europe, reforming the justice and law enforcement sectors has proved one of the most challenging tasks in the transition process. This is partly explained by the culture and ethos that these institutions brought with them from Soviet days. Their task was to uphold the rule of the Communist Party rather than protect a constitutional order freely chosen by its citizens. Their primary duty, therefore, was not to the people but to their authoritarian leaders. In the hands of the Bolsheviks, the law was not just malleable, it was used to justify their greatest crimes, including the murderous collectivization of agriculture and the bloodletting in the purges of the 1930s.

## 2.5 Entrenched interests thwart real change

Today's generation of judges, prosecutors and police officers in Ukraine or Moldova, whether young or old, has grown up in an institutional culture that has not yet adapted to the needs of a democratic state. The judiciary in both cases is still subservient by nature and accustomed to old informal practices such as discussing cases

outside the courtroom with interested parties. At the same time, the prosecution services and the police tolerate political interference in their work. In both countries, these organizations that once served the Soviet system have so far transitioned only to serving the outwardly democratic systems that have replaced them.

In the language of social science, Ukraine and Moldova remain “natural states” or “limited access orders” (North, Wallis and Weingast 2009: 269) in which institutions are not under democratic control because of the dominance of elite groups that seek privileged access to state resources to sustain their power and wealth.

Of course, not all judges, prosecutors and police officers in these countries are corrupt and resistant to cultural change. However, so far there is no sign of internal constituencies in these institutions in either country that can drive a reform process from within.

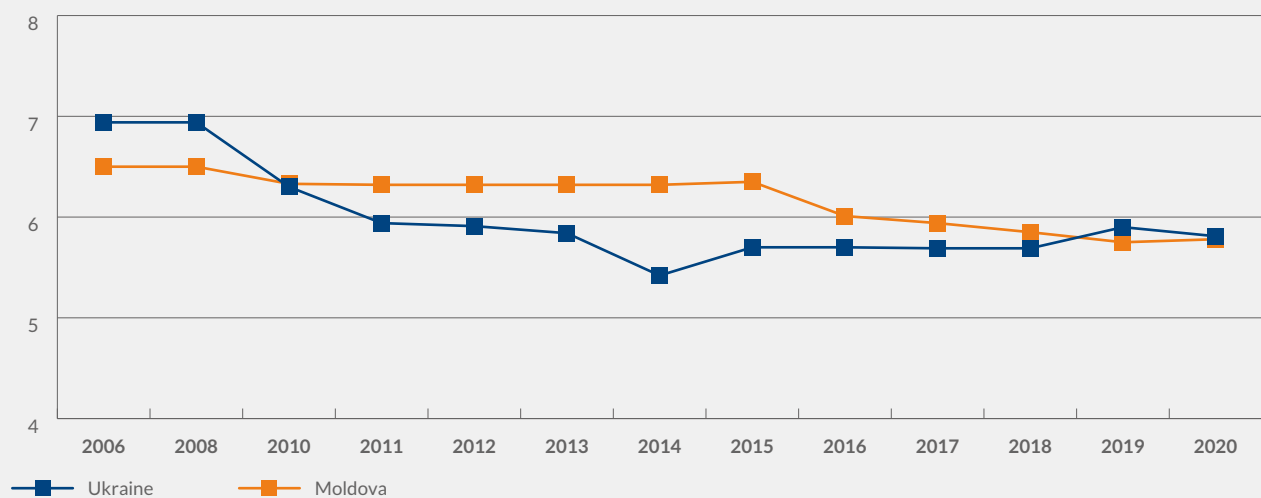
Societal attitudes are also a significant factor. In Ukraine and Moldova, citizens see corruption as a major concern. In a poll commissioned by the International Republican Institute (IRI) in Ukraine in late 2019 (before the Covid-19 crisis), 44 percent of respondents listed corruption in state bodies as the top problem facing the country (Center for Insights in Survey Research 13.-29.12.2019: 9). In a similar IRI poll in 2019 in Moldova, 77 percent of respondents listed corruption as a major problem in the country (Center for Insights in Survey Research 8.5.-10.6.2021: 18). Interestingly, a surprising number of respondents in both countries tell pollsters that they have not recently paid a bribe even though the education and healthcare sectors are notorious in Ukraine and Moldova for extracting illegal payments from their users. It appears that both societies often see no alternative to paying bribes to access the services they need and that they experience no especial discomfort in doing so even if there have been some indications in Ukraine since 2015 that tax inspectors and other officials have been more reluctant to demand bribes from small businesses for fear of disciplinary action (Mogilevich 23.7.2019).

Petty corruption and grand corruption are two sides of the same coin. While there is popular anger in both Ukraine and Moldova at the corrupt practices of high-level businesspeople, politicians and officials, there is little recognition outside elite civil society groups of the contradiction between rejecting corruption at one level and tolerating it at another. Petty corruption and grand corruption together erode distrust in the state. It is particularly difficult to discourage citizens from continuing to pay bribes as the simplest route to resolving problems when they sense that their leaders are continuing to engage in corrupt practices but on a far greater scale.

In both countries, this ambivalence weakens the ability of society to demand the governance changes necessary to break down the models of crony capitalism that have impoverished them so severely over the past three decades. According to World Bank data, Moldova’s GDP per capita in 2019 was US \$4,503 and Ukraine’s was US \$3,659. By contrast, Romania’s stood at US \$12,919 and Poland’s at US \$34,431. The shocking level of emigration of working-age Moldovans tells its own story about the lack of economic prospects created by the country’s political model.

Revolutions in Ukraine (2004 and 2014) and Moldova (2009) changed governments and introduced wide-ranging reforms but did not break the grip of the underlying systems on policy-making and distribution of economic rents. The systems in both countries showed their resilience and the ability of their main operators to resist encroachment on their main sources of influence: their dominant positions in the economy, their control of major media assets and their influence over parliament as well as the judiciary and the law enforcement agencies.

FIGURE 1 Comparison of democracy’s development in Ukraine and Moldova



Source: The Economist – Democracy Index 2020. In sickness and in health? <https://www.eiu.com/n/campaigns/democracy-index-2020-download-success>, own illustration, Scale: 1–10, with 10 as highest value

Volodymyr Zelensky's sweeping victory in the 2019 presidential election showed the disappointment of Ukrainian voters' expectations after the Revolution of Dignity and their distrust of the established elites. Zelensky's predecessor, Petro Poroshenko, symbolized this old system. A major business owner, he had served in previous governments and was a beneficiary of the established system with no motivation to undermine it through radical reform. By contrast, Zelensky, a self-made man with no political experience, ran as an outsider on a vague but appealing anti-corruption ticket vowing to address the problems of the country neglected by previous administrations.

However, as the Constitutional Court crisis demonstrated in late 2020, the old system had re-discovered its strength and was prepared to roll back key reforms that if continued would threaten its interests. Zelensky had become its hostage.

Moldovan society has also moved through a similar cycle of initial optimism about reforms followed by disillusionment. It has also experienced the sharp shifts of orientation between the governance models offered by Russia and the EU. Maia Sandu's emphatic victory in Moldova's presidential election in November 2020 possibly heralds a re-balancing of political forces that could put Moldova back on a path to integration with Europe. However, the failure of the Alliance for European Integration (governed 2009-2014) to achieve a decisive breakthrough in its reform program despite a promising start hangs heavily on Moldova's reformist forces. It is also a burden for the EU that initially hailed Moldova as a poster child for its "Neighbourhood" policies.



# Ukraine

## 3. Ukraine

The strong impetus to initiate wide-ranging anti-corruption reforms and to reform the judiciary after the 2014 Revolution of Dignity was a response to the failure of the 2004 Orange Revolution and the depredations of the Yanukovich years, when the theft of state assets reached unprecedented levels and the judicial system became especially politicized to protect the ruling group's grip on power.

After 2004, despite introducing constitutional changes that strengthened the role of parliament, President Yushchenko's administration perpetuated rather than dismantled the system that had embedded itself in the 1990s under his predecessor, Leonid Kuchma. A handful of powerful business groups continued to dominate the state, preventing possibilities for reforming the judiciary

and the law enforcement agencies. Both continued to serve the interests of the ruling class rather than Ukraine's citizens. As political rivalry increased between Yushchenko and his Prime Minister Yulia Tymoshenko, both stood accused of attempting to politicize justice.

There was no effort to address the governance problems in the country that were a breeding ground for grand corruption. Yushchenko was relaxed about the continued influence of major business owners who had come to the fore during the Kuchma years, turning a blind eye to a scandalous arrangement for the sale of large volumes of Russian gas to Ukraine that was believed to benefit the interests of a select few close to the leadership.

### 3.1 The Yanukovich legacy

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Viktor Yanukovich's presidency (2010–2014) centralized control of corruption to such an extent that it disrupted the political balance and created the conditions for a new revolution. To reinforce his grip on power, Yanukovich tightened control of the judiciary by giving vast powers to the High Qualification Commission of Judges (HQCJ) to appoint and dismiss judges. This created a system of unprecedented political control over the judiciary (Kuzio 2015: 354). In 2010, Yanukovich relied on his new appointments to the Constitutional Court to consolidate his power by ruling that reforms under Yushchenko that restricted the powers of the president were unconstitutional. He also broke new ground by relying on the courts to jail his opponents. Former Prime Minister Yulia Tymoshenko and a former Minister of the Interior Yuri Lutsenko were convicted on what observers in Ukraine and abroad viewed as politically motivated charges. The European Court of Human Rights ruled that both their arrests had been "arbitrary".

A damning study of high-level corruption issues prepared by the new government in 2014 with the assistance of the IMF noted the "pyramidal" nature of influence over the government system with "powerful well-known elites at the top, heads of agencies in the middle and agency staff at the base" that entrenched their "oligopolistic control of the economy" (Government of Ukraine 11.7.2014:

4). It described the criminalization of state structures by predatory interests, noting that the police, the Prosecutor General's Office (PGO) and the tax administration were "believed to have formed corrupt networks that abuse their formidable powers over investigation, prosecution and conviction to intimidate, obtain bribes, raid and harass corporate and business interests" for the benefit of top-level elites (ibid.). The administration of justice was hampered by a "lack of judicial independence, pervasive corruption, and a complex and unwieldy judicial structure and court process" (ibid.).

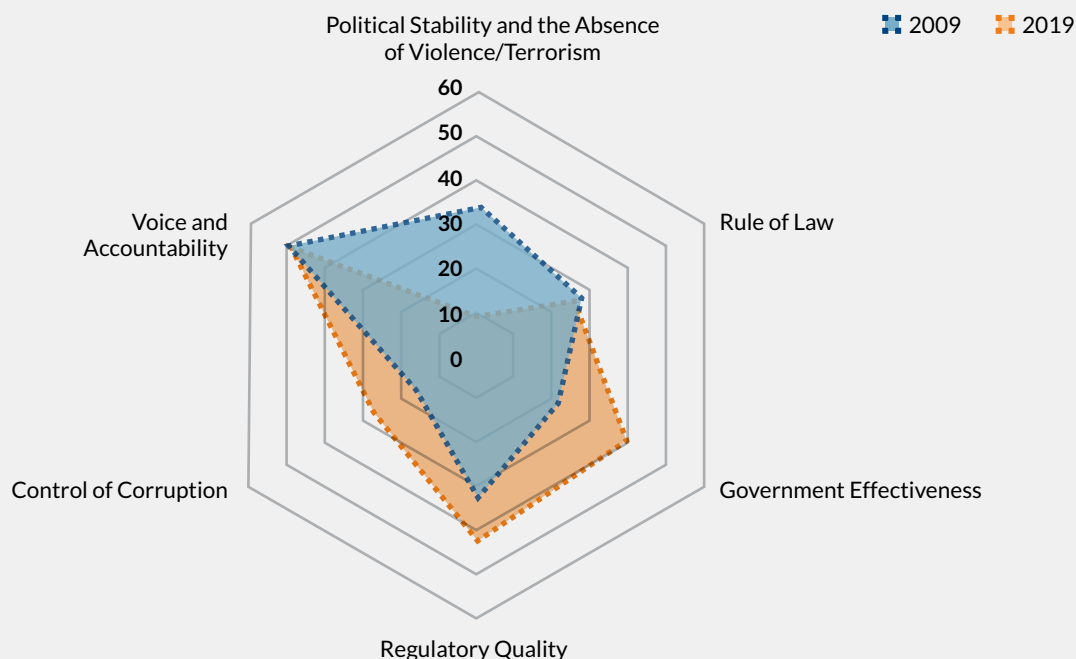
The analysis could also have mentioned Ukraine's State Security Service (SBU) that was deeply enmeshed with organized crime and had become so riddled with corruption crime that it posed a threat to national security.

After the 2014 "Euromaidan" Revolution, civil society instigated an unprecedented effort to reduce corruption in Ukrainian public life. Popular anger at the excesses of Yanukovich's rule and strong western support made it possible to adopt wide-ranging anti-corruption measures. As investigative journalists began to reveal details of the many corrupt schemes that had grown up over the years, Ukrainian voters had good reason to expect that real change was now possible.



FIGURE 2 Institutional framework for Ukraine – Comparison of 2009 and 2019

“Political Stability” declined sharply within 10 years, while “Government Effectiveness” and “Regulatory Control” each increased.



Source: World Bank – The World Governance Indicators 2020, <https://info.worldbank.org/governance/wgi/Home/Reports>, own illustration  
Scale: 0–100, with 100 as highest value

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### 3.2 After the revolution, brakes on progress

However, there were two significant brakes on progress. First, President Poroshenko, who had considerable influence over the implementation of the anti-corruption reforms, was only a partial reformer. He had never lived or operated in a country with rule of law. Instead, as a businessman with his origins in the 1990s, he was at home in a system defined by backroom deals and personal understandings with politicians and officials. He was a transition figure who saw his main task as defending the country against Russian aggression while conducting the minimum reforms necessary to sustain western support. He cleverly brought these two agendas together, frequently telling impatient western governments that keeping Russia at bay limited his administration's ability to pursue the anti-corruption reforms with the desired vigor. At the same time, he had no qualms about continuing his own business activities in Russia. His chocolate factory in Lipetsk ceased production in 2017 only after a public outcry in Ukraine.

There was truth to the fact that the government's resources were severely stretched by the war effort and the challenges of keeping the country economically afloat. However, it was disingenuous for him to claim that his Administration wished to be more active

on the anti-corruption front when there was clear evidence that it was sabotaging crucial parts of the anti-corruption reforms. This included the work of the National Agency for Corruption Prevention and later the formation of a specialized anti-corruption court.

Admittedly, there were some notable successes. A clean-up of the gas sector put an end to some of the old schemes that had benefited some elites and left Ukraine dangerously dependent on Russian gas. Likewise, the nationalization of PrivatBank, the country's largest retail bank serving a quarter of the population, and the closure of scores of “pocket banks” that served no purpose other than to strip resources from the state budget removed another source of rent for politically-connected insiders. The establishment of an online public procurement system (ProZorro) was a further significant step forward in reducing the space for old corrupt practices, as were changes to healthcare procurement and the operation of the tax system (for an assessment of the anti-corruption policies conducted after 2014, see Lough and Dubrovskiy 19.11.2018).

These improvements had little public impact because the anti-corruption issue had become strongly associated among the popula-

tion with the desire to punish senior officials implicated in corruption. Civil society led the charge with support from the EU, US and others to operationalize the new anti-corruption institutions with

the purpose of holding corrupt officials accountable. The difficulties of putting this policy into practice quickly became clear and fueled public frustration with the slow pace of change.

### 3.3 Justice sector reforms 2014–2020

In October 2014, Ukraine adopted an impressively broad and detailed anti-corruption strategy. It combined prevention and punishment of corruption in state institutions with the creation of new structures to detect, investigate and prosecute high-level official corruption. Its vision for reducing corruption levels included judicial reform and the need to reduce possibilities for corrupt prac-

tices in the judiciary as well as the PGO and the police. The strategy cited an opinion poll that suggested that Ukrainians regarded the judiciary as the most corrupt institution in the country and that 47 percent of respondents believed it was “completely corrupted” (Parliament of Ukraine 8.8.2015).

In 2014, judges’ salaries ranged between UAH 12,180 and 34,835 (roughly €1,103–3,155). The average salary at the time was UAH 3,619 (roughly €328). By 2020, they had increased significantly for judges in local courts ranging overall between UAH 68,100 at this level and 391,575 for the highest paid Supreme Court judge (a range of approximately €2,188–12,583).

The average salary by this time was UAH 14,179 (roughly €456). In other words, over this period pay for the lowest paid judges rose from a factor of 3.4 to 7.4 times higher than average salaries to 4.8 to 11.0 times higher. (These rates in all cases are for judges who passed the qualification assessment). *Data provided by Stepan Berko, DeJure Foundation.*

		UAH		EUR		Average salary UAH	Average salary EUR
2014	Local courts	12,180	26,796	1,103	2,427	3,619	328
	Appellate courts	14,616	32,155	1,324	2,913		
	Supreme Court	15,834	34,835	1,434	3,155		
2020	Local courts	68,100	156,630	2,188	5,033	14,179	456
	Appellate courts	113,500	261,050	3,647	8,388		
	Supreme Court	170,250	391,575	5,471	12,583		

#### 3.3.1 Halting start for new anti-corruption bodies

The implementation of the strategy focused heavily on establishing three new anti-corruption bodies: the National Agency for Corruption Prevention (NACP) to establish a system for verifying e-asset declarations by senior officials, including judges; the National Anti-Corruption Bureau of Ukraine (NABU) to investigate high-level corruption; and the Specialized Anti-Corruption Prosecutor’s Office (SAPO) to prosecute cases brought by NABU. In addition, a new agency to take over the investigative functions of the PGO was to be formed.

With strong support from the US and several EU countries, reformist forces succeeded in creating a reputation for NABU as having an organizational culture distinct from other Ukrainian investigative bodies. The recruitment process for the leadership positions placed strong emphasis on candidates’ personal values while salaries for its detectives were far higher than those in the PGO with the purpose of deterring corrupt behavior.

Inevitably, NABU found itself isolated and under attack since it was a misfit in an old system that was proving reluctant to undergo similar cultural change. It proved unable to secure convictions of note in the courts because the “big fish” that it targeted found ways to wriggle out of its grasp, often by exploiting the unreliability of the courts. One analysis noted that usually only a little over 1 percent of criminal proceedings were delayed in the courts, while in the case of NABU it was over 40 percent (Kostetskyi 9.10.2017).

One notable example of the problem facing NABU was the 37-year-old head of the State Fiscal Service (SFS) under Poroshenko, Roman Nasirov. He was arrested in March 2017 after a NABU investigation into an allegation that he defrauded the state of 2 billion hryvnias (US \$74 million) for the benefit of a fugitive lawmaker. He immediately suffered a supposed heart attack and was hospitalized. In the end, he was only in detention for a few hours after a judge granted him generous bail conditions even though he was a clear flight risk. Another judge refused to accept evidence from the British Home Office that Nasirov held a UK passport. A Kyiv court also upheld his claim that he had been unlawfully dismissed from his position as head of the SFS.

### 3.3.2 Judiciary

After the Revolution of Dignity, there was a flurry of reforms that formally aligned much of the workings of the judicial system with international best practice. These began in April 2014 with a Law “On Restoration of Trust in the Judiciary” aimed at dismissing judges who had taken unconstitutional decisions against protestors who had brought about the Revolution months earlier.

A new framework was put in place for screening and re-assessing judges and dismissing those who had violated their obligation to observe the law. However, this fell far short of a lustration process, although the requirement for judges to take a qualification test to remain on the bench led to the voluntary resignation of around 2,000 out of 8,000 judges. At the same time, as a measure to increase the independence of the judiciary, newly appointed judges had security of tenure instead of serving a five-year probationary period.

The Law “On Ensuring the Right to a Fair Trial” adopted in February 2015 reformed the disciplinary liability of judges and, pending fresh elections, removed judges from the administrative positions they held as members of the High Council of Justice (HCJ) and the High Qualification Commission of Judges (HQCJ). Yanukovich had filled these two key bodies with loyalists. This and further legislation adopted in 2016 broadly aligned the disciplinary framework for judges with Council of Europe standards. All court presidents were also dismissed.

SAPO was a less successful creation than NABU. The first Special Anti-Corruption Prosecutor Nazar Kholodnytsky became embroiled in scandal. In April 2018, NABU provided wiretap evidence showing that Kholodnytsky had encouraged a witness to give false testimony and tipped off several suspects about impending searches of their properties. He received a reprimand for unethical behavior from the disciplinary body in the PGO but remained in his position for a further two years despite vigorous protests by civil society.

NACP took 18 months to launch the asset declaration system, raising suspicions that it was deliberately dragging its feet. There were allegations that the Presidential Administration was directly influencing its work and trying to use it to target its enemies. In any case, the asset declaration system quickly became unmanageable as its reach extended to over a million public servants. The apparently successful re-launch of the Agency after Zelensky came to office suggested that it would finally start to deliver on its original mission.

The major structural change in the judicial system came in the summer of 2016 with the reduction of the courts system from four levels to three: first-instance and second-instance courts and a new Supreme Court reincorporating the high specialized courts created under Yanukovich. The reform also significantly reduced the number of courts at district level. The purpose of the restructuring was to improve the overall efficiency and coherence of the judicial system. New legislation also provided for open competitions for judicial positions.

An early test of the open competitions was the recruitment of judges for the new Supreme Court with civil society involvement. The role of the new Public Integrity Council (PIC) consisting of 20 elected representatives from civic organizations was to vet candidates’ ethical qualities. The HQCJ required a qualified majority to overcome a negative opinion of the PIC. The relationship between the two bodies was predictably tense.

Despite the unprecedented transparency of the process – the interviews were broadcast online – civil society representatives complained that there was no openness around candidates’ overall scores in the assessment process and that the final decision-making took place behind closed doors. Of the 113 judges appointed on November 11, 2017 the PIC had objected to 25 (Sukhov 11.11.2017). The main problem, as civil society saw it, was that the

re-constituted HQCJ, a body consisting mainly of judges elected by judges, was favoring its own and ensuring the continuation of inappropriate practices in the courts.

The reforms after 2014 had formally increased judicial independence by raising the quotas of judges elected to the HCJ and the HQCJ by the Congress of Judges. Formally, Ukraine now met Council of Europe standards in this area.

While the overall scale of reform appeared significant, there were disturbing signs that little was changing for real. The dismissal and re-appointment of court presidents by election in 2014 had appeared to be an encouraging step since they had a reputation for exceeding their formal powers and interfering in judges' decision-making. However, the election results told a different story. Over 80 percent of court presidents retained their positions and 60 percent of those appointed by Yanukovich to courts where they had not previously served also remained in place (Popova and Beers 2020: 124). The vote to preserve the status quo showed that there was no revolutionary mood in the lower ranks of the judiciary.

This lack of bottom-up change meant that there was little improvement in the functioning of the lower courts and no reason for the Ukrainian public to sense that judicial reform had brought a change to the delivery of justice. Another factor inhibiting palpable change in the lower courts was judges' fears for their safety. A poll taken in 2016 showed that 88 percent of judges did not feel safe in their own courtrooms after the withdrawal of police protection for budgetary reasons. There were reports of hundreds of attacks on judges (OECD 2017: 88).

However, the final months of Poroshenko's rule saw progress with the creation of a High Anti-Corruption Court (HACC) to try cases brought by SAPO that frequently ran into obstacles in the first-instance courts. There were frequent indications that judges were deliberately frustrating NABU's work by refusing to issue search warrants, leaking details of investigations and refusing to suspend suspects from their positions in government. Strongly resisted by the Poroshenko Administration, the HACC materialized only after sustained international pressure. The IMF and the EU tied future assistance to the establishment of the new Court with a rigorous procedure for the selection of its 38 judges that involved civil society as well as foreign experts. The Court began hearing cases in September 2019. By August 2020, it had delivered 14 decisions, and had sentenced two officials to jail terms (Transparency International Ukraine 5.8.2020), one a judge who received seven years for taking a US \$2,500 bribe.

Backed initially by a large majority in parliament, the Zelensky Administration moved fast to address what it regarded as the defi-

ciencies in the judicial reforms that had taken place after 2014. A Law adopted in October 2019 dissolved the HQCJ and reduced the number of Supreme Court judges from 200 to 100. If the logic was clear for re-booting the HQCJ and creating an Integrity and Ethics Panel attached to the HCJ to do so, experts were left scratching their heads to understand the need to halve the number of newly appointed Supreme Court judges.

In March 2020, the Constitutional Court annulled key parts of the Law, including the reduction in size of the Supreme Court. It also ruled that the Integrity and Ethics Panel could not overrule decisions by the HCJ and rejected several amendments for strengthening disciplinary procedures against judges. Bizarrely, it decided that a handful of judges who had been part of the old Supreme Court before the Poroshenko reforms had not been formally dismissed and continued to be judges of the new Supreme Court.

The President's Office responded with a draft Law amending the role and composition of the 21-member HCJ and establishing a competition commission for appointing the 16 members of the HQCJ. This still left the unreformed HCJ fully in control of the selection of the HQCJ. There was no provision for vetting HCJ members despite civil society's concerns about the HCJ's selection procedures and the integrity of some of its serving members. Civil society experts also bemoaned the HCJ's failure to carry out properly its responsibilities for disciplining judges. One analysis indicated that only 16 percent of the judges who were investigated on account of their rulings during the 2014 revolution were found guilty of an offense and dismissed (Ukraine Crisis Media Center 20.2.2019). In addition, the HQCJ stood accused of failing to clean up the lower courts. Out of 2,827 judges who underwent a qualification test after 2014, only 35 were dismissed (Halushka and Chyzyk 24.10.2019).

Yet before Parliament could finish examining Zelensky's new draft Law, the Constitutional Court adopted its controversial decision of October 27, 2020 that invalidated much of the post-2014 anti-corruption legislation. Its ruling responded to a complaint by 47 opposition MPs about the legal basis for the anti-corruption infrastructure that had finally begun to operate as intended after the re-launch of NACP and the successful functioning of the HACC. This meant that there was a chain in place that led from the scrutiny of officials' asset declarations to criminal investigation, prosecution and conviction.

The Constitutional Court broke the chain at its first link by ruling that there was no criminal liability for providing false information in asset declarations. Journalists later revealed that the Chairman of the Court had committed an offense by failing to declare his purchase of land in Crimea in 2018. The Council of Europe's experts who assessed the Court's decision were baffled by how the Court

annulled legal provisions for all civil servants when its reasons referred to judges only (Venice Commission 10.12.2020: 6).

Many commentators believed that the Court's decision reflected its support for a campaign by political forces opposed to western-style reforms to weaken Ukraine's relationship with the EU and other western institutions. It left the Zelensky presidency in deep crisis and with no sign of a quick resolution as both the Constitutional Court and the HCJ dug in for a long fight.

The derailment of judicial reform under Zelensky raised serious questions about the composition and recruitment procedures for the Constitutional Court and the HCJ. In October 2020, four out of 15 of the Constitutional Court's judges were holdovers from the era of President Yanukovich who had taken up their positions before the start of post-revolutionary judicial reform and the adoption of a new Anti-Corruption Strategy. As a recent study by the DeJure Foundation, a lobby group for judicial reform, has noted, Ukraine lacks a genuinely competitive process for appointing

members of the Constitutional Court and its composition has become slanted in favor of judges appointed by the judiciary to the exclusion of legal professionals with a different background (Berko and Savychuk 24.12.2020).

In 2019, the HCJ's vigorous defense of the Chairman of the Kyiv District Administrative Court (KDAC) and other judges in the same court after the Prosecutor's Office filed corruption charges against them spoke volumes about its interests. NABU recordings made public showed the KDAC Chairman Pavlo Vovk boasting that "it was possible to buy anything you want" after the Constitutional Court had controversially ruled in February 2019 to cancel the law criminalizing illegal enrichment. NABU was at the time investigating Vovk on this charge. The recordings provided disturbing evidence of the levels of corruption within the KDAC, with judges conversing in criminal jargon about interfering with a decision by investigators, pressurizing the HQCJ and threatening other judges (Sukhov 11.9.2020).

### 3.3.3 Prosecution Service

As elsewhere in the former USSR, Ukraine's prosecution service has remained a powerful tool in the hands of the ruling group. It has served the purpose of protecting them from criminal investigation while also targeting their enemies through so-called commissioned cases. The corollary has been rampant top-to-bottom corruption in the Prosecutor's Office, a massive structure with over 12,000 prosecutors, and the preservation of its Soviet organizational culture in the almost total absence of reform. Poroshenko continued with the same model and even changed the law to appoint a loyal Prosecutor General who did not have the required legal qualification.

During the Poroshenko years, two of the President's close associates, Alexander Granovsky and Igor Kononenko, were believed to have strong connections with the PGO. Its main economic crimes department was popularly known as the "Kononenko-Granovsky Department". Similarly, Ukrainian media reported in 2019 that Igor Kolomoisky, one of the former owners of PrivatBank and head of one of Ukraine's largest business groups and a sworn enemy of Poroshenko, had direct contact with a leading PGO official, Kostiantyn Kulyk. The latter acquired the sobriquet "the private prosecutor" for his alleged willingness to investigate allies of Poroshenko (Romanyk 7.11.2019). Kolomoisky also has a reputation for winning cases in the Ukrainian courts (Myroniuk 22.3.2020) but losing them abroad. However, a new banking law passed in May 2020 has made it impossible for him to regain control of PrivatBank, which was nationalized in 2016 under Poroshenko's rule after the discovery that it had a US \$5.5 billion hole in its balance sheet.

The State Bureau of Investigations (SBI) that became operational in late 2018 was intended to take over the investigative functions of the PGO as an independent body. However, it took nearly three years to establish, a sure sign that those in the Presidential Administration responsible for the reform were in no hurry for it to start functioning quickly when the old system worked satisfactorily for their purposes. At the time of writing, it is still not fully operational because of understaffing.

The SBI quickly showed that it was not independent. Shortly after Poroshenko left office in 2019, Roman Truba, the head of the agency appointed under Poroshenko, announced that it had opened eleven criminal cases against the former president (UNIAN 30.7.2019). The passing of amendments to the Law on the SBI in December 2019 and the replacement of Truba by a Zelensky loyalist were part of an overhaul of the agency that placed it firmly under the control of the President's Office, providing it with an outlet for transferring cases from NABU that had become politically inconvenient.

However, Zelensky's appointment of Ruslan Ryaboshapka as Prosecutor General in August 2019 led to the first attempt to clean up the Prosecutor's Office. Widely regarded in civil society as a genuine reformer, Ryaboshapka instituted unprecedented change in the PGO, firing 729 prosecutors who did not pass a re-attestation procedure and opening criminal investigations into organizations and individuals that his predecessors had not dared touch.

Despite the first signs of real change in this notoriously conservative and corrupted organization, Zelensky lost patience and fired Ryaboshapka after only six months, ostensibly for not achieving results. Addressing parliament before its vote to dismiss him, Ryaboshapka struck a defiant note, stating that under his leadership the Prosecutor's Office had begun to live by the law for the first time in 28 years. He accused those who supported his dismissal of wishing to return the organization to its previous role as a tool of pressure, political persecution and personal enrichment for a chosen few (Kyiv Post 6.3.2020).

There was widespread speculation that Ryaboshapka's refusal to follow political instructions and indict Poroshenko was a key factor behind his dismissal. It also occurred at the same time as politi-

cal forces hostile to western-style reforms reasserted themselves and forced Zelensky to sack his reformist government.

In place of Ryaboshapka, Zelensky nominated Iryna Venedyktova, an academic lawyer and acting head of the SBI, where she had caused controversy with several appointments. Her appointment appeared to halt reform of the Prosecutor's Office. In December 2020, NABU opened a criminal investigation against her on suspicion of interfering with its investigation of a suspected criminal offense by Zelensky's Deputy Chief of Staff. As NABU detectives were preparing to arrest him, Venedyktova re-assigned the case, placing it under her deputy's personal control (Kossov 26.12.2020).

### 3.3.4 Police

In a rule-of-law system, a police force must be adequately funded, competent to perform its role, trusted by society and accountable to its elected representatives. Before 2014, Ukraine was policed by a Soviet-style militia that met none of these requirements. It was a pillar of the system described above that upheld the interests of the ruling class and extracted its own benefits with impunity. Alienated from society, it married the worst of two worlds: preserving an incentive system based on high quotas for solving crimes that made easy-to-solve offenses a priority and encouraged the use of coercion against suspects and witnesses (Friesendorf 2/2019: 112).

Exacerbating this situation further, poorly paid and equipped junior police officers extorted the citizens they were supposed to protect, pocketing some of the proceeds and passing the rest to their superiors as part of a vertically integrated system of corruption. As the actions of the Berkut riot squads clearly showed during the events of the 2014 Revolution, the police had become a menace to Ukrainian society. These problems were far from unique in countries formerly part of the USSR, but in Ukraine they had taken on an extreme form that was incompatible with society's desire for a different model of policing.

After 2014, civil society led a determined effort with strong support from international donors to reform the police force that began with the disbandment of the hated Berkut and the creation of a new patrol police to replace the notoriously corrupt traffic police. Based on the successful experience of Georgia and led by Georgians, the reform was strongly backed by the US and put a small, relatively well-paid new police force on the streets of Kyiv

and other major cities starting in 2015. Recruited from outside the old militia and screened for personal integrity, the new recruits made a positive impression and were well received by society.

A new Law replaced the militia with the National Police of Ukraine (NPU) and removed operational responsibility for the police from the Minister of the Interior, a significant move towards its de-politicization. In addition, all former militia officers were required to undergo re-certification before joining the NPU. However, out of 70,000 police officers only 5,000 failed the re-certification process (Goncharuk 31.1.2018), yet 93 percent of them were able to keep their positions after going to court to contest their dismissal (Radio Liberty 29.5.2020). Reportedly, 50 percent of former Berkut officers involved in trying to suppress the 2014 Revolution also succeeded in having themselves re-instated as police officers (Bratushchak 23.11.2016).

The Georgian reformers did not stay long in their positions as they came up against influence groups in the police and the Ministry of Interior that did not share their zeal for change. The powerful Interior Minister Arsen Avakov stood accused of exceeding his formal powers to influence a wide range of senior police appointments. Predictably, the old militia establishment rallied together to protect its interests. It found support in the PGO, the Presidential Administration and parliament as it tried to limit the investigation of the killing of protestors during the 2014 Revolution while also obstructing new appointments from outside the organization and stopping the passing of further unfavorable legislation. Six years on, there have been no prosecutions related to the deaths of four police officers and 48 protestors during the Maidan events.

### 3.3.5 Security Service (SBU)

Betraying its origins in the Soviet KGB, Ukraine's Security Service bears the culture of an organization that was a tool of domestic repression. It has both law enforcement and intelligence functions. Since 1991, successive presidents have chosen not to tamper with it. They have valued it more for the purpose of fighting their political enemies than for ensuring national security. Its powers to investigate economic crime and corruption have given it great influence and have also contributed to corrupting the agency itself. Lack of accountability and indulgence by different presidents encouraged this trend, which led to repeated scandals, including most notably the SBU's role in facilitating the sale of surface-to-air missiles to Iran and China in 1999–2000.

In recent years, there have been multiple examples of the SBU exceeding its powers, for example by interfering with the procurement abroad of medicines, the export of nuts (Halushka and Krasnosil'ska 12.6.2018) and the import of liquefied natural gas (Khornovalov and Sedletska 21.2.2017). There is widespread speculation that the SBU works closely with organized crime rather than against it and that it is a major contributor to the problem of

smuggling, estimated to cost Ukraine close to US \$5 billion a year (Hassel 5.8.2018).

In March 2020, Zelensky introduced a draft Law on the Security Service of Ukraine. It met with heavy criticism from civil society because it did not significantly reduce the SBU's powers to conduct anti-corruption investigations even if it proposed disbanding its infamous Department "K" that was responsible for fighting economic crime, a task that extended to policing business. The SBU leadership argued that the agency needed to retain its role of investigating threats to national security in the economy. However, its opposition appeared to have failed when parliament adopted a draft Law in September 2020 on the creation of a Bureau of Economic Security with 4,000 employees as a single body to investigate economic crime. Not surprisingly, some businesses feared that this could simply become another predatory body staffed by former members of the SBU and the tax police (Mykhailovska 12.11.2020). The draft Law on the Security Service passed its first reading in the Rada in late January 2021.

## 3.4 Half measures yield predictable results

There were several predictable problems that frustrated the strong push to punish corrupt officials. First, the principle of collective solidarity among the elites (*kruhova poruka*)<sup>2</sup> meant that there was a consensus that no one should go to jail. Second, all the senior ranks of the Yanukovich regime had fled the country, most of them to Russia where they were beyond the reach of Ukrainian prosecutors. Third, there were doubts about whom the PGO was working for and whether it had any serious interest in pursuing them. Fourth, there were no sufficiently reliable first-instance courts for trying high-profile cases.

The lack of convictions together with the revelations of investigative journalists contributed to constant discussion of the problem of corruption and left many Ukrainians believing that corruption was on the rise. Zelensky was able to tap into the resulting anger and disillusionment to fuel his presidential election campaign.

The model of placing unreformed judicial governance bodies in charge of judicial reform was flawed and repeated the EU's mis-

take elsewhere in Central Europe. Measures to increase the independence of the judiciary ticked all the Council of Europe's boxes but simply cemented in place an old guard that was not committed to changing the culture of the judiciary. The recent actions of the Constitutional Court underline the fact that there was no proper "cleaning" of the senior judicial ranks. The failure to improve the functioning of the first-instance courts meant that the public continued to distrust and added to the disillusionment with the anti-corruption reforms overall. By contrast, the HACC has the potential to establish a different culture among judges and change public attitudes. All HACC judges passed through a rigorous integrity test as part of the recruitment process that included foreign experts. All HCJ and HQCJ members as well as all judges should undergo a similar vetting process.

Ukraine wasted five valuable years after 2014 by failing to take the necessary steps to begin overhauling the PGO. With their strong focus on developing new anti-corruption institutions, civil society and international partners did not devote enough attention to removing a key pillar of the old system where "real power" lay. Understandably, western countries wanted to avoid accusations of interference in Ukraine's internal affairs, but this

<sup>2</sup> Translated literally, *kruhova poruka* means "collective pledge". It describes the commitment within a group to stay together and not betray its members on the principle "We're all in this together. If one goes down, we all go down."

was no excuse for not pushing harder for an overhaul of this key institution. Ryaboshapka's efforts were an important start and the speed of his removal suggests that he was on a path to disrupting the networks of the old system and removing at least part of the prosecutorial system from its grasp. The SBI's lack of independence and Venedyktova's performance as Prosecutor General suggest that reform in this important area has stopped.

The drive to reform the police immediately after the 2014 Revolution has largely dissipated and Ukraine is still far away from having effective democratic policing. The establishment of the patrol police was a move in the right direction. At the outset, the new force was culturally different from its predecessor and showed that it could win public trust. 12,000-strong, it remains today only a small part of the policing system with around 10 percent of NPU's employees. It has not been a catalyst for change in the wider organization and critics suggest that its main purpose was only to create the impression of change and keep civil society and western governments happy while insulating the rest of the NPU from radical

change. The results of this approach are visible in public attitudes. According to a poll published in July 2020, 57 percent of respondents distrusted the police (Razumkov Centre 4.9.2020). The data is roughly consistent with public attitudes from well before 2014 (see for example Bova 2013). Even though the EU continues to invest considerable resources in civilian-sector security reform, the results in this case have been disappointing.

Reform of the SBU is long overdue and is essential for developing rule of law. Establishing the SBU as an intelligence agency that serves Ukraine's citizens and is properly accountable to them is a task that will take many years and face considerable institutional resistance. The draft Law is an important start in the process. It will be important for civil society and international partners to continue to follow closely the progress of the draft legislation and to call on expertise in Central European countries with experience of successfully adapting Soviet-style intelligence organizations to the needs of a democratic state.

### 3.5 Lessons learned

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- Promoting rule of law in Ukraine requires going beyond creating anti-corruption infrastructure and judicial reform to strengthen democratic institutions and opening the "limited access order". Both reformers and international partners need to be more explicit about the nature of the task and deliver a stronger message to Ukrainian audiences to explain that foreign involvement in this area is not interference in internal affairs but support enabling Ukraine to fulfil commitments to its own citizens.
- While it is easier to create new structures than to reform old ones, the new ones do not work effectively if the old machinery of influence remains in place. NABU's problems in the un-reformed first-instance courts are a prime example.
- Civil society and international partners focused too heavily on creating new anti-corruption institutions that could not deliver the impact that the public needed to see. The desire to jail corrupt public officials was understandable but not deliverable without real judicial reform. Improving the functioning of the lower courts should have been a high priority that would have made it possible to try NABU cases and would have signaled to the public that substantial changes were occurring in the delivery of justice.
- Structural reform of the judiciary cannot deliver cultural change on the part of judges if there is no overhaul of judicial bodies. Even though they had made the same mistake elsewhere in Central Europe and the Balkans, the Council of Europe and others encouraged the judiciary to strengthen its independence without insisting on reforming the recruitment processes for staffing the judicial self-governing bodies beforehand. Perversely, the support of international partners ended up making the task of real judicial reform much harder because it cemented in place a judicial old guard determined to defend its interests with serious consequences for the systems of judicial appointments and discipline.
- The creation of the HACC showed the power of EU and, above all, IMF conditionality. It was a mistake not to use similar influence to start reform of the PGO. Similarly, the response of international partners to Ryaboshapka's dismissal was lame, reflecting above all the EU's fear of interference in Ukraine's internal affairs. To a Ukrainian audience, this response suggested that western governments had either lost interest or did not believe that PGO reform was as important as in the past, when some of them had taken a more forceful position. In 2016, for example, the US government had openly called for the removal of Prosecutor General Viktor Shokin, whom it viewed as an obstacle to reform.
- Civil society has had a strong and generally highly positive influence on the anti-corruption reforms although it has sometimes allowed the best to be the enemy of the good in some of



its efforts. The clearest example is the over-elaborate asset declaration system that unnecessarily alienated some of its allies in government and parliament. It also made an error by not speaking up earlier about the efforts of the old judicial guard to block real change in the courts. Civil society, too, needs to learn from its mistakes.

- Expectations of society were set unrealistically high and bound to end in disappointment. The EU did not draw on its mixed experience in Central Europe to show the challenges

of starting and sustaining the deep reforms required in the judiciary and the law enforcement agencies to make real progress towards establishing rule of law. Bulgaria and Romania, for example, provide compelling examples how elites have either stood in the way of reforms or instrumentalized new anti-corruption infrastructure for political purposes. Notwithstanding the strong desire on the part of society to reduce levels of corruption and hold its leaders accountable, the ability of some Ukrainian elites to resist change was clear and should not have been a surprise.



# Republic of Moldova

## 4. Republic of Moldova

The “limited access order” that took shape in Moldova after the privatizations of the 1990s bore strong similarities to Ukraine’s. However, the effects were even more dramatic because of the small size of the country and the strength of the networks linking the worlds of business, politics, government and crime. This led to almost total corruption of all public institutions, severe impoverishment of the population and the exodus of a large section of the workforce, including educated people, in search of better opportunities abroad. As a result, a weakened civil society lacked the capacity to resist these processes. As in Ukraine, the old nomenkla-

tura retained a firm grip on state institutions and used its inside knowledge to gain control of many of the country’s economic assets and their cashflows.

The return to power of the Communist Party in 2001 exacerbated these tendencies by delaying reforms of Moldova’s governance on a European model. This had severe consequences for the justice sector. The law enforcement agencies and the judiciary continued to serve the interests of a small ruling group that controlled the levers of power for their own benefit.

### 4.1 Failed pro-European shift in 2009

The anti-communist Alliance for European Integration that came to power in July 2009 offered a genuine chance for moving Moldova towards a system based on rule of law with financial and technical support from international partners, including the US, UN agencies, the EU and individual EU member states.

The new coalition government (Liberal Party, Liberal Democratic Party and Democratic Party) adopted an ambitious three-pronged Justice Sector Reform Strategy (2011–16) that set goals for increasing the effectiveness of the prosecution service and of the courts. There was a particular focus on preventing interference in the work of both prosecutors and judges. In 2011, there were 748 active prosecutors (Prosecutor’s Office of the Republic of Moldova 2011: 6) and 409 active judges (Timofti 10.2.2012). In addition, the Strategy set out to improve the capacity of national institutions to counter money laundering, as well as strengthening the national agency responsible for verifying assets and interest of public officials. The Strategy included measures to increase salaries for judges with assistance from the EU. The EU pledged €58 million to support the justice sector reform, but only €28 million was received. The EU placed the remaining funds on hold after concluding that the Moldovan authorities had “showed insufficient commitment to reforming the justice sector in 2014 and 2015” (EU Delegation to Moldova 11.10.2017). The head of the EU Delegation noted at the time that there had been no qualitative improvements in the justice sector and despite significantly raised salaries for judges, corruption in the judiciary remained “endemic” (Nani 16.7.2015).

#### Judges’ salaries

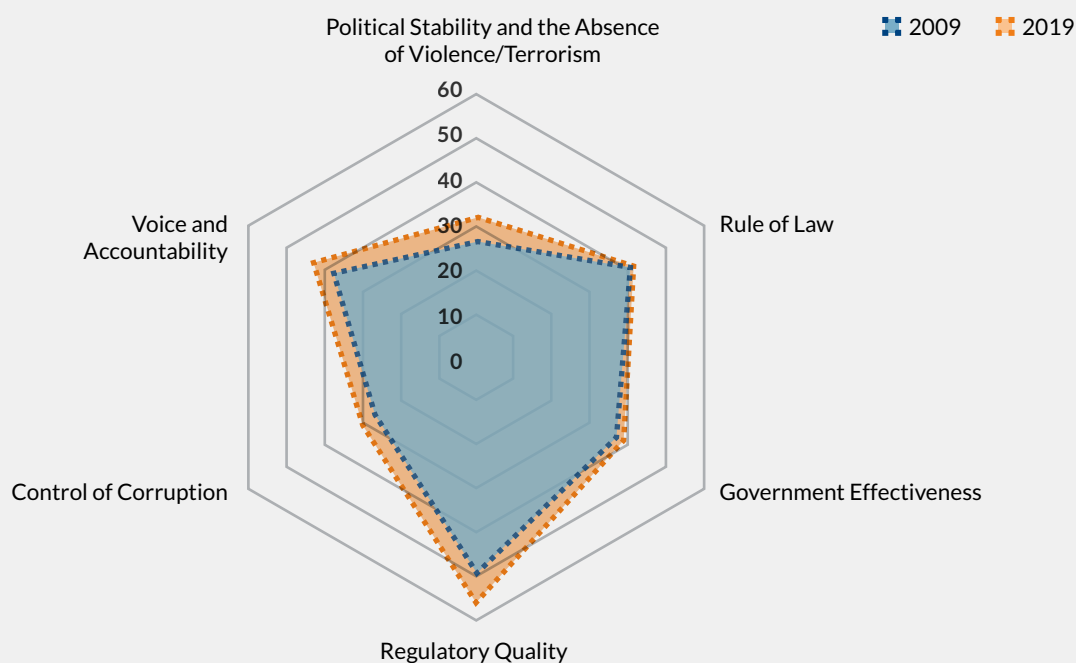
Before 2013, judges’ salaries ranged between MDL 4,200 and 8,800 (roughly €260–550). The average salary at the time was MDL 3,550 (roughly €220). By 2020, they had increased significantly ranging between MDL 20,000 and 36,000 (approximately €950–1,700). The average salary by this time was MDL 8,716 (roughly €415). In other words, over this period pay for judges rose from a factor of 1.3 to 2.5 times higher than average salaries to 2.3 to 4.15 times higher.

The key problem in implementing the Strategy was the conflict of interest on the part of the political forces in government and parliament that had backed the Strategy. Instead of genuinely implementing the steps needed to promote judicial independence and strengthen the capacity of the National Anti-Corruption Centre (NAC), the national Financial Intelligence Unit (FIU) and the Specialized Anti-Corruption Prosecutors’ Offices, the ruling class deliberately included loopholes in newly approved legislation to protect its narrow interests.

While professing commitment to bringing Moldova’s governance into line with European standards, the coalition government restricted the ability of the NAC, the FIU and the Central Bank to investigate suspected money laundering through Moldova’s banking system. Legislation adopted in 2012–2013 paved the way for

FIGURE 3 Institutional framework for Moldova – Comparison of 2009 and 2019

Moldova remains steady regarding „Rule of Law” and “Government Effectiveness” and shows slight yet steady improvements within other institutional areas.



Source: World Bank – The World Governance Indicators 2020, <https://info.worldbank.org/governance/wgi/Home/Reports>, own illustration  
Scale: 0–100, with 100 as highest value

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the theft of US \$1 billion from the reserves of the Central Bank and the so-called “Russian Laundromat”, the laundering of around US \$8 billion through the Moldovan banking system (OCCRP 20.3.2017). It also ensured that there were no timely investigations of these crimes.

At the same time, the coalition parties agreed that each should have their own spheres of influence in state institutions, appointing their representatives to senior positions in ministries as well as the prosecution service and the judiciary. So-called “secret annexes” to the Coalition Agreement<sup>3</sup> ensured that the parties could have a say over the appointment of judges, prosecutors, members of the Constitutional Court, members of the Supreme Council of Magistracy (SCM), as well as leading positions in supposedly independent bodies such as the Accounts Chamber, the National Bank and the Ombudsman. These annexes show the complete disregard of the political class for the independence of key institutions in the country.

An intense struggle between the leaders of two political parties Vlad Filat and Vladimir Plahotniuc between 2010 and 2015 further eroded the functionality of the legal system as both tried to instrumentalize it for their own purposes. The prosecution service fell under Plahotniuc’s influence, the Ministry of Interior under Filat’s. A turf war between the two institutions undermined any possibility of effective action against high-level corruption and organized crime. There were even cases where the police targeted government officials and prosecutors close to Plahotniuc’s Democratic Party for traffic offenses while prosecutors were selectively investigating officials affiliated to the Liberal Democratic Party (led by Filat).

Filat emerged the loser from this battle after Plahotniuc used his influence in the Prosecutor’s Office and parliament to instigate a parliamentary vote on lifting his rival’s parliamentary immunity and ordering his arrest. In 2016, Filat was convicted on corruption charges and received a nine-year jail sentence in a clearly politically motivated case. Filat later submitted two complaints to the European Court of Human Rights (ECHR) alleging multiple violations of his rights. At the time of writing, he is still awaiting a final decision on both. In May 2018, a London court froze three bank accounts in his son’s name with deposits totaling over £450,000 re-

<sup>3</sup> For more details, please consult the Website of the Association for Participatory Democracy <http://www.e-democracy.md/monitoring/politics/comments/secret-annexes-decision-making-transparency/>

ceived from overseas companies (Pegg 7.2.2019). The funds were later confiscated by the UK authorities.

By the time of Filat's conviction, the prosecution service and the judiciary were firmly under the control of forces loyal to Plahotniuc. Their approach was simple and effective: collect compromising evidence on judges and prosecutors in return for cash or other bonuses.

Despite its commitment to promote rule of law in the Association Agreement that it signed with the EU in 2014, Moldova's government had taken a dramatic turn in the opposite direction. According to the World Economic Forum's 2014–2015 Global Competitiveness Index, Moldova ranked 141st out of 144 countries for judicial independence (World Economic Forum 2014: 273).

The situation deteriorated still further after 2016 when Plahotniuc's Democratic Party succeeded in preserving its majority in parliament. This reinforced its control of the law enforcement agencies and the judiciary. Reform of the prosecution service as foreseen by the Justice Sector Reform Strategy resulted instead in politically controlled Specialized Prosecutor's Offices and selective justice.

Judges who challenged government decisions or who rejected direct orders from presidents of courts to issue specific decisions faced persecution and were even charged with criminal offenses. For example, the current Chair of the Constitutional Court Domnica Manole was charged in 2016 with issuing an illegal court decision (International Commission of Jurists 2019: 38). In July 2019, the charges against her were withdrawn by the prosecution. This reflected a change in the political landscape after the establishment in June 2019 of an unlikely new parliamentary majority (the ACUM bloc and the Socialist Party) and the appointment of a pro-western government. The new constellation of political forces changed the operating environment in the justice sector, encouraging criticism of the system within its ranks and with it a more courageous attitude on the part of some prosecutors.

Between 2011 and 2020, there were several other controversial decisions that demonstrated the total absence of rule of law:

- In 2014, the Chisinau District Court ruled controversially that the political party "Our Party" could not take part in parliamentary elections in response to allegations that it had received illegal financing. The Appeal Court upheld this decision but issued it less than seven days prior to the elections. According to the requirements of the Electoral Code, this meant that the Party's candidates were disqualified from running with a different political party, as political parties may change their candidates at the latest 7 days prior to the election day.

- Between 2011 and 2013, at least 16 Moldovan judges, including from courts in Chisinau and across the country, were allegedly involved in the infamous "Russian Laundromat". They issued enforcement orders for fake arbitration decisions made abroad that recognized debts based on false contracts. This provided a legal basis for the transfer of funds from Moldovan banks to offshore companies. It was an extension of the practice used in "raider attacks" when the courts recognized non-existent debts that made it possible to artificially bankrupt viable businesses and transfer their ownership to others. This form of hostile takeover blighted the financial and insurance sectors in Moldova, while some transactions involving Moldova's Moldinconbank and Victoriabank injected stolen funds into the global banking system.
- In October 2020, criminal charges against 13 out of 15 judges suspected of involvement in money laundering were dropped by the Anti-Corruption Prosecutors' Office. It claimed that there was no evidence of their involvement and that its previous leadership had rigged the investigations. The remaining two judges were not brought to justice. One died and the other fled abroad.
- In April 2017, the 18-year jail sentence handed down to the businessman Veaceslav Platon for fraud and money laundering pointed to further instrumentalization of the judicial system. In May 2020, the Prosecutor General conceded that the case against Platon had been falsified and requested the suspension of the sentence, which was subsequently granted by the Chisinau District Court. However, recent events involving Platon suggest that he is still being investigated for other alleged criminal activity, including money laundering. His release from jail was possible after the Prosecutor General pointed to significant flaws in the case, including the breach of Platon's right to a fair trial.
- In June 2018, the Supreme Court upheld the cancellation of the Chisinau mayoral election result. The winner of the election was a former prosecutor and strong critic of Plahotniuc. The decision led to protests in Chisinau and the termination of the EU's €100 million micro-financial assistance package.
- In September 2018, in response to a request from Turkey, the Moldovan authorities expelled seven staff at a Turkish school who had requested asylum in Moldova. Turkey claimed that they were linked to the Gülen movement. Moldova deported them directly to Turkey in a specially chartered plane before the outcome of their asylum applications had been considered. The ECHR ruled that Moldova had violated several articles of the European Convention on Human Rights and awarded damages to five teachers who filed complaints.

## 4.2 Justice Sector Reform Strategy for 2011–2016

The approval of the Justice Sector Reform Strategy for 2011–2016 was the first comprehensive effort to reform the judiciary and prosecution service since independence in 1991. Its main goals were to strengthen judicial independence and increase the ability of the courts to deliver justice to citizens. This included cancelling the five-year probationary term for judges and improving access to the courts through a system of free legal aid. It also aimed to make Moldova's President responsible for appointing judges at all levels, including judges to the Supreme Court of Justice, after receiving nominations from the Supreme Council of Magistracy (SCM). This part of the reform did not become law since it required amendment of the Constitution that was only possible with the support of two-thirds of MPs. The ruling Democratic Party and European People's Party did not have enough votes to cross this threshold.

The Strategy also introduced a system for the random distribution of cases to judges and clarified the functions of investigative judges. The vetting of judges was not part of the reform agenda. However, the Strategy placed emphasis on the need for the SCM to evaluate the performance of judges and ensure the operation of effective disciplinary procedures while improving the possibilities for judges to develop their careers. Although modest in nature, these steps encouraged some positive developments in the selection of judges and greater transparency in the evaluation process. As noted above, after 2013 judges' salaries increased significantly in real terms.<sup>4</sup> In 2016, prosecutors received similar increases.

Reform of the prosecution service included measures to strengthen the independence of prosecutors and banning the requirement for investigators to follow verbal instructions from their superiors. Instead, prosecutors could only act on written instructions. The reform also cancelled the broad supervisory functions of the Prosecutor's Office inherited from the Soviet system. With the adoption of the Law on the Prosecution Office in 2016, prosecutors no longer exercised general supervision over compliance with the law by any public or private entity. This allowed them to focus on criminal cases only while other bodies assumed responsibility for overseeing the implementation of sector-specific legislation.

The Strategy also included the establishment of the National Integrity Agency (NIA) to operate an upgraded asset declaration system for officials. This replaced the National Integrity Commission, the body previously responsible for asset declarations. It had produced few results because its members were political appointees and took decisions by majority vote. This meant that if a member of

the Commission raised an objection, it would be enough to stop an investigation of suspected illegal enrichment. In any case, the sanctions available for punishing offenders were limited.

According to the Strategy's timetable, the NIA was to be fully functional by the end of 2017. However, this deadline was missed and it took a further 18 months for the NIA to become even partially operational. The main reason for the delay was the slow progress in appointing the Director and Deputy Director. The slow pace of the selection process appeared deliberate. Establishing the new agency was clearly not a priority for the government, probably because the NIA was set to exercise new powers, including the authority to verify the assets of public officials as well as judges and prosecutors. The new system was far more intrusive than its predecessor. However, the delay meant that the new agency inherited a huge backlog of cases from the National Integrity Commission that drained its capacity to investigate new cases.

A revamped National Anti-Corruption Centre was also part of the Strategy, originally created in 2001 but under a different name. In its earlier incarnation, the Center never established a reputation as a body that could impartially investigate suspected corruption. Different political appointees headed the Center and, despite its large staff, it focused mainly on petty corruption without investigating more serious suspected crimes.

The Strategy also included measures to strengthen Moldova's capacity to recover illegally acquired assets. The Financial Intelligence Unit (FIU) was separated from the National Anti-Corruption Center (NAC) and became an independent entity while the Agency for the Recovery of Criminal Assets (ARCO) was created to help investigators identify and seize assets originating from criminal activity. Over the period 2018–2019, these organizations together with the NIA became operational, with additional budget and personnel directed to the NIA and FIU. There is now a much-improved system in place for monitoring suspicious transactions, and the FIU is in a better position to focus on priority cases. However, both the FIU and ARCO rely on the courts to grant freezing orders and it is still unclear whether the improved investigative capacity will translate into recovery of stolen assets.

After the adoption of the Law on Prosecutors' Offices in 2016, two Specialized Prosecutor's Offices were established to investigate and prosecute corruption and organized crime. Since their investigative functions were integrated with those of the NAC, it meant that many petty corruption cases logged with the NAC passed to the new specialized prosecutors and restricted the possibilities for them to work on high corruption cases. There is reason to believe that this was a deliberate policy to flood the specialized prosecu-

<sup>4</sup> Law no. 328/2013 on the salary of judges, repealed in December 2018, with the adoption of the Law 270/2018 on the single system of pay in the public sector. The initial version of the Law is available in Romanian at: [https://www.legis.md/cautare/getResults?doc\\_id=12719&lang=ro#](https://www.legis.md/cautare/getResults?doc_id=12719&lang=ro#)

tors with petty corruption cases. Both new Offices operated under the authority of the Prosecutor General. This structural reorganization brought some new blood into the prosecution service. However, many of the newly appointed prosecutors quickly be-

came involved in selective investigations and were later suspected of illegal enrichment. The current Prosecutor General Stoianoglo openly asked several of those prosecutors to resign after he took up his position.

#### 4.2.1 Limited change after 2019

2019 brought significant political change. The creation of an unorthodox majority in Parliament between right-wing and left-wing parties aimed at ousting from power the Democratic Party and its leader Plahotniuc generated the need for a comprehensive evaluation of judges, prosecutors and other professions involved in the justice sector.

The period 2016–2019 had seen strong political control over judges and prosecutors, the use of unauthorized surveillance of political opponents and the fabrication of evidence to convict unwanted actors. With cross-party support, the Government promoted reform of the Supreme Court of Justice, proposing to reduce the number of its judges and re-appointing 17 new judges using an evaluation process to measure integrity as well as professional and personal qualities. According to the draft Law, the 20-strong evaluation commission was to include four members of civil society and six foreign experts. The SCM and the Superior Council of Prosecutors only had two positions each with Parliament, the President and the Government also appointing two members each. However, there was no proposal to evaluate judges in the lower courts.

In the end, these proposals went nowhere because the Sandu government fell after the Socialist Party backed by the Democratic Party supported a no confidence vote. The coalition broke apart over a disagreement over how to appoint the Prosecutor General. The Chicu government supported by the Socialists and the Democratic Party proposed new draft legislation to reform the justice sector, but it also fell short of a complete re-evaluation of all judges. No attention was paid to prosecutors. The Ministry of Justice dropped the draft legislation, leaving in place an unreformed Supreme Court.

At the end of 2019, the Parliament adopted new legislation on the composition of the SCM, increasing it from 12 to 15 members (seven judges elected by the General Assembly of Judges, five law professors elected by parliament and three ex officio members, including the Minister of Justice and the Prosecutor General). The political opposition interpreted this move as a further effort to control the system for appointing and disciplining judges.

In 2020, the Chicu government promoted long-awaited changes to the Constitution aimed at strengthening judicial independence. Public consultations were organized to ensure a broad consensus and the Venice Commission provided an opinion. At the time of writing, the draft amendments are still awaiting approval in parliament in line with the usual procedure requiring their approval within a year but with voting only possible six months after submission. If Parliament does not approve the draft amendments by October 10, 2021, they will become void and re-submission under the same procedure will be necessary for their adoption. The amendments aim to increase judicial independence by excluding the initial five-year term for judges and by making the President responsible for appointments of all judges, including the ones for the Supreme Court of Justice, based on proposals by the SCM. If approved, the amendments will fix the composition of the SCM at 12 members, six of them judges and the other six legal experts. The amendments also included a provision guaranteeing the financial independence of the SCM.

Two previous attempts to amend the Constitution in 2016 and 2018 to strengthen judicial independence failed because Parliament did not meet the prescribed one-year deadline. In both cases, the ruling parties lacked the motivation to ensure their approval despite the commitments they had made to international partners. However, in 2016 another Constitutional amendment related to the prosecution service did receive parliamentary approval because of the Socialist Party's interest in allowing President-elect Dodon (previously the Chairman of the Socialist Party) to appoint the Prosecutor General. However, the Democratic Party stole a march on its unofficial political partner. On his last day in office, acting President Timofti used the amendment to appoint the Prosecutor General, denying Dodon the opportunity to appoint his own candidate. Dodon in turn did not act to dismiss the appointed Prosecutor General because he enjoyed the support of the Democratic Party and his removal would have upset the political balance at the time. This is a further example of the extreme political sensitivity associated with the position of Prosecutor General because of its powerful role in a system based on selective justice.



The arrest in January 2021 of Viorel Morari, a respected prosecutor, during President Sandu's visit to Brussels suggested that there was little likelihood of rapid progress in justice sector reform. Morari was reportedly investigating the role of the Pros-

ecutor General's wife in companies connected to an individual convicted on fraud and money-laundering charges related to the "Grand Theft" from the Moldovan banking system described above (Petru 22.1.2021).

#### 4.2.2 Police reform increases trust

The Police is one of the few sectors that has continued to receive budget support from the EU since 2015.<sup>5</sup> Formally, the head of the Police is appointed by the government, not the Minister of Interior and there is clear delimitation of functions between the Ministry and the Police. Reform has brought some positive results, including improved capacity to investigate criminal activity. According to

5 For the period 2017–2020, the EU has committed €57 million to police reform, <https://www.eu4moldova.md/en/content/eu-support-police-reform-republic-moldova-budget-support>

one poll, levels of public trust have slightly increased, with lack of trust of 66 percent in 2014 down to 56 percent in 2020 and trust of just 31 percent in 2014 rising to 41 percent in 2020 (IPP 2014: 41). There are still important challenges related to the integrity of investigative officers. Some are suspected of involvement in organized crime, including smuggling. As elsewhere in the law enforcement system, there are still problems related to the transparency of the selection and promotion of personnel.

#### 4.2.3 New strategy targets judicial independence

In late 2020, parliament endorsed a new "Strategy for Ensuring the Independence and Integrity of the Justice Sector for 2021–2024". Developed by the Ministry of Justice together with civil society and international partners, the Strategy offers a cautious approach to modernizing the judicial system and the prosecution service and making justice more accessible to citizens. Although it points to the need for effective verification of all judges and prosecutors, it does not indicate exactly how this should take place and whether, for example, civil society and international experts will be part of the process.

Among the main problems facing the sector, the Strategy identifies "factors of corruption that affect the integrity of justice sector stakeholders" as well as an undeveloped legal culture, inconsistent judicial practices and legislative instability (Ministry of Justice Republic of Moldova n.d.: 10). It notes the negligible success of the previous Strategy that defined its main goal as ensuring public

trust in the delivery of justice. This rose from 18 percent in 2011 to 26 percent in 2019 (ibid: 7).

The Strategy places heavy emphasis on increasing the independence of both judges and prosecutors, noting, in particular, the current danger facing judges of being held criminally liable for their decisions. It underlines the role of the SCM in ensuring judicial independence and recognizes that there is still no transparent and inclusive mechanism for selecting its members. It also advocates amending the Constitution to ensure that Constitutional Court judges serve only one term, while stipulating that there must be an odd number of judges to avoid parity outcomes.

The Strategy identifies the need to upgrade the current NIA's system for verifying assets and interests for all judges and prosecutors. It also points to the requirement to improve training for both professions.

### 4.3 Fighting a reactionary tide

Although the 2011–2016 Strategy was successful in creating and strengthening new institutions as well as establishing new procedures in existing ones, it did not address the most basic requirements for establishing an independent justice sector. Judges in the Supreme Court of Justice were still appointed by Parliament while all judges had to continue serving an initial five-year proba-

tion. The prosecution service continued to face political pressure with the appointment of senior prosecutors subject to political interference.

Despite public demands for the recovery of the US \$1 billion siphoned from the banking system, there has been no progress. In-

stead, the losses have been passed on to Moldovan taxpayers. Similarly, Ilan Shor, the main suspect in the banking fraud, remains an active political player who has created his own party – the Shor Party. His appeal against a seven-year prison sentence for his role in the fraud has been pending for five years and suggests that there may have been pressure on the judiciary. Shor’s lawyers have been able to use a range of legal devices to delay the appeal process helped by the slow procedures for appealing against a district court decision.

During 2020, 13 judges facing criminal investigations on charges of participation in the “Russian Laundromat” were freed from criminal prosecution. The Anti-Corruption Prosecutor’s Office claimed the evidence against them was insufficient and that the cases had been fabricated. Veaceslav Platon, another important suspect in the same case, had charges against him lifted although in one case he was found guilty but only received a suspended sentence. These cases have raised questions about the independence and impartiality of the Prosecutor General, particularly after a video recording appeared showing the Prosecutor General personally leading a meeting with Platon while he was in detention (YouTube 2020). There is speculation that Platon was able to reach a personal deal with the Prosecutor General that led to the suspension of his sentence.

Several video recordings appeared in 2020 showing President Dodon receiving a weighty package from Plahotniuc, the former leader of the Democratic Party, allegedly containing money (Journal.md 2020) and raising suspicions of illegal party financing. Other recordings of meetings between the two suggest that Dodon was keen for Plahotniuc to take a decision on Transnistria that would have been advantageous to Russia (YouTube 2019). At the time, Plahotniuc was seeking to create a parliamentary majority with Dodon’s Socialist Party. There are strong suspicions that Plahotniuc deliberately recorded the meetings to have compromising

evidence against Dodon. Details of the President’s luxurious vacations have also been made public but the Prosecutor General has refused to investigate them claiming that the NIA is responsible, although according to the Criminal Procedure Code prosecutors are obliged to initiate an investigation to assess if a crime was committed.

Important criminal cases of illegal enrichment and abuse of power initiated in 2019 by the acting Prosecutor General have not moved forward. Prosecutor General Stoianoglo, in office since late November 2019, decided to close some of these cases. On the other hand, Mihai Murgulet, a whistle-blower judge who highlighted corruption issues inside the judiciary and whose revelations triggered criminal investigations against some prominent judges, was refused nomination by the SCM for tenure and could no longer serve as a judge. The SCM claimed that he was ineligible since he was the subject of several complaints from the public.

The reforms in the justice sector have demonstrably failed to deliver the intended results. Continuing pressure on the main actors in the justice sector by politicians from different parties underlines a key drawback of the judicial reform agenda. New political forces with different motivations are necessary to break this vicious circle. The prosecution service and the judiciary have been unable to clean themselves from within despite the availability of legislation to sanction lack of integrity and conflicts of interest.

At the same time, individual principled judges and prosecutors who want to see cultural change are not sufficiently protected and supported to act as agents of change and break the grip of the system that instrumentalizes their institutions. The past two years have shown that individuals who have the courage to speak up about the problems facing the justice system eventually find themselves excluded from it (EEAS 11.9.2019: 7). They are swimming against a powerful tide.

## 4.4 Lessons learned

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- The failure of the justice sector reforms reflects above all the preservation of a political model that allows the ruling class to engage in rent-seeking with impunity by using the police, the prosecution service and the courts as its accomplices. Such an environment has made it impossible to conduct meaningful reform of these organizations even though in such a small country only a few reformist judges and prosecutors should in theory be necessary to achieve rapid institutional change. Sadly, the efforts of international partners in these areas have produced few results because the ground on which they have been trying to work is inappropriate for the seeds that they

have tried to plant. The investment of trust in Filat’s and Plahotniuc’s political agendas and the provision of assistance without conditionality are a case in point. In a small country, the networks spawned by the crony capitalism model can prove particularly resilient and difficult to disrupt because all the players are connected to each other.

- To reform the justice sector requires a strong push from reformist forces in government, backed by civil society and international partners, to first clean the ranks of judges and prosecutors and then focus on institutional building, not the

other way around. Moldova cannot carry out this process effectively without the participation of international experts because of the power of its internal networks.

- The 2011–2016 Strategy envisaged a process to re-evaluate all judges, but the SCM dug its heels in. One factor hindering the process at the time was that Moldova did not yet have a proper asset declaration system to use as part of the re-evaluation procedure. In any case, there is still no proper system for evaluating the performance of judges, although at the time of writing President Maia Sandu, in office since December 24, 2020, is pushing hard to adopt a vetting model that incorporates experience gained in Albania and adapted to Moldovan realities. She championed the same approach when she was Prime Minister in 2019 but did not have time to push it through. The Ukrainian example of vetting in the justice sector is not encouraging, while the recent judgement of the European Court of Human Rights that upheld the dismissal of an Albanian Constitutional Court judge (European Court of Human Rights 9.2.2021) provides hope that a similar approach in Moldova can be effective. A similarly robust approach to vetting the appointments of judges, prosecutors and investigators with the involvement of foreign experts is essential to clean up the justice system.
- The lack of constitutional safeguards to appoint members of the SCM based on merit and with vetting of their integrity remains a serious obstacle to creating an independent judiciary. The changing political majorities in the Parliament have made it easy to adjust the composition of the SCM and appoint politically controlled members. It is still unclear whether a political consensus is possible that will allow the SCM to recruit its members without political interference and attract the talent needed to assert itself as a genuine leadership body for the judiciary committed to upholding the law.
- The justice system needs to recruit individuals with high levels of professional competence and integrity ready to defend their right to refuse illegal instructions from their superiors. Prosecutors and judges with these qualities will be able to carry out their work based on the law, not selective justice.
- Low salaries for judges and law enforcement officers have contributed to preserving corrupt practices. Accepting a bribe just once is enough to make a judge or prosecutor permanently vulnerable to a criminal system.
- In terms of the number of corruption cases investigated, NAC has performed well. However, these are predominantly petty corruption cases. The Center has failed to disrupt high-level corruption because it has never had a genuine mandate to do so. In 2019, NAC filed 253 cases but they concerned only low-ranking officials. Overall, NAC has opened 1,011 criminal cases, out of which 640 led to prosecution. In 2019, 312 persons were indicted on corruption charges (NAC 2019: 11). No data is available for the number of successful convictions.
- The EU made the mistake after 2009 of taking at face value assurances from Moldova's leaders who talked the talk about justice sector reform but were not committed to implementing the changes that they claimed to support. The banking fraud uncovered in 2014 provided spectacular evidence of how the quality of governance in Moldova had deteriorated despite significant support from the EU and other international partners. Between 2007 and 2016, Moldova received aid from the EU totaling over €780 million, making it, in per capita terms, the best supported of all the EU's Eastern Neighbourhood countries (European Court of Auditors 2016: 5). Since 2016, the EU has applied stricter conditionality to its support for reforms in Moldova. For example, the macro-financial assistance approved in May 2020 sets specific conditions for improving the work of the NIA.
- The problem facing the small number of committed reformers in Moldova in positions of power is that they rely heavily on the EU to drive change in the justice sector while the EU has shown reluctance to involve itself in the task of vetting prosecutors and judges. Despite frustration in society with the high levels of political corruption and a dysfunctional justice sector, successive governments have deliberately avoided lustration policies in the justice sector. They have also shown no appetite for establishing a new court to try high-level corruption cases as in Ukraine.
- The reforms attempted so far have not succeeded in creating even a small virtuous circle where the public can see that there is the possibility to conduct fair investigations and trials that deliver justice in the true sense of the word. It is hardly surprising, therefore, that Moldovan society has so little trust in its institutions.

## 5. Conclusions

Despite the difference in the size of the two countries, justice sector reforms in Ukraine and Moldova have run into the same problems:

- The reforms under-delivered because they prioritized form over substance in environments characterized by high resistance to change.
- They failed to promote cultural change in the judiciary and the law-enforcement agencies.
- They set unrealistic populist expectations about the possibilities of bringing corrupt officials to justice.
- They paid insufficient attention to improving the functioning of the lower courts and increasing public trust in the delivery of justice.

In both countries, parts of the political class united to obstruct improved governance and progress towards rule of law. Even though this resistance was entirely predictable, the architects of the reforms did not take sufficient account of the underlying systems in both countries that were hostile to change because control of law enforcement bodies and the judiciary was vital to their grip on power. This created a chicken-and-egg situation. Reformers viewed judicial reform as a catalyst for systemic transformation, yet it could not play this role because the old model of governance prevented it from doing so. In both Ukraine and Moldova, opponents of reform have claimed that the extension of foreign influence into the justice sector is tantamount to illegitimate external governance (for examples of this argument, see Voykuto 14.10.2019; Medvedev 15.1.2021). Such arguments are unconvincing since the efforts of international partners in this area have focused only on supporting domestic reforms based on commitments by both countries to the principle of rule of law.

The Council of Europe and other international partners mistakenly treated the judiciary in both countries as if it had emerged from a western rather than a Soviet culture. By recommending measures to strengthen judicial independence, their advice gave the old judicial corporations greater influence and reinforced their resistance to cultural change. This is a revealing example of how western principles applied with the best of intentions to post-Soviet environments can produce results diametrically opposed to those intended.

At the same time, reformers and international partners paid inadequate attention to reforming the law enforcement agencies, particularly the prosecution service, and placed disproportionate emphasis on creating new anti-corruption structures whose functionality was constrained by the power of old networks in the law enforcement system.

This vicious circle has bred frustration on the part of those driving the reforms and disillusionment in society. It has contributed to the impression in Ukraine and Moldova as well as outside that both countries are caught in an endless cycle of failed anti-corruption reforms that no amount of western assistance can break.

Transforming the justice sectors in countries blighted by the legacy of Soviet institutions and their “commercialization” in conditions of crony capitalism is a long-term process that goes far beyond recruiting “untainted” prosecutors and judges. It requires changing the operating environment for politicians and businesspeople to the point where they see the value of independent courts for upholding rights. Society has a vital role to play in this process by holding its leaders to account and demonstrating a sustained demand for unbiased justice.

By virtue of the strength of its civil society, Ukraine has advanced further down the long path of justice sector reform than Moldova. Paradoxically, it may now have the chance to make a significant breakthrough since the Constitutional Court crisis has brought the issue of judicial reform to a head and exposed the errors of allowing unreformed judicial self-governing bodies to take the lead. Radical action will be necessary to resolve the problem.

At the same time, with external assistance in vetting judges, prosecutors, investigators and police officers, and an injection of new blood into the judiciary and the law enforcement, Moldova could make rapid progress. Its small size could become an advantage with the rapid spread of a new culture of behavior in the justice sector.

The experience of each country offers lessons for the other. Reformers in both Ukraine and Moldova would do well to study these together and make this mutual learning part of their bilateral co-operation. The EU’s Eastern Partnership could usefully encourage this process.

## 6. Recommendations for international partners of Ukraine and Moldova engaged in justice sector reform

- In the design of assistance programs, take greater account of how the governance systems in Ukraine and Moldova function and the place of the justice sector within them.
- Speak openly about the factors inhibiting reform of the justice sector, including political influence over it as well as the culture of judges, investigators and prosecutors.
- When designing reform measures, consider the impact they will have in the context of these systems. Where will they encounter resistance and how can this be overcome?
- Replicate the recruitment approaches used for staffing NABU and the HACC as part of re-evaluation exercises for serving judges, investigators and prosecutors.
- Encourage the opening of the judiciary's ranks to outsiders, particularly experienced lawyers, and consider moving away from a career model for judges that encourages the formation of a "judicial corporation".
- Develop programs that encourage cultural change in organizations with strong in-built identities and interests. Business organizations have considerable expertise to offer in change management, particularly those that have been through complex mergers or faced the urgent need to improve their business practices.<sup>6</sup>
- Manage public expectations. Justice sector reform is a marathon, not a sprint, and not compatible with short-term election cycles. Jailing corrupt senior officials and businesspeople should not become an end in itself.
- Do not prioritize building new anti-corruption institutions over comprehensive reform of the justice sector. The two must go hand in hand.
- Place much greater emphasis on reforming investigative bodies and prosecution services. A better functioning judiciary cannot deliver justice without competent, impartial investigations and prosecutions.
- Focus on improving the first-instance courts and demonstrating to the public that the judicial system works to the benefit of citizens. Positive examples of individuals asserting their rights in the absence of interference in judges' decision-making will increase trust in the courts and the value of the law.
- To communicate the benefits of better functioning courts, encourage the development of journalism focused on authoritative crime and court reporting. This requires providing legal training for journalists.
- Promote better public understanding of the concept of rule of law and how it develops, with particular reference to the role of society in holding its leaders to account. This is not the task of a small number of committed civic activists. The decentralization reform in Ukraine offers significant opportunities for greater civic engagement by bringing government closer to the citizens it serves.

<sup>6</sup> BP's success in creating a new corporate culture at its joint venture TNK-BP is an excellent example of how corporate mergers create opportunities for radical change. Similarly, the Nordic telecoms company Telia was forced to take radical steps to improve its governance and standards of business conduct after it was rocked by a bribery scandal in 2012.

## 7. The countries: facts and figures

TABLE 1 Key figures for Ukraine and Moldova

	Ukraine	Moldova
Population (millions)	44.6	3.5
Total area	603,550 km <sup>2</sup>	33,851 km <sup>2</sup>
Population growth (annual rate)	-0.5%	-0.1%
Net immigration rate (migrants per 1,000 inhabitants)	-0.26	-8.95
Life expectancy in years	71.8	71.7
Urban population	69.4%	42.6%
GDP per capita (in PPP)	\$9,233	\$7,301
Poverty*	0.5%	1.1%

Sources: Bertelsmann Stiftung - BTI 2020 Country Reports | [https://www.bti-project.org/content/en/downloads/reports/country\\_report\\_2020\\_MDA.pdf](https://www.bti-project.org/content/en/downloads/reports/country_report_2020_MDA.pdf);

[https://www.bti-project.org/content/en/downloads/reports/country\\_report\\_2020\\_UKR.pdf](https://www.bti-project.org/content/en/downloads/reports/country_report_2020_UKR.pdf)

Total Area and net migration rates from: CIA - The World Factbook 2021, <https://www.cia.gov/the-world-factbook/>

\* Percentage of the population that lives from less than \$3.20 per day (international price comparison in 2011)

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TABLE 2 Democracy Index 2020

	Ukraine	Moldova
Democracy Score		
Rank (out of 167 countries)	79	80
Overall score*	5.81	5.78
Categories		
Electoral process and pluralism	8.25	7.00
Functioning of government	2.71	4.64
Political participation	7.22	6.11
Political culture	5.00	4.38
Civil liberties	5.88	6.76

Source: The Economist - Democracy Index 2020. In sickness and in health? | <https://www.eiu.com/n/campaigns/democracy-index-2020-download-success>

Scale: 1-10: Democracy Score, with 10 = highest value

\* Overall score: 8-10 = Full democracy; 6-7.9 = Flawed democracy; 4-5.9 = Hybrid regime; 0-3.9 = Authoritarian regime

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TABLE 3 Corruption Perception Index 2020

	Ukraine	Moldova
Rank (out of 180 countries)	117	115
Score (out of 100 points)	33	34

Source: Transparency International – Corruption Perceptions Index 2020 | <https://www.transparency.org/en/cpi/2020/index/mda>;  
<https://www.transparency.org/en/cpi/2020/index/ukr>  
 Scale: 1–100 for perception of corruption, with 0 = Highly Corrupt and 100 = Very Clean | Data extracted from 13 sources

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TABLE 4 Political Transformation, Economic Transformation, Governance Index

	Ukraine	Moldova
Rank in Status Index (out of 137 countries)	30	61
Status Index* (max. value of 10)	6.8	5.8
<b>Political Transformation</b>	6.9	5.8
Stateness	7.5	7.3
Political participation	7.5	6.0
Rule of Law	6.3	4.5
Stability of democratic institutions	7.5	6.0
Political and social integration	5.8	5.3
<b>Economic Transformation</b>	6.71	5.75
Level of socio-economic development	6.0	4.0
Market organization	7.0	6.8
Monetary and fiscal stability	8.0	7.5
Private property	7.0	6.5
Welfare regime	6.5	5.5
Economic Performance	7.0	5.0
Sustainability	5.5	5.0
<b>Governance Index</b>	5.52	4.89
Level of Difficulty	5.4	5.4
Steering capability	6.3	5.3
Resource efficiency**	6.0	5.0
Consensus-building	5.6	5.8
International cooperation	6.7	5.7

Source: Bertelsmann Stiftung – BTI Transformation Atlas 2020 | [https://atlas.bti-project.org/1\\*2020\\*CV:CTC:SELUKR\\*CAT\\*UKR\\*REG:TAB](https://atlas.bti-project.org/1*2020*CV:CTC:SELUKR*CAT*UKR*REG:TAB)

\* The Status Index is calculated from the overall score in the categories "Political Transformation" and "Economic Transformation."

\*\* "Resource Efficiency" includes "Anti-Corruption Policy"

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## Abbreviations

<b>ACUM</b>	Moldovan political alliance (also known as “NOW”)
<b>ARCO</b>	Agency for the Recovery of Criminal Assets
<b>BP</b>	British Petroleum (oil and gas company)
<b>ECHR</b>	European Court of Human Rights
<b>EEAS</b>	European External Action Service
<b>EUAM</b>	European Union Advisory Mission
<b>FIU</b>	Financial Intelligence Unit, Moldova
<b>DCFTA</b>	Deep and Comprehensive Free Trade Area
<b>HACC</b>	High Anti-Corruption Court, Ukraine
<b>HCJ</b>	High Council of Justice, Ukraine
<b>HQCJ</b>	High Qualification Commission of Judges, Ukraine
<b>IMF</b>	International Monetary Fund
<b>IPP</b>	Institutul de Politici Publice
<b>IRI</b>	International Republican Institute
<b>KDAC</b>	Kyiv District Administrative Court
<b>KGB</b>	Komitet Gosudarstvennoy Bezopasnosti (Committee for State Security of the Soviet Union)
<b>MDL</b>	Moldovan Leu (national currency)
<b>NABU</b>	National Anti-Corruption Bureau of Ukraine
<b>NAC</b>	National Anti-Corruption Centre, Moldova
<b>NACP</b>	National Agency for Corruption Prevention, Ukraine
<b>NIA</b>	National Integrity Agency, Moldova
<b>NPU</b>	National Police of Ukraine
<b>OCCRP</b>	Organized Crime and Corruption Reporting Project
<b>OECD</b>	Organization for Economic Co-operation and Development
<b>PGO</b>	Prosecutor General’s Office, Ukraine
<b>PIC</b>	Public Integrity Council, Ukraine
<b>ProZorro</b>	Ukrainian online public procurement system
<b>SAPO</b>	Specialized Anti-Corruption Prosecutor’s Office, Ukraine
<b>SBI</b>	State Bureau of Investigations, Ukraine
<b>SBU</b>	State Security Service, Ukraine
<b>SCM</b>	Supreme Council of Magistracy, Moldova
<b>SFS</b>	State Fiscal Service, Ukraine
<b>TNK-BP</b>	Tyumenskaya Neftyanaya Kompaniya – British Petroleum (oil and gas company merger)
<b>USAID</b>	United States Agency for International Development
<b>USSR</b>	Union of Soviet Socialist Republics



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