

**LIBERTIES**

**RULE OF LAW REPORT**

**2022**



*Country & Trend Reports on Democratic  
Records by Civil Society Organisations  
Across the European Union*



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# ***Executive summary***

## ***A unique reporting exercise***

The Liberties Rule of Law Report 2022 is the third annual report on the state of rule of law in the European Union (EU) published by the Civil Liberties Union for Europe (Liberties) – the most in-depth reporting exercise to date on the rule of law in the EU by an NGO network. The report, jointly drafted by Liberties and its national member and partner organisations, is a ‘shadow report’ to the European Commission’s annual rule of law audit, aimed at providing the Commission with reliable information and analysis from the ground to use in its annual audit, besides offering an independent analysis of the state of the rule of law in its own right.

The report lays out the most striking developments concerning the rule of law and democracy in 2021 in 17 countries across the EU. More than 30 civil society organisations from across the EU contributed to the research, which looked into a wide range of areas including the functioning of justice systems, the anticorruption framework, media freedom, pluralism and safety of journalists, checks and balances, civic space and human rights defenders and systemic human rights violations affecting the rule of law environment.

Besides pulling together all the individual country reports drafted by member and partner organisations, the report includes an overview

of general trends on the rule of law in the EU compiled by Liberties. It also formulates detailed recommendations addressed to both national government and the EU institutions on how to address the shortcomings identified in each of the areas covered, and suggests a series of improvements the European Commission could make to enhance the usefulness and impact of its annual rule of law monitoring exercise.

## ***Authoritarianism grows, while elsewhere problems stagnate***

We find few signs of progress. Most governments allowed existing problems to stagnate, while some already problematic regimes continued to build or entrench an authoritarian state.

Steps towards the creation of an authoritarian state worsened in Hungary and Poland. These governments refused to relent in their attempts to capture and control the justice system, civil society and media, and to scapegoat and curtail the rights of women and minority groups including LGBTQI+ people and migrants. Rather, their attacks became even more blatant and were accompanied by an escalation of the rule of law row with the EU. At the same time, Slovenia continued down the same path to authoritarianism we reported last year, with the government increasing pressure on the

prosecution system, independent media and civil society.

Meanwhile, this year's findings reveal few efforts by governments in other EU countries to resolve problems that most of them share, which we already documented in last year's report.

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## **Key findings**

### ***Justice***

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In the area of justice, the report confirms that the situation in Bulgaria, Hungary and Poland has deteriorated. We note modest improvements in the Czech Republic, Italy, the Netherlands and Slovakia. Other countries made no notable efforts to resolve problems identified last year. Among the most pressing concerns, the report points to pressure on courts' independence, including constitutional and supreme courts. We find these problems even in countries with a traditionally strong democratic records, such as Belgium, Ireland, Sweden and Spain. Researchers report that the justice systems in Belgium, Croatia, Ireland, the Netherlands, Poland and Slovakia are underfunded, making them less accessible and effective. Several justice systems still suffer from excessively long court proceedings, in particular in Belgium, Croatia, Ireland, Italy and Poland. A number of justice systems are failing vulnerable groups, or are difficult to access because of inadequate legal aid systems, such as in Belgium, Croatia, Hungary, Ireland, Estonia and Sweden. A number of countries also make excessive use of pre-trial detention: Belgium, Italy, Slovakia and Sweden.

### ***Corruption***

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We find even less progress on anticorruption. Corruption levels and risks have generally remained the same or even increased, as reported in countries across the board including Bulgaria, Croatia, the Czech Republic,

France, Hungary, Ireland and the Netherlands. In some cases, corruption is reported specifically in relation to management of the pandemic and the (mis)use of EU recovery funds. Only a few member states are genuinely engaging in reforming their anticorruption framework, but even where this is the case, reforms are moving very slowly. This is the case in the Czech Republic, Ireland, Italy and France. Rules to prevent corruption are mostly considered inadequate. These include rules on whistleblower protection, with EU safeguards not yet implemented in Belgium, the Czech Republic, France, Germany, Ireland, Italy, Romania and Spain, and progress only reported in Slovakia. Corruption cases are still poorly investigated, mainly because of the lack of effort by law enforcement authorities, as reported in Bulgaria, Croatia, Hungary and Italy. Restrictions on access to information hinder the exposure of corruption in Hungary, the Netherlands and Romania.

### ***Media and civic space***

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The situation for media and civil society across the EU is overall even more concerning than last year.

Journalists are facing an increasingly unsafe environment. In more than half of the countries we covered (Bulgaria, Croatia, France, Italy, the Netherlands, Poland, Slovenia, Spain and Sweden) we note an increase in attacks against journalists. These variably include verbal and physical violence, including by the police, online hate speech as well as legal harassment, such as Strategic Lawsuits Against Public Participation (SLAPPs). Threats to

media freedom and pluralism are also increasing and extend beyond the systemic and deliberate attempts to pressure, capture and control media reported in recent years in Hungary, Poland and Slovenia. Researchers in Bulgaria, Italy and Spain find that political and economic pressure is harming independent media and public service. We also find problems with the independence of media authorities in Bulgaria, the Czech Republic and the Netherlands. The report points to a persistent lack of transparency and publicity of media ownership in Croatia and Italy. A number of countries also suffer from a high concentration of media ownership, as reported for example in Hungary, Italy, the Netherlands and Slovenia. With the sole exception of Spain, public trust in traditional media, which was already low in 2020, is reported to have further declined in 2021, as reported by researchers in Bulgaria, Croatia, Hungary, Italy, the Netherlands, Poland, Slovakia and Slovenia. At the same time, our contributors in Bulgaria, Italy, Slovenia and Sweden report low editorial standards among some media outlines, sometimes contributing to the dissemination of hate speech and disinformation.

Civil society organisations and rights defenders continue to be targeted by verbal and physical attacks, legal harassment and smear campaigns. This particularly affects those who promote equality for marginalised groups such as ethnic minorities LGBTQI+ persons, or work on politically sensitive issues such as environmental protection and anti-police violence. This trend spans the whole EU and is particularly visible, among the countries covered in the report, in Belgium, Bulgaria,

Croatia, Ireland, Italy, Poland, Slovenia and Sweden. The governments of Croatia, Hungary and Slovenia have been particularly active in trying to discredit and delegitimise civil society organisations who take a critical stance towards them. Some governments have proposed new restrictive regulations to weaken, control or limit the activities of civil society organisations, in particular those performing advocacy and watchdog functions. This is reported in Estonia, France and the Netherlands. Some problems we highlighted in previous reports persist, such as discriminatory registration practices in Bulgaria, restrictive rules on political advertising in Ireland, and the criminalisation of humanitarian assistance in Belgium and Croatia. Meanwhile, the financial landscape for civil society organisations has further deteriorated, as reported in Croatia, Estonia, France, Germany, Hungary, Ireland and Slovenia – with restrictive requirements in Croatia and Slovenia also limiting access to EU funds.

These attacks occur in a wider context of increasing restrictions on freedom of expression through laws that disproportionately limit legitimate free speech. These include laws on defamation in Italy, Ireland, Spain and Sweden, laws curtailing journalistic work in France and Spain, laws on disinformation in Slovakia and laws on online content regulation in Hungary, Ireland and Slovenia. Governments are also reported to be restricting other rights that allow the public to participate in their democracies. For example, we find undue restrictions on access to public interest information in almost half of the countries covered (Belgium, Ireland, Italy, Hungary,

the Netherlands, Poland, Slovenia and Spain). Similarly, some governments also unduly curtailing the exercise of the right to protest, either through inadequate (in Germany) or repressive (in Spain) legal frameworks, or by abusing existing powers on policing assemblies (in Belgium, Bulgaria, Germany, Slovenia and Spain). The latter includes misuse of powers and regulations created to respond to the COVID-19 pandemic to ban protests or arrest and prosecute protestors and activists.

### ***Systemic human rights violations***

Systemic human rights violations and impunity were reported in 14 out of the 17 countries covered. With very few exceptions, systemic human rights violations reported on last year went unresolved. This includes: regression in equality laws and institutionalised discrimination (in Belgium, Bulgaria, the Czech Republic, France, Hungary, Ireland and Sweden); poor detention conditions and police ill-treatment of persons in custody (in Belgium, Bulgaria, Italy and Spain); severe violations of rights of migrants and asylum seekers (in Croatia and Spain); and violations of privacy and data protection (in Belgium, Bulgaria, Estonia and Ireland). Despite some progress reported in the Czech Republic, Ireland and Sweden, impunity remains an issue. This is also reflected in the poor implementation rate of judgments of the European Court of Human Rights and of the Court of Justice of the EU in Belgium, Bulgaria, Estonia, Hungary, Italy, Poland and Romania.

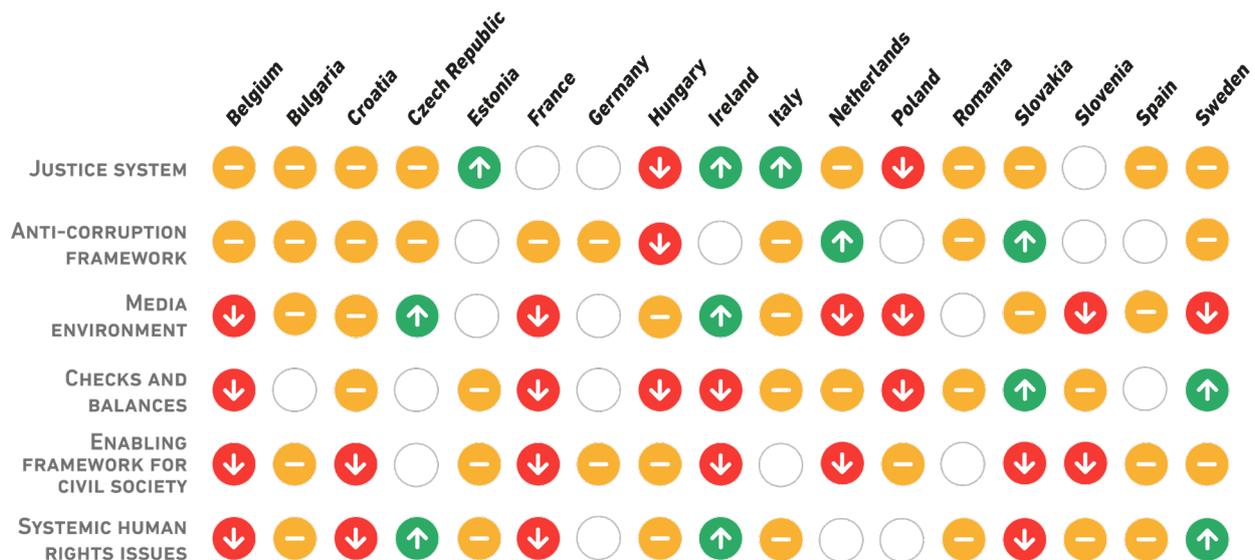
## The persisting impact of the COVID-19 pandemic

The COVID-19 pandemic continued to play a role. The ruling party of Hungary continued to abuse the emergency powers it created to deal with the COVID-19 to cover up corruption in what looks like an attempt to tilt the scales in upcoming elections. But governments elsewhere also seem unable to transition away from emergency powers to manage the public health threat under ordinary regimes. The report’s contributors question the legality of the executive’s operations in several countries including Belgium, Croatia, France, Ireland, Italy, the Netherlands, Poland and Sweden. If emergency powers become normalised we will see a progressive, long-term reduction of parliamentary and civil society oversight of the executive branch. This is especially problematic in countries where the courts and other

independent bodies and democratic structures have been weakened because it creates a risk that the imbalance of powers cannot be corrected. We find several concerns with the system of checks and balances: ineffective constitutional review mechanisms (endemic in Hungary and Poland, but also reported in Ireland and Slovakia); limited possibilities for judicial review (including in countries such as Belgium and Ireland); inadequate public consultations (reported in Belgium, Croatia, Ireland, the Netherlands and Slovakia); and the absence of effective watchdog authorities (in Hungary, in Belgium, Italy and Romania).

Contributions on Croatia, Estonia, Slovakia and Sweden also flag the failure of governments to mitigate the medium- and long-term damage caused by the pandemic, especially on vulnerable groups.

### State of Play



**Legend:** Regression ⬇️ No progress ⬜️ Progress ⬆️

## ***The crucial role of civil society***

The report finds that, in the absence of government initiatives to promote public understanding and debate on the rule of law, civil society is acting as a driving force. The latter is active in raising awareness and fostering public discussions on rule of law, mobilising and supporting efforts by other watchdogs, joining forces in monitoring developments and engaging in strategic litigation.

The rule of law is there to allow all members of society to enjoy equal rights, freedoms and opportunities to live fulfilling lives, to participate in social, economic and democratic life, and to make sure that those in power use it for the good of everyone in society. Liberties will continue to support civil society organisations in their efforts to monitor, protect and promote the rule of law across the EU and to alert on threats and challenges to help ensure that policy makers at all levels act in the best interests of all of their people.

## About this report

The Liberties Rule of Law Report 2022 (hereinafter ‘the 2022 Report’) is the third annual report on the state of rule of law in the European Union (EU) published by the Civil Liberties Union for Europe (Liberties).<sup>1</sup> The research is carried out by Liberties and its member and partner organisations and covers the situation in 2021. Liberties’ report is a ‘shadow report’ to the European Commission’s annual rule of law audit.<sup>2</sup> As such, its purpose is to provide the European Commission with reliable information and analysis from the ground to use in its annual audit and to provide an independent analysis of the state of the rule of law in its own right. Liberties’ report represents the most in-depth reporting exercise to date on the rule of law in the EU by a civil society network.

*Liberties is a non-governmental organisation (NGO) promoting the civil liberties of everyone in the EU. Liberties is built on a network of national civil liberties NGOs from across the EU. Currently, we have member organisations in Belgium, Bulgaria, the Czech Republic, Croatia, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania, Spain, Slovakia, Slovenia, Spain and Sweden. Liberties, together with its members*

*and partner organisations, carries out advocacy, campaigning and public education activities to explain what the rule of law is, what the EU and national governments are doing to protect or harm it and to gather public support to press leaders at EU and national level to fully respect, promote and protect our basic rights and values.*

The 2022 Report includes 17 country reports that were developed on the basis of a common structure mirroring and expanding on the priority areas and indicators identified by the European Commission for its annual rule of law monitoring cycle. A total of 32 among Liberties’ members and partner organisations across the EU contributed to the compilation of the country reports, which reflect the NGOs’ views, priorities and key concerns on developments affecting the rule of law in their countries. This year’s contributors are:

- Belgium – Belgian League of Human Rights (LDH)
- Bulgaria – Bulgarian Helsinki Committee & Association of European Journalists Bulgaria

1 For previous reports see: Liberties, [A response to the European Commission consultation on rule of law in the EU \(May 2020\)](#); Liberties, [EU 2020: Demanding on Democracy - Country & Trend Reports on Democratic Records by Civil Liberties Organisations Across the European Union \(March 2021\)](#).

2 [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en)

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- Croatia – Centre for Peace Studies (CMS) & Croatian Platform for International Citizen Solidarity (CROSOL)
  - Czech Republic – League of Human Rights (LLP)
  - Estonia – Estonian Human Rights Centre
  - France – Vox Public
  - Germany – Society for Civil Rights (GFF)
  - Hungary – Hungarian Civil Liberties Union
  - Ireland – Irish Council for Civil Liberties & CityWide Drugs Crisis Campaign, European Movement Ireland, FLAC-Free Legal Advice Centres, Inclusion Ireland, Independent Living Movement Ireland, Irish Traveller Movement, The Environmental Law Officer of the Irish Environmental Network
  - Italy – Antigone & Italian Coalition for Civil Liberties and Rights (CILD)
  - Netherlands – Netherlands Committee of Jurists for Human Rights (NJCM) & Netherlands Helsinki Committee (NHC), the Commissie Meijers, Free Press Unlimited (FPU), Transparency International Nederland (TI-NL)
  - Poland – Helsinki Foundation for Human Rights (HFHR)
  - Romania – APADOR-CH – The Helsinki Committee
  - Slovakia – Via Iuris
  - Slovenia – The Peace Institute – Institute for Contemporary Social and Political Studies
  - Spain – Rights International Spain
  - Sweden – Civil Rights Defenders & Swedish Section of the International Commission of Jurists (ICJ-Sweden)

Based on these country reports, the 2022 Report offers an overview of general trends on the rule of law in the EU and a series of recommendations. These recommendations make clear what action national governments and EU institutions need to take to rectify shortcomings.

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# ***Rule of law: what it is and why & how it needs to be monitored***

## ***It is about our rights and well-being***

Liberties uses ‘rule of law’ in a broad sense to include not only the health of the judiciary, equality before the law and integrity of the technical legislative process. We also include the state of the democratic process and protection of fundamental rights. The term ‘rule of law’ may sound odd and abstract to most people. We hear that governments should stick to the rule of law, that the European Union (EU) is not just a market but a union of values, and that governments can’t expect EU money if they do not respect EU values, including the rule of law. As explained by Liberties in a recent communications guide for policy makers,<sup>3</sup> using technical terminology like ‘rule of law’ can make it harder for people who are not experts on the topic to understand how important this principle is to delivering things we value in our daily lives. Figures who have a public platform have a responsibility to make sure that it is people who are the ultimate beneficiaries of a government’s obligation to abide by the rule of law.

The rule of law allows all members of society to enjoy equal rights, freedoms and opportunities to live fulfilling lives, to participate in social, economic and democratic life, and to make sure that those in power use it for the good of everyone in society. For example, the rule of law implies that judges must be independent so they can verify that politicians and businesses follow laws designed to prevent corruption or damage to the environment, so that citizens can enjoy properly funded schools and hospitals and clean air and water. Similarly, the rule of law implies that laws and policies are made through a democratic process that includes free, informed and balanced public debate, and that laws have to respect limits designed to protect the dignity and equality of everyone in society. **Attacks on the rule of law are attacks on the idea that a government is supposed to act in the best interests of all its people.**

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3 I. Butler, [Your ‘Rule of Law’ rhetoric is helping Orbán and Kaczyński – but there is another way](#) (November 2021).

## Keeping governments on their toes

Member state governments agreed with each other through the Treaty on European Union that the main purpose of the EU was to promote the well-being of their peoples and the values they shared; namely, the rule of law, democracy and fundamental rights. EU governments have in the past generally been recognised as performing well on the rule of law, democracy and fundamental rights. However, in recent years, **some governments have deliberately and systemically threatened these values, most notably in Hungary and Poland.** But elsewhere, too, governments' responses to challenges such as developing a fair and sustainable migration policy, facing the pandemic emergency or managing the rapid evolution of technology are leading to **falling standards.** In the EU, as in other parts of the world, promoting and upholding the rule of law requires vigilance and constant effort.

**The EU has a crucial role to play in keeping governments on their toes.** The European Commission, in particular, which is supposed to be an independent institution acting solely

for the benefit of the EU, and its people, has taken important steps to progressively develop what it calls its 'Rule of Law toolbox'.<sup>4</sup> The yearly audit on the state of rule of law across the EU, which the Commission committed to undertake since 2019, is one key element of this toolbox. The Commission defines it as a process for an annual dialogue on existing developments and challenges and how to best address them, involving EU institutions and governments as well as national parliaments, civil society, rights defenders and other interested stakeholders.<sup>5</sup> The audit, and the related annual reports published by the Commission, should serve as a basis for technical and political dialogues with governments. When dialogue fails, the report's findings should underpin enforcement actions and sanctions – including infringement proceedings, restricting the flow of EU funds under the new budget conditionality regulation<sup>6</sup> and special political sanctions under Article 7 of the EU Treaty. The Commission committed, as of 2022, to include recommendations to each country in its annual rule of law report.<sup>7</sup> This is a welcome step, which Liberties has long called for: it increases the chances that the report can lead to tangible steps to resolve problems by creating accountability for governments and

4 [https://ec.europa.eu/info/sites/default/files/rule\\_of\\_law\\_factsheet.pdf](https://ec.europa.eu/info/sites/default/files/rule_of_law_factsheet.pdf)

5 [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en)

6 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. For more information, see: [https://ec.europa.eu/info/strategy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation\\_en](https://ec.europa.eu/info/strategy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en)

7 European Commission, [2021 State of the Union address](#) (September 2021).

the Commission if they fail to follow up or implement these recommendations.<sup>8</sup>

At the same time, the EU is in a privileged position **to protect and support the work of public watchdogs like rights defenders, CSOs and independent media.** These public watchdogs make rule of law and democracy work for all of us: they give us a channel to communicate with our representatives while they're in office; they keep us informed about how politicians are using the resources and powers we have given them; they make sure our governments don't overstep the boundaries set by our freedoms; and they help people get justice for wrongs and abuses. The more a government is accountable to us, and the more involved we are in government, the more likely that our leaders will do what's best for all of us.

That is why the health of civil society as well as media freedom and pluralism are among key areas surveyed in the Commission's rule of law reports. And it is why these actors, including Liberties and its member and partner organisations, contribute to the Commission's annual rule of law audit and other efforts by the EU to monitor and protect the rule of law.

## ***Using the annual EU rule of law audit to its full potential***

As with Liberties' previous annual reports, this report offers a **comprehensive overview of the past year's most striking developments related to the rule of law as viewed by civil liberties organisations in 17 countries across the EU.** With a view to feeding into the country-specific recommendations that the European Commission is expected to include in its annual reports as of 2022, and inform follow-up action, the report also formulates **targeted recommendations addressed to both national and EU policy makers.** Liberties also has three recommendations for the European Commission, noted in previous annual reports and statements,<sup>9</sup> on **how to improve its annual rule of law audit and maximise its potential as a tool to protect the rule of law.**

### ***A change in tone from descriptive to critical analysis***

For the annual rule of law audit to really have the power to strengthen the rule of law, the Commission should move away from a merely descriptive approach to **embrace a more critical and contextualized analysis.**

<sup>8</sup> <https://www.liberties.eu/en/stories/eu-commission-second-rule-of-law-audit-same-concerns-as-first/43693>

<sup>9</sup> See for example Human Rights and Democracy Network (HRDN), [Submission to the European Commission in the framework of the 2nd Annual Rule of Law Review Cycle](#) (June 2021) and European Partnership for Democracy, [Civil society recommendations: how the Commission can improve the credibility, inclusiveness and impact of the Rule of Law Report](#) (September 2021). These recommendations were also echoed by the European Parliament in its [Report on the Commission's 2020 Rule of Law Report \(2021/2025\(INI\)\)](#) (June 2021).

The country-specific recommendations should be clear, concrete and measurable, with a set timeline for implementation and reporting on their implementation in the following year's report. They should take into account and be complementary to recommendations issued by other international and regional bodies. This would empower national authorities to work towards practical legislative and policy measures, while emboldening independent bodies and watchdogs to monitor and support these efforts.

The rule of law audit would also need to be more visibly integrated with other EU tools and mechanisms designed to protect the rule of law. The reports' findings should be articulated in such a way as to **enable the Commission to rely on them to promptly initiate strategic infringement proceedings and, where relevant, activate the rule of law conditionality mechanism**. In addition, the reports should be linked with the monitoring of the implementation of existing standards relevant to the rule of law, such as the recently adopted EU recommendation on journalists' safety and relevant EU strategies in the area of non-discrimination and the fight against racism.

The Commission should also include in the report clear indications as to possible **EU-level initiatives to address identified common challenges**, including legislative proposals to fill gaps left by inadequate national legal frameworks, proposals to recast and reform EU laws vulnerable to abuse, or guidance to member states to avoid dangerous unintended interpretations and applications of existing EU provisions.

### ***Acknowledge and address other systematic issues causing rule of law problems***

**The current scope of the Commission's report does not extend to looking at large-scale human rights violations caused by systemic problems.** This makes some of the problems identified by the Commission harder to solve. As the 2022 Report shows, systemic problems include a steep regression in equality for women and LGBTQI+ persons, structural discrimination and racism including racial profiling and police brutality, degrading detention conditions, disproportionate restrictions on the work of rights defenders, activists, campaigners and protesters, as well as widespread violations of the rights of migrants including violent pushbacks and ill-treatment. Many governments have failed to prevent, investigate and sanctions such violations. Many are also failing to implement recommendations and decisions by European and international monitoring bodies, including rulings by the European Court of Human Rights. If the Commission's report correctly identifies that certain problems with the rule of law are products of systemic issues, its recommendations are more likely to address the root causes of violations.

In particular, the Commission should devote itself to a **more in-depth analysis of the challenges facing media freedom and pluralism across the EU and examine and report more comprehensively about the obstacles facing rights defenders and CSOs in doing their work**. The media and CSOs play vital roles in ensuring that the rule of law works in practice

by facilitating democratic debate, public participation and government accountability.

### ***Closer cooperation with, and support for, civil society organisations***

**CSOs play a critical role in gathering evidence on threats to the rule of law, and in ensuring independent oversight** of whether national authorities are implementing the recommendations of EU institutions and bodies. Therefore, EU institutions, and in particular the Commission and the Council, should do more to **support civil society's efforts to promote and protect the rule of law.**

This requires, as a minimum, a series of concrete improvements to how the annual rule of law audit is carried out. In particular, to **make sure that all parts of civil society with valuable information are able to contribute and have sufficient notice to prepare their contribution.** Improvements that the Commission could make include: clearer and more timely communication about the consultation process and the other stages of the report's preparations; the creation of thematic and country focal points with whom contributing CSOs can communicate; a consultation with CSOs over the report's methodology and scope. The process would also benefit from the creation of transparent criteria for the selection of stakeholders to be consulted during the audit for the purposes of: gathering information on the national situation; formulating

recommendations; participating in a new annual dialogue with civil society, at both EU and national level, to evaluate the report and openly discuss its follow up at technical and political level, and to inform preparations of the following monitoring cycle.

As well as making the process more transparent, the Commission should also **address the barriers to participation caused by the lack resources and increasing restrictions on and retaliations over the work of CSOs.** The Commission is in a key position to help secure a more enabling environment for civil society. The measures the Commission could take include: developing EU standards to address certain challenges faced by CSOs across the EU, as also suggested by the European Parliament;<sup>10</sup> regularly monitoring restrictive national laws and practices and sanctioning governments when these violate EU law; supporting the creation of a mechanism to detect and act on the first signs of attacks against CSOs and rights defenders, including a helpline, legal assistance and temporary relocation, similar to the EU Human Rights Defenders Protection Mechanism supported by the EU in the context of its external action.<sup>11</sup> All these initiatives could be brought under a **dedicated policy framework** on enabling, safeguarding and protecting the civic space at national and at EU level, building on relevant international human rights standards and on EU rules including Article 11 of the Treaty on European Union, which creates an obligation on the EU to engage in an open, transparent and regular dialogue with CSOs.

10 [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2026\(INL\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2026(INL))

11 <https://protectdefenders.eu/>

# Overview of trends and key recommendations

## ***EU democracies in 2021: little progress, widespread stagnation and deepening authoritarianism***

Last year's report<sup>12</sup> revealed coherent efforts to create **authoritarian regimes in Hungary and Poland**, and flagged that **Slovenia** was following the same path. We also reported disappointing trends in **traditionally strong democracies** in all the areas covered by our research. Unfortunately, we were unable to report many positive developments and practices. The negative developments we found were in part due to the way that countries responded to the outbreak of the COVID-19 pandemic. Some governments, such as those of **Hungary, Poland and Slovenia**, **abused the pandemic** to accelerate their strategy to dismantle democratic standards. Many other governments seemed to ignore or failed to consider how measures to deal with the pandemic

undermined the rule of law, democracy and fundamental rights.

This year's report suggests the direction of travel remains the same. **Hungary and Poland continued to take further steps towards creating an authoritarian state.** These governments have shown no signs of relenting in their attempts to **capture and control the justice system, civil society and media, and to scapegoat.** They have continued to **curtail basic rights including sexual and reproductive rights and the rights of minority groups such as LGBTQI+ people and migrants.** The latter has been used as a deliberate tactic to fuel divisions in society and thereby divert attention from their own failings and secure public support on the pretext of defending national culture and sovereignty.

Instead of taking action to address concerns raised by, among others, the EU, the governments of **Hungary and Poland escalated the rule of law row and intensified their attacks on the EU.** The latter was depicted as an imperialist power in an effort to turn

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12 Liberties, [EU 2020: Demanding on Democracy - Country & Trend Reports on Democratic Records by Civil Liberties Organisations Across the European Union](https://www.liberties.eu/en/get-involved/demanding-on-democracy-eu-2020-report/67), cited. The main report and all country reports are also accessible on the campaign page on Liberties' website: <https://www.liberties.eu/en/get-involved/demanding-on-democracy-eu-2020-report/67>

domestic public opinion against the EU and **dissuade EU institutions, and in particular the Commission, from targeting them with serious political and economic sanctions.** Hungary and Poland even brought actions before the Court of Justice of the EU (CJEU) to seek the annulment of the so-called rule of law conditionality mechanism,<sup>13</sup> the EU regulation adopted in 2020 that allows for the suspension of disbursement of Union funds to countries where a systemic threat to the rule of law creates a risk that those funds will not be spent in line with EU rules.<sup>14</sup> Following pressure from civil society and the European Parliament,<sup>15</sup> which later even sued the European Commission before the CJEU for failure to trigger the mechanism and delay its application,<sup>16</sup> the Commission sent letters to Hungary and Poland in November 2021<sup>17</sup> – an informal first step toward triggering the mechanism while waiting for the CJEU judgment.<sup>18</sup> The letters were sent while the Commission had blocked for months the approval of billions in pandemic recovery funds allocated

to these countries over rule of law concerns. Yet, this year's report shows continued efforts by both regimes to increase their latitude to **misuse and appropriate EU funds intended to benefit their citizens.** For example, the government of Poland continued its attacks on the independence of the judiciary and on EU law, while Hungary's government flouted rules on public procurement and conflict of interest.

Meanwhile, Slovenia continues to follow a **similar path towards authoritarianism.** The country held the Presidency of the Council of the EU in the second semester of 2021. But this did not make the government shy away from **intensifying attacks on media freedom and civil society and obstructing the functioning of its prosecution service.** The latter includes unjustified delays in the appointment of the Slovenian delegate to the European Public Prosecutor's Office (EPPO) – a new Europe-wide body tasked to tackle large-scale, cross-border crime against the EU budget.<sup>19</sup>

13 CJEU, [Case C-156/21, Hungary v Parliament and Council](#) and [Case C-157/21, Poland v Parliament and Council](#)

14 [Regulation \(EU, Euratom\) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.](#)

15 See among others the [European Parliament resolution of 8 July 2021 on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget \(2021/2071\(INI\)\).](#)

16 [https://www.europarl.europa.eu/former\\_ep\\_presidents/president-sassoli/en/newsroom/parliament-files-lawsuit-against-commission-over-rule-of-law-mechanism.html](https://www.europarl.europa.eu/former_ep_presidents/president-sassoli/en/newsroom/parliament-files-lawsuit-against-commission-over-rule-of-law-mechanism.html)

17 <https://www.politico.eu/article/eu-rule-of-law-penalty-process-poland-hungary/>

18 The CJEU judgment on the lawsuits brought by Hungary and Poland against the Regulation is expected right at the time of the publication of this report. According to the Opinions expressed by the CJEU Advocate General on 2 December 2021, the cases are to be dismissed and the validity of the Regulation should be confirmed (see [Advocate General Opinion](#) in case C-156/21 and [Advocate General Opinion](#) in case C-157/21).

19 [https://ec.europa.eu/anti-fraud/policy/policies-prevent-and-deter-fraud/european-public-prosecutors-office\\_en](https://ec.europa.eu/anti-fraud/policy/policies-prevent-and-deter-fraud/european-public-prosecutors-office_en)

Threats to democracy in **Slovenia** were the object of a **dedicated resolution adopted by the European Parliament** in December 2021.<sup>20</sup> Among the most serious concerns raised, the resolution pointed to **defunding of the media, online harassment, abusive lawsuits, threats and smears against critical voices such as independent media and CSOs** in the country's **highly polarised political environment**. Responsibility for these problems was largely attributed to prominent public figures and politicians, including members of the government and the Prime Minister himself. The resolution also condemned the government's plans to **change the appointment criteria for prosecutors and hinted at political reasons for deliberately delaying the appointment of state prosecutors**, including to the EPPO, which have an impact on investigations. The latter issue was also raised in the Commission's 2021 rule of law audit on Slovenia.<sup>21</sup> The European Parliament also raised concerns over the government's **continuing practice of rule by decree**. The resolution was adopted following a fact-finding mission of a delegation of the Parliament's Democracy, Rule of Law and Fundamental Rights Monitoring Group, during which MEPs reported experiencing a "climate of hostility, distrust and deep polarisation in the country, which erodes trust in

and between various public bodies".<sup>22</sup> After the visit, Prime Minister Janez Janša personally attacked the MEPs with hate speech on social media, including antisemitic remarks, after having declined to meet them without any explanation – as also did the defence and justice ministers.<sup>23</sup> Despite the attention generated both at EU level and domestically by the European Parliament's warnings, the **government's pressure on public institutions, the media and civil society does not seem to be diminishing**, as the present report shows.

Aside from these more extreme cases, the 2022 Report shows that **very little progress was made during 2021 to address certain problems with the rule of law shared by many member states**, which we identified last year.

While we note **some modest improvements** in some member states in the area of **justice**, this is **not the case everywhere**. Pressure persists on **courts' independence**, including in countries with a traditionally strong democratic record, while efforts to improve quality, efficiency and transparency of justice are overall **rather poor**.

While **corruption** levels have generally **remained the same or even increased**, with

20 [European Parliament resolution of 16 December 2021 on fundamental rights and the rule of law in Slovenia, in particular the delayed nomination of EPPO prosecutors \(2021/2978\(RSP\)\)](#)

21 [Commission Staff Working Document SWD/2021/726 final, 2021 Rule of Law Report Country Chapter on the rule of law situation in Slovenia.](#)

22 <https://www.europarl.europa.eu/news/en/press-room/20211011IPR14622/rule-of-law-in-slovenia-meps-conclude-their-first-mission-to-the-country>

23 <https://euobserver.com/democracy/153244>

several high-profile corruption cases being reported, **only a few member states are genuinely engaging in reforming the anticorruption framework.** Even where reforms are taking place, they are being carried out at a very slow pace. **Rules to prevent corruption are mostly considered inadequate,** including in the area of whistleblower protection. Corruption cases are poorly investigated, while evidence shows that corruption is also affecting, in various member states, the **(mis) use of recovery funds.**

Overall, the **situation for media and civil society across the EU is even more concerning** than last year. **Journalists are facing an increasingly unsafe environment,** with a higher incidence of verbal and physical violence, including by the police, online hate speech and legal harassment, such as Strategic Lawsuits Against Public Participation (SLAPPs) being reported in several countries. **Media freedom and pluralism across the EU is being further squeezed** by political pressure on independent media and public service media, the lack of independence of media authorities and lack of transparency in media funding, coupled with a strong concentration of media ownership. **CSOs and rights defenders continue to be targeted by verbal and physical attacks, legal harassment and smear campaigns,** especially those who act in defence of the rights of minorities and vulnerable groups. An increasing number of governments put in place restrictive regulations to weaken, control or limit the activities of CSOs, in particular those performing advocacy and watchdog functions, while the financial landscape for CSOs has further deteriorated, as is their involvement in law

and policy making. Governments in a number of countries have also imposed **increasing restrictions on freedom of expression and access to public interest information,** as well as the **exercise of the right to protest.**

**Systemic human rights violations** reported on last year, including regression in equality laws and institutionalised discrimination, poor detention conditions and ill-treatment of persons in custody by the police, severe violations of the rights of migrants and asylum seekers and privacy and data protection violations **remain unaddressed, with very few exceptions.**

The **COVID-19 pandemic** continued to prove a severe test for rule of law and human rights protection. Two years after the first outbreak, most governments seem **unable to transition to the sustainable management** of the public health threat under ordinary regimes, or, in some cases, **unwilling to give up the emergency powers** that they granted themselves to deal with the pandemic. As a result, the **use of emergency powers and measures seems to become a normality.** This damages the health of our democracies: elected representatives sitting in national parliaments and citizens wanting to participate in their democracies through CSOs are being cut out by executives that are giving themselves greater powers to rule without oversight. The problem of executive bloating is compounded by the fact that in many countries there are **ineffective constitutional review mechanisms, limited possibilities of judicial review, poor public consultations** and the **absence of independent and effective watchdog authorities.** The

result is fewer checks from voters, parliamentarians and the courts on the executive branch, with citizens losing out. At the same time, the **medium- and long-term impact of the crisis, especially on vulnerable groups**, is worrying and measures taken to date by governments to mitigate problems appear largely insufficient.

## ***Delivering justice: the good, the bad and the lazy***

### ***Key findings***

- In 2021 there was a clear deterioration of the situation in those countries where attacks on the judiciary formed part of a broader strategy to dismantle the rule of law. Similarly, challenges worsened where governments seem unwilling to muster the political will to address systemic and longstanding issues affecting the independence and effectiveness of the justice system.
- Some countries, which already had reforms underway, made some progress, but governments overall failed to address key concerns identified last year.
- A number of countries, including some with a traditionally solid democratic system, continue to have problems with the independence of judges and courts. This includes problems with the procedures to appoint judges and prosecutors, the independence and functioning

of supreme courts, constitutional courts, prosecutors and councils of the judiciary as well as the process for disciplining members of judiciary.

- Many countries continue to have a problem with the quality of justice, because they under-resource their courts. Among other problems this leads to excessively long court cases. However, some governments are making efforts to improve the situation.
- In a number of countries, the pandemic expedited the process of digitalisation in courts. However, this has been implemented in a way that can risk the fairness of trials.
- Inadequate legal aid systems and court fees continue to prevent access to justice being available to everyone in a number of countries. Little progress was made in 2021, and more efforts are needed to ensure that vulnerable groups (such as children, persons with disabilities and migrants) can access fair and effective justice.
- Despite some progress, a number of countries continue to have serious problems with their criminal justice system; in particular, they make excessive use of pre-trial detention and have allowed prisons to become overcrowded.

### Key recommendations

#### Governments should:

- Take steps to ensure the full independence, professionalism and integrity of judges at all levels, including by strengthening judicial self-governance through independent and effective judicial councils and enhancing training.
- Beyond digitalisation, governments should increase investments in the justice system to make it more accessible, fairer and efficient for the benefit of all people in society, including vulnerable and marginalised groups.
- Revise rules to ensure fair allocation of costs of proceedings between the parties and improve legal aid systems, in particular for civil cases.
- Design and implement judicial reforms in close consultation with the legal community and civil society.
- Reform the criminal justice systems to give priority to community justice and other non-custodial sentences.

#### The EU should:

- Trigger the rule of law conditionality mechanism against governments that attack the judiciary as part of broader strategy to dismantle the rule of law and take no genuine steps to restore agreed standards.
- Use all its powers, including guidance, peer pressure and infringement proceedings, to promote and enforce international standards on the independence of the justice system.
- Use EU funding, including the recovery and resilience fund, to push for tangible and specific investments in the area of justice to make it more accessible, fairer and efficient for the benefit of all people in society.
- Initiate work towards an EU recommendation on standards on detention, including detention conditions, pre-trial detention and alternatives to detention.

Liberties' **2021 report** revealed a mixed picture as regards the extent to which justice systems in the countries covered were able to deliver fair, effective and independent justice. While it noted that **announced reforms** in a few member states were a positive sign, **it also**

**found many problems** shared by several countries. They included **threats to judicial independence**, also in countries with traditionally strong rule of law standards, the **excessive length of proceedings** and **under resourced courts**, barriers to access justice due to **high court fees** and **poor legal** aid systems and risks to the fairness of trials caused by digitalisation.

This year's report finds some concrete progress in those member states where reforms were underway or announced, and in particular the Czech Republic, Italy and Slovakia. But our research also reveals the continued failure by governments to address important problems common to many countries. In addition, we find a clear deterioration of the situation in Hungary and Poland, where attacks on the judiciary are part of a broader strategy to dismantle the rule of law, and in Bulgaria, where the authorities seem unwilling to make concrete progress on systemic and longstanding issues affecting the independence and effectiveness of the justice system.

### ***Pressure persists on courts' independence***

As regards **independence of judges and courts**, reforms underway in **Slovakia** and expected in the **Czech Republic** are a **step in the right direction** in terms of enhancing independence and transparency of the judiciary, including prosecution services. While we welcome commitment to reforms in Ireland, civil society would like the process to be more transparent and participatory.

By contrast, the situation has continued to deteriorate in Hungary and Poland, where the political influence on the judiciary, including prosecutors, is becoming more obvious, including through interference in the appointment of prosecutors. Blatant attacks have continued, in particular in Poland, where **recommendations by monitoring bodies and judgments** by the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) against the Polish government on judicial independence remain unimplemented. As a result, the following problems remain unresolved: the **unlawfully composed National Judicial Council** continues to appoint and promote judges with no transparency; judges and public prosecutors face **smear campaigns and disciplinary action** such as service suspension, relocation to other courts and the waiver of immunity for handling politically sensitive cases; public prosecutors are **under surveillance** (as revealed in reports on the use of Pegasus spyware); the **Constitutional Tribunal** is under the control of the ruling party; and the rules that decide how cases are **allocated to different courts** remain untransparent.

But elsewhere, too, beyond these extreme cases, concerns over the independence of the judiciary remain. In **Bulgaria**, the political turmoil has affected the independence of courts and prosecution offices, and the system of appointment and selection of judges and prosecutors has suffered shortcomings. **Flawed procedures to appoint judges and prosecutors** are also reported in countries with a traditionally solid democratic system, such as **Sweden**, where the country report raises

concerns over the unbalanced composition of judging panels. In **Bulgaria**, the **allocation of cases to courts** lacks transparency, while steps taken to improve the case allocation system in the **Netherlands** seem overshadowed by the wide discretion left in individual cases, which risks weakening the effectiveness of new rules. Attempts to reform the **judicial map** seem to have so far failed in **Bulgaria** and **Slovakia**. Concerns over the **independence of supreme courts** and constitutional courts are particularly common. In **Belgium, Croatia, Ireland** and **Sweden**, these variably refer to the composition and system of appointment of supreme or constitutional courts' members and presidents, which are said to make them potentially vulnerable to political pressure. Researchers also find that **problematic practices** damage the independence of the court of cassation in **Belgium**, which revealed cooperation with state prosecutors in the drafting of judgments, and the constitutional court in **Spain**, which has untransparent contacts with the government.

The country reports also find that the independence of and legal regimes applicable to **councils of the judiciary** are problematic in **Spain** and **Romania**. Here, the lack of transparency and apparent arbitrariness of decisions taken by the councils have a negative impact on the public's perception of the independence of judiciary. Liberties' member and partner organisations suggest the **creation of a council of the judiciary** in **Sweden**. In the **Czech Republic**, our member reports that **public opinions diverge** on the creation of such a council. In contrast, we find positive developments in **Slovakia**, where the judicial

council is becoming more transparent thanks to efforts to digitalise its hearings and more public information on its work being made available online.

The **lack of independence and autonomy of the prosecution service** remains a serious issue in Bulgaria, where prosecutors are failing to conduct effective investigations into high-level corruption cases and suspicious activity is reported between members of the judiciary and prominent businesspeople. In **Slovakia**, there is still concern about the power of superior public prosecutors to revoke decisions made by their subordinates. In **Ireland**, researchers find that the Special Criminal Court hearing about offences against the state lacks the necessary independence. On a positive note, a bill is under discussion in the **Netherlands** that would strengthen prosecutors' independence.

Country reports on **Bulgaria, Ireland** and **Romania** reveal problems with the process for **disciplining members of judiciary**, while researchers in **Slovakia** greet the newly created Supreme Administrative Court as a positive sign of greater accountability for judges and prosecutors.

### ***Poor efforts to improve quality of justice***

In terms of the **quality of justice, positive progress** is generally reported in **Italy**, where the recovery and resilience plan adopted in response to the COVID-19 pandemic is leading to important reforms of the civil and criminal justice systems, aimed in particular at reducing the length of court proceedings,

reducing the number of pending cases and making progress on digitalisation.

At the same time, the **under resourcing of courts** remains a concern in many countries. Despite modest improvements, the country reports find that governments made insufficient investments in **Belgium, Croatia, Ireland, the Netherlands, Poland** and **Slovakia**. The need for **more and better training** is also highlighted in country reports on **Croatia, Ireland** and **Sweden**, while we find **progress** in the **Netherlands**, particularly in the area of cybercrime and cybersecurity.

The pandemic expedited the process of **digitalisation** in courts, and country reports note concrete progress in a number of countries including **Croatia, the Netherlands** and **Slovakia**. But researchers also find that **digitalisation risks undermining standards that ensure a fair trial**; in particular, the right to a fair public hearing, as illustrated in country reports on **Belgium, Hungary, Ireland, Poland** and **Sweden**. In the **Netherlands**, a study is due to be conducted looking at the impact of digitisation on vulnerable groups, and whether this has implications for better resourcing the data protection authority. In **Bulgaria**, an EU-funded project to digitalise the justice system delivered **disappointing** results due to software flaws.

**Inadequate legal aid systems** remain a barrier to **access justice**, especially for the most vulnerable, as reported, in line with trends illustrated in last year's reports on **Belgium, Croatia, Hungary, Ireland** and **Sweden**. This is exacerbated in certain countries by very **high court**

**fees**, such as **Sweden**, and **damaging rules on costs**, such as in **Ireland**, which make it more difficult to bring cases in the public interest. **Concrete progress** on the legal aid system and the lowering of courts fees was only reported in the **Netherlands**. As regards access to justice more generally, important gaps remain as regards access to effective remedies and the treatment in court of **vulnerable groups** including children, persons with disabilities, persons in a situation of poverty and persons in a precarious socio-economic situation such as migrants – as variably reported in **Croatia, Hungary, Ireland, Estonia** and **Sweden**.

### *Efficiency, transparency and compliance with fair trial standards need improving*

The justice systems of several countries still suffer from problems with **fairness and efficiency**, mainly because of the **excessive length of proceedings**. The problem remains systemic in **Belgium, Croatia, Ireland, Italy** and **Poland**. Nonetheless, **efforts to tackle the issue** by accelerating the resolution of cases and diminish the courts' case backlog are reported in **Estonia, Italy, Ireland** and **Slovakia**. In **Hungary**, a new law introduced to provide **monetary compensation** for the excessive duration of civil proceedings is seen as a positive development, but efforts to speed up final decisions by **removing the possibility of appeal** are concerning.

A number of countries have **limited access to court decisions**, which is bad for transparency of the justice system. This is reported in particular in **Belgium** (where a 2019 law

providing for decisions to be published in an online database has not yet been implemented), **Ireland** (specifically with regard to quasi-judicial tribunals) and **Slovakia** (where there is no free public access to court decisions). On a positive note, steps are being taken in **Estonia** to improve access to court decisions and case files.

Serious concerns persist in the area of **criminal justice**. These include: **the excessive use of pre-trial detention**, reported in **Belgium**, where recent data show that as much as 35-40% of detainees in prisons are held in preventive detention, as well as in **Slovakia** and **Sweden**; **the lack of respect of fair trial standards for persons with disabilities** in **Sweden**; **privacy concerns** related to the use by prosecuting authorities of communications data in **Estonia**; and **prison overcrowding** in **Italy**. In Italy, however, there is **hope for progress** in the shape of plans for a **comprehensive reform of criminal trials**. This reform could offer judges alternative sentences to detention and improve the penitentiary system. The **Romania** country report notes a positive development: a decision by the Constitutional Court now requires courts to publish the grounds on which they determine criminal sentences in each case without delay. This is an important step in better safeguarding the **right to access to a court and to an effective remedy** in criminal proceedings.

## **No real progress on corruption**

### **Key findings**

- Overall, governments made very little progress in the fight against corruption. A number of country reports point to high-profile corruption cases revealing how corruption has also affected the (mis)use of recovery funds.
- Rules to prevent corruption, such as lobbying transparency measures, are still inadequate. On a positive note, reforms are being discussed in a number of countries, albeit at a slow pace.
- Governments in several countries have not yet implemented EU whistleblower protection rules, and CSOs consider efforts to investigate and prosecute corruption cases as still insufficient.

### **Key recommendations**

#### **Governments should:**

- Ensure full transparency and accountability in the distribution of public funds, including by improving lobbying transparency measures.
- Allocate more resources to tackle corruption and foster better

cooperation between relevant institutions and authorities.

- Swiftly implement the rules contained in the EU whistleblower protection directive in full consultation with stakeholders including civil society.

### The EU should:

- Trigger the rule of law conditionality mechanism against governments that weaken the rule of law framework to facilitate and cover up systemic corruption.
- Strictly monitor the transparent and lawful disbursement of EU funds, including recovery and resilience funds, and use its enforcement powers to ensure respect for public procurement and other relevant EU rules.
- Take steps to prompt progress in the transposition and implementation of rules contained in the EU whistleblower protection directive, in close cooperation with non-state actors including civil society.

Last year's report pointed to **concerning levels of corruption** in a number of EU countries. The findings revealed that, despite slight progress recorded in a few member states, authorities were **reluctant to tackle corruption and**

**ensure transparency and accountability**, even going so far as to hamper the work of CSOs fighting corruption.

The situation has not improved. **Corruption levels either stayed the same or worsened.** In **Hungary**, in particular, the situation worsened significantly: our member reports a lack of transparency in government spending, budget reallocation and outsourcing of state assets. It also highlights how the government has been **misusing pandemic recovery funds** through opaque public tenders and weakened public procurement standards. The Hungarian government's declared intention to create committees of inquiry to address problems appear to be empty rhetoric. But the situation is alarming elsewhere, too. Country reports on **Croatia**, the **Czech Republic**, **France** and **Ireland** find corruption is a serious concern. In the **Netherlands**, the country report also points to **corruption risks emerging from the pandemic**, in particular in the area of public procurement. CSOs in **Bulgaria** and **Croatia** highlight **high-profile corruption cases** involving government officials and equally involving **misappropriation of EU funds**.

In some countries, **plans to prevent corruption are progressing**, but at a rather **slow pace**. Reforms are being discussed in the **Czech Republic**, **Ireland**, **Italy** and **France** but with no concrete results yet. In **Belgium** and **Croatia**, CSOs report that a **lack of resources and political will** hinder real progress. In **Hungary**, **Ireland**, **Italy** and the **Netherlands** reports highlight inadequate or non-existent rules on lobbying transparency, conflict of interest and integrity of public officials.

EU whistleblower protection rules have not yet been implemented in **Belgium**, the **Czech Republic**, **France**, **Germany**, **Ireland**, **Italy**, **Romania** and **Spain**. In **Belgium**, our member reports that the government even initiated a **procedure aimed at firing two whistleblowers** working at the national data protection authority who had alerted the parliament about dysfunctions in the agency. While whistleblower protection rules were proposed in **Croatia**, **Ireland** and the **Netherlands**, there are concerns regarding their **adequacy and effectiveness**. By contrast, **Slovakia** created a new **Whistleblower Protection Office**, which is seen as a step in the right direction.

CSOs consider **investigation and prosecution of corruption cases** as still inadequate in a number of countries. Reports on **Bulgaria**, **Croatia**, **Hungary** and **Italy** deplore the **lack of efforts by law enforcement authorities**. A recent report on Croatia revealed that in 2021, the State Attorney's Office dropped 91.3% of its total corruption cases, a 35% increase from the previous year. Investigations and prosecutions are also negatively affected by **restrictions on access to public interest information**, which CSOs reported in **Hungary**, the **Netherlands** and **Romania**.

## **Media and journalists under increasing pressure**

### **Key findings**

- The situation for media freedom and safety of journalists across the EU generally worsened in 2021.
- In several countries, online and physical violence and attacks against journalists, including by the police, have remained significant or even worsened. SLAPPs (abusive lawsuits) targeting investigative journalists are on the rise, which means the media are increasingly deterred from reporting on matters of public importance.
- Political pressure on independent media and public service media, the lack of independence of media authorities and lack of transparency in media funding, coupled with a strong concentration of media ownership, continue to threaten media freedom and pluralism across the EU.
- Governments in a number of countries have imposed increasing restrictions on freedom of expression and access to public interest information.
- With very few exceptions, efforts to fight disinformation and laws on hate speech and on online content regulation remain inadequate, as vague provisions risk in practice

to disproportionately impact on freedom of expression and information.

### **Key recommendations**

#### **Governments should:**

- Take steps to ensure a safe environment for journalists to carry out their work. They should put in place the necessary safeguards to protect journalists from violence, harassment and surveillance, including from law enforcement authorities. Measures must also be taken to prevent, protect and support journalists and other watchdogs from SLAPPs.
- Improve transparency of state subsidies and ensure fair distribution of public funds to media with special regard to public service media and state-funded advertising across the media sector.
- Improve transparency of cross-sector media ownership.
- Safeguard and strengthen independent and effective media authorities.
- Support independent and professional journalism and facilitate access to information and public documents.

- Revise unduly broad or vague laws that criminalise legitimate free speech.

#### **The EU should:**

- Closely monitor and report on the implementation of the EU Recommendation on the Safety of Journalists and related EU legislation, such as the Whistleblowing Directive, in close consultation and cooperation with civil society and media representatives.
- Come up with an ambitious initiative to counter SLAPPs.
- Propose a comprehensive Media Freedom Act based on the concept of information as a public good and international human rights standards on freedom of expression and of information, including measures to ensure that the enforcement of state aid and competition rules benefits pluralism and address the concentration of the media market beyond mere economic competition goals, provisions to ensure strong supervisory authorities at national and EU level and measures to counter government capture of public service and independent media.

**Last year's report** highlighted that across the EU **toxic media landscapes** were threatening media pluralism as well as freedom of access to information. The main concerns raised included **political pressure on media**, the **concentration of media ownership** and a **deterioration of the independence and effectiveness of media regulatory bodies**. In addition, our members reported an **increasingly hostile and sometimes violent environment for journalists**, alarming trends in restrictions on **free speech**, harassment and intimidation of journalists through **SLAPPs** and a **rise of disinformation** combined with **restrictions on access to information**. Unfortunately, the situation in this year's report is **even more worrying**.

### ***Curtailing freedom of expression and information***

CSOs report **increasing restrictions on freedom of expression and information** over the past year. In a number of member states, laws continue to disproportionately limit free speech, with no concrete progress made to date despite the announcement of reforms. These include **laws on defamation** in **Italy, Ireland and Spain** – where our member also reiterates concerns about the impact of the so-called Gag Law and of counterterrorism laws. In **France**, a new law risks compromising the work of **journalists trying to expose forms of police violence**, while in **Slovenia**, our member reports an attempt to introduce new rules on the criminalisation of insults including against officials to **punish criticism of the Prime Minister and other government representatives**. Meanwhile, in **Slovakia**, our member

refers to criticism over a **newly proposed law targeting disinformation which risks being abused** to target stories that are simply politically sensitive. In **Sweden**, self-censorship on social media is reported because of the threat of lawsuits for defamation, and in **Hungary** there is increasing self-censorship following the Pegasus scandal and the trans- and homophobic propaganda law.

At the same time, CSOs consider the **legal framework to counter hate speech as inadequate**, as reported in particular in **Ireland, Slovenia and Sweden**, and similar concerns are raised as regards **laws on online content regulation** in **Hungary, Ireland and Slovenia**.

**Restrictions on access to public interest information** remains an issue in several countries: **Belgium, Ireland, Italy, Hungary, the Netherlands, Poland, Slovenia and Spain**. In Hungary, our member reports a deterioration of the situation, in particular in the context of the **COVID-19 pandemic**, reporting that journalists were refused entry to hospitals to cover the public health emergency and authorities responded to freedom of information requests very slowly and sometimes not at all. Restrictions on access to information are found in other sensitive areas, too, such as **environmental protection** – as reported in **Hungary and Ireland** – and **migration** – as reported in Spain. On a positive note, following mobilisation by civil society groups, a **reform** of the legal framework regulating access to information is on the table in **Slovakia**, and in the **Netherlands** the government conceded an exemption for journalists to a general travel ban to terrorist-controlled areas.

In **Bulgaria, Croatia, Hungary, Italy** and **Ireland** there are still no measures to counter disinformation, or the existing legislation lacks clarity and risks being used to force journalists to self-censor instead of effectively tackle disinformation. On a positive note, our member in **Slovakia** reports efforts by health authorities to fight disinformation related to the COVID-19 pandemic on social media.

### *Journalists are not safe*

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In half of the countries covered, **journalists face an increasingly unsafe environment**. CSOs in **Bulgaria, Croatia, France, Italy, the Netherlands, Poland, Slovenia, Spain** and **Sweden** report worrying episodes of harassment and attacks against journalists, including in connection to demonstrations against COVID-19 measures. **Attacks on social media** against journalists, and particularly women journalists, are also on the rise in **Croatia, Italy, Slovenia** and **Spain**, often perpetrated by right-wing groups and organised networks. **Cyberattacks** against media have also been reported in **Croatia** and **Spain**.

CSOs equally report **incidents of police violence against journalists in Bulgaria, Italy, Poland and Slovenia**. In **Belgium**, our member reports police intimidation, destruction of journalistic material, arbitrary arrests and prosecutions of journalists and citizens filming the actions of police officers. In **Croatia** and **Slovenia**, governments themselves **led smear and hate campaigns** against independent and public service media, and CSOs report **surveillance** of journalists in **Hungary** and **Spain**.

There is increasing concern about the frequency and impact of **SLAPPs** on journalists and media, as reported in **Bulgaria, Croatia, Italy, Hungary, the Netherlands, Poland** and **Slovenia**. SLAPPs often target journalists that are critical of the government or political and public figures, but also those who investigate activities of powerful businesses. Lawsuits are also being brought against journalists to **force disclosure of sources**, as illustrated in country reports on **Belgium, Ireland, Italy, Poland** and **Spain**.

As a result of this unsafe environment, there is an **increasing tendency to self-censor**, as CSOs report in **Bulgaria, Hungary, Italy, Slovenia** and **Sweden**.

### *A steady decline of media freedom and pluralism*

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**Political and economic pressure** continues to be one of the main threats to media freedom and pluralism in a number of countries, including **Bulgaria, Hungary, Poland, Slovenia** and **Spain**. The government in **Poland** continues to discriminate in favour of pro-government media when granting broadcasting licenses. A new law, the so-called Lex TVN, risked banning non-European companies from owning Polish broadcast media, but was eventually vetoed by the President. Our member in **Spain** highlights a report by the Madrid Press Association, which reveals that 65% of journalists surveyed in the study felt there was a lack of press freedom caused by economic and political pressure.

**Non-transparent public funding of media and undue control of media through subsidies** is a particular concern in **Bulgaria, Hungary, Poland** and **Slovenia**, where CSOs report that governments only support media outlets that are in line with their ideology. In **Bulgaria** and **Slovenia**, this even leads to public funds being used to support media outlets that **fail to meet ethical and professional standards and disseminate hate speech and propaganda**.

A **high concentration of media ownership** also remains a major concern in **Hungary, Italy, Poland** and **Slovenia**, as well as the **Netherlands**, particularly as regards foreign influence. CSOs in **Croatia, Slovenia** and **Italy** flag the **lack of transparency and publicity of media ownership**.

In several countries, governments are putting **public media services under serious pressure**. In **Hungary** the public service media are under **government control**. In **Slovenia** the **pressure and harassment** exerted by the government on public service media worsened. The government, for example, **stopped funding the national press agency for almost the entire year**, and bankruptcy was only avoided thanks to a crowdfunding campaign organised by the Slovenian Association of Journalists. In **Poland**, the ombudsman of the public media services was recently replaced with a pro-government figure. Similar political interference in and control on public service media are reported in **Croatia**. In **Italy**, the ruling coalition influenced the selection of new board members for national public television.

**Media supervisory authorities**, which are supposed to ensure and enforce rules on media freedom and pluralism, **are not considered independent or effective in Bulgaria, the Czech Republic, Hungary, Poland** and **Slovenia**. In Slovenia, for example, the media authority lacks resources, which explains its general passivity, and the appointment of the director and governing body is under government control. In Poland, the members of the national broadcasting council are composed of people with ties to the ruling party. In Bulgaria, the government can interfere in the appointment of members in the Council of Electronic Media. In Hungary, the new president of the media authority was a nominee of the ruling party Fidesz. CSOs in the **Netherlands** have also raised concerns over the process for the appointment of the board of the regulatory authority for public broadcasters.

With the sole exception of **Spain**, where our member reported a slight improvement, **public trust in traditional media**, which was already low in 2020, appears to be **declining even further in Bulgaria, Croatia, Hungary, Italy, the Netherlands, Poland, Slovakia** and **Slovenia**. This is partly linked to anti-press sentiment triggered by reporting on the pandemic and the spread of disinformation, or government smears as is the case in **Slovenia**. In **Bulgaria**, CSOs see **low media literacy and greater reliance on social media** as factors that contribute to lower trust in traditional media sources and make citizens more vulnerable to disinformation and propaganda. Our members in **Italy** also attribute diminishing trust to the **challenges facing the financial viability of public service broadcasts**, which

also leads to lower editorial standards in news reporting. In **Sweden**, CSOs call for better enforcement of public service broadcasters' obligation to adhere to democratic values. On a positive note, steps are being taken in **Croatia** to **regulate and promote professional and ethical standards for online media**.

## ***Checking the executive: a precarious balance***

### ***Key findings***

- This year's report finds continued abuse by the government in Hungary of the emergency regimes triggered in response to the COVID-19 pandemic, including to pass controversial and restrictive laws with fast-track procedures and to engage in and cover up corruption.
- In other countries, while such a deliberate strategy is not being pursued, CSOs raise concern over a "normalisation" and strengthening of emergency and executive powers originally put in place to deal with the COVID-19 pandemic.
- The absence of public consultations, or the ineffectiveness thereof, especially regarding too short timeframes and the poor involvement of CSOs, are having a negative impact on the system of checks and balances in more than half of the countries covered.
- In a number of countries, including countries with a traditionally strong democratic record, our members and partners highlight

that constitutional review mechanisms are ineffective and that there are limited possibilities to obtain judicial review of certain administrative decisions.

- CSOs in some countries point out the absence of independent and effective watchdog authorities.

### **Key recommendations**

#### **Governments should:**

- Reassess the necessity of emergency regimes and powers in the context of the COVID-19 pandemic and swiftly transition to a normalised management of the crisis, restoring the ordinary system of checks and balances.
- Ensure more transparency and inclusive participation of citizens, civil society and other stakeholders in the legislative process.
- Enhance opportunities for judicial review and ensure effective constitutional review mechanisms.
- Set up or strengthen independent and effective watchdog authorities, including national human rights institutions.

### The EU should:

- Conduct an in-depth and regular assessment of the necessity of emergency regimes and powers in the context of the COVID-19 pandemic and provide guidance to governments on a transition, in close cooperation with civil society and international and regional monitoring bodies.
- Urge governments to set up or strengthen independent and effective watchdog authorities, by enforcing relevant existing EU standards and adopting new ones, for example on national human rights institutions.

Last year's report highlighted problems with the **quality and transparency of the process of enacting laws** in various countries, in particular as regards involvement of citizens and CSOs and accelerated procedures. Existing shortcomings were also exacerbated by additional challenges brought by the emergency regimes set in place in response to the COVID-19 pandemic. This year we find a **similar picture**, in part because **emergency powers have been normalised** in a number of member states.

### **COVID-19 emergency regimes and powers, between abuse and normalisation**

The government of Hungary continued to **abuse COVID-19 emergency regimes and powers** to pursue a deliberate strategy to further weaken the checks and balances system. Government-issued decrees were not preceded by any public debate, and the special legal order imposed by the government is scheduled to last until the next parliamentary elections.

But elsewhere, too, there are **concerns over a “normalisation” of emergency regimes and powers**, and the long-term impact this can have on the system of checks and balances. In **Croatia**, emergency acts continued to be passed with a simple majority, and the body tasked with pandemic response has been fully controlled by the executive branch. CSOs in **Ireland** and **France** report that the **executive continues to progressively strengthen its powers** and that there is limited parliamentary oversight of emergency measures. Meanwhile, **Italy**, too, finds itself in the midst of another state of emergency, although attempts have been made to ensure greater checks on the executive. In **Sweden, Belgium**, and the **Netherlands**, our members raise doubts about the **legality** of emergency measures, because of the absence of a clear legal basis for the exercise of emergency powers, while emphasising on a positive note the **mobilisation of parliaments** to contain and better regulate the use of emergency powers and the **greater judicial oversight** through constitutional review. Similarly, in **Poland**, the government's emergency measures are legally suspect. Local and

regional courts have been issuing decisions that confirm that restrictions on fundamental rights under emergency powers conflict with the constitution. At the same time, the Polish government used the state of emergency declared in connection with the situation on the border with Belarus as justification for rushing legislative procedures on controversial and restrictive acts such as the amendment to the Act on the Protection of the State's Border, which has prevented media and civil society from providing humanitarian aid to people crossing the Polish-Belarusian border, before being declared unlawful by the Supreme Court.

### ***Deficient systems for judicial review***

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This year's findings show how the system of checks and balances in countries across the EU is at risk of **tilting towards the executive branch and away from the judiciary**.

CSOs in a number of member states flagged that **effective constitutional review of laws** is not always possible. The issue is systemic in **Poland**, where the constitutional review process still lacks independence: not only are the court and its judges subject to executive influence, but the executive branch misuses the court to effectively bypass parliament and pass new legislation through court rulings. Our member in **Hungary** also points to a steady decline in the number of decisions made by the Constitutional Court over the past decade. But the problem is also raised, for example, in **Ireland**, where the constitutional review process is said to be squeezed by excessively short

timeframes to decide on cases. In contrast, a more positive development was recorded in **Slovakia**, where our member reports that the Constitutional Court played an important role in safeguarding the electoral process in an attempted referendum on early elections.

The justice system in several countries also suffers from a **lack of transparency and publicity of various administrative decisions**, especially in certain areas such as the environment – as seen in **Ireland, Slovenia, and Hungary** – and arms trade – in **Belgium**. This is coupled with an **insufficient judicial review of administrative decisions** in these areas. CSOs in **Ireland** further criticise the country's failure to implement relevant final decisions of the CJEU, as well as the recommendations of monitoring bodies, especially as regards the protection of the environment. In **Hungary**, courts are said to rarely reverse unlawful administrative decisions and too often fail to provide effective remedies to citizens. Our member in **Belgium** stresses the **lack of accountability** for law enforcement officers, while our member in **Slovakia** criticises the unclear regulations on the holding of democratic referenda.

### ***Undue limitations on public participation in law making***

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Across the board, our members have expressed concern about the **limited transparency in the law-making process and the lack of consultation with the public and civil society**. This trend has only worsened during the COVID-19 pandemic. In **Croatia**, our member reports that the law-making process has

effectively been hijacked by the executive, and that generally public consultations are empty exercises. Problems in consultations have also been reported by our members in **Ireland, Hungary, Romania, Belgium, Slovenia, Poland, the Netherlands, and Slovakia**. Our member in **Estonia** also finds that the legislative process is not transparent and legislative impact assessments are weak, but also notes that civil society play an important corrective role by prompting judicial review of COVID-19 restrictions.

### ***More independent watchdog authorities needed***

In several countries, public watchdog bodies such as ombudsperson offices or National Human Rights Institutions (NHRI) have experienced **threats to their independence and effectiveness**. The situation is particularly dire in **Hungary**, where the Data Protection Authority and the Media Authority lack independence from the executive, and the NHRI office is mostly inactive, as demonstrated in its failure to speak out on key human rights issues such as the surveillance of journalists or homophobic laws. In Romania, there was an attempt in 2021 to remove the sitting ombudsman from office, which was later deemed arbitrary by the Constitutional Court. Reports on both **Romania** and **Belgium** criticise the current landscape of independent watchdog authorities as rather fragmented and in need of reform. The country report of **Croatia** points out that the government tried to prevent the Office of the Ombudsperson from carrying out its investigative duties in particular in sensitive areas such as migration. Meanwhile,

**Italy** still **does not have an NHRI** to act as an independent body.

## ***Civic space and rights defenders under attack***

### ***Key findings***

- Verbal and physical attacks, as well as hate crimes, have increased against minorities, and legal harassment and smear campaigns have increased against CSOs, many of which act in defence of the rights of minorities and vulnerable groups.
- Restrictive regulations that serve to weaken, control or limit the activities of CSOs worsened in many countries, including those with strong democratic traditions.
- It is becoming harder for CSOs to access equitable funding and CSOs are increasingly being excluded from public consultation in the law-making process across the EU.
- In several countries, laws and practices regulating the right to protest are either inadequate to protect this freedom or outright repressive.

### ***Key recommendations***

#### **Governments should:**

- Take action to effectively prevent and address attacks on rights

defenders and CSOs, including hate crime and speech and SLAPPs (abusive lawsuits designed to hamper investigative journalists and CSOs).

- Reassess and revise rules restricting CSOs' advocacy role in light of international human rights standards, and speak out in support of CSOs' work.
- Improve the funding and financing framework for CSOs working in areas of public interest.
- Involve and make full and transparent use of civil society's expertise and input in drafting laws and policies.
- Guarantee the right to freedom of peaceful assembly by focusing on enabling and protecting it rather than restricting or repressing it, in accordance with international human rights obligations.

#### **The EU should:**

- Enhance and expand its monitoring and reporting of challenges affecting civic space, CSOs and rights defenders within its annual rule of law audit and use enforcement powers against restrictive laws breaching EU rules.

- Support the creation of a mechanism to detect and act on the first signs of attacks against CSOs and rights defenders, including a helpline, legal assistance and temporary relocation.

- Ensure a consistent impact assessment of existing and upcoming EU laws that are (ab)used to limit civic space, in areas such as anti-money laundering, counterterrorism and facilitating irregular migration.

- Develop standards to address challenges faced by CSOs and rights defenders, such as protection against hate speech, hate crime and legal harassment including SLAPPs and protection against restrictive regulatory frameworks that hinder CSOs' ability to operate within the internal market.

- Adopt a policy framework to enable, safeguard and protect civic space at national and at EU level, based on relevant international human rights standards and EU rules including Article 11 of the Treaty on European Union, which creates an obligation on the EU to engage in an open, transparent and regular dialogue with CSOs.

**Last year's report** highlighted the use of smear campaigns against CSOs in several member

states, as well as restrictions on advocacy activities, criminalisation of certain activities, and limited access to funding. This year's report shows the situation has **worsened**.

### ***Attacks and harassment***

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In several countries, **verbal and physical attacks** against rights defenders, and in particular LGBTQI+ activists, have intensified, as illustrated in the country reports on **Bulgaria, Italy, and Sweden**. In **Sweden**, our member has also observed a rise in attacks against ethnic minorities and people with disabilities, and has spoken out against the insufficient regulation and prosecution of hate crimes, especially when minority groups are the targets.

Civil society activists across multiple countries also face the **threat of prosecution and lawsuits, including SLAPPs**. These abusive prosecutions and lawsuits tend to be in retaliation for CSO campaigns that threaten the interests of businesses or certain politicians. Examples include cases filed against CSOs and activists promoting environmental protection in **Ireland and Croatia**, women's and LGBTQI+ rights in **Bulgaria and Poland**, anti-police violence activism in **Belgium**, anti-government protests in **Slovenia**, and migrants' rights in **Croatia**.

In several countries, governments have tried to **discredit and delegitimise CSOs** who take a critical stance towards them. In **Croatia, Hungary and Slovenia**, smear campaigns continue to be periodically launched by government representatives and public authorities against advocacy CSOs, even through public

campaigns, manipulated media content and public consultations. Smear campaigns are also targeted at CSOs specializing in particular fields, like environmental protection in **Ireland**, LGBTQI+ rights in **Hungary**, and anti-police violence activism in **Belgium**.

CSOs in **Bulgaria and Belgium** both criticise the government for implementing surveillance practices in violation of privacy and data protection – as confirmed, in Bulgaria, by a recent ECtHR judgment concerning the surveillance of CSOs' lawyers.

### ***Restricting the right to association and limiting CSOs' work***

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CSOs in several countries have expressed concern over new rules that restrict freedom of association.

In **France**, our member points with concern to the new anti-separatism law, which has gravely weakened civil society and freedom of association by making it easier for the government to dissolve associations that fail to adhere to a vague concept of "national values". In the same vein, a law has recently entered into force in the **Netherlands** that grants the government the power to prohibit any organisation that "creates, promotes or maintains a culture of lawlessness." Our member in **Estonia** also reports on attempts by certain political forces to portray CSOs' advocacy and their efforts to facilitate public participation as 'political' activity, touting requirements for them to disclose information on donors.

Meanwhile, old problems persist. In **Bulgaria**, our member reports no change in the country's persistent refusal to permit the registration of certain CSOs representing ethnic minorities. Other countries have kept in place rules restricting organisations' advocacy role and capacity. CSOs in **Ireland** regret that rules on political advertising still impose restrictions on CSOs' spending, although some progress has been made towards reform. The government in **Hungary** has replaced the 2017 law declared unlawful by the CJEU two years ago by new rules that still stigmatise CSOs and interfere with their autonomy. Similarly, **Belgium** and **Croatia** continue to criminalise humanitarian assistance to asylum seekers and migrants and prosecute CSOs. On a positive note, the government in **Estonia** has made efforts to simplify and foster the work of CSOs during the pandemic by easing some of the more limiting administrative rules.

### ***Excluding civil society from law and policy making***

The systemic exclusion of CSOs from decision-making processes is an ongoing problem in several countries. The input of civil society representatives is said to be barred in a wide range of areas in the **Netherlands** and **Slovakia**, and in Ireland this applies in particular to representatives working with environmental protection. Our member in **Belgium** reports that, in general, the public has limited access to information on policy making in the first place, curbing its ability to participate. CSOs in **Croatia** describe their exclusion from discussions on the new national recovery and resilience plan.

### ***An ever-worsening financial landscape***

In several countries, **CSOs' struggle to access funding** is intensifying. CSOs in **Croatia, Estonia, France, Germany, Hungary, Ireland** and **Slovenia** report that the financing frameworks in these countries make it harder for CSOs to operate normally, especially for those organisations working in areas such as culture and the environment. In **Slovenia**, our member points to **discriminatory public funding practices** including as regards the disbursement of funding from supranational bodies, such as the Norway and European Economic Area Grants. Country reports on **Estonia, Germany** and **Ireland** flag that CSOs continue to face the risk of revocation of their charitable status for taking positions that politicians deem are 'political'. In **Croatia**, CSOs point out that the process for distributing funding, including EU funds, is arbitrary and excessively cumbersome, and seems to favour CSOs that are in line with the government's positions.

### ***Curbing the right to protest***

In several countries, the legal framework and practices for regulating the right to protest is either inadequate to protect the right, as is the case in **Germany**, or is outright repressive, as reported in **Spain** due to the Law on Citizens' Security.

Abuse of law enforcement power in policing assemblies has particularly been reported in **Belgium, Bulgaria, Germany, Slovenia** and **Spain**. In Belgium, our member raises concern

about the police and authorities disrupting protests and arresting activists, especially where minority groups are concerned. In **Bulgaria**, the police have also failed to protect protestors from physical attack by counter-protestors.

In these countries, CSOs also report how the COVID-19 pandemic has been used as an excuse to ban and repress assemblies. In **Slovenia**, for example, our member reports that the government banned group demonstrations several times in 2021, disregarding a ruling from the Constitutional Court. Finally, our members in **Germany** and **Belgium** report on a worrying increase in state surveillance and criminal prosecution of peaceful protestors and activists.

## ***Systemic human rights violations and impunity continue to undermine the rule of law framework***

### ***Key findings***

- With very few exceptions, patterns of systemic human rights violations and impunity highlighted in last year's report remain unaddressed and even worsened over the past year.
- Systemic human rights violations and impunity are recorded in 14 out of the 17 countries covered.

- The most serious concerns relate to ethnic profiling and discriminatory law enforcement, violations of rights of Roma and travellers as well as migrants and asylum seekers, including violent pushbacks and police brutality in some countries, regression on the rights of LGBTQI+ persons, ill treatment of persons with psychosocial disabilities, prison overcrowding and the failure to ensure compliance with privacy and data protection rules.

- In some countries CSOs have reported that COVID-19 has had a serious impact on human rights protection, in particular as regards inequalities, domestic violence and the enjoyment of rights by vulnerable groups.

- Efforts to fight impunity are limited to a few countries, and overall avenues for redress and reparations for victims of human rights abuses, including systematic and historical abuses, remain inadequate, as also reflected in the poor implementation rate of judgments by supranational courts.

### **Key recommendations**

#### **Governments should:**

- Take steps to ensure full compliance with international human rights standards and effective redress for victims, including by ratifying and respecting relevant international human rights instru-

ments and effectively implementing ECtHR and CJEU judgments.

- Ensure regular impact assessments, clarity and transparency and avenues for judicial reviews of restrictions put in place in the context of the COVID-19 pandemic.

### The EU should:

- Make full use of the annual rule of law audit to monitor and report on systemic human rights issues that have an impact on the rule of law environment.
- Ensure the relevance of the thematic focus chosen for the annual reports on the EU Charter of Fundamental Rights, in close consultation with international and regional monitoring bodies and with civil society.
- Use its powers to drive progress in the ratification and implementation of human rights instruments and the enforcement of international human rights standards relevant to the EU legal framework, including in the area of equality, the treatment of persons with disabilities and the rights of migrants and asylum seekers.
- Ensure continued support of efforts by CSOs and other actors to monitor, report on and take action

against human rights violations and impunity, including by making funding available to support strategic litigation in areas relevant to the EU legal framework.

**Last year's report** revealed patterns of **systemic human rights violations and impunity** weakening the rule of law in several countries. This included rowing back on equality for women and for LGBTQI+ persons, structural racism including racial profiling and police brutality, pushbacks and violence against migrants. With very few exceptions where some progress was made, generally driven by civil society advocacy efforts, **these patterns remain unaddressed and even worsened over the past year.**

### *Failing to respect international human rights obligations*

This year's report reveals **continued non-compliance with international human rights standards.** Among the most serious concerns are **ethnic profiling and discriminatory law enforcement in France, Hungary and Ireland.** The **lack of respect of rights of migrants and asylum seekers** is reported in **Croatia, France, Hungary, Italy, Ireland, Slovenia, Spain and Sweden.** Reports of **violent pushbacks and police brutality** came from Croatia, Slovenia and Spain, with widespread impunity and the authorities even openly refuting evidence gathered by international and regional monitoring bodies. In **Bulgaria and Hungary,** CSOs reported **continued regression on the rights of LGBTQI+ persons. Violations of the basic rights of Roma and travellers** continue to be

reported in **France** and **Ireland**. **Belgium**, **Bulgaria**, the **Czech Republic** and **Sweden** have systemic problems with the **treatment of persons with disabilities**, and CSOs report **ill treatment** and the **arbitrary deprivation of liberty** of persons with psychosocial disabilities. Prison overcrowding remains worrying in **Belgium** and **Italy**. Concerns regarding the failure to comply with **privacy and data protection rules** is emerging in an increasing number of countries, including **Belgium**, **Bulgaria**, **Estonia** and **Ireland**, despite some positive practices reported in relation to COVID tracking apps in Estonia.

### *The impact of responses to COVID-19 on human rights protection*

COVID-19 also had a serious impact on human rights protection, in particular in terms of **exacerbating existing inequalities**, **increasing domestic violence** and affecting the enjoyment of rights by **vulnerable groups** including children and persons with disabilities, as illustrated in particular in reports on **Estonia** and **Sweden**, despite efforts taken by the authorities to expand the social safety net. In this respect, CSOs in **Croatia**, **Estonia** and **Slovakia** also call for more thorough **human rights impact assessments and review** as regards COVID-19 restrictions impacting on human rights, including quarantine measures.

### *Impunity persists*

Alongside failure to comply with human rights standards, this year's findings also reveal **governments' failure to ensure full redress for**

**victims** of systematic human rights violations in several countries. This includes **Roma** and **Travellers** in **France** and **Ireland**, in particular as regards violations of their right to housing, **ethnic minorities** in **Hungary** and **Sweden**, **victims of police violence and ill treatment** in **Belgium**, **Bulgaria**, **Italy** and **Spain**, and **asylum seekers and migrants** whose rights are violated in **Croatia** and **Spain**. In **Bulgaria**, **Hungary** and **Italy**, CSOs also report that the legal framework to protect the **rights of LGBTQI+ persons** is ineffective. This includes laws to protect victims of **hate crime and hate speech**. Italy also fails to provide adequate protection for **women victims of gender-based violence**. **Reparations for victims of historical human rights violations** are also still inadequate and insufficient in some countries: **Ireland**, as regards victims of abuses documented in mother and child homes; **Slovenia**, as regards stateless persons illegally erased from registers 30 years ago; and **Spain**, as regards victims of the Civil War. The **lack of independent human rights bodies** is mentioned as one important obstacle in the fight against impunity in **Hungary**, while the **restrictive Law on Citizens' Security** is said to hinder effective monitoring and reporting about human rights violations in **Spain**. In many of the countries covered, and namely **Belgium**, **Bulgaria**, **Estonia**, **Hungary**, **Italy**, **Poland** and **Romania**, CSOs also denounce a generally **poor implementation of judgments** of the ECtHR and of relevant decisions of the CJEU. On a positive note, **some progress in the fight against impunity** was reported in some countries: the **Czech Republic**, where a new law on compensation for **women sterilized against their will** entered into force;

**Ireland**, as regards justice for **victims of child abuse**; and **Sweden**, as regards **discriminatory practices in the public sector**.

## ***Fostering a national rule of law culture: civil society in the lead***

### ***Key findings***

- The general lack of efforts to foster a rule of law culture on the side of the authorities, reported last year, persists, with very few exceptions.
- Visible efforts were made by governments with authoritarian tendencies to manipulate public opinion and downplay rule of law challenges and to escalate confrontation with EU and regional bodies.
- By contrast, civil society and CSOs are acting as a driving force, as reflected in Liberties' members' efforts to raise awareness and foster public debates and discussions on rule of law, mobilise and support efforts by other watchdogs, join forces in monitoring challenges and engage in strategic litigation.

### ***Key recommendations***

#### **Governments should:**

- Foster a genuine and inclusive public and political debate on rule

of law challenges and how to address them, including the active involvement of CSOs.

- Enable and support monitoring and reporting by civil society and other independent watchdogs.

#### **The EU should:**

- Ensure that a genuine and inclusive public and political debate on rule of law challenges and how to address them takes place in each member state, by activating as necessary EU institutions and bodies as well as the European Commission's representations at national level.
- Organise an annual rule of law dialogue with civil society stakeholders at EU level, to discuss common concerns and progress made and feed the preparation of future monitoring cycles.
- Better sustain efforts by CSOs and other actors to mobilise citizens' support for the rule of law and democracy, including through dedicated funding under the Citizens, Equality, Rights and Values programme.

As regards efforts to foster a national rule of law culture, last year's report highlighted a worrying **lack of effort on the side of the authorities**. **That remains the case this year.**

In contrast, **CSOs are acting as a driving force** to mobilise citizens' support for rule of law and democracy despite the challenging situation they find themselves in.

Interesting civil society initiatives included efforts of Liberties' members in **Croatia, Hungary, Ireland, the Netherlands, Slovenia** and **Sweden** in raising awareness and fostering public debates and discussions on the state of the rule of law domestically, to increase public participation and interest around these issues. Some Liberties members are also taking the lead in **mobilising civil society** to feed the EU rule of law monitoring and reporting mechanism, such as in **Ireland** and **Sweden**, and to **support other public watchdogs**, such as in **Slovenia**. In **France**, Liberties' member led on the setting up of a **monitoring network of civil society actors and independent observers** in the context of the COVID-19 emergency, while members in **Hungary, Slovenia** and **Sweden** continue to invest in driving change through strategic litigation.

Cases where these **efforts were backed by state authorities** were limited to the **Netherlands** and **Ireland** – where some initiatives were partly funded by the government. In contrast, visible efforts were made by governments with authoritarian tendencies to actively **manipulate and pervert the rule of law debate**, as reported in **Hungary**; to **smear watchdogs** publicising threats to the rule of law, as reported in **Slovenia**; or to **ignore criticism and rather step up confrontation** with EU and other regional bodies, as happened in **Poland**, with efforts to promote a genuine political debate

only being made, to the extent possible, by the opposition.

***COUNTRY  
REPORTS***

# **LIBERTIES RULE OF LAW REPORT 2022**

**BELGIUM**



# Belgium

## About the authors



For over a hundred years, the **Ligue des Droits Humains (LDH)** (League of Human Rights) has fought injustices and infringements of fundamental rights in Belgium. LDH educates the public to the respect of basic human rights (including institutional violence, access to justice, respect for minorities, women's rights), challenges the political powers on issues concerning human rights, trains adults on awareness over human rights issues and the law, and brings issues regarding the development of educational tools and training to the attention of education stakeholders. Born in 1901, the League of Human Rights is a non-profit, independent, pluralistic and interdisciplinary organization. It is a movement in which everyone feels concerned and acts with respect for the dignity of all. LDH works on subjects such as youth, prisoners' rights, migrant and refugee's situation and rights, access to justice, economic, social and cultural rights, psychiatric patient's rights, equal opportunities, privacy and diversity. LDH is also a member of the International Federation for Human of Human Rights (FIDH), a non-governmental organization with 192 leagues worldwide.

## Key concerns

In the area of justice, no significant progress was made on existing concerns and no major reform seems to be planned by the federal government. Among the most pressing issues affecting judicial independence, it is worth noting how the composition of the Constitutional Court makes it vulnerable to political pressure. The recent disclosure of the informal practice of cooperation between the public prosecutor's office and judges of the Court of Cassation ahead of judgments being handed down also raises concern. Despite some improvements in recent years, the legal aid system remains inadequate and acts as a barrier to access to justice, especially for the most vulnerable. The shortage of resources which characterises the justice system has a negative impact on access to justice, on the independence of judges and on the fairness and efficiency of justice, notably for its consequences on the length of proceedings. While the COVID-19 pandemic expedited plans to digitalise the justice system, there are concerns as to the respect of fair trial and data protection standards with respect to the use of videoconferencing. In the area of criminal justice, the excessive use of pre-trial detention affects the fairness of proceedings and impacts particularly people belonging to minority groups. The accessibility of court decisions is still hindered by the fact that a 2019 law providing for decisions to be published online in a database accessible to every citizen remains, to date, unimplemented.

No significant progress has been made or is planned to be made to strengthen the anti-corruption framework, either. The lack of resources and a certain political reluctance hinders the authorities' capacity to effectively investigate and prosecute corruption, in particular financial crime. The legal framework for the protection of whistleblowers is not in place to date, and the treatment of the whistleblowers who recently denounced the dysfunctions of the Data Protection Authority – dysfunctions which triggered the European Commission to start an infringement procedure – is at odds with Belgium's obligations under the EU Whistleblowers Protection Directive.

As regards media freedom and freedom of expression, it is concerning that police forces seem to be reluctant to abide to legal standards on the respect of freedom of expression and information, and engage instead in intimidation, destruction of journalistic material, arrest or even prosecution of journalists and citizens filming police interventions.

Despite steps taken to ensure legality of measures restricting fundamental rights and freedoms adopted in the context of the COVID-19 pandemic, concerns over the necessity and proportionality of such measures persist, and triggered the scrutiny of courts. Limitations on the independence of human rights monitoring bodies and the pursuit of arms sales to states that massively violate human rights, which persist in a total lack of transparency and in violation of final court decisions, are worrying trends negatively affecting the system of checks and balances, which worsened in 2021.

The repeated acts of repression of freedom of assembly and the persistent failure to respect the case law of the Court of Justice of the EU as regards “data retention”, against the background of blanket surveillance of citizens, are worrying practices that severely restrict civic space. Limited access to information, legal harassment, smear campaigns by public authorities and the criminalization of solidarity also negatively affect the work of activists and rights defenders.

Prison overcrowding, incarceration of people with mental illnesses and police violence remain systemic human rights issues that are not taken seriously by Belgian authorities, thus negatively impacting on the national rule of law framework.

### State of play

-  Justice system
-  Anti-corruption framework
-  Media environment and freedom of expression and of information
-  Checks and balances
-  Enabling framework for civil society
-  Systemic human rights issues

#### Legend (versus 2020)

Regression: 

No progress: 

Progress: 

## Justice system ➔

### Key recommendations

- The legitimacy of the right to access to justice should be forcefully reaffirmed and its application guaranteed through the legal aid system. This guarantee requires adequate funding and could be achieved through the establishment, in the long term, of a form of mutualisation of legal costs.
- The available data shows that the length of proceedings is particularly long in Belgium, which is a cause for concern. The lack of resources allocated to the justice system being the main reason, it is necessary to provide for massive investment in the judicial sector and give the judiciary control over the management of its budget.
- The use of videoconferencing does not guarantee the public nature of hearings, which is an essential democratic guarantee protected by the Constitution, and raises a number of questions in terms of data protection. It should therefore

not be a remedy to respond to the lack of investments in the justice system, even in times of pandemic.

### Judicial independence

#### ***Appointment and selection of judges, prosecutors and court presidents***

Half of the Constitutional Court judges must be ex-representatives of the Legislative power<sup>1</sup> and are designated by political parties, which leads to obscure, behind-closed-doors political negotiations and deals. Their nomination can therefore trigger political rivalry.<sup>2</sup> This situation is unacceptable to guarantee the independence of the Constitutional Court and should be remedied: all constitutional judges must be highly qualified professionals and nominated by the High Justice Council, like any other magistrate.

#### ***Significant developments capable of affecting the perception that the general public has of the independence of the judiciary***

In recent proceedings before the European Court of Human Rights (ECtHR),<sup>3</sup> the Belgian government openly mentioned the existence of a procedure within the Court of

1 See <https://www.const-court.be/en/court/presentation/organization>.

2 See among others [https://www.rtf.be/info/belgique/detail\\_zakia-khattabi-le-mr-a-tente-de-marchander-ma-nomination-a-la-cour-constitutionnelle-contre-300-millions-d-euros?id=10516346](https://www.rtf.be/info/belgique/detail_zakia-khattabi-le-mr-a-tente-de-marchander-ma-nomination-a-la-cour-constitutionnelle-contre-300-millions-d-euros?id=10516346) or [https://www.rtf.be/info/article/detail\\_une-cour-la-particratic-et-madame-khattabi-philippe-walkowiak?id=10503368](https://www.rtf.be/info/article/detail_une-cour-la-particratic-et-madame-khattabi-philippe-walkowiak?id=10503368).

3 ECHR (3rd Ch.), 18 May 2021, *Manzano Diaz v. Belgium*.

Cassation, which is not provided for in the law, by which the Advocate General and the judge of the Court of Cassation would consult and cooperate on draft judgments prior to them being handed down, before the cassation hearing and in the absence and without the knowledge of the parties concerned and their lawyers. This would happen by means of practical arrangements that are not laid down in the law either.<sup>4</sup> The very existence of this “entre-soi” on the subject of a draft judgment between a representative of the public prosecutor’s office and a judge at the Court of Cassation raises questions about the respect for the principle of the separation of powers and the rule of law. It is also in contradiction with ECtHR jurisprudence.<sup>5</sup>

## Quality of justice

### Accessibility of courts

Access to justice is a fundamental principle of the rule of law. Yet it remains complicated in Belgium, despite the fact that the Constitution expressly states that everyone has the right to legal aid, and that the legislator cannot infringe this right.<sup>6</sup> The legal aid system was substantially modified in 2016.<sup>7</sup> The reform is based on a suspicion of widespread, unsubstantiated abuse, and on the alleged irresponsibility of the poorest litigants and the lawyers accepting to defend them.<sup>8</sup>

On several occasions, the Constitutional Court has recognized that access to justice is too costly for many citizens and has annulled some of the provisions introduced by the reform.<sup>9</sup> However, the reform remains in force in its other aspects and continues to discourage access to justice for the most vulnerable.<sup>10</sup> The costs of the proceedings remain a barrier for many litigants.<sup>11</sup>

4 Ibid., §§ 19-20.

5 See ECHR (G.C.), 30 October 1991, *Borgers v. Belgium* ; ECHR (G.C.), 31 March 1998, *Reinhard and Slimane-Kaïd v. France*.

6 Const., art. 23.

7 Act of July 6, 2016, amending the Judicial Code with respect to legal aid (M.B. 14-07-2016).

8 For more information, see the preparatory work of the law, House of Representatives, « A bill to amend the Judicial Code with respect to legal aid », May 4, 2016, DOC54 1819/001, pp. 4-6.

9 C.C., judgment n° 77/2018 of June 21, 2018.

10 LDH, “*Réforme de l’aide juridique: la Cour Constitutionnelle annule le ticket modérateur mais l’accès à la justice reste semé d’embûches* », on June 25, 2018.

11 For a comparison between legal costs and average household income, see LDH, « *La Cour Constitutionnelle annule la hausse des droits de greffe et reconnaît que l’accès à la justice était trop coûteux pour de nombreux citoyens* », June

It should be noted that some improvements can be observed over the years. For example, the thresholds for access to legal aid have been raised.<sup>12</sup>

### **Resources of the judiciary**

For several years, various actors have been sounding the alarm about the lack of resources in the justice system. The judicial system is cruelly lacking in resources, which has detrimental consequences in practice. This lack of means is felt in three aspects.

On the human level, the legal framework establishing the number of judges is not respected,<sup>13</sup> in many jurisdictions there is a serious lack of personnel.<sup>14</sup> This lack of judges has, in some cases, led to the postponement and cancellation of hearings.<sup>15</sup>

Financially, justice is also undergoing budgetary restrictions. The year 2020 closed with a budget slightly below 2 billion euros.<sup>16</sup> Since 2018, there have been denunciations of the way justice is treated. The justice budget represents 0.5% of GDP, and 0.7% of public spending. Since 2014, every year, a linear economy has been imposed on it. After 5 years, this represents a decrease of 10%. This way, the government does not give justice the means to properly carry out its missions.<sup>17</sup>

On the material level, some progress has been made in digitalizing the justice system, but this is still insufficient.<sup>18</sup> The government is considering ambitious initiatives to be completed by 2025.<sup>19</sup> These initiatives include the creation of a single online justice portal for citizens and businesses, the creation of a single case management system for all jurisdiction, etc.

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14, 2021.

12 Act of July 31, 2020, amending the Judicial Code to improve access to legal aid by increasing the applicable income limits (M.B. 06-08-2020).

13 For example, at the French-speaking court of first instance in Brussels, the legal framework provides for 126 judges distributed among the different branches. In reality, there are only 106. M. Joris, “Justice: des juges à bout de souffle, des délais six fois plus longs », available [here](#), May 17, 2021.

14 This article lists the number of magistrates in each judicial district, C. Dath, “*La justice belge est surchargée: quels sont les temps d’attente dans les différentes cours d’appel* », May 9, 2019.

15 La Libre, « *Le manque de magistrats conduit à la suppression d’audiences* », October 4, 2018.

16 All data related to the justice budget can be found on the [Federal Public Service website](#).

17 A. Lismond-Mertes, “*On est occupé à casser le pouvoir judiciaire* », December 2018.

18 Opinion of the European Commission in its report on the state of law 2021 in Belgium, Document SWD(2021), of July 20, 2021, p. 4.

19 Belgian Government (2021), National Plan for Recovery and Resilience.

All in all, the means allocated to the justice system do not guarantee its independence.<sup>20</sup> The only constitutional and consistent power against the executive is the judiciary. However, successive federal governments considerably weakened it, which constitutes a danger for democracy as a whole.

### **Digitalisation**

Due to the COVID-19 pandemic, the Minister of Justice prepared a ‘Covid bill’ in which it envisaged the abolition of oral hearings and the generalisation of written procedure in certain matters. In other matters, particularly criminal matters, hearings by videoconference would have become the norm.<sup>21</sup> Though the minister had to back down following outraged reactions by civil society actors,<sup>22</sup> he stated that his renouncement was only temporary.

The right to access to a judge must be concrete and effective, not theoretical or illusory. It is therefore necessary to create the conditions

that allow all courts to deliver justice in a humane manner and within a reasonable time. In certain matters, particularly in criminal matters, personal appearance is a fundamental right<sup>23</sup> recognised by the Constitutional Court.<sup>24</sup> The accused should therefore always be able to appear in person, assisted by his or her lawyer, unless he or she expressly waives this right. The use of videoconferencing poses a number of difficulties and does not appear to be an acceptable alternative to holding hearings.<sup>25</sup>

Moreover, the use of videoconferencing does not guarantee the public nature of hearings, which is an essential democratic guarantee protected by the Constitution, and raises a number of questions in terms of data protection.

### **Geographical distribution and number of courts/jurisdictions (“judicial map”)**

The lack of means from which the judicial system suffers impacts the geographical

20 Opinion of the President of the French Bar Association in an interview by L. Colart, “*Les avocats attaquent l’état fédéral en justice*”, April 12, 2019.

21 See <https://plus.lesoir.be/335503/article/2020-11-02/justice-la-videoconference-casse-tete-pour-la-nouvelle-loi-covid>.

22 See <https://www.liguedh.be/loi-covid-le-recours-generalise-a-la-procedure-ecrite-et-la-videoconference-contraires-a-une-administration-de-la-justice-humaine-efficace-et-respectueuse-des-droits-fondamentaux/>.

23 ECHR, 24 November 1993, *Poitrinol vs. France*, § 35 ; ECHR, 25 November 1997, *Zana vs. Turkey*, § 68.

24 C.C., judgment n° 76/2018, 21 June 2018.

25 Byrom, N. (2020). What we know about the impact of remote hearings on access to justice: a rapid evidence review. Briefing paper. London: Nuffield Family Justice Observatory/The Legal Education Foundation ; Shari Seidman Diamond, Locke E. Bowman, Manyee Wong, Matthew M. Patton, Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions, 100 J. Crim. L. & Criminology 869 (2010). See also <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>.

distribution and the number of jurisdictions within our country. Several court buildings are in disrepair, and some court locations have had to be eliminated for budgetary reasons.<sup>26</sup> This decrease in the number of court locations constitutes an additional obstacle to access to justice.<sup>27</sup>

## ***Fairness and efficiency of the justice system***

### ***Length of proceedings***

Significant data gaps remain with respect to the length of court proceedings. The available data show that the length of proceedings is particularly long, which is a cause for concern.<sup>28</sup> The lack of resources allocated to the justice system is one of the main reasons for the length of proceedings.<sup>29</sup> Indeed, as already explained above, the justice system lacks staff, an efficient computer system and a real

digitalization policy, which leads to numerous delays in the processing of cases.

This phenomenon is not recent; Belgium has already been condemned several times by the ECtHR for violation of the right to be tried within a reasonable time.<sup>30</sup> However, the judicial framework remains unchanged.

### ***Respect for fair trial standards including in the context of pre-trial detention***

In Belgium, the use of pre-trial detention of foreign nationals is described as a common practice that could be due to external pressure from different actors such as public opinion, the police and the media.<sup>31</sup> A recent study by the National Institute of Criminalistics and Criminology<sup>32</sup> shows that, among other things, a person born outside of Belgium is more likely to be detained, and even more so if he or she was born outside of Europe, regardless of whether or not he or she is domiciled

26 Testimony of the President of the magistrates' union association in the article of M. Akutu, "*Les conséquences du sous-financement de la justice*", available on , 2019.

27 Barriers to access to justice are identified in an article by the LDH, "*La justice pour toutes et tous, qu'en disent les partis?*", available on , May 24, 2019.

28 Opinion of the European Commission in its report on the state of law 2021 in Belgium, *op. cit.*, p.2.

29 For example, it takes 39 months for a dispute between an employee and his employer to simply be settled in the Labour Court. This example taken from an interview with the President of the Labour Court of Brussels conducted by J. Balboni, available [here](#), November 5, 2021.

30 ECHR, *J.R. v. Belgium*, January 24, 2017. For a more recent case, see ECHR, *Brus v. Belgium*, September 14, 2021.

31 C. Tange, D. Burssens & E. Maes. (2021), *Un tiers des personnes en prison sont des prévenus : expliquer le recours à la détention préventive en Belgique - Une étude longitudinale*, Bruxelles, Institut National de Criminalistique et de Criminologie, p. 12

32 <https://incc.fgov.be/>

in Belgium. However, a person who is not domiciled in Belgium is twice as likely to be detained. This is explained by the concern of magistrates about the risk of absconding and evading justice. In this respect, foreign nationality increases the possibility of being held in pre-trial detention as well as the duration of this detention.

These findings echo the ones of the UN Committee on the Elimination of Racial Discrimination, which “*remains concerned (...) about (...) [r]eports that non-citizens are overrepresented in the prison system and the lack of reliable data on the national or ethnic origin of the persons concerned and the rate and length of imprisonment*”.<sup>33</sup>

Regarding pre-trial detention, it is to be noted that preventive detention should be thoroughly reformed in order to limit its use to solely the most serious crimes and offenses. Indeed, the Act of 20 July 1990 on preventive detention<sup>34</sup> is not respected or properly applied. This leads to a worrying trend: 35 to 40 per cent of the detainees in Belgian prisons are in fact held in preventive detention. There is an urgent need to reform this legislation in order to limit

the excessive use of preventive detention, in particular by limiting the offenses which may justify preventive detention (offenses against persons, increasing the threshold of the penalty allowing the use of preventive detention, etc.).

### ***Quality and accessibility of court decisions***

As of September 1, 2020, all judgments and rulings rendered by Belgian courts and tribunals were supposed to be published online in a database accessible to every citizen. This fundamental right goes beyond all commercial considerations and is guaranteed by a May 5, 2019, law, amending Article 149 of the Constitution.<sup>35</sup> However, this major democratic promise remains unfulfilled because, almost three years after its adoption, this law is not yet in effect.<sup>36</sup> Furthermore, neither the normative means nor the technical means that would enable it to be implemented have yet been specified. In view of the difficulties that lie ahead in this respect and the unpreparedness of the Belgian authorities, it is to be feared that the entry into force of this law will be postponed once again.<sup>37</sup>

33 [Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twentieth to twenty-second periodic reports of Belgium](#), 21 May 2021, CERD/C/BEL/CO/20-22, § 26.

34 M.B. 14-08-1990.

35 Act of May 5, 2019 amending the Code of Criminal Procedure and the Judicial Code regarding the publication of judgments and rulings (M.B. 16-05-2019).

36 The coming into force of the above-mentioned law has been postponed from September 1, 2020 to September 1, 2022.

37 See <https://www.lesoir.be/401670/article/2021-10-23/carta-academica-sur-louverture-du-droit-et-de-la-justice-ou-en-est-ou-va-t> and <https://openjustice.be/2020/05/16/la-publication-online-des-decisions-de-justice-constats-durgence/>.

## Anti-corruption framework –

### Key recommendations

- Allocate the necessary resources (financial, human and legal) to allow an efficient fight against financial crime and corruption.
- Put in place comprehensive whistleblower legislation to protect whistleblowers, specifically mentioning the protection of civil servants.

### Levels of corruption and investigation and prosecution of corruption cases

Belgium's corruption-related problems lie in the link that can be established between corruption and the lack of financial means

granted to the fight against financial crime.<sup>38</sup> This type of crime is a real problem in a lot of countries, and Belgium is no exception: a lot of money disappears from the state's coffers.<sup>39</sup>

However, several actors in the field denounce the timidity of political actions in the fight against financial crime. Indeed, investigations are confronted with obstacles, not only because of a lack of legal and material means, but also because of political obstacles.<sup>40</sup> For several years now, the fight against financial crime has produced very poor results.<sup>41</sup> In spite of this shortfall, the government does not seem to want to include in its agenda an increase in means or a reform to fight against this type of delinquency.

Some judicial actors believe that beyond a lack of political will, there is rather a political will not to tackle economic and financial delinquency.<sup>42</sup> One of the reasons could be that the political, economic and bureaucratic worlds are closely intertwined. Therefore, political

38 For more information on corruption in Belgium, see the evaluation of the Group of States on Corruption (GRECO).

39 For an estimate of the losses for the Belgian state, see the article of C. Dechamps, "*La fuite: enquête sur la fraude fiscale en Belgique*", July 4, 2019.

40 Numerous testimonies of magistrates specialized in financial crime are included in the article of L. Baudrihaye-Gérard, "The Doubts: les magistrats belges face à la lutte contre la délinquance économique et financière", *Rev. Dr. Pén. Crim.*, 2017/2, p. 100.

41 For several years, the poor results of the fight against financial crime have been denounced. See in particular the report made on behalf of the Committee and the budget by Mr. Luk Van Biesen, Belgian House of Representatives, hearing of the College of Public Prosecutors General on the problem of the follow-up of judicial files on tax fraud and money laundering of 24 Mars 2014, *Doc. Parl.*, Ch., n°53-3481/001, p. 3.

42 This belief emerges from the interviews conducted by L. Baudrihaye-Gérard, *op. cit.*, pp. 119-120.

representatives may not act because they are themselves “corrupt”.<sup>43</sup>

Unfortunately, we lack reports that clearly highlight this possible connection between corruption and the lack of resources allocated to the fight against financial crime.

### ***Framework to prevent corruption***

#### ***Measures in place to ensure whistleblower protection and encourage reporting of corruption***

As early as November 2020, the European Commission was alerted, through a complaint by two of its directors, of breaches of independence of several members of the Belgian Data Protection Authority (DPA), in violation of Article 52 of the General Data Protection Regulation (GDPR). Belgium was then invited in August 2021 to take corrective measures. As Belgium has not put an end to those breaches of the DPA’s independence, as the members concerned remained in function, the European Commission decided to send

a reasoned opinion to Belgium in November 2021.<sup>44</sup> Consequently, Belgium had to, before January 12, 2022, take the necessary measures, failing which the Commission may decide to refer the matter to the Court of Justice of the European Union.

Not only did Belgium fail to respect its obligations in that matter,<sup>45</sup> it also decided to initiate a procedure aiming at firing both the whistleblowers, Ms. Alexandra Jaspar and Ms. Charlotte Dereppe. Both having alerted the Parliament on multiple occasions about the dysfunctions of the DPA, such a procedure in their regard is tinged with a potential violation of the protection due to whistleblowers under the Directive (EU) 2019/1937, not yet transposed into Belgian law.

As the EU Commission puts it in its 2020 Rule of Law country report about Belgium: *“Comprehensive whistleblower legislation has not yet been put in place. The government agreement provides for the adoption of comprehensive rules to protect whistleblowers, specifically mentioning the protection of civil servants who, in good faith,*

43 Opinion of Michel Claise, investigating judge specialized in the fight against financial crime, interview conducted by M. Benayad and F. Mathieu, “Michel Claise, juge d’instruction à Bruxelles: nous sommes dans un pays corrompu, c’est quelque chose d’épouvantable”, available on , September 24, 2021.

44 EU Commission, Data Protection: Commission sends a reasoned opinion to BELGIUM for lack of independence of its Data Protection Authority, 12 November 2021: [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_21\\_5342](https://ec.europa.eu/commission/presscorner/detail/en/inf_21_5342).

45 See <https://www.liguedh.be/wp-content/uploads/2022/01/2022.01.11-Lettre-commission-UE.pdf> and <https://www.lesoir.be/418065/article/2022-01-14/pourquoi-le-probleme-de-non-independance-de-lapd-est-loin-detre-regle>

*blow the whistle on wrongdoing before the end of 2021*".<sup>46</sup> It is still the case in 2022.

## **Media environment and freedom of expression and of information** ↓

### **Key recommendations**

- Guarantee the right to film and to take photographs of law enforcement interventions.
- Prevent all lawsuits and prosecutions against journalists and citizens for simply filming the police.
- Prohibit the detention of journalists and citizens for simply filming the police.

## **Safety and protection of journalists and other media activists**

### ***Frequency of verbal and physical attacks***

Verbal abuse against journalists from police forces is not uncommon in Belgium. In some cases, obstacle to the exercise of their profession or even illegal arrests took place. In its analysis, Reporters Without Borders notes that the situation of journalists and press freedom remains worrying. It cites as an example the case of a reporter who was pushed around, arrested and threatened by police officers, despite presenting his press card, during a Black Lives Matter demonstration.<sup>47</sup> It is not an uncommon situation.

In that framework, the association of professional journalists also condemned on several occasions acts of police violence against journalists.<sup>48</sup>

It is not unusual in Belgium to see complaints filed against police officers who have administratively arrested journalists, and who have seized and erased the images taken by

46 Opinion of the European Commission in its report on the state of law 2021 in Belgium, Document SWD(2021), of July 20, 2021, p. 9.

47 Reporter Without Borders, opinion on Belgium, available on <https://rsf.org/fr/belgique>. For more information on this case, see <https://www.rtbef.be/article/intimidations-de-journalistes-par-la-police-l-ajp-ouvre-un-dossier-de-plainte-10517526>.

48 The Professional Association of Journalists publishes various articles on its website in which it denounces police violence against journalists.

the cameras.<sup>49</sup> These complaints are eventually successful, as the Belgian courts respect the jurisprudence of the European Court of Human rights and the EU Court of Justice, which recognize that the role played by the media is of particular importance. The courts state that the media's presence guarantees that the authorities can be held accountable for their behavior towards the public in general.<sup>50</sup>

However, police forces seem to ignore this state of play. Since a few years, following several well-documented incidents of questionable, even illegitimate, police action against both professional journalists and citizens, the issue of the right to film law enforcement agencies has been omnipresent in various events, whether on a large scale (Extinction Rebellion

demonstration and intimidation of national television journalists,<sup>51</sup> Black Lives Matter demonstration and intimidation of a journalist from Agence France Presse,<sup>52</sup> to name but a few examples) or in everyday life (intimidation of a journalist filming an arrest in the context of compliance with containment standards<sup>53</sup>).

While the work of journalists in providing information is more necessary than ever, it is also under threat. Indeed, abusive arrests of journalists are also denounced in our country.<sup>54</sup>

In December 2021, a Brussels civil court convicted the Belgian state for the arrest of two journalists reporting on a peaceful demonstration, stating that this arrest is “*a clear violation*

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49 See for example the case of the members of ZinTV and the ATTAC collective who filed a complaint against police officers for the reasons stated. In January 2021, the police officers were convicted for theft of use and illegal erasure of video data by the correctional court of Brussels. For more details, see <https://bx1.be/communes/bruxelles-ville/deux-policiers-qui-avaient-pris-la-camera-des-journalistes-de-zin-tv-coupables-de-vol-dusage/> and <https://www.alterechos.be/shoot-or-dont-shoot/>.

50 ECHR, case *Pentikäinen v. Finlande*, October 25, 2015, § 89; CJEU, February 14, 2019, *Buivids vs. Latvia*, Case C-345/17.

51 See [https://www.rtbf.be/info/inside/detail\\_extinction-rebellion-pouvait-on-filmer-les-arrestations-par-la-plice?id=10355443](https://www.rtbf.be/info/inside/detail_extinction-rebellion-pouvait-on-filmer-les-arrestations-par-la-plice?id=10355443). During this demonstration, Olivier de Schutter, UN Special Rapporteur on extreme poverty and human rights and professor at the Catholic University of Leuven, was molested and gassed in the face while peacefully addressing the police. He had been invited by the organizers to give a speech at the event (see <https://www.lesoir.be/253441/article/2019-10-13/enquete-sur-les-violences-policieres-lencontre-dextinction-rebellion> and <https://www.lecho.be/economie-politique/belgique/bruxelles/extinction-rebellion-olivier-de-schutter-gaze-au-visage-raconte/10171416.html>).

52 See above.

53 See <https://www.dhnet.be/regions/bruxelles/policiers-filmes-en-pleine-arrestation-a-bruxelles-pourquoi-le-policier-sur-cette-video-a-tort-5f3cf8acd8ad5862199ac26>.

54 The Association of Professional Journalists and the RTBF (national media group) denounce the abusive arrests of journalists in the article “*L’APJ et la RTBF dénoncent l’arrestation abusive de journalistes*”, June 20, 2018.

of the fundamental right to freedom of expression of journalists”.<sup>55</sup>

Recently, the UN Committee against torture (CAT) issued a recommendation to Belgian authorities stating that “*The State party should (...) Enhance training for the police on the use of force, techniques intended to prevent violence from escalating, respect for fundamental freedoms, including in connection with the filming of police interventions, and the obligation for police officers to identify themselves and explain their actions.*”<sup>56</sup> The Court of Justice of the EU (CJEU) has also clearly established rules protecting journalists and citizens in this framework.<sup>57</sup>

Unfortunately, Belgian authorities seem to stay deaf to this appeal. Proof is the recent opinion by the Supervisory Body for Police Information, which sheds doubt on the well-established right of citizens and journalists to film police action.<sup>58</sup>

### **Lawsuits and prosecutions against journalists and safeguards against abuse**

The “Don’t shoot” trial highlighted the tensions between the police and the media. The trial originated from a complaint filed by police officers and a police body (police zone of Brussels-Capital – Ixelles) against a photo exhibition describing police interventions in the public space.<sup>59</sup>

This exhibition was organized by civil society actors and professional photographers. The police zone and police officers complained about an infringement of the right to image, honor and reputation because they were identifiable in some photos. The court of first instance of Brussels was able to recognize the undeniable journalistic and educational vocation of the exhibition and the importance of the subject of general interest that constitutes the denunciation of police violence.<sup>60</sup>

55 See <https://www.lesoir.be/414275/article/2021-12-23/arrestation-de-journalistes-en-reportage-au-127-bis-la-police-condamnee>.

56 UN Committee against torture, *Concluding observations on the fourth periodic report of Belgium*, 25 August 2021, CAT/C/BEL/CO/4, § 12.

57 CJEU, February 14, 2019, *Buivids vs. Latvia*, Case C-345/17.

58 Organe de contrôle de l’information policière, *Avis d’initiative concernant les situations dans lesquelles des citoyens filment des interventions de police et concernant la protection des données à caractère personnel et de la vie privée des fonctionnaires de police à l’égard de tiers pendant l’exécution de leurs missions policières*, 22 November 2021, [https://www.organedecontrol.be/files/DD200025\\_Avis\\_dInitiative\\_F\\_SIGN%C3%89\\_00045750.pdf](https://www.organedecontrol.be/files/DD200025_Avis_dInitiative_F_SIGN%C3%89_00045750.pdf).

59 The photos and videos selected were intended to illustrate the repression of freedom of expression, the increasing criminalization of social movements and the increasingly blatant impossibility of being able to photograph the police during these events without being arrested and confiscated or destroying the equipment.

60 For a more detailed analysis of the ruling, see the LDH article « *Procès “Don’t Shoot”: la justice confirme le droit de diffuser des images non floutées de la police* », November 9, 2019.

This trial illustrates the position of our national jurisdictions on the importance of the role of journalists. It also constitutes a worrying threat to the freedom to inform. This lawsuit comes at a time when abusive limitations on the work of the press are increasing, whether through legal action or through the prohibition to take pictures in the field.<sup>61</sup> This type of lawsuit is also worrisome in that it may discourage media outlets or individuals who legitimately wish to publish a photograph or video reporting on police actions.

Despite the court's decision, the media support and the clear standards set by the CJEU, the police zone decided to introduce an appeal against this decision, putting pressure on the organizers of this photographic exhibition. And, through them, on all journalists covering police interventions.

## ***Freedom of expression and of information***

### ***Access to information and public documents***

In 2021, two newspapers teamed up to lead a project over transparency of local authorities.<sup>62</sup> They conducted a survey of 281 Walloon and Brussels municipalities to see if it was possible for a citizen to obtain precise information before each municipal council. The verdict: no, in the vast majority of cases. It constitutes a breach of Art. 32 of the Belgian Constitution, which guarantees the right to transparency of public powers and therefore can constitute an important tool in the fight against corruption.

On another level, the Federal Commission for Access to Administrative Documents (CADA)<sup>63</sup> is no longer functioning at all. The reason for this is that the royal decree appointing its members, which must be issued every four years, has still not been renewed. The last one dates from June 22, 2017. However, there is no provision for members to extend their mandate until they are renewed. The president of the CADA managed to keep its work going for part of the summer 2021, in line with the continuity of public services. But since 1

61 Opinion of M. Simonis, Secretary General of the Association of Professional Journalists and R. Gutiérrez, Secretary General of the European Federation of Journalists in the article "*Carte blanche: Quand la police menace le droit d'informer*", October 1, 2019.

62 See <https://www.lesoir.be/401758/article/2021-10-21/les-communes-wallonnes-devront-se-montrer-plus-transparentes>.

63 See <https://www.ibz.rn.fgov.be/fr/commissions/publicite-de-ladministration/presentation-de-la-commission/>.

September 1, 2021, the Commission has been inoperative.<sup>64</sup>

See also developments below about the transparency of administrative decisions in the framework of arms exportation.

## Checks and balances

### Key recommendations

- Ratify the OPCAT as soon as possible and establish a national prevention mechanism with adequate legal, financial and human resources to ensure effective, independent and impartial external monitoring of all places where people are deprived of their liberty, in accordance with the OPCAT requirements.
- Ensure the independence of human rights monitoring bodies, such as the Permanent Control Committee of the Police Services (Committee P), the Supervisory Body for Police Information and the Data Protection Authority (DPA), to ensure the effectiveness of the complaint's mechanisms, in

accordance with international recommendations.

- Guarantee the respect of fundamental rights as well as greater transparency in the issuing of licences for the export of arms to foreign countries by thoroughly amending the Walloon decree of June 21, 2012, on the import, export, transit and transfer of civilian arms and defence-related products.

### **Process for preparing and enacting laws**

#### **Transparency and quality of the legislative process, in particular in the context of the COVID-19 pandemic**

As noted in the EU Commission 2021 report on the state of the rule of law in Belgium,<sup>65</sup> on March 31, 2021, the Brussels Court of First Instance ruled that the coronavirus measures taken by the federal government did not have a sufficient legal basis. After several unsuccessful appeals to the government, LDH and the Liga voor mensenrechten filed an action for interim relief against the Belgian state with the Brussels Court of First Instance. The purpose of this action was to challenge the legality of the management of the health crisis

64 See <https://www.levif.be/actualite/belgique/transparence-toujours-pas-de-baton-wallon/article-normal-1474361.html>.

65 Opinion of the European Commission in its report on the state of law 2021 in Belgium, Document SWD(2021), of July 20, 2021, p. 13.

by means of ministerial decrees and the use of a dubious legal basis to limit fundamental rights and freedoms.<sup>66</sup> Indeed, in view of the restrictions to fundamental freedoms imposed to fight the COVID-19 pandemic, a debate in the Parliament was essential. These measures have an undeniable impact on rights and freedoms and, even in a health or security crisis, the principles of the rule of law and legality must prevail. Beyond the formal requirements they set, these principles are the best guarantee of the democratic legitimacy of the measures adopted. However, the Belgian state didn't comply with these obligations for a long time, dealing with the pandemic through executive acts and ignoring advice of official bodies, such as the DPA, in the process.<sup>67</sup>

The Brussels Court of Appeal finally overturned the decision of the Court of First Instance and rejected the application of the Leagues, finding that the measures did not *prima facie* appear to be manifestly illegal. The court found, however, that the process raised serious questions in terms of respect for fundamental rights, as enshrined in the Constitution and the European Convention on Human Rights. In particular, the Court of

Appeal questions the constitutionality of the laws that were invoked as the legal basis for the ministerial orders.<sup>68</sup> The Court of Appeal also considered that it was necessary to await the forthcoming ruling of the Constitutional Court as to whether the COVID-19 measures were adopted in full compliance with the Constitution and fundamental rights. This ruling is still awaited, as are several privacy-related cases in front of the Council of State.

The federal legislator finally adopted a law on the pandemic,<sup>69</sup> but it didn't prevent federal, regional and community governments from adopting measures highly questionable regarding the respect of fundamental rights and the rule of law.

On December 22, 2021, governments decided on a new set of measures to deal with the arrival of the new omicron variant. Among these measures, the cultural sector was particularly affected: theatres, concert halls and cinemas had to close their doors. This measure undermined the right to participate in cultural life and the rights of workers in the cultural sector. This was incomprehensible and unjustified considering the advice rendered by the

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66 See <https://www.liguedh.be/suite-a-laction-introduite-par-la-ligue-des-droits-humains-et-la-liga-voor-mensen-rechten-letat-belge-est-condamne-a-adopter-un-cadre-legal-pour-encadrer-les-mesures-covid/> and <https://www.justice-en-ligne.be/L-Etat-a-trente-jours-pour-revoir>.

67 See for example <https://www.liguedh.be/applications-de-tracing-pour-la-ligue-des-droits-humains-la-vigilance-reste-de-mise/>.

68 See <https://www.liguedh.be/legalite-des-mesures-covid-la-cour-dappel-reforme-la-decision-du-tribunal-de-premiere-instance-le-recours-aux-arretes-ministeriels-nest-pas-manifestement-illegal-mais-pose-questi/> and <https://www.justice-en-ligne.be/Justice-et-mesures-COVID-pour-la>.

69 Act of August 14, 2021 on administrative police measures during an epidemic emergency (M.B. 20-08-2021).

group of experts commissioned by governments (GEMS): the closure of performing arts venues was not one of the measures they advocated. Therefore, the Council of State had to annul the contested measures.<sup>70</sup>

### ***Use of fast-track procedures and emergency procedures***

As noted by the EU Commission, “*the Advisory Division of the Council of State continues to face difficulties in carrying out its mandate effectively. A lack of resources, in particular budgetary and human resources, continues to pose difficulties for the advisory branch. These difficulties, combined with the frequent use of shortened procedures, mean that the Council of State is in some cases unable to give an opinion on draft legislation. In addition, recent budgetary restrictions have made it even more difficult for the Advisory Division to carry out its mandate of ensuring the quality of legislation effectively*”.<sup>71</sup> This assertion is particularly true regarding anti-pandemic pieces of legislation and is still true to this day.

### ***Independent authorities***

There are several bodies in Belgium that do not enjoy the independence required to carry out their missions.<sup>72</sup>

First, Belgium signed in 2005 the Optional Protocol to the United Nations Convention against Torture (OPCAT), but it has not yet been ratified. Belgium has repeatedly announced its intention to ratify it, but to date, no law of assent has been published. In Belgium, there are various institutions responsible for reviewing places of deprivation of liberty, such as the Central Supervisory Board of Prisons (CCSP)<sup>73</sup> or, marginally, the Standing Police Monitoring Committee.<sup>74</sup> However, none of these bodies meets the international requirements for NPMs (national prevention mechanism). In practice, this means that there is no independent national preventive body responsible for monitoring places of deprivation of liberty, and that detainees are deprived of an external review of their rights. It is absolutely necessary that Belgium ratify the OPCAT as soon as possible and establish a preventive mechanism with adequate financial, human and legal means to ensure an effective, independent and impartial expertise consistent with its international obligations, as

70 Council of State, decision n° 252.564, 28 of December 2021.

71 Opinion of the European Commission in its report on the state of law 2021 in Belgium, Document SWD(2021), of July 20, 2021, p. 13.

72 For more information, see League of Human Rights, *Chiens de garde de la démocratie: mordants ou non?* Chronique n° 196, September 2021, .

73 See <https://ccsp.belgium.be/>.

74 See <https://comitep.be/index.html?lang=en>.

stated by the UN Committee against torture: *“The Committee (...) urges the State party to (...) [r]atify the Optional Protocol to the Convention as soon as possible, in order that the State party can establish or designate a national mechanism for the prevention of torture”*.<sup>75</sup>

Secondly, the Standing Police Monitoring Committee (Committee P) has been criticized by many international organizations for its lack of independence, particularly because of the composition of its investigate department.<sup>76</sup> This department is composed of police officers from different units who are responsible for the work of law enforcement officials. Several recommendations suggest that the Belgian state should take appropriate measures to further strengthen the control and supervision mechanisms within the police. It is not new that Committee P and its investigation department are particularly targeted, as they should

be composed of independent experts recruited from outside the police.<sup>77</sup> In that regard, the independence of the Supervisory Body for Police Information also raises questions.<sup>78</sup>

Finally, as already mentioned, the independence of the Data Protection Authority (DPA) can also be questioned. Several conflicts of interest can be observed within this institution, which could undermine its independence.<sup>79</sup> For instance, three members of the DPA are members of the civil service. However, according to the conditions of appointment defined in the law,<sup>80</sup> the members of this authority cannot be public officials. This creates a legal incompatibility, since the mandatary, as a principal, must be loyal to the executive branch for which he or she works.<sup>81</sup> Another problematic example is a member of the DPA who is also a political staff member. Being employed in a political group is not

75 UN Committee against torture, Concluding observations on the fourth periodic report of Belgium, 25 August 2021, CAT/C/BEL/CO/4, § 18.

76 *“The Committee once more expresses its concern about the ineffectiveness of the inquiries carried out by oversight bodies, in particular the Investigation Service of the Standing Committee for Police Oversight (Committee P), which is made up of full members and members seconded from the police and is responsible not only for inquiries but also for identifying police failings and helping the police to remedy them, a situation that can give rise to a conflict of interests and undermine its impartiality”* UN Committee against torture, Concluding observations on the fourth periodic report of Belgium, 25 August 2021, CAT/C/BEL/CO/4, § 7.

77 See for instance UN Committee against torture, Final observations of the Committee against torture: Belgium, January 3, 2014, § 13,e (CAT/C/BEL/CO/3).

78 See above, the Media environment and freedom of expression and information chapter.

79 See above, the Anti-corruption framework chapter.

80 Act of December 3, 2017, establishing the Data Protection Authority (M.B. 10-01-2018), art. 38.

81 For further explanations and examples, see the letter to the speaker of the House of Representatives and the group leaders sent by the LDH, June 23, 2020.

compatible with the independence requirements for this authority.<sup>82</sup> Furthermore, this double-hatting is not in line with the established case law of the CJEU, which establishes the incompatibility of holding an office subject to a political supervisory authority, with also holding an office with the data protection authority.<sup>83</sup> As a result, as already mentioned, the European Commission decided to send a reasoned opinion to Belgium in November 2021<sup>84</sup> and will likely prosecute the Belgian state for non-complying with its obligations.<sup>85</sup>

These examples reflect various and serious problems of independence within certain institutions in Belgium.

## ***Accessibility and judicial review of administrative decisions***

### ***Transparency of administrative decisions and sanctions***

The granting of arms export licenses is subject to a severe lack of transparency on the part of the Walloon authorities. So much so that a petition to the Walloon Parliament has been launched by various associations to be heard on the lack of transparency and that the Parliament recently organized an hearing on the matter.<sup>86</sup>

In fact, the Belgian state has signed and ratified the United Nations treaty on the arms trade.<sup>87</sup> However, it blithely violates this treaty – as well as European and Walloon law – by allowing arms exports to states involved in serious violations of international humanitarian law. The violations of these different rights are attested by the multiple suspensions by the Council of State of the decisions of the Walloon Minister-President to grant export

82 General Data Protection Regulation, art. 52.

83 For examples, see the judgment C-518/07, *European Commission v. Federal Republic of Germany*, March 9, 2010, and judgment C-614/10, *European Commission v. Republic of Austria*, October 16, 2012.

84 EU Commission, [Data Protection: Commission sends a reasoned opinion to BELGIUM for lack of independence of its Data Protection Authority](#), 12 November 2021.

85 See <https://www.liguedh.be/wp-content/uploads/2022/01/2022.01.11-Lettre-commission-UE.pdf>.

86 See <https://www.lesoir.be/418550/article/2022-01-17/armes-wallonnes-une-petition-pour-plus-de-transparence-defendue-au-parlement?> and <https://www.liguedh.be/armes-wallonnes-amnesty-la-cnapd-la-ldh-et-vredes-actie-deposit-une-petition-au-parlement-de-wallonie-pour-plus-de-transparence/>.

87 Arms trade Treaty of the United Nations. There is a particular interest in its article 7, which establishes a precautionary principle in the context of arms export.

licenses to Saudi Arabia to Walloon arms companies.<sup>88</sup>

There have been numerous political declarations stating that the Minister will not grant licenses for new contracts to countries that commit serious violations of international humanitarian law or international human rights law.<sup>89</sup> In fact, these weapons are constantly found in countries that should be prohibited, which contradicts the statements of political representatives.<sup>90</sup>

In order to put an end to this opacity, NGOs ask that the decisions to grant – or refuse – licenses, as well as the decisions of the Commission of Advice, competent to give counsel to the Walloon Minister-President, be made public; that the date provided in the government reports be standardized with those available to the customs authorities in order to

allow for a real readability of exports; that the frequency with which these reports are published be increased; and that the time limits for the publication of the reports be reduced in order to allow for an effective parliamentary and public control.<sup>91</sup>

Furthermore, it is of utmost necessity to review the composition of the Commission of Advice, to guarantee its independence. Indeed, the decree of June 21, 2012, on the import, export, transit and transfer of civilian arms and defence-related products<sup>92</sup> has created a “Commission for advice on arms export licenses”, responsible for formulating reasoned and confidential opinions “at the request of the Government or on its own initiative”. Unfortunately, the advice it has produced remains secret and its composition is not independent, as a majority of its members directly depend from the Walloon authorities.<sup>93</sup>

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88 For the last one, see [Council of State, decision n° 249.991 of 5 March 2021](#): “*The Council of State suspends, under the extreme urgency procedure, the execution of four export licences for arms and defence-related material issued by the Walloon Region to Saudi Arabia. It considers that these licences are not adequately motivated with regard to the clear risk that the military technology or equipment whose export is envisaged will be used for internal repression or to commit serious violations of international humanitarian law in the context of the conflict in Yemen*”.

89 Région Wallonne, « Déclaration de politique régionale pour la Wallonie 2019-2024 », September 9, 2019, pp. 20-21.

90 More details are in the report of the [Walloon weapons observatory](#), May 26, 2020.

91 All the recommendations are included in the article of the LDH, « Armes wallonnes: Amnesty, la CNAPD, la LDH et Vredesactie déposent une pétition au Parlement de Wallonie pour plus de transparence », *op. cit.* See also the affirmation of the GRIP, « Valeur des licences en hausse, l’Arabie Saoudite reste n°1: décryptage du Rapport annuel 2018 sur les exportations d’armes wallonnes », available [here](#).

92 M.B. 05-07-2012.

93 Among the 8 members of the Advisory Committee on Arms Export Licences, 5 are members of the Walloon administration, including its president ([https://www.liguedh.be/wp-content/uploads/2020/09/observatoire\\_des\\_armes\\_wallonnes\\_-\\_3e\\_me\\_e\\_dition.pdf](https://www.liguedh.be/wp-content/uploads/2020/09/observatoire_des_armes_wallonnes_-_3e_me_e_dition.pdf)).

Therefore, it is essential to guarantee greater transparency by thoroughly amending the Walloon decree of June 21, 2012.

### ***Implementation by the public administration and State institutions of final court decisions***

As mentioned in the previous section, the Walloon Region has been granting export licenses for arms and defence material to Saudi Arabia. NGOs have been successfully challenging in court those decisions, but the Walloon authorities stubbornly persists to grant those licenses, in blatant contradiction with the UN, EU and regional rules. These licences, which had been suspended by the Council of State in March 2020 and August 2020, were again readopted in February 2021. It is becoming really urgent that the Walloon Region understands that its decisions concerning the granting of arms export licenses to Saudi Arabia are simply unjustifiable under international and Wallonian law.

## **Enabling framework for civil society**

### **Key recommendations**

- Guarantee freedom of assembly and freedom of expression by imposing clear engagement rules to

police forces in cases of pacific demonstrations and by prosecuting every infringement to the exercise of these freedoms.

- Refrain from prosecuting civil society actors when they express legitimate concerns and claims about Belgium's human rights situation.
- Strictly respect the CJEU jurisprudence in the "data retention" case by forbidding blanket surveillance of citizens and by limiting exceptions to the strictly necessary cases, providing sufficient safeguards are put in place.

## ***Regulatory framework***

### ***Freedom of assembly***

Police made numerous arrests during demonstrations in 2021, which raised doubts about the authorities' recognition of the fundamental nature of the right to demonstrate. Concerns mounted in particular following a demonstration on January 24, 2021, in Brussels, in light the number of protesters arrested and the numerous testimonies indicating a disproportionate and illegitimate use of force in policing the demonstration.<sup>94</sup> This was the third rally in three months aimed at denouncing the worrying levels of police violence and the

94 For more information on this demonstration, see <https://dossiers.parismatch.be/les-casernes-de-la-honte/?ga=2.261101645.1310436169.1618985695-1664218201.1587652888>.

dysfunction of the justice system that police ended up excessively repressing in defiance of the law and fundamental rights.

The Police Act requires that the use of force by the police meets the criteria of proportionality, necessity and legitimacy. During three consecutive rallies (“Justice for Adil” in Anderlecht on November 27, 2020, “Justice for Ibrahima” in Saint-Josse on January 17, 2021, and “Against class and racist justice” on Sunday, January 24, 2021), many testimonies were received about the illegitimate nature of the use of force by the police, including as regards: disproportionate police measures and a lack of communication with demonstrators and passers-by, and even provocative, aggressive and intimidating behaviour towards them; non-respect for the right to demonstrate; arbitrary and violent arrests, particularly of minors, often racialised, accompanied by racist and sexist insults; violations of the right to film the police; disproportionate and illegitimate use of force during detention; and detention conditions that do not respect the rights of the detainees, many of whom are minors, nor the sanitary conditions.<sup>95</sup>

These demonstrations reflect the tensions triggered by a more general context of repressive policing, which has become even tougher in recent months. LDH was specifically contacted by victims and relatives of victims

who took part in these three demonstrations. LDH examined these three demonstrations in particular because, in addition to the infringement of the right to demonstrate and the disproportionate police presence, the police manifested particularly violent attitudes (physical and psychological) against racialised people, which was documented in the public space and in the police premises. LDH is also concerned about the way social distancing and precautionary measures imposed on public gatherings in response to the COVID-19 pandemic are being abused to prevent citizens from demanding justice for victims of police violence and an end to police impunity, the arrest of a large number of minors and the persistence of ethnic profiling.

#### ***Access and participation to decision-making processes***

As already mentioned, in 2021, two newspapers teamed up to lead a project over transparency of local authorities.<sup>96</sup> They conducted a survey of 281 Walloon and Brussels municipalities to see if it was possible for a citizen to obtain precise information before each municipal council. The findings indicated that this is not possible in the vast majority of cases. This constitutes a breach of Art. 32 of the Belgian Constitution, which guarantees the right to transparency of public powers and therefore

95 See <https://www.liguedh.be/quand-les-citoyen%C2%B7ne%C2%B7s-utilisent-leur-droit-de-manifester-pour-denoncer-les-violences-policieres-les-forces-de-lordre-repondent-par-la-violence/>.

96 See <https://www.lesoir.be/401758/article/2021-10-21/les-communes-wallonnes-devront-se-montrer-plus-transparentes>.

can constitute an important tool for the participation of civil society in public affairs.

## **Attacks and harassment**

### **Legal harassment, including SLAPPs, prosecutions and convictions of civil society actors**

As already mentioned, the “Don’t shoot” trial, which originated in a complaint by police officers and a police body (police zone of Brussels-Capital – Ixelles) against a photo exhibition describing police interventions in the public space,<sup>97</sup> highlighted existing tensions between the police, the media and civil society actors. The complaint was grounded in the claim of an alleged infringement of the right to image, honor and reputation because law enforcement officials were identifiable in some photos. The court of first instance of Brussels was able to recognize the undeniable journalistic and educational vocation of the exhibition and the importance of the subject of general interest that constitutes the denunciation of police violence.<sup>98</sup>

This trial illustrates the position of our national jurisdictions on the importance of the role of journalists and civil society actors. It also constitutes a worrying threat to the freedom to inform and to the freedom of expression. This lawsuit comes at a time when abusive limitations on the work of the press are increasing, whether through legal action or through the prohibition to take pictures in the field.<sup>99</sup> This type of lawsuit is also worrisome in that it may discourage media outlets or individuals who legitimately wish to publish a photograph or video reporting on police actions.

Despite the court’s decision, the media support and the clear jurisprudence of the CJEU, the police zone decided to introduce an appeal against this decision, putting pressure on the organizers of this photographic exhibition. And, through them, on all journalists and civil society actors covering police interventions or expressing critical opinion on police actions.

In another case, the criminal court of Tournai ruled in January 6, 2022, the dismissal of charges against anti-racist activist Nordine Saïdi and his movement, Brussels Panthers, prosecuted for having opposed the racist

97 The photos and videos selected were intended to illustrate the repression of freedom of expression, the increasing criminalization of social movements and the increasingly blatant impossibility of being able to photograph the police during these events without being arrested and confiscated or destroying your equipment.

98 For a more detailed analysis of the ruling, see the LDH article « *Procès “Don’t Shoot”: la justice confirme le droit de diffuser des images non floutées de la police* », November 9, 2019.

99 Opinion of M. Simonis, Secretary General of the Association of Professional Journalists and R. Gutiérrez, Secretary General of the European Federation of Journalists in the article “*Carte blanche: Quand la police menace le droit d’informer*”, October 1, 2019.

folklore of what was called until 2018 “*La grande sortie des Nègres*” (sic).<sup>100</sup> Nordine Saïdi and the Brussels Panthers were prosecuted on the one hand for “threats” and on the other hand for “harassment”, all in a “terrorist context”, because he had sent two letters to the municipal authorities in 2018 asking for the cancellation of the traditional event.

The Tournai correctional court dismissed the charges, insisting on the legality of the motive and the means used, considered as not threatening to any reasonable person. As far as the plaintiffs are concerned, the court insists that Nordine Saïdi was indeed addressing the mayor and the political representatives in their capacity to act against negrophobic folklore. For the court, the two letters sent by the Brussels Panthers did not represent a threat, and the collective indicated that it wanted to raise awareness about racism. This case can be seen as an attempt to repress a legitimate political expression.

Furthermore, it seems that there was an instrumental use of justice: that this case has gone so far and that the resources of the police and judicial authorities have been mobilized for many months is in itself a serious concern.

Even if the outcome is positive, this case should never have reached a criminal court.

### ***Smear campaigns and other measures capable of affecting the public perception of civil society organisations***

On February 27, 2021, Philippe Pivin, deputy of the Federal Parliament, made comments about LDH and Police Watch, LDH’s Observatory of Police Violence, describing its publications as “a driver of social tensions” that “stirs up anti-police movements” and denounces “unacceptable comments”. As a result, he announced that he had asked the Minister of the Interior to “launch an investigation” and nothing less than an “early suspension of payments of public money” to Police Watch.<sup>101</sup>

These remarks, close to intimidation, echo those made on February 10, 2021, by Vincent Gilles, president of the SLFP Police, the country’s main police union, who claimed that LDH was composed of “ill-intentioned people” who aim to “destabilise our democracy and our State”.<sup>102</sup> A few months earlier, the same union leader insulted the director of Amnesty International Belgium live on a national TV channel.<sup>103</sup> The violence of these

100 See <https://www.lesoir.be/416543/article/2022-01-06/annulation-de-la-sortie-des-negres-le-representant-du-collectif-antiraciste>.

101 N. Bensalem, « Philippe Pivin flingue l’observatoire des violences policières de la Ligue des droits humains : « c’est anti-policier ! » », DH Les Sports, 27 février 2021.

102 F. De Halleux, « Bashing pour déstabiliser la police... et l’Etat ! », *Sudinfo.be*, 10 février 2021.

103 See <https://www.lesoir.be/322287/article/2020-09-01/affaire-chovanec-le-president-dun-syndicat-policier-insulte-le-directeur>.

remarks raises questions: there is a hardening of the discourse of some police unions, which have an important weight in the functioning of the police and whose positions are relayed by the voice of some political representatives.

LDH is an association that has been defending and promoting fundamental rights for over 100 years. It is recognised for the rigour of its analyses, its strict independence from any political party or movement and its presence in the associative and militant sector. It covers many human rights issues, including police violence. Police Watch, its observatory on police violence, has three missions: to inform, to analyse and to act. This is why LDH has already met several times with police authorities to discuss the findings of Police Watch.

### ***Criminalisation of solidarity***

As it is the case in other EU countries, there is a trend in Belgium toward the criminalisation of solidarity, including the misuse of criminal law to target individuals defending the rights of refugees, asylum seekers and migrants.

For instance, in a highly publicised case, four individuals were prosecuted for providing minimal assistance in a human trafficking case after helping migrants cross into Great

Britain in 2017.<sup>104</sup> The prosecution accused them of having lent money or a telephone to migrants they were hosting at home, which they would have used to help other migrants reach Great Britain. Several defence lawyers jointly denounced it as a political trial, the intention of which was to dissuade people who come to the aid of migrants from doing so, by showing them what criminal proceedings they are exposed to. For them, the prosecution was turning this case into a “trial of solidarity”, by trying to convict Belgian citizens who only wanted to help destitute migrants, and to convict migrants themselves who wanted to help others get to Britain.<sup>105</sup> Fortunately, in May 2021, the Brussels Court of Appeal acquitted the four people who had sheltered migrants in 2017.<sup>106</sup>

Despite the successful outcome in this particular case, it is necessary to publicly recognise, promote and commend the role of these organisations and individuals as human rights defenders and protect their legitimate activities, which include a wide range of solidarity actions.

### ***Control and surveillance***

In 2015, the Constitutional Court<sup>107</sup> annulled the law of July 30, 2013, amending Articles

104 See <https://www.justice-en-ligne.be/Proces-des-hebergeurs-hebergeurs>

105 See <https://www.rtf.be/article/bruxelles-l-arret-dans-le-dossier-dit-des-hebergeurs-de-migrants-sera-prononce-mercredi-10769051?id=10769051>.

106 See <https://www.lalibre.be/belgique/judiciaire/2021/05/26/acquittement-general-lors-du-proces-des-hebergeurs-de-migrants-F5AVRLF72BGSFPZLVSTTIZCZFA/>.

107 C.C., 11 June 2015, n° 84/2015.

2, 126 and 145 of the Act of 13 June 2005 on electronic communications and Article 90*decies* of the Code of Criminal Procedure (the so-called ‘Data Retention Act’)<sup>108</sup> transposing the European Directive 2006/24/EC,<sup>109</sup> which had itself been invalidated by the Court of Justice of the European Union in its Digital Rights judgment.<sup>110</sup>

This annulment was intended to put an end to the obligation imposed on telecommunications operators and Internet access providers to retain, for the purposes of combating serious crime, all traffic information concerning telecommunications users (also known as metadata).

Despite this first annulment, the Belgian state adopted new but similar legislation<sup>111</sup> which, although it did not have all the flaws of the first one, nevertheless imposed a systematic and massive collection of the metadata of people present on Belgian territory. Therefore, NGOs logically asked and obtained from the Constitutional Court the annulment of this legislative norm in 2021.<sup>112</sup>

The CJEU clearly established that the state may derogate from this prohibition of generalized surveillance, but only in the event of a serious threat to national security and provided that the retention of data is limited in time and to the extent strictly necessary, that sufficient safeguards are provided and that the control of access is in the hands of a court or an independent administrative authority.

Unfortunately, the Belgian federal government disregarded the clear indications provided by both national and international courts. Indeed, the first echoes from the Council of Ministers are far from reassuring: far from limiting itself to “repairing” the illegalities observed by the above-mentioned courts, the initial draft bill introduced a requirement relating to encrypted messaging applications aimed at making it possible to decrypt what is exchanged by certain users, at the request of law enforcement agencies and with the agreement of an investigating judge. In other words, service providers would have been obliged to “disable” encryption for certain users.<sup>113</sup> However, the encryption of communications makes the information sent

108 M.B., 23-08-2013.

109 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, Official Journal of the European Union (ISSN 1725-2563), 13 April 2006, p. 54.

110 CJEU, 8 April 2014, *Digital Rights Ireland Ltd & Michael Seitlinger e.a.*, C-293/12 & C-594/12.

111 Act of 29 May 2016 on the collection and retention of data in the electronic communications sector, M.B., 18-07-2016.

112 C.C., 22 April 2021, n° 57/2021.

113 See [https://www.rtf.be/info/belgique/detail\\_un-projet-de-loi-belge-menace-la-confidentialite-des-messages-cryptes?id=10858753](https://www.rtf.be/info/belgique/detail_un-projet-de-loi-belge-menace-la-confidentialite-des-messages-cryptes?id=10858753).

with an application unreadable for people who are not the recipients of the message. Thus, the information that passes through an encrypted channel is scrambled, accessible only to those who are communicating with each other. This is an indispensable tool in a democracy, not only for certain specific professions (journalists, lawyers, etc.), but also for all individuals.

Faced with a strong reaction from civil society<sup>114</sup> and the Data Protection Authority,<sup>115</sup> the government was forced to backtrack and announced that it would no longer include this obligation in the draft bill in question. However, it appears that the executive has not completely abandoned this possibility in the future, which is extremely problematic.<sup>116</sup>

It should also be noted that, with regard to the other issues raised by the data retention reform, the draft bill in question has been the subject of a very critical and detailed opinion from the Data Protection Authority (DPA).<sup>117</sup> The DPA notes that there are significant risks for the respect of fundamental rights, whether from the point of view of legality, necessity or

proportionality.<sup>118</sup> It also notes, among other things, the fact that the preliminary draft does not provide for access to data to be always subject to prior control either by a court or by an independent administrative body which has the status of a third party in relation to the authority requesting access to the data, which is a European requirement.<sup>119</sup>

In view of the DPA's conclusions regarding this preliminary draft, the possibility of a new appeal to the Constitutional Court for annulment is far from hypothetical. Indeed, the DPA concludes with regard to the preliminary draft that "*It must be noted, however to note that the draft bill does not really bring about the change of perspective required by the case law of the CJEU and the CC. In its opinion, the Authority notes that the draft bill intends to impose new measures for the retention of traffic and location data which could lead to the de facto reintroduction of general and undifferentiated data retention obligations, while at the same time extending the possibilities of access to such data*".<sup>120</sup>

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114 See Global Encryption Coalition, « [Open Letter: 107 organizations and cybersecurity experts call on the Belgian Government to halt legislation to undermine end-to-end encryption](#) », 28 September 2021, .

115 Data Protection Authority, Opinion n° 108/2021 of 28 June 2021, § 163.

116 See Council of Ministers, « *Retention of identification data and metadata in the electronic communications sector – Second reading* », [press release of 17 December 2021](#), which mentions that "*The government will study the possibility of supplementing the Electronic Communications Act or another law with a provision on access to the content of encrypted communications*".

117 Data Protection Authority, Opinion n° 108/2021 of 28 June 2021.

118 *Ibid.*, pp. 71-75

119 *Ibid.*, §§ 153-155.

120 *Ibid.*, p. 76.

## **Disregard of human rights obligations and other systemic issues affecting the rule of law framework** ↓

### **Key recommendations**

- Belgium should put an end to the endemic prison overcrowding situation by developing alternatives to deprivation of liberty in case of conviction and by reviewing its penal policies to ensure that the prison sentence is the ultimum remedium.
- Belgian authorities should take the necessary measures to combat ill-treatment by the police effectively, including ill-treatment based on any form of discrimination, and punish the perpetrators appropriately. To do so, it needs to guarantee the independence of the Permanent Control Committee of the Police

Services (Committee P). It should also authorize filming or photographing police interventions.

- Put an immediate end to the incarceration of people with mental illnesses in prisons.

### **Systemic human rights violations**

#### ***Widespread human rights violations and/or persistent protection failures***

Prison overcrowding is endemic in Belgium and the resulting conditions of detention lead to inhuman or degrading treatment. As a result, the Belgian state faced several convictions of violations of Article 3 of the ECHR.<sup>121</sup> The Belgian state was also sentenced by the national judicial order for endemic prison overcrowding of a Brussels establishment.<sup>122</sup>

The Belgian state must comply with the requirements of international bodies in this field, in particular of the European Committee for the Prevention of Torture (CPT)<sup>123</sup> and of

121 ECHR, *Sylla and Nollomont vs Belgium*, 16 May 2017, req. n°37768/13 and 36467/14 ; ECHR, *W.D. vs. Belgique*, 6 September 2016, req. n°73548/13 ; ECHR, *Bamouhammad vs Belgium*, 17 November 2015, req. n°47687/13 ; ECHR, *Vasilescu vs Belgium*, November 25, 2014, req. n°68682/12 ; etc.

122 International Prison Observatory (OIP) - Belgian section, « The Belgian State responsible for prison overcrowding », January 17, 2019.

123 <https://www.coe.int/en/web/cpt> See in particular CPT, Report to the Government of Belgium on the visit in Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading

the High Commissioner for Human Rights of the Council of Europe,<sup>124</sup> by adopting a policy that does not involve the construction of new penal institutions. As also highlighted by the UN CAT, “*the State party must consider instituting alternative measures to detention rather than increasing prison capacity*”.<sup>125</sup> The CPT points out that “*It is important, however, that priority should continue to be given to reducing the prison population and controlling it to reasonable proportion [...]. This also requires ensuring that attention is not excessively given to the increase of the total capacity of the penal institution*”.<sup>126</sup>

Prison expansion is a ploy, as many scientific studies have shown: the evolution of the prison population actually depends on the implemented criminal policies. In this regard, given the obvious failure of the criminal policy that has been deployed for decades and the largely counterproductive nature of freedom

deprivation in many cases, it is necessary to ensure that prison sentence is truly the *ultimum remedium*, both about preventive detention and the execution of sentences. This includes in particular the use of alternative sanctions. In that regard, the Belgian state should on the one end ensure the proper implementation of cooperation agreements between the federal state and the communities responsible for the enforcement of sanctions of unpaid work and electronic monitoring, on the other end by developing new alternatives (special confiscation, day fines, etc.), while remaining careful not to widen the criminal net.

#### ***Impunity and/or lack of accountability for human rights violations***

There is a lack of accountability in Belgium as regards the illegitimate use of force by the police. In their recommendations to the

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Treatment or Punishment (CPT) from 27 March to 6 April 2017, March 8, 2018, §§ 36 and seq. ; see also CPT, Report to the Government of Belgium on the visit in Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 28 September to 7 October 2009, July 23, 2010, § 79.

124 Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Belgium from 15 to 19 December 2008, June 17, 2009, CommDH(2009)14, p. 31, § 6.

125 UN Committee against Torture, « Concluding observations of the Committee against Torture – Belgium », November 21, 2008, CAT/C/BEL/CO/2, § 18.

126 CPT, Report to the Government of Belgium on the visit in Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 6 April 2017, March 8, 2018, § 38.

Belgian state, the CPT,<sup>127</sup> the UN Human Rights Council<sup>128</sup> and the UN CAT stipulated, among other things, that “*The State party should take the necessary measures to combat ill-treatment effectively, including ill-treatment based on any form of discrimination, and punish the perpetrators appropriately*”.<sup>129</sup> More recently, the UN CAT has stated that “*recalling the recommendation contained in its previous concluding observations (...), the Committee calls on the State party to urgently conduct an independent and transparent investigation into the use of ill-treatment and the excessive use of force by the police, with a view to establishing the necessary prevention policies and strengthening internal and external oversight mechanisms*”.<sup>130</sup> The UN CERD, for its part, recommended that the Belgian

state “*[t]ake measures to ensure that prompt, thorough and impartial investigations are carried out into all racist incidents caused by or involving the police, ensure that those responsible for such acts are prosecuted and appropriately punished and provide adequate reparation to the victims*”.<sup>131</sup> Despite this, allegations of ill-treatment by law enforcement officers continue to be made.

Reports and news over the last few years pointed to police violence as an acute problem in Belgium. Many documented cases of disproportionate use of force by police eventually resulted in the death of the persons arrested, without an adequate reaction from the judicial authorities.<sup>132</sup> Similarly, many disproportionate police interventions resulted in the serious

127 CPT, « Report to the Government of Belgium on the visit to Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27th March to 6th April 2017 », 8th March 2018, §§ 12 ff. See also, CPT, « Report to the Government of Belgium on the visit to Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18th to 27th April 2005 », 20th April 2006, §§ 11 and 12 ; CPT, « Report to the Government of Belgium on the visit to Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 28th September to 7th October 2009 », 23rd July 2010, §§ 13 ff.

128 UN Human Rights Council, Draft report of the Working Group on the Universal Periodic Review - Belgium, 11 April 2016, A/HRC/32/8, pt. 139.8 - 139.10.

129 UN Committee against Torture, ‘Concluding observations: Belgium’, 19 January 2009, CAT/C/BEL/CO/2, § 13.

130 UN Committee against torture, Concluding observations on the fourth periodic report of Belgium, 25 August 2021, CAT/C/BEL/CO/4, § 8.

131 UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twentieth to twenty-second periodic reports of Belgium, 21 May 2021, CERD/C/BEL/CO/20-22, § 14. (a).

132 To take up only the deaths in the hands of the police, see the ‘Bangoura’ case in *Le Soir*, ‘Mort de Lamine Bangoura : pas de renvoi en correctionnelle pour les 8 policiers’, 16 March 2021 ; ‘Barrie’ case in *Le Soir*, ‘Décès d’un jeune homme après son passage au commissariat de Saint-Josse : ce que l’on sait’, 11 January 2021 ; ‘Charrot’ case in *Le Soir*, ‘Affaire Adil : une plainte pénale déposée contre le parquet de Bruxelles’, 16 December 2020 ; ‘Chovanec’ case in *Le Vif*, ‘Chovanec : l’enquête sous enquête’, 10 September 2020 ; ‘Abbedou’ case in *Le Soir*,

interference with the fundamental rights of citizens peacefully demonstrating in the public space.<sup>133</sup> Measures adopted in the context of the public health emergency also amounted to numerous interferences with the fundamental rights of individuals.<sup>134</sup> In this context, the fact of being a minor or young adult did not protect individuals from disproportionate or even illegal police interventions,<sup>135</sup> nor did the fact of being in a particularly vulnerable situation due to one's administrative status.<sup>136</sup>

Reactions by the Belgian authorities are limited and not commensurate with the seriousness of the phenomenon.

### ***Follow-up to recommendations of international and regional human rights monitoring bodies***

As already highlighted, Belgium has serious shortcomings in following-up recommendations of international and regional human rights bodies. Specifically for the year 2021, see the UN CAT recommendations,<sup>137</sup> the UN Committee on the Elimination of Racial

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'Décès d'Ilyes Abbedou : chronologie d'une détention qui pose bien des questions', 25 January 2021 ; 'Kadri' case in *RTBF*, 'Anvers : la mort d'Akram à la suite d'une intervention policière suscite l'indignation sur les réseaux sociaux', 20 July 2020 ; 'Bouda' case in *Sud Info*, 'Mehdi, 17 ans, tué par un combi de police : sa famille pense demander des devoirs d'enquête complémentaires, 'on se battra pour se faire entendre', 8 October 2020 ; etc.

133 On the subject, see the analysis of Police Watch, the LDH's Observatory of Police Violence, « When citizens use their right to demonstrate to denounce police violence, the police respond with violence », 3 February 2021.

134 LDH, « Police Watch Report. Police abuses and lock-downs », June 2020.

135 See in this regard the report of the General Delegate for the Rights of the Child of the French Community, which states that « *The General Delegate is regularly questioned by young people, their families or front- and second-line professionals, making allegations of police violence, abusive and discriminatory identity checks or denouncing, more generally, intimidating or humiliating methods.* » in Délégué Général aux Droits de l'Enfant, « Rapports sur le Covid-19 et les activités 2019-2020 », p. 113.

136 In October 2018, Médecins du Monde published a survey on police violence against migrants and refugees in transit in Belgium, highlighting, among other things, the fact that almost 60 % of respondents said they had been confronted with police violence in the field (Médecins du Monde, « Police violence against migrants and refugees in transit in Belgium - A quantitative and qualitative survey », October 2018).

137 UN Committee against torture, Concluding observations on the fourth periodic report of Belgium, 25 August 2021, CAT/C/BEL/CO/4.

Discrimination<sup>138</sup> and the UN Human Rights Council.<sup>139</sup> A consistent number of those recommendations are reiterations of recommendations already made in previous reports, which remain not implemented.

### ***Implementation of decisions by supranational courts***

#### *Data retention*

As already mentioned in previous sections, the Belgian state continues to show reluctance in abiding to the CJEU jurisprudence in the “data retention” case.

#### *Rights of detainees with mental health problems*

The incarceration of people with mental illnesses in prisons must be ended: this recommendation has been made many times before and the Belgian authorities have been frequently condemned for this, even to the extent of a pilot ruling by the ECtHR.<sup>140</sup> This underlines once more the urgency of this issue. However, to date, and although the government seems to have become aware of the importance of this problem, in part by creating closed care facilities which are independent of prisons, the psychiatric annexes to prisons

do still exist and the law of May 4, 2016, on internment and various provisions relating to justice<sup>141</sup> still allows patients to be sent there.

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138 [UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twentieth to twenty-second periodic reports of Belgium, 21 May 2021, CERD/C/BEL/CO/20-22.](#)

139 [UN Human Rights Council, Report of the Working Group on the Universal Periodic Review – Belgium, 14 July 2021, A/HRC/48/8.](#)

140 ECHR, *W.D. vs. Belgique*, 6 September 2016, req. n°73548/13.

141 M.B. 13-05-2016.

# **LIBERTIES RULE OF LAW REPORT 2022**

**BULGARIA**



BULGARIAN  
HELSINKI  
COMMITTEE



CIVIL  
LIBERTIES  
UNION FOR  
EUROPE

# Bulgaria

## About the authors



BULGARIAN  
HELSINKI  
COMMITTEE

**The Bulgarian Helsinki Committee (BHC)** is an independent, non-governmental, not for profit organisation of the civil society for defending basic human rights in the Republic of Bulgaria: political, civil, cultural, and social. It was established in 1992. The organisation's focus is on defending the most vulnerable members of Bulgarian society: children, women, people with disabilities, unpopular minorities, and people deprived of liberty.



**The Association of European Journalists – Bulgaria** is a member of the international Association of European Journalists, uniting journalists from 30 European countries. AEJ is an independent international association that supports critical journalism in the process of European integration and freedom of information and of the media. The Association is an independent observer in the Media Committee of the Council of Europe.

## Key concerns

None of the systemic problems in the Bulgarian justice system was solved in 2021, the main factor being political instability and the prolonged inability to form a government. Thanks to this, however, the topic of justice reform became popular and is being placed at the centre of political debates.

With the change in the balance of political forces, the issue of corruption in the high levels of government was put on the table. Despite the lack of concrete results, a lot of data has been made public and has received attention that was lacking before.

Media freedom and pluralism remained in serious doubt in 2021. The particular influence of some media outlets close to the previous government and to the Prosecutor's Office was not seriously affected, and there are still no mechanisms to highlight unregulated influence in the media.

Civil society organisations are still threatened by SLAPPs and incidents of physical violence. 2018 and 2019 saw a period of smear campaigns against the Istanbul Convention and 'gender ideology', and in 2021 there were no major changes to the hostile atmosphere for NGOs. Cooperation with them remained timid and sluggish.

In 2021, the political crisis prevented Bulgaria from making progress on human rights. This was not the case before the crisis, but the formation of a new government by the long-standing opposition opens a window for change that may unfortunately be shorter than expected.

### State of play

- ⊖ Justice system
- ⊖ Anti-corruption framework
- ⊖ Media environment and freedom of expression and of information
- N/A Checks and balances
- ⊖ Enabling framework for civil society
- ⊖ Systemic human rights issues

#### Legend (versus 2020)

- Regression: ↓
- No progress: ⊖
- Progress: ↑

## Justice system ⊖

### Key recommendations

- The institutions with legislative initiative – the Council of Ministers and the Parliament – should carry out a thorough reform of the legal framework of the judiciary to ensure effective self-government of judges, balanced control over the prosecution and the possibility for the Chief Prosecutor to be investi-

gated by an independent body in case they are suspected of committing crimes.

- There should be strengthened cooperation with a wide range of experts from NGOs who have previously shed light on problems in the judiciary.
- Decisions on changes to the judicial map must be made after increased consultation with the judicial and legal community.

## Judicial independence

### Appointment and selection of judges, prosecutors and court presidents

The year 2021 was marked by a political crisis in Bulgaria. On April 4, regular parliamentary elections were held after the third government of Prime Minister Boyko Borissov (GERB/ European People's Party) completed its full term. The elections produced a serious shift in the political landscape, with six parties represented in the parliament, three of which were until recently part of the opposition and extra-parliamentary. After a failure to form a government, a second parliamentary election was held on July 11, where the same six parties were again represented, but, for the first time in many years, GERB came in second place behind one of the opposition parties. After a second failure to constitute a government on November 14, with a record low turnout, the 47th Parliament of Bulgaria was elected,

where another drastic reshuffle took place and two new parties, now seven in total, took the place of one of the dropped opposition parties. GERB again remained in second place, and the parties that were opposition until recently managed to establish a coalition government after tough negotiations.

After several months of a caretaker government with no legislative powers during the period under review, no legislative amendments were made to ensure the independent and transparent selection of the Chief Prosecutor or the Presidents of the two Supreme Courts. Problems remained regarding the selection procedure before the Supreme Judicial Council (SJC) and, above all, the strong influence of the parliamentary and prosecutorial quota within it, which continued this year to demonstrate unanimity and unity in voting on important decisions related to staffing and disciplinary responsibility, including of the Chief Prosecutor himself.

The latest example came in December, when, in a matter of minutes, the prosecutorial collegium of the SJC voted unanimously in favour of all the appointments proposed by Chief Prosecutor Ivan Geshev, including a promotion for investigator Yassen Todorov – a member of the previous SJC and one of the most ardent

opponents of calls to reform the prosecution and pass measures ensuring the accountability of the Chief Prosecutor.<sup>1</sup> Todorov was promoted to Deputy Director of the National Investigation Service. In 2017, Todorov was filmed by journalists entering with a bag the office of the businessman and gambling magnate Vasil Bozhkov. Subsequently, Todorov was also filmed leaving Bozhkov's office without the bag, whose content is unknown, then getting into the car of a former deputy speaker of parliament.<sup>2</sup>

### ***Irremovability of judges, transfers, dismissal and retirement regime of judges, court presidents and prosecutors***

In January, the Ethics Committee of the SJC refused to consider a report filed by the BHC for damaging the prestige of the judiciary and the Chief Prosecutor. The basis for the report is that, in July 2020, through the website of the Prosecutor's Office, the spokeswoman of the Chief Prosecutor announced the imminent disclosure of materials in an ongoing pre-trial proceeding, the defendant in which is Vasil Bozhkov, who has been under scrutiny in the media for suspected illegal activities and connections with organised crime groups. The materials were actually distributed later that day by the Specialized Prosecutor's Office.<sup>3</sup>

1 See <https://defakto.bg/?p=97252>.

2 See <https://www.mediapool.bg/shefat-po-etikata-na-vss-yasen-todorov-zasnet-da-izliza-ot-ofisa-na-vasil-bozhkov-news264107.html>.

3 See the document in Bulgarian at <https://www.bghelsinki.org/web/files/richeditor/documents/internal/communications/2020-ivss/2020-07-20-signal-do-ivss.pdf>.

They are recordings of intercepted telephone conversations with Bozhkov, in which he commented that Prime Minister Borissov and the Chief Prosecutor Geshev should be replaced.

At this point, Bozhkov – subsequently placed on a US sanctions list under the Magnitsky Act<sup>4</sup> – was out of the country and took steps to form an opposition political party,<sup>5</sup> while mass protests were being held in the capital and other Bulgarian cities demanding the resignation of Prime Minister Boyko Borissov and Chief Prosecutor Ivan Geshev. A number of media outlets, sympathetic to the GERB government, circulated the claim that the protests were organised and paid by Bozhkov. The report, filed in the SJC’s Ethics Committee, points out that this is a selective and one-sided publication of compromising materials in a pending pre-trial proceeding and does not serve to establish the truth in the case, but rather serves political purposes – to discredit the mass protests against the government and against the Chief Prosecutor himself.

The Ethics Committee of the SJC responded that, according to Article 312 of the Judicial System Act (JSA), a proposal for disciplinary punishment of a prosecutor can only be made by a limited number of persons, including the Inspectorate of the SJC.<sup>6</sup> Earlier, in September 2020, the Inspectorate of the SJC refused to propose disciplinary proceedings against the Chief Prosecutor for these actions.<sup>7</sup>

On July 22, 2021, the SJC held a hearing on a proposal by the interim Minister of Justice Yanaki Stoilov for the early dismissal of Chief Prosecutor Geshev on the basis of Article 129, para. 3(5) of the Constitution.<sup>8</sup> The grounds for the motion were both the selective and tendentious disclosure of materials on the pre-trial proceedings against Bozhkov and the neglect of the principle of random case assignment in the Prosecutor’s Office, as well as other conducts of the Chief Prosecutor.<sup>9</sup> The SJC decided by 12 to 8 votes that the minister’s proposal was inadmissible due to the lack of authority to submit such proposals.

4 See <https://www.state.gov/public-designation-of-five-bulgarian-public-officials-due-to-involvement-in-significant-corruption/>.

5 See <https://www.investor.bg/analizi/85/a/bojkov-pred-bloomberg-nujdaem-se-ot-nov-politicheski-proekt-305898/>.

6 See the SJC letter at <https://www.bghelsinki.org/web/files/richeditor/documents/internal/communications/2020-ivss/2021-01-21-vss-etichna-komisia.pdf>.

7 See <https://www.bghelsinki.org/web/files/richeditor/documents/internal/communications/2020-ivss/2020-09-16-stanovishte-na-ivss.pdf>.

8 A serious violation or systematic failure to perform his duties, as well as actions that undermine the prestige of the judiciary.

9 See the proposal as well as enclosed materials and responses from the Chief Prosecutor at <http://www.vss.justice.bg/root/f/upload/32/Predlojenie-MP.pdf>

Subsequently, the minister appealed the decision before the Supreme Administrative Court (SAC) and requested the Constitutional Court to rule on whether it is within his powers under Article 130c(3) of the Constitution to make a proposal for the early dismissal of the Chief Prosecutor under Article 129, para. 3(5) of the Constitution. The case, No. 17/2021, remained pending before the Constitutional Court during the reporting period.<sup>10</sup>

### ***Allocation of cases in courts***

The three-page proposal by interim Minister of Justice Stoilov lists the grounds for Geshev's early release, mostly grouped into five categories, and is accompanied by a 108-page report by the interim Interior Minister. Among the reasons for the proposal is the disregard of the principle of random allocation of cases through the creation of specialized departments in the Sofia District and Regional Prosecutors' Offices. In addition, staff members in these departments were seconded from other Prosecutors' Offices, which calls into question their independence. In Section III on page 9 of his report, the Minister of the Interior points out that Ivan Geshev introduced non-public rules, not in line with the norm of Article 9 of the JSA, allowing for the allocation of cases with a decision of the administrative head of the respective Prosecutor's Office – not on a

random basis. The report lacks details on the source of this information.

On October 29, interim Minister Stoilov was appointed by the president as a judge in the Constitutional Court and Ivan Demerjiev became the interim minister in his place. On December 9, Minister Demerjiev submitted a new request for Ivan Geshev's early dismissal from the post of Chief Prosecutor, this time based entirely on the issue of the random allocation of cases in the Prosecutor's Office.<sup>11</sup> Unlike the previous interim minister's proposal, this new proposal was not published on the SJC website. Instead, on December 15, the SJC's prosecutorial chamber announced that it was returning the proposal to the Minister for elaboration because, according to the prosecutors who attended the SJC meeting, "the proposal does not provide clarity on the facts and the legal conclusions put forward, it is necessary to clarify what violations have been committed and [under] what procedure it should be considered."<sup>12</sup> The announcement underlines that the meeting was chaired by Ivan Geshev, but he did not vote.

The announcement of the proposal on the website of the Ministry of Justice<sup>13</sup> makes it clear that the previous Minister of Justice had already sent a letter to numerous administrative heads in the courts and the Prosecutor's Office, including the Chief Prosecutor, requesting

10 See the case at <https://constcourt.bg/bg/Cases/Details/603>.

11 See <https://segabg.com/node/200556>.

12 See <http://www.vss.justice.bg/page/view/107782>.

13 See <https://www.justice.government.bg/home/index/ea047070-4883-48d7-b9f6-3ce887ec6e56>.

information on the internal acts adopted by the respective administrative heads ensuring the application of the principle of random allocation. The first such letter to Ivan Geshev was sent in the end of August, and a second one in mid-September. The Prosecutor's Office, however, did not respond to this inquiry.

### **Promotion of judges and prosecutors**

At the end of March, Prosecutor Dimitar Frantishek Petrov, who headed the Specialised Prosecutor's Office after Ivan Geshev's election for Chief Prosecutor, received the highest rank in the system as a supreme prosecutor. This was the proposal of the interim head of the Specialised Prosecutor's Office, Valentina Madjarova. The rank elevation was voted on by the SJC without debate or controversy. Elevating one's rank is not a promotion, but it brings a pay raise – BGN 440 (app. EUR 220) to the basic salary.<sup>14</sup>

Petrov is known from the interviews with Iliya Zlatanov, a businessman and former majority owner of the Izamet elevator factories, who in 2020 publicly revealed an attempt to misappropriate his company by a group of investigators, prosecutors, and lawyers. Zlatanov claims that Petrov personally visited the notorious restaurant The Eight Dwarfs – the group's centre for meetings and instructions.<sup>15</sup> Zlatanov's daughter also claims that Petrov conducted a search of their home, during which large quantities of

gold were found and seized. The family claims to have seen the gold being loaded into the car of a woman who was in a relationship with the investigator and was also part of the group. A public prosecutor's inquiry (not a formal investigation) has been launched, the outcome of which has not yet been announced.

In December, Petrov was one of the three prosecutors against whom disciplinary proceedings were initiated in the SJC in relation to the Eight Dwarfs case. The proceedings were initiated following a motion submitted by interim Justice Minister Ivan Demerjiev, who told the media that he submitted the motion due to the inaction of the institutions to investigate the case since the publication of the journalist investigation on the matter in June 2020.<sup>16</sup> By the end of the reporting period, the SJC had issued no decisions.

### **Independence (including composition and nomination of its members), and powers of the body tasked with safeguarding the independence of the judiciary (e.g. Council for the Judiciary)**

The increased pressure from the Committee of Ministers of the Council of Europe, various EU institutions, as well as from civil society on the implementation of the ECtHR's judgment in the *Kolevi v. Bulgaria* case forced the government of Prime Minister Borissov to demonstrate some efforts towards justice

14 See <https://www.clubz.bg/node/111542>.

15 Full four-part documentary on the case is published with English subtitles at <https://youtu.be/BuldtVxkaY>.

16 See <https://defakto.bg/?p=96993>.

reform in the last year and a half of his mandate. Such attempts for reform initiated at the end of 2019, during 2020, and at the beginning of 2021 were so flawed in design that their failure was expected, and it became necessary to prolong deadlines for the preparation of further measures. Thus, the time leading up to the end of this government's term was effectively wasted.

After the end of the Borissov's term in May, Bulgaria was governed by two caretaker governments until the elections in November, after which a new regular government was formed in mid-December. Both the new opposition parties in Parliament and the Ministers of Justice of the two caretaker governments and the new regular cabinet have stated the need for justice reform, which includes measures ensuring accountability of the Chief Prosecutor, replacing Ivan Geshev as the Chief Prosecutor, and reforming the SJC.

The incident regarding the motion for Chief Prosecutor Geshev's early dismissal, which occurred on top of existing tensions among the judicial community, divided over the need for a comprehensive justice reform, triggered a crisis in judicial circles. In September, judges of the Supreme Court of Cassation (SCC) addressed a letter to the members of the SJC elected by them, calling on them to resign and thus terminate the council.<sup>17</sup> No resignations

were submitted. Thus, in October, when two new members of the College of Judges had to be elected due to the resignation of two members, just over 30% of the Bulgarian judges participated in the vote, which required 50% participation. This necessitated a second vote where the threshold was 33%, but only 26% voted.<sup>18</sup> Thus, no new members were elected.

In the 46th Parliament (July 21 – September 16), the Democratic Bulgaria party submitted a bill for, *inter alia*, early termination of the mandate of the SJC, but the term of office of this parliament was not long enough for the proposal to be considered.<sup>19</sup> In December, Atanaska Disheva – a member of the SJC's panel of judges – said publicly that calls for a change in the SJC's membership were redundant as its term expires on October 3, 2022, and a procedure to elect new members by law could be opened as early as February 2022.<sup>20</sup>

***Accountability of judges and prosecutors, including disciplinary regime and bodies and ethical rules, judicial immunity and criminal liability of judges***

In 2021, no significant advancements were achieved in the implementation of the ECtHR's judgment in the case Kolevi v. Bulgaria, concerning the assassination of a senior magistrate and suspicions by him and his relatives that the assassination was ordered

17 See <https://news.lex.bg/?p=62933>.

18 See <https://defakto.bg/?p=94102>.

19 See bill No. 46-154-01-52/31-08-2021 at <https://www.parliament.bg/bg/bills/ID/163823>.

20 See <https://defakto.bg/?p=97144>.

by the then Chief Prosecutor Nikola Filchev (currently advisor to the Chief Prosecutor Geshev<sup>21</sup>).

At the end of 2020 and beginning of 2021, the government of Boyko Borissov submitted, and the National Assembly adopted, a bill strongly criticized by civil society organisations and introducing the new figure of the Special Prosecutor for the investigation of the Chief Prosecutor.<sup>22</sup> In response to the amendments introducing the Special Prosecutor, the president referred parts of the new legislation to the Constitutional Court for review of their compliance with the constitution – Article 46(8), Article 194(6), Article 213a(2), and Article 411a(4) of the Criminal Procedure Code (CPC), as well as Article 136(11) of the Judicial System Act (JSA). On May 11, 2021, the Constitutional Court delivered a judgment in Case No. 4/2021<sup>23</sup> repealing all these five provisions (leaving others referring to the Special Prosecutor in place due to the limited scope of the presidential referral).

In addition, the attempts to start the procedure for the early release of Chief Prosecutor Ivan Geshev are the subject of a pending case before the Constitutional Court. During the heated debate in the plenary of the SJC, the question was raised as to whether there was any procedure at all for the early removal of

the Chief Prosecutor and whether it should be disciplinary in nature or otherwise, and therefore which principles of disciplinary procedure it should be subjected to, including the statute of limitations. The discussion did not reach any conclusions on these issues. In the other case, the procedure appears to have been defined as disciplinary by the petitioner himself and was considered by the prosecutorial chamber of the SJC, but was referred back to the Minister with a request for clarification of the same nature: to explain what offences had been committed and under what procedure and in what manner it should be dealt with. In the meantime, however, a new government has been formed and whether the new Minister of Justice will respond to the prosecutorial chamber remains to be seen.

### *Independence/autonomy of the prosecution service*

In July 2021, the Prosecutor's Office announced<sup>24</sup> that it was continuing its investigation into the so-called Barcelonagate – an alleged international money laundering scheme linked to former Bulgarian super-model Borislava Yovcheva, who in the past was alleged to have had intimate relations with Prime Minister Borissov. The allegations were first published at the end of 2015 by Bulgarian opposition media, but the

21 See <https://prb.bg/bg/news/42531-sys-zapoved-na-glavnija-prokuror-e-syzdaden-ek-59>.

22 See decision of CoE's Council of Ministers from 11 March 2021 (CM/Del/Dec(2021)1398/H46-6), §§ 5–7, retrieved from [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a1abfa](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a1abfa).

23 See <https://constcourt.bg/bg/Acts/GetHtmlContent/a4b67d2a-45f2-4cf7-8682-566c38ef4ddf>.

24 See <https://www.segabg.com/hot/category-bulgaria/prokuraturata-tursim-prane-na-pari-barselonageyt>.

Bulgarian Prosecutor's Office ignored them. It was only after the Spanish publication *El Periodico* wrote on the subject in 2020<sup>25</sup> that the Bulgarian Prosecutor's Office decided to launch an investigation. However, nothing more was reported about developments in the case before the end of the year.

On September 10, Chief Prosecutor Geshev was spotted exchanging text messages on his phone with Borissov's PR Sevdelina Arnaudova during his hearing with the opposition parties in the parliament. Geshev and Arnaudova confirmed this<sup>26</sup> but downplayed the nature of their conversation, which was never made public. Earlier in the year, Arnaudova was named by Vasil Bozhkov – a defendant in various criminal proceedings and sanctioned by the US under the Magnitsky Act – as an intermediary in a corruption scheme involving PM Borissov aiming to shield Bozhkov from government inspections and sanctions. Following the publication of pictures of Geshev and Arnaudova privately communicating during the hearing, the BHC has asked for Geshev's resignation over doubts about his integrity,<sup>27</sup> but he has not commented publicly on the request.

In November, the Bulgarian chapter of the Radio Free Europe (RFE/RL) published<sup>28</sup> a journalistic investigation revealing that former Interior Minister from the cabinet of PM Borissov and MOP candidate Mladen Marinov are linked through at least two individuals to the scandal that became known as the Eight Dwarfs – the case of the alleged racketeering and a business embezzlement scheme led by former and current senior investigators and prosecutors with the help of the local police and a prominent private security firm.<sup>29</sup> One of the embezzled properties was a businessman's SUV, which was bought by Marinov's daughter shortly after it was appropriated. The injured businessman also claimed before investigative journalists that Marinov's brother was the driver of one of the racketeers in the case.

In July 2020, the media received scandalous photographs of Borissov from an anonymous person, showing him sleeping on a bed, next to which there is a bedside table with a gun on it and an open drawer full of gold bars and large euro banknotes.<sup>30</sup> In December 2020, the Prosecutor's Office found no reasons for investigation in the case.<sup>31</sup> The Prosecutor's Office

25 See <https://www.elperiodico.com/es/politica/20200221/primer-ministro-bulgaria-mossos-investigacion-blanque-7848274>.

26 See <https://www.svobodnaevropa.bg/a/31456386.html>.

27 See <https://www.bghelsinki.org/bg/news/20210915-open-letter-geshev-arnaudova>.

28 See <https://www.svobodnaevropa.bg/a/31554590.html>.

29 Full four-part documentary on the case is published with English subtitles at <https://youtu.be/BuldtNvXkaY>.

30 See <https://btvnovinite.bg/bulgaria/tarsi-se-mata-hari-mvr-razpita-borisov-obzor.html>.

31 See <https://www.banker.bg/obshtestvo-i-politika/read/prokuraturata-ne-otkri-chii-sa-pachkite-i-kiulcheta-v-shkafcheto-na-borisov>.

interest in the case resumed after the election of a regular government in December 2021.<sup>32</sup> Borissov's interrogation was scheduled for January 2022, and was, however, initiated and conducted by the police, not the prosecution.

## **Quality of justice**

### **Digitalisation of the justice system**

At the end of December 2020, the SJC voted on the proposal of the judicial chamber to phase in the new Unified Court Information System, funded by the European Union, and set different deadlines for implementation for different courts.<sup>33</sup>

In April 2021, however, the president of the Supreme Court of Cassation (SCC), Lozan Panov, informed the SJC that the system lacked important functionalities for the work of the court, which hindered its implementation. Panov points out that in February the creator of the software acknowledged the problems, but that there has been no progress in fixing them, which makes it impossible to conduct the necessary training for working with the system before the deadline for its implementation in the SCC, which is June 1.<sup>34</sup>

In July, a closing event was held on the European project, where it was announced that the system is for the internal use of the courts and will not be able to serve e-justice to citizens. For the latter purpose, two other systems will need to be built, again financed with EU funds. It was also announced that the system has been introduced in all courts except the administrative courts, the Supreme Administrative Court, and the SCC.<sup>35</sup>

At the same time, in a long and detailed scathing letter, 69 SCC justices criticized both the system and the developer's attempts to impose its vision of what features and functions this system should entail. "This software is clearly not in line with the objectives of the project under which it was developed," the letter reads, and continues: "This software does not take into account the fact that in the system of legal guarantees for the protection of the rights and legitimate interests of citizens, judicial safeguards are supreme, because the court in its activities should be independent and subject only to the law, and not to the requirements of an obscure programme."<sup>36</sup>

Sofia Bar Council issued a statement in support of the letter,<sup>37</sup> and the Supreme Bar Council issued a statement calling the flaws in

32 See <https://webcafe.bg/bulgaria/prokuraturata-proveryava-snimkite-s-noshtoto-shkafche-na-borisov.html>.

33 See <https://defakto.bg/?p=79378>.

34 See <https://defakto.bg/?p=86332>.

35 See <https://defakto.bg/?p=90872>.

36 See <https://defakto.bg/?p=90956>.

37 See <https://defakto.bg/?p=91298>.

the system “dangerous.”<sup>38</sup> In October, interim Justice Minister Yanaki Stoilov held a meeting with SCC judges. “The hasty introduction of a fully e-justice system could be a failure for the judiciary. A transition period of several years is needed to preserve classical justice along with e-justice,” the minister said after the meeting and committed the ministry to draft the necessary legislative changes for this to happen.<sup>39</sup>

### ***Geographical distribution and number of courts/jurisdictions (“judicial map”) and their specialisation***

The restructuring of the judicial map has been declared a priority in the work of the SJC for at least the last six to seven years. In January, the judicial chamber of the SJC chose the “radical” version to change the judicial map.<sup>40</sup> It generally provides for a major shift in subject-matter jurisdiction between the district, regional, and appellate courts, for district judges to move to the regional level and regional judges to the appellate level, and for some district courts to be divisions of others. Plus, it creates “divisions” in the Sofia Court of Appeal and a new model of competing for promotions.

The decision was not well received by judges and the legal profession. The Supreme Bar Council

issued a strong letter against the reform model,<sup>41</sup> and it was subsequently criticised by local authorities and the Ombudswoman.<sup>42</sup> At the end of July, interim Justice Minister Yanaki Stoilov said that without a new debate on the issue, there would be no closure of courts.<sup>43</sup> This led two judges, members of the SJC, to resign in June 2021.<sup>44</sup>

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38 See <https://defakto.bg/?p=91853>.

39 See <https://defakto.bg/?p=94365>.

40 See <https://defakto.bg/?p=80804>.

41 See <https://defakto.bg/?p=88018>.

42 See <https://defakto.bg/?p=88349>.

43 See <https://defakto.bg/?p=89324>.

44 See <https://news.lex.bg/?p=59172>.

## Anti-corruption framework –

### Key recommendations

- The new leadership of the Ministry of Interior has to find mechanisms to work effectively with the prosecution in the case of former tax official Borislav Kolev.

### Investigation and prosecution of corruption

#### *Effectiveness of investigation and application of sanctions for corruption offences*

After the failure to form a government at the beginning of the year, in mid-May the president appointed a caretaker government. Soon after taking office, the interim Minister of Regional Development and Public Works, Violeta Komitova, told the media about numerous irregularities in the ministry, including the EU-funded construction of the Hemus motorway.<sup>45</sup> At the beginning of June, the Court of Auditors published a report independently confirming many of the violations, including that the state-owned company “Motorways” had impermissibly outsourced activities worth billions of leva to dozens of external companies

– in violation of the Public Procurement Act.<sup>46</sup> For several months the issue has been the subject of an exchange of serious accusations between Minister Komitova, former Regional Minister Nikolay Nankov and some of the builders involved in the project.

On November 5, on the eve of the combined parliamentary and presidential elections, Interior Ministry Secretary-General Petar Todorov revealed to the media that tens of millions of leva, allocated in advance for the construction of the highway, were withdrawn and taken away in sacks. A month later, on December 7, the General Directorate for Combating Organised Crime (GDCOC) arrested the man suspected of the scheme. Borislav Kolev, a former tax official and soccer referee, was charged with money laundering. Part of the scheme included shell companies that were registered days before the money was transferred to them. Todorov reports that 14 people were arrested because of operational information that document destruction was being prepared. Also involved in the probe was the State Agency for National Security, whose chairman, Plamen Tonchev, reports that several withdrawals of huge sums of money allocated for the construction of the highway were identified. On the same day, a spokeswoman for the Chief Prosecutor made a public statement that the Prosecutor’s Office was also working on the highway case and

45 See <https://bntnews.bg/news/regionalniyat-ministar-ustanovi-stroezh-bez-razresheniya-i-avansovo-plash-tane-pri-inspekciya-na-obekt-po-am-hemus-1158715news.html>.

46 See <https://segabg.com/hot/category-economy/luzhite-na-gerb-za-avtomagistrali-lusnaha-pulna-sila>.

expressed dissatisfaction with the duplication of activities.<sup>47</sup>

On December 12, the Prosecutor's Office organised two media briefings at which it announced that it had initiated pre-trial proceedings for an attempt by the head of the GDCOC, Kalin Stoyanov, and other officials to put pressure on prosecutors to violate their duties in this investigation. Two hours later, at a briefing held by the Chief Prosecutor Ivan Geshev and the leadership of the Prosecutor's Office, a statement was made that a bunch of national and international institutions and embassies would be informed about the case.

Later on the same day, the Interior Ministry organised a briefing at which it was explained that the actions assessed by the prosecution as pressure were the insistence by the Ministry of Interior that prosecutors attend an interrogation at which the accused, Kolev, would make a confession. To confess, Kolev demanded the prosecution to commit not to protest his house arrest with a request for a more severe pre-trial supervision measure. However, prosecutors have refused any plea agreement and the accused has refused to testify. The Interior Ministry accuses prosecutors of thwarting a confession by their actions, which in this case is key to furthering the investigation.<sup>48</sup>

On December 29, it was announced that the Prosecutor's Office summoned for questioning in the case the already appointed regular Minister of the Interior Boyko Rashkov.<sup>49</sup>

These cases add to the systemic failure by the prosecution service to investigate and prosecute suspected corruption by politicians and high-level officials, exemplified by the lack of progress as regards inquiries over the so-called Barcelonagate, mentioned above.

## **Media environment and freedom of expression and of information** —

### **Key recommendations**

- Protect journalists and media from Strategic Lawsuits Against Public Participation (SLAPPs) or other forms of institutional harassment. This should include the training of prosecutors and judges to recognize and prevent SLAPPs. In many cases, there are indicators that some prosecutors and judges are engaged in SLAPPs. A more transparent and well-managed judicial system would prevent that.

47 See <https://btvnovinite.bg/bulgaria/kak-zapochna-sagata-hemus-i-zadochnite-prestrelki-mezhdu-mvr-i-prokuraturata.html>.

48 See <https://www.capital.bg/4293020>.

49 See <https://btvnovinite.bg/bulgaria/aferata-hemus-prokuraturata-vika-na-razpit-vatreshnija-ministar.html>.

There is also a need to reform the Civil Procedure Code and the Criminal Procedure Code to prevent these abusive lawsuits.

- Protect journalists and media from all kinds of threats to their physical safety: a better protection should be provided by the Ministry of Interior, the Prosecutor's Office and Special Services.
- Distribute public funds to media, according to clearly defined and transparent criteria, and stop buying media comfort and stop funding outlets that do not respect ethical and professional standards. This recommendation is addressed to central and local authorities distributing public funds to the media. They should promote the work of the National Council for Journalism Ethics in order to build confidence in quality journalism and stop funding outlets that violate ethical standards.

## ***Media and telecommunications authorities and bodies***

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### ***Independence, enforcement powers and adequacy of resources of media and telecommunication authorities and bodies***

Due to the political interference and appointment of political figures without relevant experience, the trust in Council of Electronic Media (CEM) in Bulgaria is relatively low.

### ***Conditions and procedures for the appointment and dismissal of the head / members of the collegiate body of media and telecommunication authorities and bodies***

There is a need for substantial changes to be made in the selection of the members of the CEM and their appointment in order to strengthen the capacity of the body and to build confidence in it. Three out of five members of CEM are appointed by the Parliament and two by the President. The criteria for appointment are very vague and there is no real competition but rather, appointment of persons loyal to the majority in the Parliament or to the President. As a result, in many cases as members of the Council are appointed figures that lack the expertise and the experience for such a position.

### ***Public trust in media***

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The ongoing COVID-19 pandemic has taken a dramatic toll on the Bulgarian society – not only in terms of the record number of preventable deaths, but also in the shape of a dramatic decline in trust in science, media, and public

institutions. It has reshaped and radicalised the public dialogue, creating sharp divisions that challenge the main principles and foundations of the democratic society. The phenomenon, framed by the World Health Organisation as an “infodemic”, severely affected the country, which remains EU’s least vaccinated country and among the ones with the highest COVID-related death rate. The reasons for those dark statistics are complex, but the problems related to the country’s outdated education system, low media literacy and troubled media environment play an important role in the picture.

Amid the unprecedented wave of disinformation surrounding the pandemic, the people’s capacity to choose reliable media sources is of key importance. However, according to a 2020 survey by the European Broadcasting Union, Bulgaria tops the EU rankings in terms of trust in the social media – the main generator of fake news. In addition, it is the only EU member state where this trust is on a continuous rise.

Meanwhile, the reputation of traditional media remains low, as pointed out by the Open Society Institute’s latest survey of the trust in public institutions, published in January 2022.<sup>50</sup> According to the report, only 30% of Bulgarians declare they trust the media, while the number among younger people aged between 18 and 29 is even lower – 27%.

This predominant mistrust comes together with Bulgaria’s traditionally low level of media literacy (lowest in the EU according to the Open Society Institute’s 2021 Media Literacy Index<sup>51</sup>). Statistics show that half of Bulgaria’s children, aged nine to 17, and 40% of their parents can’t differentiate between true and false information, according to a 2016 survey conducted by the Safe Internet Centre.<sup>52</sup> At the same time, the series of lockdowns have caused an undoubted blow on the educational system, although it is worth admitting that Bulgaria achieved satisfying results in the transfer to remote education.

Issues like political and economic pressure, self-censorship, lack of good-quality journalism, smear campaigns, etc., specific to Bulgaria’s media environment further complicate the picture and make citizens particularly vulnerable to propaganda. Furthermore, disinformation could have adverse effects on their decision-making capacities as citizens and voters.

## ***Safety and protection of journalists and other media activists***

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### ***Smear campaigns***

Smear campaigns against journalists and activists are not unusual for the Bulgarian media landscape. For instance, outlets such

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50 See <https://osis.bg/?p=4020>.

51 See <https://osis.bg/?p=3749>.

52 See <https://www.safenet.bg/images/sampleddata/files/DML-BG.pdf>.

as PIK, BLITZ, TRUD or some anonymous sites are engaging in such campaigns against critics of former ruling party GERB or Chief Prosecutor Ivan Geshev.

### ***Law enforcement capacity to ensure journalists' safety and to investigate attacks on journalists and media activists***

In September 2021, for the first time, Bulgaria's Interior Ministry admitted that police officers used unauthorized violence against the journalist Dimitar Kenarov during a wave of anti-government rallies in 2020. Kenarov had been beaten, handcuffed and arrested unlawfully, states a letter sent to AEJ-Bulgaria and the Anti-Corruption Fund and signed by the caretaker Interior Minister Boyko Rashkov. In June 2021, Rashkov launched a new internal probe into the case. It has identified "a number of violations of the professional discipline by senior and other employees" of the police headquarters in Sofia and Plovdiv, which have been filed to the disciplinary authorities in charge. In addition to that, "taking into account the existing evidence," the case has been forwarded to the Sofia Regional Prosecutor's Office. The letter comes shortly after *Sega Weekly* newspaper announced that a senior prosecutor upheld an earlier decision not to investigate the police's actions against Kenarov.

The case indicates how the protection of fundamental rights such as integrity of person and freedom of expression, which are enshrined

in the Constitution, depends on the political situation, rather than respecting the law.

### ***Lawsuits and prosecutions against journalists (including) SLAPPs and safeguards against abuse***

SLAPPs remain a problem for Bulgarian journalists. In December, the Sofia City Court found that Boris Mitov, now a journalist for RFE/RL's Bulgarian Service, and Stoyana Georgieva had caused physical and mental anguish to Svetlin Mihailov, a former chairman of the City Court.<sup>53</sup> The City Court ordered them and the website that published the articles four years ago to pay him damages amounting to 60,000 BGN (some 30,700 EUR). In 2018, Mitov was working with the news website Mediapool in covering Mihailov's bid to become head of the Sofia City Court, Bulgaria's largest district court. At the time, Georgieva was the editor-in-chief of Mediapool. Four of those articles were examined by the court, and judge Daniela Popova ruled on December 21 that they contained "defamatory allegations against [Mihailov]." Lawyers for Mitov and Georgieva argued that the articles in question contained information about Mihailov, including questions about his sizable wealth and property, that had appeared at the time and since then in other publications.

Other journalists and media outlets such as Nikolay Stoyanov from Capital Weekly and the Bivol website are subjects of court litigation that have the traits of SLAPPs.

53 See <https://defakto.bg/?p=97767>.

## Freedom of expression and of information

### *Censorship and self-censorship, including online*

The situation with self-censorship in the media did not undergo significant improvement in 2021. AEJ-Bulgaria's flagship biannual press freedom survey, published in 2020,<sup>54</sup> showed that the culture of political and economic pressure in Bulgaria is strengthening amid the sharp deterioration of the media environment. The COVID-19 pandemic has only made things worse for journalists who face a shortage of funds, limited transparency and threats of increased censorship in the face of political, economic and judicial pressure.

All of the above leads to a major deficit in the Bulgarian democratic system which far exceeds the difficulties of journalism itself – namely the loss of the role of the media as a watchdog and a reliable source of information for society. This complex environment, characterised by information overload where the borders between facts and lies have been blurred, revealed the need for a holistic approach. It should include robust efforts for capacity building in the media that includes high quality training in the field of journalism, media management and analysis, combined with civic educational activities aimed at significantly developing the media literacy skills for people of all ages.

## Enabling framework for civil society –

### Key recommendations

- The government and parliament should strengthen the use of civil society organisations and their expertise and inputs in drafting and discussing laws.
- The framework governing civil society organisations needs to be reformed both in the direction of more transparency of their funding sources, including through public registers, and in the direction of more incentives, e.g. in terms of court fees, tangible and intangible incentives for employees, etc.
- The government should stop denying the right to self-determination to people claiming to be ethnically Macedonian and treating such ethnicity as a challenge to Bulgarian national identity.
- Bulgaria should recognise the elevated social dangerousness of crimes motivated by the real or presumed sexual orientation or

54 See <https://aej-bulgaria.org/wp-content/uploads/2020/10/Журналистика-без-маски-2020-г.-годишно-изледване-за-свободата-на-словото-в-България.pdf>.

gender identity of expression of the victim and enhance punishment for such crimes.

- Bulgaria should promptly improve the legal framework governing surveillance.

## ***Regulatory framework***

### ***Freedom of association, including registration rules***

The most significant restriction on the freedom of association in 2021 in Bulgaria remained the refusal of the Bulgarian authorities to allow the registration of an association of Bulgarian citizens identifying themselves ethnically as Macedonians. Bulgarian courts issued final rulings in such cases in May,<sup>55</sup> June,<sup>56</sup> and August.<sup>57</sup> Of these, the one from June is among the most telling about the atmosphere of acute chauvinism on the issue advocated by Bulgarian institutions. In its judgment in that case, the court found that the wording of the statutes of the appealing association, which referred to a Macedonian ethnic minority, to be “creat[ing] the impression

of the existence of a minority Macedonian ethnic group on the territory of the Republic of Bulgaria, deprived of its rights or having such rights violated, opposed to the rest of the Bulgarian citizens and repressed by the state. In these circumstances, the establishment of an association with the aims and means set out in its constitutive act essentially pursues the artificial creation, imposition and promotion of the idea of the existence among a certain part of the Bulgarian population of an ethnic identity, other than the national one, without such having been formed historically.” Many other cases have been decided at first instance and are awaiting judicial review.

## ***Attacks and harassment***

### ***Verbal and physical attacks***

Following the second general election of the year on June 11, the 46th Parliament was formed. Although it lasted less than two months, the new, highly critical opposition, until recently non-parliamentary parties, established a Special Committee to investigate the use of tear gas, force and aids by the Ministry of Interior during a series of protests on July 10 and September 2, 2020, and to investigate the facts and circumstances of

55 See Judgment No. 320 of 31.05.2021 in Case No. 301/2021 of the Sofia Court of Appeals, retrieved from <https://legalacts.justice.bg/Search/GetActContentByActId?actId=Ya70VT1Dza8%3D>.

56 See Judgment No. 339 of 08.06.2021 in Case No. 302/2021 of the Sofia Court of Appeals, retrieved from <https://legalacts.justice.bg/Search/GetActContentByActId?actId=ytFnggQx4G0%3D>.

57 See Judgment No. 544 of 18.08.2021 in Case No. 727/2021 of the Sofia Court of Appeals, retrieved from <https://legalacts.justice.bg/Search/GetActContentByActId?actId=fpzCFfSQNWQ%3D>.

the use of special intelligence on protesting citizens, opposition leaders and members of political parties of the opposition.<sup>58</sup> The 2020 protests were directed against the government of Boyko Borissov and the Chief Prosecutor Ivan Geshev. At an extraordinary open meeting of the Special Committee in August, security camera footage from the area in front of the Council of Ministers was shown. The video footage shows how for 17 minutes, seven youths were dragged, hit, including with police batons, and thrown behind the pillars of the building. Nikolay Hajigenov, MP, told the committee that the footage was sought for over a year, eventually being found in a drawer at the Sofia Directorate of Internal Affairs and that it was provided to him by the interim Minister of Internal Affairs.<sup>59</sup> In response to the records, the Sofia District Prosecutor's Office announced that four Interior Ministry officers were being investigated for police violence and that the case is under enhanced supervision.<sup>60</sup> In December, as part of the supervision of the execution of the *Velikova* group of cases before the European Court of Human Rights, the Committee of Ministers of the Council of Europe invited Bulgarian authorities to provide information on the outcome of any inquiry or investigation in the reported instances of police violence during the 2020 rallies.<sup>61</sup>

On May 15, a pride parade was held in Burgas for the first time, and became the first such event outside the capital city. According to initial plans, it was to include a gathering and a march. On the day of the pride, however, Burgas police allowed a counterdemonstration to deviate from its originally stated route and the crowd of anti-pride protesters to surround members of the LGBTI community. They yelled threats and threw vegetables at the latter, and police instructed the pride organisers not to hold their march due to the security risk.<sup>62</sup>

Eighteen incidents of violence against the LGBTI community were recorded in May and June in the days before and immediately after Sofia Pride. Many of these were related to vandalism of property, mostly by putting stickers on windows and doors of LGBTI community spaces. In several cases, mobs of extreme nationalists entered community events without violent acts, causing fear among participants and compromising the status of safe spaces. In one case, extreme nationalists handed out leaflets with homophobic and transphobic defamations, including allegations of child sexual molestation tendencies among LGBTI people. Following a complaint to the police and respective ID checks of those who distributed the leaflets, the case

58 Information about and documents of the 10 July and 2 September Special Committee are available at <https://www.parliament.bg/bg/parliamentarycommittees/2867?date=9999-12-31>.

59 See <https://nova.bg/news/view/2021/08/13/336673>.

60 See <https://defakto.bg/?p=91505>.

61 See [https://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2021\)1419/H46-10E](https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2021)1419/H46-10E), § 5.

62 Details derived via personal correspondence with the organiser.

is pending before the national equality body, the Commission for the Protection against Discrimination.<sup>63</sup>

In each of the three election campaigns during the year, the extreme nationalist party VMRO-BND – a coalition partner of Boyko Borissov’s government – and its individual members made election promises to restrict the right to peaceful assembly of LGBTI people by banning pride parades and to take various measures against “gender ideology” and protect Bulgarian children from it. One of the cases in June<sup>64</sup> was sent to the Central Election Commission as a complaint about election materials violating good morals by inciting discrimination – a violation of Article 183(4) of the Electoral Code. The Commission ruled that the disseminated agitation constituted an exercise of freedom of expression and enjoyed the protection of the Constitution.<sup>65</sup> In a judicial review, the Supreme Administrative Court ruled that the protection under Article 183(4) of the Electoral Code is enjoyed not by citizens but by other candidates in the election campaign.<sup>66</sup>

On October 30, at the height of the campaign for the parliamentary and presidential elections,

an attack was carried out on the LGBTI community centre Rainbow Hub in Sofia.<sup>67</sup> During a community event, about 10 people burst in after tricking Gloria Philipova, a staff member, into opening the door. According to Philipova, the first intruder punched her in the face, and she recognized him as Boyan Rasate, a long-time well-known ultranationalist leader and presidential candidate. The invaders smashed all the property in the hub – all the furniture and equipment. Rasate was arrested,<sup>68</sup> and prosecutors announced that he had been charged with “hooliganism.” The case became the occasion for advocacy efforts to criminalise hate crimes on the grounds of sexual orientation and gender identity. Despite the initial widespread public reaction, including from various leaders of political parties contesting the elections, no steps were subsequently taken by the authorities to address the issue.

### ***Legal harassment, including SLAPPs, prosecutions and convictions of civil society actors***

In 2021, the tort claim proceedings against a civil activist from the umbrella organisation National Network for Children, Alexandra

63 Case No. 356/2021 of the Commission for Protection against Discrimination.

64 See <https://vmro.bg/българските-патриоти-с-готов-закон-за/>.

65 See <https://www.cik.bg/bg/decisions/379/2021-07-03>.

66 See Judgment No. 8293 of 08.07.2021 in Case No. 7030/2021 of the Supreme Administrative Court, retrieved from <http://www.sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/bf49e242f2b8b68fc-225870c00216f75?OpenDocument>

67 See a video of the aftermath at <https://www.facebook.com/lilly.dragoeva/posts/10158711090749200>.

68 See <https://nova.bg/news/view/2021/11/02/345034>.

Georgieva, continued at a second court instance. The case was initiated in 2019 and concerns an article published by Georgieva in which she expressed a critical stance against conservative civil society organisations that opposed Bulgaria’s ratification of the Istanbul Convention, as well as reforms in social legislation strengthening children’s rights and protection from maltreatment in the family. In particular, a coalition of conservative organisations accuse Georgieva of discrediting them by pointing to statements in her article that say these organisations fight “against the rights of families and children,” describe their funding as “non-transparent” and claim they carry out “anti-European and sectarian propaganda.” In August 2020, the Sofia District Court ordered Georgieva to pay the plaintiffs around €1,000 for non-pecuniary damage to the reputation of the organisations for such remarks.<sup>69</sup> Georgieva appealed that decision in September 2020, but the case was not heard throughout 2021. It is scheduled for hearing in late March 2022.

### *Control and surveillance*

In January 2022, the ECtHR delivered its judgment in the case *Ekimdzhiev and Others v. Bulgaria* (application no. 70078/12), finding violation of Article 8 of the ECHR.<sup>70</sup> The applicants in the case are lawyers working in civil society organisations. In its lengthy judgment, the court makes a very thorough analysis of the Bulgarian legislation on surveillance and subsequent accessing of communications

data. The Court found in particular that the relevant legislation governing secret surveillance did not meet the quality-of-law requirement of the Convention and was unable to keep surveillance to only that which was necessary. Similarly, the Court found that the laws governing retention and accessing of communications data did not meet the quality-of-law requirement of the Convention, and they were incapable of limiting such retention and accessing to what was strictly necessary. This important ruling by the ECtHR marks an important step forward in setting the legal standards in the area of surveillance for Council of Europe member states.

## ***Disregard of human rights obligations and other systemic issues affecting the rule of law framework*** 🟡

### ***Key recommendations***

- The Ministry of Justice should urgently review some of the longest-standing and most systemic cases of non-compliance with ECtHR rulings and decisively engage NGOs in drafting the necessary bold changes in

69 See Judgment No. 167574 of 04.08.2020 in Case No. 53760/2019 of Sofia District Court.

70 See <https://hudoc.echr.coe.int/fre?i=001-214673>.

legislation and administrative practice.

- Parliament should prioritise addressing the systemic human rights problems in Bulgaria.
- The academic community should also be involved in the processes of finding quick and meaningful solutions to long-standing problems.

## ***Systemic human rights violations***

### ***Widespread human rights violations and/or persistent protection failures***

In October, the Constitutional Court of Bulgaria delivered its ruling<sup>71</sup> on the meaning and the scope of the term “sex” used in the equality clause and other norms in the Bulgarian Constitution. The case was brought at the request of the SCC on the occasion of an interpretative case in this court to overcome conflicting case laws on the admissibility of changing data on sex in the civil registers of transgender people. The Constitutional Court ruled that, under the Bulgarian Constitution, sex is to be understood as a biological binary category and that the institutes of marriage, family and motherhood reflect “the Bulgarian national, spiritual and cultural tradition” and “have a direct bearing on reproduction as a

natural (biological) aspiration for the continuation of the species.” Furthermore, it stated that Eastern Orthodox Christianity has a special significance “for the construction of Bulgarian cultural, spiritual and value identity” and this should be taken into account when interpreting the Constitution. However, the Court held that gender identity can be the basis for changing the sex entered in civil status records only in the borderline instance where, due to deviations from the typical combinations of sex chromosomes (XX for women and XY for men), the person possesses the distinctive sex characteristics of both sexes and therefore sex is hard to be biologically determined (a state which is defined as “intersex”). During the reporting period, the SCC did not render a decision on the unification of jurisprudence.

In December, the CJEU delivered its judgment in Case C-490/20 *Stolichna Obshtina, Rayon ‘Pancharevo’*, finding that if a child, being a minor and a Union citizen, whose birth certificate was drawn up by the host Member State and designates as parents two persons of the same sex, the Member State of which the child is a national is obliged to issue an identity card or a passport to that child without requiring a birth certificate to be drawn up beforehand by its national authorities. The dispute concerns a married couple consisting of two women, one of whom is a Bulgarian national, while the other is a national of the United Kingdom; they had a child in Spain, their Member State of residence. In the birth certificate issued by the Spanish authorities,

71 See <https://constcourt.bg/bg/Acts/GetHtmlContent/5aca41e4-659e-42dc-80a5-c3f31746898b>.

the two women are designated as ‘mothers’ of the child. Since a birth certificate issued by the Bulgarian authorities is necessary to obtain a Bulgarian identity document, the Bulgarian mother applied to the Sofia municipality (Bulgaria) for a birth certificate for the child to be issued to her. In support of her application, the mother submitted a translation of the extract from the Spanish civil register relating to the child’s birth certificate. The Sofia municipality, however, instructed the Bulgarian mother to provide evidence of the parentage of the child, with respect to the identity of her biological mother. The model birth certificate applicable in Bulgaria has only one box for the ‘mother’ and another for the ‘father’, and only one name may appear in each box. The mother took the view that she was not required to provide the information requested, whereupon the Sofia municipality refused to issue the requested birth certificate. Reaching the administrative court, the case was referred for preliminary ruling to CJEU. Despite the judgment, same-sex families of Bulgarian nationals remain completely unrecognized under Bulgarian law.

At the beginning of November, the CoE’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or

Punishment (CPT) issued a public statement on Bulgaria revealing findings of grave human rights violations documented in “visit after visit” in social care homes and psychiatric hospitals including persons having been slapped, punched, kicked, and/or hit with sticks by the staff as well as neglected in degrading conditions.<sup>72</sup>

### ***Implementation of decisions by supranational courts, such as the Court of Justice of the EU and the European Court of Human Rights***

Several systemic human rights issues in Bulgaria have gone unaddressed by the Bulgarian authorities for yet another year: police violence (*Velikova group v. Bulgaria*<sup>73</sup>), the indiscriminate destruction of homes due to illegal construction without the provision of permanent alternative shelter (*Yordanova and Others v. Bulgaria*<sup>74</sup>), the right of prisoners to vote in parliamentary elections (*Kulinski and Sabev v. Bulgaria*<sup>75</sup>), the right of association of Bulgarian citizens with Macedonian ethnic identity (*United Macedonian Organisation Ilinden and Others group v. Bulgaria*<sup>76</sup>), the possibility for the Chief Prosecutor to be investigated by an independent body in cases of possible criminality and to be suspended

72 See <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-issues-public-statement-on-bulgaria>.

73 See <https://hudoc.exec.coe.int/eng?i=004-3593>.

74 See <https://hudoc.exec.coe.int/eng?i=004-1924>.

75 See <https://hudoc.exec.coe.int/eng?i=004-39505>.

76 See <https://hudoc.exec.coe.int/eng?i=004-3657>.

for the duration of the investigation (*Kolevi v. Bulgaria*<sup>77</sup>) and the control of surveillance (*Association for European Integration and Human Rights and Ekimdzhiev, Hadzhiev and Natsev*<sup>78</sup>). In none of these areas did Bulgaria make progress during the year and there were no major legislative changes or changes in administrative practice.

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77 See <https://hudoc.exec.coe.int/eng?i=004-3557>.

78 See <https://hudoc.exec.coe.int/eng?i=004-3669>.

# **LIBERTIES RULE OF LAW REPORT 2022**

**CROATIA**



# Croatia

## About the authors



The **Centre for Peace Studies (CPS)** is a civil society organisation that protects human rights and aspires to social change based on the values of democracy, anti-fascism, non-violence, peacebuilding, solidarity and equality by using activism, education, research, advocacy and direct support. We work with communities, initiatives, organisations, media, institutions and individuals in Croatia and internationally.



The **Croatian Platform for International Citizen Solidarity (CROSOL)** is a non-governmental organisation active in the area of international development cooperation and humanitarian aid. It was established in 2014 and has 31 member organisations. The main goals of the Platform are strengthening the capacities of civil society organisations to provide international development cooperation and humanitarian aid and advocating for the improvement of development policies of Croatia and the EU.

## Key concerns

The inefficiency of the justice system and the excessive length of proceedings are still problems for Croatia. The free legal aid system is inadequate to meet the needs of those seeking justice in courts. The controversial appointment of the Supreme Court President has spurred a conflict between the government, the President and various political actors. Last but not least, there are no effective investigations into the allegations of illegal and violent pushbacks of refugees and migrants from Croatia.

GRECO, the Council of Europe anti-corruption body, concluded in December 2021 that Croatia has not implemented any of their 17 recommendations to target corruption. The Corruption Perception Index shows that Croatia is stagnating - with a score of 47/100, it is placed 63rd in the world. The Global Corruption Barometer shows that Croatia had some of the worst results in the EU for 2021, as there were multiple recorded cases of high-level corruption.

Developments in the area of media freedom and pluralism have been mixed. On the one hand, the new Electronic Media Act was passed in October 2021 and guarantees freedom of expression for electronic media. However, the public broadcaster Croatian Radio Television (CRT) remains under the influence of the government and the ruling party. The previous

CRT director was arrested under suspicion of trading in influence, while the new director was elected by a parliamentary majority in an irregular procedure, despite accusations of his conflicts of interest. There have been hundreds of SLAPP procedures against journalists and the media, and reported cases of attacks, threats and smear campaigns.

With regard to Croatia's system of checks and balances, the role of the Parliament is still weak in comparison to the executive branch. The number of legislative acts passed using fast-track procedures decreased from the previous year, but it is still too high. The national Civil Protection Headquarters makes most of the decisions related to the COVID-19 pandemic. Finally, the Ombudsman's Office lacks sufficient resources and has had difficulties performing its duties of visiting detention centres unannounced and accessing data relating to migrants as part of the National Preventive Mechanism.

The institutional framework for the development of civil society further deteriorated in 2021. The National Strategy for Creating an Enabling Environment for Civil Society has still not been brought. The criminalisation of civil society organisations working on issues of asylum and migration continued and culminated in a final court decision in the case of Dragan Umičević. Moreover, civil society organisations have had problems with financing, and unofficial sources suggest that the funds for civil society organisations in the new financial perspective for 2021 to 2027 will be smaller than in the previous period.

The condition of human rights in Croatia continued to worsen in 2021, as demonstrated in the illegal and violent pushbacks of refugees and migrants from Croatia into neighbouring countries. New evidence on these serious and systemic human rights violations were presented to the public in the form of video recordings. The European Court of Human Rights found a number of rights violations in the case of *M.H. and Others v. Croatia*, but nationally, there are still no effective investigations or sanctions against the perpetrators. In Croatia, the Independent Border Monitoring Mechanism lacks transparency and independence.

Civil society organisations like the Centre for Peace Studies and the Croatian Platform for International Citizen Solidarity have shown resilience in their work. In 2021, they carried on filing official complaints, informing the public about systemic human rights violations and pursuing those cases all the way to the European Court of Human Rights. This report is a collection of their findings over the past year.

## State of play

- Justice system
- Anti-corruption framework
- Media environment and freedom of expression and of information
- Checks and balances
- ↓ Enabling framework for civil society
- ↓ Systemic human rights issues

### Legend (versus 2020)

- Regression: ↓
- No progress: —
- Progress: ↑

tions of illegal and violent push-backs of refugees and migrants from Croatia.

## Judicial independence

### Appointment and selection of judges, prosecutors and court presidents

The appointment of the Supreme Court President is controversial and was widely debated among political actors in 2021. Essentially, the debate revolved around the relationship between the provisions of the Constitution and the Law on Courts. On the one hand, the Constitution stipulates that the President of the Supreme Court is appointed by the Parliament upon the proposal of the President of the Republic.<sup>1</sup> On the other hand, the Law on Courts stipulates that the State Judicial Council publishes the public call and sends the application to the President of the Republic, who requests the opinions from the General Assembly of the Supreme Court and the competent parliamentary committee.<sup>2</sup> Early 2021, three persons applied in the call, but the President did not propose any of them to the Parliament, but instead put forth his own candidate, Zlata Đurđević, who had not applied to the call. The ruling majority in the Parliament stated that they would not appoint

## Justice system —

### Key recommendations

- Take all necessary steps to increase the efficiency of the justice system and shorten the length of procedures in Croatian courts.
- Draft a new Free Legal Aid Act and increase resources and funds that would make free legal aid more accessible.
- Ensure independent and effective investigations into allega-

1 Croatia. [Constitution of the Republic of Croatia](#), Official Gazette No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14, art. 116.

2 Croatia. [Law on Courts](#), Official Gazette 28/13, 33/15, 82/15, 82/16, 67/18, 126/19, 130/20, art. 44.a. Judgment of the Constitutional Court, 23 March 2021, U-I-1039/2021, U-I-1620/21.

Đurđević. In March 2021, the Constitutional Court brought a judgement that the Law on Courts is in accordance with the Constitution and that the President can only propose candidates who applied for the public call, or propose no candidates.<sup>3</sup> After this, the President requested that the State Judicial Council open the call again, and five candidates, including Đurđević, applied. The President proposed to the Parliament that Đurđević should be appointed, but her appointment was refused.<sup>4</sup> The call was opened for a third time in July 2021, after which the President proposed Judge Radovan Dobronić to the Parliament, which did appoint him.<sup>5</sup> He was sworn in on 18 October 2021.

## Quality of justice

### Legal aid system

Free legal aid is financed by the state in order to enable access to justice to persons who cannot afford it. In Croatia, the system of free legal aid transpires in two degrees. NGOs in Croatia mostly provide first-degree free legal aid. When it comes to the system of first-degree free legal aid in Croatia, there are some concerning issues on how it is managed – and these issues have been analysed in the thematic

report “Primary legal aid – perspective of authorised providers”<sup>6</sup> published by Human Rights House Zagreb in 2017. Most of the issues highlighted in that report are ongoing and still relevant to 2021. The fundamental problem is that the first-degree free legal aid provision is financed on a project-basis, which is inadequate and unsustainable. Namely, this is because project-based financing disrupts the continuity of the free legal aid program between the completion of the project in one year, the announcement of tenders the following year and the approval of project proposals. Not only may the provider be left without funds, but they are also unable to plan future programs due to the uncertainty of that funding. Moreover, these time periods of uncertainty are unnecessarily long. While the project ends at the end of December, the new tender is only announced the following year. In 2021, the deadline to apply for the ongoing year was in March, and the results were announced in June. This left the providers without the means necessary for them to operate for six months.

The second issue concerns the geographical distribution of associations in Croatia, as in many parts of Croatia there are no associations that provide primary legal aid. This deprives

3 Judgment of the Constitutional Court, 23 March 2021, U-I-1039/2021, U-I-1620/21.

4 See <https://www.vecernji.hr/vijesti/uskoro-uzivo-sabor-u-12-sati-glasa-o-izboru-durdevic-za-predsjednika-vrhovnog-suda-1503294>

5 See <https://www.tportal.hr/vijesti/clanak/radovan-dobronic-velikom-vecinom-glasova-izabran-za-novog-predsjednika-vrhovnog-suda-20211015>

6 Human Rights House Zagreb (*Kuća ljudskih prava Zagreb*). Primary legal aid – perspective of authorised providers (*Besplatna primarna pravna pomoć – perspektiva ovlaštenih pružateljica*).

many citizens in rural and remote parts of Croatia of the opportunity to access legal aid.

### **Resources of the judiciary**

The budget proposal of the Ministry of Justice and Administration for 2022 amounts to 3,507,758,172 HRK (466,196,521.15 EUR), which is 144,122,175 HRK (19,154,472.26 EUR) more than what was planned for 2021. The largest part of the funds, in the amount of 1,045,210,185 HRK (138,913,040.25 EUR), is reserved for the needs of the Ministry, which, compared to 2021, represents an increase of 93,312,803 HRK (12,401,682.79 EUR).<sup>7</sup> To put it in perspective, the state budget for 2021 was 147.3 billion HRK (around 19,568,581,560 EUR) for revenues and 157.9 billion HRK (around 20,857,211,846 EUR) for expenditures. In the heading 3 of the budget, expenditures for courts were 2,188,956,315 HRK (around 290,799,526 EUR) and in the heading 9 on education, expenditures for pre-school, primary and secondary education were 509,630,087 HRK (around 67,703,584 EUR).<sup>8</sup>

### **Training of justice professionals**

The Judicial Academy Lifelong Professional Development Program for 2021<sup>9</sup> covers a total of ten areas: civil and civil procedural law, criminal and criminal procedural law, misdemeanour law, administrative law, commercial law, EU and international law, a special program for judicial officers, education focused on skillsets – e.g. communication skills – e-courses on different topics and education on commitments according to national strategies. These trainings are intended mostly for judges and state attorneys.

The Judicial Academy also provides training for presidents of courts and state attorneys.<sup>10</sup> This group of workshops was developed within the Judicial Academy in order to strengthen the capacities of the leaders of judicial bodies in the fields of organisation management, communication with employees, strategic planning, time management, effective meeting management, and development of managerial skills in the judiciary. There were ten topics covered: the structure of internal business; financial and material operation; building and

7 Croatia. Croatian Parliament (*Hrvatski sabor*). Report of the Committee on Justice on the Draft State Budget of the Republic of Croatia for 2022 and projections for 2023 and 2024 (*Izvješće Odbora za pravosuđe o Prijedlogu državnog proračuna Republike Hrvatske za 2022. godinu i projekcija za 2023. i 2024. godinu*), 1 December 2021.

8 Croatia. Ministry of Finance (Ministarstvo financija). State budget for 2021 (*Državni proračun 2021. godina*), 25 November 2020.

9 Judicial Academy (*Pravosudna akademija*). Lifelong Professional Development Program for 2021 (*Program cjeloživotnog stručnog usavršavanja za 2021. godinu*).

10 Judicial Academy (*Pravosudna akademija*). Professional Development Program for Court Presidents and State Attorneys for 2021 (*Program stručnog usavršavanja Pravosudne akademije za predsjednike sudova i državne odvjetnike za 2021. godinu*).

real estate management; human resources; use of information systems; public procurement; international cooperation and protocol affairs; media relations; supervision of personal data processing and protection of data confidentiality; and communication and management skills. The topics are listed in accordance with the Ordinance on the program and manner of conducting professional training of court presidents and state attorneys.<sup>11</sup> The basic training lasts a minimum of 30 hours and, in addition to the heads of judicial bodies, it can be attended by other judicial officials and officials working in the judiciary and administrations of state attorney's offices.

There is no publicly available information on the results of the conducted evaluation from the mentioned training programs.

### **Digitalisation**

On 25 June 2021, the Ministry of Justice and Public Administration amended the Ordinance on the eSpis system.<sup>12</sup> In 2020, eSpis system was used in 49 courts (county, municipal and commercial courts, the High Commercial Court and the Supreme Court), while its introduction to administrative and

High Administrative Courts was planned for September 2021.

Users of the eSpis system are judges, court clerks, courts and the Ministry of Justice and Public Administration. The purpose and goal of the eSpis system is to improve existing systems and introduce new functionalities for courts, as well as to further connect the eSpis system with other information systems, upgrade existing services for the public and transfer the eSpis system to a new infrastructure. It also aims to promote technical modernisation of courts and the judiciary, maximise transparency and efficiency of courts, as well as better utilise human and organisational resources in courts, with the ultimate goal of introducing a fully electronic file.

### **Geographical distribution and number of courts/jurisdictions ("judicial map")**

In the Republic of Croatia, judicial power is exercised by regular and specialised courts, as well as by the Supreme Court.

The process of rationalising the court network started in 2005 with the opening of negotiations on accession to the European Union through the Judicial Reform Strategy. The

11 Ministry of Justice and Public Administration (*Ministarstvo pravosuđa i uprave*). Ordinance on the program and manner of conducting professional training of court presidents and state attorneys (*Pravilnik o programu i načinu provedbe stručnog usavršavanja predsjednika sudova i državnih odvjetnika*). Official Gazette 106/2019, 19/2021 (*Narodne novine* 106/2019, 19/2021).

12 Ministry of Justice and Public Administration (*Ministarstvo pravosuđa i uprave*). Ordinance on amendments of Ordinance on the eSpis system (*Pravilnik o izmjenama i dopunama pravilnika o radu u sustavu eSpis*). Official Gazette 70/2021 (*Narodne novine* 70/2021).

process was carried out in several phases, the last of which took place in 2015.<sup>13</sup>

For the purposes of tracking this transition, the Council for Monitoring the Implementation of the Judicial Reform Strategy was established in 2006.<sup>14</sup> The Council should meet at least four times a year, but there is no information provided on the Council's activities since the last reform in 2015.

The regular courts are composed of:

- 34 municipal courts in bigger cities across the territory of the country
- 15 county courts in some of the county capitals

Specialised courts are composed of:

- Nine commercial courts
- Four administrative courts
- The High Commercial Court of the Republic of Croatia, situated in Zagreb<sup>15</sup>
- The High Administrative Court of the Republic of Croatia, situated in Zagreb<sup>16</sup>
- The High Misdemeanour Court of the Republic of Croatia, situated in Zagreb<sup>17</sup>
- The High Criminal Court of the Republic of Croatia, situated in Zagreb<sup>18</sup>

The Supreme Court of the Republic of Croatia is the court of last instance (Article 14 of the Law on Courts).<sup>19</sup>

There are 15 county prosecutors' offices and one State Prosecutor's Office in Zagreb.<sup>20</sup>

13 Ministry of Justice and Public Administration. The process of the rationalisation of the court network (*Racionalizacija mreže sudova*).

14 Ministry of Justice and Public Administration. Council for Monitoring the Implementation of the Judicial Reform Strategy (*Savjet za praćenje provedbe Strategije reforme pravosuđa*).

15 Croatia. High Commercial Court of the Republic of Croatia (*Visoki trgovački sud Republike Hrvatske*). Law on Courts (*Zakon o sudovima*). Official Gazette 130/2020 (*Narodne novine 130/2020*), Articles 29, 30 para. 1. and 31. para. 1.

16 Croatia. High Administrative Court of the Republic of Croatia (*Visoki upravni sud Republike Hrvatske*). Administrative Disputes Act (*Zakon o upravnim sporovima*). Official Gazette 20/2010 (*Narodne novine 20/2010*), Article 12, para. 3.

17 Croatia. High Misdemeanour Court of the Republic of Croatia (*Visoki prekršajni sud Republike Hrvatske*). Law on Courts (*Zakon o sudovima*). Official Gazette 130/2020 (*Narodne novine 130/2020*), Article 26.

18 Croatia. High Criminal Court of the Republic of Croatia (*Visoki kazneni sud Republike Hrvatske*). Law on Courts (*Zakon o sudovima*). Official Gazette 130/2020 (*Narodne novine 130/2020*), Article 26a.

19 Croatia. The Supreme Court of the Republic of Croatia (*Vrhovni sud Republike Hrvatske*).

20 Croatia. State Attorney's Office of the Republic of Croatia (*Državno odvjetništvo Republike Hrvatske*).

## ***Fairness and efficiency of the justice system***

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### ***Length of proceedings***

The inefficiency of justice system, in particular pertaining to the extensive lengths of procedures and arbitrary decisions, can be seen in cases related to pushbacks and torture of refugees and other migrants in Croatia. The access to legal remedies in these cases is extremely difficult, but even when persons initiate criminal proceedings for a violation of their rights after infringements have been committed, we are not aware of any proceedings that would be considered an effective investigation according to the established criteria. Although there have been numerous allegations of torture and violence and, to our knowledge, at least 20 criminal complaints for illegal expulsion and/or violence against refugees and other migrants, no indictments were brought and, accordingly, no perpetrators of reported crimes were identified, prosecuted or sanctioned in any. The Centre for Peace Studies has filed two criminal complaints in 2021 for pushbacks and torture of refugees, while the State Attorney has also started an investigation into a case where Lighthouse Reports journalists published a video of Croatian police officers violently pushing persons back from Croatian territory.<sup>21</sup> The investigations are ongoing.

We also refer to the Report of the Domestic Policy and National Security Committee from

the discussion on the refusal of international protection in the Republic of Croatia from 1 March 2018. It includes the Ombudswoman's assessment of the ineffectiveness of investigations:

“She emphasized that they began receiving first complaints about the return of migrants without implementing an individualized approach at the end of 2016 [...] She pointed out that her Office initiated proceedings and that, based on the complaints received, they were in constant communication with the Ministry of the Interior. According to the available information, the investigations of the Ministry of the Interior into these alleged events were reduced to the final conclusion that the events were not documented in the police records. Since the Ministry of the Interior does not usually keep records of such actions, she said that consequently they were not even able to conduct an effective investigation. After some time, it came to her attention that these cases were investigated within the General Police Directorate, about which her Office did not receive concrete information, and she asked why such an investigation was not conducted by the Internal Control Services. She considers it indicative that her Office was not able to get the footage of thermal imaging cameras for disputed situations in which there was alleged violence, under

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21 See: <https://www.telegram.hr/politika-kriminal/dorh-istrazuje-policaјce-snimljene-dok-mlate-migrante-sumnja-na-neljudsko-i-okrutno-postupanje/>

the justification that the footage did not exist for the specified time period.”

Furthermore, the actions regarding the criminal complaints related to pushbacks of refugees and other migrants show that, under international and national law, none of the actions necessary to identify the perpetrators were taken, that the proceedings were unreasonably long and that they were not carried out with due diligence – hence the criteria for an effective investigation were not met. We stress that, in cases involving victims and witnesses who are refugees and other migrants, the use of expedited procedures is crucial due to frequent changes in their location in search of protection - with the passage of time, it becomes increasingly difficult to identify and locate victims.

## **Anti-corruption framework** 🟡

### **Key recommendations**

- Ensure sufficient resources for the implementation of the Protection of Reporters of Irregularities Act.

### ***Levels of corruption***

The Corruption Perception Index for 2021 has shown that Croatia is stagnating. With a score of 47 out of 100, Croatia is ranked 63rd in the world.<sup>22</sup> The Global Corruption Barometer – European Union for 2021 shows that Croatia has some of the worst results in the EU.<sup>23</sup> For example, 41% of people in Croatia think that corruption increased in the previous year, and 92% of people think that government corruption is a big problem. 72% of people in Croatia think their government is doing badly in tackling corruption, while 14% of Croatian respondents admitted to paying a bribe to get a service in the previous 12 months.

On 29 April 2021, the Croatian State Attorney’s Office (DORH) presented the Parliament with a report<sup>24</sup> on its work in 2020. According to the report, 91.3% of a total of 1,271 criminal charges for corruption were dropped, which is a 35% increase compared to the year before. 83.3% of the charges were for abuse of power and authority. In the same period, there was a 23.94% decrease in the number of investigations for corruption.

There were several high-profile examples of corruption among the members of the ruling party on national, local and regional levels, which the State Attorney’s Office often neglected to act upon.

22 See: <https://www.transparency.org/en/cpi/2021>

23 See: [https://images.transparencycdn.org/images/TI\\_GCB\\_EU\\_2021\\_web\\_2021-06-14-151758.pdf](https://images.transparencycdn.org/images/TI_GCB_EU_2021_web_2021-06-14-151758.pdf)

24 See: <https://dorh.hr/sites/default/files/dokumenti/2021-04/dorhgodisnjeizvjesce2020.pdf>

On 15 April 2021, news portal Telegram published an article<sup>25</sup> stating that the job of managing the Ministry of Health's website for COVID-19<sup>26</sup> vaccinations was granted to a company called Cuspis, owned by a close friend of Health Minister Vili Beroš.<sup>27</sup> Initially, the Ministry refused to provide this information and ignored Telegram's inquiry on the identity of the service provider. It was also discovered that there was no public procurement for the grant.<sup>28</sup> The website crashed and malfunctioned several times,<sup>29</sup> rendering it completely dysfunctional while local and regional medical service providers were unable to use it. Eventually the website was shut down and replaced by the pre-existing state website. Cuspis received 4.4 million HRK for this grant, and in total they received 14 million HRK in various grants by the Ministry of Health since Vili Beroš became minister in 2018.

### ***Framework to prevent corruption***

In December 2021, GRECO concluded that "Croatia has implemented satisfactorily or dealt with in a satisfactory manner none of the seventeen recommendations contained in the Fifth Round Evaluation Report. Eight recommendations have been partly implemented and nine have not been implemented."<sup>30</sup>

The Ministry of Justice and Administration was late in initiating the creation of the new Corruption Prevention Strategy for the period of 2021 to 2030, while the old one expired in 2020. This led to a delay in the adoption of the new Strategy, which was adopted on 29 October 2021 – creating a gap of eleven months without an adequate strategy on preventing corruption.

### ***Measures in place to ensure whistleblower protection and encourage reporting of corruption***

During 2021, the new Draft of Protection of Reporters of Irregularities Act<sup>31</sup>

25 See: <https://www.telegram.hr/politika-kriminal/telegram-otkriva-ono-sto-beros-mjesecima-skriva-propali-cijepise-radio-njegov-poznanik-kojem-daje-milijune/>

26 <https://cijepise.zdravlje.hr/>

27 See: <https://www.index.hr/vijesti/clanak/tvrtka-mu-vrti-milijune-na-poslovima-s-berosevim-ministarstvom-on-se-cijepio-viskom/2254605.aspx>

28 See: <https://www.telegram.hr/politika-kriminal/vlada-je-izbjegla-raspisivanje-natjecaja-za-izradu-platforme-cijepise-sad-ne-zeli-reci-kome-su-ga-dali/>

29 See: <https://www.telegram.hr/politika-kriminal/zasto-je-afeta-cijepise-najgora-ministarska-afeta-koju-je-telegram-dosad-otkrio/>

30 See: <https://rm.coe.int/fifth-evaluation-round-compliance-report-on-croatia-adopted-by-greco-a/1680a4f0f6>

31 Draft of Protection of Reporters of Irregularities Act, [https://sabor.hr/sites/default/files/uploads/sabor/2021-12-15/161202/PZE\\_242.pdf](https://sabor.hr/sites/default/files/uploads/sabor/2021-12-15/161202/PZE_242.pdf)

(whistleblowers) was put forward by the government. Two years after the first Protection of Reporters of Irregularities Act<sup>32</sup> was introduced, the new text of this legislative act is drafted for the purposes of transposing the Directive (EU) 2019/1937 of the European Parliament and the Council from 23 October 2019 on the protection of persons who report breaches of Union law. The new Draft of Protection of Reporters of Irregularities Act represents a positive step for the protection of whistleblowers, but, even after public consultation, it still has certain deficiencies. The provisions about the right to free legal aid were added after the consultations, but considering how the Law on Free Legal Aid is currently applied in these cases, and considering that the system of free legal aid is already inadequate, we can presume that, in practice, whistleblowers will not be able to exercise this right. Furthermore, there are no provisions on psychological support for whistleblowers, who often suffer various mental health issues as a result of the pressure and stigmatisation. Also, it is necessary to ensure sufficient resources for the Ombudsman's Office in order to secure full implementation of this legislation. The Protection of Reporters of Irregularities Act will be decided on by the Parliament in 2022 and we hope these deficiencies will be removed.

### *Investigation and prosecution of corruption*

The Croatian Criminal Law<sup>33</sup> criminalises numerous corrupt acts. The Office for the Suppression of Corruption and Organised Crime is a special State Attorney's office for the prescribed catalogue of criminal offenses, and is tasked with taking the necessary procedural actions.

In November 2021, several arrests took place for alleged corruption as regards the implementation of EU funds. The persons arrested included Gabrijela Žalac, Croatia's former Minister for Regional Development and EU Funds (from 2016 to 2019), Tomislav Petric, the director of the Central Finance and Contracting Agency (SAFU), and Mladen Šimunac and Marko Jukić, two entrepreneurs and associates who owned IT companies, and one of whom is a friend of ex-Minister Žalac. The arrests were part of an operation by the European Public Prosecutor's Office (EPPO) in Croatia, an EU watchdog monitoring how EU funds are spent. The case is dubbed "Software", and it involved crimes committed in the ministry and SAFU related to overpayment of the public procurement of an information system. Namely, the case concerns the software design, which the Ministry of Regional Development and EU Funds conferred on the

32 Croatia. Protection of Reporters of Irregularities Act (*Zakon o zaštiti prijavitelja nepravilnosti*), Official Gazette 17/2019.

33 Croatia. Criminal Code (*Kazneni zakon*), Official Gazette 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021 (*Narodne novine 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021*).

Ampelos company when Žalac was the minister. At the time, Žalac was also a member of the SAFU Board of Directors. According to the European Prosecutor's Office, she had asked SAFU Director Petric to ensure that the Agency did not challenge the negotiated public procurement procedure for Šimunac and Jukić's IT companies, to which Petric agreed.<sup>34</sup>

News portal Telegram<sup>35</sup> first broke the story in 2019, reporting that Žalac, then still Minister of Regional Development and EU Funds, had paid 13 million HRK, about 1.7 million EUR, for software that originally cost 2.9 million HRK, around 400,000 EUR.

In his comment on the arrest, Prime Minister Plenković, among others, took time to admire the work of former Minister Žalac: "Nowhere else in Croatia had I seen anyone with so much knowledge, enthusiasm, quality and familiarity with EU funds. I think she was brilliant."<sup>36</sup>

At the beginning of 2022, Žalac and Petric were released from custody, because it was concluded that the possibility of them influencing witnesses in the proceedings was no longer existent. The case is ongoing.<sup>37</sup>

## **Media environment and freedom of expression and of information** 🟡

### **Key recommendations**

- Croatian Radio Television must be reformed and other legal actions to ensure full independence of the public broadcaster from political influence need to be taken.
- Journalists and media have to be protected against SLAPPs.
- Journalists and media have to be protected against threats and attacks. Smear campaigns against media should be curtailed.

### **Media and telecommunications authorities and bodies**

The main media regulator in Croatia is the Agency for Electronic Media.<sup>38</sup> It was established in accordance with the provisions of the Electronic Media Act (EMA) and performs

34 See: <https://balkaninsight.com/2021/11/11/croatia-former-eu-funds-minister-arrested-for-corruption/>

35 See: <https://www.telegram.hr/politika-kriminal/kako-je-telegram-razotkrio-prevaru-sa-softverom-zbog-ko-je-je-danas-uhicena-zalac/>

36 See: <https://hr.n1info.com/english/news/pm-party-leadership-will-decide-on-zalacs-status-in-the-party/>

37 See: <https://www.telegram.hr/politika-kriminal/nakon-zalac-iz-istranog-zatvora-ranije-pusten-i-hdz-ov-bivsi-sef-agencije-za-eu-projekte/>

38 Croatia. Agency for Electronic Media (*Agencija za elektroničke medije*).

administrative, professional and technical tasks for the Electronic Media Council,<sup>39</sup> the governing body of the Agency and the regulatory body in the field of electronic media.

### **Pluralism and concentration**

One issue concerning the new media law relates to the popular cable news channel N1 Hrvatska, which is admired by many for its independent reporting. In March 2021, the channel was removed from the package provided by an important telecom operator, A1 as their contract was not extended, due to disagreement on the price of broadcasting. Due to the fact that N1 Hrvatska is owned by the United Group and is not a free-to-air television channel with a national licence, it is not covered by the cable must-carry rules that apply to stations licensed in Croatia. The channel is advocating for the issue to be resolved in a new media law or a national broadcasting licence. In case they are not, the potential loss of distribution would pose a real risk to media pluralism and diversification in Croatia.<sup>40</sup>

### **Transparency of media ownership**

In terms of media ownership, there is a lack of transparency in data collection and regulation. In accordance with media legislation, media publishers are obligated to publish information on ownership, but there is no clearly defined body that supervises this process.

The Agency for Electronic Media maintains a register of electronic publications providers.

### **Public service media**

#### **Independence of public service media from governmental interference**

Croatian Radio Television (CRT), a public television and radio broadcaster, cannot be considered independent and does not fulfil its role as a reliable, pluralistic source of information. For years, a number of relevant actors, such as the Croatian Journalists' Association (CJA) and the Trade Union of Croatian Journalists, have been warning about this. CRT is heavily controlled by the government and the ruling party.

In March 2021, CJA reacted to dismissal of CJA president Hrvoje Zovko from CRT and notice prior to dismissal to Maja Sever, president of the Trade Union of Croatian Journalists for her interview as a Union president, in which she spoke about the processes related to allegations of sexual harassment at CRT. The CJA invited “the government, the Ministry of Culture and Media and the parliamentary Committee for Information, Informatisation and Media, as well as the Supervisory Board of CRT, to examine the manner of managing the public national service, the public welfare of all citizens, that became the property of one

39 Croatia. Electronic Media Council (*Vijeće za elektroničke medije*).

40 See: [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital News Report 2021 FINAL.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital%20News%20Report%202021%20FINAL.pdf), p. 70.

man and his interest group by failure to act by the competent authorities.”<sup>41</sup>

In July 2021, CRT Director Kazimir Bačić, who was responsible for the aforementioned actions against journalists and leading people of the CJA, was arrested under suspicion of trading in influence for the anti-corruption action against the deceased mayor of Zagreb, Milan Bandić, launched by the Office for the Suppression of Corruption and Organised Crime. Bačić is accused of obtaining an apartment for serving as an intermediary between Bandić and construction entrepreneur Milan Lončarić, who allegedly bribed Bandić to obtain permits for construction of a building in one of Zagreb’s neighbourhoods.

In October 2021, Robert Šveb was appointed as the new director of CRT. In response, almost the entire parliamentary opposition organised a protest in the Parliament, claiming that the procedure leading to his appointment was irregular as the sessions of the parliamentary Committee for Information, informatisation and Media were not held in accordance with the Rules of Procedure. Also, there were allegations of Šveb’s conflict of interest, as he is the owner of a company that cooperates with CRT.<sup>42</sup>

On this occasion, the Croatian Journalists’ Association and the Trade Union of Croatian

Journalists stated the following: “Croatian Radio-Television has been devastated, and the crisis has reached its peak as the ruling majority embarks on the election process for the new CRT director, who is accumulating problems day by day. It is high time for the adoption of a new Croatian Television Act and a change in regulations that would ensure independence for public television.”<sup>43</sup>

## **Online media**

### **Regulatory framework**

The New Electronic Media Act (passed in October 2021)<sup>44</sup> guarantees the freedom of expression and full program freedom of electronic media, and the provisions of the law do not leave any wiggle room for potential censorship or restriction of the right to freedom of speech and expression. State bodies and their representatives, political parties, trade unions and various interest groups may not influence the broadcaster to create a program.

The law stipulates that publishing activities are of public interest and that they achieve goals and values of importance for the state: the exercise of the right to public information and information of all citizens of the country, protection of the Croatian language, preservation of national and cultural identity, protection of children and youth, as well as children

41 See: <https://hnd.hr/bacicev-progon-celnih-ljudi-hnd-a-i-sindikata-novinara-novi-je-udar-na-slobodu-medija>

42 See: <https://www.vecernji.hr/vijesti/oporba-uz-prvo-pjevanje-pakla-opstruira-raspravu-o-hrt-u-i-svebu-1531053>

43 See: <https://hnd.hr/hrvatska-radiotelevizija-mora-postati-servis-gradana-a-ne-politike>

44 Croatia. Electronic Media Act, Official Gazette NN 111/21.

and other persons with disabilities and special needs, encouragement of cultural creativity, development of education, science, arts and sports, protection of nature, the environment and human health, and promotion of media literacy.

According to the law, radio and television programs shall not contain incitement to violence or hatred against groups or members of a group based on sex, gender, race, ethnic or social origin, genetic characteristics, language, religion or beliefs, political views or any other opinions, national minority affiliation, property, birth, disability, age, sexual orientation and citizenship, as well as content that provokes the commission of a terrorist offense.

In addition, the law provides that advertising and teleshopping shall be easily identifiable and distinct from the editorial content, and may not use subliminal techniques, jeopardise human dignity, include or promote discrimination, encourage behaviour that is harmful to health or safety, or encourage behaviour that is highly harmful to the environment.

The law introduces changes related to the transparency of the ownership structure of television and radio broadcasters and the violation of pluralism and diversity of electronic media. In the event that the share of one media service provider reaches 40% in

total annual revenues of all media service and electronic publications providers, this provider will be considered dominant in the market and a disruption to the pluralism and diversity of electronic media. Consequently, that provider would not be able to acquire new shares in addition to their existing ones, nor could the Electronic Media Council grant it a new concession or permission.

### ***Impact on media of online content regulation rules***

Under the chapter on media and telecommunications authorities and bodies, the new Electronic Media Act (EMA)<sup>45</sup> in Article 94(3) regulates user-generated content, i.e. comments left by the users on online articles. The Act states that, in order to comment on an online article, users will have to register to the website and publishers are required to warn them in a clear and understandable way about commenting rules and violations. In this way, the responsibility for unlawful comments will not go to the publishers, but rather to the users who made them.

### ***Competence and powers of bodies or authorities supervising the online ecosystem***

The Agency for Electronic Media (AEM)<sup>46</sup> maintains a register of electronic publications providers,<sup>47</sup> in accordance with Article 80 of

45 Croatia. Electronic Media Act (*Zakon o elektroničkim medijima*) Official Gazette 111/2021 (*Narodne novine 111/2021*), 1 October 2021.

46 See: <https://www.aem.hr/about-the-agency/>

47 See: <https://www.aem.hr/en/elektronicke-publikacije/>

the EMA. As previously noted, the AEM is a media regulator performing administrative, professional and technical tasks for the Electronic Media Council (EMC),<sup>48</sup> the governing body of the Agency.

The Croatian Journalists' Association (CJA) Ethical Council is the only self-regulatory body operating within the CJA since its founding in 1910. The Council has 11 members elected by members of the CJA assembly.<sup>49</sup> According to the Code of Ethics, members of the CJA, if reported for violating the Code of Ethics, must respond to the report, in person or in writing. The Ethical Council then concludes or gives its opinion on whether and, if so, which ethical principles from the Code of Ethics have been violated. In the case of minor offences, the Ethical Council can issue a warning to journalists who are members of the CJA, reminding them of their obligations and duties to adhere to ethical and professional standards. In the more serious cases, the Council may issue a severe warning of a serious violation of ethical and professional standards. For the most serious offenses that compromise the profession's dignity, the Council may decide to exclude a journalist from the CJA.

Citizens' complaints on discriminatory content online can be addressed to the Ombudsman's

Office<sup>50</sup> in line with the Office's role as the central body for combating discrimination. Article 25 of the Anti-discrimination Act<sup>51</sup> prohibits behaviours that might cause fear or create a hostile, degrading or offensive environment based on the grounds of race, ethnicity, skin colour, gender, language, religion, political or other belief, national or social origin, wealth, union affiliation, social status, marital status, age, health, disability, genetic heritage, gender identity or expression and sexual orientation. This provision refers to both the physical as well as the online environment.

#### ***Financing framework (including allocation of advertising revenues, copyright rules)***

The Fund for the Promotion of Pluralism and Diversity of Electronic Media<sup>52</sup> is a fund of the Agency for Electronic Media and financed by the Croatian Radio and Television Act (3% of RTV fee revenues). The Fund works at the local and regional level to promote the production and publication of audio-visual and radio programs, as well as television and/or radio content.

The Fund's resources are distributed among certain types of users in ratios:

48 See: <https://www.aem.hr/en/vijece/>

49 See: <https://www.hnd.hr/novinarsko-vijece-casti1>

50 See: <https://www.ombudsman.hr/hr/ovlasti-i-nadleznosti/>

51 Croatia. Anti-discrimination Act (Zakon o suzbijanju diskriminacije) Official Gazette 85/2008 (Narodne novine 85/2008), 21 July 2008.

52 See: <https://www.aem.hr/kategorija/fond-za-pluralizam/>

1. television broadcasters at the local and regional level, non-profit television broadcasters and non-profit media service providers referred to in Articles 19 and 79 of the EMA - 46.5%
2. radio broadcasters at the local and regional level, non-profit radio broadcasters and non-profit media service providers referred to in Articles 19 and 79 of the EMA - 46.5%
3. non-profit providers of electronic publications - 3%
4. non-profit audio-visual content producers - 3%
5. non-profit radio content producers - 1%<sup>53</sup>

### **Public trust in media**

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According to a recent study on public trust in media conducted by the Reuters Institute, the overall trust in the news in Croatia is quite high, at 45% (up by 6% from 2020), which is probably caused by the fact that people became more reliant on media during the pandemic.<sup>54</sup>

At the same time, there is research showing that public trust in the media is quite low. Other research on public trust in media in Croatia underscores that trust in traditional media is declining.<sup>55</sup> According to the study, “What Does The Public Want?”, which was conducted by Faktograf.hr in December 2020 and presented to the public in October 2021, the general population believes that the most misleading news or disinformation can be found on social networks (27%), internet portals (24%), the public broadcaster HRT (16.2%), commercial television (12.1%), followed by newspapers (10.9%) and radio (8.9%).<sup>56</sup>

The pandemic played a role in the further decline of public trust in the media in Croatia. This is also illustrated in research conducted by the Friedrich-Ebert-Stiftung Zagreb in 2020<sup>57</sup> and in 2021.<sup>58</sup>

### **Safety and protection of journalists and other media activists**

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We do not believe that the existing legal framework or the current media environment

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53 Croatia. Electronic Media Council (*Vijeće za elektroničke medije*). Ordinance on the Fund for the Promotion of Pluralism and Diversity of Electronic Media (*Pravilnik o Fondu za poticanje pluralizma i raznovrsnosti elektroničkih medija*) Official Gazette 150/2013 (*Narodne novine 150/2013*), 21 December 2013.

54 [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital News Report 2021 FINAL.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital%20News%20Report%202021%20FINAL.pdf), p. 19; 70-71.

55 <https://faktograf.hr/2021/11/27/nepovjerenje-u-tradicionalne-medije-dio-je-sireg-nepovjerenja-u-institucije/>

56 <https://hrzz.hr/wp-content/uploads/Jourlab-Sto-publika-zeli-Anketa.pdf>, p. 10.

57 <http://library.fes.de/pdf-files/bueros/kroatien/17220.pdf>, p. 8; 15.

58 <http://library.fes.de/pdf-files/bueros/kroatien/18797.pdf>, p. 14.

ensure adequate protection for journalists and their work in Croatia. In 2021, there were several cases of threats and even attacks against journalists that underscore this unfortunate situation.

### ***Frequency of verbal and physical attacks***

Multiple instances of attacks on journalists took place in 2021. Journalist Danka Derifaj received verbal attacks and death threats after she reported on the illegal construction of a building in Split in which the controversial Croatian singer Marko Perković owns an apartment. As the latter is suspected of being involved in illegal or semi-legal activities that, inter alia, negatively affect his neighbours' right to enjoy their property, the singer tried to block the story from being published in the investigative magazine "*Potraga*". Perković incited a wave of hate via his Facebook profile by insinuating that Derifaj and her crew had broken into his home and disturbed his underage children. Because of this, he claimed, he would press criminal charges against her. Later, the police denied that Derifaj broke the law and denied that any elements of a misdemeanour or crime could be found. However, Perković's Facebook posts sparked a series of hateful messages directed against Derifaj, who submitted several criminal charges against a number of unknown perpetrators.

Furthermore, her lawyer announced that she was pressing criminal charges against Perković.<sup>59</sup>

In November 2021, journalist Boris Dežulović, who is famous for speaking out about Croatian nation-building myths that have emerged since the dissolution of Yugoslavia, became the target of harsh attacks by parts of the public and political actors. These followed the publication of his controversial column, in which he derided the cult surrounding the city of Vukovar, which encapsulates the official victim narrative of Croatia during the War of Independence in the early 1990s. Dežulović received several threats, including death threats that have become subject to police investigation.<sup>60</sup>

In the same month, the journalist Drago Hedl was threatened by the husband of former Minister Gabrijela Žalac at their residence. Through his work, Hedl revealed the corruption leading up to Minister Žalac's ultimate arrest. When the police showed up at her house with a search and arrest warrant, her husband tried to attack Hedl and other journalists who were present at the scene, but was stopped by police officers.<sup>61</sup>

In January 2022, a journalist for Faktograf.hr received a serious death threat after they

59 See: <https://www.snh.hr/podrska-kolegici-danki-derifaj/>

60 See: <https://balkaninsight.com/2021/11/10/croatian-police-investigate-threats-to-columnist-over-vukovar-column/>; <https://hnd.hr/policija-istrazuje-prijetnje-dezulovicu-zbog-kolumne-o-vukovaru>; <https://hnd.hr/hnd-dezulovic-je-izlozen-institucionalnom-lincu>

61 See: <https://hnd.hr/hnd-poziva-nadlezne-da-reagiraju-na-prijetnje-dragi-hedlu>

published a series of articles debunking false information on COVID-19.<sup>62</sup> A message was sent to Faktograf.hr's Facebook page inbox with the link to an article on Wikipedia on the "Assassination market".<sup>63</sup> The message read: "Are you proud that half of the state hates you? Consider how good it is. Greetings from Croatian anonymous, while you are harassing people, we are preparing smart contracts in silence. Please make us open Pandora's box! You will be the first in history after whom the citizens will organize the hunt. continue with your work, let's make history together. Death to totalitarians, liberty to the people!". An assassination market is defined as a prediction market where any party can place a bet (using anonymous electronic money and pseudonymous remailers) on the date of death of a given individual, and collect a payoff if they "guess" the date accurately. This could potentially incentivise assassinations, because an assassin could profit by making an accurate bet on the time of the subject's death.

### ***Smear campaigns***

In November 2021, the fact-checking portal Faktograf.hr<sup>64</sup> received numerous threats of physical violence, including death threats after the businessman Nenad Bakić called for a public lynching of the portal and invited his

Facebook followers to file lawsuits en masse. Bakić also publicly spoke about the possibility of establishing a fund for these lawsuits. Bakić is one of the most influential spreaders of disinformation about COVID-19 and, as such, is often fact-checked by the portal.<sup>65</sup> Moreover, in December 2021, Faktograf.hr was the target of a coordinated hacker attack. The attack came after the lynching initiated by Bakić and aimed to intimidate the portal. The fact that Faktograf.hr has been subjected to harassment, abuse and threats against its team of journalists was nothing new. Since the outbreak of the pandemic, the portal has been exposed to regular hate speech and threats received via email, social networks and click-bait media. During this period, Faktograf.hr reported almost 40 threats of physical violence and death to the police. In less than 13 hours after the hacker attack, from December 13 to December 14, over 27 million attempts were made to access the Faktograf.hr site. In this organised DDoS attack, these attempts were made mainly from Russia and Indonesia.<sup>66</sup>

In May 2021, shortly after the second round of local elections in Croatia, Prime Minister Andrej Plenković once again attacked the media, accusing them of "being paid to vilify a political camp" and of deliberately and repeatedly misnaming his party's (HDZ) candidate

62 See: <https://faktograf.hr/live-blog-dezinformacije-o-koronavirusu/>

63 See: [https://en.wikipedia.org/wiki/Assassination\\_market](https://en.wikipedia.org/wiki/Assassination_market)

64 See: <https://faktograf.hr/>

65 See: <https://www.telegram.hr/politika-kriminal/bakic-napao-faktograf-i-pozvao-pratitelje-da-tuze-portal-redakcija-pocela-dobivati-prijetnje-smrcu/>

66 See: <https://faktograf.hr/2021/12/14/hajka-protiv-faktografa-nece-nas-zastrasiti/>

for mayor of Zagreb, Davor Filipović, during debates in the first election round. Plenković further accused the media of being “mercenaries who disgust one’s political option”. However, when asked by N1 TV journalist Elvir Mešanović why he never responded to their invitations for an interview, Plenković replied that “(N1) should write a poster declaring what ideological television they are”. He also said that the political analyst and commentator Dražen Lalić, a professor at the Zagreb Faculty of Political Science, was paid by broadcasters to smear HDZ candidates and targeted CJA president Zovko, who strongly condemned Plenković’s attacks on the media.<sup>67</sup>

#### ***Lawsuits and prosecutions against journalists SLAPPs and safeguards against abuse***

In April 2021, the Croatian Journalists’ Association published a report documenting the continued use of lawsuits to silence journalists investigating people in positions of power. They found 924 such cases, primarily targeted against journalists working for Hanza Media and Styria, publishers of the largest dailies Jutarnji list, 24 sata, and Večernji list. The commercial television channels RTL, N1 and NOVA TV were put under increased pressure by the Prime Minister Andrej Plenković,

who accused the media of conspiring against his party’s (HDZ) candidates, following local elections in May 2021.<sup>68</sup>

In addition, the portal Index.hr is faced with 56 lawsuits, which could bring the portal to the verge of collapse as most of the lawsuits seek compensation ranging from 10,000 to 100,000 HRK (around 1,330 to 13,300 EUR). Undoubtedly, such lawsuits aim to silence journalists and coerce them to self-censor, which is already a wide-ranging issue in Croatia.<sup>69</sup>

In March 2021, the journalist and president of the Croatian Journalists’ Association, Hrvoje Zovko, was dismissed by his employer, the Croatian public broadcaster HRT. He had allegedly demonstrated violent behaviour in the workplace. The firing happened only seven months after a court decided that Zovko’s previous termination by the same employer in 2018 was unlawful and that he must be returned to the workplace. The second attempt at termination was not delivered directly or officially to him, instead he was informed via the media. According to his lawyer, this represented a continuation of the public broadcaster’s public and private abuse against Zovko.<sup>70</sup> Moreover, the CJA stated that the termination was likely connected to Zovko being its president, as

67 See: <https://europeanjournalists.org/blog/2021/06/01/croatia-prime-minister-plenkovic-attacked-media-after-local-elections/?fbclid=IwAR2EvA76LZzlcafDGQXDT-Et5e0l3nYXOayabPHhcqIM9oKxKBhKBzsNmMw;>

68 See: [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital News Report 2021 FINAL.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital%20News%20Report%202021%20FINAL.pdf), p. 70; see also <https://www.snh.hr/anketa-hnd-a-924-tuzbi-protiv-novinara/>

69 See: <https://www.snh.hr/medunarodne-novinarske-organizacije-zabrinute-zbog-vala-tuzbi-protiv-index-hr-a/>

70 <https://www.index.hr/vijesti/clanak/hrt-povukao-tuzbe-protiv-hnda-i-mikleusevic-pavic/2315564.aspx>

he had used this role to speak out about the poor state of media freedom in Croatia and the censorship practices at HRT.<sup>71</sup> Zovko was furthermore sued by the HRT. In November 2021, the director of HRT's business unit, Mislav Stipičić, privately sued the vice-presidents of the CJA, Branko Mijić and Goran Gazdek, for the criminal offence of libel. This lawsuit is confirmation of the fact that, in Croatia, powerful persons threaten journalists and the media with lawsuits, thus endangering journalistic and media freedoms. In the EU, Croatia is already recognised as a country in which these freedoms are at risk. The lawsuits filed by the top people of HRT against journalists and the CJA are shameful.<sup>72</sup>

In another case, the Polyclinic for the Protection of Children and Youth of the City of Zagreb and its director, Gordana Buljan Flander, filed a personal suit against the non-profit media portal H-Alter<sup>73</sup> for a series of articles published by the journalist Jelena Jindra. In these articles, Jindra called out the Polyclinic and Flander for malpractice as the Polyclinic uses the controversial theoretical approach “parental alienation” in its work to support families going through divorces and breakups. At the proposal of the Polyclinic and Flander, on 21 September 2021, the court passed a temporary

measure prohibiting H-Alter from further reporting, that is, presenting “information relating to dignity, professional work and professional achievements” of the clinic and Flander. The temporary measure constitutes a de facto proactive censorship preventing the portal from publishing any more texts on the topic. While the City of Zagreb eventually dropped their lawsuit, Flander did not.<sup>74</sup>

In November 2021, the Municipal Court in Šibenik upheld the action brought by the Supreme Court Judge Senka Klarić Baranović against journalist Davorka Blažević. Under the infamous so-called “violation of honor and reputation” provisions (Arts. 147. to 151. of the Croatian Criminal Code), Blažević must pay the plaintiff 75,000 HRK (around 10,000 EUR), in addition to the costs of the proceedings. The decision of the court was made in a retrial brought against Blažević by Judge Baranović over an article published in 2015 on the non-profit Tris.com portal,<sup>75</sup> in which Blažević commented on the Supreme Court's decision in the “Fimi Media” case concerning the former Croatian PM Ivo Sanader. This final ruling was made without any new evidence introduced before the court. Following the previous trial, in which Blažević was acquitted, the County Court in Zagreb annulled the

71 <https://balkaninsight.com/2021/03/10/veteran-reporter-accuses-croatian-broadcaster-of-revenge-sacking/>

72 <https://hnd.hr/jos-jedna-sramotna-tuzba-mislav-stipic-tuzio-potpredsjednike-hnd-a-mijica-i-gazdeka>

73 See: <https://h-alter.org/>

74 See: <https://hr.n1info.com/vijesti/poliklinika-povukla-svoj-dio-tuzbe-protiv-portala-h-alter-ne-i-buljan-flander/>;  
<https://hnd.hr/urednik-h-altera-zabrana-pisanja-predstavlja-cenzuru-zaobilaznim-putem>

75 See: <https://tris.com.hr/>

initial decision and returned the case back to the Municipal Court in Šibenik for retrial.<sup>76</sup>

## ***Freedom of expression and of information***

### ***Legislation and practices on fighting disinformation***

Sanctions for spreading disinformation are elaborated on in the Act on Misdemeanours against Public Order and Peace<sup>77</sup> in Article 16. This law was adopted in 1977 and has been amended several times, most recently in 1994. Nonetheless, despite this, it has not undergone significant changes, which is why it is justifiably considered an obsolete regulation.

There is no information on the usage of the sanction under this article on the spread of disinformation.

## **Checks and balances**

### **Key recommendations**

- The role of the Croatian Parliament needs to be strengthened and anti-corona measures that limit human rights should require a two-thirds majority in the Parliament in order to be passed.

- The number of legislative acts brought under the urgent procedure protocol should be reduced.
- The resources and capacities of the Ombudsman's Office and other independent authorities should be strengthened.

### ***Process for preparing and enacting laws***

#### ***Transparency and quality of the legislative process***

The legislative procedure in Croatia continues to be defined by the weak role of the Parliament and dominance of the executive branch, which usually submits laws and other legislative acts, while the ruling majority adopts them regardless of the debate or other arguments brought forth.

Impact assessments and policy analyses are seldom used in a meaningful way and are often intransparent and/or unavailable to the public. Public consultations are predominantly held pro forma, with relevant government bodies and institutions acknowledging the comments made by the public, but rarely incorporating them into laws and public policies. Consultations are often announced late in the legislative process or during holidays with

76 See: <https://hnd.hr/skandalozna-presuda-suda-u-sibeniku-protiv-novinarke-davorke-blazevic>

77 Croatia. Act on Misdemeanours against Public Order and Peace (*Zakon o prekršajima protiv javnog reda i mira*). Official Gazette 41-323/1977 (*Narodne novine 41-323/1977*), article 16.

short deadlines, so the public has little time to react.

In 2021, a total of 423 proposals were voted on, including legislative acts and various technical and procedural decisions, as well as reports. Out of those, 214 acts (51%) were sponsored by the government.<sup>78</sup> It is important to note that almost none of the proposals or amendments made by opposition parliamentary groups were supported.

The dominance of the executive over the legislative branch been exacerbated by the COVID-19 pandemic and the introduction of the Civil Protection Headquarters of the Republic of Croatia. The Headquarters are an executive body whose goal is to introduce temporary measures and policies aimed at combatting the pandemic and protecting public health. However, throughout 2021, the Headquarters was criticised for serving as a political tool.<sup>79</sup> Many of its decisions were arbitrary and contradicted the epidemiological situation, and they often limited human rights and freedoms without a clear justification and without parliamentary support. There are also controversies around the application of the provisions of the Constitution under which

anti-pandemic legislation should be enforced. As a result, since the pandemic started, a number of legislative acts limiting human rights were able to be passed with a simple majority, instead of with the two-thirds majority stipulated by Article 17 of the Constitution.

In November, the parliamentary opposition party MOST launched a referendum initiative aimed at curtailing the powers of the Headquarters<sup>80</sup> and returning those powers to the Parliament, as well as suspending COVID certificates. At the time of writing of this report, the signatures are still being counted. MOST claims they have collected around 400,000 signatures,<sup>81</sup> while the minimum necessary in order for the referendum to be granted is 368,446 (10% of total voters).

### ***Rules and use of fast-track procedures and emergency procedures***

The use of fast-track and urgent procedures is a widespread practice in the Croatian Parliament despite them being nominally preferred only in extraordinary circumstances (“laws may be enacted under urgent procedure when this is required on particularly justified grounds, which have to be clearly explained”).<sup>82</sup> During

78 See: <https://www.sabor.hr/hr/sjednice/pregled-dnevnih-redova>

79 See: <https://www.nacional.hr/bencic-stozer-je-potpuno-politicki-instrumentaliziran-mora-se-mijenjati/>

80 See: <https://www.jutarnji.hr/vijesti/hrvatska/most-krece-u-prikupljanje-potpisa-pokrecemo-dva-referendums-ka-pitanja-zelimo-ukinuti-stozerokraciju-15124834>

81 See: <https://www.vecernji.hr/vijesti/uzivo-most-o-prikupljanju-potpisa-za-referendum-za-ukidanje-covid-potvrda-1549761>

82 Rules of Procedure of the Croatian Parliament, article 204.: <https://www.sabor.hr/sites/default/files/uploads/inline-files/Poslovnik%20Hrvatskoga%20sabora%20-%20procisceni%20tekst%202018.pdf>

2021, a total of 200 legislative bills were voted on. Out of those, 37 bills (18.5%) were discussed under urgent procedure.<sup>83</sup> This represents a significant decrease from the previous year, although many of the legislative acts were implemented as executive decisions by the Civil Protection Headquarters of the Republic of Croatia, meaning they weren't voted on in the Parliament.

### ***Independent authorities***

In February 2021, the mandate of Ombudswoman Lora Vidović, which started in 2013, ended.<sup>84</sup> The procedure for appointing the new Ombudswoman was set in the Parliament, and finally, in March 2021, Tena Šimonović Einwalter was appointed as the new Ombudswoman by a majority of 115 votes in the Croatian Parliament. Šimonović Einwalter is a lawyer, an expert in the area of combating discrimination. Prior to her appointment, she served as the Deputy Ombudswoman for Ombudswoman Vidović.

The Ombudsman's Office lacks sufficient resources and office space since the 2020 Zagreb earthquake.

The Ombudswoman's unannounced visits to detention centres and free access to the data of persons deprived of liberty are key tools in the National Preventive Mechanism (NPM). However, the former Ombudswoman has on many occasions raised concern that the Ministry of Interior repeatedly prevented her from carrying out these activities in relation to undocumented migrants, and denied her access to data.

Furthermore, in the case *M.H. and Others v. Croatia*,<sup>85</sup> the European Court of Human Rights (ECtHR) concluded that the evidence introduced was sufficient to deduce that the acts of restricting contact between the applicants and their lawyer and pressuring the lawyer with a criminal investigation served the purpose of discouraging them from taking their case to Strasbourg (breach of Article 34 of the Convention).<sup>86</sup>

Also, in their report on Croatia, the Council of Europe's Committee for the Prevention of Torture (CPT) pointed out that their delegation was provided with incomplete information regarding places where migrants may be deprived of their liberty. The CPT also claimed to have been obstructed by Croatian police officers in accessing documentation

83 See: <https://www.sabor.hr/hr/sjednice/pregled-dnevnih-redova>

84 See: <https://www.ombudsman.hr/en/en-2013-2021/>

85 *M.H. and Others v. Croatia* - [15670/18](#) and [43115/18](#). The case concerns the death of a six-year-old Afghan child, MAD.H., near the Croatian-Serbian border, the lawfulness and conditions of the applicants' placement in a transit immigration centre, the applicants' alleged summary removals from Croatian territory, and the respondent State's alleged hindrance of the effective exercise of the applicants' right of individual application.

86 Judgment in the case of *M.H. and Others v. Croatia*, par. 336.

necessary for the delegation to carry out the Committee's mandate.<sup>87</sup>

## Enabling framework for civil society

### Key recommendations

- The Government Office for Cooperation with NGOs has to ensure the transparent and democratic functioning of the Council for Civil Society Development and finish the process of drafting National Strategy for Creating an Enabling Environment for Civil Society Development.
- The Ministry of Regional Development and EU Funds and the Ministry of Labour, Pension System, Family and Social Policy have to ensure that sufficient funds are ensured for CSOs in the period from 2021 to 2027.
- The criminalisation of activities of organisations working on asylum and migration has to be stopped immediately.

## Regulatory framework

### *Criminalisation of activities*

The criminalisation of the work of NGOs in Croatia is particularly felt by organisations and activists who are active in the field of protecting the rights of refugees and other migrants, but also by citizens who offer humanitarian aid to undocumented migrants in Croatia. This process involves formal criminalisation (with drastic fines) and informal criminalisation (using harassment and intimidation).

The Law on Foreigners does not clearly differentiate between acts of solidarity for humanitarian reasons and the smuggling of migrants. This gives the authorities a wide margin of interpretation, which was misused on several occasions to criminalise persons who, for humanitarian reasons and without any personal gain or interest, helped a refugee or migrant. Therefore, in 2020, the Centre for Peace Studies called for amending the Law on Foreigners to further differentiate between acts of humanitarianism and acts of smuggling. Namely, the CPS has suggested the following definition of aid for humanitarian reasons: "Helping for humanitarian reasons is considered helping which does not result in any material or financial benefit for the helper, but is guided by the moral and humanitarian principle in situations of necessary assistance to protect the life or integrity of a person illegally crossing the border or staying illegally in the

87 Council of Europe, [Croatia: anti-torture Committee publishes report on 2020 ad hoc visit](#), 3 December 2021.

Republic of Croatia.” However, the comments were rejected.

The ways in which this provision is misused can be seen in the case of Dragan Umičević, a volunteer with the NGO Are You Syrious? (AYS), which is active in the protection of rights of refugees and other migrants. In 2021, Umičević was convicted and fined for helping the family of Madina Hussiny illegally enter Croatia.<sup>88</sup> Madina Hussiny was a 6-year-old girl who died at the Croatian-Serbian border after she was, together with her mother and siblings, forced out of Croatia into Serbia. In November 2021, the ECtHR brought a judgement in the case of *M.H. and Others v. Croatia* (applications nos. 15670/18 and 43115/18), in which it found violations of five rights guaranteed under the European Convention on Human Rights.<sup>89</sup>

As the Hussiny family had previously been illegally expelled from Croatia and lost their child because of this pushback, in March 2018, when they again entered the country, they asked AYS for support in seeking asylum. AYS immediately notified the police about the location of the family and asked their volunteer Dragan Umičević to go to the control checkpoint of the police to ensure that the family would be granted access to the asylum

procedure. The AYS office in Zagreb notified the police about Umičević’s arrival. Although Umičević did not have direct contact with the family and his sole intent was to make sure that the Croatian police followed the law on allowing the Hussiny family to seek asylum, the police pressed charges against him. In 2021, the High Administrative Court handed down their final ruling and fined him with 60,000 HRK (7,970 EUR) in a misdemeanour proceeding. According to AYS, “This is a man who acted in accordance with law and morality, and the show trial against him, besides being in direct contravention of the Constitution of the Republic of Croatia and the verdict of the European Court of Human Rights, is a continuation of intimidation that we as a society must not agree to. By the verdict of the authorities, he now has to pay a fine of 60,000 HRK (which is a precedent in our judiciary) and 1,300 HRK (173 EUR) in court costs. The court knew for certain that Dragan was a retired Croatian veteran, whose monthly income is 5,000 HRK (665 EUR), and who has no way to cover this enormous amount.”<sup>90</sup> Are You Syrious? organised a crowdfunding campaign in which it managed to collect enough money to cover the fine and the court costs, and it is planning to continue the legal proceedings in this matter.<sup>91</sup>

88 Are Your Syrious (2021), “[LJUDI DRAGI, SLAVIMO!!](#)”, press release, 16 December 2021.

89 European Court of Human Rights (ECtHR), [M.H. and Others v. Croatia](#), No. 15670/18 and 43115/18), 18 November 2021.

90 Are You Syrious (2021), “[AYS News Digest 14–15/12/2021: Volunteer convicted in Croatia for preventing pushback](#)”, press release, 16 December 2021.

91 Are Your Syrious (2021), “[LJUDI DRAGI, SLAVIMO!!](#)”, press release, 16 December 2021.

### ***Access and participation to decision-making processes***

The new National Strategy for creating an Enabling Environment for Civil Society has not yet been presented, while the last one expired in 2016. The working group for drafting the strategy was established in 2021, but there is no information on the concrete steps of the working group.

Access to and participation in decision-making processes for the citizens and civil society in Croatia is still facing negative trends. Public consultations are mainly held online, via the portal [esavjetovanja.gov.hr](https://esavjetovanja.gov.hr), but this is largely pro-forma, as comments and proposals made by citizens and other actors are rarely considered or accepted. Civil society organisations (CSOs) have their representatives in specific working groups for drafting certain public policies or legislation, and their representatives are elected and appointed through the Council for Civil Society Development. However, in the new convocation of the Council from May 2020, CSO representatives in the Council have limited influence on the decisions brought by the Council because most of its members come from various state institutions. This often means that CSOs without enough expertise or experience in a given topic are represented in working groups tackling that issue, because they will be less critical of the government.

For part of 2021, the government did not appoint new representatives of the public authorities to the Council following the parliamentary elections in 2020. This was in spite of the requests by CSO representatives in the Council. The move had repercussions for the participation of CSOs in decision-making processes. For example, for months it was not possible to carry out the selection of CSO representatives in the working groups for designing the programme for EU funds during the financial period of 2021 to 2027. In the end, their sessions were held without representatives of civil society.

The government did not adequately include civil society and trade unions in the development of the National Recovery and Resilience Plan. In March 2021, Green Action/Friends of the Earth (FoE) Croatia issued a statement warning the public that 40 days prior to the deadline for the Plan's submission, the government was still hiding it from the public. The organisation demanded that the government publish the Draft National Recovery and Resilience Plan.<sup>92</sup> Early in April 2021, the 80-page summary of the Draft Plan was published and presented to the public at the session of the government.<sup>93</sup> This document contained the list of reforms and investments and a general overview of how the 6.3 billion EUR in non-refundable grants and 3.6 billion EUR in loans would be distributed. In other words, it was impossible to fully understand

92 See: [https://zelena-akcija.hr/hr/opcenito/priopcenja/premijeru\\_plenkovicu\\_hitno\\_objavite\\_plan\\_oporavka](https://zelena-akcija.hr/hr/opcenito/priopcenja/premijeru_plenkovicu_hitno_objavite_plan_oporavka)

93 Government of the Republic of Croatia, Summary of the Draft National Recovery and Resilience Plan. URL: <https://planoporavka.gov.hr/UserDocsImages//dokumenti//51%20-%203%20NPOO.pdf>

what exactly these reforms and investments entailed, as no detailed descriptions were published. In mid-April, the Prime Minister presented the same information on the Draft Plan to the Parliament, causing wide criticism from the opposition for the fact that they were not given the full Draft National Recovery and Resilience Plan. On the same day, civil society organisations Green Action/FoE Croatia, the Society for Sustainable Development (DOOR) and the Centre for Peace Studies (CPS) held a press conference to point out once again the complete lack of public participation in drafting the National Recovery and Resilience Plan.<sup>94</sup> On 15 April 2021, the Summary Draft National Recovery and Resilience Plan was presented to the members of the Council for Civil Society Development, an advisory body to the government. Almost all CSO representatives strongly criticised the procedure and stated that they cannot comment on the content of the Plan, as the full text was not available prior to the session. Some of the representatives of the government claimed that the CSO representatives' approach was not constructive.<sup>95</sup> The full Draft Plan was brought and published at the government session on 29 April 2021 and was sent to the European Commission. No public consultation or meaningful participation of the civil society or the public took place.

### *Financing framework*

Throughout the year, there were difficulties in financing the work of civil society organisations: the non-publication of and delays in the announced European Social Fund (ESF) calls, as well as inadequate and lengthy procedures for selecting projects to be financed.

For example, at the end of 2020, 100 associations raised the problem concerning the opening deadline (i.e. the submission of projects) and the “fastest finger” procedure for the tender ‘Strengthening the capacity of CSOs to respond to the needs of the local community’ in an open letter. The “fastest finger” is a procedure based on the first-come-first-served principle. The CSOs can submit their project proposals from the moment the call is opened and, if the proposals fulfil the general and administrative requirements of the call, applicants that have submitted their proposals first, are awarded the funding. Usually, milliseconds divide those that get the funding and those that do not. This procedure is discriminatory to organisations with smaller capacities or to those working in rural areas, and, ultimately, it does not ensure that the best projects win funding. The deadline was eventually extended, but the “fastest finger” process remained. It is important to note that this tender has not yet been closed — the first financing decision was made only on 27 October 2021 and one of the three funding groups still has not been

94 See: <https://zelena-akcija.hr/en/opcenito/priopcenja/we-need-a-resilience-plan-not-resistance-to-change>

95 Republic of Croatia, Government Office for Cooperation with NGOs, 4th session of Council for Civil Society Development. URL: <https://www.youtube.com/watch?v=S43aCnOfGsQ>

selected. In other words, the tender, which was designed to provide financial support to civil society organisations to overcome the epidemic crisis, was only allocated one and a half years after the beginning of the pandemic and has still not been fully allocated.

A number of ESF calls within the EU Multi-Annual Financial Framework 2014-20, which were announced in the Annual Plans for the Publication of Calls for Proposals of the Operational Programme Effective Human Resources 2014-20, were not and will not be opened.

The position of civil society as a beneficiary of EU funds, as reflected in the programming document for the financial period of 2021 to 2027 in Croatia, remains unclear. In July 2021, CSO representatives in the working group Solidary Croatia warned the Council for Civil Society Development that the available funds for civil society in Croatia will decrease by 85% in comparison to the 2014 to 2020 period. This was substantiated by unofficial information coming from some of the competent institutions.

Institutions overseeing EU funds and other funds in Croatia continue to put large, illogical and unnecessary burdens on CSOs in Croatia, resulting in serious limitations on their work, especially to organisations providing social services and to organisations that don't have large administrative capacities.

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## ***Attacks and harassment***

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### ***Legal harassment, including SLAPPs, prosecutions and convictions of civil society actors***

The indirect criminalisation of activities of activists and organisations working on the protection of rights of refugees and other migrants in Croatia has continued in 2021.

First is the case of Omer Essa Mahdi, a refugee whose asylum status was revoked after he rejected the offer to be “an informant” for the secret services. This arbitrarily issued decision was also marked with a level of secrecy, which means that neither Mahdi nor his lawyer are able to access the information based on which he is accused of being a threat to public security. To his knowledge, Mahdi has not committed anything that could bring about such an assessment, and he is unable to defend himself against accusations that he does not know the content of. Furthermore, his partner is Tajana Tadić, one of the most vocal (and media-present) activists for the rights of refugees and other migrants in Croatia, who, at the time, was employed by the organisation Are You Serious?. The decision to revoke Mahdi's refugee status was made by the Security and Intelligence Agency and the Ministry of the Interior with full knowledge of the nature of their relationship. Therefore, said decision was also an attack on Tadić's activities as a human rights defender and an attempt to silence and intimidate her. As stated, neither Mahdi nor his attorney were given access to the part of the file classified as “secret”. Therefore, Mahdi could not submit a review of the documents,

including numerous international expert opinions which substantiated his claims. The Ministry of Interior also objected to hearing the witnesses suggested by the defence. On 12 January 2021, the Administrative Court of Croatia dismissed the appeal against the decision of the Ministry of Interior to revoke Mahdi's refugee status. Furthermore, he was instructed to voluntarily leave the European Economic Area (EEA) within 30 days of the decision, or face forcible removal. Fearing deportation to Iraq, Mahdi had no choice but to leave Croatia.<sup>96</sup>

The intimidation and legal harassment towards the NGOs Centre for Peace Studies, Are You Syrians? and the lawyer Sanja Bezbradica Jelavić were confirmed in the judgement of the European Court of Human Rights relating to the case *M.H. and Others v. Croatia*, on 18 November 2021.<sup>97</sup> The Court examined the steps the Ministry of Interior took in 2018 to prevent the Hussiny family from contacting Jelavić, their chosen lawyer, even after requesting an interim measure from the ECtHR. It also investigated the inappropriate pressure put on Jelavić and her office, against whom a criminal investigation was initiated.

In this particular case, she was denied access to lawyers and her right to representation was hampered by efforts to challenge the signed power of attorney, although family members clearly confirmed that they had signed the power of attorney and that it reflected their real will. The Court considers that "restriction of contact between the applicants and their chosen lawyer S.B.J., and the criminal investigation and pressure to which that lawyer was subjected were aimed at discouraging them from pursuing the present case before the Court". In doing so, Croatia violated Article 34 of the Convention and violated the right of family members to an individual request.<sup>98</sup>

One example of SLAPPs against CSOs in Croatia is a proceeding against the environmental CSO Zelena akcija/Friends of the Earth (FoE) Europe and its leaders, which started in December 2017.<sup>99</sup> According to Zelena akcija, "Razvoj Golf is seeking the punishment of the responsible persons for the campaign in which FoE Croatia called for compliance with the law and court rulings regarding the construction of an apartment complex on Srđ in Dubrovnik."<sup>100</sup> In the criminal proceeding, the private company Razvoj

96 Frontline Defenders, [PRESSURE ON FAMILY MEMBER OF MIGRANT RIGHTS DEFENDER TAJANA TADIĆ](#), 21 July 2021.

97 European Court of Human Rights (ECtHR), *M.H. and Others v. Croatia*, No. 15670/18 and 43115/18), 18 November 2021.

98 *op.cit.* para 336

99 See: <https://zelena-akcija.hr/en/programmes/environmental-law/the-company-razvoj-golf-gets-a-permit-for-condo-isolation-green-action-gets-a-lawsuit>

100 See: <https://zelena-akcija.hr/en/programmes/environmental-law/foe-croatia-the-company-razvoj-golf-cannot-silence-us?fbclid=IwAR0K98gGYwvOfzyf3keu5GRMSY3w99n4Ilg8gMEpcOUI1zKChPOYY2xjkDY>

Golf sued the president and vice-presidents of Zelena akcija, three people in total, demanding approximately 9,000 EUR from each defendant. Criminal proceedings are handled by the court in Dubrovnik, meaning that each court hearing requires the defendants to travel from Zagreb to Dubrovnik and dedicate time for preparing and participating in judicial procedures. The entire proceeding is coupled with travel costs and lawyer fees, given that each defendant needs to be represented by her own lawyer and be present before the court. The costs amount to around 1,500 EUR for each court hearing held in Dubrovnik. So far, three hearings have been held, and at least two more are planned.

***Smear campaigns and other measures capable of affecting the public perception of civil society organisations***

In May 2021, local elections were held, and a part of the Zagreb elections was based on disinformation and a smear campaign against civil society organisations working mainly in the areas of human rights, independent culture, democratisation and environment. Between the first and second round of the elections for the Mayor of Zagreb, candidate Miroslav Škoro of the Homeland Movement (*Domovinski pokret*) based his campaign on false information about a number of civil society organisations. His opponent, Tomislav

Tomašević of the political platform We can! (*Možemo!*), and other representatives of the platform are former civil society activists. In their campaign, the Homeland Movement used public information and financial reports of various CSOs to claim that the organisations were being used for extracting public funds for the private interests of Tomašević and other members of *Možemo!*. Škoro's campaign held press conferences, posted on social media and made public statements in which the information about the CSOs' income from 2013 to 2020 were gradually revealed – during the first press conference the incomes of five CSOs were presented, and at the last press conference the incomes of 41 CSOs were presented. The Homeland Movement claimed that more than 67,218,908 EUR of public funds had been extracted through these CSOs. Without citing any evidence, they also claimed that the political work and campaign of *Možemo!* was financed by these civil society organisations, even though *Možemo!* had already at that point published its campaign financial reports.

This caused an outburst of hatred against CSOs in comments on the media and social media and is considered to be the first real disinformation political campaign in Croatia.<sup>101</sup> CSOs were referred to as “foreign mercenaries”, “Cosa Nostra”, “Soros’ mercenaries”, etc.<sup>102</sup> Some of those targeted publicly reacted to these claims,

101 See: <https://faktograf.hr/2021/05/28/skoro-propagandisti-priznajem-hr-ankete-dezinformacije/>

102 See: <https://www.portalnovosti.com/uzalud-vam-trud-huskaci>

e.g. Centre for Peace Studies,<sup>103</sup> Green Action/Friends of the Earth Croatia,<sup>104</sup> Gong,<sup>105</sup> and more. Institutions responsible for financing civil society, such as the Government Office for Cooperation with NGOs and the National Foundation for Civil Society Development, did not react to these claims, although the CSO representatives in the Council for Civil Society Development requested that they make public statements to inform the public about the rules and terms under which civil society in Croatia is financed. The Head of the Government Office gave a brief statement to Jutarnji List<sup>106</sup> upon request. Unfortunately, although all of these allegations were proven to be false, they do affect the public opinion of and public trust in civil society organisations, and the consequences are likely to be long-term.

## **Disregard of human rights obligations and other systemic issues affecting the rule of law framework** ↓

### **Key recommendations**

- The European Commission and Ministry of Interior should ensure full transparency and executive and financial independence of the Independent Border Monitoring Mechanism.
- Ensure that effective investigations into police conduct are carried out by independent bodies.
- The Ministry of Interior has to ensure the transparency of police work and adherence to human rights standards.

103 See: <https://www.cms.hr/hr/izjave-za-javnost/cms-u-drzavni-i-lokalni-proracun-uplacuje-vise-nego-sto-iz-nje-ga-uprihodi>

104 See: [https://zelena-akcija.hr/hr/opcenito/priopcenja/reakcija\\_miroslav\\_skoro\\_siri\\_prljave\\_lazi\\_o\\_zelenoj\\_akciji\\_kojima\\_obmanjuje\\_javnost](https://zelena-akcija.hr/hr/opcenito/priopcenja/reakcija_miroslav_skoro_siri_prljave_lazi_o_zelenoj_akciji_kojima_obmanjuje_javnost)

105 See: <https://faktograf.hr/2021/05/28/domovinski-pokret-financiranje-civilno-drustvo/>

106 See: <https://www.jutarnji.hr/vijesti/hrvatska/vlada-o-skorinim-optuzbama-evo-sto-su-nam-odgovorili-o-financiranju-udruga-i-njihovoj-kontroli-15076075>

## Systemic human rights violations

### Widespread human rights violations and/or persistent protection failures

In 2021, activists collected reports from different institutions, national and international NGOs, evidence in the form of photographs, videos and medical documentation, and testimonies of thousands of victims – together, these all pointed in the same direction: to systematic, severe violations of refugees' and migrants' human rights at Croatian borders and within Croatian territory.

For example, from January until the end of November 2021, the Protecting Rights at Borders (PRAB) initiative recorded 8,812 persons pushed back from Croatia into Bosnia and Herzegovina.<sup>107</sup>

The Centre for Peace Studies filed two criminal complaints for police brutality against refugees in 2021. In July, a criminal complaint was filed for serious police misconduct and severe violence against a family of four intending to seek international protection. The brutality included an act of rape committed against the mother of this refugee family. Another criminal complaint was filed in August for the illegal expulsion of an Afghan family, including a woman in her fourth month of pregnancy and her four children. After receiving medical treatment at the hospital, police officers

ignored their request for international protection, and illegally expelled them to Bosnia and Herzegovina.

In October 2021, a violent and illegal expulsion of refugees from Croatia to Bosnia and Herzegovina was recorded<sup>108</sup> on video in high resolution and was shared with media across Europe. Forensic analysis of the footage showed that Croatian police officers performed a violent and illegal expulsion of refugees, which included beating and pushing them into the river. The videos published by a group of journalists from ARD, Lighthouse Report, Novosti, RTL Croatia, Spiegel and SRF confirmed the involvement of special police units in performing these violent and illegal expulsions. Furthermore, they proved the credibility of the testimonies of victims of violent and illegal expulsions accusing police officers in the same uniforms of torture and inhuman treatment.

Furthermore, on 3 December 2021, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) published a report on its ad hoc visit to Croatia from 10 to 14 August 2020. The report was made public pursuant to Rule 39§3 of the Rules of Procedure of the CPT, following public written statements made by State Secretary Terezija Gras on the content of the report. The report documents several accounts of migrants being subjected to

107 Protecting Rights at Borders (PRAB), *Human dignity lost at the EU's borders*, December 2021.

108 RTL Croatia: Danka Derifaj, Karla Vidović. *VIDEO Potraga u posjedu ekskluzivnih snimki: Izvoljavaju se na migrantima, mlade ih palicama i tjeraju iz Hrvatske*, 6 October 2021.

severe ill-treatment by Croatian police officers, such as migrants being forced to march through the forest to the border barefoot and being thrown with their hands still handcuffed into the Korana river. Some migrants alleged being pushed back into BiH wearing only their underwear and, in some cases, they were naked. A number of persons stated that, when they were being apprehended and were lying face down on the ground, certain Croatian police officers had discharged their weapons into the ground close to them.<sup>109</sup>

While the CPT's report highlighted a number of serious violations of the human rights of refugees and other migrants, the final version of the first semi-annual report of the Independent Border Monitoring Mechanism<sup>110</sup> found no irregularities. It is important to note that the working version, published on December 3 and withdrawn a day later, stated that "the police carry out illegal deterrence (pushbacks) and do not record deterrence allowed under Article 13 of the Schengen Borders Code". A week later, the final version of the report was published, where this sentence was replaced by the following: "the police carry out permissible deterrence under Article 13 of the Schengen Borders Code, although they do not record them, and in mine suspected areas, in isolated cases, they also allow illicit deterrence".

### *Impunity and/or lack of accountability for human rights violations*

Despite overwhelming evidence, the Croatian State Attorney's Office continues to reject criminal complaints against Croatian authorities, and the Ministry of Interior continuously states that it did not find any misconduct or breaching of the law, without giving any argumentation or showing that an unbiased investigation was conducted. The investigations remain internal (the Ministry investigates itself) and aren't independent. The results of the conducted investigations remain unknown to the public and to the Ombudswoman. The low number of investigations shows the unpreparedness of the government to stop the violence and secure the rule of law, while the lack of independent investigations is worrying and further undermines the rule of law and functioning of the legal state.

In May and June 2021, the Centre for Peace Studies received rejection letters issued by the Croatian State Attorney's office for two criminal complaints related to extremely violent cases of pushbacks from Croatia to BiH from May and October 2020. The reasons outlined in the rejection letters are factually wrong and poorly (if at all) substantiated, which further fuels concerns

109 Council on Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), [Report to the Croatian Government on the visit to Croatia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment \(CPT\) from 10 to 14 August 2020](#), 3 December 2021.

110 The Independent Border Monitoring Mechanism was established at the initiative of the European Commission due to numerous allegations of human rights violations at Croatian borders.

over the absence of effective investigations in Croatia related to pushback cases.

Even in the above-mentioned case of the published video footage recording the violent and illegal expulsion of refugees from Croatia, only three police officers were sanctioned with temporary suspension.<sup>111</sup>

In the previously mentioned CPT report, the anti-torture committee urged the Croatian authorities to take determined action to stop migrants from being ill-treated by police officers and to ensure that cases of alleged ill-treatment are investigated effectively. The CPT criticised Croatian authorities' failure to conduct thorough and timely investigations into complaints of police misconduct and noted that the files of a few completed cases "fail to demonstrate any fact-finding investigative acts worthy of the name." Finally, the CPT noted that these "investigations", which should have been conducted by an independent body, were instead carried out by police officers themselves, undermining any notion of independence or impartiality.

#### ***Follow-up to recommendations of international and regional human rights monitoring bodies***

One of the important recommendations provided by the CPT is the following: "...Irrespective of whether persons are 'detained' ('zadržavanje'),

'brought in' ('dovodjenje'), 'arrested' ('uhićenje'), or simply physically caught by the police and held against their will — including in a police van — the reality of their situation is that they are deprived of their liberty and they must be accorded the fundamental safeguards against ill-treatment commensurate with that status (cf. further paragraphs 33 to 36). The CPT recommends that this be made unequivocally clear in the draft amendments to the Law on Foreigners which are currently under discussion in the Croatian Parliament."

The CPT report also concluded that it wished to continue its dialogue with Croatian authorities, but only on the condition that such dialogue is "grounded on a mature acknowledgment, including at the highest political levels, of the gravity of the practice of ill-treatment of migrants by Croatian police officers and a commitment for such ill-treatment to cease."

There were two public reactions to the published report and given recommendations: the press release made by the Ministry of the Interior prior to the publication of the report, claiming that the "Committee based its report on unverifiable information from Bosnia and Herzegovina and clearly exceeded its power" and that "all the recommendations from that visit have for the most part been implemented",<sup>112</sup> and the reaction of Croatian President Zoran Milanović, who went

111 Jutarnji.hr: Mario Pušić. *Policajci koji su tukli migrante vraćeni na posao, jedini grijeh im je bio krivo nošenje uniforme!?*, 17 January 2022.

112 Ministry of the Interior of the Republic of Croatia, *Reaction to the unilateral publication of the CPT Report*, 2 December 2021.

as far as to call the CPT delegation members “pests” upon the report’s publication.<sup>113</sup>

## **Fostering a rule of law culture**

### **Contribution of civil society and other non-governmental actors**

Throughout 2021, the CPS continued to warn the public about systemic and severe violations of refugees’ and migrants’ human rights at Croatian borders and within Croatian territory, which represent a serious rule of law issue, especially without effective investigations or protection mechanisms in place. The CPS also filed two criminal complaints for police brutality against refugees in 2021.

Before and following the establishment of the Independent Border Monitoring Mechanism in Croatia, the Centre for Peace Studies actively advocated for transparency and independence to be assured in the functioning of the monitoring mechanism, warned about the key concerns of the established monitoring mechanism, and provided recommendations to the members of its Advisory Board.

As mentioned above, in November 2021, the ECtHR issued a ruling in the case of M.H. and Others v. Croatia, upholding violations of the right to life, the prohibition of torture and inhuman treatment, the prohibition on collective expulsion, the right to security and liberty, and the right of individual petition. The decision was the result of a proceeding in which the Hussiny family was represented by lawyer Sanja Bezbradica Jelavić, in cooperation with the Centre for Peace Studies. The CPS also intervened in the case as a third party.<sup>114</sup>

Following the publication of the ruling, the CPS organised a press conference, requesting the immediate identification and sanctioning of direct perpetrators, as well as the dismissal of key people from the police and Ministry of Interior for their command and political responsibility.<sup>115</sup>

113 Index News. *Milanović napao Vijeće Europe zbog izvješća o mučenju migranata: To su štetočine*, 3 December 2021.

114 Centre for Peace Studies, *Centre for Peace Studies’s third-party intervention in the European Court of Human Rights*, 19 January 2021.

115 Centre for Peace Studies, *ON THE ECtHR JUDGMENT CONFIRMING THAT THE CROATIAN POLICE ARE GUILTY OF MADINA’S DEATH - Prime Minister Plenković must dismiss the top of the Ministry of the Interior and the police*, 19 November 2021.

# **LIBERTIES RULE OF LAW REPORT 2022**

**CZECH REPUBLIC**



# Czech Republic

## About the authors



### LIGA LIDSKÝCH PRÁV

The **League of Human Rights (LLP)** is a non-governmental non-profit human rights organization that monitors the state of respect for fundamental rights in the Czech Republic and points out their violations. LLP has long advocated systemic changes in the area of violations of fundamental rights in the Czech Republic, through various instruments. At present, we focus on the protection of the rights of vulnerable people, including patients, mothers, and especially mothers with psychosocial disabilities, children and illegally sterilized women..

## Key concerns

In the area of justice, new rules on judges' appointment and selection will come into force in summer 2022 and are expected to increase the transparency of the appointment process. A reform of both the public prosecutor's office and the system of appointment and selection of prosecutors is also on the table and could be discussed by the newly elected government and parliament, whereas no proposals have been made to date as regards the creation of

a supreme council of the judiciary, on which there are divergent public opinions.

Discussions are yet to take place under the new government and parliament on several anti-corruption bills, including new rules on whistleblower protection. The vast majority of people in the Czech Republic consider corruption a problem and more than half think that the new government should focus on tackling corruption.

While the level of objectivity and independence of media in the Czech Republic is generally regarded as high, stakeholders are urging the parliament to establish fully independent and effective media councils with a view to strengthening media independence.

Despite the fact that there are still systemic fundamental rights issues in the Czech Republic that need to be addressed, things are slowly changing for the better and such progress benefits the national rule of law environment. The adoption of a law compensating victims of illegal sterilization is a major symbolic step forward, as is the abolition of infant institutions. NGOs played a major role in prompting such important achievements.

## State of play

- ⬇️ Justice system
- ⬇️ Anti-corruption framework
- ⬆️ Media environment and freedom of expression and of information
- N/A Checks and balances
- N/A Enabling framework for civil society
- ⬆️ Systemic human rights issues

### Legend (versus 2020)

Regression: ⬇️

No progress: ⬇️

Progress: ⬆️

## Justice system ⬇️

### Key recommendations

- The legislators, in cooperation with the Government, should discuss and adopt all proposed legislation as soon as possible, several of which are already ready for debate

## Judicial independence

### Appointment and selection of judges, prosecutors and court presidents

The new legislation on judges' appointment and selection, which we reported about in our contribution to Liberties' 2021 Rule of Law

Report, will come into force in summer 2022. This legislation introduces changes which should make the whole appointment process more transparent.

Last year, a reform of the public prosecutor's office was expected, including a new system for the appointment and dismissal of the chief prosecutor. The new legislation is drafted but the former Chamber of Deputies did not get to discuss it. In the beginning of October 2021, elections to the Chamber of Deputies took place, followed by the formation of the new government. The government and Chamber of Deputies are now expected to deal with this and other important proposed reforms that did not pass through the legislative process of the former Chamber of Deputies.

There is also a new draft legislation proposed by the Senate concerning the appointment and selection of prosecutors.<sup>1</sup> The proposal was also not discussed in the former Chamber of Deputies and since the elections no progress has been made. The proposal has a dissenting opinion of the former government because supposedly the executive had proposed another bill on the same matter. Nonetheless, the Organizing Committee of the Chamber of Deputies recommended the proposal to be discussed. It is yet to be seen what the new members of Chamber of Deputies will do with this proposal. The main goal of the proposed reform is to increase the transparency of the appointment of the public prosecutors and to ensure that the dismissal of the Chief Public

1 More information at <https://www.psp.cz/sqw/historie.sqw?O=8&T=569>

Prosecutor may only occur on the basis of disciplinary proceedings. The new law would also set clear terms for the mandate of prosecutors.

### *Independence and powers of the body tasked with safeguarding the independence of the judiciary*

There have been discussions about the creation of a Supreme Council of the Judiciary among the ‘professional public’ for decades but no proposal to that effect has been made yet. In the Czech Republic, a Judicial Union exists, which is a professional association created by and composed of judges and operates on a voluntary basis. About 50% of judges are members of this association. However, opinions on the opportunity of establishing an official Supreme Council of the Judiciary vary across the society. Some think it might help coordinating the judicial system considering the limited resources of the Ministry of Justice, while some think it might lead to encapsulation of the judiciary.<sup>2</sup>

## **Anti-corruption framework** —

### **Key recommendations**

- The legislators, in cooperation with the Government, should dis-

cuss and adopt all proposed legislation as soon as possible, several of which are already ready for debate

### **Framework to prevent corruption**

Around 92% of people in the Czech Republic consider corruption a problem and more than half think that the new government should focus on tackling corruption.<sup>3</sup>

At present, at least 9 important anti-corruption bills have been prepared, which the former government and the Chamber of Deputies did not manage to discuss. These include an amendment to the Public Prosecutor’s Office Act, the Whistleblower Protection Act, an amendment to the Conflict of Interest Act, the Lobbying Act, an amendment to the Information Act, reform of campaign and political party supervision, amendments to public service media law, public procurement supervision reform, or extension of the powers of the Supreme Audit Office to joint-stock companies with state participation.<sup>4</sup> These bills are now expected to be discussed by newly elected deputies and government officials. The new government underlined its commitment to achieve the adoption of several of, albeit not all, these laws in its programming statement.

2 Šipulová, K., Urbániková, M., Kosař, D. Nekonečný příběh Nejvyšší rady soudnictví: Kdo ji chce a proč ji pořád nemáme? Časopis pro právní vědu a praxi. 2021, č. 1. <https://journals.muni.cz/cpvp/article/view/14273>

3 See the article of the project Rekonstrukce státu by the organisation Frank Bold Society, z. s., [here](#).

4 See the article of the project Rekonstrukce státu by the organisation Frank Bold Society, z. s., [here](#).

### **Measures in place to ensure whistleblower protection and encourage reporting of corruption**

The former Chamber of Deputies did not manage to discuss the bill on the protection of whistleblowers, which is based on the now effective European directive 2019/1937. The directive is now directly applicable to public authorities. The aim of the implementation of the directive is to ensure the protection of the whistleblowers so that they do not face negative consequences after reporting, for example in the form of job loss or wage reduction. Representatives of the civil sector now call on the new government and the new Chamber of Deputies to adopt a quality law to protect whistleblowers as soon as possible.<sup>5</sup>

## **Media environment and freedom of expression and of information**

### **Key recommendations**

- Legislators should adopt new legislation on media councils which should be more independent, and their structure and decision-making should be subject to judicial review

### **Media authorities and bodies**

According to the project Rekonstrukce státu carried out by the organization Frank Bold, the level of objectivity and independence of the media in the Czech Republic is high even by European standards. However, it is fragile because it lacks the necessary legal support in the absence of fully independent and effective media councils. Rekonstrukce státu is now lobbying at the Senate to push for the following measures aimed at ensuring media independence:<sup>6</sup>

- Members of public service media councils should be elected by the Chamber of Deputies and the Senate. Now they are elected only by the Chamber of Deputies.
- Only established institutions should be able to appoint councillors.
- Councillors should be impartial and politically independent experts.
- Parliament should not be able to dismiss the media council as a whole. The annual reports of the councils will not require approval by the Parliament, but only serve to advise of their activities.
- The Supreme Administrative Court will be able to verify the legality of the procedure for the election of a media council

<sup>5</sup> See the article of the project Rekonstrukce státu by the organisation Frank Bold Society, z. s., [here](#).

<sup>6</sup> See the article of the project Rekonstrukce státu by the organisation Frank Bold Society, z. s., [here](#).

members and the decisions of the media councils.

## **Disregard of human rights obligations and other systemic issues affecting the rule of law framework**

### **Key recommendations**

- Legislators should finally adopt new legislation on the disciplinary proceedings of judges in order to take due account of infringements
- Legislators should pay more attention to the possibilities of monitoring the observance of fundamental rights in psychiatric hospitals and their effective exercise, and possible sanctions for violations of these rights
- The Ministry of Labor and Social Affairs should give more support to training opportunities for social workers and other professionals helping people with disabilities. It should also seek to increase the number of these professionals, who are few and lack sufficient sup-

port to carry out their work effectively. As a result, the rights of their clients, i.e. vulnerable people with disabilities, might be violated

### **Systemic human rights violations**

There is insufficient protection of people with psychosocial disabilities (i.e. people with mental disabilities, mental illness, autism spectrum disorder, etc.) in the Czech Republic.

As regards the interference with their rights in connection with their involuntary hospitalization in psychiatric hospitals, the problem is perceived on different levels.

First, we observe an ineffective representation of the assessed person within proceedings to assess the opportunity of involuntary hospitalization. The assessed person must be represented in the proceedings. The court appoints an attorney to the assessed person as procedural guardian.<sup>7</sup> However, often the lawyer does not meet the assessed person in person, listen to him/her, or reflect his/her wishes and interests in court. The court also sometimes fails to meet these standards. Also, the court often issues a decision on the appointment of a guardian at the same time (or in close succession) with the decision on the merits, and deliver them both to the lawyer at once. In such a situation, the lawyer cannot defend the rights of the assessed

7 DURAJOVÁ, Z., KAŠTYL, M. *Analýza dostupnosti a účinnosti existujících nástrojů ochrany práv pacientů při nedobrovolné hospitalizaci a léčbě*, odst. 97.

person effectively. The courts rely only on the report of the doctor who admitted the person to the hospital. Secondly, the rights of the involuntarily hospitalized person are also violated by the employees of the psychiatric hospitals. This was confirmed by the Office of the Ombudsman which LLP approached as the national preventive authority to monitor the compliance with the UN Convention against Torture.

Women with psychosocial disabilities are often deprived of their children immediately after birth, even if there is no proof of risk of neglect or abuse.<sup>8</sup> The European Court of Human Rights has long criticized this unlawful practice.<sup>9</sup> The persistent reluctance to address this problem points to strong prejudices on the part of social and healthcare workers towards mothers with psychosocial disabilities, which is also confirmed by expert research.<sup>10</sup>

On a positive note, the law on compensation for women sterilized against their will and against the law<sup>11</sup> finally passed in summer 2021. Victims of illegal sterilizations have been waiting for compensation for decades and an estimated 400 women will want to apply for it (from thousands of victims). As

they often have low socio-economic status, old age and unfavorable health, they will need help applying for compensation. To that effect, LLP in cooperation with other civil society organisations created two dedicated support centres.

Although the law establishing the institution of a children's ombudsman has still not been adopted, new legislation banning infant institutions has finally passed.

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8 FELDMAN, M., MCCONNELL, D., AUNOS M. Parental Cognitive. Impairment, Mental Health, and Child Outcomes in a Child Protection Population. *Journal of Mental Health Research in Intellectual Disabilities* [online] 2012; 5(1): 66-90. [cit. 28.4.2021]. Dostupné z: <https://doi.org/10.1080/19315864.2011.587632>

9 Judgement of European Courts of Human Rights from 29. 3. 2016 in case n. 16899/13. *Kocherov and Sergejeva vs. Russia*. Available [here](#).

10 BERNOLDOVÁ, J. et al., *Ženy s mentálním postižením v roli matek*. Praha: Univerzita Karlova, Pedagogická fakulta. 2019, 115 s. ISBN 978-80-246-4329-8.

11 See here: <https://www.psp.cz/sqw/historie.sqw?o=8&t=603>

# **LIBERTIES RULE OF LAW REPORT 2022**

**ESTONIA**



# Estonia

## About the authors



The **Estonian Human Rights Centre (EHRC)** is an independent non-governmental human rights advocacy organisation. EHRC was founded in December 2010. The mission of EHRC is to work together for Estonia to become a country that respects the human rights of every person in the country. EHRC develops its activities according to the needs of society. EHRC focuses on the advancement of equal treatment of minority groups, diversity and inclusion, the fight against hatred, the human rights of asylum seekers and refugees, and data protection and privacy issues. EHRC coordinates the Estonian Diversity Charter. EHRC also monitors the overall human rights situation in Estonia and publishes bi-annual independent human rights reports about the situation in the country. EHRC carries out comprehensive, effective and sustainable advocacy in the field of human rights. This report is based on the EHCR 2021 Human Rights Report.<sup>1</sup>

## Key concerns

In the area of justice, the persisting stability of the judiciary system, despite the challenges brought by the COVID-19 pandemic, is a positive sign. The state's focus has continued to be on improving the efficiency of the judiciary system and on measures to reduce the length of proceedings and harmonise the workload of courts. Resources which have been allocated to the courts from the state budget are under pressure, but significant cuts have so far been avoided. Efforts have also been made to better ensure public access to court files and court decisions. However, the government has not yet intervened to address concerns raised by the Court of Justice of the European Union and by the Estonian Supreme Court on the use of communications data by the prosecution service in court proceedings. The insufficient protection of rights and interests of vulnerable persons in court proceedings remains a major concern.

The checks and balances framework has been challenged by the conditions created by the COVID-19 pandemic. While restrictions have not significantly infringed upon fundamental rights and freedoms, the reasons behind the restrictions have often been difficult to understand and it is almost impossible for parliament, the Chancellor of Justice, or

1 <https://humanrights.ee/en/materials/inimoigused-cestis-2022/>

the courts to verify their appropriateness. Some concerns also persist surrounding the electoral process. Nothing has yet been done to lift the restriction on prisoners voting, while discussions have been regurgitated regarding the security and accessibility of e-elections.

The situation has slightly improved for civil society organisations in terms of enabling environment, but they continue to face challenges surrounding access to funding and resources, while the government expressed its intention to increase the accountability and transparency of “politically-orientated” foundations and NGOs. The courts ordered a review on the proportionality of restrictions affecting the exercise of the right to freedom of peaceful assembly.

In terms of other systemic issues surrounding the rule of law framework, COVID-19 restrictions affecting fundamental rights, including freedom of movement, assembly, and association, the right to respect for private and family life, the right to education, and the right to engage in business, call for a thorough and regular analysis of their proportionality, effectiveness and impact, in particular in relation to the rights of vulnerable groups. The spread of misinformation causes problems in the fight against the pandemic, with the issue of vaccination especially polarising society. This needs to be addressed. Respect for privacy and data protection remains a topical concern, in particular as the ruling of the Supreme Court that declared the indiscriminate storage of communications data on Estonian residents to be illegal has still not been implemented. Various data protection issues have also arisen

in connection with the pandemic, but the government has shown preparedness to tackle these adequately (including in the case of the HOIA mobile application, for example).

### **State of play**

- ↑ Justice system
  - N/A Anti-corruption framework
  - N/A Media environment and freedom of expression and of information
  - Checks and balances
  - Enabling framework for civil society
  - Systemic human rights issues

#### **Legend (versus 2020)**

- Regression: ↓
- No progress: -
- Progress: ↑

## **Justice system** ↑

### **Key recommendations**

- Enhance as a matter of urgency the protection of people’s privacy in the field of storing communications and location data, and in the organisation of access to that data, thereby bringing Estonian national law into line with EU law.
- Enhance the protection of the rights and interests of vulnerable persons in court proceedings

through both legislative and practical measures.

- Ensure that the pursuit of greater efficiency in the judiciary system does not lead to any deterioration in the quality of justice.

### ***Judicial independence***

Potential reforms of the prosecution and judiciary system, which would have undermined the independence of that very system, and which were debated by legislators in 2019, have not been relevant since the start of 2020.

At the beginning of 2020, the process of appointing the new prosecutor general, which began in 2019 and initially caused controversy in the government, was finally completed. Andres Parmas, a former judge and a lecturer in criminal law at the University of Tartu, was appointed to this position.<sup>2</sup>

In 2020 and 2021, the Minister of Justice appointed new county court chairpersons to deal with civil and criminal proceedings of the first instance, with each of them being appointed for a period of seven years. The appointees included: Astrid Asi at Harju County Court, Toomas Talviste at Pärnu

County Court and Liina-Naaber Kivisoo at Viru County Court.

### ***Public perception of the judiciary***

The World Justice Project's Rule of Law Index 2020 survey awarded Estonia a score of 0.81 and tenth place in the country rankings (the same as in 2019).<sup>3</sup>

The European Commission's Rule of Law Report for 2021 highlighted the good functioning of the judicial system in Estonia under the conditions being imposed by a pandemic, as well as the high level of digitisation.<sup>4</sup>

The 2021 EU Justice Scoreboard showed that the Estonian judicial system continues to be amongst the most efficient and quickest in Europe.<sup>5</sup>

### ***Quality of justice***

#### ***Impact of COVID-19***

The functioning of the judiciary system was significantly affected by the COVID-19 pandemic, which became evident in the spring of 2020. In March 2020, The Estonian foreign minister, Urmas Reinsalu, unexpectedly notified the Council of Europe of the activation of Article 15 of the Convention for the

2 Justiitsministeerium. 2020. [Valitsus nimetas riigi peaprokuröriks Andres Parmase](#), 09.01.2020

3 World Justice Project. 2020. [Rule of Law Index](#).

4 European Commission. 2021. [2021 Rule of Law Report – Country Chapter on the rule of law situation in Estonia](#).

5 European Commission. 2021. [The 2021 EU Justice Scoreboard](#).

Protection of Human Rights and Fundamental Freedoms, but the Supreme Court responded quickly with a statement which emphasised the fact that were that Article to be used, Estonia's constitution would still apply and thus so would the right to a fair trial.<sup>6</sup>

On a positive note, the COVID-19 pandemic did not interrupt the Estonian judicial system. Since the beginning of the pandemic, the country has generally followed the principle that the judiciary system must not be disrupted,<sup>7</sup> and necessary measures to adapt to the pandemic were swiftly undertaken by the courts, the most important of which was the widespread use of video sessions in all areas of court proceedings, including the holding of essential court hearings in this way, and where possible, the use of written procedures.<sup>8</sup> As a result, the impact on trials remained relatively modest in relation to the state of emergency which was declared in the country between 12 February 2020 and 17 May the same year, as well as in relation to the subsequent health emergency.<sup>9</sup>

The effective continuation of the work of the Estonian judicial system under pandemic conditions is certainly something worth acknowledging. Good preconditions for this result

had already been created due to the relatively high levels of digitalisation in the courts. This was also ensured by rapid adaptation, both in terms of amending legislation and through the implementation of practical solutions. People's access to justice, the right to a trial within a reasonable time, and the right to effective judicial protection all remained guaranteed even when the country found itself in an emergency situation.

### *Justice and vulnerable groups*

On 22 June 2021, the European Court of Human Rights ruled in the case of R B v Estonia, in which the ECHR found a violation of Articles 3 and 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* due to the failure of the Estonian state to ensure effective measures in criminal proceedings to protect the interests of a child victim who had been the victim of sexual abuse.<sup>10</sup> This adjudication is important in terms of taking due account of the vulnerable position of child victims, as well as to better protect the needs and interests of such victims in the future.

Between 2020 and 2021, three important analyses of the Supreme Court's case law were

6 Riigikohus. 2020. [Õiglane kohtupidamine on tagatud ka artikli 15 kohaldamisel](#), 30.03.2020.

7 Eesti Kohtud. 2020. [Kohtud jätkavad tööd](#), 15.03.2020

8 Kohtute haldamise nõukoda. 2020. [Kohtute haldamise nõukoja soovitusel õigusemõistmise korraldamiseks eriolukorra ajal](#), 16.03.2020.

9 Justiitsministeerium. 2020. [Kohtud kohanesid eriolukorraga kiiresti ja hästi](#), 15.05.2020

10 Euroopa Inimõiguste Kohtu 22.09.2021. a otsus R.B. vs. Eesti, kohtuasjas nr 22597/16

published: namely, *Placement in a closed child care institution*,<sup>11</sup> *The placement of a person with a mental disorder in a closed institution*,<sup>12</sup> and *Cases involving aliens in the practices of the Supreme Court's Administrative Chamber in 2020: the more effective protection of rights*.<sup>13</sup> All of these drew attention to shortcomings in the practical implementation of measures which were being applied to children, persons with mental disorders, and aliens, respectively.

### **Fairness and efficiency in the justice system**

The 2020-2021 period was characterised by several amendments to the Judicial Procedure Code, with those amendments aimed at providing the necessary flexibility for litigation under pandemic conditions, along with various court measures aimed at reducing the burden on the busiest courts (especially Harju County Court), by directing cases to other courts. It is too early to assess the practical impact of these changes, but they are expected to increase access to justice to some extent and shorten procedural times in the most congested courts.

A legislative initiative which has had a greater impact on the general public concerns the public nature of judicial proceedings. Following public debates, a draft law is currently being

approved under the auspices of the Ministry of Justice.<sup>14</sup> It more precisely regulates the access of persons who are not parties to the proceedings to case files, and increases the number of court decisions which are published on the internet (including non-enforced court decisions which will now be available on the internet). In order to protect personal information, it is envisaged that personal information will be removed from any decisions which have not entered into force. The bill is expected to reach the Riigikogu in 2021.

On 2 March 2021, the Court of Justice of the EU provided a preliminary ruling in Case C-746/18, in which it took two fundamental positions in regard to Estonian national law and practice: (i) law enforcement access to traffic and location data, without being limited to procedures which are aimed at combating serious crime or preventing a major threat to public security is contrary to EU law; and (ii) national law which confers on a public prosecutor, whose task it is to conduct pre-trial criminal proceedings and, where appropriate, to represent the public prosecution in subsequent proceedings, any authority to provide an official institution with access to traffic and location data for the purpose of a criminal investigation is contrary to EU law.<sup>15</sup>

11 Riigikohus. 2020. Kohtupraktika analüüs "[Kinnisesse lasteasutusse paigutamine](#)".

12 Riigikohus. 2021. Riigikohtu praktika ülevaade "[Psüühikahäirega isiku kinnisesse asutusse paigutamine](#)".

13 Riigikohus. 2021. [Välismaalaste asjad Riigikohtu halduskolleegiumi praktikas 2020: õiguste tõhusam kaitse](#).

14 Justiitsministeerium. 2021. Halduskohtumenetluse seadustiku ja teiste seaduste muutmise seaduse eelnõu (kohtumenetluse avalikkus), 29.09.2021.

15 [Euroopa Liidu Kohtu 02.03.2021. a otsus kohtuasjas nr C 746/18](#).

On 18 June 2021, the Supreme Court reached a decision in a case related to the aforementioned reference to a preliminary ruling, in which it held that traffic and location data required for communications undertakings based on authorisation from the Prosecutor's Office is generally inadmissible as evidence. Based on the procedure that has remained in force, law enforcement authorities may not make any new inquiries in order to obtain such data.<sup>16</sup>

The cited court decisions are significant for Estonia when it comes to the protection of the right to privacy. Unfortunately the state has not yet been able to develop and implement amendments to those acts for which amendments are necessary in order to end violations of the right to privacy.

Following the rulings by the Court of Justice and the Supreme Court, a public debate was initiated concerning amendments needed for the collection of communications data, which covers the conditions for the use of such information in court proceedings. However, no political agreement has been reached to date, and we do not know when such changes will become law or what their scope might be. Under current legislation, the general retention of everyone's communications data (known generally as traffic data) by communications companies (data retention) is a practice which continues in Estonia. This is despite rulings from the European Court of Justice and the Supreme Court's finding that the obligation

to retain such data is contrary to EU law, and despite the fact that there is a level of confusion about which cases should involve the retention of data and how law enforcement authorities should be able to obtain and use such data. From the point of view of ensuring the protection of privacy, the current legislative situation is unsatisfactory.

## Checks and balances

### Key recommendations

- Continue the debate regarding a more effective solution to the constitution-related review of restrictions on fundamental rights and freedoms.
- Amend relevant legislation so that the ban on elections applies only to prisoners for whom this ban has been applied as an additional form of punishment.
- Contribute to the accessibility of polling stations and e-elections.

### ***Review of and public debate on measures taken to address the COVID-19 pandemic***

In May 2020, a clustered draft act for several legal amendments related to the COVID-19

16 [Riigikohtu kriminaalkolleegiumi 18.06.2021. a otsus kohtuasjas nr 1-16-6179.](#)

pandemic all came into force together, amending more than thirty pieces of legislation in the process.<sup>17</sup> The Chancellor of Justice criticised the fact that the package of urgently-needed amendments included changes which were not urgent, the impact of which extended beyond the emergency situation itself. Of particular concern was the amendment to reduce the period of judicial review regarding involuntary treatment and involuntary placement in a psychiatric hospital, as it made it possible to exclude people from being heard in such court proceedings.<sup>18</sup>

The Estonian Refugee Council and the Estonian Centre for Human Rights condemned one of the amendments contained in the cluster draft act, according to which the detention of applicants for international protection would be allowed without extraordinary justification, provided there were an exceptionally large number of applications.<sup>19</sup>

In addition, the *Act Amending the Communicable Diseases Prevention and Control Act* was passed

in May 2021. The draft specifies the competence of the government and the Health Board, and adds a legal basis to the law, making it possible to ensure that people are under an obligation to follow the precautionary infection safety measures in the event of the spread of an infectious disease. The act also adds the possibility of involving the police and other law enforcement agencies in the performance of the tasks of the Health Board.<sup>20</sup> Before the law was passed, people protested on Toompea against the draft act. Protesters expressed their fear that the draft act would allow the law to be used to evict people, especially children, by force. Legal experts have confirmed that this is not in fact the case, with the law changing procedure only to a minimal extent.<sup>21</sup>

Throughout the period in question, a more fundamental legal problem became clear. Namely, that there is no parliamentary scrutiny of the government's general arrangements when it comes to imposing restrictions,<sup>22</sup> nor could those restrictions be challenged by the Chancellor of Justice, who was left to instruct

17 Riigi Teataja. 2020. [Abipolitseiniku seaduse ja teiste seaduste muutmise seadus \(COVID-19 haigust põhjustava viiruse SARS-Cov-2 levikuga seotud meetmed\)](#), 06.05.2020.

18 Õiguskantsler. 2020. [Tähelepanekud abipolitseiniku seaduse ja teiste seaduste muutmise seaduse \(COVID-19 haigust põhjustava viiruse SARS-Cov-2 levikuga seotud meetmed\) eelnõu kohta, nr 18-1/200565/2001935](#), 07.04.2020

19 Eesti Inimõiguste Keskus, Eesti Pagulasabi. 2020. [Arvamus abipolitseiniku seaduse ja teiste seaduste muutmise seaduse \(COVID-19 haigust põhjustava viiruse SARS-Cov-2 levikuga seotud meetmed\) eelnõu 170 SE kohta](#), 13.04.2020.

20 Riigi Teataja. 2020. [Nakkushaiguste ennetamise ja tõrje seaduse muutmise seadus](#), 22.05.2021.

21 Ellermaa, E. 2020. [Meeleavaldajate ja õigusekspertide tõlgendus seaduseelnõust läheb lahku](#), ERR, 08.04.2021.

22 Madise, Ü. ja Koppel, O. 2021. [Ülle Madise ja Olari Koppel: õigusriik pandeemia ajal](#), ERR, 13.06.2021.

people to go to court to air their grievances.<sup>23</sup> Parliamentary parties remained sceptical about extending the Chancellor of Justice's mandate.<sup>24</sup> In response to this civil society actors called on the courts to review the government's measures (see below in relation to freedom of assembly).

Judgments regarding COVID-19 restrictions can be found in various areas. These include complaints about the rights of prisoners, as well as restrictions on freedom of movement and communications. Based on the available court rulings, the prevailing view is that restrictions regarding prisons, such as bans on long-term visits, are indeed proportionate, as the public interest in preventing the spread of the virus outweighs the impact of the restrictions on the rights of detainees.<sup>25,26</sup>

Many issues that could be related to COVID-19 restrictions have not reached the Estonian courts. Complaints have instead been directed to the Chancellor of Justice, who questioned the fact that restrictions have been established by a general order, over which the Chancellor of Justice cannot initiate a constitutional review. Instead, in the event of there being any cases involving a violation of rights, the

individual concerned must go to court to address the matter.<sup>27</sup> In this regard, the Tallinn Administrative Court has stated that the form of the general order is correct in terms of restrictions, while urging better opportunities for people to be able to protect their rights and interests. In the same decision, the court dismissed the complaint by the *Foundation for the Protection of the Family and Tradition* regarding the legality of COVID-19 restrictions, finding that the disputed restrictions regarding the number of participants at public meetings were indeed appropriate, necessary, and moderate in order to make it possible to prevent the spread of COVID-19.<sup>28</sup>

Issues and gaps emerged during the crisis, especially regarding colliding fundamental rights. These have been the object of a lively public debate and demonstrations, which should be welcomed from legal and practical points of view, especially where it involves institutions and even the courts addressing the rights and freedoms covered in this chapter. This is something that may allow some restrictions to be set earlier, before any intrusion has a chance of becoming serious. At present, however, it is still difficult to assess the extent to which the recent protests, mainly against

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23 Krjukov, A. 2021. [Reformierakond, EKRE ja Isamaa on õiguskantsleri õiguste laiendamise suhtes skeptilised](#), ERR, 09.09.2021.

24 [Tallinna Halduskohtu 01.10.2021. a otsus kohtuasjas nr 3-21-1079 \(jõustumata\)](#).

25 [Tartu Ringkonnakohtu 21.12.2020. a määrus haldusasjas nr 3-20-2343](#).

26 [Tallinna Ringkonnakohtu 18.01.2021. a määrus haldusasjas nr 3-20-2267](#).

27 Õiguskantsler. 2021. [Õiguskantsleri aastaülevaade](#).

28 Nael, M. 2021. [Halduskohus ei rahuldanud SAPTK kaebust koroonapiirangute kohta](#), ERR, 01.10.2021

masks, vaccinations, and restrictions,<sup>29</sup> are exacerbated by general confusion, information noise, mistrust, and boredom, or whether case law may reveal fundamental problems with the restriction of rights. Observers have explained the split society by using, amongst other things, the term ‘envy populism’.<sup>30</sup>

### ***Electoral process***

Local government elections took place in Estonia during the reporting period. For the first time, the voter list was electronic, so voters were no longer affiliated with a particular polling station and they had more flexibility to vote.<sup>31</sup> Polling stations were not pre-determined and everyone could go to the polling station of their choice within their district. Also, e-voters were given the opportunity to change their vote on election day itself.<sup>32</sup>

Several previous human rights reports have indicated that the right of all prisoners to vote should not automatically be restricted. There was no discussion at the national level regarding this, but discussions did take place at the international level. For example, in a shadow report submitted by the Estonian Equal

Treatment Network to the UN Human Rights Council, human rights NGOs in Estonia suggested that the ban on prisoners voting should be lifted.<sup>33</sup> During the UN Human Rights Council’s regular review of Estonia, both Canada and Sweden proposed that the total ban on voting be lifted.<sup>34</sup> Estonia’s response to the proposal was not promising, stating that the Ministry of Justice would analyse whether the current restrictions should be changed and how that might be achieved.<sup>35</sup> In light of this the situation is not expected to improve in the near future.

In the autumn of 2021, Eduard Odinets, a member of the Riigikogu, addressed the Chancellor of Justice, raising the issue of the political neutrality of educational institutions during local elections. More specifically, the director of the Narva Language Lyceum had sent out a call to parents to support his candidacy in the election, using the schoolchildren to take a letter home and giving the children chocolate for doing so. The Chancellor of Justice found that candidates were not prohibited from presenting their political goals and election promises in educational institutions. At the same time, he also referred to the fact

29 Vallimäe, T. 2021. [Liberaaldemokraatia ja rahvuslik solidaarsus](#), Sirp, 27.08.2021.

30 Vabariigi Valitsus. 2021. [Kaja Kallase valitsuse tegevusprogramm](#).

31 Vabariigi Valimiskomisjon. 2021. [Valijate nimekiri](#).

32 Ploompuu, A. 2021. [Kohalikud valimised tulevad mitmete muudatustega](#), Postimees, 14.06.2021

33 Eesti võrdse kohtlemise võrgustik. 2020. [Ühisaruanne Eesti kolmanda üldise korralise ülevaatuse \(UPR\) jaoks](#).

34 UN General Assembly. 2021. Report of the Working Group on the Universal Periodic Review – Estonia (A/HRC/48/7).

35 UN General Assembly. 2021. [Report of the Working Group on the Universal Periodic Review – Estonia, Addendum \(A/HRC/48/7/Add.1\)](#)

that advertising in school buildings is generally prohibited and that the Consumer Protection and Technical Surveillance Authority can assess the act.<sup>36</sup>

At the end of 2021, after several failures, the Ministry of Economic Affairs and Communications found a bidder to analyse the implementation of proposals for ensuring security and raising public awareness of the system, as proposed by the Electronic Voting System and Electronic Voting Task Group, which was convened in 2019 by the Minister of Foreign Trade and Information Technology.<sup>37</sup>

The local government elections of 2021 were the first after 2005 to lift the ban on outdoor advertising, which unreasonably restricts freedom of expression.<sup>38</sup> Candidates were allowed to campaign anywhere on election day except at polling stations. Since the introduction of the ban, the Estonian Centre for Human Rights has emphasised in various reports that the ban was disproportionate.<sup>39</sup> It was also

criticised by the Chancellor of Justice, who in 2017 asked the Riigikogu to lift the ban.<sup>40</sup>

The Electoral Commission and the courts were, for the most part, approached due to problems related to e-voting. For example, the Constitutional Review Chamber of the Supreme Court rejected a complaint by EKRE and Silver Kuusik that e-votes should be cancelled in certain election district constituencies because the translation application changed the names of candidates on the election website. The courts considered that a translation problem could not significantly affect the electronic voting result.

The Supreme Court also dismissed a grievance in which the complainant requested that electronic voting not be initiated on 11 October.<sup>41</sup> The complainant alleged that electronic voting was not sufficiently secure or reliable because the voting software and voter applications had not been audited. The Electoral Committee did not agree with this complaint, and the Supreme Court also considered that

36 [iguskantsler. 2021. Valimisreklaam koolis, 15.10.2021.](#)

37 [Liive, R. 2021. Riik tellis auditi, mis selgitab välja, kuidas on Kert Kingo e-valimiste töörühma ettepanekuid rakendatud, Digigeenius, 28.10.2021.](#)

38 [Riigi Teataja. Euroopa Parlamendi valimise seaduse, kohaliku omavalitsuse volikogu valimise seaduse, Riigikogu valimise seaduse, rahvahääletuse seaduse ja karistusseadustiku muutmise seadus \(valimispäeval valimisagitatsiooni piirangu ja välireklaami keelu kaotamine\), 13.01.2020.](#)

39 [E. Rünne. 2015. Inimõigused Eestis 2014 – 2015, õigus vabadele valimistele. Õiguskantsler. 2019. Euroopa Parlamendi valimise seaduse, kohaliku omavalitsuse volikogu valimise seaduse, Riigikogu valimise seaduse ja karistusseadustiku muutmise eelnõu, 17.06.2019.](#)

40 [Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi 28.10.2021. a otsus kohtuasjas nr 5-21-16.](#)

41 [Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi 21.10.2021. a otsus kohtuasjas nr 5-21-15.](#)

no circumstances had arisen to provide any reason to stop electronic voting going ahead.<sup>42</sup> However, the Supreme Court did recommend that election organisers be more transparent. It also asked for it to be possible to disclose audits and system analyses where these were carried out before the start of electronic voting, as long as doing so would not compromise security.<sup>43</sup>

In 2020, the state commissioned research into the possibility of voting on smart phones. The analysis found that e-voting by smartphone is technically possible, but various risks needed to be mitigated before it could be implemented. For example, devices running iOS and Android could use m-voting, although they would have to have the latest version of the software installed. Additionally, general cyber hygiene was pointed out as a threat (hackers, and the possibility of m-voting making it easier to vote on behalf of someone else).<sup>44</sup>

The analysis of facial recognition technology, which was commissioned by the State Information System Board (RIA), and was carried out by AS Cybernetica, found that facial recognition is a technically complex issue and would require sweeping technical changes. It would increase the risk of e-voting

failures, while also significantly increasing the system's performance requirements, whereas it would be impossible to reduce the error rate to zero. The study found that the e-voting service would become more inconvenient for the user, as it would require the presence of equipment, including a working camera. It also flagged additional privacy breaches. Instead of facial recognition, less intrusive measures could be used to combat attacks against e-voting. These include informing the person by email or text message that a vote has been cast on their behalf, as well as creating good practice for nursing homes when it comes to storing ID cards.<sup>45</sup>

Since e-elections first started, technical issues interfering with the e-voting processes have attracted a degree of public attention, and this election was not error free. As soon as the elections began, people who voted using the latest macOS operating system found they were having problems, receiving an error message and not being able to vote. The problem was fixed on the same day.<sup>46</sup> The voting app also displayed incorrect information to the first e-voters, making it seem as if their vote had not been taken into account, with the application displaying a message that it was a test vote.<sup>47</sup> This was caused by incorrect server

42 Ibid.

43 Ibid.

44 Cybernetica. 2020. [Mobile voting feasibility study and risk analysis](#).

45 ERR. 2021. [Uuring näotuvastust e-hääletamisel veel ei soovita](#), 15.07.2021

46 Alas, B.. 2021. [E-valimisi häirisid esimesed tehnilised rikked](#), Postimees, 11.10.2021

47 au, A. 2021. [E-hääletamine algas tehnilise praagiga: 900 kasutajale anti teada, et nende hääl ei lähe arvesse](#), Delfi, 11.10.2021.

programming concerning the time at which the message was displayed. However, all votes cast were counted.<sup>48</sup>

There were also problems and bottlenecks in terms of the accessibility of e-voting. One problem concerned the 2019 Riigikogu elections and European Parliament elections, where the attention of the Electoral Committee was drawn to the fact that the screen reader was unable to read the text in the voting app on the macOS operating system. A representative from the Electoral Committee admitted that the matter had been investigated, but the application was not improved over the next two years.<sup>49</sup>

Another issue which limited the user-friendliness and availability of the voting app arose in the local elections of 2021. The voting app is only available in Estonian. However, everyone who permanently resides in Estonia is allowed to participate in local government elections, although many of them do not speak

Estonian.<sup>50</sup> According to the State Electoral Service, there are currently no plans in place to add the option for the voting app to be made available in English or Russian.<sup>51</sup>

On 13 October, the newspaper *Postimees* published a piece stating that the translation application changed the names of candidates displayed on the election website.<sup>52</sup> In fact the names only changed if someone used the Google Chrome web browser and had the automatic translation feature turned on. For example, Hõbe Kuusik was displayed instead of Silver Kuusik.<sup>53</sup> On the same day a software patch was made available via [valimised.ee](http://valimised.ee), which eliminated this.<sup>54</sup>

On 14 October, the Estonian Conservative People's Party (EKRE) and Silver Kuusik, a candidate on their list, filed a complaint with the National Electoral Committee, asking them to cancel the results of electronic voting in those election districts which had been affected by the translation problem.<sup>55</sup>

48 Vabariigi Valimiskomisjon. 2021. [Kõigi kell 9 e-hääletanute hääled läksid arvesse](#), 11.10.2021.

49 Koitmäe, A. ja Arm, M. 2021. [Kas tulevikus saab valimistel hääletada ka mobiiltelefonis?](#) Vikerraadio.

50 Riives, A. 2021. [Kes on Hõbe Meikar või Sipelga Hilving? Tõlkerakendus muudab valimiste veebilehel kandidaatide nimesid](#), *Postimees*, 13.10.2021

51 Riigi valimisteenistus, e-kiri, 01.10.2021.

52 Riives, A. 2021. [Kes on Hõbe Meikar või Sipelga Hilving? Tõlkerakendus muudab valimiste veebilehel kandidaatide nimesid](#), *Postimees*, 13.10.2021

53 Pau, A. 2021. [Taas probleem: kandidaadid Silver Meikar ja Silver Kuusik moonduvad valimiste veebilehel Hõbe Meikariks ja Hõbe Kuusikuks](#), *Delfi*, 13.10.2021.

54 Vabariigi Valimiskomisjon. 2021. [Automaattõlge ei mõjutanud kandidaatide nimede kuvamist valijarakenduses](#), 15.10.2021

55 *Delfi*. 2021. [EKRE nõuab e-hääletuse tühistamist: kandidaadid, kelle nime väänas tõlkeprogramm, on ebavõrdes seisus](#), 15.10.2021.

The Electoral Committee did not satisfy the complaint, responding that there were only any problems with automatic translation on the valimised.ee website.<sup>56</sup> The same group appealed against the decision via the Supreme Court. The Supreme Court's Constitutional Review Chamber dismissed the appeal by EKRE and Silver Kuusik because the translation problem was unable to significantly affect the results of electronic voting.<sup>57</sup> According to the court, it can be argued in principle that the party responsible for displaying the names in translated form is the voter who set up automatic translation in their browser, while on the other hand it can also be argued that the National Election Service is responsible for not excluding the possibility of their website being automatically translated.

According to the Supreme Court, the Electoral Service violated the right of applicants to stand as candidates by failing to ensure that way it displayed the list of candidates on its website was not in some way distorted. The fact that the correct list was displayed in the voter application does not invalidate this conclusion. At the same time, the Supreme Court did not annul the results of electronic voting because the probability that someone did not vote for the desired candidate due to the Election Service's

failure to act is so small that the results could not have been significantly affected.<sup>58</sup>

In order to involve various groups of people and to share information, the National Electoral Committee, in co-operation with the Alarm Centre, opened a 24-hour election hotline on the +372 631 6633 number. The hotline provided answers to general questions related to the elections. In the period between 7-18 October, a total of 3,395 calls were answered via the election hotline. The majority of the calls were questions about how to take part in e-voting, along with the contents of the election information sheet, the location of voting booths at polling stations, and the right to vote.<sup>59</sup> The helpline was available for callers between 7 October and 18 October 2021, and questions were answered in Estonian, Russian and English.<sup>60</sup>

## **Enabling framework for civil society** —

### **Key recommendations**

- Exercise extreme caution surrounding state regulation of the disclosure of NGO donors, as this

56 Vabariigi Valimiskomisjon. 2021. [Vabariigi Valimiskomisjon jättis rahuldamata kaks e-hääletamisega seotud kaebust](#), 15.10.2021.

57 Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi 28.10.2021. a otsus kohtuasjas nr 5-21-16.

58 Riigikohus. 2021. [Riigikohus jättis rahuldamata kaks e-hääletamist puudutanud kaebust](#), 28.10.2021

59 iigi valimisteenistus, e-kiri, 01.10.2021.

60 Lomp, L. 2021. [Sügisel nõustab valijaid infotelefon](#), Postimees, 27.05.2021.

is something autocratic regimes often do.

## Regulatory framework

### General developments

On the one hand, the development during the reporting period was the result of a normalisation of the political situation, with the government changing at the beginning of 2021, with those who had rather selectively supported fundamental rights and freedoms not continuing in the coalition. On the other hand, the period was marked by a constant stream of restrictions and support measures following the spread of coronavirus. By 20 March 2020 the government had informed the Council of Europe that it might not respect the ECHR, including the freedoms included therein. The move itself received criticism,<sup>61</sup> although disproportionate interference could not be identified in practice. Although the police were sometimes accused of overreacting to threat assessments,<sup>62</sup> violations were also found at various demonstrations.<sup>63</sup>

In the Kaja Kallas government, the Minister of Population, whose portfolio included the

field of civil society for almost two years, did not continue, and the topic remained with the Minister of the Interior. Due to the change in power at the top, the already-approved development plan for the field was opened, family policy and other topics were taken out of it and, under the new title of *Coherent Estonian Development Plan 2021-30*, the Ministry of Interior Affairs and the Ministry of Culture sent a joint document to parliament for discussion in the summer.<sup>64</sup> No significant new topics on the subject of civil society were included in the development plan, but the topics of integration and adjustment and global ‘Estonianness’ found a place next to civil society.

The legal acts adopted to address the COVID-19 pandemic included amendments which have continued to have a favourable impact on the work of civil society organisations. As of 24 May 2020, amendments to the Non-profit Associations Act<sup>65</sup> and the Foundations Act<sup>66</sup> have made it possible for non-profit associations and foundations to make decisions in writing without having to hold a meeting, which typically requires physical presence. The amendments also lifted the requirement that the list of attendees at a general meeting of a non-profit association, as well as the minutes of a general meeting of a non-profit association,

61 Rünne, E. 2020. *Kergekäeline loobumine inimõiguste konventsioonist on libe tee*, ERR, 29.03.2020.

62 Sarv, H. 2021. *Ekspertid peavad politsei jõukasutust meelevaldustel liigseks*, ERR, 12.04.2021.

63 Tooming, M. 2021. *Politsei tuvastas piiranguvastaste meelevaldusel mitmeid rikkumisi*, ERR, 20.03.2021.

64 *Siseministeerium*. 2021. *Sidusa Eesti arengukava 2021-2030*.

65 *Mittetulundusühingute seadus*.

66 *Sihtasutuste seadus*.

must be signed by hand.<sup>67</sup> In addition, the rapid amendment of the legislation made it possible to postpone deadlines for submitting annual reports in 2020, from July to October, and at the same time the period of office for members of the governing bodies, which had expired in the meantime, was considered to have been extended due to difficulties in holding election meetings.

In 2021, the strategic partnership development programme was completed after having been delayed due to the pandemic. This was implemented by the Network of Estonian Non-Profit Organisations and the Centre for Applied Anthropology on behalf of the state chancellery. The aim was to improve permanent partnerships with NGOs in at least three ministries which, to some extent has succeeded despite the crisis. The Ministry of Education and Research, which was criticised in the previous report, has come a long way in developing a completely new concept, which will go through a reality test at the end of 2021.<sup>68</sup> During the programme, a handbook for officials was prepared, which helps to make sense of the whole process from setting goals to reporting.<sup>69</sup>

At the end of 2020, the first civic initiative was launched, focusing on the promotion of liberal values in Estonia, namely the Liberal Citizen Foundation (SALK). This, among other things, monitors the transparency of party funding, both in terms of donations<sup>70</sup> and social media advertising.<sup>71</sup>

### *Financing framework*

In other respects, the government reacted relatively neutrally to the crisis from the point of view of civil society. No special assistance was offered to NGOs, but most of the sectoral support measures also included non-profit organisations and foundations. An exception involved several subsidies in the field of entrepreneurship, where NGOs were discriminated against solely on the basis of their legal form of activity. For example, in the tourism sector only business associations were classed as being qualified to receive compensation for damages.<sup>72</sup> The Ministry of Economic Affairs and Communications only partially eased the conditions in the spring of 2021.<sup>73</sup> The Supreme Court supported the position of the administrative court and declared unconstitutional one of the unreasonable technical

67 [Tsiiviilseadustiku üldosa seaduse ja teiste seaduste muutmise seadus \(elektrooniliste võimaluste laiendamine koosolekute korraldamisel ja otsuste vastuvõtmisel\)](#) 180 SE.

68 Haridus- ja Teadusministeerium. 2021. [Strateegiliste partnerite rahastamine](#).

69 A. Rammo. 2021. [Strateegiline partnerlus vabaühedustega](#).

70 SA Liberaalne Kodanik. 2021. [Rahapada – Erakondade rahastamine](#). SA Liberaalne Kodanik. 2021. [Poliitreklaam Facebookis](#).

71 Tupay, P. 2021. [Kas oleme politseiiriigi loomise lävel](#), ERR, 09.04.2021.

72 Hea Kodanik. 2020. [MKM, miks sa sotsiaalseid ettevõtteid diskrimineerid](#), 07.05.2020.

73 Vabariigi Valitsus. 2021. [Valitsus toetas turismisektori toetuse tingimuste leevendamist](#), 09.03.2021.

conditions set out by the Ministry of Culture when it came to qualifying for support.<sup>74</sup>

While nothing changed in the distribution of regional support funds, the EKRE Minister of Finance forbade the *State Shared Service Centre* from making contractual payments to several strategic partners of the Ministry of Social Affairs in the field of equal treatment. This was an unexpected political intervention that included the argument, supported by the National Audit Office, that the Gambling Tax Act does not allow these issues to be financed.<sup>75</sup> The NGOs considered this bullying,<sup>76</sup> while the Ministry of Social Affairs found a short-term solution to the problem.<sup>77</sup> A more long-term solution needs to be found in 2022, when tax revenues will be fully decoupled from costs<sup>78</sup>.

No changes were made in the tax policy in favour of donations, although with the abolition of the tax exemption on housing loan interest from 2022 income, 300 euros per year can now in theory be added to the deduction of donations.<sup>79</sup> The topic was also discussed

at a traditional joint sitting of the three committees of the Riigikogu.<sup>80</sup> In terms of foreign funding, the reserve of the Active Citizens' Fund, which is supported by the European Economic Area, was increased by two million euros.<sup>81</sup>

At the end of 2019, the Supreme Court provided a newer interpretation of the Public Procurement Act (RHS), which until now has been strictly understood according to the instructions of the Ministry of Finance, meaning that almost every public interest NGO must comply with the RHS if more than half of its funding comes from taxpayers. Now the administrative chamber has seemed to state more clearly that the performance of a public task must be imposed on the association by law, not simply assumed, although there is no information regarding the use of the interpretation in practice.<sup>82</sup>

Once again, a name dispute reached the court, this being one of the few options for the state when it comes to hindering the freedom of association upon the registration

74 Riigikohtu põhiseaduslikkuse järelevalve kolleegiumi 22.12.2020. a otsus kohtuasjas nr 5-20-60.

75 Riigikontroll. 2020. [Vastus märgukirjale](#), 04.02.2020.

76 Hea Kodanik. 2020. [Ühenduste rahastuse peatamine on poliitiline kius](#), 14.07.2020.

77 Pölluste, G. 2020. [Tanel Kiik väljus lahingust Martin Helmega võidukalt: riigi toetus võrdsuse eest võitlevate ühenduste taskusse jätkub](#), Delfi, 17.07.2020.

78 Riigi Tugiteenuste Keskus. 2021. [Eesti kodanikuühendused saavad RTK abiga kaks miljonit eurot lisaraha](#).

79 Riigikogu. 2021. [Tulumaksuseaduse muutmise seadus 402 SE](#). Riigikogu. 2021. [Heategevuse rollist kodanikuühiskonnas](#), 28.09.2021.

80 Riigi Tugiteenuste Keskus. 2021. [Eesti kodanikuühendused saavad RTK abiga kaks miljonit eurot lisaraha](#).

81 [Riigikohtu halduskolleegiumi 20.11.2019. a otsus kohtuasjas nr 3-17-2718](#).

82 [Tallinna Ringkonnakohtu 11.06.2020. a määrus kohtuasjas nr 2-19-16784](#).

of associations (albeit this particular dispute came through the courts). It was found that, in the application filed on 13 September 2019, the intended name goes against good morals. The registry official saw the discrepancy in the desired name of MTÜ Süvariik ('Deep State'); the position was supported by the county judge, who forwarded the appeal against the ruling to the Tallinn Circuit Court for resolution. The latter asked for advice from the Estonian Language Institute and found on 11 June 2020 that the county court had incorrectly interpreted the meaning of 'deep state' and had not substantiated its reasoning for the name being inappropriate.<sup>83</sup> The association was entered into the register on the day after the ruling by the circuit court.

While most of the recommendations on reviewing company law focused on reducing regulation and reporting obligations for NGOs, the government's action programme includes the sentence: 'We consider it important to increase the accountability and transparency of politically-orientated foundations and NGOs',<sup>84</sup> referring to plans to analyse and make proposals, which will probably again begin to address the disclosure of donors (especially foreign ones) to advocacy organisations.<sup>85</sup>

### *Freedom of assembly*

Over the years, freedom of assembly has been the subject of debate. Estonia has even been called a police state,<sup>86</sup> because in order to prevent the spread of the virus, almost all public gatherings were temporarily banned, including the opportunity to demonstrate peacefully, even against those very restrictions. At the beginning of the pandemic, the Chancellor of Justice found that the intrusions were justified as long as the general restrictions on movement, which had been established to prevent the spread of the virus, remained in force, and that there were other ways in which individual freedom of expression could be realised.<sup>87</sup>

Religious associations reacted furiously to the ban on collective worship, but again the Chancellor of Justice found that freedom of religion itself was not restricted, while the ban on gatherings of more than two people was justified.<sup>88</sup> The Foundation for the Protection of the Family and Traditions (SA Perekonna ja Traditsiooni Kaitseks) compiled a comprehensive guide to the rights of demonstrators,<sup>89</sup> even going to court.

The court decision arrived on 1 October 2021. The Tallinn Administrative Court dismissed

83 USAID. 2020. [2019 Civil Society Organization Sustainability Index](#).

84 Krjukov, A. 2018. [Reinsalu loob Eestile välisagentide seadust](#), ERR, 28.03.2018.

85 Pärli, M. 2021. [Õigusteadlane kritiseerib riigikogu passiivsust koroonaalukorras](#), ERR, 28.08.2021.

86 Õiguskantsler. 2020. [Kogunemisvabaduse piirangud](#), 29.04.2020.

87 Õiguskantsler. 2020. [Usvabaduse piirangud eriolukorras](#), 22.04.2020.

88 Vooglaid, V. ja Nurmsalu, H. 2021. [Analüüs: meelevaldajad, tundke oma õigusi](#), Objektiiv, 28.05.2021.

89 Pärli, M. ja Tooming, M. 2021. [Politsei pidi meelevaldusse sekkuma](#), ERR, 11.04.2021.

the identification appeal against the government's order of 19 August 2020, considering both the form of a general order – meaning an individual act itself – and the restrictions being imposed on demonstrations to be lawful.

The general courts took a contrary view regarding the protection of rights in the matter of an individual act versus a government regulation: 'The form of the order provides individuals with even better opportunities to protect their interests and rights, as anyone whose rights it violates can directly challenge the order by means of a court action. There would be no availability of such an immediate option if the same restrictions were imposed by means of a regulation. In the latter case, a judicial review of similar restrictive clauses would only be possible within the context of a constitutional review procedure'.<sup>90</sup> However, the courts stated that the epidemiological situation and the pace of change in terms of restrictions could make judicial review of restrictions virtually impossible, even if court proceedings were expedited. They also considered prohibition appeals unworkable, as future events are difficult to predict.

The courts agreed with the applicant that the lack of knowledge cannot 'justify all sorts of preventive measures forever'. The Foundation for the Protection of the Family and Traditions (SAPTK) promised to appeal against the

judgement.<sup>91</sup> The government questioned the (popular) right of appeal by the foundation as a memberless organisation. The courts did not accept this because any legal entity can organise a meeting and every advocate is included in the protection of the right to freedom of assembly. Nor did the courts agree with the respondent in terms of an identification appeal not being processed against an administrative act, which has been annulled in the meantime, finding that such an appeal had the preventive purpose of protecting rights in the future. EKRE submitted a similar complaint to the courts regarding the restriction of fundamental rights and freedoms, taking umbrage against the government's order of 23 August 2021.<sup>92</sup>

At the time SAPTK was building up its strategic litigation capacity and it was more successful in another dispute. In this one the county court annulled a fine of 160 euros which had been imposed by the PBGB for violating the requirements for public meetings. The core of the dispute, however, was not freedom of assembly but sloppy misconduct proceedings by an over-eager official.<sup>93</sup> Case law covering restrictions is still in its infancy in Estonia, while in several other European countries such cases were resolved as long ago as the summer of 2020.

90 Nael, M. 2021. [Halduskohus ei rahuldanud SAPTK kaebust koroonapiirangute kohta](#), ERR, 01.10.2021.

91 Krjukov, A. 2021. [EKRE taotleb kohtult koroonakorralduste tühistamist](#), ERR, 30.09.2021.

92 [Harju Maakohtu 21.06.2021. a otsus kohtuasjas nr 4-21-2257](#).

93 Laffranque, J. [Koroonajuhtumitest Euroopa riikide kohtutes](#), Õhtuleht, 3.06.2020.

### **Public perceptions of civic space and civil society**

No major studies have been completed regarding civil society. The *NGO Viability Index*, which was published in autumn 2020, continued to recognise overall capacity and freedom of action, with concerns about attacks against NGOs and about growing inequalities between more and less able NGOs. In the index, Estonia again held first place in most indicators, compared to twenty-four other Eastern European and Eurasian countries.<sup>94</sup> In the subsequent year's report, Estonia remained at the same high level, surpassing all eighty-two countries included in the index.

In its report on social entrepreneurship, the OECD recommended that entrepreneurship education should be improved, that the capacity of associations should be increased, and that equal access to finance should be ensured.<sup>95</sup>

## **Disregard of human rights obligations and other systemic issues affecting the rule of law framework –**

### **Key recommendations**

- The response to the COVID-19 pandemic must be thoroughly analysed and publicly justified in terms of human rights and levels of proportion. The impact of restrictions must be considered both before and, periodically, afterwards, with a possible analysis also being conducted on a regular basis regarding possible side effects.
- The specific nature of the measures, the messages included in them and information which has been shared in regard to those measures, are all important aspects including for the purposes of mitigating the risk of misinformation.
- In a crisis situation, special attention should be paid to protecting the rights of vulnerable groups, including the rights of people with special needs, by cooperating with

94 USAID. 2021. [CSO Sustainability Index Explorer](#).

95 OECD. 2020. [Sotsiaalse ettevõtluse ja sotsiaalsete ettevõtete arengu stimuleerimine Eestis. Strateegia süvaanalüüs](#).

relevant organisations and, among other things, following the recommendations of the Estonian Chamber of Disabled People.

- The procedure for retaining communications data should, as a matter of urgency, be aligned with national and EU law and case law.
- A comprehensive audit of the current arrangements for the collection and storage of biometric data should be carried out, covering technical, legal, and wider societal perspectives.

### ***Impact of measures taken to address the COVID-19 pandemic on rule of law and fundamental rights***

On 12 March 2020, the Estonian government declared a state of emergency in response to the COVID-19 pandemic. This state of emergency ended on 18 May 2020. As of 12 August 2021, a fresh healthcare emergency has been in force in the country.<sup>96</sup>

In March 2020, Estonia informed the Council of Europe that it was exercising its right to derogate from its obligations under Article 15 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Estonia announced the suspension of a number of rights, including the right to liberty and the security of the person, the right to a fair trial, the right to respect for private and family life, freedom of assembly and association, the right to education, and the right to freedom of movement.<sup>97</sup> The use of the derogation ended at the conclusion of the state of emergency on 18 May 2020.<sup>98</sup>

Most of the COVID-19 measures introduced by the state were widely implemented, focussing generally on restricting freedom of movement, assembly, and association, alongside measures to restrict business operations. Restrictions on freedom of movement were imposed on people who had been diagnosed with COVID-19 and people who were living with them, along with people who were crossing the Estonian state border, while movement in public spaces was also restricted (known as the 2 + 2 rule).<sup>99</sup>

Restrictions on movement particularly affected vulnerable groups. In April 2020, people who were living in general care homes and special

96 Vabariigi Valitsus. 2021. [Koroonaviirus ja selle vältimine](#).

97 Eesti Vabariigi alaline esindus Euroopa Nõukogu juures. 2020. [Note verbale nr 1-16/6, 20.03.2020](#)

98 Oja, B. 2020. [Eesti teavitas Euroopa Nõukogu eriolukorra lõppemisest](#), ERR, 16.05.2020

99 Riigi Teataja. 2021. [Meetmed koroonaviiruse SARS-CoV-2 leviku tõkestamiseks](#).

care homes were prohibited from leaving the care home grounds until the emergency situation had been concluded.<sup>100</sup> Restrictions on care homes also concerned the right to respect for private and family life, as residents were unable to meet their relatives for a long time due to the visitation ban.

The restrictions also significantly affected the rights of detainees. The Chancellor of Justice criticised the ban on walking in fresh air and reductions in the opportunity to call on relatives to just once a week, which was put in place during the state of emergency.<sup>101</sup>

During that state of emergency, all public gatherings were banned, raising questions about the constitutional validity of the ban on political demonstrations and worship. The Chancellor of Justice expressed the opinion that, during the state of emergency, freedom of opinion and expression as provided for in the constitution was not in fact being restricted, as it remained possible to express opinions other than through physical gatherings. The Chancellor of Justice also explained that the ban on public gatherings prevented religious services from being held, although they were still permitted in private, with churches and

other places of worship remaining open and prayers not being banned.<sup>102</sup>

The COVID-19 restrictions also affected the right to education. During lockdown, distance learning was introduced in schools, while in some places distance learning was applied even after the end of the state of emergency. The lack of contact learning placed those students with special educational needs in a particularly vulnerable position. The Estonian Chamber of Disabled People found that the closure of contact schools, dormitories, and social services in schools and special schools resulted in a sharp increase in the care burden being borne by the parents of children with disabilities, with parents stating that school support for distance learning was for the most part insufficient.<sup>103</sup>

In June 2021, the Praxis think tank published a study entitled: The socio-economic impact of the COVID-19 pandemic on gender equality, which found that gender inequality had increased during the pandemic. With the closure of schools and childcare facilities, most of the burden of caring for children and carrying out domestic work was borne by women, with their opportunities to do paid work being reduced. The analysis revealed that measures to

100 Riigi Teataja. 2020. [Eriolukorra juhi korraldus hoolekandeesutustes liikumisvabaduse piirangu kehtestamise kohta](#), 17.05.2020.

101 Õiguskantsler. 2020. [COVID-19 haigust põhjustava viiruse leviku tõkestamise meetmed](#), nr 7-7/200489/2001899, 06.04.2020.

102 Õiguskantsler. 2020. [Õiguskantsleri aastaülevaade – Õigusriik eriolukorras](#).

103 EPIKoda. 2020. [Puudega inimeste toimetulek kriisiajal](#), 14.09.2020.

support gender equality during the pandemic in Estonia were insufficient.<sup>104</sup>

In the summer of 2020, the Estonian Chamber of Disabled People conducted a mini-study entitled *Disabled people coping during the crisis*. The recommendations of the study emphasised the need to provide basic social services for people with disabilities even during a crisis, as well as the need to provide contact learning opportunities for children who have special educational needs. In addition, emphasis was placed on the importance of providing accessible communications, and preventive organisation in terms of social work.<sup>105</sup>

Disputes over vaccination and mask wearing are widespread on social media and beyond. Some people see COVID-19 restrictions as a deprivation of liberty and a violation of human rights. The spread of misinformation has contributed to this. Misinformation related to the vaccination programme has been widely disseminated in Estonia.

The vaccination programme raises a number of issues which have been widely discussed in the media, in particular the COVID-19 certificate,

or vaccine passport. Since the autumn of 2020, in Estonia it has been compulsory to present a COVID-19 certificate to participate in certain activities, including public meetings or events, and visits to entertainment and catering establishments. Opinion articles in the media have been analysed in some detail, in particular regarding compatibility with the right to equal treatment when it comes to using vaccine passports for non-medical purposes, as well as issues related to the protection of personal data.<sup>106</sup>

Professor Mart Susi of Tallinn University has argued that the use of a vaccine passports does not violate human rights if presenting one is not an absolute condition for access to certain services or events. He also argued that anyone can obtain a vaccine passport if they want one.<sup>107</sup> In May 2021 the Chancellor of Justice explained that requesting an immunity certificate from consumers attempting to access certain services is a justifiable act inasmuch as it reduces the risk of infection, although it should still remain a temporary solution.<sup>108</sup>

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104 Haugas S., Sepper, M-L (Mõttekoda Praxis). 2021. [COVID-19 pandeemia sotsiaal-majanduslik mõju soolisele võrdõiguslikkusele](#).

105 EPIKoda. 2020. [Puudega inimeste toimetulek kriisiajal](#), 14.09.2020

106 Luik-Tamme, I., Šipilov, V. 2021. [Ingeri Luik-Tamme ja Vitali Šipilov: vaksineerimispassi mõju põhiõigustele](#), ERR, 05.03.2021.

107 Susi, M. 2021. [Mart Susi: vaktsiinipass versus inimõigused](#), Postimees, 14.05.2021.

108 Õiguskantsler. 2021. [Lihtsustatud juurdepääs teenustele immuunsustõendi alusel, nr 14-1/210929/2103416](#), 18.05.2021.

## Privacy and data protection

The question of whether, and to what extent, the right to privacy and data protection can be restricted has become extremely topical during the pandemic.

At the end of March 2020, Estonia joined the list of countries to have informed the Council of Europe that they had activated Article 15 of the European Convention on Human Rights, which allows for the partial restriction of the rights in the convention. The right to respect for private and family life was one of these rights. During the emergency situation, Statistics Estonia analysed the movements of Estonian residents in areas covered by certain mobile phone masts, on the basis of anonymous data received from telecommunication companies. In addition, the Health Board's voluntary mobile application, HOIA, was active as of August 2020.<sup>109</sup> The app exchanged non-personalised codes using Bluetooth signals and, if the user had registered an illness, informed their close contacts. By October 2021, the application had 272,378 users, with only a small percentage reporting their illnesses.<sup>110</sup> On a positive note, although it is difficult to assess the impact of the application, it is a positive that special attention has been paid

to the protection of personal data during the app's development. It is not possible to identify users or their location through the app, and the state does not receive any information about the identity of infected people or their close contacts.<sup>111</sup> The Data Protection Inspectorate and the Office of the Chancellor of Justice have also praised the HOIA application in this regard.<sup>112</sup>

The procedure for storing communications data has been a problem for seven years. This is a long time for such a problem not to have been resolved, and it is understandable that over the last two years it has become an even more newsworthy topic. In reality, it is an almost endless re-running of the same old argument. Fortunately, there are real changes being put in place this time around, especially with regard to case law. The universal obligations on the storage of metadata from network and telephone communications and the obligation to transmit this data to various public authorities to allow them to carry out investigations arises from the repealed EU Data Retention Directive. Until now, storage of communications data has continued based on national law (an implementing provision of the invalid Directive paragraph 111 of the Electronic Communications Act). The report from

109 TEHIK. 2020. [Telefonirakendus "HOIA" privaatsustingimused](#), 21.08.2020.

110 Allik, H. 2021. [Ebaõnnestumiste rägastik: kuidas HOIA rakendus on läbi kukkunud](#), Postimees, 22.02.2021.

111 Sotsiaalministeerium. 2020. [Täna saab laadida nutitelefoniga koroonaviiruse levikut piirava mobiilirakenduse HOIA](#), 20.08.2020

112 R. Liive. 2020. [AKI peab eestlaste koroonäppi sobilikuks, õiguskantsleri büroo jagab tunnustust](#). Digigeenius, 19.08.2020.

2018–2019 examined the ‘Intention to develop a draft amendment to the electronic communications act and related acts’ (in Estonian, ‘*Elektroonilise side seaduse ja sellega seonduvalt teiste seaduste muutmise eelnõu väljatöötamiskavatsus*’), which was initiated by the Ministry of Justice and which promised, among other things, to ‘establish more precise and clear criteria for situations in which communications data may be retained and later used in various procedures, thereby ensuring better protection of privacy and personal data’. The intention to develop the draft did not bring about any rapid changes, partially due to the desire to await decisions on the references for a preliminary ruling which was pending with the European Union Court of Justice at that time. The solutions are now available and are very explicit (see the next subsection), making it all the stranger that the Electronic Communications Act and the bill on ‘Amendments to Other Acts’, which was in its third reading in the Riigikogu on 15 September 2021, did not include amendments to paragraph 111.<sup>113</sup>

On 29 June, President Kersti Kaljulaid announced the *Act Amending the Identity Documents Act and Related Acts*, establishing Automatic Biometric Identification System (ABIS) database.<sup>114</sup> ABIS is an interoperable database that aggregates biometric data collected by public authorities for various

purposes. However, it does not allow such data to be linked to biographical data. The biggest problem with ABIS is its centralisation and the possibility of it being cross-used, so that in the future a fingerprint which has been issued for applying for a residence permit could in theory be used in criminal investigations, for example. The centralised collection and cross-use of sensitive personal data is problematic. This requires precise rules regarding access, retention periods, deletion, and rights of data subjects. Therefore ABIS may not be the best and most secure way to systematise biometric data held by the state. However, the current fragmented system (of which data owners are often unaware and for which the procedural rules are very vague) understandably also posed major security and confidentiality risks. Unfortunately, in addition to this the process of setting up ABIS does not include any precise definitions of which specific areas of data can be stored in it, how this should be done or even for how long the data should be kept. If there is no systematisation and clarity in regard to the biometric data being collected, or the rules for storage and access, the proposed database will create make it easier for breaches of the fundamental right to privacy and data protection rules to happen.

In October 2020, the European Court of Justice provided clarification in a case brought by the

113 Majandus- ja kommunikatsiooniministeerium. 2021. [Elektroonilise side seaduse, ehitusseadustiku ja riigilõivuseaduse muutmise seadus](#).

114 Riigikogu. 2021. [Isikut tõendavate dokumentide seaduse muutmise ja sellega seonduvalt teiste seaduste muutmise seadus 366 SE](#).

French advocacy organisation, Quadrature du Net,<sup>115</sup> regarding the admissibility of the lawful retention of communications data following the repeal of the Data Retention Directive in the 2014 Digital Rights Ireland decision. The decision clarifies the issues in terms of the cases involving Tele2 Sverige,<sup>116</sup> and also the Ministry of Finance,<sup>117</sup> while moving slightly away from the strictness of the Digital Rights Ireland and Tele 2 Sverige cases. In the Quadrature du Net case, the court explained that the state may oblige providers of electronic communications services to retain traffic and location data for all users of electronic communications equipment for a limited time if it faces an immediate and genuine security threat.<sup>118</sup> This means that the obligation to retain communications data is not fundamentally contrary to EU law, provided that it pursues a sufficiently serious legitimate aim and is supported by an accessible and clear system of restrictions and remedies. As a reminder, the Tele 2 Sverige adjudication stated that no data can be stored under any additional conditions. The Quadrature du Net adjudication provides that in the interests of the investigation of a serious crime, it is possible to request the retention of data from a specific service user and the release of data collected by the service provider for another purpose, such as ensuring

the quality or continuity of the service.<sup>119</sup> The Quadrature du Net adjudication introduced a degree of flexibility into the previous categorical ban and may have caused confusion both for those who consider the retention of all communications data to be useful for some reason and for those who have actively fought against it.

On 2 March, in response to a reference for a preliminary ruling from the Supreme Court, the European Court of Justice announced its views on the procedure for storing and using communications data in criminal proceedings, pursuant to paragraph 111 of the Electronic Communications Act,<sup>1</sup> and paragraph 901 of the Criminal Procedure Act.<sup>120</sup> The preliminary ruling clearly returns to the principles expressed in the Digital Rights Ireland and Tele 2 Sverige cases, while also reiterating the fact that, despite the invalidity of the Data Retention Directive, and that domestic security remains regulated by domestic law, the practice of retaining and using communications data remains subject to EU law because it directly concerns the activity of the service providers and the fundamental rights of EU citizens.

115 [Euroopa Liidu Kohtu 06.10.2020. a otsus liidetud kohtuasjades nr C 511/18, C 512/18 ja C 520/18.](#)

116 [Euroopa Liidu Kohtu 21.12.2016. a otsus Tele2 Sverige AB vs. Watson jt. ühendatud kohtuasjades nr C 203/15 ja C 698/15.](#)

117 [Euroopa Liidu Kohtu 02.10.2018. a otsus kohtuasjas nr C-207/16](#)

118 [Euroopa Liidu Kohtu 06.10.2020. a otsus liidetud kohtuasjades nr C 511/18, C 512/18 ja C 520/18, § 137.](#)

119 [Euroopa Liidu Kohtu 06.10.2020. a otsus liidetud kohtuasjades nr C 511/18, C 512/18 ja C 520/18, § 141.](#)

120 [Euroopa Liidu Kohtu 02.03.2021. a otsus kohtuasjas nr C 746/18.](#)

According to the court, Estonian national law is not in line with EU law and case law for the following reasons:

- It provides for the general and undistinguishing storage of communications data.
- In circumstances in which the prosecutor's office conducts pre-trial proceedings and, where appropriate, represents the public prosecution, it cannot be considered an independent body which has been empowered to authorise the retrieval of communications data from service providers.

The Court of Justice has provided clarification by stating that a disproportionate obligation to retain the communications data of all service users cannot provide a basis for gathering legitimate evidence. Evidence gathered in this way cannot be relied upon in criminal proceedings even if the prosecution has requested information only on data which has been recorded for a limited period of time and regardless of the amount and type of data available. However, if the communications service provider is required to retrieve the data of a highly-identifiable suspect, where such data has been collected for any other purpose, this can only be done for the purposes of investigating serious crime or mitigating serious security threats.

On 18 June, the Supreme Court also reached a significant decision in the Estonian criminal case of H K (see also the report for 2018–2019), in which it agreed with all the views expressed by the Court of Justice and concluded that telephone communications data which had been retained by telecommunications companies under the requirements of an unlawful provision may not be requested in criminal investigations.<sup>121</sup> There should therefore no longer be any doubt regarding the unlawfulness of paragraph 111 of the Electronic Communications Act,<sup>1</sup> nor could the judgment concerning Estonia be in any way surprising in light of the Court of Justice's previous case law.

In November 2020, the Ministry of Justice published the results of the survey, *People's privacy rights and the protection of personal data 2020*.<sup>122</sup> According to the survey, Estonians trust the data processing practices of public institutions the most, especially healthcare institutions, but trust private sector service providers to a much lesser degree. In the same year, the Data Protection Inspectorate pointed out that most complaints have been related to unauthorised access to health data. At the same time, the survey shows that about two thirds of the Estonian population does not have a clear understanding of which institutions and companies collect data about them.

A 2021 survey of fundamental rights by the European Union Agency for Fundamental Rights shows that 75% of Estonians think that

121 [Riigikohtu kriminaalkollegiumi 18.06.2021. a otsus kohtuasjas nr 1-16-6179.](#)

122 [Justiitsministeerium. 2020. Inimeste privaatsusõigused ja isikuandmete kaitsmine 2020, 05.11.20.](#)

they can change the provisions of web applications, pages, and services so that they do not collect personal data. This is the highest figure in Europe. Regarding concerns about service providers, law enforcement, or surveillance agencies, or national or foreign intelligence agencies or cybercriminals being able to access and misuse their data, Estonians are precisely at the European average, without showing any obvious trust or suspicion. Estonians consider their awareness of legislation to be slightly lower than the average European. Such legislation can be used to find out what data their service providers have collected and how they have used it. In relations with the public sector, Estonians' legal awareness is slightly higher than the European average. Strangely, according to the respondents themselves, awareness about the general data protection regulation is one of the lowest in Europe. In general, younger people, and those with higher incomes, were more confident and, in their view, more aware of the technical and legal options when it comes to being able to stand up for their privacy. There were no sharp differences between male and female respondents.<sup>123</sup>

Estonians self-reported relatively good awareness about the privacy settings of websites and the options they have for adjusting those settings to suit their personal preferences can be considered a good, promising practice.<sup>124</sup> It

is certainly good practice – albeit one which is still rather new – to expand the scope and opportunities of NGOs and advocacy. For example, from 2021 this is one of the main activities of the Estonian Centre for Human Rights in the field of data protection and digital services, which is providing an advisory service and is also hoping to be able to deal with advocacy and strategic litigation in the future.<sup>125,126</sup>

The issue of the retention of communications data, as well as the collection and use of biometric data, has come up often in public debates. For the former, the indispensability of such data in the fight against crime is often something which is emphasised, while it is difficult to find publicly-available statistical evidence about it, such as the relationship between the amount of communications data issued at the request of the prosecution and how much of it is successfully used to resolved criminal cases. It also needs to be repeated that the retention obligation is already a relic of a rather old and invalid EU directive. It is pointless to assume that the storage of communications data in Estonia can continue in its current form. The retention of biometric data has not received such widespread attention in the past, so critical questions have rightly been asked about the proportionality and necessity of ABIS. The possible uses of biometric data for security and safety have been clarified, but

123 FRA. 2021. [Fundamental Rights Survey, Data Protection and Privacy](#).

124 Ibid.

125 Eesti Inimõiguste Keskus. 2021. [Keskuse tegevus laieneb](#), 25.05.2021.

126 Eesti Inimõiguste Keskus. 2021. [Keskus alustab nõustamis andmekaitse ja privaatsuse vallas](#), 04.10.2021.

the chaotic nature of the current system has been criticised.

A trend which can be seen here is the increase in legal awareness, but also the increased readiness to restrict fundamental rights, which is probably something which can be justified by the circumstances of the pandemic. In contrast to greater awareness and positive case law, there is also a real tendency to take a bold and public approach to privacy restrictions – as an example, see ABIS and the draft amendment to the Electronic Communications Act – as well as the increased digital dependence and vulnerability which accompanies the pandemic.

# **LIBERTIES RULE OF LAW REPORT 2022**

**FRANCE**



# France

## About the authors



**VoxPublic** is a non-profit organisation composed of a permanent team of four advocacy specialists based in Paris. It is governed by a seven-member executive board and receives support from an active community of volunteers and ‘VoxPublic Agora’ members.

The association was created in 2016 and ever since has been working on empowering French civil society organisations and citizen initiatives in their advocacy actions. VoxPublic thereby provides support and capacity-building to victims of discrimination and social injustices wishing to challenge decision-makers. The team shares its expertise on a voluntary basis and thereby aims to reinforce partners’ capacities in the fields of advocacy strategies and communication skills. VoxPublic also provides partners with operational support in terms of campaign building, networking, strategic document writing, as well as strategic social media use and media.

## Key concerns

In the area of corruption interesting initiatives were taken by members of parliament, and the independent institution against corruption

made a compelling assessment of corruption risks and how to possibly address them. However, while a bill is pending before the parliament, the government has not to date taken any specific follow-up action.

The new ‘anti-separatism’ law – passed in July 2021 - includes several provisions which jeopardize freedom of information and freedom of expression, thus weakening media freedom. The law might also lead to severe restrictions on the right to freedom of association, insofar as it expands quite substantively the level of control over associations by the State, thereby producing a chilling effect on the work of civil society actors and a negative impact on civic space.

The state of health emergency introduced in the context of the COVID-19 public health crisis was maintained in France until June 2021, followed by a “period of exit from the state of emergency”. The considerable decision-making power afforded to the executive and the clear reduction of legislative and judicial powers which have resulted from this emergency regime have undermined the system of checks and balances, thus weakening the rule of law. The state of emergency in force in the framework of this public health crisis has immediately followed the state of emergency enacted in the framework of the state’s counter-terrorism measures, and civil society actors fear that the French democratic system will be weakened by a normalization

of extra-ordinary measures. Against the background of these worrying trends, VoxPublic set up the Watch Network – a network bringing together academics, lawyers, and representatives of associations and unions to monitor and report about rule of law threats during this unprecedented period.

The state’s failure to meet basic human rights obligations on several issues, which persists since decades, exacerbates social tensions and creates a system in which citizens feel excluded from society. These tensions are then used to justify the adoption by the state of new security measures that, in turn, gradually undermine the rule of law in France. This vicious circle is regularly denounced by the communities concerned and by many civil society actors.

### State of play

N/A Justice system

- Anti-corruption framework
- ↓ Media environment and freedom of expression and of information
- ↓ Checks and balances
- ↓ Enabling framework for civil society
- ↓ Systemic human rights issues

#### Legend (versus 2020)

- Regression: ↓
- No progress: –
- Progress: ↑

## Anti-corruption framework –

### Key recommendations

- Reform the national anti-corruption framework including through measures to reinforce protection of whistle-blowers.

According to the latest annual Transparency International’s Corruptions Perception Index, France ranked in the 23rd position with a score of 69. This score represents a regression of 2 points compared to the previous decade. The decline is due in part to the context of the COVID-19 health crisis, where considerable pressure has made it more difficult for many institutions to fight corruption.

The High Authority for the Transparency of Public Life (HATVP) has been denouncing the flaws in the control of political life, particularly concerning lobbying and illegal interest taking. To remedy, this the HATVP intends to make a more precise inventory of the activity of lobbies and shorten the timeframe by which lobbies must report their action from biannual to annual reporting. As for conflicts of interest affecting elected officials, it intends to clarify the definition of ‘taking interest’ in the Penal Code in order to penalize a wider range of fraudulent activities.<sup>1</sup>

1 <https://www.latribune.fr/economie/france/plus-belle-la-politique-la-hatvp-veut-mieux-encadrer-les-lobbies-et-la-prise-illegale-d-interets-886031.html>

A mission to evaluate the Sapin II law (anti-corruption/transparency for political activities, passed in 2016) was also undertaken this year, with members of parliament (MPs) Raphaël Gauvain and Olivier Marleix as co-rapporteurs. The mission led to a list of 50 recommendations. While rapporteurs commend the effectiveness of the French Anti-Corruption Agency (AFA), they nevertheless believe that the system should be substantially reformed. According to their proposal, the AFA should be refocused on economic actors and placed under a semi-tutelage of the government, and the competences of the independent anticorruption authority be transferred to the HATVP which would become the High Authority for Probity (HAP). In their view, the range of entities to which the Sapin 2 law applies should also be extended. The report also recommends promoting further the use of the Judicial Agreement of Public Interest (CJIP), an alternative and faster procedure than a traditional court action to submit claims related to transparency, the fight against corruption and the modernization of economic life. Finally, it also recommends strengthening the protection measures in place for whistle-blowers and ensuring the efficient and transparent treatment of reports.<sup>2</sup>

Following the report led by the two deputies, a bill to strengthen the fight against corruption in France was filed on October 19th 2021 by

MP Raphaël Gauvain. While this bill does not address all the recommendations made in the report, particularly with respect to the protection of whistle-blowers, it contains a number of relevant measures and, if passed, would greatly strengthen the national anti-corruption framework.

A tribune<sup>3</sup> in support of this bill was published on November 4th 2021, by a coalition of unions and associations including Anticor, a French association fighting against corruption. The tribune denounces the flaws of the Sapin II law and formulates 12 recommendations<sup>4</sup> to address the identified issues. While parts of these recommendations are addressed in the above-mentioned bill of MP Raphaël Gauvain, the coalition draws attention to the fact that the bill does not take into account the shortcomings regarding the status of whistle-blowers. France cannot consider itself exemplary in its fight against corruption if it does not integrate a much better protection of whistle-blowers into its legal framework.

<sup>2</sup> <https://www.economie.gouv.fr/cedef/convention-judiciaire-interet-public-cjip>

<sup>3</sup> [https://www.lemonde.fr/idees/article/2021/11/04/proteger-l-alerte-et-le-lanceur-d-alerte-est-un-enjeu-de-societe-majeur\\_6100939\\_3232.html](https://www.lemonde.fr/idees/article/2021/11/04/proteger-l-alerte-et-le-lanceur-d-alerte-est-un-enjeu-de-societe-majeur_6100939_3232.html)

<sup>4</sup> <https://loi.mlalerte.org/propositions/>

## Media environment and and freedom of expression and of information

### Key recommendations

- Repeal Article 36 of the Anti-Separatism law, or else provide guidance on their application to avoid any disproportionate impact on the exercise of the rights to freedom of expression and information

The law consolidating the respect for the principles of the Republic, the so-called ‘anti-separatism law’, which VoxPublic mentioned in its contribution to Liberties’ rule of law report 2020, was definitively adopted by the parliament on 23rd July 2021, incorporating some of the measures that had been rejected under the Global Security Bill. Despite numerous protests from associations and civil society and the referral to the Constitutional Council by more than 60 deputies, the decision rendered by the latter did not meet the expectations and fears of all these actors.

Article 36 greatly compromises the work of journalists and others trying to expose forms of police violence, as it provides that, “It is an offence to reveal, disseminate or transmit, by

any means, information relating to the private, family or professional life of a person that allows him or her to be identified or located for the purpose of exposing him or her or his or her family members to a direct risk of harm”, which then leads to “3 years’ imprisonment and a 45,000 euros fine.” This would result in ‘three years’ imprisonment and a fine of 45,000 euros” and “five years’ imprisonment and a fine of 75,000 euros” in the case of journalists.

Moreover, it is important to remember that France is the first European country in which journalists are most harassed, according to the 2021 annual report of the Council of Europe Platform for the Protection of Journalism and the Safety of Journalists.<sup>5</sup> Reporters Without Borders (RSF) released a documentary on October 14th 2021, denouncing the frequent use of Strategic Lawsuit Against Public Participation (SLAPP) by businessman Vincent Bolloré to silence journalists who might investigate his industrial activities. These SLAPPs are a real threat to freedom of expression and information, but also to the rule of law. RSF has published 7 recommendations to face this danger.<sup>6</sup>

## Checks and balances

### Key recommendations

- Conduct a careful assessment of the impact of the emergency re-

5 <https://rm.coe.int/embargo-version-annual-report-2021-wanted-real-action-for-media-freedom/1680a2440d>

6 <https://rsf.org/fr/actualites/le-systeme-b-le-documentaire-choc-de-rsf-sur-le-systeme-bolloré>

gime on the system of checks and balances and restore full parliamentary and judicial oversight over the executive

The COVID-19 pandemic and the associated health state of emergency in France has led to a strong questioning of the checks and balances between the executive and legislative branches. Legal scholars are alarmed that the executive has granted itself exorbitant powers, while parliamentary and judicial oversight mechanisms have failed to maintain a proper balance between managing the crisis and protecting the rule of law. Indeed, the government has granted itself wider powers during this period of crisis, notably through governance by ordinances, decrees, and orders. The vertical and sometimes chaotic management of the pandemic by the French executive has resulted in numerous infringements of fundamental rights and freedoms, marking a clear retreat from the rule of law. Following the creation of the Watch Network, in September 2021 VoxPublic published the report ‘15 Months of State of Health Emergency: What is the Outcome for the Rule of Law in France?’. The findings of this unique report point to a strong risk of trivialization of exceptional measures and, similarly to the anti-terrorist state of emergency (in force in France between November 2015 and October 2017), of their normalisation and integration in the ordinary legal framework. The Watch Network, which

seeks to foster a rule of law culture, remains active to this day.<sup>7</sup>

## **Enabling framework for civil society** ↓

### **Key recommendations**

- Repeal Articles 12 and 16-22 of the anti-separatism law, or else provide guidance on their application to avoid any disproportionate impact on the exercise of the rights to freedom of association

The adoption of the anti-separatism law has also greatly weakened the civil society framework.

In addition to the above-mentioned impact Article 36 has on freedom of assembly, Article 16 broadens the grounds for dissolution of an association, including associations, “that provoke armed demonstrations or violent acts against persons or property”. Associations such as Greenpeace or Attac, which often use spectacular non-violent actions to draw attention to their issues, see their freedom of expression greatly diminished by this. Article 16 also makes associations responsible for any comments and actions by any member, including comments made by volunteers on social networks.<sup>8</sup>

7 [https://www.voxpublic.org/IMG/pdf/rapport\\_etat\\_d\\_urgence\\_sanitaire.pdf](https://www.voxpublic.org/IMG/pdf/rapport_etat_d_urgence_sanitaire.pdf)

8 [https://www.assemblee-nationale.fr/dyn/15/textes/115t0656\\_texte-adopte-seance](https://www.assemblee-nationale.fr/dyn/15/textes/115t0656_texte-adopte-seance)

Furthermore, the provisions concerning the ‘contract of republican commitment’ and the new declarative obligations regarding private sponsorship add many additional restrictions and burdensome requirements negatively affecting freedom of association, including their access to funding.

Article 12 provides that associations wishing to obtain public financial aid must subscribe to this ‘republican commitment contract’. Article 13 prohibits associations that have not signed this contract from receiving young people for civic service. Finally, Article 15 makes the signing of this contract a condition for obtaining State agreement, and thus the financial or material benefits linked to this agreement.

These sanctions, among others economic in nature, can have the effect of muzzling associations which are particularly critical towards the authorities.

Articles 17 to 22 relate to changes in the granting of various tax benefits for associations and endowments, but also new reporting obligations and control powers for the tax authorities over associations’ resources and donors.<sup>9</sup>

The recent dissolution of the CCIF, an association fighting Islamophobia in France, on September 24th 2021 is symptomatic of the worrying reduction of associative freedoms in

France today and was followed by similar dissolutions such as that of the CRI (Coordination against Racism and Islamophobia). This dissolution was approved by the Council of State on the grounds that “to criticize without nuance” public policies or laws that are considered discriminatory is to push the victims of the alleged discrimination on the slope of radicalization and invite them to evade the laws of the Republic.<sup>10</sup>

Faced with the dangers of this law, the French coalition for associative freedoms continue to mobilize civil society actors (including associations, academics etcetera) alerting them about this reduction of their democratic space. The Observatory of Associative Freedoms - a project managed by the Coalition - will conduct an active monitoring of the consequences of this law. Coalition members will provide advice to associations that consider themselves unfairly sanctioned or penalized by the application of this law.<sup>11</sup>

9 [https://www.assemblee-nationale.fr/dyn/15/textes/l15t0656\\_texte-adopte-seance](https://www.assemblee-nationale.fr/dyn/15/textes/l15t0656_texte-adopte-seance)

10 <https://www.voxpublic.org/Dissolution-du-CCIF-Un-grave-coup-porte-a-la-liberte-d-association-en-France.html>

11 <https://www.lacoalition.fr/>

## **Disregard of human rights obligations and other systemic issues affecting the rule of law framework** ↓

### **Key recommendations**

- Take steps to ensure respect of Travellers' right to housing
- Adopt measures to ensure that the basic needs of exiles in informal settings can be met, including by halting evictions and confiscations in informal camps and initiating a constructive citizen dialogue with associations to allow them to distribute basic necessities
- Take concrete and effective measures to end systemic racial profiling

### **Systemic human rights violations**

Violations of the rule of law across the spectrum of human rights were of great concern in 2021 in France.

Here are three examples of problematic situations which expose systemic human rights violations and the failure by the state to address them:

#### ***1. Basic rights of Travellers aren't respected***

Travellers in France suffer continuous and severe violations of their right to housing. The State manages Travellers' housing through a system of 'reception areas' that do not respect the needs of communities. People find themselves confined to segregated spaces, often far from other homes, isolated from the most essential public services, and located in highly polluted and unsuitable areas. Moreover, evictions are very frequent, without sufficient time to prepare for them and without a solution for relocation. The families are then left in a situation of wandering and instability, as they are unable to access authorized areas that meet their needs. These systematic violations of the right to housing, and therefore of the rule of law, were made public in the report of the Observatory of the Rights of Itinerant Citizens on September 16th 2021 entitled, "Endless exclusion, the reality of the right to housing for 'Travellers' in France".<sup>12</sup>

The recent experimental implementation in seven 'départements' of new legislation, including provisions foreseeing fixed fines of up to €500 euros for the illegal occupation of someone else's land, is also denounced by Travellers as a discriminatory measure, especially since

<sup>12</sup> [https://www.voxpublic.org/IMG/pdf/rapport\\_odci\\_1\\_exclusion\\_sans\\_fin\\_droit\\_au\\_logement\\_des\\_voyageurs.pdf](https://www.voxpublic.org/IMG/pdf/rapport_odci_1_exclusion_sans_fin_droit_au_logement_des_voyageurs.pdf)

the communes do not respect their obligations in terms of reception areas.

## **2. Exiled people's basic rights are denied**

The repression of exiles has also increased this year, particularly with regard to the exiles in the Calais region (North of France). If the situation in Calais has been deplorable for many years, the actions of the state against exiles and civil society organizations advocating for the defence of their rights have reached alarming heights in 2021. In October and November, a 38-day hunger strike by Ludovic Hollbein and Anaïs Vogel and a 25-day hunger strike by the priest Philippe Demeestère denounced this situation, calling for three simple measures: a halt to the evictions of camps during the winter truce, a halt to the confiscation and destruction of personal belongings, and a constructive citizen dialogue with associations to allow them to distribute basic necessities. To date, despite a large mobilization of civil society organisations in support of the cause, wide media coverage, and numerous appeals to the government and the President of the Republic, these three basic demands have not been met. On December 1st, following a shipwreck in the Channel that killed 27 exiles trying to reach England, many associations mobilized to demand a change in policy from the French authorities. Instead of intervening to urgently

improve the dramatic situation and prevent further tragedies, the government's response was to tighten repressive measures against people in Calais, both legislatively and in practice, notably by prohibiting the distribution of food to associations not mandated by the State and by reinforcing security measures.<sup>13</sup>

## **3. Black and Arab men routinely discriminated by French police**

Amnesty International, Human Rights Watch, Maison Communautaire pour un Développement Solidaire, Open Society Justice Initiative, Pazapas Belleville, and REAJI have launched a class action lawsuit against the state for discriminatory ethnic profiling by the French police. Through this lawsuit, the judge could order the government to take concrete and effective measures to end systemic racial profiling.<sup>14</sup>

Recently, the case of abusive fines in Epinay-sous-Sénart confirms the fact that the issue of racial profiling is still far from being resolved and contributes daily to the undermining of the rule of law. About thirty teenagers and young people from visible minorities denounced the fines they are subject to imposed during the first lockdown period, which, according to them, are illegal, abusive, and discriminatory.<sup>15</sup>

13 <https://www.voxpublic.org/Greve-de-la-faim-a-Calais-pour-denoncer-la-maltraitance-des-exile-es.html>

14 <https://www.voxpublic.org/Action-de-groupe-contre-le-controle-aux-facies.html>

15 <https://www.bondyblog.fr/societe/police-justice/des-jeunes-surendettes-a-cause-des-amendes-du-couvre-feu-dans-les-quartiers/>

# **LIBERTIES RULE OF LAW REPORT 2022**

**GERMANY**



# Germany

## About the authors



**GFF (Gesellschaft für Freiheitsrechte / Society for Civil Rights)** is a Berlin-based not-for-profit NGO founded in 2015. Its goal is to establish a sustainable structure for successful strategic litigation for human and civil rights (HCR) in Germany, bringing together plaintiffs and excellent litigators to challenge infringements of HCR in court. GFF's initial cases focused on protecting privacy, freedom of information and freedom of the press against state intrusion, and on defending equal freedom for all.

## Key concerns

Germany has failed to implement the EU Whistleblowing Directive in time, negatively affecting the **anti-corruption framework**.

The **enabling framework for civil society** in Germany continues to raise rule of law concerns regarding the freedom of assembly and the financing framework for civil society groups. Tax law and jurisprudence continue to severely restrict and sanction political and critical engagement as well as advocacy work of civil society organisations. State practice and

newly adopted legislation disproportionately restrict the freedom of assembly in several ways.

### State of play

- N/A Justice system
- ⊖ Anti-corruption framework
- N/A Media environment and freedom of expression and of information
- N/A Checks and balances
- ⊖ Enabling framework for civil society
- N/A Systemic human rights issues

### Legend (versus 2020)

- Regression: ↓
- No progress: ⊖
- Progress: ↑

## Anti-corruption framework ⊖

### Key recommendations

The federal government should present a draft bill for the implementation of the EU Whistleblowing Directive. The legislation should provide comprehensive protection for whistleblowers, regardless of whether they report violations of EU law or other serious

misconduct. The legislation should be passed as quickly as possible, while ensuring sufficient time for parliamentary consultation and civil society participation.

the requirements of the directive and include reports of significant violations of national laws or other significant misconduct in the scope of the future Whistleblower Protection Act.<sup>4</sup>

## ***Framework to prevent corruption***

### ***Measures in place to ensure whistleblower protection and encourage reporting of corruption***

Germany has failed to implement the EU Whistleblowing Directive<sup>1</sup> by the deadline of December 17, 2021. A draft bill<sup>2</sup> from the Federal Ministry of Justice was not submitted to parliament. This failure was criticised by GFF and other civil society organisations.<sup>3</sup> Thus, for the time being, the existing law, which essentially consists of case law, will remain in place. The few existing protective regulations for whistleblowers are incomplete, confusing and subject to great uncertainty.

It is therefore urgently necessary that the EU Whistleblowing Directive be implemented in a uniform Whistleblower Protection Act. It is a positive development that the new coalition government has agreed to go beyond

## ***Enabling framework for civil society*** –

### ***Key recommendations***

State legislation that regulates the freedom of assembly should focus on enabling, facilitating and protecting the exercise of the freedom of assembly. Provisions that lead to more legal uncertainty, state surveillance and criminal prosecution, and thereby creating a severe chilling effect, should be reassessed in light of what is strictly necessary in a democratic society.

New forms of protest like climate camps should be recognised as falling under the scope of freedom of assembly and should only be restricted accordingly.

1 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law

2 [https://www.whistleblower-net.de/wp-content/uploads/2021/02/2020\\_11\\_26-Referentenentwurf-Whistleblowing-BMJV-1.pdf](https://www.whistleblower-net.de/wp-content/uploads/2021/02/2020_11_26-Referentenentwurf-Whistleblowing-BMJV-1.pdf)

3 Press release of April 29, 2021, by Gesellschaft für Freiheitsrechte, [Whistleblower-Netzwerk](#) and [Transparency Germany](#)

4 Coalition agreement between SPD, Bündnis 90/Die Grünen and FDP, p. 111.

The tax law that is de facto regulating most civil society organisations in Germany must be reformed to allow and protect public participation and advocacy work of civil society organisations.

## ***Regulatory framework***

### ***Rules regulating the exercise of the right to freedom of peaceful assembly***

In December 2021, despite sharp criticism from civil society,<sup>5</sup> the state parliament of North Rhine-Westphalia passed the state's first law of assembly (VersG NRW), which introduces numerous new restrictions for peaceful assemblies and participants of such. A broad catalogue of provisions imposes penalties on violations of certain prohibitions codified as either misdemeanours or criminal offenses. The penalties range from fines to imprisonment of up to two years. Inter alia, the prohibitions cover legitimate forms of protests (such as counter demonstrations)<sup>6</sup> and raise concerns regarding both the principle of

legal certainty in criminal law and proportionality.<sup>7</sup> Under the new law, participants face serious legal uncertainties as to which activities, conduct, and appearances may be deemed to fall within the scope of such prohibitions – and therefore lead to criminal prosecution. The prospect of potentially being prosecuted under unforeseeable circumstances intimidates and deters participants from exercising their constitutionally guaranteed right to assembly (the so-called chilling effect). Such effects are reinforced by the expanded surveillance competences foreseen by the new law as well as several other restrictive provisions.<sup>8</sup>

While the most pressing challenges to the freedom of assembly in the context of COVID-19 have been resolved from a constitutional point of view,<sup>9</sup> the second prevailing crisis of our time, global climate change, underlies recent rule of law concerns regarding the right guaranteed under Art. 8 of German Basic Law.<sup>10</sup> Climate protest camps organised by civil society organisations like Fridays for Future that involve infrastructures for sleeping, food-supply or debating<sup>11</sup> serve as a central means of expression or even a precondition for the

5 See for example <https://www.nrw-versammlungsgesetz-stoppen.de/>

6 See BVerfG, Beschluß vom 24. 10. 2001 - 1 BvR 1190/90.

7 For an overview of several legal opinions, see <https://www.nrw-versammlungsgesetz-stoppen.de/hintergrund/>.

8 Further examples include the facilitation of security check points by the authorities before and after assembly, or the general ban of assemblies on public highways.

9 See the German Constitutional Court's decisions: BVerfG, decision of April 15, 2020 - 1 BvR 828/20; decision of April 17, 2020 - 1 BvQ 37/20.

10 See <https://verfassungsblog.de/wir-bleiben-bis-ihr-handelt/> for a comprehensive evaluation of the matter.

11 The concept resonates notably well with the German Constitutional Court's framing of the core protected interest of Art. 8 as "participating in the formation of public opinion", see i.e., BVerfG, decision of October 24, 2001 - 1 BvR 1190/90 and BVerfG, decision of June 23, 2004 - 1 BvQ 19/04.

protests, and are currently facing substantial legal uncertainties. In absence of a decision by the Federal Constitutional Court,<sup>12</sup> regional courts rule inconsistently on whether certain infrastructures fall within the scope of protection of Art. 8.<sup>13</sup> This lack of clear legal guidance has led to a highly unpredictable practice by assembly authorities and police. Thus, even infrastructures serving basic needs such as sanitary facilities, weatherproofing<sup>14</sup> or resting facilities have been prohibited,<sup>15</sup> protesters have been harassed by police,<sup>16</sup> and criminal charges have even been filed. Consequently, protesters are deterred from exercising their freedom of assembly and are increasingly limited in their choice of means for protest.

According to the German Constitutional Court, the freedom of assembly is granting its holders a comprehensive right to self-determination regarding content, location, time and form of the assembly.<sup>17</sup> Hence, the state must not evaluate an assembly's objective or effectiveness as a justification for imposing restrictions.

Currently, regional courts do not consistently implement the Federal Administrative Court's jurisprudence on protest camps or non-traditional assemblies.<sup>18</sup> They often disregard the functional and symbolic meaning of infrastructures and consequently prohibit setting up such infrastructure, for instance tents or resting facilities. The authorities therefore neglect the organiser's right to self-determination,<sup>19</sup> which requires them to respect the concept of a protest that the organisers and participants have envisioned and to only limit infrastructure or other means of protests if they pose a concrete threat to other constitutional concerns or public safety. Moreover, this practice has turned the constitutional principle that any peaceful assembly does not require prior permission<sup>20</sup> by the state upside down. In fact, written approval of any infrastructure is now required, as otherwise protesters may face criminal prosecution or the dissolution of their protest.

12 The BVerfG explicitly left the issue undecided in BVerfG, decision of June 28, 2017 - 1 BvR 1387/17.

13 Restrictively, see VG Dresden, decision of September 04, 2020 - 6 L 600/20 or VG Aachen decision of July 04, 2018 - 6 K 1117/18; progressively, see VG Oldenburg, decision of July 12, 2021 - 7 B 2319/21, OVG Bremen decision of May 4, 2021 - 1 B 215/21, or OVG Münster, decision of June 16, 2020 - 15 A 3138/18; diversely, see VG Ansbach decision of October 27, 2021 - 4 S 21.1807.

14 See VG Hamburg, decision of September 4, 2020 - 13 E 3768/20.

15 See VG Dresden, decision of September 04, 2020 - 6 L 600/20, which effectively made the camp impossible.

16 See <https://taz.de/FFF-Klimacamp-am-Hamburger-Gaensemarkt/!5704102/>.

17 See BVerfG, decision of May 15, 1985 - 1 BvR 233/81, 1 BvR 341/81 69, 315 - Brokdorf.

18 See BVerwG, decision of May 16, 2007 - 6 C 23.06.

19 See i.e., OVG Schleswig, Beschluss vom 26.03.2021, 2 B 84/21.

20 See § 14 of the federal Assembly Law (§ 14 VersG).

### **Financing framework for civil society organisations**

The legal uncertainties concerning public participation and political activity of civil society organisations with tax-exempt status (public benefit organizations) have not been resolved,<sup>21</sup> albeit the finance ministries of *Bund and Länder* having promised to do so at least by reforming the administrative decree (*Anwendungserlass der Abgabenordnung*).

In addition, no further legislative reforms have been initiated. This inaction increases the pressure on civil society organisations. Some have increasingly faced legal action and threats by political opponents aiming to prevent them from publicly expressing criticism and generally from continuing their advocacy work.

Anti-democratic actors and the *Alternative für Deutschland* use the legal situation to intimidate unfavourable organisations.<sup>22</sup> They continue to publicly discredit non-profit organisations that work against right-wing extremism and demand that their tax-exempt status be revoked. They argue that tax-exempt civil society organisations are not allowed to publicly criticise a political party or to identify right-wing extremist positions or antisemitism

within the party, basing their arguments on the *Attac* case law of the Federal Fiscal Court.<sup>23</sup>

Many civil society organisations withdraw from public debates because of the legal uncertainties, and because of a case law by the Federal Fiscal Code that only allows tax-exempt civil society organisations to engage in political matters if strictly necessary to pursue the activities included in the Fiscal Code. This chilling effect became especially worrisome during the last year, when many elections in Germany took place, including the election for the federal parliament. Many organisations that traditionally supply information about their issues and warn against anti-democratic and far-right tendencies remained silent during last year's elections.

The legal uncertainties also seem to have influenced administrative proceedings, which take unreasonably long and thus become an additional burden for some organisations. For instance, in the case of *Demokratisches Zentrum Ludwigsburg*, the civil society organisation is still waiting for a decision by the financial authorities on whether their tax status remains withdrawn, inter alia, on grounds of breaching the principle of neutrality by taking a clear stance against right-wing extremism, after the first announcement of withdrawal in

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21 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 12.; 2021 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 17.

22 See for example the case of “*Fulda stellt sich quer*”

23 Judgment of the Federal Financial Court of 10 January 2019, V R 60/17; Judgment of the Federal Finance Court of 10 December 2020, V R 14/20.

June 2019.<sup>24</sup> The resulting financial insecurity, now lasting more than two years, threatens the very existence of such donation-based local civil society organisations.<sup>25</sup>

Public participation and political activity for civil society organisations are further restricted because, according to the current legal situation, any organisation that is mentioned in the public reports of the internal intelligence services (*Landesämter or Bundesamt für Verfassungsschutz*) is practically automatically deprived of its tax-exempt status. This is due to a reversal of proof in the fiscal code (§ 51 Absatz 3 Satz 2 AO), according to which, organisations – once mentioned in such a report – must prove that they are not extremist in order to uphold the tax-exempt status.<sup>26</sup> In addition, as the sources of the intelligence services are often confidential, the civil society organisations do not have access to the information on which the claims are being made and can hardly rebut it. The possibilities of legal protection are therefore extremely narrowed.

This restrictive financing framework creates chilling effects on civil society organisations that might prevent financially less stable local organisations from engaging in public debates.

Such chilling effects, as well as the generally sanction-like character of the tax law, may amount to an infringement on the right of civil society organisations to pursue political goals (provided that they do so using lawful and democratic means and provided that the aims advocated for are compatible with the fundamental principles of democracy) that is guaranteed to them as freedom of expression and freedom of association under Articles 10 and 11 of the European Convention on Human Rights (ECHR).<sup>27</sup>

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24 For further information, see: <https://freiheitsrechte.org/demoz/>.

25 For another case, in which the decision of the financial authorities took more than two years after the tax declarations was submitted, see <https://freiheitsrechte.org/pm-stellungnahme-changeorg/>.

26 See for instance, the case of *Vereinigung der Verfolgten des Naziregimes – Bund der Antifaschistinnen und Antifaschisten VVN-BdA*, an association founded by Holocaust survivors. For more information, see <https://freiheitsrechte.org/faq-demokratiestaerkungsgesetz/#verfassungsschutzklausel>.

27 See legal analysis by Prof. Dr. Dr. Wiater, <https://freiheitsrechte.org/pm-rechtsgutachten-gemeinnuetzigkeit/>.

# **LIBERTIES RULE OF LAW REPORT 2022**

**HUNGARY**



# Hungary

## About the authors



This report has been authored by the Hungarian Civil Liberties Union (HCLU). The Hungarian Civil Liberties Union is a human rights NGO. Since its founding in 1994, the organisation has been working to make everybody informed about their fundamental human rights and empowered to enforce them against undue interference by those in positions of public power. HCLU monitors legislation, pursues strategic litigation, provides free legal aid assistance in more than 2,500 cases per year, provides training and launches awareness-raising media campaigns to mobilise the public. It stands by citizens unable to defend themselves, assisting them in protecting their fundamental rights. They are present at courts, national and international conferences, universities, in the capital and the countryside.

## Key concerns

In the area of justice there were no significant changes. The criticised developments of previous years have further undermined the independence of the judiciary. As more senior

judicial positions are filled in this system, political influence becomes more manifest.

Similarly, in the area of corruption, opaque government spending and outsourcing of state assets to unaccountable organisations in 2021 create significant corruption risk. This, combined with shrinking public space and a systemic lack of action against high-level corruption, represents a significant step backwards.

Hungary is facing many serious challenges in the area of press freedom and pluralism and freedom of expression. The secret surveillance of journalists is a new emerging issue which makes it even more difficult for journalists to obtain reliable information.

The independent institutions that should limit the government's power are operating in a dysfunctional manner and the permanent special legal order (state of emergency) seriously threatens compliance with constitutional principles.

In addition, civil society organisations continue to face certain hurdles in carrying out their work. The repeal of the unlawful anti-NGO law was a step forward, but a new anti-NGO law has replaced it. The government continues to conduct a campaign against NGOs active in public life, using even legislative means.

The persistent failure to effectively address certain human rights issues also continues to

impact the national rule of law environment. As in previous years, fundamental rights are under serious threat. In the permanent special legal order established to allegedly respond to the public health crisis, rights can be severely restricted. In 2021, the government's campaign against the LGBTQI community opened a new chapter in the history of government-led hate campaigns.

### State of play

-  Justice system
-  Anti-corruption framework
-  Media environment and freedom of expression and of information
-  Checks and balances
-  Enabling framework for civil society
-  Systemic human rights issues

#### Legend (versus 2020)

- Regression: 
- No progress: 
- Progress: 

## Justice system

### Key recommendations

- The government should strengthen judicial self-governance by expanding the powers of the National Council of the Judiciary to counterbalance political influence on the judicial administration.

- The National Judicial Office should fill judicial and court management positions through regular tendering procedures in full respect of fairness and transparency requirements.

### Judicial independence

Although there were no changes to the legislation concerning the judiciary in 2021 and there were no significant personal changes, the developments of previous years have had an impact in practice this year, further undermining the independence of the judiciary.

The system of the appointment, selection, transfers, dismissal and retirement regime of judges and courts leaders remained substantially the same as they were in the previous years. The system for allocating cases has been similarly unchanged. The criticisms made in previous years remain valid. However, as more and more senior judicial positions are filled in this system, political influence in the judiciary is becoming more and more manifest. This can be seen, for example, in the decreasing expectations for independent and impartial judgments from the Kúria's (the Supreme Court) panels in politically sensitive cases, which overall shows a slow erosion of the independence of the judiciary. Although on the occasion of his appointment in 2019, the new President of the National Office for the Judiciary (NOJ) said that his priority was to end the tension between the National Judicial Council (the body tasked with safeguarding the independence of the judiciary) and

the NOJ, it has become clear that relations between these bodies have improved to a very limited extent.<sup>1</sup>

### ***Appointment and selection of judges, prosecutors and court presidents***

In 2021, the arbitrary administration of judicial appointments took another turn. A judgement declared unlawful the practice of arbitrarily annulling judicial appointments without any justification and any possibility of appeal, but the Kúria also ruled against this. The case is before the Constitutional Court, which will uphold the arbitrary practice until its decision.

The case has been ongoing since 2017, when, although a judge's application for a post at the Metropolitan Court was ranked first each time, the President of the National Office for the Judiciary (NOJ) repeatedly annulled it without giving any reason. In 2021, a final judgment was delivered that this practice was illegal. Still, on the motion of the NOJ, the Kúria also overturned this judgment and rejected all the applications of the judge seeking to enforce his rights.

The judgment<sup>2</sup> (which was later overturned by the Kúria) in the spring of 2021 laid down important safeguards against similar administrative arbitrariness in the appointment procedure for judicial posts, namely:

a) The judgment stated that there is a right of appeal even in the case of an invalid competition. Therefore, it is possible to appeal to the courts against a decision of the President of NOJ to annul a judicial vacancy. The annulment of applications is not merely a general administrative matter but an individual employer's measure affecting the legitimate interests of the applicants, against which the applicants must have a right of appeal to the courts.

b) The judgment also ruled that EU law protects the independence of judges in Hungary. One of the most forward-looking elements of the judgment was based on EU law regarding the right of persons applying for judicial posts to appeal against the annulment of their candidature. EU law requires the rule of law principles and effective judicial protection to be enforced in all member states. In doing so, the law obliges member states to give effect to the rights guaranteed in the EU Charter of Fundamental Rights, including the right to a judicial remedy. According to the judgment, given the primacy of EU law, Hungarian courts should ensure the right to a remedy in proceedings such as the present one, even if this is contradicted by domestic law.

c) The judgment also held that the annulment of competition could not be arbitrary.

1 Based on a statement made by a member of the National Judicial Council when he resigned from his position.  
[http://www.nepszava.hu/3141493\\_nemzetkozi-szervezetnel-folytatja-a-lemondott-biro](http://www.nepszava.hu/3141493_nemzetkozi-szervezetnel-folytatja-a-lemondott-biro)

2 Judgment no. Mf.V.30.054/2020/13/I. of the Regional Court of Appeal of Győr (Győri Ítéltábla).

It clarified that the annulment of a judicial vacancy is an employer's measure that must be duly justified, with details of the factual circumstances giving rise to it. This is the only way for the persons directly concerned, i.e., the candidates, to exercise their right to appeal.

d) The judgment also clarified that it does not matter if the post has already been filled. The court ruled that the transfer of a judge who has won a competition cannot be prevented by the fact that the position has already been filled in another way.

The court ordered the President of the NOJ to remedy the breach of rights and to act lawfully in response to the application of the judge concerned, who had been ranked first.

The NOJ brought an extraordinary appeal against that judgment. As a result, the Kúria set aside the final judgment and, in essence, upheld the judgment of the first instance, dismissing the application of the judge concerned. The Kúria<sup>3</sup> found that the decisions of the NOJ annulling the competition were lawful and duly reasoned, and that the petitioner's right to a legal remedy and a fair trial had been exhausted in that he had a legal opportunity to bring an action against the decisions against his employer, the Metropolitan Court of Budapest. The judge concerned has challenged

the Kúria's judgment, lodging a constitutional complaint<sup>4</sup> because it infringes the independence of the judiciary and the right to a judicial remedy. The Constitutional Court has not yet put the case on the agenda, nor has it ruled on its admissibility. The decision of the Kúria is currently in force.

### *Independence of the Bar association and lawyers*

It was revealed in the summer of 2021 that Hungarian lawyers, including the President of the Hungarian Bar Association, might have been the target of surveillance by the Pegasus spyware distributed by the Israeli company NSO.<sup>5</sup> Their telephone numbers appeared on the leaked list that includes the potential targets selected by the Hungarian operators of the Israeli cybersecurity company. According to all indications, the Hungarian operator was a Hungarian state body. In addition to the President of the Hungarian Bar Association, nine other Hungarian lawyers were identified among the potential targets, including defence lawyers working on criminal cases and lawyers dealing with civil law (business, real estate, compensation, etc.). Although there is no clear evidence that lawyers were targeted with Pegasus for political reasons, representatives of the profession have had several conflicts with the government in recent years. Several lawyers objected to measures that undermined

3 Judgment no. Mfv.X.10.049/2021/16. of the Kúria, 2 June, 2021.

4 Case no. IV/03595/2021 of the Constitutional Court.

5 Direkt36: President of the Hungarian Bar Association and several other lawyers targeted with Israeli spyware Pegasus. July 20. 2021. <https://telex.hu/direkt36/2021/07/20/pegasus-nso-surveillance-hungary-lawyers-bar-association-janos-banati>

the judiciary's independence and spoke out when the government attacked lawyers filing damages lawsuits against the state on behalf of convicts, labelling this process as "prison business". Due to the legally fortified institution of attorney-client privilege, the surveillance of lawyers is problematic. However, the rules of secret information gathering are so loose in Hungary that lawyers may become surveillance targets in a formally legal way. National security services, in particular, can monitor virtually anyone on a very large scale and with very little external control, even with intrusive spyware such as Pegasus. As of the beginning of 2022, Hungarian authorities have not finished any official investigation relating to this surveillance.

## **Quality of justice**

### **Accessibility of courts: legal aid system**

Since an amendment to the law in 2020, people living in disadvantaged conditions, extreme poverty or with disability have become even more vulnerable, as they can no longer appeal against administrative decisions in administrative cases - such as child removal or guardianship proceedings, or disability benefits - but can only challenge decisions by guardianship authorities and other administrative bodies in court. However, court proceedings are more costly and difficult for citizens to access than administrative proceedings. This problem persisted in 2021.

The amendment has made it extremely difficult for those who already had trouble in asserting their interests, especially those who cannot

access legal aid. These are the people who most need the help of public bodies to deal with their cases. Instead, the law has been amended on the grounds that removing the possibility of appeal will speed up final decisions. Another reasoning behind the amendment was that clients had hardly any appeals against decisions. However, this is contradicted by the experience of NGOs working with the affected people. In many cases, the correct decision was reached by appealing the administrative procedure at the second instance. The administrative appeal procedure is always shorter than an administrative court case, and it is much easier to draft an appeal than a court action. Not to mention that the fees for a judicial review are significantly higher. Although the client can ask for the costs to be covered, the application is complicated and challenging to complete without legal assistance.

### **Resources of the judiciary**

The government continued to increase the salaries of judges and prosecutors in 2021. Under the law adopted in 2021, the salary base for judges and prosecutors will increase by 13% in 2022. The salary increases, which was implemented in three steps from 2019, bring the salaries of judges and prosecutors to the same level. In total (over the three years), the salary increase is close to 60 percent.

### **Digitalisation: Publicity of hearings during the pandemic**

The pandemic situation has posed challenges for the publicity of court hearings. The government has created a new situation for the

trial phases of court proceedings by adopting Government Decree 112/2021 (III. 6.) on the reintroduction of certain procedural measures during an emergency. In the case of administrative proceedings, no hearing is held during the period of the enhanced defence, so that in this type of proceedings the issue of the publicity of the hearing does not arise during the period of the enhanced defence. However, in criminal proceedings, hearings and (de jure) public sessions cannot be avoided, and in some cases can be held by telecommunication during the enhanced defence period. In civil proceedings the Decree also provides, as a general rule, for hearings to be held, as far as possible, by means of an electronic communications network or other means of electronic image and sound transmission. In criminal and civil proceedings, the question arises as to how the publicity of court hearings is ensured during the period of the strict defence if the hearing is held by means of an electronic communications network or other means of electronic image and sound transmission or telecommunications equipment. Whereas public access to the courtroom was previously ensured by the fact that anyone could enter the courtroom, the possibility for anyone to follow the proceedings is not ensured in the case of trials held in the online space.

## ***Fairness and efficiency of the justice system***

### ***Length of proceedings***

By ratifying the European Convention on Human Rights, Hungary has committed itself to ensuring the right to a fair trial within a reasonable time under Article 6 and ensuring the right to an effective remedy for violations of this right under Article 13. This declaration appears in Article XXVIII of the Fundamental Law. Still, the European Court of Human Rights (ECtHR) has repeatedly indicated in recent decades that the Hungarian legal system does not provide a domestic remedy for the fulfilment of the requirement of Article 13 of the Convention, which the ECtHR considers effective and which would serve exhaustively to prevent the delay of court proceedings or to remedy the violation of rights caused by such proceedings. In its judgment in *Gazsó v. Hungary*, the ECtHR called on Hungary to establish a domestic remedy or a remedy consortium capable of addressing the structural deficiencies identified in the judgment in an appropriate manner, in accordance with the Convention principles laid down in the ECtHR case law.

Regarding the length of proceedings, the most important development in 2021 was the adoption of Act XCIV of 2021 by the Parliament. This Act contains provisions on the enforcement of pecuniary compensation for delay in civil proceedings. The Act introduces the compensation in the form of pecuniary (financial) satisfaction for the infringement of the fundamental right to have the civil proceedings

concluded within a reasonable time. The law will only enter into force on 1 January 2022.

This law only provides compensation in the form of pecuniary (monetary) satisfaction in cases of infringement of the fundamental right to have civil proceedings completed within a reasonable time. Administrative and criminal proceedings are not affected by this law.

## **Anti-corruption framework**

### **Key recommendations**

Levels of corruption are higher than ever. The government must stop taking advantage of the coronavirus pandemic to engage in corruption and must take the necessary legislative and non-legislative measures to ensure transparency in spending and to return assets used for public functions to public ownership.

### **Levels of corruption**

In Hungary, the dismantlement of the constitutional state and the elevation of corruption to public policy happens simultaneously, in strong correlation with one another, generally

under the guise of some mission carried out for the public good (currently: the actions against the crisis caused by the coronavirus).

### ***Opaque government spending and budget reallocations***

The pandemic provides many opportunities for opaque government spending and budget reallocations. In 2020, the government set up new funds as a response to the economic crisis caused by the pandemic because the measures related to the epidemic justify some unforeseen budgetary expenditure. This is undoubtedly true. However, once the funds were exhausted, the government reallocated more and more funds. In many cases, these funds were used for investments, improvements (or even salaries) that had already been included in the annual budget, so it seems as if they were spent twice. In all cases, the spending of the funds was decided outside the standard budgetary procedure, essentially on an ad hoc basis, in the form of government decisions. In many cases, it was impossible to determine, based on these government decisions, what specific measures were being financed by the expenditure and to what extent they were actually helping mitigate the epidemic's economic impact.

According to an article of the most acknowledged economic weekly newspaper, at most a quarter of the money spent from the Economic Protection Fund was (at least indirectly) used for economic protection.<sup>6</sup> A particular

6 A gazdaságvédelemre szánt pénzeknek legfeljebb a negyede mehetett válságkezelésre. 19 January, 2021., [https://hvg.hu/gazdasag/20210119\\_gazdasagvedelmi\\_alap\\_szamok](https://hvg.hu/gazdasag/20210119_gazdasagvedelmi_alap_szamok)

difficulty with the estimate was that it was almost impossible to determine to what extent the amounts sent contributed to this objective. In many cases, the measures were not necessarily intended to provide a wage or other support for jobs in existing businesses that had lost their market or were in difficulty, but to provide job creation benefits for new investment by the elite close to the government. Meanwhile, the government communicates every job rebate as a direct response to the COVID crisis. The primary beneficiaries of the transfers are partly investments by various pro-government actors and a number of sports-related facility developments. The reallocations to sports are interesting because they are transfers from the Economic Protection Fund, the emergency government reserve, and the Central Residual Settlement Fund.<sup>7</sup>

The new waves of the epidemic also hit the economy hard. As a result, in May 2021, the government had to make significant changes to the 2021 budget, for example, raising the deficit target from 2.9% to 7.5%. The overspending became so excessive that even the Hungarian National Bank spoke out against it.<sup>8</sup> The amendment of the budget was non-transparent: it did not include tables or numerics, derived justifications, or severe macroeconomic

forecasts.<sup>9</sup> Similarly to 2020, the government did not specifically use the increased room for manoeuvre to mitigate the epidemic's negative economic and social impact. In many cases, the funds were used to support additional investments by the clientele or for other purposes, such as sports or churches. This remained the case in 2021, as budget amendments largely swelled the budget of the completely opaque Economic Protection (now called Economic Recovery) Fund.<sup>10</sup> The government can reallocate it to a wide variety of purposes without the consent of Parliament, and therefore without a transparent debate. The budget for 2022 theoretically foresees a smaller deficit but introduces the Investment Fund, which could similarly serve clientele-building purposes, and is planned to remain part of the budget in the coming years.<sup>11</sup>

### ***Outsourcing of state assets***

This process continued in 2021 in even greater in volume than in 2020. The process can be described as a means of transferring power: after outsourcing public assets to a foundation, some public tasks are formally performed by bodies independent from the state. The bodies of these foundations have many people close to the present government or even members

7 19,7 milliárdot vesz ki a kormány a Gazdaságvédelmi Alapból. 15 December, 2020.

8 *Gyorsabb hiánycsökkentéssel a fenntartható felzárkózásért.* Press release of the Hungarian National Bank. 27 April, 2021.

9 Karsai Gábor: *A módosított magyar költségvetés tele van átláthatatlan és trükkös számításokkal.* G7, 6 May, 2021.

10 Karsai, *ibid.*

11 *Szórja a pénzt a kormány a 2022-es költségvetésben a nagy beruházásokra.* 5 May, 2021.

of the government. The transfer of public assets can be put into different categories: these include, first of all, the higher education institutions, and using this framework for asset transfers, which includes either transferring state universities to private foundations, or already existing private foundations, that can be linked to the government or Fidesz politicians (such as Mathias Corvinus Collegium),<sup>12</sup> receiving exceptionally substantial assets to perform public duties associated with higher education. The stated aim of the transformations was to make the foundations independent from the current government, but by requiring a qualified majority, these rules are unchangeable.

The outsourcing of universities into foundation maintenance was done in several waves; the last wave happened in early 2021. In January, many more prominent universities of the countryside (of Szeged, Pécs, and the University of Sciences of Debrecen) and the Semmelweis University of Budapest started to be organised under a public foundation. On April 27, 2021, the Parliament passed laws according to which most of Hungary's higher education will no longer belong to the government. Outside of Budapest, there are no universities left that a foundation or a church does not maintain. In addition, many more asset-manager foundations were created in the fields of culture, education or agriculture, their leadership and

oversight being handed to entities close to the government. The new pieces of legislation provided significant assets free of charge to these foundations.<sup>13</sup> At the same time, regulations related to the public trust funds were codified: the two-thirds parliamentary majority of the governing parties created the act that regulates the new legal institution.<sup>14</sup>

From the perspective of anti-corruption, the most worrying development is the fact that while the state provided (and can further provide) significant assets to public trust funds that will perform important public tasks (e.g., higher education, or in the case of university clinics, healthcare activities as well) the government's opportunity to enforce the sufficient level of performing these tasks will be limited. The boards of these foundations are unaccountable, their members cannot be removed, and the state can basically disclaim all of its founder's rights in favour of them. After the appointment of the first board, the state or the government will no longer have the right to revoke the board member, not even in case of not or not sufficiently performing the public task or misuse of the significant assets provided for the fund.

This is particularly problematic because the act, more or less, does not determine any rules about conflict of interest related to members of the board. Active Fidesz-party politicians and

12 *Magánkézben jobb helyen van a vagyon az államinál, mondta az államtitkár, majd átadta magának az állami vagyont.* 19 October, 2020.

13 *Megszavazta a parlament, hogy alapítványokba szervezzék ki a közvagyonot.* 27 April, 2021

14 See the content of the issue no 75 of 2021 of the Official Gazette (Magyar Közlöny), 30 April, 2021.

government members received several positions in the boards - according to some calculations, nearly 40 to 50 percent of the board positions are filled with members related to the Fidesz party or to the government directly. An additional 20 percent are related to the government in a less direct way,<sup>15</sup> which makes the government's statement (namely, that the reform is necessary to reduce the governmental dependency of higher education institutions and guarantee university autonomy)<sup>16</sup> unfounded. In this regard, independence and autonomy could be applied only if the government is different from the current one because the strong personal bonds can guarantee the influence of the current government.

Different types of risk emerge when it comes to the plan regarding the Hungarian campus of the Chinese Fudan University. Under the plan, the Hungarian government would bring one of the most prominent Chinese universities to Hungary in the framework of a large-scale investment, and the Hungarian business partner should pay the costs. According to the proposal of the competent ministry, this would happen by using Chinese loans, Chinese materials, and the contribution of Chinese companies. During the consultations related to the plan, the affected municipalities' recommendations (led by the opposition) were not taken into consideration,<sup>17</sup> and only the

large-scale protest of citizens convinced the government to delay the project to 2022, after the elections. Contrary to this, the bill that establishes the public trust fund to maintain the Fudan University and provides it with valuable real estates in Budapest was already adopted by the government majority of the Parliament.

The establishment of a new state authority is also related to the outsourcing of the state. This regulatory body, the Supervision Authority for Regulated Activities is entitled to issue decrees within its own competence. The new body will also take competencies from the Ministry of Finance and from the Ministry of Justice. By the second half of 2021, this authority supervises the following activities: tobacco trade, the gambling market, activities of the bailiffs and liquidators. Furthermore, the authority deals with concession issues. The prime minister appoints the newly established authority's president for nine years, which strongly suggests that the aim of establishing the authority is to limit the margin of a subsequent government which might be different from the current one,<sup>18</sup> and to create an informal network suitable to replace the formal, regulated structures with a kind of "deep-state".<sup>19</sup>

Furthermore, another government plan attracted a lot of attention. In June 2021, a

15 *Egyetemi modellváltás: íme az újabb kuratóriumi tagok névsora*. 27 April, 2021.

16 *Elfogadták az alaptörvény kilencedik módosítását*. 15 December, 2020.

17 *Ennél értékesebb telket nehéz lett volna felajánlani Kínának*, 7 June, 2021.

18 Schiffer András: *Magyarország kiszervezése*. 6 April, 2021.

19 *Perverz privatizáció zajlik a mélyben: adjátok vissza az országunkat!* 14 April, 2021.

tender was issued for a concession agreement to maintain and partly develop the highway system of Hungary for the next 35 years. However, publishing the founding documentation was refused.

### **Framework to prevent corruption**

#### **General transparency of public decision-making: access to public interest data**

Under the state of emergency, the process for requesting public interest data allows for the legally binding response deadline to be increased to 45 days by the data provider, three times the original one (which could be extended once by 45 days), if the request for the public interest data would negatively impact the entity's ability to carry out its public activities related to the pandemic. Public authorities widely use this possibility, even when this has no relevant epidemiological reason. In their decision made in April 2021, the Constitutional Court stated that the possibility of the considerable deadline extension was not against the Fundamental Law. Still, they declared that the data controller must specify the exact reason for the extension, and it is not sufficient to refer to this regulation in a general way.

#### **Rules on preventing conflict of interests in the public sector**

According to a decree issued under the state of emergency, the member of the government

responsible for emergency prevention and an appointee of them may, in certain cases, grant exemptions from the general public funding rules for procurements related to the coronavirus. In especially urgent cases, calling a partner directly to bid is even possible. The reason for the modification was to minimise the bureaucratic impediments to procurements related to health care and others directly linked to the pandemic. Thanks to these eased rules, hundreds of billions of forints' worth of procurements may have taken place without any real competition, with a total lack of transparency. The general public was not informed about the identity of the person eligible to grant exemptions in case of certain procurements.

The public procurement of the COVID vaccines also shows irregularities. The Russian Sputnik V and the Chinese Sinopharm vaccines were both authorised in Hungary. The contract for the Russian vaccine contained provisions unfavourable to the Hungarian side in certain elements.<sup>20</sup> Specific purchase prices also came to light for eastern vaccines: according to this, one dose of the Sinopharm vaccine costs 31.5 euros (HUF 11,352), while one dose of the Sputnik V serum costs 8.5 euros (HUF 3,063). It is worth comparing this data with the price of vaccines from the joint procurement of the EU, which became known in December 2020: the cheapest of the vaccines bound for Hungary is AstraZeneca, of which one dose is 1.78 euros (HUF 641), followed by the one-dose Johnson & Johnson vaccine, which costs 8.50 dollars (HUF 2,526), the Pfizer-Biontech

<sup>20</sup> *Orosz vakcinaszereződés: teljesen egyoldalú szerződést írt alá a kormány.* 11 March, 2021.

vaccine at 12 euros (HUF 4,325) per dose, and the Moderna serum at 18 dollars (HUF 5,348). From the contracts made public, it has also come to light that the government entered a contract with an intermediary company with a questionable background<sup>21</sup> in the interest of obtaining the Chinese vaccines; this company is also associated with a company that profited from the ventilator acquisitions back in 2020. In addition, the use of an intermediary company seems unnecessary regarding this specific transaction. The company has not seen such tasks in the past, and the revenue from the acquisition of the Chinese vaccine significantly exceeds revenue produced throughout its existence up to now.<sup>22</sup>

It is important to note that Gergely Gulyás, Minister of the Prime Minister's Office, published the contracts of the acquisition of the Russian and Chinese vaccines on his Facebook page, which cannot be considered an official communication platform. In the past months, it has become more and more common that certain members of the government use Facebook to share official information via the social media platform.<sup>23</sup> Meanwhile, on official government platforms important information and documentation is shared late and is difficult to access. This is done most likely with the intention of directing citizens to the personal communication platforms of pro-government politicians, where they can be informed more

frequently and directly about the governing party's political messages.

### ***Measures in place to ensure protection and encourage reporting of corruption***

The governing parties undermined parliamentary work in many cases where the opposition took the initiative. A good example of this was when the MPs of the governing parties were not present at an extraordinary parliamentary meeting, convened on the initiative of opposition representatives, on 1 February 2021. When initiating the convening of the meeting, the opposition announced that it wished to create committees of inquiry to examine the pandemic control and the government's economic protection measures. Then, in a form operating beyond parliamentary frameworks, the six opposition parties brought about the committee of inquiry, which began its operation on February 12. László Kövér, the Speaker of the House - despite the fact that the committee acted in conformity with legislations - felt it necessary to announce that the committee had no parliamentary licence and is a "pretence of a committee operating without legal basis", which would be suitable for the deception of the public; furthermore, he noted that they cannot use the title of parliamentary committee of inquiry either.

21 *Színjáték lehetett a kínai vakcinát beszerző, zavaros hátterű magyar cég tulajdonosváltása*. 13 March, 2021.

22 *Összeér a kínai vakcinabiznisz és a botrányos lélegeztetőgép-beszerzés*, 12 March, 2021.

23 *Orbán Viktor bejelentése a várható legújabb védelmi intézkedésekről*, 9 November, 2020.

## **Investigation and prosecution of corruption**

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### **Legislation and policy measures**

One of the few steps recently taken against corruption is an action against gratuities. Criminal law amendments and other provisions that were introduced in parallel with the increase in doctors' salaries divide citizens. Despite this, it seems the government is committed to countering the phenomenon of gratuities, and a fifty-person department has been set up within the State Department of Civil Defence to deal with the matter. These officials may, even covertly, investigate physicians to ascertain that they do not in fact accept gratuities.

A small positive step is that the government amended the Criminal Code in accordance with the OECD recommendation, which means that in the future, persons working for foreign public organisations and state or local government companies will be considered foreign officials.

However, the government and state institutions did not take substantive steps to address the corruption risks posed by the pandemic,

although they have drawn attention to their existence.

### **Legal consequences of high-level corruption**

In recent years, due to resistance from prosecutors, there have been no legal consequences for high-level corruption in Hungary. The reasons behind this, according to the findings of international organisations (such as the Council of Europe's Venice Commission and GRECO Group reports),<sup>24</sup> are the lack of necessary prosecutorial and law enforcement measures and procedures, the failure to prosecute when proceedings are initiated, and the lack of accountability of the prosecutor general. In this respect, no systemic changes occurred in 2021. Two cases, however, should be highlighted, which paint a more nuanced picture. The first case is significant - for the purposes of the present analysis - because, in applying EU law, the Court of Justice of the European Union took into account the fact that a corruption case had no legal consequences in Hungary.<sup>25</sup> The case arose from a request for access to an OLAF report, which has been refused by OLAF. The applicant wanted to find out what abuses OLAF had identified in relation to an EU-funded street lighting project, which, instead of improving

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24 *Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, adopted by the Venice Commission at its 91st Plenary Session* (Venice, 15-16 June 2012), CDL-AD(2012)008-e, *Corruption prevention in respect of members of parliament, judges and prosecutors*. Evaluation Report, Hungary. Adopted by GRECO at its 67th Plenary Meeting (Strasbourg, 23-27 March 2015), Greco Eval IV Rep (2014) 10E.

25 Homoki v Commission case, T-517/19.

the street lighting infrastructure, had further reduced the visibility of the streets. OLAF investigated the case, which revealed “serious irregularities” and “conflicts of interest” in the tender for the project, which was won by a company co-owned by István Tiborcz, the son-in-law of the Hungarian Prime Minister. A year later, the Hungarian authorities found no irregularities, and Hungarian taxpayers ended up having to pay the HUF 13 billion (€36.3 million) cost of the project. OLAF refused access to the report on the grounds that OLAF reports should only be made available to the authorities of the countries concerned, and only they can then decide whether to make them public; disclosure would jeopardise the effective conduct of national proceedings. However, the Court’s judgment considered the fact that there was no prosecution in Hungary; the Hungarian authorities established the absence of an infringement following an investigation by the Pest County Prosecutor’s Office. The Court, therefore, held that the grounds for refusing access did not apply and that the document should be made available to the applicant NGO.

The other case is significant because of its exceptional nature. The case, which came to light in December 2021, is the first one in which a high-ranking government official was prosecuted in Hungary for corruption. On the morning of 7 December, the chief prosecutor’s office had requested the waiver of the immunity of Member of Parliament Pál Völner, secretary of state in the Ministry for Justice. The chief prosecutor’s statement revealed that Völner - who was also the ministerial commissioner responsible for the

Hungarian Court Bailiffs Chamber since August 2019 - is accused of having illegally received regular bribes from the president of the branch of bailiffs over a sustained period of time. Völner’s immunity has been waived, but (as of the date of this report) he has not been arrested or remanded in custody. Nevertheless, such a high-ranking politician has never been found in such an unpleasant situation in the government of Viktor Orbán. It is not clear how this exceptional case could have occurred.

According to the weekly newspaper HVG, the ruling parties have tried to do everything possible to keep the details of the embarrassing case in secret for as long as possible, preferably until the election. Still, as the investigations into the bribing bailiffs progressed, it was no longer possible to keep secret the case of the bribed secretary of state.

## **Media environment and freedom of expression and of information** 🟡

### **Key recommendations**

- The National Assembly should elect a Media Council with a composition that ensures the authority’s independence from the government; restrictions on media investment and campaign spending and enforcement of these limits are needed to restore a pluralistic media system.

- Parliament should limit the legal possibility to monitor journalists in order to protect journalistic sources.
- The government should inform the public and the press about public affairs, both proactively and on request, while respecting the fundamental standards of freedom of information.

## ***Media and telecommunications authorities and bodies***

### ***Independence, enforcement powers and adequacy of resources of media and telecommunications authorities and bodies***

The Media Council has been existing in essentially the same form since 2010. It has regulatory functions, it decides on frequency tenders, selects public service media operators and carries out media monitoring. Parliament elects its president and members for a nine-year term. Since 2010, the Council has been composed exclusively of members nominated and elected by the governing majority, as the governing party's two-thirds majority in Parliament did not approve any opposition candidates. The Media Council cannot therefore be considered independent by any standards.

The nine-year-long mandate of the president of the media authority was due to expire in August of 2022, after the elections, but the president announced her resignation on 15

October 2021. This created an opportunity for the government majority to appoint someone loyal to Fidesz to lead the authority for another nine years, regardless of the outcome of the upcoming elections. As the elections approach, Fidesz is blatantly entrenching its party people at the head of formally independent authorities, including the media authority. As expected, the Parliament has elected the new president, András Koltay, a Fidesz nominee.

## ***Pluralism and concentration***

### ***Levels of market concentration***

Media concentration has been a long-standing process in Hungary, as a result of which the media market cannot be considered pluralistic. After 2015, the two-thirds majority government significantly transformed the media environment, and this process is still ongoing. In Hungary, state-owned banks provide billions of HUF in loans to pro-government entrepreneurs, who then place media companies at the service of Fidesz. Government circles have taken over several influential press outlets critical of the government: *Origó*, *Figyelő*, TV2 and *Index* have become pro-government through the ownership circle, while *Népszabadság*, for example, has ceased to exist following the change of ownership. The Cabinet Office of the Prime Minister (Miniszterelnöki Kabinetiroda) decides on advertising spending by public bodies at the ministerial level. Pro-government laypeople have bought up and grouped in one hand the entire provincial newspaper market, which are visibly edited centrally. Hundreds of

commercial media outlets, worth tens of billions of dollars, were taken over by a clearly politically captured foundation (KESMA). Today, there is almost no government-independent radio left in Hungary. As a result, the government directly or indirectly controls at least 50% of the Hungarian media market. This figure doesn't include the press that agrees with the government, but refers solely to the media companies that the government controls through owners dependent on it.<sup>26</sup>

Nevertheless, there exists a free press in Hungary that is independent of the government. However, the government always confuses this with the opposition. It pretends that there should be a pro-government and opposition press parallel to government and opposition parties. In doing so, naturally, it destroys the credibility of the independent press and tries to blunt the edge of criticism. It also alienates its own voters from the non-government press. Finally, it uses this narrative to legitimise the existence of a media owned by pro-government circles.

### ***Transparency of media ownership***

According to a study published by Mérték Media Monitor 2021,<sup>27</sup> it is clear that politics has taken hold of the media market; the role of political investors and the market-distorting influence of the state have increased

significantly. In recent years, several foreign investors have withdrawn from the Hungarian market and have been replaced by domestic investors. At the same time, the ownership structure has become very concentrated, with pro-political, and in particular pro-governmental, owners becoming dominant. Political considerations dominate the allocation of public advertising expenditure. Independent media are struggling to survive. Partly due to global trends (the rise of digital platforms) and partly due to the market-distorting influence of the state, independent media companies are sharing an ever-shrinking advertising pie. In recent years, many media outlets have been asking audiences to contribute, and users' willingness to pay has been increasing, but competition for these revenues is growing.

The Mérték study also highlights that a specific feature of the Hungarian market is the emergence of the so-called grey zone. This includes media companies that appear to be independent at first sight because their owners are not necessarily considered to be close to the government, but are in fact at the mercy of the state, for example, through state advertising, and are therefore not independent in essence. It is also important to bear in mind that political pressure is not always exerted directly on the editorial board and the media company, but on other companies in the same corporate group as the publisher, or on companies with

26 Attila Bátorfy: *The Past Ten Years of the Hungarian Media*. Átlátszó; Attila Bátorfy, Krisztián Szabó: *Monitoring Media Pluralism in the Digital Era*. Country report: Hungary. Eötvös Loránd University, Media Department.

27 *Four Shades of Censorship. State Intervention in the Central Eastern European Media Markets*. Mérték Média Monitor. 2021 June.

which the media company has other business links (influence through the media ecosystem).

### **Public service media**

In Hungary, public service media (or rather: state media) does not fulfil their role of impartial and independent broadcasting, and the government has literally taken it over. This is greatly facilitated by the fact that the organisational structure of state media (which operates in the dual structure of MTVA - Media Services Support and Asset Management Fund and Duna Media Service Non-profit Ltd.) is opaque, its responsibilities are unclear, spending is not transparent, and the operation of the institutions is almost impossible to monitor. MTVA's CEO is appointed by the Media Council, which is composed exclusively of Fidesz members. State media is heavily overfunded; the budget allocated to MTVA is increasing spectacularly year on year; in 2021, it received HUF 117.7 billion from the central state budget. In addition to public television channels and radio stations, the national news agency is also part of the state media. The state media also enjoys a kind of news monopoly through the latter. It provides news free of charge to other players in the media market, making other news agencies uncompetitive. The political pressure is apparent and institutionalised<sup>28</sup> and the editors are politically biased: the editorial policy is clearly

pro-government. As a result, the public service media are primarily engaged in political communication rather than information.<sup>29</sup>

A lawsuit, which started in 2018 and took a new turn in 2021, says a lot about the state media's vision of its own role, and on public service. In 2018, a government-linked youth organisation told lies about the Menedék Association at a press conference in front of its office. The state media were involved in disseminating these statements, which were ruled unlawful by the Kúria. According to the judgment, the public service media should have checked before publishing the footage whether it contained any false statements that could be offensive to the Menedék Association. The state media completely failed to do so, thus infringing the rights of the Menedék and misinforming its audience. The state media challenged the judgment in a constitutional complaint<sup>30</sup> to the Constitutional Court. It argued that, as a media outlet, it is not its duty to provide objective information: they do not have to verify the truth of what is said at a press conference. They can even spread information that is manifestly untrue if it is not stated by the media but by the person holding the press conference. They argue that expecting them to check sources and question the other party would constitute censorship. In its constitutional complaint, the state media pretend that there is no difference between the responsibility of the press, which

28 *„... a maffiában lehet hasonló, gondolom” – ilyen a köztévé belülről.* 10 November 2020; *Kézivezérlés a közmédiában, következmények nélkül,* 27 December, 2020.

29 Four Shades of Censorship, *ibid.*

30 *Constitutional complaint*, available at the website of the Constitutional Court.

operates independently of the state, and that of the public media. The case is pending before the Constitutional Court.<sup>31</sup>

## Online media

### *Impact on media of online content regulation rules*

In January 2021, the Minister of Justice announced<sup>32</sup> that the Ministry of Justice would begin work early this year to prepare legislation to regulate social media operation (which in Hungary primarily means Facebook). According to her post (published on Facebook), the government would seek to prevent social media companies from banning users arbitrarily and without remedies.<sup>33</sup> Otherwise, the objectives and the content of the planned regulation have never been made clear by the government, and since then it seems that it has abandoned the need for regulation. In April 2021, the minister stated that Hungary would wait “for Brussel’s rule and then create the national one accordingly,” implying that the government will follow the

EU-level Digital Services and Digital Markets Acts.<sup>34</sup> Facebook has nevertheless been subject to attempts by the domestic authorities to be regulated: the Hungarian Competition Authority (Gazdasági Versenyhivatal) previously imposed a 1,2 billion HUF consumer protection fine on it, which was annulled by the Kúria in 2021. According to the ruling, Facebook’s advertising as a free social media does not constitute misleading consumers.<sup>35</sup>

According to the Freedom of the Net 2021 report of Freedom House, Hungary’s internet is still free; however, its freedom index declined for the second year in a row. The reason behind the last decline reflects reports that the government deployed spyware technology to target journalists and lawyers.<sup>36</sup>

### *Public trust in media*

Trust in various media platforms and outlets is highly dependent on the audience’s political views. According to the Reuters Institute’s Digital News Report 2021,<sup>37</sup> Hungary, with a highly polarised public, has one of the lowest

31 Case no IV/3900/2021. Disclaimer: HCLU provides legal representation to the Menedék Association in this case.

32 Törvényjavaslat készül a technológia cégek szabályozásáról, Kormány.hu, 2021.01.26.

33 Judit Varga: “After consulting with the heads of the involved state institutions, the Ministry of Justice will propose a law to the Parliament this spring about the regulation of the great tech companies’ Hungarian operation,” January 26, 2021, <https://www.facebook.com/VargaJuditMinisterofJustice/photos/a.2025259724159640/4072305249455067/>

34 *Hungary to hold off from regulating big tech ahead of EU-wide rules*. 14 April, 2021.

35 Judgment no Kfv.II.37.243/2021/11., Kúria.

36 *Freedom of the Net 2021*, Report on Hungary, Freedom House.

37 *Reuters Institute Digital News Report 2021*, pp. 84–85.

news trust scores in their global survey. The most trusted news sources continue to be HVG and RTL-Klub, while the trust index of public media is low. The majority of Hungarian respondents read the news on their mobile phones, but only 14% of them pay for some kind of online news service. The responses of Hungarians show that trust in news in Hungary is low by international standards, at 30 percent. (In contrast, 65 percent of people in Finland, which leads the list, trust the news.)

### ***Safety and protection of journalists and other media activists***

#### ***Lawsuits and prosecutions against journalists: SLAPPs***

The phenomenon of SLAPP lawsuits continues to be a problem in Hungary, mainly through the misuse of the GDPR. The National Authority for Data Protection and Freedom of Information supports this activity. The lawsuits filed in recent years against editorial offices for inclusion in the list of the wealthiest Hungarians and for press reports on the unauthorised use of state subsidies are still ongoing. The data protection authority's interpretation of the GDPR undermines timely journalistic reporting and can be expected to result in a severe chilling effect.<sup>38</sup> The use of the GDPR

to force content removal is an emerging issue in Hungary.

#### ***Confidentiality and protection of journalistic sources***

In July 2021, it became public that the spyware of the Israeli company NSO could have been used in Hungary against a number of targets, including independent journalists, not only for its original purpose (fight against terrorism and organised crime), but also for political purposes.<sup>39</sup>

Zoltán Varga, the owner of Central Media Group, one of the largest privately owned, independent newspaper publishers, was affected. Varga had previously repeatedly said that the government had pressured him to sell his media companies. Shortly after the elections, Varga hosted a group of seven people. After the visit, the phone numbers of all the guests were added to the Pegasus target list. Two journalists from Direkt36, Szabolcs Panyi and András Szabó, who investigated the Pegasus case from the Hungarian side, were also involved. Dávid Dercsényi, a former journalist for hv.g.hu, was also under surveillance. It turned out that the phone of Brigitta Csikász, a crime journalist, was hacked several times in 2019. Dániel Németh, a photojournalist, working for several newsrooms, was also affected.

38 *GDPR Weaponized – Summary of Cases and Strategies where Data Protection is Used to Undermine Freedom of Press in Hungary*, 23 November, 2020, Disclaimer: The HCLU provides legal representation to the media outlets concerned.

39 All the articles of Direkt36 on Pegasus can be found here: <https://www.direkt36.hu/en/tag/pegasus/>

He typically photographs the hidden luxury lifestyles of pro-government figures and documents the use of private planes and yachts. Another Hungarian photographer who may have been targeted by the software was working with a US journalist who was covering the affairs of the Russian-run International Investment Bank, which was moving to Budapest. Another target was György Pető, a former RTL Klub journalist, who later became a pilot. As a long-time colleague he is well known to many journalists, who often ask him for professional help not only on more general aviation issues, but also when they write about the flights of Viktor Orbán, Lőrinc Mészáros and other people close to the government. In addition to journalists, politicians, lawyers, a chief security guard for the President of the Republic, and some private individuals have also been observed.

Since the information was made public, the government has essentially failed to respond to questions raised. When asked about the use of Pegasus, pro-government politicians have consistently replied that all surveillance performed in Hungary after 2010 was lawful; only an independent investigation could determine whether this was the case, but Fidesz does not consider it necessary to launch such an investigation. The first meeting of the National Security Committee of the Parliament could not be held because of a lack of quorum, as the government party MPs did not show up. Later, the committee was quorate, and the Minister of the Interior and

the State Secretary for the Ministry for Justice, who authorised the surveillance, were present. According to opposition MPs nothing of substance was said, but the meeting minutes were classified until 2050. The prosecutor's office has opened an investigation into the suspected crime of unauthorised collection of secret information, and the journalists involved have been questioned as witnesses. The National Authority for Data Protection and Freedom of Information (NAIH) has also started an investigation into the case, but no news on the outcome is available as of January 2022.

The use of Pegasus was first acknowledged on 4 November by Fidesz MP Lajos Kósa, who also pointed out that Hungarian authorities use several similar devices. A week later, Gergely Gulyás, Minister of the Prime Minister's Office, also acknowledged the use of Pegasus, saying that some of the information about wiretapping published in the press was true.

There are at least three severe problems with the Hungarian rules on secret surveillance for national security purposes. First, the legal conditions for covert surveillance are extremely vague. Second, the existence of the requirements is determined by a person (the Minister for Justice) who cannot be expected to make an objective decision that appropriately considers the interests that are contrary to the surveillance. Third, there is no effective legal remedy against unlawful surveillance in Hungary. For all these reasons, the ECtHR condemned Hungary in 2016,<sup>40</sup>

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40 See the judgment of the case of Szabó and Vissy v Hungary.

but the Hungarian state has not implemented the judgment since then. With regard to the press, it is essential to underline that there are no rules in Hungarian law that would allow the surveillance of certain professions, such as journalists, only under stricter conditions. The possibility of surveillance thus directly affects the freedom of journalists to communicate freely with their sources.

### *Difficulties in access to information*

The findings of the studies conducted in 2019 and 2020 on the Hungarian government's practice of information quarantine of the independent press were confirmed by a new study completed in 2021.<sup>41</sup>

Independent media providing daily news are the most affected by the restriction of available information. Public authorities (ministries, municipalities, professional organisations) hardly provide any meaningful information to the press. Public bodies only answer the questions they want to put to the press, either in a press conference or in writing. Some members of the critical press are never invited or allowed to attend government press conferences. The independent press is only allowed to ask the Prime Minister once a year at a press conference. Other sources of information are also restricted. Potential interviewees are intimidated. Those who leak information

to the independent press, especially health workers, teachers, professional organisations, and other professionals involved in the fight against the epidemic, are threatened with retribution. The discrediting of the independent media has intensified and become organised, with the independent press being accused of being politically motivated.

### *Freedom of expression and of information*

#### *Censorship and self-censorship, including online*

Self-censorship is a severe problem in Hungary, which has been significantly worsened by the Pegasus scandal and the homo- and transphobic propaganda law. Those in employment with the state rarely dare to speak to the press, and the secret surveillance of journalists has not helped this situation. And the greatest danger of the latter is that it encourages people, including representatives of culture and the arts, to remain silent for fear of possible dangers and consequences. This is precisely what the law does.

According to the Reporters Without Borders (RSF) international journalists' organisation's Press Freedom Index, Hungary was among the world's top ten countries in 2006,<sup>42</sup> ranked at number ten, and was still 23rd in 2010.<sup>43</sup>

41 The HCLU study on state obstruction of the press, summarising the experiences of the period March 2020 to January 2021, is available here: [https://tasz.hu/a/files/tasz\\_sajtokutatas\\_3.pdf](https://tasz.hu/a/files/tasz_sajtokutatas_3.pdf)

42 [Worldwide Press Freedom Index 2006](#).

43 [World Press Freedom Index 2010](#).

Since then, however, the situation has deteriorated year on year, with Hungary now ranking 92nd, and last among EU countries.<sup>44</sup>

### ***Restrictions on access to information***

The information of greatest public interest in 2011 would have been the data related to the coronavirus epidemic and the vaccine, as these directly impacted every person's life. However, the government provides very little information on these. There is no available, up-to-date data on the infection rates and death rates in each town. Trends can only be followed because online portals produce time-series charts from daily data. One of the best examples of the deficiencies of government communication is the case of the vaccination plan, only one excerpt of which was available for the public. The government did not make this plan public even though it is available in its full length in several countries,<sup>45</sup> but in the field of proactive and on-demand government communication, we can also see countless examples of solutions in our region that are more progressive and aim to enable transparency significantly more.

Lack of information also heavily affected the press. After journalists were refused several times to report from hospitals treating people with coronavirus, independent news portals published an open letter asking the decision-makers to cease the above-mentioned practice:

“Only those working in the health sector know better than you how the life-endangering effect of the coronavirus is most visible inside hospitals. However, under the present regulations doctors and nurses cannot speak about this publicly. At the same time the press is not allowed into hospitals, and so is unable to cover what is happening inside.

Why is this a problem? The importance of showing the work being done inside hospitals during the pandemic has been recognised in many countries. (...) It is especially noteworthy that so far the only reports that have given us Hungarians a true picture in Hungarian about how a Covid ward operates have been about hospitals in Odorheiu Secuiesc (Székelyudvarhely) in Romania and Dunajská Streda (Dunaszerdahely) in Slovakia. In Hungary, any editor who wants to report in a responsible manner befitting broader social interest about the pandemic and the workload that hospitals face runs up against a brick wall.

The lack of information has serious consequences. Since the government and the pandemic commission prevent reports being made about the true state of affairs inside our hospitals, many people continue to play down the dangers of the pandemic and do not follow the necessary precautions. This in turn leads to more

44 [World Press Freedom Index 2021](#), Hungary.

45 *Lehet másként is – Van, ahol nyilvános az oltási terv, mutatunk néhányat*, 6 January, 2021., <https://www.szabadeuropa.hu/a/oltasi-tervek-europaban/31036421.html>

coronavirus cases and to the worsening of the pandemic.”<sup>46</sup>

On the day of publishing the letter, government spokesperson Kovács Zoltán reacted to the initiative with the following words:

“Hospitals are meant for healing, not for footage-making. The Operative Staff informs the public on a daily basis. Left-wing portals spread fake news and discredit the Hungarian healthcare system. Hungarian hospitals, doctors and nurses perform in an outstanding way carrying out incredible efforts.”<sup>47</sup>

Information practices have not changed since then. Instead of up-to-date information, the government’s corona virus information page publishes propaganda messages. For example, the article titled “National consultation - No LGBTQ propaganda in nursery and school”.<sup>48</sup> Requests for access to data of public interest also face difficulties. Offices take advantage of the fact that the time limit for responding to requests under the special legal regime has been extended to 45+45 days in some cases. Many offices do not even reply and usually one must go to court to obtain the information. This is how epidemic data can be made public, often several months in advance, such as the

vaccination plan, which was made public a year after its introduction.<sup>49</sup>

## Checks and balances

### Key recommendations

- The government should stop abusing the special legal order: such order should be declared only for the most necessary time. The government should eliminate the situation where the de jure temporary state of emergency becomes de facto permanent.
- It must be ensured that the Constitutional Court, the Ombudsman, the Data Protection Authority and other independent bodies act in accordance with their constitutional functions: not as a legitimization of public authority, but as a limit to the power of the government in order to protect the rights of the individuals.

46 [Freedom of information can save lives – open letter from 28 editorial offices.](#) 1 April, 2021.

47 [https://hvg.hu/itthon/20210331\\_kovacs\\_zoltan\\_egeszsegugy\\_operativ\\_torzs\\_koronavirus\\_jarvany](https://hvg.hu/itthon/20210331_kovacs_zoltan_egeszsegugy_operativ_torzs_koronavirus_jarvany)

48 Instead of up-to-date information, the government’s corona virus information page publishes propaganda messages. For example, the article entitled: [National consultation - No LGBTQ propaganda in nursery and school.](#) 7 October, 2021.

49 [Megszereztük az oltási tervet, amit majd' egy éve próbál titkolni a kormány.](#) 11 November, 2021.

## ***Process for preparing and enacting laws***

### ***Transparency and quality of the legislative process***

In recent years, compared to the previous decade, new phenomena have been observed in Hungary in terms of legislative transparency. In the past decade, many laws were adopted in increasingly shorter timeframes. Important bills were not submitted by the government but by MPs, thus avoiding the need for public consultation and ensuring transparency in the legislative process. In 2021, the Parliament adopted significantly fewer laws than before: 40% fewer laws compared to 2013 and 27% fewer compared to 2017. The number of laws adopted on the proposal of governing party MPs has also decreased significantly, from 64 proposals in 2013 and 37 in 2017 to only 9 proposals in 2021.<sup>50</sup> However, this does not mean that the legislative process has become more transparent. The change is due to a significant shift in the ratio of legislation to decree-making. There is no obligation of transparency in the case of decrees of the government, which are not preceded by a public debate, only the result (the promulgated decree) is public.

### ***Special legal order***

In Hungary, a special legal order was in force for the whole of 2021 (all 365 days of the year). The current state of emergency (state of danger) has been in force since 4 November 2020

(it was lifted by the government on 8 February 2021, but re-declared at the same moment, for technical reasons). Parliament has repeatedly authorised the government to extend the state of emergency, most recently until 1 June 2022, and there is, of course, no legal obstacle to further extensions. Under the special legal order, the government can issue decrees on legislative matters, suspend the application of certain laws, derogate from statutory provisions and take other extraordinary measures. The government has made use of this possibility in a significant number of cases. While in 2021 the Parliament adopted 151 laws, the government adopted 832 decrees, 113 of which were decrees adopted on the basis of special emergency powers, which may therefore contain rules that derogate from the provisions of the laws. (For comparison, in 2013, there were 565 government decrees for 254 laws passed, and in 2017 there were 532 government decrees for 208 laws passed, which of course could not be contrary to the provisions of the laws.) The proportions of law-making and decree-making have therefore changed significantly, with the government making new rules during the state of emergency, without consultation or transparent procedures, that significantly affect everyday life. This shift is not surprising since the essence of the special legal order is government by decree. However, the fact that the conceptually temporary special legal order has been in place for such a long period (at least 19 months, as far as we know at present), with the potential for significant deviation from the ordinary legal order, poses a significant risk to

50 [Összehasonlító statisztikai adatok. 2013, 2017, 2021. évek. Országgyűlés Hivatala, 2021.](#)

the rule of law. The next parliamentary elections will also be held under the special legal order.

### ***Constitutional review of laws***

There has also been a significant decline in the constitutional control of legislation. While in 2013 the Constitutional Court issued 53 decisions declaring a law or legislative provision to be unconstitutional, in 2017 there were 10 such decisions, and in 2021 only 7.<sup>51</sup> This represents a drop of 87% compared to 2013. (2013 was the year in which the Constitutional Court was not dominated entirely by the so-called one-party constitutional judges, appointed under the new procedure established by the two-thirds majority, which allows for appointment with the support of the governing party only.)

### ***Independent authorities***

Independent institutions do not exist in Hungary. While there are apparently such institutions, whose statute laws contain a number of guarantees of independence, the two-thirds majority of the ruling party in Parliament turns all those guarantees off. In the Hungarian constitutional system, no state

institution can be independent of a government with a two-thirds majority in Parliament. This was the case in 2021, as it was in the past.

### ***The equal treatment body***

On 1 January 2021 the Equal Treatment Authority ceased to exist, and its powers were transferred to the Ombudsman. Consequently, there is no independent body specifically dealing with equal treatment in Hungary anymore. Following the merger, a significant part of the professional staff left, and no Director-General has been appointed to head the department dealing with the promotion of equal treatment in the form of an authority. The change, although not considered a priori a mistake, was considered, in the Hungarian context, risky for the protection of equal treatment by the Venice Commission of the Council of Europe.<sup>52</sup>

### ***The Ombudsman***

The work of the Commissioner for Fundamental Rights has been almost invisible in 2021, despite the challenges posed by the special legal order and the epidemic to the protection of human rights. The Ombudsman intervened in very few high-profile cases of human rights

51 See the statistics available on the website of the Constitutional Court. [https://alkotmanybirosag.hu/uploads/2017/08/ab\\_ugyforgalom\\_2013\\_december\\_31\\_jav\\_2014.pdf](https://alkotmanybirosag.hu/uploads/2017/08/ab_ugyforgalom_2013_december_31_jav_2014.pdf), [https://alkotmanybirosag.hu/uploads/2017/12/2017\\_12\\_31\\_ab\\_ugyforgalom\\_korr.pdf](https://alkotmanybirosag.hu/uploads/2017/12/2017_12_31_ab_ugyforgalom_korr.pdf), [https://alkotmanybirosag.hu/uploads/2021/10/2021\\_09\\_30\\_ab\\_ugyforgalom.pdf](https://alkotmanybirosag.hu/uploads/2021/10/2021_09_30_ab_ugyforgalom.pdf)

52 Opinion on the amendments to the Act on Equal Treatment and Promotion of Equal Opportunities and to the Act on the Commissioner for Fundamental Rights as adopted by the Hungarian parliament in December 2020, adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October

abuses that affected or concerned a significant proportion of Hungarian citizens in 2021. He has not spoken out on compulsory vaccination, homophobic legislation or national security surveillance of journalists. The institution has been so inactive in recent years that it is as if it did not exist.

At the end of 2021, the HCLU collected all their submissions to which the Ombudsman had not responded for years. Invariably, these submissions drew the attention of the Ombudsman to systemic violations of fundamental rights of persons in a seriously vulnerable situation that could not be remedied by other means. There is no more effective means of redress than the Ombudsman in the Hungarian legal system. However, the Ombudsman has left these complaints unanswered, thereby contributing to the fact that these fundamental rights violations remain unaddressed. He sends a message to all citizens affected by the fundamental rights violations described in the petitions that the Ombudsman considers that their grievance is not even worthy of any kind of reply. As the mere fact that a catalogue of fundamental rights declares them does not constitute a guarantee of fundamental rights, the institution of the Ombudsman does not function as a guarantor of fundamental rights simply by existing, if it ignores the petitions that draw its attention to violations of fundamental rights. The office certainly responds to many petitions, even on the merits, but

from the perspective of one of the most active Hungarian civil society organisations defending fundamental rights, it does not appear that the Ombudsman is an effective redress forum in Hungary. This is confirmed by the collected petitions, for which HCLU has indicated in detail how many months or years it has been waiting for the Ombudsman's reply. The longest unanswered referral has not been answered for 11 years.

Not unrelated to this, in 2021 the Global Alliance of National Human Rights Institutions (GANHRI) Sub-Committee on Accreditation recommended the withdrawal of the "A" status of national human rights institutions from the Commissioner for Fundamental Rights. According to their report, one of the reasons for downgrading the Ombudsman to "B" status is that he has failed to adequately address a range of human rights concerns, including violations affecting vulnerable ethnic minorities, LGBTI people, refugees and migrants, and has not referred certain politically sensitive issues to the Constitutional Court. This also shows the lack of independence of the Ombudsman.<sup>53</sup>

### ***The Data Protection and Freedom of Information Authority***

The most telling sign of the DPA's lack of independence is the way it handled the Pegasus case, which could potentially result

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2021), CDL-AD(2021)034-e [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)034-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)034-e)

53 See [Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation \(SCA\) 14-24 June 2021, pages 12-15.](#)

in a finding that government bodies are liable for the abuse of their powers. The fact that the Hungarian government might use a spyware, which was originally used to control terrorists and organised crime figures, also to secretly monitor investigative journalists, activists, opposition politicians and lawyers came to light on 18 July 2021. Although the data protection authority received several complaints about the wiretapping scandal, it only started to deal with the case after 3 August, because Attila Péterfalvi, the chairman of the National Authority for Data Protection and Freedom of Information, was on his summer holidays.<sup>54</sup> Péterfalvi first promised to close the investigation by the beginning of November,<sup>55</sup> then asked for 1-2 weeks more, and later said he did not see the end in sight.<sup>56</sup> In December he said that he could not close the investigation because of the lack of cooperation from Amnesty International Hungary, and he had still not published the results of his investigation at the beginning of 2022.

### ***The Media Authority***

The governing parties have ensured that the media authority, which they fully control, will remain firmly in their control in the unlikely event they lose the 2022 elections. Almost a year before the end of her term of office, the authority's president, Mónika Karas, resigned.

Her appointment would have expired in September 2022 - after next spring's parliamentary elections. Her early resignation paved the way for the current governing majority to decide on a successor, cementing a nine-year term for the new head of the media authority, which has a budget of over HUF 40 billion this year, and the Media Council, which controls the operations of media service providers and, in principle, prevents market concentration. After her resignation, Mónika Karas was appointed President of the State Audit Office, and on 3 December 2021, a two-thirds majority in Parliament appointed András Koltay, one of the developers of the much-criticised media law, as President of the Media Authority for a nine-year term.

### ***Accessibility and judicial review of administrative decisions***

#### ***Transparency of administrative decisions and sanctions***

The most pressing problem at present with regard to judicial review of administrative decisions is that this (essentially legal) review has recently taken the place of administrative appeals. In a significant number of administrative cases, the possibility of appealing against decisions has disappeared from the legal system, and the only possibility for clients to

54 [Az adatvédelmi hatóság elnöke szabadságon van, majd két hét múlva dönt arról, indít-e vizsgálatot.](#) 20 July, 2021.

55 [Péterfalvi Attila november elejére jár a Pegasus-ügy végére,](#) 23 September, 2021.

56 [Itthon: Már le akarta zárni, most mégsem látja a Pegasus-vizsgálat végét Péterfalvi,](#) 9 November, 2021, [https://hvg.hu/itthon/20211109\\_Peterfalvi\\_Pegasusvizsgalat\\_hol\\_a\\_vege](https://hvg.hu/itthon/20211109_Peterfalvi_Pegasusvizsgalat_hol_a_vege)

challenge the decisions is to do it before a court on the grounds that the decision is unlawful. This has in essence led to a reduction in the right to remedy, firstly because a judicial remedy is less accessible to citizens than administrative remedies, and secondly because judicial review of administrative decisions can only be brought against decisions that are contrary to the law, whereas the legal basis for an appeal before an administrative authority (i.e., the second instance authority) was broader. Recent experience has shown that judicial review of administrative decisions is most effective in formal/procedural defects cases, while administrative courts are less suitable for redressing substantive violations. This is supported by the fact that judicial review can lead to a mainly cassatory result. The possibility of the court reversing a decision found to be unlawful is exceptional.

#### ***Implementation by the public administration and state institutions of final court decisions***

The amendment to the Constitutional Court Act in 2019, which allows public bodies to bring constitutional complaints against judicial decisions for violation of their “fundamental rights”, has an impact primarily on judgments in the area of judicial review of administrative decisions. The Constitutional Court has already admitted constitutional complaints of public bodies several times on the grounds that a court had violated their fundamental right to a fair trial in the course of judicial review of

their decisions. In 2021, this also happened at the government’s request: the court annulled a court ruling that found a government decision unlawful on the basis of a citizens’ petition because the court had violated a fundamental right of the government.<sup>57</sup> The amendment and the subsequent Constitutional Court practice create a constitutionally difficult situation: in the context of judicial control of public administration, which should ultimately ensure the protection of citizens’ rights, the Constitutional Court is defending the fundamental rights of the authorities and the government.

## ***Enabling framework for civil society*** —

### ***Key recommendations***

- The discrediting of NGOs that criticise the government’s actions must stop, and Parliament must repeal the law on NGOs that can influence public life. If the legislator fails to do so, it will be up to the Constitutional Court to annul the offending law.
- The CJEU’s ruling on the ‘Stop Soros’ law must be enforced: the law must be repealed by Parliament.

57 Decision of the Constitutional Court in case IV/03991/2021.

## *Regulatory framework*

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The Hungarian legal system is not generally hostile to NGOs; the establishment and administration of organisations have been simplified a lot in recent years. However, the government is hostile to organisations that carry out watchdog activities or seek to promote civic activity, and the consequences of this can be found in the legal system. For years it has been trying to control these organs by various means, but so far without success. In 2021, the following should be highlighted in this regard.

After a delay of about a year, the Parliament has repealed the anti-NGO law on transparency of foreign-funded organisations, copying the Russian and Israeli model. The law violated the EU law in several respects. With the repeal of the law, proceedings under the law were terminated, and the designation “foreign-funded organisation” had to be removed from the register of NGOs. In doing so, the Hungarian state has complied with the European Court of Justice’s judgment of summer 2020 in a dispute between the European Commission and the Hungarian state.

The Parliament was obliged to do so under the terms of the court ruling. In fact, that is all it should have done. But the Hungarian government felt it necessary to replace the rules of the offending law with new rules that could stigmatise NGOs.

The new anti-NGO law, which replaced the old one, also revamped the government’s approach of suspecting problematic organisations of

serving foreign interests. The new law no longer refers to terrorism or money laundering. Instead, it pretends that being capable of influencing public life is suspicious, therefore requiring close state control.

The scope of the Act on Civil Society Organizations Engaging in Activities Capable of Influencing Public Life covers foundations and associations whose balance sheet total for the previous year exceeds HUF 20 million. In other words, if the net assets of an organisation exceed this amount, its activities are considered capable of influencing public life. Therefore, the law establishes a presumption: an organisation with assets of more than 20 million is engaged in an activity capable of influencing public discourse.

The law gives the State Audit Office the task of carrying out a legal audit of associations and foundations that carry out activities that are likely to influence public discourse. However, the constitutional function of the State Audit Office, as defined in the Fundamental Law, is to be the financial and economic audit body of the Parliament. The role of the SAO is therefore a special parliamentary control, to promote the lawful, expedient and efficient management of public funds by those who have access to them. The Fundamental Law also defines the activities of the SAO in concrete terms: it monitors the implementation of the central budget, the management of public finances, the use of resources from public finances and the management of national assets. It is clear from this that the SAO’s constitutional function is not to control the activities of organisations established under the right of association, which

may have no connection whatsoever with the state budget and national property. The fact that the SAO is required to carry out an activity other than that for which it is constitutionally mandated is in itself unconstitutional because it exceeds its powers. It also leads to a violation of the autonomy of associations since it interferes in the life of organisations through an illegitimate power of control that cannot be derived from the constitutional function of the institution. The SAO's audit plan for 2022 already includes the audit of NGOs under the new law.<sup>58</sup>

Several organisations have challenged the law before the Constitutional Court, arguing that the law interferes with the autonomy of associations established under the right of association, the privacy of citizens who are involved in public affairs, and the freedom of expression and thus the democratic public as a whole.

Furthermore, the homo- and transphobic propaganda law adopted in the summer of 2021, in its part concerning public education, severely restricted teachers from inviting NGOs working on sexual culture, gender, sexual orientation, sexual development, the harmful effects of drug abuse, the dangers of the internet and other physical and mental health issues to their schools. According to the law, only an employee of the institution, a school doctor, a public body with an agreement, or a person or organisation registered by a minister may hold such a session. The ministerial registration could be a way for the government to filter the

NGOs on the basis of its worldview. At the beginning of 2022, this register has not yet been created, so no one can legally be invited to such lessons in schools. Anyone who holds such a session without being authorised to do so will be subject to infringement proceedings by the authorities. The legal consequences of the offence may be a warning, a fine, community service, but the law also provides for the possibility of a detention order.

## ***Attacks and harassment***

### ***Smear campaigns***

In 2021 (also in the context of the new anti-NGO law mentioned above), the government rhetoric that participation in public affairs is not an activity for NGOs continued. Indeed, 'good NGOs' do not engage in such activities, according to the government. This rhetoric is not new: for years now, government politicians have been voicing the view that public activity is the prerogative of those who contest elections (in some cases only the winners) and that everyone else should refrain from it or else they are engaging in suspicious activities that should be controlled by the state.

### ***Control and surveillance***

In the Pegasus case, since the summer of 2021 there has been no evidence that NGOs or their leaders have been monitored with this spyware. However, this cannot be ruled out under Hungary's highly permissive rules on secret

58 ELLENŐRZÉSI TERV, 2022, Állami Számvevőszék.

surveillance. Court proceedings in relation to surveillance cases involving NGO leaders that have been made public in previous years are still ongoing, none of which were successful in 2021.

In November 2021, the CJEU found that the 2018 ‘Stop Soros’ Law, which the Hungarian Parliament had passed in June 2018, breaches EU law. It threatens those who help or give legal assistance to asylum-seekers, commission information leaflets for them, or conduct human rights border monitoring with one year in prison. The law also allows imposing criminal sanctions on entire organisations. The law served nothing but the political aim of intending to intimidate civil society with criminal sanctions, amid an already vile propaganda campaign targeting migrants and civil society organisations. The Hungarian government has not yet implemented the CJEU ruling, and the law is still in force.

## **Disregard of human rights obligations and other systemic issues affecting the rule of law framework** 🟡

### **Key recommendations**

- The government should refrain from attacking and smearing LGBTQI people in general and especially in the context of the

upcoming election in 2022; the government should reverse regressive legislation which directly attacks and discriminates against LGBTQI people.

- The permanent state of emergency should be lifted, and the pandemic should be managed under the normal legal framework.
- The Hungarian government must do much more than it is currently doing to address the systemic violations revealed by the ECtHR judgments: the judgments should be implemented.

### **Systemic human rights violations**

#### ***Widespread human rights violations and persistent protection failures***

It has been a long-standing practice of the Hungarian government to incite voters against a select group of society. It conducts a campaign against them, using both the legislative and executive branches of government. In 2021 the group of LGBTQI people became the “public enemy”. In 2021, what happens in this context shows best how the Hungarian state interprets human rights and how it disrespects them:

### *The unresolved situation of trans people*

It is worth remembering that in May 2020, the National Assembly amended the law on the register of births and stated that the registered gender cannot be changed. This is still the case, but there are still obstacles in the processing of gender change applications (previously submitted) pending at the time of the amendment - for years, trans people in Hungary have been unable to change their gender in their documents. The main obstacle to this is not the law but the resistance of the state administration, which, presumably because they want to comply with the new political trend, is unwilling to apply the law before the amendment to the law to applications submitted earlier. The public authorities are completely ignoring that they have been making many people's daily lives very difficult to bear for years.

### *Smear campaigns against LGBTI+ people and their rights defenders*

Politicians and public officials close to the government have increasingly conflated LGBTI+ people with paedophiles. Homosexuality and bisexuality were portrayed as a danger to children. As a result of the government's campaign, some members of society (typically those who had previously held anti-gay views) now feel empowered to enforce these

views, even violently. According to the Háttér Society, which runs a legal aid service for LGBTIQ people, the number of homophobic and transphobic atrocities in Hungary increased in 2021.<sup>59</sup>

The conflation of paedophilia and homosexuality can be seen in a law adopted in the summer of 2021. A bill aimed initially at severely punishing paedophilia has been amended during the legislative process with new provisions that (following the Russian model) severely restrict freedom of expression and children's rights, banning LGBTIQ-themed educational programmes in schools and social advertising.<sup>60</sup>

The law also prohibits not only the promotion but also the mere display of homosexuality and gender reassignment to persons under the age of 18. Thus, it is prohibited to make available to under-18s any content that depicts a deviation from the self-identity of the sex of birth or that "promotes or displays" homosexuality. And only an organisation registered with a public body can provide sex education in schools.

Not only has the European Commission launched an infringement procedure because of the law, but the Council of Europe's Venice Commission has also found that the propaganda law, which the government has claimed

59 *Több a homofób gyűlöletbűncselekmény a propagandatörvény elfogadása óta.* 19 July 2021.

60 Act LXXIX of 2021 amending certain Acts for the protection of children.

is to protect children, is incompatible with international human rights standards.<sup>61</sup>

Public authorities act according to the government narrative. Media or books displaying LGBTQI content have to face administrative proceedings. For example, an authority ordered the Labrisz Lesbian Association to print disclaimers in their book that contains stories that promote respect of people from all backgrounds and sexual orientations. The disclaimer should state that the book contains “behaviour inconsistent with traditional gender roles”.<sup>62</sup> In another case, a fine was imposed on a bookshop for selling a children’s book featuring rainbow families together with other children’s books.<sup>63</sup> The Media Authority launched a legal proceeding against RTL for broadcasting an advertisement that raised awareness about LGBTQI families.<sup>64</sup>

The government also initiated a planned national referendum in 2022 on LGBTQI issues as a part of its anti-LGBTQI campaign, and in connection with the above-mentioned homo- and transphobic propaganda law. The proposed questions cannot be considered as real questions. Some questions (such as those

relating to the promotion of gender reassignment to children) relate to non-existent problems, while others (such as the one relating to the unrestricted broadcasting of pornographic content in the media) may have a legally unenforceable result. On the other hand, the proposed questions are suitable for keeping the government’s homo- and transphobic campaign on the agenda. The proposed questions are the following:

1. Do you support that children shall encounter sexual educational content that shows different sexual orientations without parental consent?
2. Do you support that sex reassignment procedures shall be promoted to children?
3. Do you support that sex reassignment procedures shall be made available for children?
4. Do you support that media programmes which influence children’s development shall be aired without restrictions?

61 [Opinion on the compatibility with international human rights standards of Act LXXIX amending certain Acts for the protection of children](#), adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021), CDL-AD(2021)050-e.

62 Hungary’s government orders disclaimers on books with gay content. 19 January, 2021, <https://www.reuters.com/article/us-hungary-lgbt-books-idUSKBN29O2AT>

63 *Hungary fines bookshop chain over picture book depicting LGBT families*. 8 July, 2021,

64 Telex: *Eljárást indított a Médiatanács az RTL ellen, mert leadtak egy szivárványcsaládokról szóló társadalmi hirdetést*. 4 March, 2021, The advertisement can be seen here: <https://www.youtube.com/watch?v=wXLuhRgihog>

5. Do you support that media programmes which portray sex change shall be available for children?

The referendum is supposed to be held on the same day as the next parliamentary elections, therefore the electoral campaign will probably be interlinked with the government's campaign related to the referendum.

Impunity and lack of accountability for human rights violations

#### *The permanent state of emergency*

In Hungary, a special legal order was in force for the whole of 2021 (all 365 days of the year). The current state of emergency (state of danger) has been in force since 4 November 2020 (it was lifted by the government on 8 February 2021, but re-declared at the same moment, for technical reasons). Parliament has repeatedly authorised the government to extend the state of emergency, most recently until 1 June 2022, and there is, of course, no legal obstacle to further extensions. With regard to fundamental rights, the special legal order means that fundamental rights can be restricted to a greater extent than under the ordinary legal order. The Fundamental Law does not allow for derogations from the restrictions that can be justified under the ordinary legal order for certain fundamental rights (the right to human dignity, the prohibition of torture, guarantees

in criminal proceedings), but allows for the suspension of the exercise of rights and the possibility of restrictions beyond the limits allowed by proportionality for all other rights. In this case, the guarantee of proportionality is expressed in the conceptually definite temporality of the measure, but since the special legal order is almost permanent, this guarantee is not applied at all.

#### *Withdrawal of the "A" status of the Ombudsman*

The Global Alliance of National Human Rights Institutions (GANHRI) Sub-Committee on Accreditation recommended the withdrawal of the "A" status of national human rights institutions from the Commissioner for Fundamental Rights in 2021. According to their report, one of the reasons for downgrading the Ombudsman to "B" status is that he has failed to adequately address a range of human rights concerns, including violations affecting vulnerable ethnic minorities, LGBTI people, refugees and migrants, and has not referred certain politically sensitive issues to the Constitutional Court. This also shows the lack of independence of the Ombudsman.<sup>65</sup>

#### *Implementation of ECtHR judgments*

Hungary is doing very poorly at implementing the judgments of the European Court of Human Rights. According to the European Implementation Network's statistics (closed

65 See Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation (SCA) 14-24 June 2021, pages 12-15. <https://www.ohchr.org/Documents/Countries/NHRI/GANHRI/EN-SCA-Report-June-2021.pdf>

on 10 August 2021), the implementation of 81% of the leading judgments handed down by the ECtHR in the last 10 years against Hungary are still pending. Out of the 47 countries under the ECtHR's jurisdiction, only Azerbaijan, Finland and Russia perform worse than Hungary.<sup>66</sup>

### ***Other systemic issues***

#### ***Implementation of judgments of the Court of Justice of the European Union and respect of the primacy of EU law***

On 9 October 2021, the Hungarian government welcomed the decision of the Polish Constitutional Court on the relationship between national law and EU law in a government resolution.<sup>67</sup> According to it, the decision of the Polish Constitutional Court was triggered by the bad practice of the European Union institutions, which disregards the principle of the transfer of powers and, by means of a stealthy extension of powers without amending the Treaties, seeks to take away from the member states powers which they have never transferred to the European Union. The resolution stated that the EU institutions must respect the national identities of the member states, which are an integral part of their fundamental political and constitutional order. Alongside the EU institutions,

national law enforcement bodies, in particular constitutional courts and tribunals, have the right to examine the scope and limits of EU competencies.

Nevertheless, in December 2021 the Hungarian Constitutional Court published a less radical ruling on the government's motion to interpret the Fundamental Law. In relation to the judgment of the Court of Justice of the European Union on the status of foreign nationals illegally residing in the territory of the Hungarian state (C-808/18), it held that if the exercise of shared competence with the European Union is incomplete, Hungary is entitled, in accordance with the presumption of sovereignty retained, to exercise non-exclusive EU competence until the institutions of the Union take the measures necessary to ensure the effective exercise of shared competence. If the lack of effective exercise of shared competence leads to consequences that may infringe the right of persons living on the territory of Hungary to their identity, the Hungarian state is obliged to ensure the protection of that right as part of its duty to protect the institutions. However, the Constitutional Court did not examine whether, in the specific case, there was a lack of joint exercise of powers. The Constitutional Court also stressed in its decision that abstract constitutional interpretation cannot be the subject of a review of a

66 For the statistics, see <https://www.einnetwork.org/countries-overview> and <https://www.einnetwork.org/hungary-echr>

67 Government Resolution No 1712/2021 (X. 9.) on the Hungarian position to be taken in relation to the decision of the Constitutional Court of the Republic of Poland regarding the relationship between national law and European Union law.

CJEU judgment and that it did not address the question of the primacy of EU law in this case. The Constitutional Court's decision can be interpreted in different ways; in the government's interpretation, the Constitutional Court expressly allowed the government to contradict the judgments of the CJEU.

## **Fostering a rule of law culture**

### ***Efforts by state authorities***

The governing Fidesz party has been in power since 2010. Throughout its governance, it has regularly and seriously violated the requirements on the rule of law, basic rights, and democratic values set out in the documents of the European Union. In Spring 2022, parliamentary elections will take place in Hungary. The current government party lost important strongholds at the 2019 local elections and now faces the consequences of the coronavirus pandemic. Years 2020 and 2021 became an extended campaign and preparation period for the government, including a potential election defeat. The preparation includes a diverse set of tools, including establishing an information monopoly, restricting the space of their political opponents, and strengthening their own clientele. As a preparation for a worst-case scenario, the government started to extensively outsource its powers and a great share of valuable assets.

The concept of the rule of law in the government's narrative mostly means compliance with formal rules, especially rules enacted by Hungarian legislation, and is very often referred to by government politicians as an elusive and indefinable concept that is primarily an attack on Hungary's sovereignty. The Hungarian government usually rejects the European Commission's findings on the rule of law in Hungary. After the publication of the 2021 Rule of Law Report, the government adopted a resolution<sup>68</sup> stating that Hungary has an effective anti-corruption crackdown, an independent prosecution and constitutional court, and well-functioning checks and balances on government power.

### ***Contribution of civil society and other non-governmental actors***

In the second half of 2021, an interesting public discourse emerged among lawyers and other intellectuals on whether, and if so, how and with what limits, the rule of law can be restored in Hungary if the current opposition wins the next elections. The debate was particularly sharp on whether constitutionalism can be restored without a constitutional majority in parliament. The debate has resulted in clashes concerning the form and content of the rule of law, as well as theoretical and practical considerations. As the debate was (and still is) conducted in the independent press, it received wide publicity and contributed significantly to the broader public awareness of the rule of law issue, its arguments and counterarguments.

68 Government Resolution no. 1527/2021. (VIII. 2.) on the European Commission's Rule of Law Report 2021.

It was also interesting to see how the public authorities reacted to this debate of intellectuals: the President of the Constitutional Court, in an open letter,<sup>69</sup> concluded that a process of overthrowing the constitutional order was underway. He called on the President of the Republic, the Prime Minister and the Speaker of the Parliament to ensure the functioning of the Constitutional Court “by appropriate and effective measures”. A day later, the President of Kúria sent an open letter<sup>70</sup> of support to the President of the Constitutional Court. The Prosecutor’s Office also responded to the letter, stating that “the Prosecutor General and the Prosecutor’s Office will fulfil their obligations under the Constitution and other legislation in all circumstances”. According to a member of the Constitutional Court, justice Béla Pokol, there is a risk of a coup d’état, which could justify the dissolution of the political parties concerned.<sup>71</sup>

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69 [Open letter from the President of the Constitutional Court](#), 14 December, 2021.

70 [Open Letter from the President of the Kúria](#), 15 December 2021.

71 [Kreatív módszerekkel bővül a kormány ellenzékét gáncsoló eszköztára](#). 5 January, 2022.

# LIBERTIES RULE OF LAW REPORT 2022

**IRELAND**



# Ireland

## About the authors

This report has been coordinated and authored by the Irish Council for Civil Liberties (ICCL), with inputs from CityWide Drugs Crisis Campaign, European Movement Ireland, FLAC-Free Legal Advice Centres, Inclusion Ireland, Independent Living Movement Ireland, Irish Traveller Movement and The Environmental Law Officer of the Irish Environmental Network. This submission represents a compilation of a wide array of material and expertise from the aforementioned organisations in their areas of concern.



The **Irish Council for Civil Liberties (ICCL)** is Ireland's oldest independent human rights body. It has been at the forefront of every major rights advance in Irish society for over 40 years. ICCL helped decriminalise homosexuality and legalise divorce and contraception. We drove police reform, defending suspects' rights and in recent years, we led successful campaigns for marriage equality and reproductive rights.



**CityWide Drugs Crisis Campaign** is a national network of community activists and

community organisations that are involved in responding to Ireland's drugs crisis. Set up in 1995 by the Inner City Organisations Network (ICON) to bring together Dublin communities that were struggling with the heroin crisis, CityWide now works nationally linking communities across the country dealing with a range of substance issues.



**European Movement Ireland's** mission is to develop the connection between Ireland and Europe, and to achieve greater public understanding of and engagement with the European Union and with our European partners. We do this by providing objective information and by stimulating debate. Our aim is to reach a wide range of audiences throughout Ireland, and we co-operate with the Government and with like-minded organisations. Separately, we work to inform our European colleagues, through international networks such as European Movement International, about the role Ireland plays in Europe and the EU, and the role that the EU plays in Ireland.



**Irish Environmental Network** is a network of individual environmental Non-Government Organisations (NGOs) that work individually

and, as appropriate, jointly to protect and enhance the environment, and to place environmental issues centre stage in Ireland and internationally. The IEN works to promote the interlinked principles of environmental, social and economic sustainability. In representing the environment its Members represent a common good and not self-interest. As a network, IEN is greater than the sum of its parts, with synergies developing from working together and sharing knowledge, skills, strengths and experience. The Network acts on behalf of its Members to secure core and other funding for their activities. The input provided here is from the Environmental Law Officer of the IEN who advocates on environmental law matters.



**Free Legal Advice Centres-FLAC** is a human rights organisation which exists to promote equal access to justice for all. FLAC's vision is of a society where everyone can access fair and accountable mechanisms to vindicate their rights.



**Inclusion Ireland:** Established in 1961, Inclusion Ireland is a national, rights-based advocacy organisation that works to promote the rights of people with an intellectual disability. The vision of Inclusion Ireland is that of people with an intellectual disability living

and participating in the community with equal rights. Inclusion Ireland's work is underpinned by the values of dignity, inclusion, social justice, democracy and autonomy and we use the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) to guide our work.



**Independent Living Movement Ireland-**

**ILMI** works collectively to create an Independent Living Movement in Ireland led by disabled people, promoting a rights-based social model of disability and challenging a charity/medical view of disability. ILMI are working towards the removal of societal barriers that prevent active equal participation of disabled people, challenging the denial of people's rights, and promoting the philosophy of Independent Living.



**Irish Traveller Movement (ITM):**

Established in 1991, ITM is the national advocacy and membership platform which brings together Travellers and representative organisations to develop collective solutions on issues faced by the community to achieve greater equality for Travellers. ITM represents Traveller interests in national governmental, international and human rights settings. ITM challenges racism - individual, cultural and

structural - which Travellers face and promotes integration and equality.

## **Key concerns**

While some developments were registered in the area of **justice**, a number of concerns remain. It is welcome that a number of long-promised reviews in respect of the justice and court systems are underway, however 2022 must see action beyond reviews and consultations. Time bound and adequately funded plans for the delivery of key reforms in areas such as legal aid and court reform must now be delivered. It is also of note that while spending on the justice system increased marginally in 2021, Ireland remains either close to or at the bottom of the league in terms of spending on its justice system in a comparative European sense. The continued use of the Special Criminal Court remains a serious concern notwithstanding an ongoing review of the Offences Against the State Act.

Similarly, in the area of **corruption**, while it is welcome to see some movement in respect of the need to update public ethics legislation, the timeframe the government is proposing to progress new legislation is slow and does not reflect the urgent need for progress in this area. While work on the transposition of Directive 2019/1937 continues, it is disappointing that this has not been completed by the December 2021 deadline and that the government have chosen to derogate from a number of key provisions.

While it is welcome to see progress in a number of areas with regard to media **freedom, pluralism and freedom of expression**, certain provisions of forthcoming legislation on hate crime and online safety create freedom of expression concerns. Similarly, a forthcoming police powers bill may impede the protection of journalistic sources. The review of the Freedom of Information regime is to be particularly welcomed as civil society have been highlighting flaws in the existing legislation for a number of years. The long-promised reform of Ireland's defamation laws failed to materialise in 2021, despite a report on the matter being furnished to the Minister for Justice.

The continued curtailing of debate and the side-stepping of parliamentary process with respect to the passage of COVID-19 regulations remains a serious concern, negatively affecting the system of **checks and balances**. This is now particularly true as the emergency phase of the pandemic has ended. While the swift passage of legislation may have necessitated the curtailment of normal parliamentary process in 2020, it is wholly unjustified in 2021. This disregard of other parliamentary procedures with respect to the passing of legislation, as outlined below, is also of concern.

**Civil society** organisations continue to face certain hurdles in carrying out their work. While the publication of the draft Electoral Reform Bill was welcome, it was disappointing to see that no steps have been taken to address the civil society freedom issues in the context of the bill, despite noting them as an issue for NGOs. It had also been hoped that 2021 would see a long overdue review of the

2009 Charities Act commence, but this is yet to materialise. The progression of the Housing Planning and Development Bill in its current form remains a key concern from the perspective of judicial review for environmental NGOs.

The persistent failure to effectively address certain **systemic human rights issues** also continues to impact the national rule of law environment. 2021 has seen progress in a number of areas of concern, these include steps to end direct provision and actions for survivors of mother and baby homes and abuse survivors in day schools. However, it is of concern that the government is not fully engaging in these processes to ensure the needs and concerns of survivors are addressed. With respect to mother and baby home survivors and survivors of abuse in day schools, groups have expressed disappointment and serious concern with proposed compensation schemes and other bills. Regarding direct provision, while the commitment to ending the system is welcome, the government have not engaged with the need for independent inspections of these facilities to ensure that those seeking international protection are being housed in safe and appropriate spaces. Concern also remains with regard to the lack of implementation and action on a number of items in the National Traveller and Roma Inclusion Strategy which will only serve to further marginalise Travellers and Roma people.

Against this background, the government has invested in supporting civil society to **raise awareness about the state of rule of law** in Ireland and about the EU monitoring and

reporting mechanism. ICCL benefitted from a grant to that effect, and hosted two events in 2021 to facilitate a discussion on the rule of law situation domestically and to inform other civil society organisations about the opportunity to report on rule of law issues and encourage them to take part in the reporting process feeding the European Commission's annual rule of law audit. This joint report is the result of those efforts.

### State of play

-  Justice system
-  Anti-corruption framework
-  Media environment and freedom of expression and of information
-  Checks and balances
-  Enabling framework for civil society
-  Systemic human rights issues

#### Legend (versus 2020)

- Regression: 
- No progress: 
- Progress: 

## Justice system

### Key recommendations

- Complete comprehensive review of the legal aid system, which should include, inter alia; provision for an enhanced civil legal aid system.

- Complete the review of the Offences Against the State Act and ensure that all courts comply with international fair trial standards.
- Increase overall levels of investment in the Irish courts/justice system to ensure that the system is accessible, accommodative and time efficient.

## **Judicial independence**

### **Appointment and selection of judges, prosecutors and court presidents**

The Judicial Appointments Commission Bill of 2017<sup>1</sup> lapsed following the Irish General Election on 8 February 2020.<sup>2</sup> A General Scheme for a new Judicial Appointments Commission Bill 2020<sup>3</sup> has been published and pre-legislative scrutiny of this Bill commenced in May 2021.<sup>4</sup> The final report of the pre-legislative scrutiny process was published in October 2021.<sup>5</sup> As of December 2021, the

revised legislation which should take account of the findings of the pre-legislative scrutiny process has not been published by the Department of Justice.

### **Independence and powers of the body tasked with safeguarding the independence of the judiciary**

A Judicial Council was formally established on 17 December 2019<sup>6</sup> made up of the entire Irish judiciary. The Council Published its first annual report in July 2021.<sup>7</sup>

### **Accountability of judges and prosecutors**

Under the current regime, there is no formal process for disciplining members of the judiciary. The Judicial Council seek to remedy this through their Judicial Conduct Committee which is in the process of establishment. The Judicial Conduct Committee of the Council concluded its work drafting guidelines concerning judicial conduct and ethics in June 2021 and submitted them for review by the Board of the Judicial Council. The draft

1 See <https://www.oireachtas.ie/en/bills/bill/2017/71/>

2 See [https://data.oireachtas.ie/ie/oireachtas/electoralProcess/electionResults/dail/2020/2020-05-01\\_33rd-dail-general-election-results\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/electoralProcess/electionResults/dail/2020/2020-05-01_33rd-dail-general-election-results_en.pdf)

3 See [http://www.justice.ie/en/JELR/Pages/General\\_Scheme\\_of\\_the\\_Judicial\\_Appointments\\_Commission\\_Bill\\_2020](http://www.justice.ie/en/JELR/Pages/General_Scheme_of_the_Judicial_Appointments_Commission_Bill_2020)

4 <https://www.oireachtas.ie/en/press-centre/press-releases/20211014-justice-committee-publishes-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-judicial-appointments-commission-bill-2020/>

5 <https://www.oireachtas.ie/en/press-centre/press-releases/20211014-justice-committee-publishes-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-judicial-appointments-commission-bill-2020/>

6 <https://judicialcouncil.ie/about-the-judicial-council/>

7 <https://judicialcouncil.ie/assets/uploads/documents/Annual%20Report%202020%20English.pdf>

guidelines include guidance for judges as to the matters to be considered when deciding on recusal from presiding over legal proceedings. The Board will in due course review, and may modify, those draft guidelines before the Judicial Council considers them for adoption. The latest date that this can be completed by is 28th June 2022.<sup>8</sup> No resolution has been implemented to address the issues noted in the report of the previous cycle in respect of the conduct of Supreme Court Judge the Hon Mr Justice Seamus Wolfe, and the associated issues of confidence this has created.<sup>9,10,11</sup>

### ***Significant developments capable of affecting the perception that the general public has of the independence of the judiciary***

Prior to the determination by the High Court of a Judicial Review taken by Ireland's oldest NGO – An Taisce the National Trust for Ireland, challenging a decision of An Bord Pleanála (the national planning authority) in

respect of the building of a cheese factory, statements were made by members of the Oireachtas and An Taoiseach<sup>12</sup> on the matter. This led to some considerable concern about the purpose and intent of such statements on a matter which was then sub judice, and how it accorded with Standing Order 69 in Dáil proceedings.<sup>13</sup> The Judicial Appointments Commission Bill 2020 has completed the pre-legislative scrutiny process<sup>14</sup> and a revised version is due for publication in 2022.

### ***Other issues affecting judicial independence***

In February 2021, the Minister for Justice announced a review of the Offences Against the State Act and the role of the Special Criminal Court in the Irish Judicial System.<sup>15</sup> ICCL has called for the immediate abolition of the Court. ICCL's submission<sup>16</sup> to the review group highlight six areas of particular concern:

- the absence of a jury;

8 <https://judicialcouncil.ie/judicial-conduct-committee/>

9 <https://judicialcouncil.ie/news/statement-and-report-arising-from-review-by-ms-justice-denham/>

10 <https://www.irishtimes.com/news/crime-and-law/full-text-of-denham-report-concerning-mr-justice-s%C3%A9amus-woulfe-1.4369637>

11 <https://www.irishtimes.com/news/crime-and-law/letters-in-full-what-chief-justice-said-to-mr-justice-seamus-woulfe-over-golfgate-dinner-and-his-reply-1.4404867>

12 <https://www.oireachtas.ie/en/debates/debate/dail/2021-03-31/13/>

13 [https://data.oireachtas.ie/ie/oireachtas/parliamentaryBusiness/standingOrders/dail/2021/2021-01-27\\_consolidated-dail-eireann-standing-orders-january-2021\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/parliamentaryBusiness/standingOrders/dail/2021/2021-01-27_consolidated-dail-eireann-standing-orders-january-2021_en.pdf)

14 <https://www.oireachtas.ie/en/press-centre/press-releases/20211014-justice-committee-publishes-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-judicial-appointments-commission-bill-2020/>

15 <https://www.gov.ie/en/press-release/51927-minister-mcentee-appoints-independent-review-group-to-examine-the-offences-against-the-state-acts/>

16 <https://www.iccl.ie/2021/the-special-criminal-court-must-be-abolished/>

- the dual role of judges as both judge and jury;
- the extensive powers of the public prosecutor (DPP);
- claims of privilege by gardaí;
- and the acceptance of beliefs and inferences as evidence.

The right to a trial by a jury of one's peers is a strongly-protected Constitutional right in Ireland. ICCL believes there is little evidence to suggest that jury intimidation is widespread, but if so, this is an issue which should be addressed by measures such as anonymous juries and by legislation at every level of the courts system. It is inappropriate and out of line with the practices and protections of an adversarial, common-law jurisdiction for judges to act as both judge and juror at the Special Criminal Court. The DPP's power to decide what cases go to the Court is far too broad and immensely difficult to challenge. The DPP should be required to provide the reasons they are sending a case to the Court, and those reasons should be open to challenge. At the Court, gardaí can claim privilege and refuse to give important documents to the defence. Gardaí may also present their belief that someone is guilty without having to show any other evidence. Negative inferences may be drawn from a suspect's silence. These practices are clearly contrary to fair trial rights

and should end immediately. ICCL's favoured course of action is the abolition of the Court, with the consideration of alternative means of ensuring the safety of juries and witnesses. Pending the abolition of the Court ICCL also proposes immediate reforms in how the Court currently operates.

## *Quality of justice*

### *Accessibility of courts: legal aid system*

The current civil legal aid system in Ireland is very restrictive and requires that the applicant have a disposable income of less than €18,000 per year. There are limited exceptions to these strict means requirements, such as cases which involve child protection and family law.<sup>17</sup> This system has been criticised for being prohibitive and a barrier to access to justice by a number of bodies such as the Public Interest Law Alliance (PILA) and Free Legal Advice Centres (FLAC), as well as being subject to criticism by Chief Justice Frank Clarke.<sup>18</sup>

In May 2021, the Department of Justice announced its Justice Plan 2021,<sup>19</sup> within which the Minister for Justice proposed to review and expand the civil legal aid system to improve access to justice.<sup>20</sup> While welcoming the review, FLAC told the Department

17 See <https://www.legalaidboard.ie/en/our-services/legal-aid-services/how-do-i-apply-for-civil-legal-aid/>

18 <https://www.lawlibrary.ie/2021/10/03/access-to-justice-conference-friday-1st-october-2021/>

19 See [http://www.justice.ie/en/JELR/Department\\_of\\_Justice\\_Action\\_Plan\\_2021.pdf/Files/Department\\_of\\_Justice\\_Action\\_Plan\\_2021.pdf](http://www.justice.ie/en/JELR/Department_of_Justice_Action_Plan_2021.pdf/Files/Department_of_Justice_Action_Plan_2021.pdf)

20 <https://www.justice.ie/en/JELR/Pages/PR21000132>

of Justice in July 2021,<sup>21</sup> to specifically have regard for the eligibility criteria for legal aid, highlighting the ongoing absence of civil legal aid for families facing eviction. This is vitally important. As Mr Justice Max Barrett said in a judgment delivered in May 2020, the lack of legal aid in some circumstances can lead to a “mockery of justice”. He said: “Very often (perhaps more often than not) a debtor, because he is down on his luck, has to represent himself in the court and the hearing becomes something of a mockery of justice, with the debtor often completely floundering, not sure what to say or do, often (understandably) upset to the point of tears, and trying to compete against a barrister whose skill-set comprises knowing the law and arguing a case in open court.”

It is also of note that following a government announcement of a review of equality law in June 2021,<sup>22</sup> FLAC<sup>23</sup> and other organisations<sup>24</sup> have called for legal aid to be made available to victims of discrimination and for other civil legal purposes. Inclusion Ireland<sup>25</sup> in their submission also noted the barriers which result in the persistent under-reporting of discrimination against for people with intellectual disabilities. The current absence of access to legal aid and dedicated legal services to support victims of discrimination to take complaints

has been pointed out. Groups such as people with disabilities, Travellers and others have highlighted the complexity of the procedure, the lack of reasonable accommodation to support people to access justice, and the limited outcomes that often dissuade people to take complaints.

An important negative development is the maintenance within the legislative programme of the General Scheme of a bill,<sup>26</sup> intended to radically overhaul the existing rules on Judicial Review in environmental cases, and to do so in a non-progressive way with a view to making JR in such cases more difficult to pursue, including but not limited to changes to rules on costs and locus standi. In December 2021, the relevant Joint Oireachtas Committee was preparing for pre-legislative scrutiny of the proposed changes in 2022. It is important in the context to realise the issue of costs in Irish JR remains a particular significant concern with the European Commission, with the 2019 Environmental Implementation Review Report for Ireland<sup>27</sup> stating i.a.: “Extremely high litigation costs — which can leave litigants owing hundreds of thousands of euros — present a greater barrier to environmental litigation than legal standing. For limited litigation categories, Irish legislation adopted

21 [https://www.flac.ie/assets/files/pdf/joint\\_letter\\_on\\_civil\\_legal\\_aid.pdf](https://www.flac.ie/assets/files/pdf/joint_letter_on_civil_legal_aid.pdf)

22 <https://www.gov.ie/en/press-release/24864-minister-ogorman-announces-review-of-the-equality-acts/>

23 <https://www.flac.ie/news/latestnews/2021/06/22/announced-review-of-equality-law-timely-and-necess/>

24 <https://www.flac.ie/news/latestnews/2021/07/29/43-ngos-and-advocates-join-flacs-call-on-justice-m/>

25 Inclusion Ireland 2021”Submission on the Review of the Equality Acts”

26 [The Housing and Planning and Development Bill, 2019](#)

27 [https://ec.europa.eu/environment/eir/pdf/report\\_ie\\_en.pdf](https://ec.europa.eu/environment/eir/pdf/report_ie_en.pdf)

in 2011 provides a form of cost protection. In case C-470/16, *North East Pylon*, the Court of Justice ruled that the requirement that costs not be prohibitively expensive applied to environmental litigation in general, and not just these limited categories. However, Ireland has yet to create a system that ensures that environmental litigants are not exposed to unreasonable costs”.

### ***Resources of the judiciary***

In 2020, the European Commission for the Efficiency of Justice published its annual report on the efficiency of the legal systems in each Member State. According to the report, Ireland spent just 0.1% of GDP on its judicial system in 2018, the lowest of the 46 jurisdictions reviewed in the report. The report also showed that Ireland still has one of the lowest number of judges per capita, with only 3.3 judges per 100,000 people compared to an average of 21.<sup>28</sup> In its 2021 Rule of Law Report the European Commission again criticised Ireland as having the lowest number of judges per inhabitant in the EU stating that this ‘could also affect the efficiency of the Irish justice system.’<sup>29</sup> In September 2021 the government announced the nomination of 5 new High Court judges.<sup>30</sup>

In October 2021, the Government announced it was allocating a 5.3% increase to the annual budget for the Department of Justice resulting in a total budget of just over €3.1 billion. These funds have been allocated in a number of areas, including increases in policing and administrative staffing for Gardaí. The Courts Service will receive a total of €164 million in 2022. There is also provision for administrative staff to support additional judges, as well as the recruitment of specialist staff to improve the service’s technology capacity.<sup>31</sup> However, as noted by the 2021 Rule of Law Report by the European Commission, the government’s plans to improve the situation are insufficient and more immediate measures are necessary.

### ***Training of justice professionals***

At present, there is no formalised training provided to judges when they are appointed to the bench. Instead, the education of members of the judiciary has been carried out by the Association of Judges of Ireland Committee for Judicial Studies. Due to a lack of funding, this Committee organises only one annual training day for the judges of each Court and an additional judicial conference day which all judges attend once a year. Judges are also

28 See <https://rm.coe.int/evaluation-report-part-2-english/16809fc059>

29 European Commission (2021), Rule of Law report. Country Chapter for Ireland (Brussels, 20.7.2021, SWD(2021) 715 final)

30 <https://www.lawsociety.ie/gazette/top-stories/2021/09-september/five-new-high-court-judges-nominated>

31 <https://www.lawsociety.ie/gazette/top-stories/2021/10-october/justice-budget-to-rise-by-5.3-next-year#:~:text=The%20Government%20has%20allocated%20an,4.7%25%20to%20%E2%82%AC270%20million.>

selected to attend conferences and international training events relevant to their area of work.<sup>32</sup>

The Judicial Studies Committee will be taken over by the Judicial Council on foot of the Judicial Council Act 2019. The purpose of the committee is to ensure a more consistent and high-quality educational programme for members of the judiciary. A number of trainings as part of this programme have taken place in 2021.<sup>33</sup>

### **Digitalisation**

In February 2021 the Courts Service launched their 2021-2023 strategic plan,<sup>34</sup> a key element of this plan being to progress the courts' modernisation programme. The report sets out how the modernisation programme will "fundamentally transform how the Courts Service delivers services and develops a modern, best-in-class Courts system, delivering a more efficient and user-friendly experience for all those who attend, work in and pay for the Courts. This ambitious plan focuses on re-designing services around the user, leveraging digital technology to streamline services and processes, and ultimately delivering a Courts system that enhances Ireland's international reputation". This programme was awarded €1 million towards its work in the Department of Justice Budget for 2022.

The pandemic has expedited the use of technology in the Courts, with the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 making provision for the use of videolink in lieu of live hearings. This has continued into 2021. In civil matters, the judiciary facilitate hearings and motions online via a platform called "Pexip", except for jury trials and non-urgent personal injury matters. In criminal matters, accused persons can be arraigned over videolink and, if in custody, can attend any hearings and applications via Pexip. The Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 also provides for the use of an audio only link in the definition of electronic communication in s31(6) for hearings by designated bodies. Regrettably, this has been relied upon by certain of the designated bodies (e.g. The Forestry Appeals Committee, FAC) in order to conduct hearings by telephone line only, even in circumstances where the appellant has objected to this. For example, where the appellant has outlined the poor quality of their telephone line, and the inequality and unfairness of the proceedings where other parties to the proceedings have internet access or are present, and where the impact of sustained usage of the phone impacts for the hearings considerably impacts on other members of the household – in circumstances where multiple hearings are scheduled back-to-back over a number of days. Even in circumstances where an appellant had been notified of an electricity

32 See <https://aji.ie/supports/judicial-education/>

33 <https://www.irishtimes.com/news/crime-and-law/new-to-the-bench-judges-to-be-trained-for-the-first-time-1.4676043>

34 <https://www.courts.ie/content/courts-service-strategic-plan-2021-%E2%80%93-2023-published>

outrage – the FAC insisted on continuing with the hearings, despite the fact that the electricity for the appellants internet and even offline access to their laptop was compromised given the duration of the laptop battery. Such matters have been brought to the attention of the relevant minister, given the Civil Law and Criminal Law (Misc. Provision) Act 2020 in s31(2) and relevant forestry legislation provide for considerations in respect of acting in the interests of justice and fairness. However, such escalations resulted in no change in these instances.

#### ***Use of assessment tools and standards***

It is essential that the Courts Service develop its website to improve access to persons with disabilities. FLAC recognises that technology may be developed for the Courts Service to allow for conduct of work online, so it is imperative that people with visual impairments or motor impairments who are unable to access a webpage, much less submit or retrieve information are not excluded from these services because they cannot access the technology.<sup>35</sup>

The Programme for a Partnership Government under the heading “Courts and Law Reform”<sup>36</sup> contains a commitment to the commissioning of an annual study on court efficiency and sitting times, benchmarked against international standards, to provide accurate measurements

for improving access to justice. Comprehensive data is required in relation to lay litigants and persons in need of legal aid, and persons facing repossession of their family homes or evictions in order to be able to devise accurate and effective measures for improving access to justice.

#### ***Translation of other languages and sign language interpretation in the Courts***

The Courts Service regularly facilitates interpretation services for those whom English is not their first language. The provision of the interpretation service is outsourced to private operators, however anecdotal evidence suggests that the quality of interpretation provided can be patchy. Legal interpretation requires not only the ability to speak in two or more languages, but also familiarity with legal terminology and differences in dialects and vocabulary in the relevant languages, as well as simultaneous interpreting skills. There is a clear need for standards and regulation in this area in order to ensure that those who do not have sufficient fluency in English can still access justice.

FLAC welcomed the enactment of the Irish Sign Language Act 2017 making Irish Sign Language an official language of the State and placed an obligation on courts to take all reasonable steps to allow persons competent in Irish Sign Language to be heard in ISL as

35 Rei-Anderson, Cody and Reynolds, Graham J. and Wood, Jayde and Wood, Natasha, Access to Justice Online: Are Canadian Court Websites Accessible to Users with Visual Impairments? Alberta Law Review, Vol. 55, No. 3, 2018. Available at SSRN: <https://ssrn.com/abstract=3143971>

36 [https://www.merriestreet.ie/merriestreet/en/imagelibrary/programme\\_for\\_partnership\\_government.pdf](https://www.merriestreet.ie/merriestreet/en/imagelibrary/programme_for_partnership_government.pdf)

well as a duty on public services to provide free interpretation services when accessing statutory services.

FLAC also welcomed the provisions in the National Disability Inclusion Strategy 2017-2021 which included plans to increase the number of sign language interpreters, a registration scheme and quality assurance measures, and professional training for sign language interpreters. These are progressive measures, but we also recognise that the presence of an interpreter can change the dynamic of legal interactions and court proceedings. We further note there is a lack of awareness among many in the justice system about both deaf people and their language and the nature of interpreted interaction and the fact that interpretation services can sometimes create additional barriers for a deaf person to overcome. As such, it is essential that the Courts provide effective ISL interpretation or other appropriate mechanisms to accommodate deaf people where necessary.

We note that the National Disability Authority are engaging with An Garda Síochána and with the Courts Service in relation to developing proposals to improve the response of both organisations in interacting with people with disabilities in accessing the justice system,<sup>37</sup> however, data concerning specific progress in this regard is currently unavailable. As well as access to public buildings, the legislation requires access to information including

sectoral plans for government departments requiring that access for people with disabilities becomes an integral part of service planning and provision. FLAC acknowledges that the Courts Service has appointed a Disability Liaison Officer and disabled access and facilities are included in all court building and refurbishment projects, however this work is ongoing and there is no easily accessible information online that indicates which buildings are accessible or not.<sup>38</sup> One of the aims of the review should be to ensure that people with a disability can participate fully in the justice system, and that disability issues are not considered in isolation but integrated in all areas of access to justice.

## ***Fairness and efficiency of the justice system***

### ***Length of proceedings***

In April 2020, the European Court of Human Rights (ECtHR) delivered its decision in the case of *Keaney v Ireland*. In that case, the Applicant claimed that the delay of over 11 years between the date of initiation of proceedings to the date of judgment of final appeal in the Supreme Court was excessive. The ECtHR found that this delay was excessive and a violation of Article 6 of the European Convention on Human Rights. The Court further found that there was no effective remedy for delay of this nature in

<sup>37</sup> National Disability Inclusion Strategy 2017-21 DE

<sup>38</sup> Report of the Commission on the Status of People With Disabilities

the Irish courts. The Court noted that Ireland has persistently not met its obligations in this regard and that lengthy delays in litigation were systemic. Although the concurring opinion of Judge O’Leary noted that some progress had been made with the introduction of case management and the expansion of the Court of Appeal, Judge O’Leary was still of the view that Ireland is not doing enough to meet its obligations under Article 6.<sup>39</sup> The Keaney case was one of many to come before the ECtHR on the length of proceedings in Ireland and Keaney was chosen by the Court as a lead case on the issue. In 2021 another case came before the ECtHR, Gilligan v Ireland in which it was argued that the length of proceedings amounted to a breach of Article 6. However, in that case no violation was found as the Court found that the appellants themselves had caused the delay.<sup>40</sup> However, it remains to be seen whether the State’s implementation of the Keaney judgment will be effective and whether this case will lead to systemic reform in terms of length of proceedings. Case management in respect of JR in the Superior Courts for environmental cases appears to have reduced to some extent the practice of allowing the State respondents seek numerous

adjournments, which contributed substantially to delays in such proceedings.

### ***Quality and accessibility of court decisions***

Appellants and their representatives should be given access to any previous decisions which may be relevant to their case in quasi-judicial tribunals. Anonymised searchable databases should be established in Quasi-Judicial Tribunals and made available to the public. This was recommended<sup>41</sup> by the UN Special Rapporteur on Extreme Poverty and Human Rights regarding the Social Welfare Appeals Office following her visit to Ireland in January 2011 but remains unimplemented.

### ***Corruption of the judiciary***

The anti-corruption watchdog GRECO has criticised Ireland’s judicial election process as being overly politicised. There was a controversy surrounding the appointment of former Attorney General Seamus Wolfe as a member of the Supreme Court in 2020. However, the new Judicial Appointments Commission Bill 2020 is intended to address these concerns.<sup>42</sup> This Bill has completed the pre-legislative

39 See <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-202411%22%5D%7D>

40 <https://hudoc.echr.coe.int/eng-press?i=003-6967495-9379224>.

41 <https://www.dfa.ie/media/dfa/alldfawebsitemedia/newspress/publications/2011-unhcr-independent-report-mission-to-ireland.pdf>

42 <https://www.oireachtas.ie/en/press-centre/press-releases/20210614-justice-committee-resumes-pre-legislative-scrutiny-of-the-general-scheme-of-the-judicial-appointments-commission-bill-2020/>.

scrutiny process<sup>43</sup> and a revised version is due for publication.

### ***Review of the administration of justice***

FLAC contributed to the recent Review of the Administration of Justice and welcome a number of its recommendations. However, we have sought consultation in relation to the implementation of its recommendations. Civil society was not strongly represented on the review group. FLAC was especially dismayed to hear from the Minister that legislation is planned in relation to judicial review as we have particular concerns about those recommendations being implemented. We very much welcome the proposed long overdue reform of rules and procedures but have some concerns that review recommendations if implemented will put too much onus on an unrepresented litigant to identify with clarity their claim. It is vital that these reforms are equality, human rights and poverty proofed as is required by Section 42 of the IHREC Act.

### ***Discrimination in the justice sector***

The Public Sector Duty (PSD) was introduced pursuant to section 42 of the Irish Human Rights and Equality Act 2014. It provides an important legislative mechanism for mainstreaming racial and ethnic equality and protecting the human rights of ethnic minorities. In fulfilling their duties under the 2014 legislation, public bodies - including those involved

in the administration of the criminal justice system - must consider the human rights and equality impact of their policies, services, budgets, procedures and practices. The PSD requires public bodies to take a proactive approach to tackling institutional discrimination and promote the mainstreaming of an equality perspective in all their functions.

The commitment of the Department of Justice and Equality to upholding and vindicating human and individual rights as a core element of its criminal justice sectoral strategy is welcomed as a means of the DJE meeting its obligations pursuant to the PSD.

### ***Protective Costs Orders***

Part 11 of the Legal Services Regulation Act 2015, Legal Costs in Civil Proceedings, sets out when a court may order someone involved in proceedings to pay the costs of a case, including the costs of another party. Section 169 provides that a party who is entirely successful in civil proceedings is entitled to an award of costs against the unsuccessful party. However, a court may choose not to make this order in certain instances which are outlined in the same section. These do not include cases which seek to clarify the law in the public interest. In the experience of FLAC, the costs incurred by litigants in vindicating their rights is one of the biggest barriers to accessing justice. Not only do applicants incur their own legal fees, they also run the risk of incurring

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43 <https://www.oireachtas.ie/en/press-centre/press-releases/20211014-justice-committee-publishes-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-judicial-appointments-commission-bill-2020/>

those of their opponent. Public interest litigation is inherently unpredictable, as the case is often being litigated because the law is not clear and needs clarification. In our legal system, such cases are almost always brought by an individual who is personally concerned with the outcome.

Such cases are usually against the State office of the State, because ultimately it is the responsibility of the State to protect, defend and promote the rights of its people. As is the nature such examinations of the law, the public interest litigant is bringing a benefit to the public but, in facing the significant resources of the State, bears a personal risk over and above that normally borne by someone who goes before the courts. FLAC would like to see the exceptions to the rule that costs ‘follow the event’ expanded to include Protective Costs Orders (PCO) for litigants taking cases that are in the public interest. This would provide certainty as to costs at the outset of litigation. Such an order could provide that there will be no order as to costs, that the plaintiff’s liability for costs will be capped at a certain amount, or that the defendant will pay costs, even if the plaintiff is unsuccessful. In practice, while the Irish courts have occasionally departed from the usual costs rules in public interest cases, they have not developed specific rules for public interest litigation comparable to other common law jurisdictions. FLAC is concerned that the availability of PCOs is not specifically recognised in legislation. FLAC

recommends that the courts should be specifically authorised to take into account the public interest nature of a case and that rules on costs be extended to expressly include the granting of Protective Costs Orders in public interest law cases.

It is concerning in this regard that the General Scheme of the Housing and Planning and Development Bill 2019, a proposed piece of legislation – includes provisions which would alter negatively the current protection against costs for environmental cases, and it also proposes to remove the discretion currently of the court to award costs in favour of an applicant “in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so<sup>44</sup> in a broad swathe of environmental cases.”

### *Multi-party actions*

Another barrier for litigants whose cases advance the public interest is the absence of a multi-party actions. Multi-party actions (MPAs) can be an important vehicle for enhancing access to legally enforceable remedies, particularly for vulnerable groups. By taking proceedings as a group, litigants have greater combined resources that may enable them to deal with the challenges of legal action collectively and allow them gain strength in numbers. MPAs equally allow groups to pursue litigation where the individual compensation might be nominal e.g. restoration of

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44 Section 50B(4) of the Planning and Development Act 2000 currently allows the Court discretion to award costs to an unsuccessful applicant in matters of “exceptional public importance and where in the special circumstances

a small social welfare benefit or refund of the cost of goods or services purchased.

MPAs are also seen to increase the efficiency of the courts and to reduce the costs of legal proceedings for all parties by enabling common issues to be dealt with in one action. Ireland currently has no formal rules for MPAs, save for procedures around representative actions and test cases. As these procedures are not specifically designed to operate as class actions, their use is not as common or popular as class actions in jurisdictions that have dedicated procedures. Both representative actions and test cases are subject to certain limitations that deter their use. The Law Reform Commission produced a report in 2005 on multi-party litigation which concluded that ad hoc arrangements have been used to deal with multi-party litigation and that a more structured approach should be available based on principles of procedural fairness, efficiency and access to justice.

The Superior Court Rules Committee has the power of making and changing the rules of the superior courts but as of yet has not implemented the LRC proposal. FLAC recommends that the Law Reform Commission's recommendations on multi-party actions be given due consideration with a view to the introduction of a new litigation procedure to provide for class actions. FLAC further recommends examination of the following issues

which may increase access to justice for disadvantaged groups and individuals: developing the laws on standing to allow NGOs bringing actions on behalf of their members; allowing a greater use of the amicus curiae application; increasing the discretion of a judge to award costs to an unsuccessful litigant modifying the doctrine of mootness so that courts can deal with issues which may be moot for the immediate parties, but which may continue to affect many others; devising more effective methods of extending the benefits of judicial decisions to those who are not directly party to the litigation; examining the rules of funding of litigation.

## **Anti-corruption framework** –

### **Key recommendations**

- Urgently progress the review and update of Ireland's outdated public ethics legislation to a level at least commensurate with the shelved 2015 Standards in Public Office Bill.
- Complete the transposition of EU directive 2019/1937 on protected disclosures and reverse the

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of the case it is in the interests of justice to do so" and Head 6 of the new General scheme proposes to delete that discretion. S.50B albeit in the Planning and Development Act acts across multiple sectors for environmental decisions involving certain key environmental directives.

decision to derogate from a number of provisions of the directive.

- Conduct a public consultation on national measures required to address SLAPP litigation and implement stringent dissuasive penalties in respect of those pursuing SLAPP as a measure to deter the public and organisations from exercising their access to justice and public participatory and access to information rights.

### ***Levels of corruption***

While there is no evidence of widespread corruption in Ireland, it is worth noting that the country fell two places (from 18th to 20th) in the 2020 Corruption Perception Index.<sup>45</sup> This fall in perception may stem from the lack of progress on a number of long promised reforms in the areas of public ethics and transparency which have been identified elsewhere in this submission.

### ***Framework to prevent corruption***

#### ***Integrity framework including incompatibility rules***

On November 25th 2021 the Government announced that a review of Ireland's existing statutory framework for Ethics in Public Life is underway.<sup>46</sup> The Review of Ethics Legislation will seek to respond to outstanding recommendations of the Moriarty and Mahon tribunals. The government have also stated that the review will take account of more recent developments including:

- The 'Hamilton Report' recommendations on preventing economic crime and corruption,
- The Council of Europe's Group of States against Corruption (GRECO) recommendations on reform of Ireland's statutory framework for ethics; and
- The Standards in Public office Commission's experience of administering the current framework.

It is expected that this reform process will progress over 2022 and legislation based on the review would be published in Q4 2022.

According to NGOs, the absence of an updated legal/ethical framework for public

45 <https://www.transparency.org/en/cpi/2020/index/nzl>

46 <https://www.gov.ie/en/press-release/aec32-minister-mcgrath-launches-public-consultation-on-review-of-ethics-legislation/>

officials following the lapse of the Public Sector Standards Bill 2015 has made it extremely difficult to hold public officials to account for their actions. This includes actions taken by public officials to put in place contracts (Service Level Agreements) with NGOs which prohibit the use of funding for any activity that involves criticism of government policy, effectively limiting the scope and nature of NGO advocacy work. It also includes threats, either implicit or explicit, that receipt of statutory funding will be contingent on not expressing critical views on government policy.

### ***General transparency of public decision-making***

The Lobbying Register, which was established consequent to the Regulation of Lobbying Act, 2015 does not allow for searches against a Designated Public Official, DPOs – which impedes the practical ability to determine the lobbying focus on key officials. The system also does not capture the internal effect of lobbying more junior members of staff who may have been targeted by lobbying to DPOs. A number of key bodies and agencies are also excluded from the lobbying register – e.g. An Bord Pleanála and The Environmental Protection Agency, EPA.

### ***Rules on preventing conflict of interests in the public sector***

The government have voted to delay or have not progressed a number of opposition tabled bills on conflict of interest which have received parliamentary approval in the last 12 months, including the Regulation of Lobbying (Amendment) Bill 2020<sup>47</sup> and the Regulation of Lobbying (Post-Term Employment as Lobbyist) Bill 2020.<sup>48</sup> These bills remain within the parliamentary process and have not become law. It is however expected that the government itself will bring forward proposals in this area in 2022 with a long-awaited review of public ethics legislation.

### ***Measures in place to ensure whistleblower protection and encourage reporting of corruption***

The government has begun the transposition of EU directive 2019/1937 on protected disclosures. A draft bill, which would amend existing protected disclosure legislation to incorporate the provisions of the directive, was published in May 2021.<sup>49</sup> Several sessions of pre-legislative scrutiny were held by the responsible parliamentary committee in September and October but the legislation was not enacted before the deadline set out in the

47 <https://www.oireachtas.ie/en/bills/bill/2020/62/>

48 [https://www.oireachtas.ie/en/bills/bill/2020/49/#:~:text=Regulation%20of%20Lobbying%20\(Post%2DTerm%20Employment%20as%20Lobbyist\)%20Bill%202020,\(Bill%2049%20of&text=Bill%20entitled%20an%20Act%20to,%20provide%20for%20related%20matters.](https://www.oireachtas.ie/en/bills/bill/2020/49/#:~:text=Regulation%20of%20Lobbying%20(Post%2DTerm%20Employment%20as%20Lobbyist)%20Bill%202020,(Bill%2049%20of&text=Bill%20entitled%20an%20Act%20to,%20provide%20for%20related%20matters.)

49 <https://www.gov.ie/en/press-release/d263a-minister-mcgrath-publishes-general-scheme-of-protected-disclosures-amendment-bill/>

directive of December 2021. It is of concern that the government have chosen to derogate from the directive in a number of areas which would serve to strengthen protections for whistleblowers, e.g. limiting the requirements to establish internal whistleblowing channels to companies with more than 49 employees. ICCL and others have called on the government to reverse this decision and further strengthen whistleblower protections in a pre-legislative scrutiny session in September 2021.<sup>50</sup>

### ***Investigation and prosecution of corruption***

#### ***Strategic litigation against public participation (SLAPPs)***

There has been a notable increase in anecdotal reports of the amount of Strategic Litigation Against Public Participation (SLAPP) being pursued against applicants for Judicial Review in environmental cases. This has the potential to undermine the lawful right to exercise pursuit of Access to Justice. The State has arguably failed to implement a system sufficient to accord with its obligations under Article 3(8) of the UNECE Convention on Access to Information, Public Participation

in Decision- Making and Access to Justice in Environmental Matters, the Aarhus Convention, in respect of ensuring there is i.a. no penalisation, harassment or persecution of environmental defenders.<sup>51</sup>

## ***Media environment and freedom of expression and of information***

### ***Key recommendations***

- Progress the review of the Freedom of Information system to ensure a regime that is transparent, user-friendly and accessible, and implement solutions which bring Ireland's Access to Environmental Information regime into compliance with the UNECE Aarhus Convention.<sup>52</sup>
- Amend both the Online Safety and Media Regulation and the Criminal Justice (Hate Crime) Bills to ensure that freedom of expression is protected.

50 [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_finance\\_public\\_expenditure\\_and\\_reform\\_and\\_taoiseach/2021-09-29/3/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_finance_public_expenditure_and_reform_and_taoiseach/2021-09-29/3/)

51 <https://www.gov.ie/en/publication/a85dc-aarhus-convention-national-implementation-reports/#2021>

52 Serious findings of non-compliance were established against Ireland on foot of communication ACCC/C/2016/141 [https://unece.org/sites/default/files/2021-04/ece\\_mp.pp\\_c.1\\_2021\\_8\\_eng.pdf](https://unece.org/sites/default/files/2021-04/ece_mp.pp_c.1_2021_8_eng.pdf)

- Commence the long overdue review of Ireland’s defamation laws to ensure the media are empowered to report without undue interference.

## **Media and telecommunications authorities and bodies**

### **Independence, enforcement powers and adequacy of resources of media and telecommunication authorities and bodies**

The Future of Media Commission was established by the Government in September 2020 to examine the future of the media in Ireland, including Ireland’s public service broadcasters, commercial broadcasters, print and online media platforms. As part of its work, the Commission hosted 6 “thematic dialogues” over the course of 2021.<sup>53</sup> The Commission’s final report has been submitted to the Taoiseach and the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media, Catherine Martin but it has yet to be made public as of January 2022.<sup>54</sup>

## **Safety and protection of journalists and other media activists**

### **Rules and practices guaranteeing journalist’s independence and safety**

A review of Ireland’s defamation laws has been ongoing since 2016. A 2019 report on the review of the 2009 Defamation Act has been with the Minister for Justice since September 2021 but no action has been taken and this minister has delayed the announcement of a review which was due to commence in October 2021.<sup>55</sup> This need for a review of Ireland’s defamation laws is urgent given the chilling effect the law as it stands has on journalists, a point which was highlighted<sup>56</sup> by the European Commissioner for Justice Didier Reynders at a meeting of the Oireachtas committee for European Affairs in March 2021.

### **Confidentiality and protection of journalistic sources**

In June 2021, the Department of Justice published a draft policing reform bill. The General

53 <https://futureofmediacommission.ie/#>

54 <https://www.independent.ie/business/media/funding-rte-looks-likely-to-remain-a-big-challenge-41046603.html>

55 <https://www.independent.ie/irish-news/news/justice-minister-helen-mcentee-again-reneges-on-pledge-to-publish-long-overdue-report-on-defamation-law-41158308.html>

56 <https://www.irishtimes.com/news/politics/ireland-s-defamation-laws-are-being-used-to-pressure-journalists-eu-commissioner-1.4504781?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fpolitics%2Fireland-s-defamation-laws-are-being-used-to-pressure-journalists-eu-commissioner-1.4504781>

Scheme of the Garda Síochána (Powers) Bill<sup>57</sup> provides for a general search warrant provision, as recommended by the Law Reform Commission (LRC). However, Head 15(6) of the draft bill is not in line with the LRC's recommendation that urgent applications should be made to the High Court, not the District Court. It is questionable whether such an application would be appropriate at the District Court level. Clarification on why LRC's recommendation was departed from in this instance is needed. In addition, the provisions under Head 15 fail to take into account a recent High Court case concerning a journalist who refused to give the police the password to his phone, and the comments made by Mr Justice Garrett Simmons, who warned: "The interpretation of the legislative provisions governing search warrants contended for by both parties has the consequence that there is, arguably, no statutory procedure prescribed under domestic law whereby the right to protection of journalistic sources is attended with legal procedural safeguards commensurate with the importance of the principle at stake. This might well represent a breach of the European Convention on Human Rights." "A District Court judge who has to consider

an application for a search warrant, under this Head, should have to consider additional legal procedural safeguards in respect of journalists and publishers who have a constitutional right to protect their sources but who may find themselves subjected to a search."<sup>58</sup>

### ***Access to information and public documents***

Following on from a political scandal in the summer of 2021 related to the proposed appointment of a former government Minister to a UN Special Envoy role,<sup>59</sup> the government announced a review of the 2014 Freedom of Information Act.<sup>60</sup> The review, which is being led by the Department of Public Expenditure and Reform, has commenced gathering initial inputs from stakeholders. It is expected that the review will be completed in mid-2022.<sup>61</sup>

Ireland has still failed to respond to the finding of the UNECE Aarhus Convention Compliance Committee in case ACCC/C/2016/141,<sup>62,63</sup> which found Ireland's system of review for AIE decisions to be non-compliant, given the failure to put in place measures to ensure appeals determined by the OCEI were determined in a timely manner, and in

57 <https://www.gov.ie/en/press-release/6ed9f-garda-powers-to-be-modernised-and-updated-under-new-bill-from-minister-humphreys/>

58 <https://www.irishexaminer.com/news/courtandcrime/arid-40200825.html>

59 [TheJournal.ie; September 6th 2021 "Zapponegate: Ex-Minister texted Coveney to say thanks for 'incredible opportunity' in March"](https://www.thejournal.ie/211111-zapponegate-ex-minister-texted-coveney-to-say-thanks-for-incredible-opportunity-in-march-211111/)

60 [Freedom of Information Act \(2014\)](#)

61 [Department of Public Expenditure and Redform: Review of the Freedom of Information Act](#)

62 In English: [https://unece.org/sites/default/files/2021-04/ece\\_mp.pp\\_c.1\\_2021\\_8\\_eng.pdf](https://unece.org/sites/default/files/2021-04/ece_mp.pp_c.1_2021_8_eng.pdf)

63 In French: [https://unece.org/sites/default/files/2021-04/ece\\_mp.pp\\_c.1\\_2021\\_8\\_fre.pdf](https://unece.org/sites/default/files/2021-04/ece_mp.pp_c.1_2021_8_fre.pdf)

maintaining a system where the courts may rule that information requests fall within the scope of the AIE Regulations without issuing any directions for their adequate and effective resolution thereafter.<sup>64</sup> For the Meeting of the Parties in October 2021 Ireland reported on progress, and the Bureau's report<sup>65</sup> subsequently adopted by the Parties indicates neither issue has been resolved.<sup>66</sup> These failures significantly impede the effectiveness of the regime for access to environmental information required under EU Directive 2003/4/EC<sup>67</sup> and the Aarhus Convention.

## ***Freedom of expression and of information***

### ***Abuse of criminalisation of speech***

The General Scheme of the Criminal Justice (Hate Crime) Bill 2021 was published in April 2021.<sup>68</sup> The Bill is aimed at introducing hate crime legislation in the Irish system, as well as reviewing the provisions on incitement to hatred which date back to 1989.<sup>69</sup> While the need for reform – including in relation to its

application to the online sphere – has been raised by multiple stakeholders,<sup>70</sup> there is a need to ensure that legislation seeking to criminalise any form of speech is drafted in a way that ensures full respect for the right to freedom of expression.

As currently drafted, the General Scheme contains a definition of “hatred” which is not aligned to international and regional human rights standards. The offence of incitement to hatred must be drafted in a way that fully respects the right to freedom of expression, which entails the right to shock, disturb and offend. Civil society has called for a closer aligning of the offence with international standards, in particular standards that call for an explicit connection between incitement and a particular act of discrimination, hostility and violence. Clarity and precision are vital to ensure that all persons understand where the threshold is between criminal and non-criminal speech and behaviour. It was also noted that in the new legislation, sentencing must be proportionate, highlighting that community sentencing options should be available supporting restorative justice options.

64 Paragraph 133 of Findings: [https://unece.org/sites/default/files/2021-04/ece\\_mp.pp\\_c.1\\_2021\\_8\\_eng.pdf](https://unece.org/sites/default/files/2021-04/ece_mp.pp_c.1_2021_8_eng.pdf)

65 [https://unece.org/sites/default/files/2021-08/ece.mp\\_pp\\_2021.52\\_ac.pdf](https://unece.org/sites/default/files/2021-08/ece.mp_pp_2021.52_ac.pdf)

66 <https://unece.org/env/pp/cc/decision-vii8i-concerning-ireland>

67 DIRECTIVE 2003/4/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

68 [https://www.justice.ie/en/JELR/General\\_Scheme\\_Criminal\\_Justice\\_\(Hate\\_Crime\)\\_Bill\\_2021.pdf/Files/General\\_Scheme\\_Criminal\\_Justice\\_\(Hate\\_Crime\)\\_Bill\\_2021.pdf](https://www.justice.ie/en/JELR/General_Scheme_Criminal_Justice_(Hate_Crime)_Bill_2021.pdf/Files/General_Scheme_Criminal_Justice_(Hate_Crime)_Bill_2021.pdf)

69 <https://www.irishstatutebook.ie/eli/1989/act/19/enacted/en/print#sec6>

70 See e.g. ECRI, Fifth report on Ireland (adopted on 2 April 2019 / published on 4 June 2019), para 34 -35.

In order to avoid abuse of criminalisation of speech, civil society have also called on the government to ensure that the new Bill is only one pillar of a suite of measures necessary to combat hate speech. Other forms of hate speech, which might cause deep offence for example but do not reach a criminal threshold, should be combated by other means, including education, monitoring, alternative remedies and an enabling environment for powerful counter-speech.

### ***Censorship and self-censorship, including online***

The General Scheme of the Online Safety and Media Regulation Bill was published in January 2020.<sup>71</sup> The Bill is a substantial overhaul of the regulation of online content and platforms. It seeks to, among other things, transpose the amended Audiovisual Media Services Directive [Directive (EU) 2018/1808] into Irish law; to dissolve the Broadcasting Authority of Ireland, and to establish a Media Commission which will regulate audiovisual media services, sound media services, and designated online services.

The general scheme provides for the Media Commission to create online safety codes and to issue guidance materials and advisory notices in relation to harmful online content and age-inappropriate online content. It provides for the commission to audit user complaint mechanisms operated by designated online services; to direct a designated online

service to take specified actions, including to remove or restore individual pieces of content; to conduct investigations and inquiries; to issue compliance notices; to issue warning notices if a service does not provide a satisfactory justification in relation to any alleged non-compliance; and, where the Commission deems necessary, to apply to seek sanctions.

There is troubling vagueness in respect of the definition of harmful content which gives rise to freedom of expression and censorship concerns. This is particularly the case in respect of cyberbullying material with such material being defined as “material which is likely to have the effect of intimidating, threatening, humiliating or persecuting a person to which it pertains...”

As the scheme currently sits, the bill will seek to reduce a feeling that does not need to have actually been felt by anyone, and there is no requirement that the material be abusive or threatening. There are concerns that the material could lead to disproportionate restrictions on the right to freedom of expression; could lead to the unjustified removal of material, self-censorship, prior restraint; and companies using more strenuous filtering measures, use of algorithms, AI. The scheme also provides no safeguards for literary, artistic, political, scientific or academic discourse, and fair and accurate reporting; and does not differentiate between age groups, i.e. children versus adults. The scheme provides that the Media Commission will be able to expand the

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71 See <https://www.gov.ie/en/publication/d8e4c-online-safety-and-media-regulation-bill/>

definition of harmful online content, thereby compounding the problem as it would permit extension of censorship by the executive.

In addition, the vastly wide-ranging list of services which could potentially be subjected to regulation under the OSMR bill will, on the face of it, see the expressions of members of the public subjected to codes in a way usually designed for licensed bodies in Ireland. These measures will extend to essentially all human interactions online with no adequate procedural safeguards for individuals whose speech may be censored as per the Constitution, the European Convention of Human Rights, and/or the Charter of Fundamental Rights.

### ***Publication of information and transparency***

There are certain categories of information that are not published routinely by government departments meaning that civil society, journalists and researchers must attempt to access this via Freedom of Information (FOI) legislation. For example, the Department of Social Protection (DSP) continually refuses to routinely publish their circulars. As a result, members of the public and NGOs etc, must request them via FOI. Once the FOI is submitted, departmental practice is that DSP staff will contact the applicant and state that

they may provide the FOI response outside of the scope of the FOI structure if the official request is withdrawn. This speeds up the process but is clearly unnecessary and an obvious demonstration of making accessing information more difficult for the applicant, even where they are entitled to receive this information under the legislation, while simultaneously making it easier for staff to not have to draft an FOI schedule. If Departments broadened the categories of what they routinely publish, this could be avoided. It is common practice for Departments to provide large documents in a manner that makes it more difficult to analyse. Often, they will provide photocopies of printed computer files. Elsewhere they will provide large tracts of scanned documents meaning that it cannot be searched. The costs of accessing information held by Departments is not only routinely excessively high, but there is no clarity as to how the rates are set. Costs associated with copying a retrieval is also an issue.

The issue of timeliness and directions in the context of reviews of Access to environmental information requests noted earlier<sup>72</sup> – serve to compromise the efficacy of the system, in addition to similar issues noted for the FOI regime above. Additionally, a public consultation on a comprehensive review of the AIE regulations concluded in April 2021.<sup>73</sup>

72 Findings of non-compliance against Ireland in [case ACCC/C/2016/141](#)

73 <https://www.gov.ie/en/consultation/53b81-public-consultation-on-the-review-of-the-access-to-information-on-the-environment-aie-regulations-2007-2018/>

However, despite the findings having been finalised in November 2020,<sup>74</sup> in a letter<sup>75</sup> to the Compliance Committee of the Aarhus Convention in May 2021 Ireland was still unable to provide any indication update on when the new legislation would be provided.

### **Legislation and practices on fighting disinformation**

In January 2021, the government published the general scheme of the Electoral Reform Bill (2020).<sup>76</sup> The draft bill went through an extensive period of pre-legislative scrutiny ending in July. A key component of this legislation is the establishment of an Electoral Commission, an institution which Ireland is unusual in a comparative sense for not having. As part of the pre-legislative scrutiny process, a number of academics and members of civil society called on the government to equip the to-be-established commission with powers to address and counter dis/misinformation.<sup>77</sup> While the subsequent committee report recommends that; “the proposed bill provide for the maintenance of electoral integrity and the protection against election interference as an explicit function of the Electoral Commission”,<sup>78</sup> there is no

explicit recommendation on the topic of dis/misinformation. It is expected that the government will publish a revised Bill taking into account the content of the committee’s report in the new year and the legislative process will commence thereafter.

The parliamentary committee which oversaw the pre-legislative phase of the Online Safety and Media Regulation bill has since produced a report<sup>79</sup> within which it is calling for ‘disinformation’ to be included in the bill. Disinformation was not previously included in the general scheme of the bill. The report contains no details as to how this will be included in a bill which already includes a vast amount of purposes.

### **SLAPPs**

As noted earlier, there has been a notable increase in the anecdotal report on the amount of Strategic Litigation Against Public Participation, SLAPP litigation being pursued against applicants for Judicial Review in environmental cases. This has the potential to undermine the lawful right to exercise pursuit of Access to Justice. The State has

74 [https://unece.org/sites/default/files/2021-04/ece\\_mp.pp\\_c.1\\_2021\\_8\\_eng.pdf](https://unece.org/sites/default/files/2021-04/ece_mp.pp_c.1_2021_8_eng.pdf)

75 Para 6 [https://unece.org/sites/default/files/2021-05/frPartyC141\\_21.05.2021\\_update.pdf](https://unece.org/sites/default/files/2021-05/frPartyC141_21.05.2021_update.pdf)

76 [The General Scheme of the Electoral Refrom Bill \(2020\)](#)

77 [Joint Committee on Housing, Local Government and Heritage debate - Tuesday, 2 Feb 2021](#)

78 [Joint Committee on Housing, Local Government & Heritage Report on Pre-Legislative Scrutiny of the General Scheme of the Electoral Reform Bill 2020 July 2021](#)

79 [https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint\\_committee\\_on\\_tourism\\_culture\\_arts\\_sport\\_and\\_media/reports/2021/2021-11-02\\_report-of-the-joint-committee-on-the-pre-legislative-scrutiny-of-the-general-scheme-of-the-online-safety-and-media-regulation-bill\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_tourism_culture_arts_sport_and_media/reports/2021/2021-11-02_report-of-the-joint-committee-on-the-pre-legislative-scrutiny-of-the-general-scheme-of-the-online-safety-and-media-regulation-bill_en.pdf)

arguably failed to implement a system sufficient to accord with its obligations under Article 3(8) of the UNECE Convention on Access to Information, Public Participation in Decision- Making and Access to Justice in Environmental Matters, the Aarhus Convention, in respect of ensuring there is i.a. no penalisation, harassment or persecution of environmental defenders.<sup>80</sup>

## Checks and balances

### Key recommendations

- Conduct an urgent human rights assessment of existing COVID-19 regulations and a review of the decision-making processes of government in the context of the pandemic.
- Withdraw the general scheme of the Housing and Planning and Development Bill 2019, and instead implement a system with clear and compliant rules for Judicial Review in environmental cases, including, in particular, on costs. This will serve to minimise the ability to intimidate applicants on their exposure to prohibitively expensive costs, and avoid a chilling effect on those considering judicial review affording

them the required level of certainty which the CJEU indicated was essential in case c-427/07,<sup>81</sup> para 55, and the case law cited.

- The Constitutional role of both Houses of the Oireachtas and the President in making law has been severely compromised in 2021, and there is no transparency or clarity on how the approach of this Government compromising this is to be mitigated against. There is a need for consultation within the Oireachtas and with the wider public on safeguards to ensure these practices are not continued.

### Process for preparing and enacting laws

#### *Impact assessments, public consultations and transparency of the legislative process*

The transparency of the legislative process with regards to the passage of new, or renewal of COVID-19 pandemic restrictions remains a serious issue in Ireland. Organisations have consistently raised the issue of the lack of public consultation, insufficient parliamentary oversight, and poor communication of laws and regulations regarding the pandemic. These concerns were highlighted by ICCL in

80 <https://www.gov.ie/en/publication/a85dc-aarhus-convention-national-implementation-reports/#2021>

81 Judgment of the Court, 16 Jul 2009, case c-427/07, Commission v Ireland, EU:C:2009:457.

a landmark June 2021 report; “Human Rights in a Pandemic”.<sup>82</sup>

The National Marine Planning Framework, (NMPF), is Ireland’s maritime spatial plan, pursuant to Directive 2014/89/EU,<sup>83</sup> and is of major significance given Ireland’s marine territory is more than 7 times that of its terrestrial territory, and given the major expansion envisaged particularly of offshore renewables. In April 2021, the Government tabled a motion without debate in the Seanad to pass the plan before the response to legal advice sought was returned to the Joint Oireachtas Committee on Housing Local Government and Heritage from the Office of Parliamentary Legal Advisors, (OPLA). That advice concerned the role of the Oireachtas on this plan under s.73(2) of the Planning and Development (Amendment) Act 2018 and specific rights of the Committee in respect of the draft NMPF. When the advice came back it confirmed the entitlement of any committee of either or both Houses to make reports resolutions or recommendations on the plan laid before the Oireachtas - but the Government’s move to table a motion without debate in the Seanad effectively acted to subvert that right.

Pursuant to Article 15 of the Irish Constitution, both Houses of the Oireachtas have a Constitutional role in the making of law for the State. Article 20 also clearly provides for the right of the Seanad to amend any bill, unless it be a money bill. However, the practice of the Government to table a schedule for all Seanad stages of a bill to occur over Monday to Tuesday has compromised this Constitutional role of the Seanad. This issue has arisen in circumstances where a Minister of the Government, appearing before the Seanad, has not been able to entertain amendments, as they would not be able to revert to cabinet for approval prior to the scheduled conclusion of the bill in the Seanad.<sup>84</sup> This issue compounds the practice of guillotining legislation often with very short periods of debate and compounds the issue of short periods to review published legislation and table amendments to it, even in circumstances where there is no compelling urgency to such timeframes explained or justified.

### ***Rules and use of fast-track procedures and emergency procedures***

The formulation, communication and enforcement of emergency legislation, regulations, and policing powers due to the COVID-19

82 <https://www.iccl.ie/wp-content/uploads/2021/06/Human-Rights-in-a-Pandemic.pdf>

83 Directive 2014/89/EU of the European parliament and of the council of 23 July 2014 establishing a framework for maritime spatial planning

84 See link of comments from Senator Alice Mary Higgins in the debate on the Maritime Jurisdiction Bill 2021 on what happens when a bill is scheduled to complete without an intervening cabinet meeting during and how this operates to preclude acceptance of amendments from the Seanad: <https://www.oireachtas.ie/en/debates/debate/seanad/2021-06-01/14/>

pandemic remain a concern. The significant delegation of power to the Minister for Health remains in place. ICCL has repeatedly highlighted the need for emergency powers and procedures to be time-bound, necessary, and proportionate. Ireland's emergency legislation had an initial sunset clause of 9 May 2020, which could be extended "in the public interest" by the Minister for Health – an incredibly broad threshold for extension. These extensions have been renewed a number of times by parliament, most recently until December of 2021 following truncated debates. New legislation, which consolidated existing acts into a single piece of legislation was passed in December 2021. This legislation gives the Minister the power to request that parliament extend existing COVID-19 regulations until June 2022.<sup>85</sup>

Since the advent of the emergency legislation and the transfer of power to the Minister for Health, various regulations (such as limits on travel within the state) have been applied retrospectively and not published for several days after they were made. In many cases the government has sought the quasi-legal enforcement of public health advice, which is oftentimes indistinguishable from actual legal regulations. This practice continues to have

the potential to erode the principle of legality in Ireland.

### ***Regime for constitutional review of laws***

In July 2021, President Higgins wrote to the Oireachtas to raise concerns about the volume of complex legislation he has been asked to consider in short periods of time, given his Constitutional role to review and sign legislation within a short, specified period.<sup>86</sup> A government statement was issued<sup>87</sup> in response, however, there has been little transparency on actions taken or measures implemented to ensure this issue does not re-occur.

### ***Accessibility and judicial review of administrative decisions***

#### ***Transparency of administrative decisions and sanctions***

In December 2020, the Minister for Justice welcomed the submission of a report by a Review Group set up to review and make recommendations to reform the administration of civil justice in the state. The Review Group made over 90 recommendations in order to make the civil justice system more efficient and easier for people to access. In October

85 <https://www.irishtimes.com/news/health/legislation-to-extend-covid-emergency-powers-passed-by-d%C3%A1il-1.4750499>

86 <https://www.rte.ie/news/2021/0729/1238070-higgins-letter-oireachtas/>

87 <https://www.oireachtas.ie/en/press-centre/press-releases/20210730-statement-following-meeting-of-dail-business-committee-and-seanad-committee-on-parliamentary-privileges-and-oversight-to-discuss-letter-received-from-president-higgins/>

2021 the acting Minister for Justice indicated that the government would publish legislation to address these recommendations at least partially.<sup>88</sup>

An Bord Pleanála, a third-party appeals body and a decision-maker of first instance in certain planning matters, maintain a hard copy file for their planning decisions, and this information contains i.a. important correspondence relating to the decisions. However, despite the fact such decisions can be for strategic infrastructure developments, and/or appeals which can arise anywhere in the country, the information is not available online. Inspection of this file may be critical for those considering JR. Also one particularly compelling example of issues with the lack of access to information arose in the context of a substitute consent application for the Derrybrien Windfarm, an application seeking to regularise a development which had been found unlawful by the Court of Justice in 2008.<sup>89</sup> The commencement for a further period of public consultation on the critical matter of exceptional circumstances justifying the regularisation ran from the date of the receipt by the Board from the applicant of the new public notifications on the consultation. However, the Boards online file did not reflect the receipt of the notices for most of the consultation period, and the public were not therefore clear on the timeline for this critical

consultation. This is a notable and most high profile and significant case, where a further judgment<sup>90</sup> of the Court in 2019 effectively found Ireland in contempt for its failure to resolve the part of the 2008 judgment relating to the Windfarm, and fines against the State are ongoing and in excess of €16 million.

### *Powers accorded to the courts to carry out judicial review*

The General Scheme of the Housing and Planning and Development Bill 2019, proposes to amend and constrain the scope of Judicial Review in planning cases. Additionally, the Planning and Development Act 2000 and the recently enacted Maritime Area Planning Act 2021, allow the Courts impose a requirement for undertakings on an applicant seeking to pursue JR. However, there is no requirement in the legislation that such undertakings should not be prohibitively expensive as would be required under Article 9(4) of the Aarhus Convention and indeed, as clarified by the CJEU in case c-530/11, in the context of developments requiring environmental impact assessment pursuant to Directive 2011/92/EU (now amended by Directive 2014/52/EU).

88 <https://www.lawsociety.ie/gazette/top-stories/2021/10-october/train-up-to-deal-with-sexual-violence-cases-judges-told>

89 Judgment of the Court 3 July 2008, case c-215/06 Commission v Ireland, EU:C:2008:380

90 Judgment of the Court 12 November 2019, case c-261/18 Commission v Ireland, EU:C:2019:955

### **Implementation by the public administration and State institutions of final court decisions**

2021 saw another year where the State's response to the judgment of the EU Court of Justice in case c-215/06 from 2008, and the further judgment in 2019 in case c-261/18 remain outstanding with the fines imposed through the 2019 judgment now standing at over €16 million based on the fines indicated by the Court.<sup>91</sup> Significant delays continued to be experienced in 2021 in implementing legislative responses to CJEU judgments, including in cases dealing directly with Ireland e.g. c-470/16,<sup>92</sup> and others with implications for Ireland.

### **Aarhus Convention Compliance Committee**

All findings from the Aarhus Convention Compliance Committee remain outstanding.<sup>93</sup> However, particularly problematic is the response to communication ACCC/C/2013/107 where Ireland has implemented a partial legislative response, but then also acted to implement a temporary measure

to 31st December 2023,<sup>94</sup> which arguably significantly limits the effect of the other changes made.

## **Enabling framework for civil society** ↓

### **Key recommendations**

- Revise the Draft Electoral Reform Bill to address inappropriate application of the 1997 Electoral Act (as amended) to the work of civil society organisations.
- Commence an immediate review of the Charities Act 2009 in order to allow for the promotion of human rights to be designated as a charitable purpose and to address other areas of concern for CSOs.
- Withdraw the General Scheme of the Housing and Planning and Development Bill, 2019, and in-

91 Paragraphs 125 and 135 of Judgment of the Court 12 November 2019, case c-261/18 Commission v Ireland, EU:C:2019:955

92 Judgment of the Court 15 Mar 2018, case c-470/16, North East Pylon Pressure Campaign Limited, EU:C:2018:185

93 <https://unece.org/env/pp/cc/decision-vii8i-concerning-ireland>

94 Under The Planning and Development (Amendment) Act 2001 (Commencement) (No. 2) Order 2021 (No. 458 of 2021) which commenced section 7 of the Planning and Development (Amendment) Act 2021, which inserted new sections 42B and 42(1B) into the Planning and Development Act 2000. Given the very specific wording of the new s42B it is a much more limited response than the other changes, made impacts certain of their efficacy until it expires 31 December 2023.

stead implement system with clear and compliant rules for Judicial Review in environmental cases, including in particular on costs.

## **Regulatory framework**

### ***Freedom of association, including registration rules***

The 2009 Charities Act does not include the advancement of human rights as a valid charitable purpose for an organisation. Human rights organisations have been compelled to establish and operate different legal structures to ensure their “non-charitable” human rights work is in full compliance with the law. This modus vivendi is onerous, inefficient and can be a drain on an organisation’s limited resources. Human rights organisations could experience difficulties in accessing funding and reporting to donors, where those funders require charitable status as a precondition for funding. The unfairness of this situation was highlighted in December 2021 when it was revealed that a political party had exploited a loophole in gambling regulations to register as a charity and avoid fundraising restrictions.<sup>95</sup> In response, a number of civil society organisations have called for an immediate review of the Charities Act to ensure that the advancement of human rights can be designated as a valid charitable purpose.<sup>96</sup>

### ***Access and participation to decision-making processes***

The Maritime Area Planning Act 2021 does not provide for public participation in relation to a wide range of decisions on Maritime Area Consents despite their environmental implications, raising fundamental issues in respect of Article 6 of the Aarhus Convention. It also fails to provide for access to justice in line with Article 9 of the Aarhus Convention. Legislation enacted for the Forestry sector in 2020, via primary and secondary legislation, continues to have a serious effect on public participation and access to justice rights on forestry licencing decisions. On one day alone 1864 forestry felling licence applications were notified for Coillte, the state forestry authority. The effective cost of making submissions on these given the new charges imposed in 2020, even for eNGOs, would have been €37,280, and to appeal them would have been €372,800. The information on the applications was also not uploaded in time, curtailing the already limited timeframe of 30 days the public has to respond. The relevant Minister was contacted by the Environmental Pillar on the matter and while the Minister had discretion under the legislation to extend the consultation period, she chose not to do so. The volumes of applications for felling, afforestation and felling road licences are significant and set to increase, and the fees create a disproportionate burden on

95 <https://www.breakingnews.ie/ireland/taoiseach-fianna-fail-within-legal-framework-to-declare-itself-a-charity-1222780.html>

96 <https://www.irishtimes.com/opinion/letters/human-rights-groups-and-charitable-status-1.4752335>

the public and compromises participation and access to justice.

### **Financing framework**

The 1997 Electoral Act in Ireland poses significant restrictive regulatory burden for civil society. The wording in the Electoral Act used to define ‘political purposes’ (which determines what groups, including community groups, are subject to strict spending rules) is so broad and vague that they can be applied to almost every community group in the country. As a result, any community group (from a large charity to a local Tidy Towns group or community garden) which calls on the local or national government to amend policy or legislation, could be found in breach of the Electoral Act if someone were to donate more than €100 to their cause. A wide range of civil society organisations working on issues as diverse as education and environmental rights have been directly impacted.

The human rights issues presented by the Electoral Act and the implementation of the Act by the Standards in Public Office Commission were highlighted by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association and the UN Special Rapporteur on the situation of

human rights defenders in a communication to Ireland in December 2020.<sup>97</sup>

The government have brought forward a draft Electoral Reform Bill to address a number of issues including establishing an Electoral Commission. As part of the pre-legislative scrutiny process for this report, the responsible parliamentary committee recommended that the draft bill be amended to address the ‘political purposes’ issue outlined above.<sup>98</sup> It is expected that the revised version of the Bill will be published in early 2022.

### **Attacks and harassment**

#### **SLAPPs**

There has been a notable increase in the anecdotal report on the amount of Strategic Litigation Against Public Participation (SLAPP) litigation being pursued against applicants for Judicial Review in environmental cases. This has the potential to undermine the lawful right to exercise pursuit of Access to Justice. The State has arguably failed to implement a system sufficient to accord with its obligations under Article 3(8) of the UNECE Convention on Access to Information, Public Participation in Decision- Making and Access to Justice in Environmental Matters, the

97 See <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25665>

98 [https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint\\_committee\\_on\\_housing\\_local\\_government\\_and\\_heritage/reports/2021/2021-08-19\\_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-electoral-reform-bill-2020\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_housing_local_government_and_heritage/reports/2021/2021-08-19_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-electoral-reform-bill-2020_en.pdf)

Aarhus Convention, in respect of ensuring there is i.a. no penalisation, harassment or persecution of environmental defenders.<sup>99</sup>

*Smear campaigns and other measures capable of affecting the public perception of civil society organisations*

Prior to the determination by the High Court of a Judicial Review taken by Ireland's oldest eNGO – An Taisce the National Trust for Ireland, challenging a decision of An Bord Pleanála (the national planning authority) in respect of the building of a cheese factory, statements were made by members of the Oireachtas and An Taoiseach<sup>100</sup> on the matter. The sentiment of these statements was echoed by a number of members of parliament<sup>101,102</sup> in which they framed the work of An Taisce as a “threat to rural Ireland” and suggested the public funding for the organisation should be reviewed.

## **Disregard of human rights obligations and other systemic issues affecting the rule of law framework**

### **Key recommendations**

- Engage with survivors of mother and baby homes and victims of abuse in day-schools to ensure that compensation schemes and schemes designed to address their needs are compliant with human rights standards.
- Address the concerns raised by Traveller and Roma organisations in their submission on Ireland's UPR with respect to rights violations, housing, policing and other issues.
- Expedite the development of a new international protection system for those seeking asylum, and in the interim, ratify OPCAT to ensure that direct provision centres are subject to independent inspections.

99 <https://www.gov.ie/en/publication/a85dc-aarhus-convention-national-implementation-reports/#2021>

100 <https://www.oireachtas.ie/en/debates/debate/dail/2021-03-31/13/>

101 <https://www.fine Gael.ie/an-taisce-a-leading-threat-to-future-of-rural-ireland/>

102 <https://www.irishtimes.com/news/ireland/irish-news/review-of-funds-given-to-an-taisce-demanded-at-fianna-f%C3%A1il-party-meeting-1.4563428>

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## **Systemic human rights violations**

### **Widespread human rights violations and/or persistent protection failures**

The December 2020 publication of the final report from the Commission of Investigation into Mother and Baby Homes highlighted the widespread human rights violations committed by the church and state during the 20th century, including forced labour and adoption, neglect, and more. The state failed to protect vulnerable women and children placed in its care throughout the 20th century and it continues to fail in adequately protecting them now. Survivors of the Mother and Baby Homes continue to face ongoing human rights violations, including their right to identity and access to personal information.

Throughout 2021, the government progressed the General Scheme of a Certain Institutional Burials (Authorised Interventions) which will seek to address a number of issues which are raised by the report. This Bill completed

pre-legislative scrutiny in July 2021.<sup>103</sup> Details of a redress scheme were published in November 2021,<sup>104</sup> but was met with widespread criticism from survivors.<sup>105</sup>

In their submission as part of Ireland's UPR process, the Irish Traveller movement noted a number of ongoing issues related to the lack of progression and implementation of actions committed to in the National Traveller and Roma Inclusion Strategy 2017-2021.<sup>106</sup> Concerns were also highlighted with respect to the inadequate collation of data on Traveller experiences/outcomes and ineffective funding. They also noted persistent and ongoing discrimination against Travellers, including in the national police force, remaining a day-to-day occurrence in 2021.<sup>107</sup>

### **Ethnic profiling and other discriminatory practices in law enforcement**

Through its participation in JUSTROM, FLAC became aware of significant concern among the Traveller and Roma communities

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103 <https://www.oireachtas.ie/en/press-centre/press-releases/20210715-joint-committee-on-children-disability-equality-integration-and-youth-publishes-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-a-certain-institutional-burials-authorised-interventions-bill/>

104 <https://www.gov.ie/en/press-release/ce019-government-approves-proposals-for-mother-and-baby-institutions-payment-scheme-and-publishes-an-action-plan-for-survivors-and-former-residents-of-mother-and-baby-and-county-home-institutions/>

105 <https://www.thejournal.ie/mother-baby-home-redress-protest-leinster-house-5609527-Nov2021/>

106 <https://www.justice.ie/en/JELR/National%20Traveller%20and%20Roma%20Inclusion%20Strategy,%202017-2021.pdf/Files/National%20Traveller%20and%20Roma%20Inclusion%20Strategy,%202017-2021.pdf>

107 <https://itmtrav.ie/wp-content/uploads/2021/03/Irish-Traveller-Movement-Submission-UPR-National-Report.pdf>

regarding their experience with the criminal justice system. This manifested most frequently through interaction with the Irish police force, An Garda Síochána (AGS). This has been an issue for a considerable length of time. In 2011, the Committee on the Elimination of Racial Discrimination (CERD), the body responsible for monitoring the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), noted in its concluding observations the lack of legislation proscribing racial profiling by AGS and other law enforcement officers and further noted that many non-Irish people are subjected to police stops and the requirement to produce identity cards. The CERD further recommended the adoption of legislation preventing racial profiling and requested the State strengthen its efforts to promote the humane treatment of migrants and people of non-Irish origin by AGS in accordance with international human rights law. More recently in 2019 CERD recommended that the State party: (a) Introduce legislation prohibiting racial profiling; 5 (b) Put in place an independent complaints mechanism to handle racial profiling; (c) Review, in collaboration with communities mostly affected by racial profiling, policy, practices and training of An Garda Síochána; (d) Incorporate racial profiling issues into the training curriculum of police officers.

FLAC submits that at a minimum to ensure that AGS does not engage in discriminatory profiling, it is necessary for specific training to be provided

to each member of AGS in relation to profiling; to have monitoring mechanisms in place that will highlight when discriminatory profiling may be occurring, and where it does occur it should be addressed and individuals should have access to a remedy in respect of same. Specifically, while the Equal Status Acts 2000 to 2018 (ESA) prohibit discrimination in the provision of goods and services, and the provision of accommodation and access to education, on nine grounds including the ground of race and membership of the Traveller community, the scope of the ESA is not comprehensive.

The definition of “services” in section 2 of the ESA includes public services, but has been interpreted as not extending to the performance of all functions of a public body particularly the controlling or regulatory functions of the State. Therefore, the prohibition on discrimination on the ground of race and membership of the Traveller community ground may not always apply to public authorities such as the AGS in performing functions which are not considered to be “services” for the purpose of the ESA. The UN CERD Committee in its most recent report recommended that the functions of public authorities should be explicitly included within the definition of the “services” in Section 5 of the Equal Status Acts.<sup>108</sup> This will ensure that the functions of AGS come within the remit of the prohibition on discrimination, harassment and victimisation and the obligation to provide reasonable accommodation for people with disabilities, thereby enabling individuals to seek

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108 [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT\\_CERD\\_COC\\_IRL\\_40806\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT_CERD_COC_IRL_40806_E.pdf)

redress if they consider that they have been discriminated against by AGS.

Finally, the Policing Authority Code of Ethics for AGS (the Code), published in 2017, includes a section on respect and equality, however, the Code is not on a statutory footing and a breach alone cannot form the basis of a complaint to GSOC, even where non-compliance is at a systemic level. This is also a significant weakness in the accountability of AGS, and it is submitted that placing the Code on a statutory footing, subject to any necessary amendments, is a modest extension to accountability circumstances where the Code has been widely consulted on and should now in any event be part of the operational requirements of AGS.

### ***Rights of migrants and asylum seekers***

In February 2021, the government announced a plan to end the use of direct provision as a system for accommodating asylum seekers in Ireland.<sup>109</sup> A programme board<sup>110</sup> was established to progress the plans to end the system and establish a new International Protection Support Service. A three-person independent group was appointed by the responsible Minister in September 2021

to oversee and measure progress.<sup>111</sup> In December 2021, a regularisation scheme was announced by the Minister for Justice which would allow undocumented migrants and asylum seekers who have been in direct provision for at least 2 years to regularise their status.<sup>112</sup> While these steps are hugely welcome, it remains a concern that direct provision centres are not subject to independent inspections. ICCL has requested that the Minister for Justice urgently reform the system of inspections so that they are independent and human rights focused. ICCL have also urged the government to ratify the UN's Optional Protocol to the Convention Against Torture (OPCAT) which requires governments to create a National Preventive Mechanism that would inspect all places of detention. ICCL considers Direct Provision to be de-facto detention.<sup>113</sup>

### ***Implementation of decisions by supranational courts, such as the Court of Justice of the EU and the European Court of Human Rights***

In July 2021, the government launched a revised ex-gratia scheme<sup>114</sup> in order to implement the decision of the European Court of Human Rights (ECtHR) in the case of O'Keeffe v

109 <https://www.gov.ie/pdf/?file=https://assets.gov.ie/124757/ef0c3059-b117-4bfa-a2df-8213bb6a63db.pdf#page=null>

110 <https://www.gov.ie/en/press-release/edef3-minister-ogorman-announces-membership-of-the-programme-board-overseeing-the-end-of-direct-provision-as-set-out-in-the-white-paper/>

111 <https://www.gov.ie/en/press-release/9bec5-minister-ogorman-appoints-independent-group-to-track-progress-on-ending-direct-provision/>

112 <https://www.justice.ie/en/JELR/Pages/PR21000292>

113 <https://www.iccl.ie/news/people-in-direct-provision-not-getting-the-care-they-need/>

114 <https://www.gov.ie/en/service/90a42-revised-ex-gratia-scheme/>

Ireland, a case concerning the liability of the state for serious child abuse that occurred with the national school system. Previous state redress schemes for the victims of child abuse have consistently proven to be inadequate and campaigners have highlighted a number of flaws in the revised scheme which may prevent some survivors from being awarded redress.<sup>115</sup>

## ***Other systemic issues***

### ***Data protection and privacy***

The COVID Tracker App was launched in Ireland in July 2020 to much fanfare. The Irish government launched a national communications campaign and more than 862,000 people downloaded the voluntary Bluetooth-based app within the first day. By mid-January 2021 the app had about 1.3 million active users and sent close contact alerts to more than 20,000 people.

On 6 November 2020, the ICCL asked the Irish health authorities a list of questions about the app's efficacy and about the Department of Health's measurement of its efficacy. As of December 7, 2021, these questions remain unanswered.

We are living with a pandemic but human rights laws still apply and any interference with privacy must be lawful, necessary and proportionate. As ICCL awaits evidence to illustrate the effectiveness of this app, the necessity and proportionality of the measure is left wanting.

In the summer of 2021, the Government suddenly rushed through legislation to ensure that people had to show either proof of COVID-19 vaccination or recovery to gain access to indoor hospitality settings. It followed An Taoiseach Mícheál Martin previously ruling out the idea of domestic vaccine passports, citing concerns for civil liberties. The legislation was passed without any robust, democratic debate; acceptance of amendments; or any data protection, equality or human rights impact assessment prior to its roll-out. Although it was meant to last until October 2021, it has been repeatedly extended and expanded, in its areas of use, and looks set to be used until at least March 2022. Unlike many other EU countries that have been using these systems, Ireland does not provide the option of testing to prove the pass bearer is not Covid positive, nor does it provide any exemption for people who are unable to get a COVID-19 vaccination for medical reasons.

A letter sent by ICCL to the Minister for Health on October 22, 2021,<sup>116</sup> asked specific questions about the system:

- (i) What is the purpose of the Government's vaccine certificate system?
- (ii) Why is testing still being omitted from the certificate system?
- (iii) Where is the evidence that the immunity certificate system to date has worked in curbing the transmission of COVID-19?

115 <https://www.irishexaminer.com/news/arid-40342496.html>

116 <https://www.iccl.ie/wp-content/uploads/2021/10/Covid-certificates.pdf>

ICCL has yet to receive a response to these questions and failing the immediate abolishment of the certificate system, testing should be included.<sup>117</sup>

More generally, ICCL reported in “Europe’s Enforcement Paralysis”<sup>118</sup> that Ireland’s Data Protection Commission (DPC) is ineffective. This prevents the effective vindication of a broad set of digital rights in Ireland. It also prevents the vindication of these rights at European level too, because the DPC is the “lead” supervisory authority in the European Economic Area for Google, Facebook, Apple, Microsoft, and many others under the GDPR. ICCL has made several submissions on this matter at national and EU level. However, the problem persists.

## **Fostering a rule of law culture**

### **Contribution of civil society and other non-governmental actors**

In early 2021 ICCL was awarded a grant from the Communicating Europe Initiative in the Department of Foreign Affairs to raise

awareness around the rule of law reporting mechanism in Ireland. The understanding of the importance of the Commission’s rule of law reporting mechanism in Ireland is low and the thematic focus of related events bear that out. For example, in February of 2021, the Minister for European Affairs spoke at an IIEA event on the rule of law situation in Hungary with the Hungarian Foreign Minister.<sup>119</sup> Rule of law issues are generally understood to be a problem elsewhere in the EU but not in Ireland.

With this in mind, ICCL hosted two events in 2021 to raise awareness of the situation domestically and to inform CSOs about the reporting process. The first was an event where the Minister of State for European Affairs officially launched the 2021 EU Rule of Law Report in Ireland and a general discussion on the rule of law situation in Ireland was facilitated.<sup>120</sup> The second event brought together CSOs who were interested in working on a joint submission for the 2022 cycle<sup>121</sup> which has culminated in this report.

117 <https://www.irishtimes.com/opinion/negative-tests-should-be-included-in-covid-pass-1.4732575>

118 <https://www.iccl.ie/wp-content/uploads/2021/09/Europes-enforcement-paralysis-2021-ICCL-report-on-GDPR-enforcement.pdf>

119 <https://www.iiea.com/events/webinar-rule-of-law-in-the-eu>

120 <https://www.lawsociety.ie/gazette/top-stories/2021/09-september/broad-discretion-of-executive-to-choose-judges-criticised-in-rule-of-law-report>

121 <https://www.eventbrite.ie/e/european-commissions-2022-rule-of-law-report-cycle-info-and-networking-tickets-211027778767>

# **LIBERTIES RULE OF LAW REPORT 2022**

**ITALY**



Italian Coalition  
for Civil Liberties and Rights



**CIVIL  
LIBERTIES  
UNION FOR  
EUROPE**

# Italy

## About the authors

This report has been coordinated and authored by Antigone Association and Italian Coalition for Civil Liberties and Rights (CILD). This submission represents a compilation of a wide array of material and expertise from the aforementioned organisations in their areas of concern.



Antigone is an Italian NGO founded in 1991, which deals with human rights protection in the penal and penitentiary system. Antigone carries out cultural work on public opinion through campaigns, education, media, publications and the academic journal “Antigone”. The NGO conducts many studies and research on penal and penitentiary issues, and it cooperates in writing normative texts on relevant topics. Antigone is committed to monitoring prisons. Its Observatory on Italian prisons for adults and minors involves around 100 people and has been active since 1998, when Antigone received from the Ministry of Justice special authorizations to visit prisons with the same power that the law gives to parliamentarians. Every year, Antigone’s Observatory publishes a Report on the Italian penitentiary system. Antigone’s prison Ombudsman collects

complaints from prisons and deals with dozens of individual cases per week. Antigone’s lawyers and physicians also operate in some Italian prisons through legal clinics in some cases, established in cooperation with universities. Antigone also carries out investigations about ill-treatments and is at times formally involved in the related trials.



Founded in 2014, the Italian Coalition for Civil Liberties and Rights (CILD) is a network of civil society organizations that protect and expand the rights and liberties of all, through a combination of advocacy, public education and legal action.

## Key concerns

In the area of justice, the Next GenerationEu is a driving factor for the improvement of the justice system. Comprehensive reforms of civil and penal justice have been delegated from the Parliament to the Government, who is expected to shortly elaborate on the implementing decrees that will concretise the proposed reforms. The decrees are expected to make concrete progress in limiting case backlog and the length of proceedings, enhancing digitalisation and reducing prison sentencing. Despite some positive efforts to improve the

penitentiary system, prison overcrowding remains a serious concern.

As regards the anti-corruption framework a number of positive developments in this area took place in 2021, but the proposed legislative changes needed to strengthen the anti-corruption framework in Italy are not yet in force, thus no actual improvement can be noted so far.

In 2021 threats, attacks and intimidation targeting journalists reporting on protests and demonstrations organised by anti-vaccine and anti-lockdown groups posed one of the biggest concerns for media freedom in Italy. These attacks, perpetrated by the public but also law enforcement officials, reflect a worrying growing anti-press sentiment of some segments of Italian society. In some parts of the country journalists are especially at risk of extra-legal reprisals by organised crime groups, while courts issue some problematic decisions threatening the already weak protection of the confidentiality of journalistic sources. Lawsuits and prosecutions against journalists, including those based on defamation provisions, also remain common and can entail serious financial costs for defendants. The long-standing issue of criminalization of defamation has not been solved to date, despite a new ruling by the Constitutional Court. In 2021 journalists also faced disproportionate obstructions during court reporting due to the Covid-19 pandemic. As regards the overall media environment, concentration of ownership remains a major concern and transparency of media ownership is particularly low in the online environment. Interference in and pressures on

public service media are mainly related to the politically-motivated nomination of members of governing bodies, as shown by choices made in 2021 by government and parliament for the renovation of RAI board members. The COVID-19 pandemic reportedly exacerbated some of the historical weaknesses of the Italian media sector, contributing to the decline of overall revenues, a fall in newspaper readership, and the lowering of the editorial standards adopted in news reporting (further exacerbated by the wide dissemination of manipulated online content). Access to media for women scored as being a high risk, with none of the leading news media companies in Italy having a female editor-in-chief.

In response to the continued spreading of the COVID-19 virus the Italian government prolonged the state of emergency until 31 March 2022. In response to concerns raised by legal experts over the legality of restrictions adopted in 2020 through Presidential decrees, under the current regime emergency-related measures are mostly introduced through decree-laws. Draft laws to establish a National Human Rights Institution are being examined.

Failure to properly address systemic human rights issues also negatively impacts the national rule of law environment, in particular regarding hate crime and hate speech, violence against women and homophobic and transphobic attacks – where no progress was made on proposals to strengthen the legal framework. Italy's record of implementation of judgments of the European Court of Human Rights remains poor, with no progress made to implement leading decisions in important

areas such as police ill-treatment, violence against women and justice. Pushbacks of migrants at sea also remain a serious concern.

While relevant authorities have organised conferences and high-level meetings on the rule of law in 2021, all those initiatives did not foresee the participation of civil society or stakeholders other than members of parliament and other institutional stakeholders. A lack of resources stands in the way of activities to foster a rule of law culture by civil society organisations, despite an interest in promoting such initiatives.

### State of play

-  Justice system
-  Anti-corruption framework
-  Media environment and freedom of expression and of information
-  Checks and balances
- N/A Enabling framework for civil society
-  Systemic human rights issues

#### Legend (versus 2020)

- Regression: 
- No progress: 
- Progress: 

## Justice system

### Key recommendations

- The Government, in the execution of the delegation to reform criminal justice, should give more space to community sanctions that aim towards the reintegration of the inmate into society, marginalizing home detention (an alternative to detention that does not prescribe the creation of an individualized plan for the inmate) to the last resort
- The Legislator should reform the regime of semi-liberty to eliminate the incarceration component of the penal sanction
- The Ministry of Justice - Department of Juvenile Justice and Community measures - should increase the number of staff employed in the Offices for the execution of non-custodial sanctions in view of a wider use of community sanctions instead of detention

### Fairness and efficiency of the justice system

In the area of justice, the Next GenerationEu is certainly a driving factor for the improvement of the justice system. The most recent

developments concern the reforms of civil and penal justice. In both cases, the Parliament has delegated to the Government, through a delegating law, the responsibility to elaborate the decrees in such a manner that will fulfil the requirements of the delegating law.

In particular, civil justice will be reformed by delegating law n. 206 of 26 November 2021<sup>1</sup> titled, “Delegation to the Government for the efficiency of the civil process and for the revision of the discipline of the alternative settlement of disputes and urgent measures for the rationalization of the civil proceedings regarding the rights of individuals and families as well as regarding forced execution” (*“Delega al Governo per l’efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di diritti delle persone e delle famiglie nonché in materia di esecuzione forzata”*). One of the aims of the reform is to tackle the longstanding issue of the length of civil proceedings and the simplification or abolition of some less useful mechanisms. Notably, hearings carried out in writing (i.e. when the hearing takes place with parties submitting written memoirs instead of in-person) and remote hearings (i.e. hearings taking place online) are intended to become the rule instead of the exception.

Also, penal justice will be reformed by delegating law n. 134 of 27 September 2021<sup>2</sup> titled, “Delegation to the Government for

the efficiency of the criminal trial as well as on restorative justice and provisions for the speedy definition of judicial proceedings” (*“Delega al Governo per l’efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari”*). The reforms primarily seek to reduce the speed of the criminal trial and increase the efficiency of the system.

### ***Length of proceedings***

In the reform of the criminal trial there are several modifications that aim to reduce the length of criminal proceedings, accelerate their resolution, and reduce the number of pending cases.

The primary modifications are aimed at shortening the duration of proceedings, including the shortening of the time limit for preliminary investigations, the introduction of a form of judicial control on the public prosecutor in case of inactivity after being notified of the crime, and a better organisation of the debarment phase to reduce its length.

Included amongst the proposed modifications to reduce the number of cases is the dismissal of the case where the judge finds elements “that don’t reasonably allow to foresee a guilty verdict”, a further reduction of the penalty if the accused chooses the abbreviated trial and does not file an appeal against the outcome of

1 <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2021-11-26;206>

2 <https://www.gazzettaufficiale.it/eli/id/2021/10/04/21G00146/sg>

the decision, and the widening of the possibility to use parole.

One critical aspect of the proposed reform is the idea to introduce criteria to identify crimes that should be given priority by prosecutors' offices. This has been included with the aim of shortening the length of proceedings. Although emphasis is put on the objectivity and transparency of such criteria, this could contrast with the principle of equality of criminal offenses and the principle that makes it obligatory to initiate the criminal proceeding by the public prosecutor. Finally, this could be an interference in the separation of powers.

Other proposed modifications concern the impossibility to proceed with the offence upon reaching the time limit for the reasonable duration of proceedings in the case of first instance appeal (two years), and second instance appeal at the Court of Cassation (one year). This means that when these time limitations are reached, the case is dismissed. In the case of crimes punished with a life sentence or if the accused wishes for the trial to continue, this does not apply. In the case of particularly grave crimes, the judge can extend these time limitations.

### **Digitalisation**

The digitization of the criminal trial is also part of the delegating law for the reform of criminal trials. The digitization process will concern the submission of documents and acts and official notifications, that now are not submitted digitally. Another aspect of the digitalization will concern the modality of documentation of the

interrogation of a suspect, and the possibility to participate in hearings remotely.

### ***Criminal justice and alternatives to detention***

From the point of view of the execution of criminal sentences, the reform of the criminal trial is expected to widen the access to alternatives to detention and community measures.

In particular, the reform will abolish the regime of semi-detention and of controlled liberty (which were very residual in the criminal justice system in numerical terms), and widen the access to semi-liberty, home detention, social work and fines in substitution of the deprivation of liberty in prison. This represents a positive development leading towards the overcoming of the prison sentence as the main punishment for a crime; however, more could be done. While access to these alternatives to detention has been widened, they still represent an alternative to detention instead of being elevated to self-standing punishments; this means that the judge still must give a prison sentence and only afterwards can the sentence be substituted by one of these alternatives. Finally, widening access to semi-liberty has been preferred instead of widening access to probation.

Furthermore, another important provision of the reform is the right to be forgotten that will be in line with the EU data protection legislation in cases of dismissal of the case, acquittal, and verdict of innocence.

### ***Penitentiary system***

The recent creation of the Committee for the innovation of the penitentiary system<sup>3</sup> is another important development. The Committee was created by the Ministry of Justice in September 2021, with the aim of proposing solutions to improve the quality of life in the execution of criminal sentences through normative or administrative changes both for the penitentiary administration and the administration of juvenile and community justice. The Committee has written a report with their proposals that include normative changes to the Penitentiary Law, in addition to interventions on the Regulation that gives Execution to the Law as well as administrative changes.

The main focus of the Committee has been on the following aspects: the management of order and security (e.g. searches, transfer as a disciplinary measure, the regulation of the use of force), a wider use of technology (e.g. strengthening the use of technological means to favour relationships of detainees with their family members, introducing technological means for detainees to file requests to the administration instead of filing paper requests), health (e.g. digitalising the personal health information of the detainee, strengthening access to mental health services and health care for detained people), work and vocational training (e.g. changes in the organisation of detainees' work, greater involvement of regional, local authorities and the territory), protection of rights (e.g.

revision of complaint mechanisms to make them more effective), training of personnel (e.g. strengthening and updating the training of professionals that work in prisons especially regarding the management of critical and delicate situations).

### ***Prison overcrowding***

The Italian prison system is ruled by the penitentiary law issued in 1975 (L. 354/1975), which has since then been modified many times, and the penitentiary regulation, which is dated 2000 (D.P.R. 230/2000). According to the Ministry of Justice, as of 31 December 2021, there are 54,134 detainees for 50,835 available places in 189 prisons. The prison population rate is 106.5% according to the Ministry of Justice, but this number does take into account the number of places that are unavailable (e.g. because of maintenance work) and that can amount to several thousands.

In 2021 Antigone's Observatory on detention conditions visited 99 prisons for adults, more than half of those present in Italy. The visits showed that in one third of the institutions visited, there were cells where inmates had less than 3 square meters per detainee, thus below the limit for which detention is considered inhuman and degrading. But square meters are not the only cause for concern. In 40% of the prisons monitored there were cells without hot water and 54% without showers, as is required by prison regulations in force since 2000. In 15 prisons there was no heating and in 5

3 [https://www.giustizia.it/giustizia/it/mg\\_1\\_36\\_0.page?contentId=COS360093&previousPage=mg\\_1\\_36](https://www.giustizia.it/giustizia/it/mg_1_36_0.page?contentId=COS360093&previousPage=mg_1_36)

prisons the toilet was not in a separate room from where people sleep and live. Another important issue is that 34% of the institutes do not have green areas for family visits in the summer months.

There are also some problems in terms of staffing. Only 44% of the prisons had a director in charge solely of that institution, and only 21% of the institutions had some kind of linguistic and cultural mediation service. On average, in the visited facilities, foreign detainees were 32.6%. For every 100 inmates there were on average 8 hours of psychiatric service and 17 hours of psychological service, even if, always on average, 7% of the inmates had a serious psychiatric diagnosis and 26% used mood stabilisers, antipsychotics or antidepressants. All things considered, these are signs that prisons today are a container of poverty and social exclusion. Finally, as far as work is concerned, on average 43.7% of prisoners were working in 2021. Most of them are employed by the Prison Administration and their tasks often have no potential outside the prison. Moreover, in order to get as many inmates as possible to work the number of hours worked is very low, as evidenced by the average gross salary received which is € 560 per month.

During the Covid-19 emergency the prison system reacted by releasing over 8,000 inmates who were given alternatives to detention; however, the prison population rate was not lowered to less than 100% of the available places. The penitentiary administration also had to limit contacts between inmates and their families, but also took the chance to introduce

a wider use of technologies. Currently, the penitentiary system has attempted to return to normality, but this has not taken place in all institutions with the necessary promptness.

## **Anti-corruption framework** 🟡

### **Key recommendations**

- The Italian Senate should approve the draft law on lobbying n. 196-721-1827 by the end of the current legislative term
- The Italian Parliament should proceed rapidly with the examination of the draft law on conflict of interest n. C. 702 so as to approve it as soon as possible
- The Italian Government should transpose EU Directive 2019/1937 on whistleblowing in order to guarantee protection to whistleblowers and to avoid undergoing any infringement procedure

### **Levels of corruption**

According to the Global Corruption Index (GCI) Italy, ranked 36th out of 196 countries and territories, faces relatively low

risks of corruption and other white-collar crime.<sup>4</sup> In particular, the country has strong corporate and ownership transparency and Italian authorities can cooperate effectively at international level to combat money laundering. However, its GCI score (30.1/100) is just below the average of the G20 countries (32.2/100). As far as the EU is concerned the country also lags behind, ranking 19th out of 27 countries.

### ***Framework to prevent corruption***

#### ***New national plan to prevent corruption***

In March 2021 the Italian Data Protection Authority adopted a three-year plan to prevent corruption for the years 2021–2023.<sup>5</sup> The plan includes all the measures that are mandatory by law, as well as the specific measures adopted according to the specific features of each administration.

It aims at pursuing the following objectives:

- a. identifying the activities with higher corruption risk;
- b. providing mechanisms for the training, implementation and control of decisions that are suitable for preventing the risk of corruption;

c. providing information obligations towards the Prevention of Corruption and Transparency Officer called upon to supervise the operation of and compliance with the plan;

d. defining the methods for monitoring compliance in adherence to deadlines laid down by law or regulations for the conclusion of proceedings;

e. defining the procedures for monitoring relations between the administrations and the individuals who enter into contracts with them, including by verifying any relationships of kinship or affinity existing between the owners, administrators, partners and employees of those entities and the administration's managers and employees;

f. identifying specific obligations of transparency in addition to those provided for by the law.

#### ***Integrity framework***

As of January 2022, discussion is still ongoing regarding a reform proposed by the Ministry of Justice Ms Marta Cartabia<sup>6</sup> concerning the Superior Council of the Judiciary (*Consiglio Superiore della Magistratura*), i.e., the body

4 <https://risk-indexes.com/global-corruption-index/>

5 <https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9569421>

6 <https://www.dire.it/09-12-2021/691725-stop-alle-porte-girevoli-nella-giustizia-le-proposte-di-cartabia-per-la-riforma-del-csm/>

that allocates jurisdiction and guarantees the autonomy and independence of ordinary magistrates. The reform is aimed, inter alia, at preventing magistrates from holding a political office, thus putting an end to the so-called “revolving doors” mechanism. If approved, the reform will include the prohibition for magistrates to run as political candidates in the constituency in which they have served in the last three years. In addition, if elected, upon acceptance of their candidacy, magistrates must be placed on unpaid leave, which is mandatory for the entire period of their mandate. Although the approval process of the reform has been delayed with respect to the original plans, this initiative is to be welcomed as it will provide obligations to prevent the recurrence of cases of magistrates holding simultaneously elected and/or political offices.

### **General transparency of public decision-making**

As of January 2022, Italy still lacks a legislative framework on lobbying of members of the government. However, on 12 January 2022 the Chamber of Deputies eventually approved a draft law on lobbying<sup>7</sup> proposed by the #Lobbying4change Coalition.<sup>8</sup>

The draft law provides for the following:

- a mandatory public register for lobbyists. Anyone wishing to engage in this activity must join the register and comply with an ethical code of conduct
- a public agenda for meetings between politicians, public officials and lobbyists, in which both parties are required to communicate the date of the meeting, the topics under discussion and what documentation has been filed
- serious sanctions to punish unlawful behaviour by both lobbyists and public decision-makers
- public consultations to ensure that members of the register are given the opportunity to be heard on their issues and that all contributions deemed useful for the debate reach the decision-making bodies
- a cooling-off period of two years during which public decision-makers, once they have ceased to hold office, may not carry out lobbying activities.

In order to enter into force, the draft law will have to be approved by the Senate before the beginning of 2023 (i.e., before the end of the

7 *Proposta di legge 196-721-1827, Disciplina dell'attività di rappresentanza degli interessi particolari e istituzione del registro pubblico dei rappresentanti di interessi.* See <https://www.thegoodlobby.it/qui-si-fa-la-storia-ok-della-camera-alla-legge-sul-lobbying-ora-il-senato-deve-migliorarla/>

8 <https://www.thegoodlobby.it/campagne/lobbying-italia/>

current legislative term). The approval of the draft law by the Chamber of Deputies represents a significant step forward, after 96 draft laws on lobbying have been rejected by the Italian Parliament over the last 50 years.

### ***Rules on preventing conflict of interests in the public sector***

Italy still lacks a law concerning conflict of interest.<sup>9</sup> While the text of a draft law (n. C-702) on this matter<sup>10</sup> has been adopted in October 2020 by the Constitutional Affairs Committee of the Chamber of Deputies, the legislative process has not proceeded further since then.

### ***Measures in place to ensure whistleblower protection and encourage reporting of corruption***

As of January 2022, Italy has failed to transpose EU Directive 2019/1937 on whistleblowers protection.<sup>11</sup> Mr Giuseppe Busia, President of the ANAC (*Autorità Nazionale Anticorruzione, National Anti-Corruption Authority*)<sup>12</sup> has stressed that, given the importance of the role of whistleblowers, the fight against corruption must be unrelenting.<sup>13</sup>

The deadline for the Italian government to transpose the Directive upon delegation of the Parliament expired in August 2021. The National Anti-Corruption Authority has supported the Ministry of Justice to draft a transposition text for the Directive, but no formal transposition process has started yet. Mr Giuseppe Busia has stressed that it would be useful and appropriate to include the transposition of the Directive in one of the next government measures, also to avoid the infringement procedure against Italy.

### ***Investigation and prosecution of corruption***

#### ***Criminalisation of corruption and related offences***

Although the National Recovery and Resilience Plan envisaged a draft delegated law to amend the anti-corruption and transparency rules to be presented by June 2021, this deadline was then postponed to September 2021 and eventually disregarded. This is concerning because 10 years since Law 190/2012 (i.e., the anti-corruption law) was passed, changes to the current legislative framework seem more necessary than ever to eliminate the

9 <https://www.thegoodlobby.it/campagne/conflitto-di-interessi/>

10 <https://www.camera.it/leg18/126?tab=1&leg=18&idDocumento=702&sede=&tipo=>

11 <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937>

12 <https://www.anticorruzione.it/>

13 <https://www.ilfattoquotidiano.it/2022/01/01/whistleblowing-anac-italia-inadempiente-sulla-direttiva-ue-a-tutela-di-chi-segnala-illeciti-sul-lavoro-testo-pronto-ma-e-tutto-fermo/6442841/>

criticalities that affect the legislation coming into force. For example, a more robust set of restrictions concerning donations, gifts, hospitality, favours and other benefits for members of public institutions should be put in place; and stronger efforts should be made in order to prevent corruption (e.g., by strengthening and/or introducing mandatory training on anti-corruption and Ethical Codes in relevant public and private institutions).

## **Media environment and freedom of expression and of information –**

### **Key recommendations**

- The Italian Government should act to improve the safety of journalists covering protests and demonstrations. Episodes of violence and harassment - including any acts of police brutality - must be adequately investigated and prosecuted. To that end, capacity-building among law enforcement personnel in coordination with representatives of the journalists should be improved
- The Italian Legislator should urgently reform both criminal and civil defamation laws in order to

stop SLAPPs against journalists (which often leads to self-censorship). In particular, such reform should: (i) focus on the decriminalisation of defamation; and (ii) set limits within civil law on the amount in damages that can be sought

- The Italian Legislator should adopt the same approach both in the FOIA and in the Law n. 241/1990 (which regulates access to public documents) by excluding journalistic material from their scope of application and ensuring that the two regimes comply with the ECtHR case-law and European standards

### **Pluralism and concentration**

#### ***Rules governing and safeguarding the pluralistic media market, and their application***

According to the latest report by Freedom House, although concentration of ownership remains a major concern, many media viewpoints are available, and the internet access is normally unrestricted.<sup>14</sup>

In 2021, the Italian Regulatory Authority for Communications (AGCOM)<sup>15</sup> adopted

14 <https://freedomhouse.org/country/italy/freedom-world/2021>

15 <https://www.agcom.it/>

a recommendation on the compliance with the principles protecting the correctness, completeness, impartiality and pluralism of the information.<sup>16</sup> Despite this, the two new board members of RAI, Italy's public television broadcasting company, appointed in 2021 by the government and Parliament all belong to the parties that are part of the majority in the government. No candidate proposed by the opposition parties was appointed. In this regard, on 15 July 2021, Raffaele Fitto (ECR) and Ryszard Antoni Legutko (ECR) presented two questions to the European Commission highlighting that, "this is a serious precedent and violation, considering that pluralism, which is the basis of the functioning of the democratic system, is now in no way guaranteed in the organisation of public television. Not only does the opposition not have a position on the board, but it also does not even hold the chairpersonship of the RAI parliamentary supervisory committee".<sup>17</sup>

### **Transparency of media ownership**

According to MPM2021,<sup>18</sup> transparency of media ownership in the online environment scores a higher risk when compared to the overall score for this indicator. The assessment reflects the fact that not all the digital news

media are obliged to register in the Register of Communications Operators (ROC) - the smaller ones being exempted; for the digital media that must register, transparency has several limits on effectiveness. In this regard, a development took place on 1st January 2021, when Law no. 178/2020 ("2021 budget law") entered into force in Italy. With such law, AGCOM provided that online intermediation service providers and search engines will be required to:<sup>19</sup>

**1. enrol in the Register of Communications Operators managed by AGCOM ("ROC"):** ROC is a public registry that has the purpose of guaranteeing the transparency and publicity of ownership structures, allowing the application of the rules concerning anti-concentration, the protection of information pluralism, and compliance with the limits set for the shareholdings of foreign companies. Currently, several companies are enrolled in this registry such as audiovisual media services providers, call centre operators, advertising agencies (including online advertising agencies), newspaper publishers, and companies providing telecommunication services.

16 <https://www.agcom.it/documents/10179/22130725/Delibera+92-21-CONS/ac07cf8b-57de-438e-9e34-e48a4ae51966?version=1.2>

17 [https://www.europarl.europa.eu/doceo/document/E-9-2021-003608\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2021-003608_EN.html)

18 [https://cadmus.eui.eu/bitstream/handle/1814/71951/italy\\_results\\_mpm\\_2021\\_cmpf.pdf?sequence=](https://cadmus.eui.eu/bitstream/handle/1814/71951/italy_results_mpm_2021_cmpf.pdf?sequence=)

19 *Italy extends its reach into intermediation service providers and search engines: what you need to know*, Ughi e Nunziante Studio Legale, 4 February 2021.

**2. pay an annual fee to AGCOM:** the 2021 Budget Law sets the rate at 0.15% of revenues generated in Italy by the online intermediation services and search engines. Companies based abroad are also caught by the scope of the 2021 Budget Law, in reference to the Italian sourced revenue accounted for in financial statements generated abroad. For companies not obliged to draft financial statements, the percentage must be calculated with the same items in other accounting records that certify the total value of production.

The applicable law also provides for an administrative sanction for failure to comply with the above-mentioned obligations.

Finally, MPM2021 also reports that the indicator concerning access to media for women scores a high risk. In this regard, as noted above, in 2021 none of the leading news media companies in Italy had a female editor-in-chief.

## **Public service media**

### **Independence of public service media from governmental interference**

In Italy, interference in and pressures on public service media are mainly related to politically motivated criteria for nominating governing bodies (for instance, reference is made to the

above-mentioned 2021 renovation of the positions on the board of RAI).

### **Editorial standards**

According to a recent report by the Reuters Institute,<sup>20</sup> the COVID-19 pandemic has exacerbated some of the historical weaknesses of the Italian media sector, contributing to the decline of overall revenues, the fall in newspaper readership, and the lowering of the editorial standards adopted in news reporting. The consequences of the pandemic seem to have been less severe for major online platforms.

## **Online media**

### **Impact on media of online content regulation rules**

Italy does not typically block or filter content of a political, social, or religious nature; all major websites and communication platforms are freely available (Freedom House).<sup>21</sup> According to data gathered by OONI,<sup>22</sup> Italy's blocking and filtering of the internet is limited and is primarily implemented by means of domain name system (DNS) tampering. Yet, websites are frequently blocked for hosting copyright-violating content and, in March 2021, the Customs and Monopolies Agency (ADM), an administrative body under the Ministry of Finance,<sup>23</sup> blocked the popular

20 [https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2021/italy#\\_ftn1](https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2021/italy#_ftn1)

21 [https://freedomhouse.org/country/italy/freedom-net/2021#footnote1\\_bskrmwd](https://freedomhouse.org/country/italy/freedom-net/2021#footnote1_bskrmwd)

22 <https://explorer.ooni.org/country/IT>

23 <https://www.adm.gov.it/portale/>

content sharing platform *Medium* in Italy because of posts that allegedly shared illegal gambling links. Following inquiries from the press, the block was lifted later the same day.

### ***Competence and powers of bodies or authorities supervising the online ecosystem***

According to the cited MPM2021, Italy does not filter/remove content in an arbitrary way. Other than for violations that are punishable by the criminal law, websites can be blocked or fined for violating copyright. A specific content or website can be blocked or removed in cases when an order is given from AGCOM (following for instance AGCOM's regulation on copyright) or by a judge.

### ***Financing framework***

According to the cited report by the Reuters Institute and to AGCOM,<sup>24</sup> the Italian media environment has traditionally been characterised by a particularly strong television sector and a weak and declining newspaper sector. However, online advertising revenues overtook television advertising revenues for the first time in 2019, and now represent almost half of overall advertising revenues in the Italian media sector. The pandemic has produced a sharp drop in advertising revenues, which are the main funding source for many Italian outlets, and exacerbated the decline in newspaper circulation. Consequently, Italian news media has responded in various ways: (i) several major

news outlets have increased the number of ads on their websites, as well as their invasiveness; (ii) the trend towards pay models for online news is developing further; and (iii) some sites have recently introduced membership schemes. Yet, the Reuters Institute reports that the proportion of people paying for online news is still low.

### ***Public trust in media***

Because of the severity of the COVID-19 pandemic, Italian media increased the space given to the news, and both television and online news outlets have seen a significant increase in audience reach.

According to the cited report by the Reuters Institute the 2020 11-percentage point drop in public trust in the media was recovered in 2021, however the score still remains relatively low. In particular, it appears that the most trusted brands are generally those that are known for lower levels of political partisanship, while least trusted are outlets with a pronounced partisan bias and the popular digital-born outlet Fanpage.

In any case, in 2021 the safety of journalists reporting on protests and demonstrations organised by anti-vaccine and anti-lockdown groups posed one of the biggest concerns for media freedom in Italy. According to Mapping Media Freedom, hostility against the press including threats, intimidation and anti-media

24 <https://www.agcom.it/documents/10179/23560628/Documento+generico+26-07-2021/32d25996-0a6b-4e0b-a303-0c1e9152e4cc?version=1.1>

chants were a common phenomenon at such events, some of which were organised by far-right groups: these attacks reflected a worrying rise in anti-press sentiment in some segments of Italian society.<sup>25</sup>

In this regard, Reuters Institute reports that coverage of the COVID-19 pandemic has highlighted the shortage of specialist science journalists in Italy, as well as a tendency to focus news coverage on speculation and leaks about possible changes to Coronavirus-related restrictions, rather than on the actual decisions, together with sensationalist and often contradictory coverage of facts related to the pandemic and vaccines. This, together with the spread of disinformation, might have contributed to the audience's dissatisfaction and lack of trust in news.

## ***Safety and protection of journalists and other media activists***

### ***Frequency of verbal and physical attacks***

Violence against journalists in Italy is far from being an isolated accident. In 2021, this trend is confirmed by:

- The Coordination Centre on the Phenomenon of Intimidating Acts Against Journalists<sup>26</sup> (for the period of January to September 2021): According

to this report, while organized crime is still responsible for a significant number of threats, socio-political issues remain one of the main motivations for acts of violence against journalists (especially during anti-lockdown and anti-masks protests in several cities). Such attacks range from online intimidations to verbal threats, physical aggression, threatening letters, episodes of damage, and insulting/threatening graffiti. Regarding some of these intimidating acts, it appears that the victim has not filed any complaint.

- Ossigeno per l'informazione (for the period of January to December 2021):<sup>27</sup> According to such report, as of 17 December 2021, 301 intimidations and threats in Italy against journalists, bloggers and other information operators have taken place, with 24% of all threats made against female journalists.
- As for the nature of such intimidations, the Observatory reports: 48% of specious complaints; 25% of warnings (including death threats), 16% of physical aggression, 10 % of initiatives not subject to prosecution (which have hampered the access to information in a discriminatory and arbitrary manner); 1% of damages.

25 [https://www.mappingmediafreedom.org/wp-content/uploads/2022/01/MFRR-Monitoring-Report\\_04.pdf](https://www.mappingmediafreedom.org/wp-content/uploads/2022/01/MFRR-Monitoring-Report_04.pdf)

26 [https://www.interno.gov.it/sites/default/files/2022-01/elaborato\\_giornalisti\\_30\\_settembre\\_2021.pdf](https://www.interno.gov.it/sites/default/files/2022-01/elaborato_giornalisti_30_settembre_2021.pdf)

27 <https://www.ossigeno.info/giornalisti-301-minacciati-in-italia-nel-2021-il-24-donne-nuovo-record-in-lazio/>

It must be pointed out that in 2021 journalists were facing all sorts of threats related to reporting on COVID. Indeed, 69 out of 301 total cases of attacks and threats against journalists have occurred during Covid-19-related protests and manifestations. Regions of Lazio, Campania and Sicily recorded the highest number of incidents.

More detailed information on the above-mentioned episodes of violence against journalists in 2021 can be found at Mapping Media Freedom's online website.

### ***Rules and practices guaranteeing journalist's independence and safety***

Rules and practices guaranteeing journalist's independence and safety still need to be implemented in Italy: in this regard, judges and prosecutors have a crucial role to play.

In November 2021, journalists and prosecutors discussed how to end impunity and agreed that (i) the lack of intermediaries to assist journalists when they are faced with threats, (ii) the multiplicity of attacks against journalists which may happen both online and offline, (iii) the impact of libel crimes and (iv) strategic lawsuits against public participation (SLAPP) are all existing tools to silence journalists, who are often forced to pay for their own defence.<sup>28</sup>

Consequently, there is both a need to prosecute threats and attacks against journalists on the one hand, while protecting freedom of expression and press freedom as a value for democracy and the rule of law on the other.

### ***Law enforcement capacity to ensure journalists' safety and to investigate attacks on journalists and media activists***

In 2021, incidents of verbal and physical attack against Italian journalists didn't come only from members of the public but also from members of the police. For instance:

- On 9 October 2021, the photojournalist Francesco Cocco, a contributor to daily newspaper *Il Foglio*, said he was attacked by a police officer while covering an anti-vaccine pass protest in Rome.<sup>29</sup>
- On 9 October 2021, Flavia Amabile, a journalist with the daily newspaper *La Stampa*, was hit with police batons while covering an anti-vaccine pass protest in Rome.<sup>30</sup>
- On 31 October 2021, journalists trying to question the Brazilian president Jair Bolsonaro during the G20 summit in Rome were pushed, assaulted and had their phones forcibly taken by security guards who were escorting the politician.<sup>31</sup>

28 <https://en.unesco.org/news/prosecutors-and-journalists-discuss-how-end-impunity-syracuse-italy>

29 <https://www.mapmf.org/alert/24292>

30 <https://www.mapmf.org/alert/24293>

31 <https://www.mapmf.org/alert/24345>

### ***Lawsuits and prosecutions against journalists (including) SLAPPs and safeguards against abuse***

According to IPI, while the Italian Civil Procedural Code includes some provisions aimed at countering SLAPPs (for instance Article 96 provides that those plaintiffs who filed a lawsuit in “bad faith” must compensate the defendant), judges rarely recur to these provisions in practice.<sup>32</sup>

Lawsuits and prosecutions against journalists, including defamation cases, remain common and they can entail serious financial costs for defendants. According to Ossigeno per l’informazione, in 2021 the most common types of threats were abuse of complaints and of lawsuits (equal to 48%). This macro category mainly includes defamation charges (which in 2021 have been 32) and claims for damages. For instance:

- On 28 July 2021, the Italian newspaper Domani informed its online readers that they received a letter by ENI, the partly state-owned oil company, that alleged reputational damages arising from the publication of an article. According to this official letter sent by the lawyers of the company, the newspaper had to pay €100,000 within 10 days, otherwise ENI would have sued the newspaper and

claimed for damages to its reputation in court. Media freedom groups expressed concern that the threat of legal action was aimed at pressuring and threatening the independent news outlet over its coverage. A member of the Parliament filed a written question to the ministers of Economy and Finance, and Economic Development, which have a majority share in ENI, asking the company to behave “fully in line with the respect for media freedom”.<sup>33</sup>

- On 18 October 2021, Italian journalist Lorenzo Tondo, correspondent for The Guardian, received notification of the official start of his trial (first hearing scheduled on 2 February 2022), following a mediation attempt on two civil lawsuits for defamation brought against him by Italian prosecutor Calogero Ferrara. As a result, the journalist was prevented from covering a trial on a case he was following and – according to his supporters – this does not appear to be a mere coincidence but a strategic choice to intimidate and prevent him from reporting and writing on such a trial.<sup>34</sup>

32 <https://ipi.media/italy-urged-to-reform-defamation-laws/>

33 <https://www.mapmf.org/alert/24264>

34 <https://www.mapmf.org/alert/24347>

### **Confidentiality and protection of journalistic sources**

Under Italian law journalistic sources are poorly protected. Moreover, as IPI highlights,<sup>35</sup> there is currently a conflict between the protection of journalist sources under the Italian FOIA, and the protection granted under regional standards and the data protection law. In addition, the right/duty of journalists to protect their confidential sources<sup>36</sup> applies only to the source's identity (name and surname) and – contrary to other professionals – the judge may order a journalist to indicate the source of the information in his/her possession where the information is essential for an investigation and where it is necessary to ascertain the identity of the source.<sup>37</sup> In addition, the 2016 Decree n. 97 on Transparency (FOIA), which regulates the right of access to information, and Law n.241/1990, which regulates access to public documents, applies to all public institutions including public broadcasters.

Furthermore, in 2021, the confidentiality of journalistic sources was threatened by Italian courts. More precisely:

- Surveillance of journalists emerged as a serious issue when in March 2021, it was revealed that numerous Italian journalists had their phones wiretapped by Sicilian prosecutors in Trapani as part of their investigation into sea rescue NGOs and charities. Prosecutors recorded dozens of conversations between journalists and NGO workers, breaching source anonymity. Media freedom groups said the move was one of the most serious attacks on the press in recent Italian history.
- Concerns over source protection increased further on 18 June 2021, after the Administrative Court of Lazio (TAR Lazio) ordered the Italian Media Public Broadcaster (RAI) to release documents held by TV program Report on the management of public funds in the Lombardy region, following a FOI request.<sup>38</sup> The Italian Federation of Journalists (FNSI) and the RAI Journalists' Union (Usigrai) denounced a blatant violation of the confidentiality of journalistic sources. The journalists' representative organisations denounced a court decision that threatens any journalistic investigation of public affairs.

35 <https://ipi.media/italy-access-to-information-law-should-not-be-used-to-override-journalistic-source-protection/>

36 Such right/duty is respectively provided for in Law 69/1963 on the Organisation of the journalistic profession and in the Consolidated text of the duties of the journalist, but it is also ensured by other provisions (see, for instance, Paragraph 2 of Article 271 and Article 256 of the Code of Criminal Procedure).

37 See Paragraph 3 of Article 200 of the Code of Criminal Procedure. According to the same provision, the judge may order the journalist to indicate the source of the information in his or her possession where such information is essential for the investigation and where it is necessary to ascertain the identity of the source.

38 [https://www.articolo21.org/2021/06/caso-report-riportiamo-la-sentenza-integrale-solidarieta-da-articolo-21/?fbclid=IwAR0izS7XM5KLROtGPss5uZgf4AA6iCBuGq0XIipd\\_h70aISx1Pu6LwWQRo0](https://www.articolo21.org/2021/06/caso-report-riportiamo-la-sentenza-integrale-solidarieta-da-articolo-21/?fbclid=IwAR0izS7XM5KLROtGPss5uZgf4AA6iCBuGq0XIipd_h70aISx1Pu6LwWQRo0)

## ***Freedom of expression and of information***

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### ***Abuse of criminalisation of speech***

Article 21 of the Italian Constitution protects freedom of expression and restrictive measures (to protect dignity, honour, privacy, national security and public order) are prescribed by the law, in line with the Constitution. Although freedom of expression is generally respected, some provisions of the Criminal Code do not fully comply with international standards and Article 10 of the European Convention on Human Rights (MPM2021).<sup>39</sup>

As it was already pointed out in the 2021 Rule of Law report by the European Commission,<sup>40</sup> the long-standing issue of criminalization of defamation came to a turning point in June 2020 when the Italian Constitutional Court invited the Italian Parliament to remove specific provisions deemed unconstitutional and to promote a wider reform of the defamation framework. In this regard, IPI reports that the lack of parliamentary initiative in pushing for comprehensive reform of the defamation framework in Italy is a long-standing issue

that contributes to the erosion of a free and independent press and an increase in SLAPPs against journalists.<sup>41</sup>

A further development occurred in 2021: since the legislative power took no step in amending the provisions on criminal defamation in the terms prescribed by the 2020 ruling, the Italian Constitutional Court ruled on 22 June 2021 the unconstitutionality of prison sentences in cases of defamation through the press, except for cases of “exceptional severity”.<sup>42</sup>

### ***Censorship and self-censorship, including online***

According to the cited report by Freedom House, in Italy content creators and hosts may exercise some self-censorship regarding content that could prove controversial or create friction with powerful entities or individuals. Online writers also exercise caution to avoid libel suits by public officials, whose litigation - even when unsuccessful - can take a significant financial toll. Individuals writing about the activities of organized crime in some parts of the country may be especially at risk of extra-legal reprisals. For instance:

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39 <https://cmpf.eui.eu/mpm2021-results/>

40 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0716&from=EN>

41 <https://ipi.media/italy-urged-to-reform-defamation-laws/>

42 More precisely, Art. 13 of Law 47/1948 (Press Law) –providing for automatic provision of detention penalties in case of defamation through the press attributing a precise fact-was declared not compliant with the Constitution; Art. 595 (3) of the Italian Criminal Code providing detention penalties between 6 months and 3 years for public defamation was not declared unconstitutional, but it was specified it should be used only in case of “exceptional severity”. See <https://www.article19.org/resources/italy-constitutional-court-refers-decision-on-abolishing-prison-sentences-for-criminal-defamation-to-parliament/>

- On 23 September 2021, the online Italian newspaper Fanpage.it received a legal notice from a court in Rome that ordered the media outlet to remove from its website videos of an investigation it conducted into the well-known case of embezzlement involving the political party *Lega*.<sup>43</sup> After outrage by the journalistic community including the Rome Press Association, parliamentary questions were asked to the Minister of Justice, Marta Cartabia, about on what grounds the seizure had been permitted. Days later, the preventive seizure was then revoked by the Rome prosecutor's office.

- In May 2021, the Italian Supreme Court ruled that the popular television show "*Le Lene*" must remove a segment allegedly defaming Roberto Burioni, a scientist and public figure.<sup>44</sup> Burioni had sued Mediaset, which airs "*Le Lene*", for defamation, claiming reputational damages from a segment of an episode that alleged that Burioni had promoted pharmaceutical products for his own financial benefit. The May 2021 ruling upheld an earlier decision in which a court ruled in favour of Burioni and imposed the restriction of the allegedly defamatory segment on *Le Lene*'s website. The Supreme Court's ruling also confirmed that a court can order the restriction of an entire journalistic piece in a defamation

suit, rather than only the parts of the piece considered "defamatory." Various observers have warned of the negative impact the case could have on free expression.

### **Restrictions on access to information**

In 2021, journalists also faced disproportionate obstructions during court reporting due to the COVID-19 pandemic. For instance:

- In January 2021, Italy's largest mafia trial in three decades began, but journalists were banned from taking video or audio within the courtroom.<sup>45</sup> The restriction came after a decision by a judge in the trial, with Covid-19 restrictions cited as the main reason for the decision. Italian journalists and press freedom groups criticised the ban, arguing it would significantly limit the media's ability to cover one of the biggest crime and corruption stories in many years. They added that it would limit the right to know of citizens across the EU. Only on 11 March 2021 the Court of Vibo Valentia rescinded the ban: the measure was notified to all the newspapers and television stations that in January had asked to be able to film the trial.

- On 3 April 2021, a journalist from the Sicilian city of Enna was barred by the president of the court from entering the

43 <https://www.mapmf.org/alert/24263>

44 <https://www.agendadigitale.eu/cultura-digitale/burioni-vince-su-mediasset-la-cassazione-apre-a-sequestri-di-siti-giornalistici/>

45 <https://www.mapmf.org/alert/23824>

Palace of Justice under COVID-19 rules to report on case involving a priest accused of aggravated sexual violence against minors.<sup>46</sup> The refusal to allow her access was condemned by the Sicilian Order of Journalists, the Sicilian Press Association, and the Enna provincial secretariat of the journalists' union, which said her right to work had been wrongfully impeded. In a statement made by Order and Union they said: "It is unacceptable that anti-Covid regulations are brought up to forbid the entrance to a courthouse to a single professional, with a mask, who certainly would not have created any kind of gathering" and called on the president of the court to review the decision.

- On 16 November 2021, journalists were left unable to report on the proceedings of a court case in which a lawyer under investigation for shooting a man dead was participating, due to the poor quality of the video link.<sup>47</sup> Multiple media outlets including the public broadcaster RAI had tried to attend the court in Voghera, a town in Lombardy, to report on events. However, they were informed that media were barred from the courtroom due to Covid-19 restrictions. A live stream of the court was provided, although several connection issues were not fixed by court officials, undermining the principle of open

justice and leaving the journalists unable to report on the proceedings. The National Federation of the Italian Press and the Lombard Association of Journalists issued a statement criticising the lack of proper access for journalists to cover the court case, which they said limited the ability of the media to cover a court case in the public interest.

### ***Legislation and practices on fighting disinformation***

Manipulated online content was prevalent in Italy during the last years, including material related to the COVID-19 pandemic.

GDI research in January and February 2021 highlights that the majority of ad tech companies in Italy do not have specific COVID-19 disinformation content policies or that those policies are violated and continue to fund news sites flagged publicly as purveyors of disinformation.<sup>48</sup> Furthermore, Newsguard's Coronavirus Disinformation monitoring centre found that 41 websites - including conspiratorial blogs, alternative websites, and popular news outlets - published COVID-19 disinformation in Italy as of September 2021.<sup>49</sup>

In order to fight disinformation, on 20 September 2021 Italy launched its national anti-disinformation hub - the Italian Digital

46 <https://www.mapmf.org/alert/23994>

47 <https://www.mapmf.org/alert/24399>

48 <https://disinformationindex.org/2021/02/ad-funded-covid-19-conspiracy-sites-a-look-at-the-eu/>

49 <https://www.newsguardtech.com/it/special-reports/coronavirus-misinformation-tracking-center/>

Media Observatory – at the LUISS University in Rome, as part of a European network of eight national hubs.<sup>50</sup> The network is part of the European Digital Media Observatory, an EU-funded project that promotes scientific knowledge about online disinformation, advances the development of fact-checking services, and supports media literacy programs. The Italian observatory will bring together fact-checkers, media professionals and researchers to fight online disinformation. The national centres have the task of monitoring and reporting disinformation campaigns using artificial intelligence, helping the media and public authorities to denounce them. Each pole will be responsible for organizing media education activities at national or multinational level. The Italian hub is formed by a consortium that includes the universities of LUISS and Tor Vergata, the national telecommunications provider TIM and major media such as the public broadcaster RAI, the editorial group GEDI and the daily Corriere della Sera.

Furthermore, AGCOM has joined the 2020-2021 Safer Internet Center Italy (SIC-Italy) project and now promotes educational video broadcasting in schools<sup>51</sup> so that young people

can learn how to recognise fake news and online illegal content.<sup>52</sup>

### ***Online content regulation***

In Italy, the internet access is generally free and unrestricted. According to MPM2021, limits to freedom of expression online are consistent with offline media.<sup>53</sup>

In practice, Italians do not face special economic or regulatory obstacles to publishing content online. Italy became the first European country to adopt a Declaration of Internet Rights in July 2015, which includes provisions that promote net neutrality and establish internet access as a fundamental right.<sup>54</sup> However, such Declaration is nonbinding, and net neutrality is not enshrined in national law, though a 2015 EU-level regulation empowers AGCOM to supervise and enforce the principle.<sup>55</sup>

50 <https://www.euractiv.com/section/digital/news/italy-launches-national-hub-to-fight-disinformation/>

51 Through the site [www.generazioniconnesse.it](http://www.generazioniconnesse.it)

52 <https://www.agcom.it/documents/10179/23560628/Documento+generico+26-07-2021/32d25996-0a6b-4e0b-a303-0c1e9152e4cc?version=1.1>

53 [https://cadmus.eui.eu/bitstream/handle/1814/71951/italy\\_results\\_mpm\\_2021\\_cmpf.pdf?sequence=4](https://cadmus.eui.eu/bitstream/handle/1814/71951/italy_results_mpm_2021_cmpf.pdf?sequence=4)

54 [https://www.camera.it/application/xmanager/projects/leg17/commissione\\_internet/testo\\_definitivo\\_inglese.pdf](https://www.camera.it/application/xmanager/projects/leg17/commissione_internet/testo_definitivo_inglese.pdf)

55 [https://www.agcom.it/internet-aperta\\_net-neutrality](https://www.agcom.it/internet-aperta_net-neutrality)

## Checks and balances –

### Process for preparing and enacting laws

#### Rules and use of fast-track procedures and emergency procedures

In response to the continued spreading of the COVID-19 virus, the Italian government has prolonged the state of emergency until 31 March 2022.<sup>56</sup> However, unlike 2020, in 2021 the Government decided to adopt emergency-related measures mostly through decree-laws instead of Presidential decrees. This shift followed the concerns raised by legal experts about the legitimacy of the Presidential decrees adopted in 2020 to impose severe restrictions to fundamental freedoms. However, in September 2021 the Constitutional Court ruled that resorting to Presidential decrees to impose the aforementioned restrictions does not imply any breach to the Italian Constitution, with particular regard to articles 76, 77 and 78.<sup>57</sup>

### Independent authorities

Italy still lacks a National Human Rights Institution (NHRI). However, three draft laws aimed at establishing such Institution are being examined by a Commission of the Chamber of Deputies with a view to setting the ground to create a “National Commission for the Promotion and Protection of Human Rights and the Fight against Discrimination”.<sup>58</sup> During the session of 3 November 2021, the Italian Government intervened to reiterate its full support for the establishment of the Commission.<sup>59</sup>

In January 2021, the EU network of National Human Rights institutions (ENNHRI) intervened in a conference organised by the EU’s Fundamental Rights Agency and a group of leading academics on the establishment of an Italian NHRI. ENNHRI highlighted that an Italian NHRI, in compliance with the UN Paris Principles, will contribute to greater promotion and protection of human rights in Italy. ENNHRI is closely monitoring developments in the country and stands ready to provide its expertise on the establishment and accreditation of NHRIs to relevant stakeholders in Italy, including the legislature, government, academics and civil society organisations.<sup>60</sup>

56 <https://www.gazzettaufficiale.it/eli/id/2021/12/24/21G00244/sg>

57 <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2021&numero=198>

58 <https://www.camera.it/leg18/824?tipo=A&anno=2020&mese=10&giorno=29&view=filtered&commissione=01#data.20201029.com01.allegati.all00010>

59 [https://www.camera.it/leg18/824?tipo=C&anno=2021&mese=11&giorno=03&view=filtered\\_scheda&commissione=01&pagina=#data.20211103.com01.bollettino.sede00040.tit00030](https://www.camera.it/leg18/824?tipo=C&anno=2021&mese=11&giorno=03&view=filtered_scheda&commissione=01&pagina=#data.20211103.com01.bollettino.sede00040.tit00030)

60 <http://ennhri.org/wp-content/uploads/2021/07/Regional-Rule-of-Law-Report-2021.pdf>

## **Disregard of human rights obligations and other systemic issues affecting the rule of law framework** —

### **Systemic human rights violations**

#### **Widespread human rights violations and/or persistent protection failures**

With regard to migration management in Italy the situation is still concerning, especially as far as the so-called “pushbacks at sea” are considered. Even though the situation in Libya continues to be highly unstable politically and socially, and despite the serious atrocities carried out by the self-styled Libyan coastguard and the ongoing violation of human rights, according to data from the International Rescue Committee (IRC) some 23,000 migrants have been intercepted at sea and then returned to Libya in the first eight months of 2021.<sup>61</sup> This is an appalling figure - the highest since 2017 - which almost double the 2020 figure.<sup>62</sup>

In addition, violence against women (especially domestic violence), hate crimes, racism and discriminations (including against LGBTI+ people) have been a serious problem and need legislation that has yet to be adopted.

As for violence against women, data released on November 2021 by the Italian central anti-crime directorate revealed that on average 89 women in Italy are victims of gender-based violence every day; in 62% of cases the perpetrator is the person with whom they have or had a relationship. Furthermore, as of December 2021, ANSA reported that since the start of 2021, 109 women have been murdered in Italy (8 % more than the same time period last year) with 63 of them killed at the hands of their partner or ex-partner.

In addition, Italy’s largest LGBTI+ rights group, Arcigay, records more than 100 hate crime and discrimination cases each year, but numerous attempts over the last 25 years to create a law to punish acts of homophobia and transphobia have failed. In this regard, after months of debates, on 27 October 2021 a centre-right majority in the Italian Senate voted to block the parliamentary process on the so-called ‘ddl Zan’, sought to expand current anti-discrimination laws to protect women, disabled people and members of the LGBTI+ community.

#### **Implementation of decisions by supranational courts, such as the Court of Justice of the EU and the European Court of Human Rights**

Italy has a particularly poor record of implementing the judgments of European Court of Human Rights. Statistics indicate a very

61 <https://www.rescue.org/>

62 <https://www.meltingpot.org/2021/09/nel-2021-piu-di-23-mila-persone-respinte-in-mare-e-riportate-in-libia/>

high number of leading judgments pending implementation, as well as a high percentage of leading cases which are still pending implementation.

As of 17 January 2022, relevant data from the European Implementation Network<sup>63</sup> include the following information:

- Number of leading cases pending: 54
- Average time leading judgments have been pending: 6 years, 3 months
- Proportion of leading cases pending from the last ten years: 56%

The pending cases against Italy show that relevant human rights problems are still unresolved in our country, including the following:

- Criminal convictions for acts of free speech on matters of the public interest (*Belpietro v. Italy*), pending implementation since 2013.
- Failures to enforce court judgments (*Therapic Center S.r.l. and Others v. Italy*), pending implementation since 2018.
- Extremely long court proceedings across the Italian justice system (*Abenavoli v. Italy*, *Ledonne v. Italy* (no.1), *Barletta and Farnetano v. Italy*), with the first case dating from 1997.

- Failures to address domestic violence (*Talpis v. Italy*), pending implementation since 2017.
- Police brutality not properly criminalised (*Cestaro v. Italy*), pending implementation since 2015.

The above-mentioned judgments have been pending implementation for a long period of time. The oldest pending leading judgments against Italy are *Ledonne* (no .1) and *Abenavoli*, which have been pending implementation since 1999 and 1997. They concern the excessive length of criminal and administrative proceedings. The delayed implementation of these judgments creates an ongoing risk that similar violations will continue to occur.

While civil society organisations (including CILD) have been trying to push for the implementation of the above-mentioned judgments by submitting Communications ex Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments, the Italian government has not responded adequately to these calls so far. In addition, the supervision of one of the previously pending cases, *Khlaifia v. Italy*,<sup>64</sup> has eventually been closed by the Committee of Ministers of the Council of Europe, although several civil society organisations had stressed that Italy had not yet adopted adequate measures to implement the judgement and prevent similar violations from happening.

63 <https://www.einnetwork.org/>

64 <https://hudoc.exec.coe.int/eng?i=004-45851>

## ***Fostering a rule of law culture***

While relevant authorities have organised conferences and high-level meetings on the rule of law in 2021, it seems that all those initiatives were only reserved to members of parliament and/or other institutional stakeholders. We could find no record concerning public initiatives on the issue.

While there is an interest on the side of civil society organisations to promote initiatives to foster a rule of law culture in Italy, these have not been implemented widely to date mainly because of a lack of resources.

# **LIBERTIES RULE OF LAW REPORT 2022**

## **NETHERLANDS**



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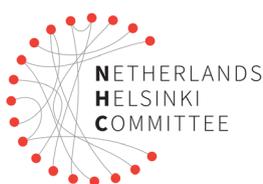
Meijers  
Committee

**CIVIL  
LIBERTIES  
UNION FOR  
EUROPE**

# Netherlands

## About the authors

This report has been compiled by Liberties on the basis of the official submission<sup>1</sup> jointly authored by the Netherlands Helsinki Committee (NHC), the Nederlands Juristen Comité voor de Mensenrechten (NJCM), the Commissie Meijers, Free Press Unlimited (FPU) and Transparency International Nederland (TI-NL) to feed the 2022 public consultation on the rule of law in the EU launched by the European Commission – subject to the consent of the authors. While not altering its content, this report is based on an edited version of the original submission and is structured on the basis of a reporting template drawn up by Liberties. Progress ratings of the various areas covered is the sole responsibility of Liberties.



**The Netherlands Helsinki Committee (NHC)** is a non-governmental organisation that promotes human rights and strengthens the rule of law and democracy in all countries



of Europe, including the Central Asian countries participating in the OSCE.

**The Nederlands Juristen Comité voor de Mensenrechten (NJCM)** was established in 1974 as the Dutch section of the International Commission of Jurists (ICJ). It has grown into an authoritative organisation that is commit-

## Meijers Committee

ted and has successfully contributed to the protection of human rights in the Netherlands and Dutch foreign policy.

**The Meijers Committee** is an independent standing committee of legal experts that provides technical-legal commentary on EU policy documents and legislative proposals. For over 25 years, the Meijers Committee



has made an important contribution to the

<sup>1</sup> [https://njcm.nl/wp-content/uploads/2022/02/20220124-NL-Contribution-to-the-Rule-of-Law-Report-2022\\_NHC-1.pdf](https://njcm.nl/wp-content/uploads/2022/02/20220124-NL-Contribution-to-the-Rule-of-Law-Report-2022_NHC-1.pdf)

protection of the rule of law and fundamental human rights within the European Union through the publication of policy papers and comments.

**Free Press Unlimited (FPU)** is committed to promoting and defending press freedom and access to reliable information, particularly



in countries with limited (press) freedom. Together with over 40 local media partner organisations, Free Press Unlimited strives to give people the information needed to help them survive, develop themselves, and with which they can monitor their government.

**Transparency International Nederland (TI-NL)** focuses on a world in which government services, the political world, business, civil society and citizens are free from corruption. The emphasis is on improving integrity, transparency and accountability in Dutch society.

## **Key concerns**

In the area of justice, steps are being taken to further strengthen the independence of the prosecutor's service, reduce court fees to increase access to justice and to improve the legal aid system. The government is also expected to invest in trainings to enhance courts' capacity to deal with cybersecurity and cyber criminality, while efforts are being made to remedy the failure to provide effective legal

protection in the childcare benefits case and to enhance the fairness of asylum procedures. The pandemic accelerated digitalisation efforts, but the impact on vulnerable litigants is yet to be assessed and such efforts call for a strong role of the data protection authority. The government is also committed to increase transparency and accessibility of courts' decisions by promoting their online publication.

The judicial system is still facing a budget deficit, but the government is committed to strengthen the resources of the judiciary.

As regards corruption, risks remain in relation to the influence of organised crime groups, foreign bribery and corruption risks emerging from the COVID-19 pandemic, in particular in the area of public procurement. Gaps persist in the integrity framework, including for public officials, and EU rules on whistleblower protection are not yet effectively implemented.

While the media environment overall enjoys a good level of independence, some concerns exist as regards the transparency and impartiality of the Dutch Foundation for Public Broadcasting, the governing entity of public broadcasters, including as regards the criteria for the allocation of public media assignments and the selection of programmes. The high concentration of (foreign) media ownership remains a feature of the Dutch media market and could be further exacerbated by a planned takeover. The safety of journalists is at risk as increases in the seriousness and frequency of threats and attacks, including violent attacks, are registered and a narrative of distrust in the media seems to be on the rise. Gaps in the

protection of journalists' privacy, especially freelancers, make them vulnerable to attacks, and there is a feeling that employers do not do enough to tackle this violence. Following the tragic murder of investigative crime journalist Peter R. de Vries, the government committed to strengthen safety mechanisms, including through a new legal amendment to the existing National Security Services Act, currently under discussion, and the project *PersVeilig* (PressSafe), jointly launched by the Dutch National Association for Journalists, the Dutch Society of Chief-Editors, the police and the public prosecutor, aims to reduce violence against journalists. By contrast, the government is not currently considering anti-SLAPP measures, although some data show how legal threats and SLAPPs are not uncommon among Dutch journalists. Despite some improvements, the legal framework regulating access to information is not fully in line with international standards. On a positive note, an exemption for journalists (as well as humanitarian workers) was included in the controversial law that criminalises travel to terrorist-controlled areas following pressure by civil society and press freedom groups.

The checks and balances system would benefit from more effective and regular involvement of citizens, civil society and grassroots organisations in the drafting of legislation and policies. While the government still operates under an emergency regime declared in connection to the COVID-19 pandemic, the Council of State has recommended several measures to modernise the emergency law in the Netherlands, echoing calls from the Parliament and society as a whole for a more sustainable emergency

policy in full compliance with the principle of legality.

Civil society organisations are under a certain pressure in particular following the entry into force of a law broadening the possibilities for banning legal entities which “create, promote or maintain a culture of lawlessness”, which rights groups see at potential risk of abuse given its contradictory and vague formulation.

Both the government and the Parliament, who recently appointed two rule of law rapporteurs, remain committed to make efforts to uphold and safeguard the rule of law domestically and in the EU.

### State of play

- Justice system
- Anti-corruption framework
- Media environment and freedom of expression and of information
- Checks and balances
- Enabling framework for civil society
- Systemic human rights issues

#### Legend (versus 2020)

Regression:

No progress:

Progress:

## Justice system

### Judicial independence

### ***Irremovability, dismissal and retirement regime of judges, court presidents and prosecutors***

On 12 August 2021, the Administrative High Court ruled that the discharge age of 70 years for judges is not discriminatory. The court argued that the discharge age is not excessively damaging and not an unreasonable instrument to guarantee the independence of judges and making place for new judges.

Because of insufficient capacity of judges, the temporary laws regarding COVID measures arranged for a temporary deployment of deputy judges up to the age of 73 years (Article 3.3 of the Tweede Verzamelingswet COVID-19).

### ***Allocation of cases in courts***

In January of 2020, the Judiciary published a Case Allocation Code, a principle-based instrument (not legislation). It aims to ensure that cases are allocated to a particular judge based on predetermined objective criteria. The code should make it verifiable why a certain judge handles a certain case. As explained in the contribution to the Rule of Law Report from 2020, the Code incorporates the rulings of the European Court of Human Rights (ECtHR) regarding clarity, transparency, judicial independence and impartiality of assigning court cases: important requirements for guaranteeing the right to a fair trial (article 6 ECHR). Article 3 of the Code dictates that the allocation of cases shall happen in an objective manner that ensures the impartiality and independence of timely and competent

justice. Article 4 adds that allocation is to be done randomly.

Since then, courts have adopted case allocation rules for different sectors, including exceptions: cases that are not allocated randomly because their allocation requires tailor-made solutions. Examples include (potentially) high-profile cases, ‘mega cases’ and cases that transcend jurisdictions. The Explanatory Memorandum accompanying the code does give examples of cases that require a tailor-made approach, but also states that a precise description of such cases cannot be given. This makes the category of ‘tailor-made cases’ potentially limitless and indeterminate, and calls into question the value of the code in the context of randomisation and thus fair administration of justice. According to a legal analysis in the Dutch Lawyers Magazine (Nederlands Juristenblad), ‘a first impression of the drafted case allocation schemes is not hopeful in this respect, as rather broad categories of tailor-made case allocation seem to be designated’.

### ***Independence of the prosecutor’s service***

An initiative bill of a Member of Parliament is now under revision by the Second Chamber of Parliament. It concerns amending the Judicial Organization Act in connection with the cancellation of the special powers of designation of the minister regarding the exercise of the duties and powers of the Public Prosecution Service. At this moment, the minister can instruct the Public Prosecution Service to investigate or to prosecute in an individual criminal case. Under the new bill, the minister can no longer issue an instruction

with regard to the way in which the Public Prosecution Service should use its powers in a concrete criminal case. Formal intervention by the minister in a concrete criminal case is thus made impossible in the proposed bill (*Wet verval bijzondere aanwijzingsbevoegdheden openbaar ministerie*).

## Quality of justice

### Accessibility of courts

The government announced in its coalition agreement for 2021-2025 a reduction of court fees by 25% in the upcoming years in order to increase the access to justice of citizens and SMEs. Between 2002 and 2012, the court fees for civil cases increased with 40%, and they have not decreased since. In December of 2021, the Civil Cases Court Fees Act (*Wet griffierechten burgerlijke zaken*) was again amended to increase all court fees.

The coalition agreement also states that ‘social advocacy’, i.e. state-funded legal aid, will be reinforced in line with scenario 1 of the recommendations of the Committee Evaluation of Point Granting of Financed Legal Aid (Van der Meer Committee). The point-based grading system stipulates that points are awarded depending on the type of case, as well as for certain circumstances of the case. The level of compensation granted for a certain procedure is determined by multiplying the number of points by the base amount. In other words, the more points awarded to a type of case in combination with the circumstances of the case,

the higher the amount of compensation which is granted. The legal profession is expected to make a substantial social contribution. In line with the plans expressed by the Minister for Legal Protection in November 2021, this means that commercial law firms will be required to provide funding. However, it is unclear on which competence this mechanism is to be based.

Furthermore, a low-threshold, independent fiscal legal aid system will be set up, following the example of the independent American Taxpayers Advocate Service (TAS). The recent childcare benefits scandal has shown that subsidised or free legal assistance in tax and social welfare matters is necessary in the Netherlands. Currently, the only available fiscal aid is through the ‘Tax Information Line’ (*Belastingtelefoon*), but the waiting times for callers can be extremely long, and according to the tax authority, the provided answers cannot always be relied upon in court. A system resembling the TAS will provide more independent, tailored aid. In the United States, if a citizen, business owner or organisation cannot resolve their tax issues on their own and qualifies for the free TAS help, they will be assigned an experienced tax advocate. This advocate then learns the details of the situation, reviews the account, researches the applicable laws, argues on the person’s, organisation’s or company’s behalf, and requests and submits the necessary documentation to resolve the problem.

Since the beginning of the COVID-19 pandemic, questions have been raised regarding the impact of the pandemic on the accessibility of courts. Many cases were postponed in the

first months of the pandemic, and now cases do take place digitally. However, this may have a grave impact on the fundamental rights of vulnerable litigants. A study will be conducted on how the measures have influenced respect for the fundamental rights of vulnerable litigants and their trust in the judiciary.

### ***Resources of the judiciary***

The judiciary is facing a budget deficit of EUR 50 million, according to a 2019 investigation by the Council for the Judiciary. This is largely due to the financing mechanism, in which the judiciary gets paid per case. In the coalition agreement the government states it will aim to decrease the number of cases the government conducts against citizens, but it does not promise extra funding for the judiciary and does not mention compensation for income loss due to the planned decrease in cases.

The coalition agreement for 2021-2025 contains only a short statement pertaining to resources of the judiciary. It reads: “We will strengthen the entire justice chain and access to justice, including adequate and predictable funding in the criminal justice chain.” However, costs of justice will also be limited by decreasing the number of legal proceedings that the government conducts against citizens.

Furthermore, resources for alternative dispute resolution, outside of the judiciary, are mentioned. The government has announced that it will increase its efforts in the area of socially effective administration of justice and

restorative justice; low-threshold alternative dispute resolution, whether or not in combination with partners from the social domain, following the example of ‘neighbourhood justice’ and ‘mediation’. Alternative dispute resolution is mentioned in the context of foreign trade. Alternative dispute resolution, a route some parties will choose because of the efficiency it brings them, is much more expensive, so presumably the government’s goal is to generate income. The government aims to set up arbitration through the new Dispute Settlement Court (the Netherlands Commercial Court that was established in 2019) or through other national institutions where possible, and to make additional mechanisms transparent.

### ***Training of justice professionals***

In relation to training and expanding the knowledge of justice professionals, the government’s coalition agreement for 2021-2025 contains commitments pertaining to cybersecurity and cyber criminality. Firstly, the document states: “We will strengthen the expertise of tackling cybercrime in all parts of the criminal justice chain.” Furthermore: “Cybercrime such as ‘ransomware’ is very undermining. We are therefore investing in a broad multi-year cyber security approach and in cyber expertise within the police, the judiciary, the Public Prosecution Service (OM) and defence.”

### ***Digitalisation***

The government’s coalition agreement stresses that it recognizes basic civil rights online. It aims to strengthen secure digital communication, part of which is to refrain from

applying facial recognition without strict legal demarcation and control, under supervision of the Dutch Data Protection Authority. The new coalition aims to legally regulate that algorithms are checked for transparency, discrimination and arbitrariness, monitored by an algorithm supervisor. Currently, the Dutch Data Protection Authority (Autoriteit Persoonsgegevens) is responsible for monitoring algorithms, but transparency, bias and arbitrariness largely fall outside the scope of personal data and privacy. That is why, according to the coalition agreement, a separate supervisor will be appointed by law. This way, and by investing in better cooperation between different digital supervisors, the government aims to better protect digital human rights. However, the Data Protection Authority already receives insufficient funds to properly execute its tasks and hire enough people. Despite recommendations from the House of Representatives to increase its budget to EUR 100 million, it was announced that it will remain EUR 25 million.

According to the coalition agreement, in order to increase transparency the administration of 2021-2025 will promote the publication of judicial decisions. In 2021, only around 5% of judgments have been published. Therefore, in May the chairman of the Council for the Judiciary, announced that in the coming ten years, about 75% of the approximately one and a half million judgments handed down annually by Dutch judges will have to be made available online. However, this will be an immense operation: before judgments can be made available on Rechtspraak.nl they have to be anonymised. According to chairman Naves,

it is therefore being investigated whether special ‘anonymisation software’ can decrease the workload.

### ***Fairness and efficiency of the justice system***

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#### ***Effectiveness of justice: the childcare benefits case***

Since our 2021 submission, there have been several developments in the childcare benefits case. A special parliamentary committee concluded that the administrative courts had not provided adequate legal protection. In response, the lower courts and the highest administrative court (the Council of State) published a report in which they reflected on their role. The lower courts reflected that they had followed the Council of State’s strict ‘all-or-nothing’ approach for too long for two reasons. First, they did not want to give parents false hope, as they believed that on appeal the Council of State would overturn their decision. Second, they followed the higher court to ensure legal certainty and legal unity between the different courts. They now resolve to give more weight to protecting citizens’ interests, by taking a more active approach and critically assessing the government’s claims.

The Council of State reflected that it should have changed its strict approach earlier. In its

report, the Council outlines three lessons for the future. First, in cases where there is an imbalance of power between the parties, the Council should take a more critical stance towards the government's claims and actively research the relevant facts of a citizen's case. Second, the Council should create more possibilities for dissent, both internal and external. Third, in cases in which the legislation is ambiguous, the Council should take a case by case approach, instead of following existing case law. There should always be room for a fair outcome in each individual case.

At the request of the Dutch Second Chamber, the Venice Commission issued an opinion on legal protection in the Netherlands. The Commission found that, while the shortcomings in individual rights protection uncovered in the childcare benefits case are indeed serious and systemic and involve all branches of government, it appears that eventually the rule of law mechanisms in the Netherlands did work. The reports of the Ombudsman, the parliamentary committee, and the legislative amendments show the reaction of the different mechanisms in the Dutch system. The rule of law issues revealed by the case are taken seriously by all branches of government, which shows the Netherlands is willing to redress the mistakes. However, this reaction has taken longer than it should have, and serious damage was caused to the families involved and those who attempted to expose the problem faced much resistance.

### ***Justice in asylum procedures***

The coalition agreement for 2021-2025 contains a commitment on the asylum procedure and immigration law, which we deal with in this section, as it is relevant to the justice system and the broader context of the rule of law. It states that although the asylum procedure is good, there is room for improvement in practice. It also promises a full implementation of the recommendations of the report of the Committee on Prolonged Stay of Foreign Nationals (*Van Zwol Committee*). This aims to guarantee timeliness and accuracy, prevent unnecessary piling up of procedures, safeguard the human dimension, and counteract the frustration of the return and departure of rejected asylum seekers. Following one of the recommendations of this Committee, the Cabinet will examine in the short term how the interests of children can best be considered in the asylum procedure, taking into account international case law and policy in neighbouring countries.

## ***Anti-corruption framework***

### ***Framework to prevent corruption***

#### ***Integrity framework***

As noted by GRECO, in the report of the Fifth Evaluation Round of the Netherlands, there is no general integrity strategy for the central government, even though this has been a recommendation for years.

There are no specific provisions on trading in influence in the legal framework of the Netherlands. The legal framework does not make any specific mention banning illicit enrichment. For public officials, the Netherlands established a measure against revolving doors in 2017, when the Minister of Interior issued a circular letter against revolving doors in the public service. In continuation of last year's submission, two events require attention. The abovementioned circular letter turned out to be overdue. The current Minister of Interior saw no possibility to re-implement this in time before all the ministers left their post. This led to two remarkable revolving door cases (Cora van Nieuwenhuizen and Stientje van Veldhoven). In response, Parliament voted for a motion to implement stricter rules. The government sent a proposal to Parliament, but has not been implemented. Up to this point, there are still no effective rules. As noted by GRECO, no further regulations are in place to address the revolving door for individuals holding top executive functions. The organisation criticises the lack of a general 'cooling off period' and a transparent mechanism to regulate the transfer of high government officials to the private sector.

The regulations regarding integrity for members of the House of Representatives determine that MPs should at the latest disclose their ancillary activities and income of the previous year on 1 April. Breaching the reporting requirements can lead to an investigation. The college of investigation can give a recommendation as to whether a sanction is relevant, actual sanctioning only happens through Parliament.

There are still no laws regulating lobbying. As noted by GRECO (Fifth Evaluation Round of the Netherlands, recommendation 4), there are no rules with regards to lobbying for officials with persons entrusted with top executive functions. Additionally, there are none for parliamentarians. A noteworthy initiative is a motion in Parliament to implement a lobby register. It asks the government to implement a lobby regulation based on the Irish model. This type of legislation is very important. The European Commission should monitor the conversion into policy and a statutory foundation that is presently missing.

As noted in the previous Rule of Law Report, there are very few restrictions on party financing, especially on the local level. The law was supposed to be revised, but there is no progress. A new and noteworthy development is that large donations were made in this political cycle. D66 received EUR 1 million and the Partij voor de Dieren EUR 350,000 from a tech entrepreneur. The CDA received EUR 1.2 million from a member, which they declared after the official registration period. It shows that the law is in dire need of revision and the government should increase its efforts to implement the law.

### ***General transparency of public decision-making and access to information***

Article 110 of the Constitution stipulates that the public administration must allow 'public access in accordance with rules to be prescribed by Act of Parliament' during the performance of its duties. These rules are set out in the Government Information (Public

Access) Act (Wet Openbaar Bestuur). This act has recently been replaced by the Open Government Act (loosely translated from Wet Openbare Overheid or WOO). The law requires more information to be made public proactively. The law is still insufficient: the decision periods are still too long compared to international standards, and it fails to mandate exhaustive lists of all available data that would enable the public to understand what they do and do not receive. There is much resistance from government to publish, leading to poor information disclosure in practice. For example, in 2021, the Ministry of Health refused to consider freedom of information requests during the COVID-19 pandemic.

#### ***Rules on preventing conflict of interests in the public sector***

Different governmental sectors, such as the national government, municipalities and provinces, have drafted their own regulations regarding integrity and the disclosure of ancillary activities. Regulations for civil servants employed by the national government for example, state that anyone working for the state should disclose ancillary activities which interests could conflict with the interests of their public position. It does not specify, however, how often disclosures should be made. In order to converge regulations regarding integrity, the Civil Servants 2017 Act will replace all regulations of individual government sectors as of January 2020.

GRECO noted that there is no general integrity strategy for officials entrusted with high public office, even though this has been

a recommendation for years. Transparency International Netherlands recently asked the government to disclose financial interests and foreign assets of newly appointed members of the new cabinet, especially when considering the members of Parliament. To date, they are not GRECO compliant.

The Senate needs to adhere to a code of conduct regarding Integrity. The code provides clarity about conflicts of interests, indicating that senators should be aware of the additional interests they have due to the other positions they hold. Moreover, senators should abstain from activities that could be seen as conflicts of interest. It is important to note that a conflict of interest only relates to a specific self-interest, usually as a result of holding other functions. Senators are required to share the additional functions they hold besides being a member of the Senate as well. This consists of a short description of the function, the company/organisation for which the function is performed and whether the function is paid or not. Moreover, all interests that can reasonably be considered as relevant, but cannot be regarded as an official function, need to be made publicly available.

#### ***Measures in place to ensure whistleblower protection and encourage reporting of corruption***

In October 2019, the EU adopted a new whistleblower directive. The Dutch Ministry of Interior has provided a draft law for implementation in the Netherlands. However, the proposal received a lot of criticism from the Council of State, NGOs, the labour movement,

Parliament and employers. Among the key criticisms: the government makes an unnecessary distinction between EU and Dutch law, making the law complex and unworkable. An arbitrary threshold is introduced, saying that the reported wrongdoing must have “societal relevance”. In violation of Recommendation XXII of the OECD Anti-Bribery Convention, to which the Netherlands is a party, the draft does not “provide for effective, proportionate, and dissuasive sanctions for those who retaliate against reporting persons” by the national Whistleblowers’ Authority.

The Council of State, the highest advisory body to the government, concluded that the law is too complex, making it hard to execute. It indicated Dutch and EU law are so entwined that it makes no sense to have separate reporting channels. In a parliamentary hearing these concerns were shared with Parliament by NGOs, labor unions and employers’ organisations. In response, Parliament returned the proposal to government. The government sent a revision of the law, which is still insufficient. If passed in its current form, the law would not improve the situation of whistleblowers in the Netherlands and not lead to increased protection under EU law. Because of the complexity, as well as a suggestion by the minister on how companies can prosecute whistleblowers, it would end up discouraging them even more.

At the same time, the Netherlands has already in place a whistleblower protection framework that prescribes companies with more than 50 employees to implement a policy to protect whistleblowers from retaliation. However, it does not establish adequate standards for these

arrangements. A 2017 study conducted by the Whistleblowers’ Authority found that half of the Dutch companies studied were not compliant with the legal requirement of an internal whistleblowing policy. This is confirmed by an assessment by Transparency International Netherlands concerning the quality of policies of 27 Dutch publicly listed companies.

### *Sectors with high-risks of corruption*

Transparency International found in its 2020 report “Exporting Corruption” that there is a high level of risk of corruption related to trade. The Netherlands faces difficulties combating international corruption cases. This was exemplified by the case of ING Bank. In its report, Transparency International noted that the Netherlands turns out to be a laggard in the execution of effective persecution of foreign bribery. Since 2016, the Netherlands only successfully concluded two out of 18 foreign bribery cases.

In the past years, we have seen various cases involving penetration of organised crime into the police. In particular, organised crime involved in the drug trade has been able to gain a foothold in the (military) police force. Other than being directly involved in drug smuggling, organised crime has been able to penetrate into the police force by bribing officers for information. Criminal organisations have made attempts to influence local government officials as well. In order to do so, they predominantly adopt the tactic of threatening with violence. In addition, criminals

have attempted to bribe local government officials (albeit to a much lesser extent). Criminal organisations have attempted to infiltrate in local governments as well. Especially worrying is the shooting of Peter R. de Vries, a crime reporter. There was also an attempt to murder another reporter, John van den Heuvel, for which the police arrested a suspect.

During the COVID-19 pandemic, we have also seen potential corruption in the Netherlands. We have identified risks at the ministry of Public Health, Welfare and Sports. According to the research of OCCRP and Follow the Money, the Netherlands suspended its usual public procurement rules, resulting in large amounts of spending that remain mostly hidden from the public. Some smaller tenders are available in TenderNed, but the prices are rarely disclosed. The Netherlands is listed as a virtual black hole of information as they rejected reporters' data requests. Recently it was found that contracts have been given to consultancy firms to assist in the execution of the handling of the COVID-19 pandemic. There were no public tenders for these contracts.

## **Media environment and freedom of expression and of information**

### **Media and telecommunications authorities and bodies**

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### **Independence, enforcement powers and adequacy of resources of media and telecommunication authorities and bodies**

The Dutch Media Authority (*Commissariaat voor de Media*) is the independent regulator of the media and monitors compliance with the Dutch Media Law. The Dutch Media Authority is financed in two ways: by the government; and by the yearly supervisory costs paid by commercial media institutions. The Media Authority is governed by a board of commissioners, appointed by the Minister of Education and Media. In October 2020, new rules were introduced for board members after criticism arose about the transfer of a former commissioner to the lobby department of Netflix. Commissioners are now bound to a 12-month 'cooling off period' after leaving their positions on the board. During this period, board members need permission from the Minister for a new job in a sector that is also monitored by the Media Authority. In the first three months of this period they are required to notify the minister of any new position - regardless of the sector - they take on. That being said, these rules are not enforceable and commissioners are expected to adhere to this new code of conduct solely on the grounds of integrity.

Furthermore, the Dutch Foundation for Public Broadcasting (*Stichting Nederlandse Publieke Omroep*) is the governing entity of the thirteen public broadcasters in the Netherlands and is tasked with the distribution and financing of airtime. As such, it enters into performance agreements with the Dutch Ministry of Education, Culture and Media every five

years. In an advice to the Minister, the Dutch Media Authority stated that the current 2022-2026 Performance Agreement - just as its predecessor - lacks concrete qualitative and quantitative objectives. It therefore does not sufficiently fulfil its purpose of defining and outlining the allocation of public media assignments as it is supposed to.

### ***Conditions and procedures for the appointment and dismissal of the head / members of the collegiate body of media and telecommunication authorities and bodies***

The Dutch Media Authority is led by a board of commissioners, all of whom are appointed by the Minister of Education and Media. However, the grounds on which the commissioners are appointed and/or dismissed are unclear.

### **Existence and functions of media councils or other co- and self-regulatory bodies**

In October 2021, the Dutch Data Protection Authority (*Autoriteit Persoonsgegevens*), the Dutch Consumers & Market Authority (*Autoriteit Consument & Markt*), and the Dutch Media Authority launched the Collaboration Platform Digital Regulatory Authorities (*Samenwerkingsplatform Digitale Toezichthouders*) to increase monitoring of digital activities in the Netherlands. They will exchange knowledge and experience from their respective sectors on themes such as artificial intelligence, algorithms, and online deceit. They will also look into ways to support

each other's enforcement procedures. With a rapidly emerging digital landscape and digital activities that transcend the focus and scope of single regulatory authorities, this platform aims to manage the effects of digitalisation on consumers.

### **Transparency of media ownership**

#### ***Safeguards against state and political interference***

By law, the Dutch Foundation for Public Broadcasting is not mandated to concern itself with media content, as public broadcasters have editorial autonomy. However, investigative journalism platform Follow The Money uncovered that the Dutch Foundation for Public Broadcasting does in fact exert such influence and sometimes even plays a leading role in the selection of programmes. However, due to a lack of criteria for the selection of programmes, broadcasters are dependent on this discretionary power of the Foundation for Public Broadcasting. In practice, it is important for public broadcasters and content creators to have strong informal relationships with the Dutch Foundation for Public Broadcasting. On top of this, the Dutch Foundation for Public Broadcasting lacks transparency when it comes to the way decisions are made and money is spent, for example regarding which programmes will be aired and/or what productions are financed.

## **Media ownership**

The Dutch media landscape is characterised by a high concentration of (foreign) media ownership. In June 2021, RTL Group announced its intention to take over Talpa Network, which is currently being reviewed by the Dutch Consumers & Market Authority. The approval of this takeover would severely affect the plurality of the Dutch audiovisual media sector, as only two major commercial broadcasters would be dominating the field (compared to six in 2018). The Dutch Media Authority has stressed the importance of a futureproof public broadcasting system to respond to this shrinkage. After the 2020 takeover of Sanoma by Belgian-owned DPG Media, the NOS, one of the biggest news media outlets, is currently the only top-12 online news service that is not under foreign ownership.

## **Safety and protection of journalists and other media activists**

### **Rules and practices guaranteeing journalist's independence and safety**

Many Dutch journalists work as freelancers, which means that they often have no other (work) address to register at the Dutch Chamber of Commerce other than their private living address. These addresses are easily obtainable from the Chamber of Commerce registry. This not only raises privacy concerns but also imposes severe risks for their safety. In August 2021 - supposedly as a result of his publications - Dutch journalist Willem Groeneveld was attacked with a fire bomb

at his house. His personal address had been publicly disclosed on social media. Another example, although from a different line of work, is the 2019 murder of Dutch lawyer Derk Wiersum in his house after his murderers obtained his private address from the Chamber of Commerce registry. Both attacks illustrate the need for better privacy measures to protect journalists' safety (and the safety of freelancers more generally).

From 1 January 2022, the Chamber of Commerce shall shield all private addresses in its registry. However, this does not apply for registration addresses, which for freelancers are often their private addresses. The only exception is in the event a probable threat exists. Despite advice from the Dutch Data Protection Authority (*Autoriteit Persoonsgegevens*), a majority vote in Parliament to enable the shielding of registration addresses that are also private addresses of journalists and the fact that the Dutch National Association for Journalists offers those fearing threats to register the Association's office as their work address, the State Secretary for Economic Affairs stated no change in policy would occur, due to conflict with EU legislation.

Furthermore, the Dutch Minister of Justice committed to amend a controversial law that criminalises travel to terrorist-controlled areas after heavy pushback from civil society. He did so after the Dutch National Association for Journalists (*Nederlandse Vereniging van Journalisten*), Free Press Unlimited, media companies, war journalists and others outed criticism. The draft law now includes an exemption for journalists and humanitarian

workers. This group will not need permission to travel to such areas.

***Attacks on journalists and media activists and law enforcement capacity to ensure journalists' safety***

On 6 July, Dutch investigative crime journalist Peter R. de Vries was fatally shot. This was believed to be in relation to his role as a key advisor to the key witness in the Marengo trial, an extensive criminal trial against leading members of a notorious drug trafficking organisation. Although he is likely to have been murdered not for his journalistic work directly but for his function as a key advisor, De Vries's murder greatly impacted the (perception of) safety of journalists in the Netherlands. De Vries was under police protection long before he took on this role in the Marengo trial, as his journalistic work led to sincere threats to his physical safety.

The attack comes at a time when Dutch media is under increasing pressure: journalists are reporting an increase in violence and threats against them, and a narrative of distrust in the media seems to be on the rise. These trends have triggered widespread public and political attention to the murder of Peter R. de Vries, as well as the subject of safety of journalists in general. In a series of debates and roundtables on the topic of press freedom in the Dutch Parliament, politicians, Prime Minister Rutte and the Royal Family have condemned the murder as an attack on the Dutch justice state and expressed the need for a proper investigation and the strengthening of safety mechanisms for journalists in the Netherlands.

*PersVeilig* (PressSafe), a project and joint effort of the Dutch National Association for Journalists, the Dutch Society of Chief-Editors (*Nederlands Genootschap van Hoofdredacteurs*), the police and the public prosecutor, aims to reduce violence against journalists. Research from 2021 shows an increase in threats and violence against journalists: more than eight out of ten journalists experienced some form of aggression or threats (as opposed to six out of ten in 2017). The frequency of aggression is also increasing: three out of ten journalists are faced with monthly incidents, whereas this was only the case for 18 percent in 2017. In 2021, *PersVeilig* received 270 notifications, which is more than twice the total of notifications received in 2020. The increase can likely be attributed in part to intensified publicity efforts of *PersVeilig*. 93% of journalists see aggression as an emerging threat to press freedom. In April, a photojournalist was purposely pushed into a ditch with his car after covering a car fire. In August, a Molotov cocktail was thrown into the house of Willem Groeneveld after his critical reporting for a local news website.

According to the above-mentioned research, 25% of journalists feel their employers do not do enough to tackle this violence. Freelancers (36%), a group that is particularly vulnerable in terms of limited employee protection, are especially unsatisfied with their employers' protection measures. *PersVeilig* recently released a Flexible Protection Package for freelancers who do not have (sufficient) protection from their employers. The package provides personalized protective equipment or measures. Examples of these are a bodycam,

an emergency button service, or a house-scan to identify weak spots.

Due to increasing pressure from civil society and the outcome of an official evaluation by an evaluation committee, the Ministers of Justice and Defense proposed a new legal amendment to the existing National Security Services Act (WIV). However, there is still concern about the protection of sources under the new amendment.

### ***Lawsuits and prosecutions against journalists (including) SLAPPs and safeguards against abuse***

There is no official data from the Dutch government on SLAPPs in the Netherlands. However, human rights organisations are noticing an increase, for example through a spike in requests for assistance. A 2021 study on violence against journalists indicated that 20% of the Dutch journalists experienced legal threats or SLAPPs at least once in the past 12 months. However, this data is still mainly anecdotal and thorough monitoring is needed.

Despite concerns in Parliament, the government is not currently considering anti-SLAPP measures due to a lack of data on the nature and scale of SLAPPs that is necessary to assess the need for legislation. The Ministry of Justice was supposed to start an investigation into this in 2019, but we are not aware of conclusions of this research.

### ***Access to information and public documents***

In October 2021, the new Government Information Act (Wet open overheid) was adopted and replaced the current Government Information Act (Wet openbaarheid van bestuur) as of May 2022, after increasing pressure from (civil) society and the child-care allowances affair. The new Government Information Act is intended to create more transparency and to make government information easier to find, share and archive. However, concerns still exist regarding the actual improvement of this law, especially as regards disclosure of sensitive information. Also, the response time under the new law is still below average compared to Tromsø requirements and other countries.

Under the new law, there will be two types of information management: active and passive disclosure. Active disclosure is a new obligation and means that certain government information must proactively be made public. More specifically, as of May 2022 government institutions must start actively disclosing eleven categories of information - including in relation to external legal advice, information requests, recommendations and subsidies. For all other types of information, passive disclosure will remain the norm, meaning that journalists will still need to request to retrieve information. In practice, this means that for the majority of (sensitive) information, nothing will change.

An Information Commissioner has been appointed to assist in this transition. The commissioner will supervise the planned improvements in the information management of the various government institutions. There will

also be an advisory committee set up, which after evaluation, could take over the commissioner's tasks and supervise the implementation of the Government Information Act as soon as it is up and running.

## Checks and balances

### *Process for preparing and enacting laws*

Citizens and civil society and grassroots organisations are not always sufficiently involved in the drafting of legislation (or policy). While it is crucial that civil society actors are actively approached and are given adequate opportunities and time to express their views, this is not always the case. For example, the internet consultation on the bill that aims to provide a legal basis for the processing of personal data for the purposes of coordination and analysis in the context of counterterrorism and national security ('Wet Verwerking Persoonsgegevens coördinatie en analyse terrorismebestrijding en nationale veiligheid') was only open for five days, whereas the standard minimum period is four weeks. This has led to criticism from civil rights organisations. In addition, on the bill on transparency of civil society organisations ('Wet transparantie maatschappelijke organisaties'), human rights organisations were not consulted outside of the standard internet consultation, whilst informal discussions did take place with other stakeholders.

### *Emergency regime in the context of the COVID-19 pandemic*

The temporary law for COVID-19 measures came into effect on 1 December 2020, for a duration of three months. Every three months, the Parliament has to decide if the law is continued for an extra term of three months. On the 1 December 2021, the fourth extension of the temporary law came into effect.

On 23 January 2021, a curfew was instated as an emergency measure. A civil group claimed before a court that the legal basis for the curfew was unfounded. The legal basis used for the curfew was a general emergency law and was considered controversial. The court decided in favour of the civil group. On appeal, the case was overturned by the Appeals Court, which decided that the legal basis for the curfew was correct. The Supreme Court has yet to decide on the case, although the advocate-general of the Supreme Court advised on upholding the decision of the Appeals Court.

At the same time as that court case, the government submitted – before the decision of the Appeals Court – a new law concerning the curfew with the temporary law for COVID-19 measures as the legal basis. The curfew was maintained until 28 April 2021. After this, the curfew was removed from the temporary law.

On 15 December 2021, the Advisory Division of the Council of State published an unsolicited advice on emergency and crisis legislation in general. The Council recommends several measures to modernise the emergency law in the Netherlands. This meets the call from the

Parliament and society as a whole for a more sustainable emergency policy with a strong legal basis.

## **Enabling framework for civil society**

### **Regulatory framework**

Globally, including in Europe, civic space is under increasing pressure. In light of this worrying development, it is crucial that the Dutch government ensures an enabling space for civil society and does not unnecessarily or disproportionately restrict civic space.

However, in 2021, the government proceeded with several bills that are potentially harmful to the independent position and the space of civil society organizations and critical citizens in the Netherlands.

The proposed bill to criminalise persons travelling to areas controlled by terrorist organisations (Wet strafbaarstelling uitreis naar terroristisch gebied) passed in the House of Representatives. The Senate has postponed further consideration of the bill in anticipation of the additional bill that arranges for the exemption of aid organisations and journalists, which is currently under public consultation. (See also page 12.)

The bill for Amendment of the Civil Code to broaden the possibilities for banning

legal entities (Wijziging van Boek 2 van het Burgerlijk Wetboek ter verruiming van de mogelijkheden tot het verbieden van rechtspersonen) entered into force on 1 January 2022.

Human rights organisations are critical of the bill, as it has far-reaching consequences, while its added value is lacking, it is internally contradictory and contains vague concepts.

The proposed bill for the Administrative prohibition of subversive organisations (Initiatiefvoorstel Wet bestuurlijk verbod ondermijnende organisaties) passed in the House of Representatives and is currently before the Senate. This bill aims to grant the power to the Minister of Legal Protection to prohibit an organisation insofar as this is necessary in the interest of public order if this organization creates, promotes or maintains a culture of lawlessness. The Minister is also authorised, in the case of a legal entity, to dissolve it. The bill is problematic because it contravenes the Constitution in several ways and does not provide sufficient safeguards against potentially politically motivated decisions.

A Memorandum of Amendment to the proposed Civil society organisations transparency act (Wet transparantie maatschappelijke organisaties) was published for consultation in June 2021. Civil society organisations remain critical.

The bill that aims to provide a legal basis for the processing of personal data for the purposes of coordination and analysis in the context of counterterrorism and national security (Wet Verwerking Persoonsgegevens

coördinatie en analyse terrorismebestrijding en nationale veiligheid) is currently pending in the House of Representatives. This bill was introduced after a Dutch newspaper revealed that for years, the National Coordinator for Counterterrorism and Security (NCTV) had collected and disseminated privacy-sensitive information about citizens. Employees also secretly followed hundreds of political campaign leaders, religious leaders and activists on social media. The proposed bill aims to create a legal basis for these practices.

## ***Fostering a rule of law culture***

### ***Efforts by state authorities***

The COVID-19 pandemic has brought an increase of polarisation, not only in society but also in the political arena. For instance, during parliamentary debates, the far-right political party Forum for Democracy has expressed threats of future tribunals. The way communication takes place among politicians, academics and elsewhere in the public debate has taken a rather threatening and hostile tone. Although the EU may not be in the position to alter this occurrence, these developments do affect the rule of law in the Netherlands.

The Dutch Parliament appointed two rule of law rapporteurs, Agnes Mulder (CDA) and Roelien Kamminga (VVD). Rule of law-related issues have been the subject of discussion and parliamentary questioning in the Dutch Parliament. They include parliamentary

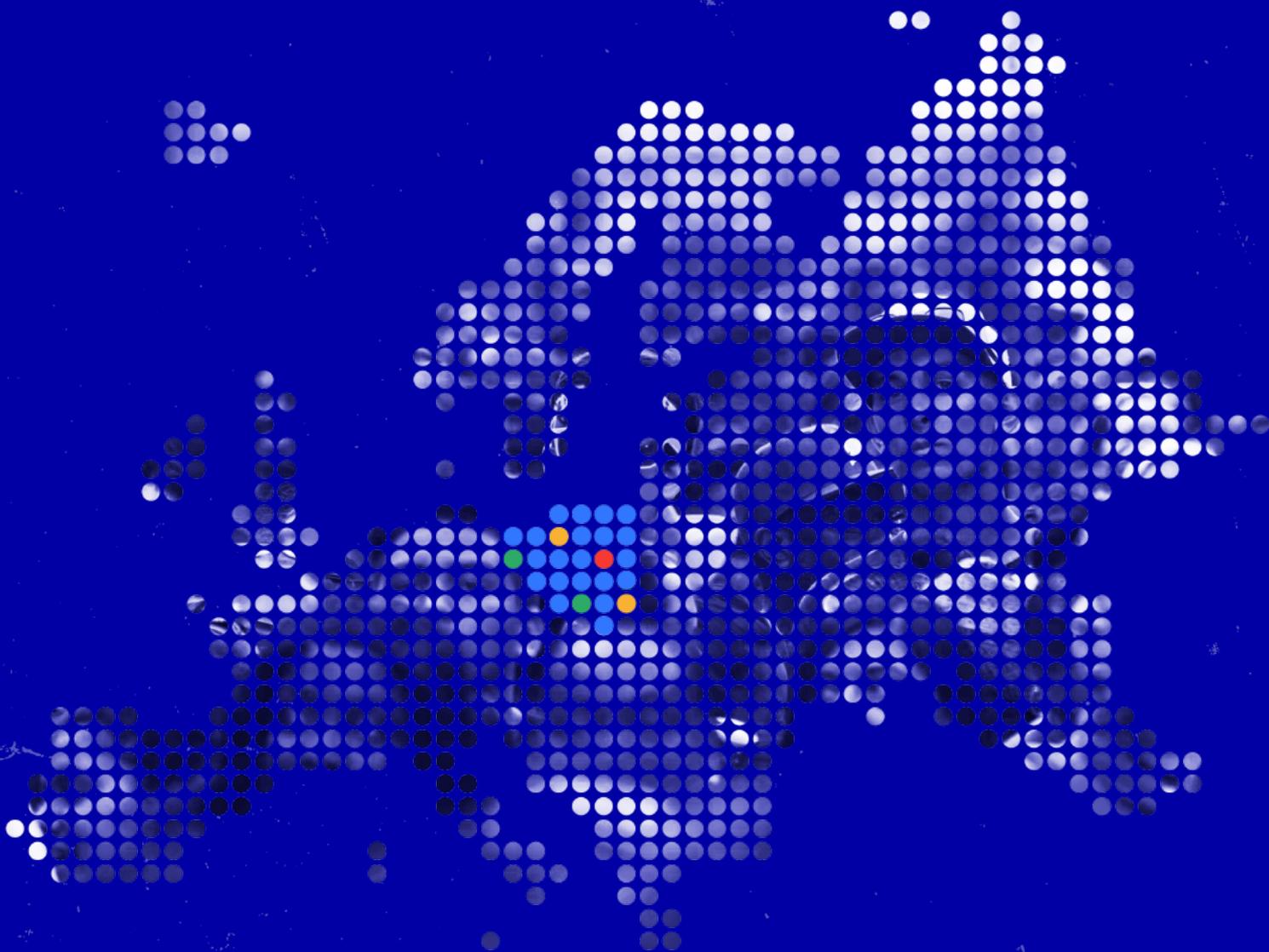
questions on Article 7 proceedings against Poland and Hungary, the request from the rapporteurs Mulder and Kamminga concerning the judgement of the Polish Constitutional Court about the primacy of EU law and the discussion of the rule of law report with Commissioner Didier Reynders with Dutch parliamentarians.

In October 2021, Dutch parliamentarians (amongst them the two rule of law rapporteurs Kamminga and Mulder) submitted a motion asking the government not to approve the Recovery Fund plan of Poland before Poland complies with EU law ensuring the independence of the judiciary.

The new government announced in its recently published coalition agreement that in order to strengthen the rule of law in the Netherlands, it will spend more money on social advocacy and access to justice. Concerning Dutch-EU policy, the coalition agreement states that “Member states that violate shared values, agreements or the democratic rule of law will be reprimanded.”

# **LIBERTIES RULE OF LAW REPORT 2022**

**POLAND**



# Poland

## About the authors

### HR HELSINKI FOUNDATION FOR HUMAN RIGHTS

The **Helsinki Foundation for Human Rights (HFHR)** is a non-governmental organisation established in 1989 and based in Warsaw, Poland. HFHR is one of the largest and most experienced non-governmental organisations operating in the field of human rights in Eastern and Central Europe. Since 2007, HFHR has a consultative status with the United Nations Economic and Social Council (ECOSOC). HFHR's objective is the promotion and protection of human rights. Its main activity areas include: domestic education in the field of human rights, international activities and public interest activities aimed at increasing the standards of human rights protection in Poland. HFHR is also a member of the National Focal Point within the European Union Fundamental Rights Agency's research network FRANET.

## Key concerns

In the past year, Poland has seen further deterioration in its judicial system. The unlawfully constituted National Council of the Judiciary (NCJ) continued to appoint new judges, amid growing concerns regarding their

independence and the validity of their future decisions. Furthermore, despite the CJEU's rulings, the Disciplinary Chamber of the Supreme Court continued to suspend judges and waive their immunities.

Freedom of the press was severely restricted by the state of emergency introduced in September 2021 in the area adjacent to the Polish-Belarusian border, which practically excluded the zone from any media scrutiny. The new law on border protection de facto extended the situation until 1 March 2022.

The quality of the legislative process, as well as the quality of laws that have been adopted in the process, have continued to deteriorate, further jeopardising Poland's system of checks and balances. The actions of the Constitutional Tribunal have remained highly politicised, especially after the wrongful appointment of three new members to the Tribunal.

Civil society organisations in Poland continue to face lawsuits and SLAPPs. In particular, organisations defending LGBTQI+ people and women's rights are being increasingly targeted for their activism from religious groups and local communities.

In 2021, attacks by the Polish government to the rule of law principle intensified and confronted the EU legal order, too. Most notably, in October, the Constitutional Court ruled on a proceeding that had been initiated by

the government, claiming that the Court of Justice of the European Union does not have the authority to make decisions about the Polish Constitution and judicial system. The case was widely perceived a challenge to the primacy of EU law.

### **State of play**

- ↓ Justice system
- N/A Anti-corruption framework
- ↓ Media environment and freedom of expression and of information
- ↓ Checks and balances
- ↓ Enabling framework for civil society
- N/A Systemic human rights issues

#### **Legend (versus 2020)**

- Regression: ↓
- No progress: —
- Progress: ↑

## **Justice system** ↓

### **Key recommendations**

- The governing majority should immediately implement all decisions of the CJEU and ECtHR in relation to the functioning of the judiciary in Poland, especially when it comes to suspending the activities of the Disciplinary Chamber of the Supreme Court and restoring full independence to the National Council of the Judiciary.

- The governing majority should immediately cease any actions or legal changes imposing further pressure on judges, especially in the form of disciplinary proceedings and other kinds of harassment in the response to content of substantive decisions issued by judges.

## **Judicial independence**

### **Appointment and selection of judges, prosecutors and court presidents**

In 2021, the rule of law crisis in Poland continued, influencing key aspects of the functioning of the judiciary system, including the process of appointing the judges of common courts and the Supreme Court.

The National Council of the Judiciary (NCJ) continued its work of promoting and appointing judges of common courts. Due to the wrongful composition of the NCJ, there are growing doubts regarding the legality of the decisions made by the Council, including the legality of the appointment process for judges. Concerns about the current NCJ result from the fact that 15 judges who are members of the Council were elected, in accordance with the provisions adopted in 2018, by the Parliament (not by other judges, as it used to before the law changed).

In several cases, judges of common courts recognised and fought against this problem in the NCJ. For example, in October 2021, a judge of the Regional Court in Częstochowa, Adam

Synakiewicz, overruled a decision of the court of the first instance based on the fact that the ruling was passed by a judge appointed by the NCJ. Similar decisions were made by judges Maciej Ferek from the Regional Court in Kraków and Agnieszka Niklas-Bibik from the Regional Court in Słupsk. In response to these decisions, the judges faced disciplinary consequences.

In 2021, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) ruled in cases concerning the problem of judges' appointments. In the case *Reczkowicz v. Poland*, the ECtHR focused on the role of the NCJ in appointing judges and how its wrongful composition influenced one's right to have a case heard by a tribunal established by law. Furthermore, in the case *Dolińska-Ficek and Ozimek v. Poland*, the ECtHR found that the Chamber of Extraordinary Review and Public Affairs of the Supreme Court did not meet the criteria of the independent court established by law given the process of its composition.

In cases *A. B. and W. Ż.*, the CJEU concentrated on the problem of appointing judges to the Supreme Court by the new NCJ. None of these judgements, however, were implemented by the governing majority in Poland. Following the CJEU's judgment in case *A.B.*, the Supreme Administrative Court declared that the NCJ's resolutions to appoint judges were partially null and void. However, according to the Court, this does not influence the legality of the President's decisions to appoint the judges presented by the NCJ.

### ***Irremovability of judges, including transfers, dismissal and retirement regime of judges, court presidents and prosecutors***

Irremovability of judges remained threatened in 2021, in particular by attempts to waive their immunities and hold them criminally liable, as well as by suspending them in judicial activities or transferring them to other departments of courts without justification.

As concerns criminal proceedings, the most notable example is Igor Tuleya, who decided to allow the media to be present in the courtroom while he was delivering a decision in a politically sensitive case during an in-camera session in 2017. In 2020, the Disciplinary Chamber of the Supreme Court waived Judge Tuleya's immunity with regard to an alleged abuse of power and dissemination of information from the investigation, and suspended him. Based on the CJEU's decisions in July 2021, ordering Poland to suspend the functioning of the Disciplinary Chamber and declaring the disciplinary regime for judges to be incompatible with EU law, Tuleya filed a motion to the president of his court for reinstatement but was denied. Another judge suspended by the Disciplinary Chamber for ordering the disclosure of lists of supporters of NCJ candidates, Paweł Juszczyzyn, won a lawsuit in 2021, in which the resolution suspending him was declared to be a violation of his personal rights. In the final decision, the court reiterated that the Disciplinary Chamber had no formal grounds to suspend Judge Juszczyzyn. However, the president of Judge Juszczyzyn's court refused to reinstate him. Furthermore, in October 2021,

the CJEU delivered a judgement concerning the case of Judge Waldemar Żurek, who had been transferred to another court department by its president. In its ruling, the CJEU has declared that a transfer to another court or department made without the judge's consent might violate the principles of irremovability and independence.

With regard to public prosecutors, the practice of delegating them to other organisational units of the prosecution, often located in distant cities, continued to be noticeable also in 2021. Although the law authorises the National Prosecutor to temporarily transfer any prosecutor to another place of service for a period of no longer than 12 months without their consent, in some cases such decisions are issued as a form of reprisal for prosecutors' activities, in particular for being members of independent associations, for making certain public statements or for taking certain procedural actions.

In January 2021, the media reported on 20 new cases of questionable transfers, including the President of the Association for Public Prosecutors "Lex Super Omnia", Katarzyna Kwiatkowska, who was delegated to a city 181 km away, its member Ewa Wrzosek, who had initiated an investigation into the cancelled presidential elections of 2020 (263 km), and Jarosław Onyszczyk, member of Lex Super Omnia's board (311 km). In December 2021, the proceedings before a labour court began with regard to Kwiatkowska's lawsuit demanding compensation for discrimination and unequal treatment. Another member of the association and a vocal critic of the current

prosecution's authorities, Mariusz Krasoń, who was first seconded to a unit located almost 300 km away from his place of living for a half-year period in 2019, also filed a lawsuit against his superiors in a labour court. In the judgement from June 2021, the court declared his delegation illegal and unjustified, stating also that decisions of the National Prosecutor were discriminatory.

### *Promotion of judges and prosecutors*

Judges in Poland are promoted by the President of Poland upon a motion from the NCJ. Since the 2017 amendment aimed at reforming the National Council of Judiciary, the independence of the Polish NCJ is in serious doubt. This has resulted in several landmark judgements by the ECtHR and CJEU, as well as in the decision of the European Network of Judicial Councils to exclude the Polish NCJ from the network.

The NCJ's dependence on the ruling majority has also had specific consequences in the area of judicial promotion. It led all judicial self-government bodies to cease participating in the judicial appointment and promotion procedures. This resulted in the 2018 amendment to reform the common courts, which presumed that the lack of judicial self-government bodies' opinion on candidates to the judicial positions has to be understood as a positive opinion.

At the beginning of 2021, the media revealed that, since 2018, the NCJ has promoted its members and their relatives to higher judicial positions more than a dozen times. The same

applies to judges (and their relatives) who have a close connection with the executive branch of power. To give an example, former deputy Minister of Justice Judge Łukasz Piebiak, who, according to the media, played an active role in the hate campaign against other judges, was promoted from the district court (the lowest level in the system of courts) to Supreme Administrative Court. Moreover, Rafał Puchalski, a judicial member of NCJ and the judge of a district court, was promoted to the Disciplinary Chamber of the Supreme Court.

To sum up, the NCJ's decision on the appointment of judges and their promotion raises considerable doubts as to their independence. It is significantly questionable whether the decisions of the Council were based only on substantive criteria.

The NCJ's decision might be challenged in the Supreme Court. The appeal from NCJ's decisions is recognised by the Chamber of Extraordinary Review and Public Affairs. On 8 November 2021 the European Court of Human Rights delivered a judgment in the case *Dolińska-Ficek and Ozimek v. Poland* (applications nos. 49868/19 and 57511/19). In that case, it found a manifest breach of the domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court. These irregularities in the appointment process compromised the legitimacy of the Chamber to the extent that it did lack the attributes of a "lawful tribunal".

The prosecutors of provincial, regional and national prosecutors' offices are appointed by the Public Prosecutor General upon a motion from the National Prosecutor (1st deputy of PPG). The Act on the Public Prosecutor's Office does not specify any criteria that have to be taken into account in order to promote a prosecutor. It only indicates minimal experience in acting as a prosecutor or practicing other legal professions. Whenever there are more than two candidates for the vacancy, the Public Prosecution General does not have to initiate a formal competition.

Before appointing the prosecutor to the prosecutorial position, the Public Prosecutor General is not obliged to ask the appropriate board of prosecution service to issue an opinion about the candidate. As a result, the procedure for appointing public prosecutors to higher positions currently does not guarantee that the decision in that field will be based on substantive criteria.

The Act on Prosecution does not make it possible to challenge the Public Prosecution General's decision on promotion or lack of promotion of a prosecutor.

### *Allocation of cases in courts*

In April 2021, the Ministry of Justice lost a case before the Supreme Administrative Court against the ePaństwo Foundation over the transparency of the Random Case Allocation System algorithm. The system is an IT tool that engages judges for specific cases before the ordinary courts.

In September, the Ministry published a document of more than 40 pages with a description of the algorithm, but, according to experts, this is an insufficient step in examining whether the system actually works in a random way. It is not possible to make such an assessment without making the full source code available. The information released does not therefore dispel doubts as to whether the system is working properly and is free from human interference.

***Independence and powers of the body tasked with safeguarding the independence of the judiciary***

In 2021, the European Network of Judiciary Councils decided to expel the Polish National Judiciary Council. The decision was preceded by a two-year period of suspension for the Polish NCJ in the network. The ENCJ stated that the NCJ does not safeguard the independence of the judiciary and does not defend the judiciary nor individual judges.

Despite the growing legal concerns regarding the legality of its operations, the NCJ continued as before. In 2021, the NCJ nominated the highest number of judges since 2017 – altogether 829 candidates for judges' positions were presented to the President by the NCJ (compared to 88 candidates in 2018 and 409 in 2020).

In December 2021, the Speaker of the Sejm started the process of screening candidates for the 15 positions of judges-members in the NCJ, as the term of office of the incumbent 15 judges-members expires in 2022. The biggest

judges association, IUSTITIA, already called upon its members to boycott the process of selecting candidates (the judges can apply either for the position of a member or support one's candidacy).

The issues regarding the NCJ's composition and functioning were the subject of several decisions of both the European Court of Human Rights and the Court of Justice of the European Union. None of these decisions were implemented by the Polish authorities.

***Accountability of judges and prosecutors, including disciplinary regime and bodies and ethical rules, judicial immunity and criminal liability of judges***

As a result of the infringement proceedings launched by the European Commission in 2019, pertaining to the regime of disciplinary liability for judges (which, in the opinion of the EC, does not guarantee sufficient protection for judges from political control), the Court of Justice of the European Union delivered a judgement in July 2021 finding the disciplinary regime incompatible with EU law. In particular, the Court has emphasised that Polish judges are exposed to the risk of disciplinary proceedings for the decisions they make (especially for requests for preliminary rulings to the CJEU). Moreover, with regard to another infringement proceeding concerning the “muzzle law” of 2020, which, according to the EC, prevents Polish courts from directly applying certain provisions of EU law to protect judicial independence, the CJEU ordered Poland to suspend the application of the provisions regulating the work

of the Disciplinary Chamber of the Supreme Court in disciplinary and immunity proceedings concerning judges. As the decision was not implemented, in October 2021, the CJEU imposed a financial penalty on Poland.

In August 2021, the First President of the Supreme Court ordered that case files concerning disciplinary liability of judges and immunity proceedings against them should be directed to the Supreme Court's registrar and stored there, unless the adjudicating bench had already been appointed to hear the case. These orders will remain in force until 31 January 2022, which means that the Disciplinary Chamber's functioning is effectively suspended by two separate institutions.

Despite the CJEU's judgements and the First President's orders, since July 2021, the Disciplinary Chamber has heard several disciplinary cases against judges. In November 2021, it suspended Judge Maciej Ferek, who was charged with questioning the status of other judges appointed with the participation of the new National Council of the Judiciary. A similar decision was issued with regard to Judge Piotr Gąciarek, who also questioned the status of another judge, as well as to Judge Maciej Rutkiewicz for disregarding the Disciplinary Chamber's decision to waive the immunity of a public prosecutor.

In October 2021, the Disciplinary Commissioner for Common Courts Judges announced that they would initiate disciplinary proceedings against two vocal critics of the changes implemented in the judiciary, Judges Olimpia Barańska-Matuszek and

Beata Morawiec. With regard to the latter, the charges also concern activities that might trigger criminal liability.

In 2021, public prosecutors who were active in public debate or who issued certain procedural decisions were also held liable in disciplinary proceedings (the suspension of hearing disciplinary and immunity cases by the Disciplinary Chamber of the Supreme Court does not apply to prosecutors). The most notable example is the case against Ewa Wrzosek, who initiated an investigation concerning the government's preparations to hold presidential elections during the pandemic in 2020. Despite earlier statements from the National Prosecutor on their intention to launch only disciplinary proceedings against her, she will face criminal charges for the alleged abuse of power. Moreover, in December 2021, the media, using the information from Canada-based Citizen Lab institute, reported that deep surveillance software Pegasus had been used at least six times with regard to Wrzosek's mobile phone.

### *Independence/autonomy of the prosecution service*

The Act on Prosecution adopted by the Sejm at the beginning of 2016 remerged the positions of the Minister of Justice and the Prosecutor General, leading to a situation in which an acting politician is also acting as the Prosecutor General. The Prosecutor General and National Prosecutor are superior prosecutors to all public prosecutors in Poland.

Under the 2016 Act on Prosecution, public prosecutors are independent, with the exception of a specific provision of the act requiring public prosecutors to enforce dispositions, guidelines and orders of superior prosecutors, even if they are considered specific prosecutorial decisions, e.g. not bringing an indictment to the court. Such orders generally have to be in writing, and only have to include a statement of reasons if requested. However, since the orders are kept in internal prosecutors' case files, the parties of the proceedings do not have any procedural possibility of acquainting themselves with the content of the orders issued in their case.

Moreover, superior public prosecutors have a right to change or revoke any decision made by subordinates. Such decisions have to be made in writing but do not require a statement of reasons. Last but not least, superior prosecutors also have the power to take over cases handled by subordinate prosecutors.

To sum up, the public prosecution system in Poland does not guarantee public prosecutors' internal independence in the decision-making process. Superior prosecutors can influence the content of certain decisions made by prosecutors.

In 2017, the Sejm, upon a motion submitted by the Ministry of Justice/Public Prosecutor General, amended the Code of Criminal Proceedings by adopting measures allowing the prosecution service to withdraw indictments that were already brought to the court. In 2021, the media revealed that such a tool was used in the case of Daniel Obajtek, a

prominent politician of the ruling party and the head of the state oil company, Orlen. The prosecution decided to discontinue the proceedings concerning Obajtek's alleged corruption.

Significant developments capable of affecting the perception that the general public has of the independence of the judiciary

In 2021, the prosecution continued an investigation concerning a series of smear campaigns against judges. According to the media reports, some top rank officials of the Ministry of Justice were allegedly engaged in this process. In 2021, the investigation was transferred from the prosecution office in Lublin to a prosecution office in Świdnica.

In January 2022, the media reported on an email correspondence between the members of the Prime Minister's team and his consultants. In this correspondence, the Prime Minister's co-workers were supposed to ask the chief of the Public Television to prepare materials attacking judges of appellate court in Warsaw in response to the judgements they had served a couple of days earlier.

## ***Quality of justice***

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### ***Resources of the judiciary***

The difficult situation for the administrative staff in courts and prosecution units has long been an issue in Poland and remained one in 2021.

According to trade unions' representatives, the average salary of non-judicial personnel (i.e. excluding judges) in courts in 2021 was approximately PLN 3,300 (EUR 733) after tax. Their low earnings are hardly commensurate with the amount of work done by the administrative staff, in particular given the increase in the number of cases relating to COVID-19 lockdown procedures this past year compared to the relatively stable total number of non-judicial employees. The inadequate remuneration has resulted in the growing frustration among courts' administrative staff, leading to low levels of employee retention and lack of stability in employment. Moreover, the lack of sufficient support for qualified court clerks affects the work of judges and contributes to the gradual increase in the length of proceedings.

In June 2021, the government announced the freezing of salaries in the public sector in 2022, including non-judicial personnel of courts and prosecution offices, which resulted in administrative employees engaging in a protest. The protest is still ongoing as of the moment of preparing this report. Among other things, the protesters demand a 12% increase in salaries for court employees and a levelling out of the differences in remuneration between different prosecution units, as well as a linking of the salaries for both groups to the national average wage.

### **Digitalisation**

The COVID-19 pandemic forced Polish authorities to adopt solutions enabling courts to conduct judicial proceedings remotely. The

practice of using such measures was assessed in the Helsinki Foundation for Human Rights report "E-hearings in Polish Courts".

According to the report, Polish courts lack a uniform approach to conducting hearings remotely. The courts differ in the software they use, the amount and quality of training provided to the judges and courts' employees, as well as the publicity of the e-hearings. Some of the courts reported technical problems during remote hearings, which resulted in some of the hearings having to be delayed or cancelled. The report also indicates that in four out of nine surveyed courts, the training for judges and employees was either not held or was held in an ad hoc form. Finally, the research indicated specific problems with the publicity of the e-hearings. More than ten circuit courts (out of 49) declared that the e-hearings are closed to the public.

### ***Geographical distribution and number of courts/jurisdictions and their specialisation***

At the end of 2020, the Minister of Justice announced the idea of flattening the structure of the judiciary in Poland. The plans of the Minister were combined with Art. 180 (5) of the Constitution of Poland, which allows public authorities to relocate specific judges or force them to retire whenever a reorganisation of the court system or a change to the boundaries of court districts happens. Until today, the Minister has not revealed detailed plans of the amendment. However, the idea of flattening the court system has to be recognised as a constant threat to the independence of Polish

judges. Every single judge is at risk of being targeted by the mechanism indicated in Art. 180 (5) of the Constitution.

At the end of 2016, the Sejm passed a law allowing the Minister of Interior Affairs to lower retirement and disability pensions for persons who had served in years 1944-1989 as officers of uniformed services (in particular, the police) during the communist regime of Polish People's Republic. The act, however, only allowed this decision to be challenged by making a complaint to the Circuit Court in Warsaw. As a result, only this one court was able to take on this type of judicial case. This undermined the Circuit Court's ability to recognise the cases in a reasonable time and hindered the possibility for Polish people living outside of Warsaw to access the courts.

As of 28 February 2021, more than 25,000 cases concerning the lowering of pensions were registered in the Circuit Court in Warsaw. The court decided to refer 7,000 of these to other circuit courts. A significant number of the remaining cases were suspended due to the question concerning the constitutionality of the aforementioned amendment.

On 9 March 2021, the ECtHR passed down to the Polish authorities their decision in the case of *Bieliński and 22 others v. Poland*, concerning the Warsaw Circuit Court's accessibility to people whose pensions had been lowered as a consequence of the act. The applicants

made their case under Article 6 § 1 of the Convention regarding the excessive length of their proceedings. In their opinion, they were effectively denied access to the court.

## ***Fairness and efficiency of the justice system***

### ***Length of proceedings***

There is no available data showing the length of proceedings in 2021.

The year 2020 was the fifth consecutive year in which the average length of proceedings increased; from 4.2 months in 2015 to 7 months in 2020.

According to the research findings of civil society (including a report by the HFHR),<sup>1</sup> the causes of judicial backlog include, among other things, the growing number of new cases brought to the courts (ca. 15 million cases in 2018), the system of appointing expert witnesses, case management and the overall management of the courts' work. The HFHR report has also shown that the available remedies to compensate for the excessive length of the proceedings are not fully efficient. Since 2016, the number of complaints for the excessive length of the proceedings has been rising, yet the average value of awarded compensation remained relatively low – from 2,752 PLN to 3,324 PLN. According to the HFHR research, the relatively low compensation rate remains

1 M. Szuleka, M. Wolny, M. Kalisz, *The Time of Trial. How do changes in justice system affect Polish judges?*, Warsaw, 2019.

one of the reasons why parties in the proceedings are discouraged from seeking relief.

### ***Execution of judgements***

Poland has a disappointing ECtHR judgement implementation record. In 2021, there were 35 judgements pending implementation, including key decisions related to the changes in the judiciary system, such as *Xero Flor v. Poland* or *Reczkowicz v. Poland*. According to the statistical data of the European Implementation Network, the average length of judgement implementation in Poland is six years and four months, which is significantly more than in neighbouring European Union states Germany, Lithuania or Slovakia. Furthermore, in future the implementation of some of ECtHR judgements may be further complicated due to the jurisprudence of the Constitutional Tribunal. In November 2021, the Tribunal ruled that Article 6(1) of the ECHR (the right to a fair trial), insofar as it applies to the Constitutional Tribunal, is inconsistent with the Polish Constitution. This judgement will probably serve as a justification for the governing majority not to implement the judgement of *Xero Flor v. Poland*. Additionally, in 2022, a similar case is pending before the Constitutional Tribunal, concerning the constitutionality of Article 6 of the ECHR in so far as this provision provided the basis for the judgements in a series of other key rule of law cases.

Similarly, in 2021, there were no further developments in implementing the judgements of the CJEU in relation to rule of law cases. Neither the governing majority nor the

relevant states' authorities have undertaken any steps to address the key problems such as functioning of the Disciplinary Chamber of the Supreme Court or the National Council of Judiciary.

## **Media environment and freedom of expression and of information** ↓

### **Key recommendations**

- Media reporters must be allowed to enter the area adjacent to the Polish-Belarusian border. The President of Poland should amend his order from 30 November 2021 (in effect until 1 March 2022), which extended the prohibition of entering the emergency zone, by excluding media workers from this prohibition or introducing an accreditation system.
- Steps must be made to reintroduce and secure the independence of the National Broadcasting Council.
- A secure and fair framework of operation for all media outlets must be provided.

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## **Media and telecommunications authorities and bodies**

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### ***Independence, enforcement powers and adequacy of resources of media and tele- communication authorities and bodies***

According to civil society reports (e.g. the analysis of Stefan Batory Foundation),<sup>2</sup> the National Broadcasting Council (NBC) in its current composition does not meet the criteria of a fully independent body. The NBC is composed of persons appointed by the governing majority and some of them have close political ties to the governing party. According to the reports, the close political ties influence the functioning of the NBC. In recent years, the Council has not undertaken any steps in relation to the work produced by e.g. public media, which, on many accounts, presented biased and discriminatory media content, especially during the election campaigns. The NBC's bias was also visible in its business decisions from 2021 while deciding on extending the licence for channel TVN24, part of the Discovery televisions network. During the Council meetings on the matter, members of the Council demonstrated their biased approach to the TV station and stated that the Council was deliberately postponing its decision on the licence renewal due to the ongoing parliamentary procedure concerning the amendments to the Broadcasting Act (i.e. Lex TVN).

### ***Conditions and procedures for the appoint- ment and dismissal of the head / members of the collegiate body of media and tele- communication authorities and bodies***

In August 2021, the Parliament adopted changes to the Act on the National Broadcasting Council (NBC). The amendments changed the process of appointing members to the Council, granting the President of Poland more powers in the process. The law, however, did not enter into effect, as in December 2021 the President of Poland vetoed the act.

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## **Pluralism and concentration**

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### ***Fairness and transparency of licencing procedures***

Throughout 2021, TVN24, a TVN-owned 24-hour news channel, was awaiting a decision from the NBC on the renewal of its 10-year broadcasting licence, which was set to expire on September 26. Even though the station had applied for the renewal in February 2020, the regulator did not issue any decision for 18 months. Such a length of the proceeding was unprecedented and particularly excessive for the renewal of a licence, for which the Broadcasting Act envisages a simplified examination of applications. According to the NBC's chairman, the Council continued to analyse whether the ownership structure of TVN group complied with non-EEA ownership restrictions laid out in the Broadcasting

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2 S. Ananicz, [The politicisation of the Polish National Broadcasting Council \(KRRiT\): a new front in Poland's rule-of-law conflict with the European Union?](#) Commentary, Warsaw, 2021.

Act, specifically given that the direct shareholder of TVN group is a company situated outside the European Economic Area and the controlling shareholder is a US company. As indicated by other members of the NBC, however, the reasons for not renewing the licence for TVN24 were also related to the content of the channel's programs, which were perceived as not compliant with the duties of journalistic diligence. As reported, on the day when the last two votes for the renewal took place, a governing majority MP representing the sponsors of the amendment to the Broadcasting Act visited the NBC's headquarters and met with one of its members (he denied, however, exerting political pressure on the NBC). Eventually, the Council renewed TVN24's licence on 26 September 2021.

At the same time, from July to December 2021, the Parliament worked on a draft legislation amending the Broadcasting Act. The legislation would effectively ban non-European companies from owning Polish broadcast media, and was directed at the US-owned TVN group in Poland. The lack of transparency in the legislative process raised significant concerns, and is but one example of the secrecy surrounding the opinion of the State Treasury Solicitors' Office on the parliamentary bill, often referred to as Lex TVN.

The opinion was not published on the website of the Sejm, and the Office refused the request for access to information on the grounds of "secrecy". Reference was made to Article 38(1)

of the Act on the State Treasury Solicitors' Office. However, it is difficult to argue from this provision that the content of opinions submitted in the course of the legislative process can be kept secret.

## ***Transparency of media ownership***

### ***Allocation of state advertising***

In 2021, there were neither legal nor policy developments aiming at a fair and equal regulation of the state's allocated funds for advertising in media outlets.

In 2021, the research centre Kantar Media published a report<sup>3</sup> summarising the money spent by the state's companies on the paid advertisement in media outlets in years 2015 to 2020. According to these findings, the state's companies spent altogether over 5 billion PLN (approx. 111 million EUR) on advertisement. The state companies' chose mostly private media outlets loyal to the government rather than private media outlets known for their critical approach to the government (such as Gazeta Wyborcza or TVN TV station).

Furthermore, in 2021, the government announced a legislative proposal introducing the media tax, which would introduce a levy on the advertising revenue of media outlets (including print outlets, radio and television, as well as internet media companies). If introduced, the tax would be most burdensome for independent media outlets such as Agora (the

3 T. Kowalski, Report. [Advertising expenditures of state-owned companies. Poland 2015-2020](#), Warsaw, 2021.

publisher of *Gazeta Wyborcza*), the private TV station TVN or Ringier Axel Springer Polska (the publisher of several of print outlets and information website Onet.pl). Eventually, the government dropped any further attempts at this proposal after massive protests from the media and civil society.

### ***Safety and protection of journalists and other media activists***

#### ***Attacks on journalists and media activists***

Since 2016, the media has been reporting on the growing number of incidents of physical and verbal violence against journalists covering, among other things, public protests. Despite this growing trend, the state authorities have not developed any specific measures aimed at combating this practice. The attacks on journalists are the subject of criminal investigations and, depending on the case, may be subject to the prosecution's discretionary decisions.

In 2021, the prosecution pressed the indictment against a perpetrator who beat up a TV operator working for the Polish Public Television. The proceeding was, however, discontinued by the court. The prosecution also pressed an indictment against a protester who attacked *Gazeta Wyborcza* journalists in Wrocław in October 2020. In 2021, there was no progress in similar cases, such as the attack on a journalist during the far-right Independence March in November 2020. According to media reports, the prosecution

plans to hear hundreds of witnesses as a part of the investigation.

In November 2021, three photojournalists – Maciej Nabrdalik, Maciej Moskwa and Martin Divíšek – were brutally apprehended while performing their duties near the emergency zone near the Polish-Belarusian border. They were dragged out of their cars, handcuffed and kept for an hour without their jackets, while Border Guard officers searched the cars, looked at the photographs stored on their cameras and read through text messages from their phones. Two of the men filed a formal complaint concerning their apprehension.

Moreover, during an annual event organised by the governing majority's officials in Warsaw in October 2021 to commemorate the victims of the tragic 2010 plane crash in Smolensk, representatives of OKO.press (an independent online journalistic entity) were not allowed to enter the premises by the State Security Service officers. Another independent journalist, Krzysztof Boczek, revealed that he had been pushed away and intentionally hit by police officers several times after the event.

#### ***Lawsuits and prosecutions against journalists including SLAPPs and safeguards against abuse***

In 2021, the media reported on several instances of proceedings launched against journalists and civil society activists in relation to their work.

The chief of the Polish state petrol company, Daniel Obajtek, sued *Gazeta Wyborcza* in

response to the number of articles concerning his private property and career path. According to Gazeta Wyborcza's journalists, this was the 63rd lawsuit issued by a person with close ties to the ruling party Law and Justice. Similarly, according to Onet.pl data, media outlets run by Ringier Axel Springer were sued 79 times and were faced with 17 criminal cases launched by people or institutions with close ties to the ruling Law and Justice since 2015.

Proceedings that have elements of SLAPP have also been launched against, among others, prosecutors. In 2021, the National Prosecution Office sued prosecutor Katarzyna Kwiatkowska in response to her media statements concerning the situation in the prosecution office. The financial demands presented by the lawsuit (i.e. the costs of a public apology in the media and a payment for a community purpose indicated by the plaintiff) are estimated at 2 million PLN.

### ***Confidentiality and protection of journalistic sources (including whistleblower protection)***

In October 2021, the media reported that the police entered the house and seized a laptop, a mobile phone, and a router that belonged to journalist Piotr Bakselereowicz without a court's order. The police had decided to seize his electronic devices by force after Bakselereowicz invoked journalistic privilege to protect his sources and refused to comply with the request voluntarily. They justified their actions as lawful by connecting them to an ongoing investigation concerning threatening e-mails allegedly sent to an MP of the

governing majority from Bakselereowicz's IP address.

Another reporter, Katarzyna Włodkowska, was questioned in October 2021 about a source in her investigation into the murder of the Gdańsk mayor Paweł Adamowicz in 2019. In 2020, the journalist wrote a report for Gazeta Wyborcza, in which she disclosed parts of a letter written by the alleged murderer, which was supposed to be sent to the imprisoned suspect's brother. Although the perpetrator had been considered mentally ill, the content of the letter indicated rather that the act was conscious and premeditated. Consequently, an investigation was launched by the Gdańsk prosecution office and the journalist was asked about her source, yet she continuously refused to disclose the source's identity, invoking journalistic privilege. Therefore, Włodkowska was charged with a fine, which she refused to pay.

### ***Access to information and public documents***

On 2 September 2021, a state of emergency in the area adjacent to the Polish-Belarusian border was introduced. The restrictions put in place practically excluded this area from any media scrutiny. Journalists were not listed as a group exempted from the prohibition of entry. In particular, no system of accreditation was introduced that would grant journalists limited access to the zone. Journalistic work was also directly hindered (if not prevented) by a ban on recording and the restriction of the right to obtain public information. On 3 September 2021, two media workers were informed by the police that they would face criminal

charges for reporting from the emergency zone (specifically, for staying in the prohibited area and for allegedly filming the border infrastructure). Another journalist was fined on 27 September 2021 while following a Border Guard bus transporting migrants towards the border, presumably in order to push the group back into the territory of Belarus.

## Checks and balances

### Key recommendations

- The three people who were appointed to the already taken seats in the Constitutional Tribunal must be replaced with legally elected judges.
- The process of enacting laws must be improved, in particular by refraining from the use of fast-track procedure where it is not justified.

### **Process for preparing and enacting laws**

#### **Framework, policy and use of impact assessments and public consultations**

Like in previous years, the Parliament hastily adopted new laws without conducting public consultation and guaranteeing appropriate *vacatio legis*. This practice by Parliament members of by-passing public consultation by submitting governmental draft acts has not changed in 2021.

Since 2019, the Sejm only once decided to organise a public hearing concerning specific draft laws recognised by the Sejm. The hearings are facultative measures aimed at providing citizens with a space to take the floor and present their opinions on submitted draft laws. The only public hearing, which took place on 5 January 2022, considered COVID-19 regulations allowing employers to check their employees' vaccination status.

#### **Rules and use of fast-track procedures and emergency procedures**

The most striking example of rush legislation concerned the amendment to the Act on the Protection of the State's Border. Despite the ongoing crisis on the Polish-Belarusian border and the impending constitutional deadline for the state of emergency, the Council of Ministers proposed the amendment at the last possible moment. The amendment was not consulted publicly, despite the fact that it largely affected media freedom and prevented CSO representatives from providing humanitarian aid to all people crossing the Polish-Belarusian border. Moreover, it was illegally recognised as "urgent" which, *inter alia*, effectively limited the President and Senate's maximum period for deliberation. Finally, the Sejm adopted the new act in just three days, leaving practically no space for effective public consultations.

#### **Regime for constitutional review of laws**

The ongoing constitutional crisis has brought into question the ability of the Constitutional Tribunal to conduct independent reviews of

the constitutionality of the law. Specific problems in that field concerned the composition of the Court (and the fact that its three members were elected to seats that were already taken), the legality of the appointment of the President of the Tribunal, and the President's actions concerning the composition of the Tribunal in certain cases. In October 2015, the then governing majority elected five new judges to the Tribunal (instead of just three whose tenures were about to expire on 6 November 2015). After the new governing majority's coming to power at the end of October 2015, during its first session, the Parliament adopted resolutions pronouncing the election of all five judges null and void, and elected another five judges based on a provision which was not yet in force. As a result, three of the newly elected judges were elected to the seats still taken by persons who were supposed to end their terms of office on 6 November 2015. Furthermore, with regard to the Court's President, when presented to the President of Poland, her candidacy for this function was not confirmed by an affirmative resolution of the Court's General Assembly (i.e. all of its judges), which is required by law.

In its judgement of 2021 (case *Xero Flor v. Poland*), the ECtHR confirmed that the flaws in the appointment process of the three judges of the Polish Constitutional Court can lead to a violation of the parties' right to have their case heard by an independent body established by law.

In 2021, the HFHR issued a report on the Constitutional Court,<sup>4</sup> in which it indicated that the Court is used by the ruling majority to rubber-stamp its most controversial changes to the legal system. Moreover, the HFHR called out the ruling majority's practice of resolving controversial and socially objectionable matters by initiating specific proceedings before the Constitutional Court instead of adopting amendments. This method was used, inter alia, to tighten the rules on access to abortion. Last but not least, the Constitutional Court is used in the rule of law crisis as a tool limiting the consequences of the CJEU and ECtHR judgments concerning Poland.

According to the conclusions in the report, the activities of the Constitutional Court demonstrate that it has ceased to be an independent institution upholding the Constitution and a cornerstone of the human rights protection system. Proceedings before the Constitutional Court in its current form are fraught with the risk of infringements of the individual's right to have their case heard by an independent body established by law.

#### ***Judicial review of emergency regimes and measures in the context of COVID-19 pandemic***

The legality of the emergency measures aimed at combating the COVID-19 pandemic still raises doubts, since not all measures have a clear statutory basis in the Act on Preventing

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4 M. Wolny, M. Szuleka, *A tool of the government. The functioning of the Polish Constitutional Court in 2016-2021*, Warsaw, 2021.

and Combating Infections and Infectious Diseases. These doubts have culminated in court rulings finding that specific restrictions violate constitutional principles concerning the limitation of human rights and freedoms. To give an example, in May 2021, the Voivodeship Court in Warsaw quashed the administrative sanction imposed on a woman who was demonstrating against the Constitutional Tribunal's decision regarding access to abortion. The administrative court found that the restrictions imposed by the Ministry of Health violated the Constitution and the Act on Preventing and Combating Infections and Infectious Diseases. Moreover, the court indicated that the proceedings conducted by the Sanitary Inspection Unit (a body tasked with, among others, monitoring of compliance with sanitary laws, e.g. related to combating infectious diseases, and authorised to impose financial penalties on individuals) was affected by various violations of the Code of Administrative Procedure. For instance, the Sanitary Inspection Unit failed to ensure the principle of effective involvement of the parties in the proceedings. Moreover, the court criticised the Inspection for basing its decision only on the memo sent by the police, without considering any other evidence. Finally, the court indicated that the sanitary inspection had imposed a financial sanction on the applicant without considering all of the circumstances of the case, especially the personal situation of the applicant.

## **Enabling framework for civil society** ↓

### **Attacks and harassment**

#### **Legal harassment, including SLAPPs, prosecutions and convictions of civil society actors**

In 2021, a number of proceedings concerning civil society activists were pending. For example, one district court acquitted three civil society activists – Elżbieta Podleśna, Anna Prus and Joanna Gzdyra-Iskander – from charges of religious blasphemy by posting pictures of Virgin Mary in a rainbow halo. In 2021, the district court also acquitted activists running the “Atlas of hate” website, on which they published information on the local communities that adopted “anti-LGBT resolutions”. One of these local communities sued the activists, but the court dismissed the lawsuit. Still, there are six similar proceedings pending against them. Also in 2021, the regional court in Mielec acquitted activist Bart Staszewski, who placed a sign that read, “LGBT-free zone”, at the entry road to the city as a part of his photo project concerning the process of local governments adopting “anti-LGBT” resolutions.

## ***Fostering a rule of law culture***

### ***Efforts by state authorities***

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In general, it is difficult to identify public authorities' actions aimed at fostering rule of law culture. The representatives of the government of Poland do not usually take part in public debates, conferences and actions focusing on the rule of law issue. On the other hand, in 2021, they conducted several actions undermining the rule of law principle. To give an example, the government initiated proceedings before the Constitutional Tribunal indicating that specific provisions of the European Convention of Human Rights violated the Polish Constitution. The judgement delivered in that case helped the government limit the consequences of the ECtHR's judgement in the case of *Xero Flor v. Poland*.

However, it has to be underlined that opposition MPs in the Sejm and Senate have established two parliamentary assemblies aimed at protecting and fostering rule of law culture: the Sejm's assembly on the reform of justice system; and the parliamentary assembly on the protection of rule of law. Both of the assemblies have created an opportunity for the MPs, external experts, CSO representatives and other stakeholders to discuss specific actions aimed at restoring the rule of law principle. The assemblies discussed, inter alia, the model of appointing of judges, threats to judicial independence, and media freedom in Poland.

# **LIBERTIES RULE OF LAW REPORT 2022**

**ROMANIA**



# Romania

## About the authors



The Association for the Defense of Human Rights in Romania – the Helsinki Committee (APADOR-CH) is a non-governmental organization working to raise awareness on human rights issues and promote human rights standards in Romania and the region. It was established in 1990, and ever since it has been working on increasing awareness and respect towards human rights standards and the rule of law in Romania and in the region.

In reaching its goals, APADOR-CH carries out legislative advocacy, fact-finding visits to prisons and police lock-ups, research and monitoring to assess compliance with laws and policies with human rights standards and rule of law principles, strategic litigation as well as capacity building to empower other civil society groups and individuals to enforce their rights.

## Key concerns

In the area of justice, no real progress has been made to address existing concerns. In January 2022, the Ministry of Justice stated

that its immediate priorities for achieving the objectives of the Cooperation and Verification Mechanism (MCV) are the abolition of the Section for investigating offences within the judiciary, the promotion of justice laws and the introduction of amendments to the Criminal Code and the Code of Criminal Procedure. These reforms have been announced since 2020 but no real progress has been made to date.

Certain practices continue to frustrate the effectiveness of the framework to prevent corruption. These include obstacles to access public interest information, with authorities

using the General Data Protection Regulation (GDPR) to further limit the scope of public interest information by unjustifiably extending the protection offered by this regulation in cases where there is an explicit and legitimate public interest visibly manifested at the general level. Access to public interest information has been particularly restricted in the context of the COVID-19 pandemic, when the authorities systematically diverted requests for access to information regarding the management of the pandemic from one body to another, with each body discharging its responsibility to disclose information. Measures to ensure whistleblower protection and encourage reporting of corruption are still inadequate, as discussions on draft laws to implement the EU Directive on Whistleblowers Protection are still ongoing.

The checks and balances system is negatively affected by the tendency of authorities to disregard provisions on transparency in the decision-making process, in particular failing to take into due account comments and recommendations on draft laws by citizens and civil society organizations, which worsened in the context of the COVID-19 pandemic. In 2021, there was an attempt by the government, considered unlawful by the Constitutional Court, to remove from Office the Ombudsman, which plays an important role in advising authorities and monitoring compliance with human rights. The legal framework regulating the independence and effectiveness of independent authorities is in need for reform, both in terms of strengthening safeguards to avoid arbitrary dismissal of the Ombudsperson. In its June 2021 ruling the Constitutional Court found that the decision to dismiss the Ombudsperson was an arbitrary act, without constitutional basis, and that not even the highly lax conditions provided by the law for the dismissal had been met (the dismissal decision did not contain any accusations regarding violations of the law or the Constitution, just referred to the unsatisfactory performance of the Ombudsperson's duties). Following an express indication in the decision of the Constitutional Court, the Ombudsperson resumed their function on 6 July 2021, on the day the ruling was published in the Official Gazette, about three weeks after their revocation. In the same decision, the Constitutional Court also analyzed the quality of the regulations contained by Law 35/1997 on the cases in which the Ombudsperson can be revoked and the respective procedure, finding that the law has severe constitutional deficiencies.

### **State of play**

- Justice system
- Anti-corruption framework
- N/A Media environment and freedom of expression and of information
- Checks and balances
- N/A Enabling framework for civil society
- N/A Systemic human rights issues

#### **Legend (versus 2020)**

Regression: 

No progress: 

Progress: 

## **Justice system**

### **Key recommendations**

- The Ministry of Justice should urgently resume the process of submitting the new justice draft laws for the necessary legal approvals so that it can be sent to the Parliament for adoption.
- APADOR-CH considers necessary that, in order to ensure an adequate legal framework for the independence of judges, the elimination of the Section for investigating offences within the judiciary (SIIJ) be doubled by the provision of an alternative guarantee, at least as strong as the one embodied by the SIIJ, that offers effective protection against abusive and intimidating

criminal investigations of judges (as it was the case before the establishment of the SIIJ). This measure will also prevent the Romanian Constitutional Court from declaring the abolition of SIIJ as unconstitutional.

- APADOR-CH recommends that the decisions of the Superior Council of Magistracy (SCM) on disciplinary matters should be motivated and public, to avoid such decisions from appearing disproportionate and subjective thus casting doubts on the independence of the justice system.

On January 15 2022, the Ministry of Justice stated that its immediate priorities for achieving the objectives of the Cooperation and Verification Mechanism (MCV) are the promotion of the law on the abolition of the Section for investigating offences within the judiciary, the promotion of justice laws and promoting amendments to the Criminal Code and the Code of Criminal Procedure. These promises are pending since 2020.

The draft laws on justice were launched for public debate in September 2020 and went through a public debate for several months, concluding in the spring of 2021. Because the laws of justice were no longer promoted by the Ministry of Justice for the approval of to the SCM, for approval by the government and for adoption by Parliament in 2021, the Ministry of Justice will resume and continue this process in 2022. Following the integration of

proposals and solutions received in the public debate that took place in 2021 and the amendment of the projects, taking into account the recent decisions of the Court of Justice of the European Union, the Ministry of Justice is expected submit the draft laws on justice for inter-ministerial approval on 15 February 2022 at the latest and, following the approval by the ministries, in the approval process at the SCM, no later than 1 March 2022, so that the project can be sent to the government for approval and to the Parliament for adoption, no later than by the end of March 2022.

Regarding the penal codes, the process of public debate on the laws amending the Criminal Codes ended in 2021, without the projects being promoted to the government and, subsequently, to the Parliament, for approval and adoption. The Ministry of Justice is expected to resume the necessary procedures for the promotion of the draft bills, so that they will be submitted to the government and the Parliament for, respectively, approval and adoption by the end of March 2022 at the latest.

## ***Judicial independence***

### ***Abolishing the Section for investigating offences within the judiciary (SIIJ)***

In January 2022, the Minister of Justice stated that the Section for investigating offences within the judiciary (SIIJ) would be abolished by the end of March 2022 and a similar structure would not replace this prosecution unit. He claimed that a draft law would be presented to the government in February 2022, to

be submitted to the vote of the Parliament in March, but only if it receives a positive opinion from the Superior Council of Magistracy (SCM).<sup>1</sup>

In this context, it is worth noting that last year another draft law to abolish the SIIJ received a **negative** opinion from the SCM (with a six-page opinion).<sup>2</sup> During the meeting which took place on 11 February 2021, the SCM plenary issued a negative opinion (11 votes out of 19) motivated by the fact that “*the proposed legislative solution is not accompanied by guarantees designed to give effect to the principle of the independence of justice, by ensuring adequate protection of judges and prosecutors against possible pressures exerted against them*”. In addition, the initiator of the draft law (Minister of Justice) excluded from the outset any discussion of these guarantees, which led to the adoption of the negative opinion.

The reasons included in the negative opinion regarding the pressures to which judges were subjected before the establishment of the SIIJ, through the process of subjecting them to criminal investigations that were harassing and intimidating, are based on the report of the Judicial Inspection No 5488/IJ/2510/

DIJ/1365/DIP/2018, which was approved by the decision of the Plenary of the SCM No 225/15.10.2019.<sup>3</sup> Following the examination of this report, the Plenary of the SCM concluded that, from the perspective of compliance with the guarantees provided by law for magistrates involved in cases pending before the National Anticorruption Directorate (DNA), there are significant deficiencies in the conduct of criminal proceedings in several cases. These deficiencies of the criminal prosecution carried out by the DNA on judges, which were detailed in the decision of the Plenary of the SCM no. 225/2019, were considered by the Plenary of the SCM as representing forms of pressure not only on the targeted judges, but on the entire professional body of judges, with direct consequences in terms of the performance of the act of justice and, finally, *on the parties’ right to a fair trial*.

Subsequently, the DNA requested in court the annulment of the decision of the Plenary of the SCM no. 225/2019 and of the report of the Judicial Inspection, which was approved by the decision of the Plenary of the SCM. However, DNA’s request was rejected by the Bucharest Court of Appeal<sup>4</sup> and on the 7 December 2021 by the High Court of Cassation and Justice.<sup>5</sup>

1 <https://www.g4media.ro/predoiu-sectia-speciala-va-fi-desfiintata-pana-in-martie-nu-va-fi-inlocuita-de-o-structura-asemanatoare-respectiv-sijj-2-0.html>

2 [http://old.csm1909.ro/csm/linkuri/11\\_02\\_2021\\_101170\\_ro.pdf](http://old.csm1909.ro/csm/linkuri/11_02_2021_101170_ro.pdf)

3 [http://old.csm1909.ro/csm/linkuri/08\\_01\\_2020\\_97031\\_ro.pdf](http://old.csm1909.ro/csm/linkuri/08_01_2020_97031_ro.pdf)

4 <https://www.clujust.ro/dna-a-pierdut-astazi-la-cab-hotararea-csm-si-raportul-inspectiei-judicia-re-prin-care-se-constatau-abuzurile-comise-impotriva-magistratilor-raman-in-picioare/>

5 [https://www.stiripesurse.ro/breaking-inalta-curte-respinge-definitiv-recursul-dna-raportul-care-dezvaluie-abuzurile-din-dosarele-cu-magistrati-ramane-definitiv\\_2132705.html](https://www.stiripesurse.ro/breaking-inalta-curte-respinge-definitiv-recursul-dna-raportul-care-dezvaluie-abuzurile-din-dosarele-cu-magistrati-ramane-definitiv_2132705.html)

The SCM's request, expressed in the negative opinion mentioned above, that the abolition of the SIIJ, to be accompanied by the provision of real legal guarantees to ensure the independence and objectivity of judges, takes into consideration the decision no. 33/2018 of the Romanian Constitutional Court (CCR).<sup>6</sup> The SCM mentions in its opinion an example of an alternative guarantee that could be taken into consideration: a preliminary authorization, from the Plenary of SCM or from the General Prosecutor, of the criminal proceedings or/and of the criminal trial against a magistrate.

There is a very high probability that the law on the abolition of the SIIJ will be declared unconstitutional by the Romanian Constitutional Court. Given decision no. 33/2018 of the same Court, we can estimate that, if the law on the abolition of the SIIJ is limited to the mere fact of disbanding the Section, without providing a set of guarantees for the judicial independence (in terms of its individual component, which refers to the independence of the judge), the law will not pass. This is because the Romanian Constitutional Court has stated that the SIIJ constitutes a legal guarantee of the principle of judicial independence. However, the dismantling of the SIIJ will represent, at least for the Romanian Constitutional Court, the

elimination of the legal guarantee referred to in decision no. 33/2018.

### *Transparency of decisions of the Superior Council of Magistracy and public perception on the independence of justice*

One major problem that sabotages the public perception on the independence of justice are the decisions of the disciplinary section for judges of the Superior Council of Magistracy (SCM). This section can impose disciplinary actions and sanctions for magistrates whenever there is a violation of the law on the statute of judges and prosecutors.<sup>7</sup> **Unfortunately, the decisions of the section are not motivated, which is a very dangerous practice because it leaves room for interpretations and speculations in the public opinion.** This is even more serious when the sanctions are very severe or apparently disproportionate. The most recent case that raised many discussions is that of judge Cristi Dănileş. In December 2021 the judge was excluded from magistracy, which is the most severe sanction according to the law.<sup>8</sup> His exclusion was triggered by some videos he posted on social media that pictured the judge in various situations of his private life (cleaning his yard, exercising karate in the pool). The SCM considered that those videos depict a “conduct that harms the image of justice”<sup>9</sup> and

6 With this decision, CCR conducted the constitutionality review of the law establishing the SIIJ and confirmed that the SIIJ constitutes a guarantee for the independence of magistrates.

7 Law no. 303/2004 on the statute of judges and prosecutors.

8 <https://www.digi24.ro/stiri/actualitate/justitie/cristi-danilet-a-fost-exclus-din-magistratura-din-cauza-unor-filmulete-pe-tiktok-judecatorul-va-contesta-decizia-csm-la-inalta-curte-1768973>

9 Art. 99 a) of Law no. 303/2004.

excluded him from the profession. The decision was adopted by a majority. Some members of the disciplinary section formulated separate opinions, suggesting that the case should be rejected, a different sanction to be adopted or a reevaluation of the case.

The judge appealed the decision to the High Court of Cassation and Justice, affirming that the videos reflect his private life and that he made no statement regarding the justice system. He also invoked many errors of the investigation procedure. Moreover, according to the law,<sup>10</sup> the judge that is removed from magistracy is also suspended from this position until the High Court issues a decision on the disciplinary sanction. Mr. Dănilieț appealed this decision as well.

The case generated many discussions in the public media and reactions from the judges. At the end of 2021, 500 magistrates from all over the country signed an open letter requesting the repeal of the provisions on disciplinary offenses provided by the law on the statute of magistrates,<sup>11</sup> for which Mr. Dănilieț was expelled from the profession.<sup>12</sup> The magistrates argue that these provisions are at high risk of arbitrary interpretations due to the lack of details and concrete criteria for the offenses. They say that this situation makes the law very unpredictable and confusing for magistrates.

APADOR-CH agrees with the fact that some of the provisions regarding the disciplinary offenses are susceptible to subjective interpretation as they don't offer the limits of the offenses or extended explanations. For example, the article invoked in the case of Mr. Dănilieț provides that "It constitutes disciplinary violation the manifestations that affect the honour or professional probity or the prestige of justice, committed in the exercise or outside the exercise of their duties."<sup>13</sup> There is no definition or examples of concrete manifestation that can constitute an offense to the prestige of justice. There is a very fine line of interpretation that can lead to different solutions based on the subjective interpretation of the person that applies the law.

Therefore, in the lack of explicit provisions regarding the disciplinary offenses, the motivation of the disciplinary decisions is of great importance.

### ***Quality of justice***

#### ***Follow up on the Robert Roșu case (2020)***

In November 2021, a full bench of the High Court of Cassation and Justice (HCCJ), which resolved an extraordinary appeal (appeal in cassation), acquitted the lawyer Robert Roșu of two offences (setting up an organized criminal

10 Art. 62 para. 1 e) of Law no. 303/2004.

11 Art. 99 and art. 100 of Law no. 303/2004

12 <https://www.g4media.ro/peste-500-de-magistrati-cer-csm-abrogarea-prevederilor-privind-abaterile-disciplinare-pentru-care-cristi-danilet-a-fost-exclus-din-magistratura-iar-curtea-de-apel-constanta-a-fost-curatata.html>

13 Art. 99 a) of Law no. 303/2004

group and complicity in the offence of abuse of office) for which, in December 2020, he had been sentenced to 5 years' imprisonment by another full bench of the HCCJ.<sup>14</sup> The first court (Bucharest Court of Appeal) acquitted Mr. Roşu, then the appeal court (HCCJ) sentenced him to a five-year prison sentence, and finally, the cassation appeal court (also HCCJ) acquitted him.

The diametrically opposite sentences (acquittal-prison sentence-acquittal) based on the same evidence, interpreted differently according to each court panel, created a negative public perception of the judicial system, which gave the appearance of total unpredictability. This perception was accentuated by the fact that the grounds of the sentencing decision, based on which Mr. Roşu was detained for about one year (341 days<sup>15</sup>), were made available four months after the date of the ruling<sup>16</sup> (the law in force at the time allowed that the motivation of the sentence to be released within three months from the date of the verdict).

Because the drafting of the grounds for the sentencing in such a critical case of public interest was delayed, several opinions and speculations have been expressed in public that the judges no longer know how to motivate their

sentencing decisions (the subsequent annulment of a sentencing decision would confirm to a certain extent this kind of allegation). Furthermore, Mr. Roşu could not appeal the prison sentence until four months after the decision date. The extraordinary appeal in cassation against this judgment (the appeal in cassation procedure can only be initiated after the judgment under appeal has been written). This delay in drafting the sentencing decision infringed Mr. Roşu's right to appeal to the courts and prevented him from exercising the remedies available to him against the decision as soon as possible.

In parallel with the development of the Roşu case, the Constitutional Court of Romania (CCR) has been dealing with an exception of unconstitutionality raised outside the context of the Roşu case, concerning the provision in the Code of Criminal Procedure which allows the grounds of the sentences to be given after sentencing.

By decision no. 233 of 7 April 2021<sup>17</sup>, the Romanian Constitutional Court admitted the objection and declared Articles 400(1), 405(3) and 406(1) and (2) of the Code of Criminal Procedure unconstitutional. The direct effect of the decision of the Romanian

14 <https://www.hotnews.ro/stiri-esential-25199992-avocatul-robert-rosu-condamnat-dosarul-ferma-baneasa-achitat-eliberat-din-penitenciar-decizie-definitiva-instantei-supreme.htm>

15 <https://www.clujjust.ro/primele-ganduri-transmise-de-avocatul-robert-rosu-dupa-eliberare/>

16 <https://www.g4media.ro/exclusiv-motivarea-inaltei-curti-in-dosarul-ferma-baneasa-de-ce-a-fost-trimis-du-pa-gratii-avocatul-robert-rosu-inculpatul-rosu-nu-este-acuzat-de-fapte-care-se-circumscriu-exercitarii-cu-bu.html>

17 [https://www.ccr.ro/wp-content/uploads/2021/04/Decizie\\_233\\_2021.pdf](https://www.ccr.ro/wp-content/uploads/2021/04/Decizie_233_2021.pdf)

Constitutional Court is that from its publication in the Official Gazette (17 May 2021), the articles of the Code of Criminal Procedure, which have been deemed unconstitutional, no longer apply.

The Romanian Constitutional Court has established that the drafting of the judgment by which the case is decided by the first instance court, or of the ruling by which the court rules on the appeal (the reasons in fact and in law) after the decision in the case has been delivered, “no later than 30 days after the decision” or after a time frame which may exceed by a considerable margin the period mentioned, deprives the convicted person of the guarantees of due process, infringes the right of access to justice and the right to a fair trial. At the same time, the Romanian Constitutional Court found that the enforcement of a final judgment before its factual and legal reasoning being made public infringes the Constitution and the provisions of the Conventions relating to individual liberty and security of the person and those enshrining human dignity and justice as supreme values of the rule of law.

In its decision, the Romanian Constitutional Court established a transitional solution, in the sense that until the amendment and completion of the Code of Criminal Procedure, the courts shall directly apply the provisions of Article 1(3), Article 21(1)-(3), Article 23(11) and Article 124(1) of the Constitution, as well as Article 5(1)(a) and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), to comply with the Romanian Constitutional Court decision. In other words, the Romanian

Constitutional Court provided in its decision that, until the adoption of a law amending and supplementing the Code of Criminal Procedure following this decision, the courts deciding the case on the merits (first instance) or an appeal must give reasons for their rulings no later than the date on which they deliver them. This means that even from the date of the judgment, the grounds for the judgment (the full judgment) must be available to the interested party.

Shortly after the adoption of the decision of the Romanian Constitutional Court (7 April 2021) and by the date of its publication in the Official Gazette (17 May 2021), the Code of Criminal Procedure was amended in accordance with this decision by *Law No 130/2021*, published in the Official Gazette on 12 May 2021 and entered into force on 15 May 2021. **Thus, the principle that a criminal sentence must be accompanied by the grounds for the ruling at the time of delivery has been enshrined in law in cases where the case’s criminal and/or civil side is decided. The same law also amended Art. 391 (3) of the Criminal Code, meaning that in all cases, the deliberation, drafting and ruling cannot take place later than 120 days after the closure of the proceedings.**

These legislative provisions also solve a problem in the Rosu case (regarding the delay in the reasoning/drafting of the judgment concerning the date of sentencing) and allow for timely appeals against the verdict.

## Anti-corruption framework –

### Key recommendations

- Authorities should ensure without delay the full transposition of EU rules on whistleblowers protection into the Romanian legal framework.

### Framework to prevent corruption

#### *Measures in place to ensure whistleblower protection and encourage reporting of corruption*

In March 2021 the Ministry of Justice launched public consultations on the whistleblowers draft law that transposes the Directive (EU) 2019/1937. After a series of meetings organized during March-May 2021 with civil society and public institutions, the draft project stagnated until December. Meanwhile, due to the national political situation, the Minister of Justice was changed. As a result, the new Minister of Justice promoted a new draft law on this subject in December 2021. This new form of the draft law is less protective for the whistleblowers because it limits their freedom of choice regarding the reporting channels and it doesn't cover the protection mechanisms provided by the Directive (financial, psychological, legal assistance). At this moment, this new draft law is still at the Ministry of Justice.

Parallel to this initiative, a draft law concerning the same Directive was registered to the Chamber of Deputies. Although it is not a perfect law project, it took into consideration many of the recommendations discussed during the public debates and it is for sure a great improvement of the current legal framework of the whistleblowers' activity (Law no. 571/2004).

It is expected that the two draft laws will be jointly discussed in the Parliament starting in March. It is to be mentioned that the deadline for the Directive transposition was 17 December 2021. Unfortunately, significantly delayed transposition of Directives is very common for Romania.

## Checks and balances –

### Key recommendations

- Law No 52/2003 should be amended to oblige the authorities to send, within a specific timeframe (e.g. 20 days after the adoption of the draft legislation), a reply to any person, natural or legal, who has sent recommendations on a draft legislation, stating which recommendations have been accepted and which have been rejected, together with the reasons for the acceptance or rejection. In addition, to ensure compliance with such a provision, a sanction for failure to answer should be introduced in the law, at least in the form of a provision that

breach of this obligation constitutes disciplinary misconduct.

- The government and Parliament should modify law 544/2001 on access to public interest information in order to provide the obligation for public entities to communicate, ex officio, the nominal composition of the various bodies (committees, commissions, groups, etc.) that are set up by/within/among/on different public authorities or institutions. This meets the requirements of transparent activities which fall within the notion of “legitimate interest of third parties” referred to in Article 6(f) of GDPR.
- The Parliament should amend the law on the organization and functioning of the Ombudsperson in accordance with the Constitutional Court decision no. 455/2021. Any rule of law complaint state has clear legal frameworks in place concerning the cases in which the Ombudsperson can be revoked and the respective procedure, especially when the law was found to have several constitutional deficiencies.
- The Romanian Institute for Human Rights, which currently does not fulfil international standards on independence and effectiveness, should be absorbed within the Ombudsperson, which has a general legal competence regarding human

rights, taking into consideration the comments and recommendations made by the Legislative Council in July 2020.

## ***Process for preparing and enacting laws***

### ***Transparency in the decision-making process***

There is already a practice, reinforced during the COVID-19 pandemic, that the authorities do not observe certain provisions of Law 52/2003 on transparency in the decision-making process.

According to the regulations of this law, citizens and NGOs can send written recommendations to the authorities within a specific timeframe on draft legislation that is subject to public debate. This is a way provided by law for civil society to be directly involved in the decision-making and law-making process. To ensure that the authorities give due consideration to the recommendations proposed by citizens and NGOs, Article 12(3) of Law No 52/2003 provides that public authorities receiving such recommendations are obliged to explain in writing the reasons they have not considered the proposals made and submitted in writing by citizens and their legally constituted associations.

Unfortunately, the general practice is not to respond to the recommendations received from the civil society, although *there is a legal*

*provision obliging authorities to send a response to those who have made recommendations.*

The fact that the authorities do not communicate with citizens and NGOs who submit recommendations the reasons for not taking the suggestions into account is a deterrent to making further recommendations for other draft legislation, as it creates a public feeling that the authorities are ignoring the contribution that civil society wishes to drive through such proposals.

### **Access to public interest information**

#### **GDPR used by authorities as a shield against disclosing public interest information**

The authorities have been using, also in the course of 2021, the General Data Protection Regulation (GDPR) as an opportunity to further limit the scope of public interest information by unjustifiably extending the protection offered by this regulation in cases where there is an explicit and legitimate public interest visibly manifested at the general level.

During the pandemic, the authorities set up various commissions, committees, groups, or other bodies, which were given significant attributions regarding the management of the COVID-19 pandemic by multiple pieces of legislation. These bodies decided on measures that significantly affected the life of the community. For example, the Strategic Communication Group, the Committee for Emergency Situations, the Technical-Scientific Support Group on the Management of

Highly Communicable Diseases in Romania, the National Coordinating Committee for Vaccination Activities against COVID-19, etc. have been set up.

Given the importance of the decisions made by these bodies for the public, there was a general interest in getting to know the people who make up these bodies. The public wanted to ensure that the decision-makers in these bodies were people with a professional background and a reputation appropriate with the prerogatives they exercise. Unfortunately, the repeated attempts of ordinary citizens and the press to find out the names and professional training of the decision-makers in these bodies, were eluded by the authorities, who invoked the GDPR (names, professional training) of the members of these bodies.

This repeated refusal is even in contradiction with some provisions of the GDPR. The general framework for the processing (disclosure) of personal data without the consent of the data subject is set out in Article 6 of the GDPR, which states that personal data may also be disclosed when the disclosure is necessary to legitimate interests pursued by a third party. It should be noted that in *Opinion 06/2014 of the Article 29 Working Party on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC* (the Directive that preceded the current 2016 GDPR), an opinion that is still valid today, the notion of “legitimate interest of third parties” is also defined in the sense of the purpose of an action that does not contravene the law, and **transparency** is given as an example of the

legitimate interest of third parties (page 29 of the Opinion).<sup>18</sup>

In other words, it is not at all contrary to, but even in line with, Article 6(c) and (f) of the GDPR, to introduce the obligation for public entities to communicate, ex officio, the nominal composition of the various bodies (committees, commissions, groups, etc.) that are set up by/within/among/on different public authorities or institutions in Law 544/2001. This meets the requirements of **transparent activities** which fall within the notion of “legitimate interest of third parties” referred to in Article 6(f) of GDPR.

This addition to Law No 544/2001 on free access to public interest information will allow information to be obtained on the names and professional training of members of similar bodies. Adopting a transparent attitude regarding the membership of these institutions can only increase the public’s confidence in the authorities while maintaining the current opacity has the opposite effect.

### ***Repeated redirection of the requests for information concerning the handling of the pandemic***

During the pandemic, the authorities contributed to creating confusion and uncertainty

about obtaining information of public interest regarding the management of the pandemic by using Law 544/2001 and diverting (redirecting) requests for information from one body to another, with the last body to receive the request claiming not to have the requested information.

For example, a request for information made by APADOR-CH regarding the COVID-19 vaccines was redirected from the Romanian Government Secretariat to the Ministry of Health, and the Ministry of Health redirected the request to the National Coordinating Committee for Vaccination Activities against COVID-19, the latter institution stating that they do not have the requested information and that they recommended requesting the information from the Ministry of Health (the same Ministry which suggested that the information be requested from the National Coordinating Committee for Vaccination Activities). Finally, APADOR-CH sued the National Coordinating Committee for Vaccination Activities against COVID-19 and obtained a court decision that ordered the Committee to provide the requested information.

However, it is worth noting that in a challenging period, due to the problems raised by the pandemic, ordinary citizens shouldn’t

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18 [https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217\\_ro.pdf](https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_ro.pdf)  
See also the section on the official website of the European Union dedicated to the definition of legitimate interest [https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/legal-grounds-processing-data/grounds-processing/what-does-grounds-legitimate-interest-mean\\_ro](https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/legal-grounds-processing-data/grounds-processing/what-does-grounds-legitimate-interest-mean_ro)

have to put their time and energy into such matters, which are rather limited, because the public authorities refuse to fulfil their legal obligations.

Journalists have reported similar situations; their requests for information were redirected from one institution to another without definitive answers.

If the Romanian authorities truly wanted to communicate the information of public interest requested by citizens on pandemic-related topics (including vaccination-related matters) accurately and completely, they would not have fragmented the recipients of the requests, thus creating the possibility of sending information requests “in circles” from one entity to another, but would have designated a single authority to receive and respond to any kind of request for information on any pandemic-related issue. This authority could have been the Government Secretariat because the management of the pandemic is primarily a government responsibility.

This would also have increased citizens’ trust in the state, which would have been perceived as a partner in the difficult situation created by the pandemic, and not as an adversary using any subterfuge to avoid answering legitimate questions.

## *Independent authorities*

### *Attempt to remove from office the Romanian Ombudsperson*

The Romanian Ombudsperson is the only public authority that has the legal power to appeal *directly* to the Constitutional Court any normative act with legal force, any law or ordinance. During the COVID-19 pandemic, the Ombudsperson challenged several legal regulations establishing measures for preventing and controlling the pandemic before the Constitutional Court, and in many cases, these objections of unconstitutionality have been admitted.

However, the government in power at the time, supported by the Parliamentary majority, made several public statements that the Ombudsperson was acting against the measures in place meant to prevent and control the spread of the pandemic. Shortly after these statements, the procedure to remove the Ombudsperson from office was initiated and completed. As a result, by **Resolution No 36 of 16 June 2020 of the Plenary of the two Chambers of the Parliament, the Ombudsperson was removed from office.**<sup>19</sup>

According to Article 9(2) of Law No. 35/1997 on the organization and functioning of the Ombudsman, the Ombudsperson shall be removed from office by a joint decision of the Chamber of Deputies and the Senate, “*as a*

19 <https://www.hotnews.ro/stiri-politic-24863583-parlamentul-reuneste-sedinta-comuna-revoce-renate-veber-din-functia-avocatul-poporului-cine-vor-inlocuiasca-pnl-usr-plus-udmr.htm>

*result of violations of the Constitution and laws*". However, the reasons cited in the decision for the removal from office were none other than the public criticism repeatedly aimed at the Ombudsperson (criticism concerning their position on measures to fight the pandemic), namely: the Ombudsperson's inaction in the case of the Caracal murders (which involved the kidnapping and murder of two young women) or on the issue of missing children, the monitoring of health units treating COVID-19 patients in terms of compliance with the rules of the prevention of torture, monitoring which created a state of fear among medical staff. The Parliamentary Group of the main opposition party at the time appealed to the Constitutional Court against the Parliament's decision to remove the Ombudsperson from office (the existing law did not and still does not allow the Ombudsperson to appeal the decision to remove them from office on their behalf).

By **Ruling No 455 of 29 June 2021**,<sup>20</sup> the **Constitutional Court** found that the decision to dismiss the Ombudsperson was an arbitrary act, without constitutional basis, and that not even the highly lax conditions provided by the law for the dismissal had been met (the dismissal decision did not contain any accusations regarding violations of the law or the Constitution, just referred to the unsatisfactory performance of the Ombudsperson's duties). Following an express indication in the decision of the Constitutional Court, the Ombudsperson resumed their function on the

day the decision was published in the Official Gazette (6 July 2021), i.e., about three weeks after their revocation.

In the same decision, the Constitutional Court also analyzed the quality of the regulations contained by Law 35/1997 on the cases in which the Ombudsperson can be revoked and the respective procedure, finding that the law has severe constitutional deficiencies, as follows:

- 1) the law does not cover distinctly and restrictively the cases in which the Ombudsperson may be revoked; it only covers serious misconduct committed by the Ombudsperson, but in a vague and loose manner, so that the conditions of clarity, predictability and reasonableness which laws must meet are not observed;
- 2) the law does not provide the Ombudsperson's right of defense through a transparent procedure that ensures a public hearing of the Ombudsperson;
- 3) the law does not provide for a procedure to challenge the revocation decision before the Constitutional Court by the person being revoked (according to the current regulation, the challenge can only be made by a certain number of members of the Parliament).

Since the recitals in a decision of the Constitutional Court have the same binding

20 [https://www.ccr.ro/wp-content/uploads/2021/07/Decizie\\_455\\_2021.pdf](https://www.ccr.ro/wp-content/uploads/2021/07/Decizie_455_2021.pdf)

force as the operative part of the decision, it follows that **the Parliament is obliged to amend Law No 35/1997 under the provisions of Decision 455/2021 of the Constitutional Court** on the three categories of constitutionality issues, mentioned above, which concern the cases in which the Ombudsperson may be revoked and the respective procedure. Following the amendment, Law 35/1997 must provide, in addition to the cases and procedure for the revocation of the Ombudsperson, the obligation that the Parliament's decision for the removal from office must identify and describe each act or omission imputed to the Ombudsperson and the corresponding legal power that has not been performed or has been performed improperly, including by mentioning the legal rules thus violated.

So far, **the Parliament has not amended and supplemented Law No 35/1997** under decision No 455/2021 of the Constitutional Court. This lack of action by the Parliament raises questions about obeying the rule of law, as laws that do not comply with the Constitution must be brought in line as soon as possible.

### ***The dismantling of the Romanian Institute for Human Rights (RIHR)***

The Romanian Institute for Human Rights (RIHR) is an independent public entity with

a legal personality established by law (Law no. 9/1991). The state-funded institution with a budget of about 1 million lei/year, from the Parliament's budget,<sup>21</sup> has the promotion of human rights as its general objective.

As the only national human rights entity accredited by the UN under the Paris Principles, RIHR has been subject to regular UN assessments. Unfortunately, the UN Sub-Committee responsible for the accreditation of human rights institutions established under the Paris Principles gave it the lowest grade, namely C, criticizing, among other things, the non-transparent appointment of RIHR members and the unlimited term of their office.<sup>22</sup>

In July 2020, 4 USR MPs initiated a legislative proposal<sup>23</sup> to dismantle RIHR and integrate and merge it with the National Council for Combating Discrimination (NCCD). The legislative proposal was motivated,<sup>24</sup> on the one hand, that "*RIHR's main activities, as shown in the institution's reports, are small-scale, inferior even to the work of some NGOs (very short, strictly localized training courses, teaching creativity competitions initiated, in fact, by the Ministry of Education, etc.) and are not part of a national and multi-annual strategy with measurable results*" and, on the other hand, that currently "*...RIHR's purpose and activities constantly overlap with those of other public bodies...*"

21 In 2020, IRDO's annual budget was 2.3 million lei, out of which about 1.8 million Lei were salary expenses; see <https://www.senat.ro/legis/PDF/2020/20L701EM.PDF>

22 <https://apador.org/en/ca-facem-cu-irido-il-desfiintam-sau-ii-schimbam-seful/>

23 [https://www.senat.ro/legis/lista.aspx?nr\\_cls=L701&an\\_cls=2020](https://www.senat.ro/legis/lista.aspx?nr_cls=L701&an_cls=2020)

24 <https://www.senat.ro/legis/PDF/2020/20L701EM.PDF>

(as an example, the overlapping of tasks between RIHR and the following public bodies was given: NCCD, National Agency for Equal Opportunities, National Authority for Persons with Disabilities, National Authority for the Protection of Children's Rights and Adoption).

The reasons for the dissolution of the RIHR (by absorption into the NCCD) were also that, *“according to its activity reports, the RIHR has not provided, by its own initiative, at least in the last half-decade, statements, opinions or legislative summaries to the Chamber of Deputies or the Senate, in other words, it has not provided the support in Parliament’s law-making activity that its subordination to the Chamber would indicate. Moreover, even in the area of legislative summaries, RIHR is in the same situation of institutional parallelism that characterizes all its work: such materials are produced and made available to Members of the Parliament by the Legislative Council and Parliament’s internal legislative services.”*<sup>25</sup> The Legislative Council endorsed this legislative proposal with comments and recommendations,<sup>26</sup> and in December 2020, the Chamber of Deputies tacitly adopted it. In November 2021, the Senate (the decision-making chamber in the case of this legislative proposal) rejected the legislative proposal, a rejection which puts the attempts to dismantle the institution to a halt for the moment.<sup>27</sup>

As it emerges from the joint report of the Senate Legal Committee and the Senate Human Rights Committee,<sup>28</sup> the legislative proposal was rejected mainly because, during the Parliamentary procedure, it did not undergo the amendments and additions necessary to meet the objections raised by the Legislative Council in the opinion issued, namely:

1. The legislative proposal does not state to what extent the field of activity of the RIHR (as established by Article 3 of Law 9/1991) is to be taken over by the NCCD, i.e., to what extent the tasks of the staff taken over by the NCCD will be maintained or will consist of.
2. There is no correlation between the provisions on the dismantling of RIHR and those on the takeover of RIHR’s assets and the transfer of RIHR’s allocated budget, and those on the takeover of RIHR’s staff (there are unjustified time differences between the date of the dismantling of RIHR and the date of entry into force of the provisions on the employment of RIHR’s staff by the NCCD and the date of the transfer of RIHR’s budgetary allocations to the NCCD).

In conclusion, it can be estimated that although the legislative proposal of July 2020 has been definitively rejected, the idea of absorbing the

25 <https://www.senat.ro/legis/PDF/2020/20L701EM.PDF>

26 <https://www.senat.ro/legis/PDF/2020/20L701LG.PDF>

27 <https://www.senat.ro/legis/PDF/2020/20L701ARD.PDF>

28 <https://www.senat.ro/legis/PDF/2020/20L701CR.PDF>

RIHR into another public entity with relevant activities related to human rights should not be abandoned. This is because there are still overlaps between RIHR and other public entities, and public expenditure on the operation of RIHR is far too generous for the results achieved.

Thus, based on an objection of unconstitutionality raised by the President of Romania and settled by decision no. 772 of 22 October 2020 of the Constitutional Court of Romania,<sup>29</sup> it is stated that the role of the RIHR becomes unclear, as it duplicates the role of the Ombudsperson, as provided in Article 1(2) of Law no. 35/1997, of promoting and protecting human rights, in compliance with the Paris Principles, adopted by Resolution A/Res/48 of the United Nations General Assembly of 20 December 1993, the relationship between the RIHR and the institution of the Ombudsman being unclear. The grounds for the President's objection also state that some of the RIHR's tasks overlap and are in conflict with the functions of lawyers (concerning the provision of legal advice in the field of human rights, something which only lawyers can provide) or with the tasks of the National Agency for Civil Servants and the National Institute of Administration (concerning human rights training programmes).<sup>30</sup>

Perhaps instead of the NCCD, the Ombudsperson is more appropriate to absorb the RIHR, including its areas of activity. Unlike the NCCD (which is focused on only one key area of human rights, namely the right not to be discriminated against), the Ombudsperson has a general legal competence regarding human rights (however, much broader than the competence of the NCCD).

**The forthcoming legislative proposal on the absorption of the RIHR by the institution of the Ombudsperson will have to be drafted taking into consideration the comments and recommendations made by the Legislative Council about the July 2020 legislative proposal (presented above), which could greatly increase the chances that the new legislative proposal will be adopted.**

29 [https://www.ccr.ro/wp-content/uploads/2021/01/Decizie\\_772\\_2020.pdf](https://www.ccr.ro/wp-content/uploads/2021/01/Decizie_772_2020.pdf)

30 See paragraphs 9-12 of Decision No 772/2020 of the CCR. Paragraph 67 of the decision states that, in view of the merits of the grounds of extrinsic unconstitutionality relating to the procedure for the adoption of the contested law, it follows that it is no longer necessary to examine the other criticisms of intrinsic (substantive) unconstitutionality raised by the author of the objection of unconstitutionality. This does not mean that the substantive issues of overlap between the IRDO and other public entities no longer exist or remain relevant.

## **Disregard of human rights obligations and other systemic issues affecting the rule of law framework** 🟡

### **Key recommendations**

- Authorities should take steps to ensure a timely and full implementation of judgments of the European Court of Human Rights.

which are waiting to be implemented. These have been pending implementation for a moderately long period of time. On average, leading cases have been pending in Romania for **more than 4 years and 5 months**, with the oldest pending implementation since 2005.

While the data shows that there is **significant room for improvement**, there are also some **positive examples** of ECtHR judgment implementation where reforms have been initiated or are underway. However, significant efforts are required further to improve ECtHR compliance and Romania's overall implementation record.

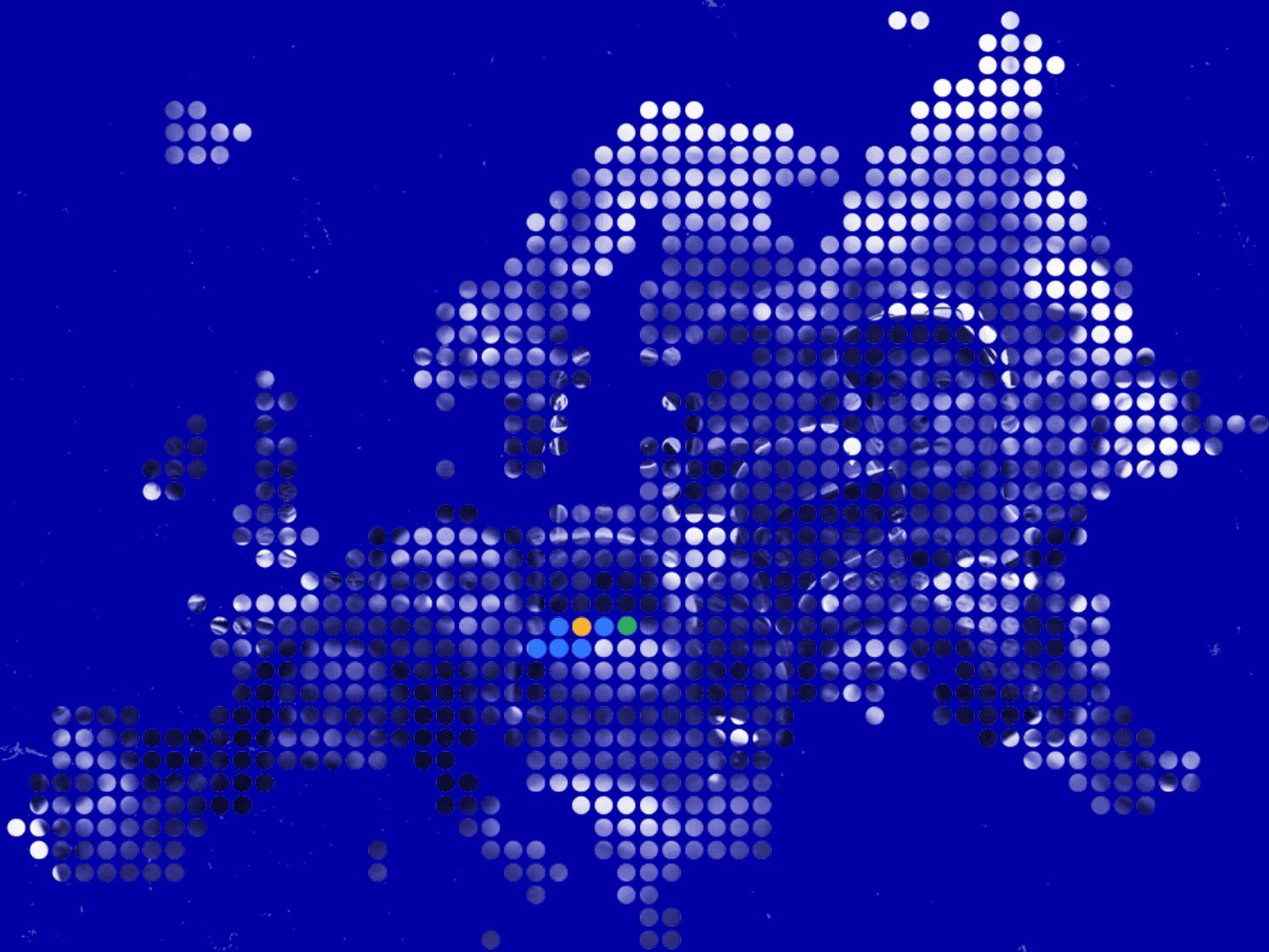
### ***Implementation of decisions by supranational courts***

As of January 2022, there are **101 leading judgments pending implementation** in Romania. This is the highest number of pending leading judgments of any country in the European Union. Only since the beginning of 2020, the ECtHR has delivered 30 violation judgments with respect to Romania. Of the leading judgments handed down by the European Court of Human Rights against Romania over the past 10 years, more than 56% await full implementation. Only five leading judgments have been implemented by authorities since the beginning of 2020.

The ECtHR implementation record in Romania is among the poorest in the European Union. The statistics indicate an extremely high number of leading judgments pending, as well as a high percentage of leading judgments

# **LIBERTIES RULE OF LAW REPORT 2022**

**SLOVAKIA**



# Slovakia

## About the authors



**VIA IURIS** is a non-partisan, not-for-profit organisation, which has been an officially registered in Slovakia as a civic association since 1993. Its main office is in Banská Bystrica (Central Slovakia), and it has a regional office in the capital city Bratislava (Western Slovakia). We operate at national level. Our mission is to use the law as an instrument of justice, bringing systematic solutions and promoting the equal application of the law for all. Our activities fall under three pillars:

- **Citizens:** Our aim is to promote effective public participation in decision and policy making. Citizens should be able to participate effectively in various impact assessments and permission procedures on decisions and policies that affect their lives, such as the building of public and private infrastructure. They should have access to information and access to justice in matters of public interest, such as environmental protection and accountability of state institutions and municipalities. We support and provide assistance to people who are threatened while advocating in the public interest.

- **Civil society:** Authentic civil society – one of the cornerstones of freedom and democracy – is being jeopardised by non-systemic legislative proposals, populist statements by politicians and disinformation campaigns spearheaded by conspiracy-minded media. Our role is to unravel myths about NGOs, critically analyse civil society and protect the legislative environment so that, in the future, Slovak citizens have the right to freely express, associate, and actively participate in and control the administration of public affairs.

- **Rule of law:** VIA IURIS aims to promote systematic measures to strengthen the political independence of courts, public prosecutors and the police. These institutions are fundamental elements of the rule of law and are crucial for securing equality before the law and enforcing justice. They should guarantee the exercise of public power via elected officials in compliance with the public interest rather than the private interests of oligarchs. They have to guarantee that everyone is held accountable for overstepping the law, even politicians.

## Key concerns

In 2021, Slovakia's justice system underwent some significant reforms, although no concrete progress has been reported yet. Even though the Supreme Administrative Court, a supreme judiciary body tasked also with disciplining judges and prosecutors for misconduct,

formally started its operation in August 2021, it is still too early to see any significant changes. Criminal proceedings against several judges that were initiated in 2020 are ongoing, but no judgments have been issued yet.

In its attempts to secure a framework for anti-corruption efforts, Slovakia created the Whistleblower Protection Office. Its mission is to help people who report on unlawful activities both of civilians and politicians. The Office began operating in September 2021.

There has also been little progress in the area of media freedom and freedom of expression. There have been some legislative proposals to introduce criminal liability in some areas of freedom of expression, such as spreading disinformation, but none of these proposals have been voted on yet.

The Constitutional Court of the Slovak Republic has issued several ground-breaking decisions that further specified the powers and competencies of several branches of public authority. Significant interpretations of the constitution have been issued, which have had a positive effect on Slovakia's system of checks and balances.

By contrast, civil society was excluded from several significant political decisions in 2021, in particular decisions pertaining to reforming Slovakia's recovery and resilience plan.

The current Slovak human rights legislation is chaotic and fragmented due to repeated attempts to amend different parts of it. As a result, people are often unsure of where the

limits of their fundamental rights and freedoms are, especially with COVID-19 health and safety measures. This has led to public resistance to the current regulations.

### **State of play**

-  Justice system
-  Anti-corruption framework
-  Media environment and freedom of expression and of information
-  Checks and balances
-  Enabling framework for civil society
-  Systemic human rights issues

#### **Legend (versus 2020)**

Regression: 

No progress: 

Progress: 

## **Justice system**

### **Key recommendations**

- Reassessing the scope of power granted to the General Prosecutor of the Slovak Republic and reconsidering the model of the Slovak prosecution in its current state.
- Finalising the court map based on the current requirements of the judiciary.
- More consistent training for judicial appointees and an emphasis

on the ethical standard of the judiciary must be enforced.

## ***Judicial independence***

### ***Appointment and selection of judges, prosecutors and court presidents***

In September 2021, the president of the Judicial Council of the Slovak Republic announced the elections for the judge and additional judge of the General Court of the European Union. Eligible applicants were able to submit proposals for candidates until November 5. However, not a single proposal was received by this deadline. For this reason, the elections, which were originally scheduled for 2 December 2021, did not take place. This was the fourth election that had to be cancelled due to a lack of registration for either position.

### ***Independence and powers of the body tasked with safeguarding the independence of the judiciary***

Two new members of the Judicial Council of the Slovak Republic were appointed in 2021, one by the president and the other by the Judicial Council at the Regional Court in Banská Bystrica, both for five-year terms. The ratio for appointing members remains the same – nine members are appointed by the judges, three members are appointed by the government, three members are appointed by the National Council and three members are appointed by the president.

Last year, the meetings of the Judicial Council were also broadcast to the general public and the audio recordings were accessible to everyone, making the Judicial Council meetings more transparent.

### ***Accountability of judges and prosecutors, including the disciplinary regime, bodies and ethical rules, judicial immunity, and criminal liability of judges***

Act No. 432/2021 Coll. On the disciplinary rules of the Supreme Administrative Court of the Slovak Republic was approved in November 2021 (and came into effect on 1 December 2021). It entitles the newly created Supreme Administrative Court (operative since 1 August 2021) to take on disciplinary proceedings in cases of judges, prosecutors, notaries and bailiffs (until then, these types of disciplinary proceedings were conducted by the Supreme Court of the Slovak Republic and professional chambers). Accountability is enforced through the disciplinary chambers of the Supreme Administrative Court, which are composed of three judges from the court (one of whom is the chairman of the Senate) and two jurors from non-judicial backgrounds; either prosecutors, executors or notaries, or other persons from the legal field, depending on who is being disciplined. The term for issuing a disciplinary decision is usually three months, but can be up to six months, provided that the legal conditions are met.

The aim of the uniform legislation for reforming several legal professions was not only to replace the fragmented former system, but also to enhance capacity and flexibility to create

functioning disciplinary senates and improve the effectiveness of disciplinary proceedings concerning judges.

However, a problem concerning jurisdiction and competence arose when the proposal to initiate disciplinary proceedings against the Special Prosecutor of the Slovak Republic was filed by the General Prosecutor in August 2021. This was because, while the disciplinary proceedings against the Special Prosecutor were triggered when the Supreme administrative court was constitutionally competent for assessing them, it was not clear whether the disciplinary proposal had to be decided on the basis of existing law or postponed until the new disciplinary code for the Supreme administrative court had been approved by parliament.

According to a recent amendment to the constitution, the Supreme Administrative Court of the Slovak Republic became operative from 1 August 2021, and one of its responsibilities is to decide on cases concerning the disciplinary liability of judges and prosecutors. The manner of disciplinary proceedings was to be defined by the disciplinary rules of the Supreme Administrative Court, which were only approved in November 2021. Until then, the disciplinary liability of prosecutors was governed by the Act on Prosecutors, but the mandate of the disciplinary commission should have been passed onto the Supreme Administrative Court in August 2021. However, the disciplinary commission continued its operation into autumn. This situation was formally in conflict with the Constitution, since, at that time, the Supreme Administrative Court had been

granted jurisdiction. Practically speaking, the court could not decide on cases, even though it had the mandate to do so, because it was not able to define the disciplinary senates and rules until November. The disciplinary proceedings against the Special Prosecutor were also tinged with political tensions, since the General Prosecutor and the Special Prosecutor had had several misunderstandings, which limited the smooth operation of both offices during the second half of the 2021.

In a few cases, judges have been temporarily suspended by the Judicial Council for refusing to adhere to anti-epidemic measures against COVID-19 without legitimate reasons. These decisions were preceded by reprehension and the repeated imposition of disciplinary fines. One of the most common offenses was for judges to refuse to wear masks while presiding over hearings.

### *Independence/autonomy of the prosecution service*

The independence of both the General Prosecutor and the Special Prosecutor of the Slovak Republic may be brought to the question. Besides the aforementioned disciplinary case, the General Prosecutor officially visited the Russian General Prosecutor Igor Krasnov for the 300th anniversary of the Russian Prosecutor's Office, even though Krasnov is on the EU sanctions list for violating human rights. There is also a provision in the Slovak legal system that enables a general prosecutor to annul valid decisions made by a prosecutor or police officer, if that decision, or the actions preceding it, violated the law. The current

General Prosecutor applied this mandate in several politically delicate cases, placing the legal provision at the centre of public discussion.

It seems that the Special Prosecutor is still influenced by his history as a politician and an attorney, which becomes evident especially in his media communication.

In any case, when it comes to assessing the independence of the General Prosecutor and the Special Prosecutor, it seems that both would benefit from refraining from making references to each other in the media.

### ***Independence of the Bar and of lawyers***

Act No. 432/2021 Coll. On the disciplinary rules of the Supreme Administrative Court of the Slovak Republic excluded two professional chambers, the Chamber of Notaries and the Chamber of Bailiffs, from the power to decide on disciplinary offenses. Instead, this power was transferred to the Supreme Administrative Court on the grounds that these cases concern public professions (in contrast to attorneys, whose disciplinary offenses will continue to be decided by the Bar). This was not accepted positively by everyone, although it is a step towards greater independence of disciplinary proceedings, as representatives of several legal professions will be present in the disciplinary chambers.

## ***Quality of justice***

### ***Digitisation***

Preparations for a new business register, which would fully replace the existing one, is underway and expected to enter into force on 1 January 2023. The new interface presupposes electronic access to all public data in the commercial register, including the collection of documents (which is now only accessible on request) and more accessible online establishment of limited liability companies, as well as the possibility of simultaneous registration in the Commercial Register and notification about the commencement of business and translations.

### ***Use of assessment tools and standards***

Significant analytical activities are being carried out by the Analytics Centre of the Ministry of Justice, which is seeking to systematically collect, process, evaluate and supply the reliable data needed to make strategic decisions. Relevant data, collected and provided through functional information systems, are also used for reporting departmental and international statistics. The Centre helps with the evaluation of designated vacancies of judges in the courts, analysis of the length of proceedings and with the examination of external factors impacting the operation of the judiciary.

### ***Geographical distribution and number of courts/jurisdictions (“judicial map”) and their specialisation***

The Supreme Administrative Court of the Slovak Republic, a supreme judicial authority together with the Supreme Court, was formally established on 1 January 2021 and started operating on 1 August 2021. The main function of the court is to decide on cassation complaints against decisions of the regional courts. In some instances, it also acts as a first-instance judicial body and decides on remedies or other issues.

Currently, the court makes its decisions in chambers or in plenary sessions, but the law also presupposes the establishment of colleges.

The establishment of the court through the uniform judicial reform was also accompanied by the plans for a new judicial map. However, the current political establishment has still not agreed on its final form, and opinions on its future composition are divided. It is expected that the final version of the court map will be approved in the first quarter of 2022.

An updated methodology for determining the number of judges’ seats in district and regional courts was signed in March 2021. The methodology itself is based on the average estimated length of proceedings in Slovakia before the COVID-19 pandemic. Judges are assigned twice a year, in March and September. Additional judge vacancies are determined mainly for courts that are not in line with the national average of “disposition time” (an indicator established by CEPEJ which estimates

the timeframe for solving cases in the judicial system) and thus cannot cope with the volume of cases.

### ***Fairness and efficiency of the justice system***

#### ***Respect for fair trial standards including in the context of pre-trial detention***

In 2021, the question of the overuse of collusive detention in criminal proceedings was once again a topic of debate. The prerequisite for collusive detention is a reasonable suspicion that the offence in question was committed by the accused and that, cumulatively, his or her actions or other factors raise reasonable concerns that the accused might try to influence witnesses, experts or co-defendants, or otherwise obfuscate the facts relevant to the criminal prosecution. This becomes problematic when, in the next stages of the preparatory proceedings, the detention of the accused is relatively lengthy (often more than 12-18 months) and when there is no longer a need to hear witnesses who may be susceptible to collusion with the accused (because they have already been heard, for example). This does not apply to cases in which witnesses that have already been heard are also scheduled to testify in court proceedings, meaning that the collusive detention should continue. But again, no political consensus has been reached in this matter.

#### ***Quality and accessibility of court decisions***

There is still no open data source for judicial decisions run by the public authorities. All of

the greater and more complex databases are run by private individuals and are monetised.

## **Anti-corruption framework**

### **Framework to prevent corruption**

#### **Measures in place to ensure whistleblower protection and encourage reporting of corruption**

The Whistleblower Protection Office finally began operating on 1 September 2021 (it was established with the adoption of Act no. 54/2019 Coll.). Its main mission is to provide legal advice and assistance to people who report on unlawful acts that have a negative social impact. Formally, anti-social activities are understood as all crimes, offenses, administrative offenses, and other actions that negatively impact society. Informally, the office primarily supports citizens who expose corrupt practices and promotes the protection of whistleblowers.

## **Media environment and freedom of expression and of information**

### **Public trust in media**

The most comprehensive study on media trust in Slovakia for 2021 was conducted by Reuters Institute for the Study of Journalism.<sup>1</sup> Based on this, only 30% of respondents trust the news overall, 42% trust the news they use, 29% trust the news they search for and only 16% trust news on social media. The highest scoring news outlet in terms of trust was the Slovak private news television broadcaster TA3 (65%), followed closely by the national public broadcaster RTVS (63%). Third place was shared by both the internet news portal Aktuality.sk (55%) and print and virtual economic news publisher Hospodárske noviny (55%).

### **Freedom of expression and of information**

#### **Laws regulating freedom of expression**

In November 2021, an amendment to the Criminal Code was submitted by the Ministry of Justice of the Slovak Republic, which included a new form of offence, the dissemination of false information. The proposal has been widely criticised by the legal community, media and general public as such. It has raised

<sup>1</sup> <https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2021/slovakia>

concerns among many about whether the dissemination of any politically sensitive information could be prosecuted, or even if such information is at risk of censorship.

### **Access to information**

In Slovakia, access to information is regulated by Act no. 211 / 2000 Coll. On Free Access to Information, which largely implements the regulations of the Directive (EU) 2019/1024 on open data and the reuse of public sector information. Shortcomings are mainly the result of the practice of the public authorities. In November 2021, our organisation, together with two other NGOs, proposed improvements during the inter-ministerial comment procedure regarding the latest amendment to the Act. These suggestions directly reflected the practical issues that arose from our activities within the area of free access to information. The evaluation of the comment procedure will take place sometime in February 2022. However, our comments have not yet found political support.

### **Legislation and practices on fighting disinformation**

There have been increased initiatives by the public authorities to combat misinformation, as demonstrated by the activities of the Ministry of Health and the Police of the Slovak Republic. This includes efforts to help in the fight against commonly spread hoaxes on social media by debunking them and communicating fact-checked data and information, as the Ministry of Health does in

relation to disinformation on the COVID-19 pandemic.

## **Checks and balances**

### **Process for preparing and enacting laws**

#### **Regime for constitutional review of laws**

In 2021, the opposition initiated a petition for a referendum to recall the current government and trigger early elections. The petition gathered over 585,000 signatures. In an interesting clash of powers, the President of the Slovak Republic filed a submission to the Constitutional Court concerning the constitutionality of the referendum on early elections.

The case brought before the Constitutional Court was unprecedented in two ways. First, the Constitution does not fully outline the rules on holding referendums, and second, case law on this issue is not consistent.

After the assessment, the Constitutional Court decided in a plenary session that the referendum on early elections was not in accordance with the constitution. It was not possible to appeal against the decision, making it final. This ruling also covers future attempts at holding referendums to shorten parliamentary terms. However, the Constitutional Court also indicated that a referendum on early elections would be possible after a corresponding change to the Constitution.

### *General transparency in decision making*

The selection procedures for all supreme positions in government management needs to be more transparent, and the practice of ministers appointing people to these positions without a transparent selection process must be put to an end.

## **Enabling framework for civil society** ↓

### Key recommendations

- Civil society must be more involved in the decision-making process.
- There must be increased financial support for the non-governmental sector.
- Misinformation about the non-governmental sector needs to be curbed as much as possible.

### Regulatory framework

#### *Access to and participation in the decision-making processes*

Negotiations concerning civic society's participation in the development and implementation of Slovakia's recovery and resilience plan took place in 2021. Unfortunately, it was largely unsuccessful for civil society. Since a large

spectrum of representatives from different sectors was omitted from pre- and post-consultation, in the end public participation was more of a formality than a genuine contribution. We discussed the hapless situation with the government several times, but unfortunately we were unsuccessful.

### *Financing framework*

The financing of the civic sector, especially in the field of culture, appears to be insufficient, as both the Ministry of Culture and individual funds to support the arts finance projects in the form of a de minimis scheme. There needs to be a change in the understanding of the use and disbursement of state funding for non-governmental organizations, as currently the minimum threshold to access funding under the de minimis scheme is inadequate for achieving an effective financing of cultural activities and projects.

## **Disregard of human rights obligations and other systemic issues affecting the rule of law framework** ↓

### Key recommendations

- Current rules should be backed by clearer reasoning and communication to ensure their stability.

- The set powers and competencies of individual public authorities must not be exceeded.
- Judicial review must be available when it comes to measures significantly affecting rights and freedoms.

hand, the court did not restrict the power of the Ministry of Health and the Public Health Office to order domestic isolation, which the court did not view as a restriction of personal freedom. It ruled that the issuing of invoices for the state-enforced quarantine period was in accordance with the Constitution, but that the state had an obligation to reimburse the incurred costs.

### ***Compliance of measures taken to address COVID-19 with fundamental rights and rule of law***

Back in 2020, the Public Defender of Rights of the Slovak Republic filed a complaint to the Constitutional Court concerning violations of fundamental rights and freedoms during the ongoing COVID-19 pandemic. The submission concerned the issue of deprivation of personal liberty of people from other countries, who were compulsorily placed into state quarantine during the first wave of the pandemic. The ombudsperson also objected to the issuing of invoices for this compulsory state quarantine (which seemed irrationally high) and questioned the unclear capabilities of the Public Health Office and the Ministry of Health of the Slovak Republic to deal with the COVID-19 pandemic.

The Constitutional Court largely confirmed the ombudsperson's claims as regards the state-enforced quarantine. The court concluded that it represented an unacceptable interference with personal freedom and that the scope of the restriction of fundamental rights is not clearly defined in Slovak law. On the other

# **LIBERTIES RULE OF LAW REPORT 2022**

**SLOVENIA**



CIVIL  
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EUROPE

# Slovenia

## About the authors



### The Peace Institute – Institute for Contemporary Social and Political Studies

is an independent, non-profit research institution founded in 1991 in Ljubljana, Slovenia, by individuals who believed in peaceful conflict resolution, equality and respect for human rights standards. The Peace Institute (PI) uses scientific research and activism aimed at creating and preserving a society capable of critical thought and based on the principles of equality, responsibility, solidarity, human rights and the rule of law.

The Institute develops interdisciplinary research, educational, advocacy and awareness-raising activities in four thematic fields: human rights and minorities, politics, media, and gender. Acting as a research and civil society organisation, it focuses mainly on Slovenia, but it is also participating in numerous cross-border collaborative actions and comparative research on EU level and in the region of South East Europe. The PI acts against discrimination, as an ally of vulnerable groups and in partnership with them. It has carried out projects in support and advancement of the rights of children, women, victims of crimes, defendants in criminal proceedings,

Roma communities, “erased people”, refugees and migrants, stateless people, LGBT communities, journalists and others.

## Key concerns

Challenges affecting media are a persisting concern affecting the national rule of law framework. There is a continuing hostile environment for journalists in Slovenia incited by the actions and rhetoric of the government, particularly the ruling party and Prime Minister Janez Janša. Online harassment and smear campaigns are routinely directed against critical journalists and media, and the misuse of legal instruments to intimidate journalists is also becoming a common practice. Public service media, particularly the Slovenian Press Agency (STA), but also RTV Slovenija, have been the main targets of government pressure. STA was left without monthly payments of their public service operations from the Government Office for Communication (UKOM) for almost the entire year. The national online platform for reporting attacks on journalists and media registered more than 30 attacks in 2021, including physical attacks, threats and harassment. The media and telecommunication operations distributing TV programs within the state-owned Telekom Slovenije have also been misused for promoting the interests of the ruling party.

Like in 2020, the government often did not respect the relevant national provisions concerning the duration of public consultations in the process of adopting laws and regulations, thus preventing effective public participation in law and decision-making and negatively affecting the checks and balances system. In addition, the Human Rights Ombudsman established in 2021 violations by the Ministry of the Environment and Spatial Planning of the right to participation in public affairs on at least two occasions.

The year 2021 saw various attempts by the government and the ruling party to hamper the work of civil society organisations and restrict civic space. These included attempts to limit the exercise of the right to peaceful assembly and to protests and to restrict access to funding for NGOs. While such attempts were not necessarily always successful, they reflect a persistently hostile attitude of the government towards activists and civil society organisations, which are increasingly the object of misinformation and smear campaigns.

Systemic human rights violations of rights of migrants and asylum seekers also undermine the rule of law framework in Slovenia. Pushbacks of asylum seekers to Croatia are leading to a serious risk of people being subjected to torture and inhuman treatment. In 2021, only 19 people were granted international protection in Slovenia. The discrepancy in the number of irregular crossings and the number of people that actually apply for international protection, together with reports on documented pushbacks, indicate a systemic lack of screening and identification mechanisms. The

situation of statelessness of persons illegally erased from the register of permanent residents of the Republic of Slovenia 30 years ago also remains unresolved, with more than half of the concerned persons left without any form of redress.

Against this background, civil society organisations and other non-governmental actors have been invested in initiatives aimed at increasing public participation, assisting people in the enforcement of their rights and supporting and protecting public watchdogs, with a view to strengthen the rule of law framework and foster a culture of rights.

### ***State of play***

- N/A Justice system
- N/A Anti-corruption framework
- 🔴 Media environment and freedom of expression and of information
- 🟡 Checks and balances
- 🔴 Enabling framework for civil society
- 🟡 Systemic human rights issues

#### ***Legend (versus 2020)***

- Regression: 🔴
- No progress: 🟡
- Progress: 🟢

## **Media environment and freedom of expression and of information** ⬇️

### **Key recommendations**

- Protecting public service media from government pressure and interference by countering such practices by various means (including legal), but also by changing the media legislation to introduce better safeguards (particularly related to the appointment and composition of the governing bodies at RTV Slovenija).
- Introducing sanctions for the government representatives involved in unlawful obstruction of financing of STA for almost all of 2021.
- Independent bodies (such as the Court of audit) and law enforcement to investigate investments, sales and all other elements of media-related business of the state-owned Telekom Slovenije, and to introduce sanctions for those involved in misuse of the company for political interests.
- Revision of the media legislation related to state subsidies to media to introduce better safeguards against

political misuse of the subsidy schemes.

- Establishing clear criteria and increasing transparency of state advertising in the media (by state bodies, local governments and public companies) in the revised media legislation.

### **Media and telecommunications authorities and bodies**

The legal framework for independence and enforcement powers of the media and telecommunication authority mostly remains the same as in 2020. **Changes to the Audiovisual Media Services Act were adopted by the Parliament**, in December 2021, transposing the Audiovisual Media Services Directive, **but the new law does not contain the provision on independence of the regulatory authority**,<sup>1</sup> despite such requirement being included in the Directive. As a result, the Directive has not been transposed entirely, with the national law failing to transpose a key provision introduced in the Directive with the purpose to increase legal safeguards for the national regulatory authority's independence.

The main media regulatory authority in Slovenia, the Agency for Communication Networks and Services (AKOS), serves as an independent regulatory body for several sectors, including telecommunications, postal services, railway traffic as well as radio and

1 The amended Audiovisual Media Services Act is available (in Slovenian language) [here](#).

television. It is a body functionally separate from the government. For years, one of the main threats to independence of the regulator has been connected to the appointment of the Director – the highest (individual) decision-making body in the Agency – which is under direct control of the government. The collective body introduced in the form of the Agency’s Council as a body supervising the work of the Agency in terms of annual plans and reports, which can also propose the Director’s dismissal, is equally appointed by the government. One of the main instruments of independence of the regulator is its financing system, which is based on collection of spectrum fees, license fees, etc.

In 2020, the government proposed to merge eight regulatory agencies (including AKOS) in two super-agencies, with the alleged intention to streamline public administration. Such law, which would have created additional risks to the Agency’s independence, was rejected by the Parliament in April 2021.<sup>2</sup>

The enforcement powers of the agency include warnings and fines. The prevailing attitude of AKOS, as the regulatory authority in the field of radio and television, has been over the past years to remain highly invisible and passive in terms of using the existing regulation and powers to challenge controversial practices.

This, however, has slightly changed in 2021, in particular following a **complaint submitted to the authority by the Peace Institute in relation to hate speech in a television program**. After a more than 6-month procedure, the AKOS rendered in June 2021, for the first time, a decision declaring the violation of content regulation rules (Audiovisual Media Services Act) regarding incitement to hatred. This can be considered a positive development.<sup>3</sup>

This prevailing passive and largely invisible attitude towards the enforcement of media regulations can be partly attributed to the lack of sufficient resources and capacity of AKOS, due to shortages of staff in the departments related to implementation of media regulation. As we highlighted in our previous submissions to Liberties’ Rule of Law Report, such an approach also reflects a lack of ambition to build strong capacities, take stronger positions, systematically challenge the controversial practices and gain public reputation in this field, and this seems to be connected with the internal policy of the Agency leadership to keep low profile in the politically sensitive field of media regulation.

In addition to AKOS, there is a “media inspector” in the system of regulation of media in Slovenia, integrated in the Inspectorate for Culture and Media, a body within the

2 For more information see: <https://www.delo.si/novice/slovenija/poslanci-zavrnilo-vladni-nacrt-o-zdruzitvi-regulatorjev/>.

3 For more information see: <https://www.mirovni-institut.si/akos-zakljucil-postopek-glede-sovraznega-govora-v-oddaji-faktor-na-tv3/> and <https://www.sta.si/2920172/akos-tv3-mora-v-televizijskem-programu-prenehati-spodbujati-rasno-noonakopravnost>.

Ministry of Culture. This inspector handles complaints related to certain provisions in the media regulation in compliance with the Inspections Act, the Minor Offences Act and the General Administrative Procedure Act.

A long-established self-regulatory body called Journalists' Court of Honour<sup>4</sup> operates within the Slovenian Association of Journalists and enjoys a good reputation. The body is composed of representatives of journalists and the public. It handles complaints and takes decisions based on the Code of Ethics, which are publicly announced on regular basis. The self-regulatory body is co-founded by the Slovenian Association of Journalists and the Slovenian Union of Journalists and appointed by their representative bodies.

The Ombudsman of public media RTV Slovenija<sup>5</sup> is also very operational and reputable. The Ombudsman handled more than 2,300 complaints in 2021, rendering decisions based on Professional Standards and other self-regulatory documents of RTV Slovenija. The Ombudsman is appointed by the governing body of RTV Slovenija – Programming Council – for a mandate of five years, and its independence is guaranteed by internal rules.

In late 2021, the Programming Council, composed predominantly by pro-government members (appointed by the Parliament), did not re-confirm the mandate of the previous, highly professional and active Ombudsman, but rather appointed a new person for the position, with no experience or professional reputation, but supportive of the government.<sup>6</sup>

### *Pluralism and concentration*

The level of **media market concentration is high**. Media group Pro Plus, with television programmes, VOD and online media,<sup>7</sup> dominates the market, but there are also dominant media groups in print and radio.

**Section 9 of the Mass Media Act regulates the protection of media pluralism and diversity**, including provisions on restrictions on ownership, concentration and associated persons. It also includes restrictions relating to incompatibility in the performance of radio and television activities, incompatibility in the performance of advertising activities and radio and television activities, and incompatibility in the performance of telecommunications activities and radio and television activities.<sup>8</sup> The act also clearly states that publishers

4 For more information see: <https://razsodisce.org/>.

5 For more information see: <https://www.rtvlo.si/varuh>.

6 For more information see: <https://vezjak.com/2021/12/07/skoraj-zrusili-baskovica-nastavili-svojo-varuhinjo/>.

7 For more information see: <https://pro-plus.si/eng.html>.

8 For more information see: <https://rm.coe.int/iris-special-1-2020en-media-pluralism-and-competition-issues/1680a08455>.

and operators fall under the regulations of competition protection. The procedures of authorities, competent for competition protection, referring to the concentration of media publishers and operators involve the Ministry for Culture, while those referring to the publishers of radio and television programs involve the Agency for Communication Networks and Services of the Republic of Slovenia. The act provides numerous mechanisms enabling the state to prevent illicit concentration while simultaneously including mechanisms allowing for proactive measures to finance content in the public's interest (through subsidies). The responsibility for media pluralism protection is de facto distributed among various agents participating in the procedures, meaning that regularly the accountability for decision-making is avoided by all involved.<sup>9</sup> However, **the implementation of the rules safeguarding pluralistic media market has been deficient.**

Despite the incompatibility in the performance of telecommunications activities and radio and television activities, specified in the law, Telekom Slovenije, a state-owned telecommunication operator, owned, between 2012 and 2021, a television channel. There are also private telecommunication operators with television channels in their portfolio. There have been some vague provisions in the Mass

Media Act used as a justification for regulators not to act against such practices.

**Media ownership of Telekom Slovenije**, a state-owned company, in which the key personnel has been appointed, in 2020 and 2021, to reflect interests of the ruling party SDS, was partly sold in 2020. Its television channel was acquired by a Hungarian owner close to the ruling party in Hungary, an ally of the Slovenian ruling party. The programming content and editorial policy has changed accordingly. In 2021, Telekom Slovenije suspended the intended sale of the remaining media operations (in its subsidiary TS Media). According to media reports,<sup>10</sup> the Hungarians were also in play for TS Media, in addition to United Media, the media division of United Group. The latter owns the Slovenian mobile operator Telemach and is setting up a news portal under the N1 brand. The investigative news portal Necenzurirano recently reported, based on unofficial information, that United Group had the most favourable bid, of EUR 5 million, which was more than EUR 3 million more than had been offered by TV2 Media from Hungary.<sup>11</sup>

**Telekom Slovenije**, as a telecommunication/cable operator, in 2021 **prioritised in their scheme of the distributed television**

9 Ibid.

10 For more information see: <https://www.investslovenia.org/news-and-media/business-news/telekom-slovenije-suspends-sale-of-ts-media>.

11 For more information see: <https://necenzurirano.si/clanek/aktualno/drzavni-telekom-se-brani-milijonov-ki-niso-madzarski-873203>.

**programs two televisions channels co-owned by the ruling party associates (Nova24 TV)**, placing them from earlier place 20 in the programming scheme to near the starting positions, while the most popular televisions channels of Pro Plus (POP TV and Kanal A) were pushed back to place 11 and 12.<sup>12</sup> This change by Telekom Slovenije has been seen by experts and reporters as an act not justified by any objective criteria, since Nova24 TV channels have neither significant audience nor quality programming of general interest to be given such prominence. Such a move should be rather understood as a promotion of the pro-government propaganda channels and a punishment for Pro Plus channels for providing critical, professional reporting. The multi-year contract between Pro Plus and Telekom Slovenije regarding distribution of their programs will expire soon, and some media reported about the possibility that Telekom Slovenije could entirely exclude Pro Plus television channels from their offer and not sign the new contract.<sup>13</sup>

Independent media also revealed that **Telekom Slovenije** has been **paying**, in 2020 and 2021, excessive **monthly fees for the distribution of**

**the television channel Nova24 TV – owned by ruling party associates and the Hungarian co-owners.** When accounting for their reach and fees paid by other operators, amounts paid by state-owned Telekom Slovenije do not seem economically justified. This way, state-owned telecommunication company has been seemingly sustaining financially the television operations of the ruling party.<sup>14</sup>

In 2021, the government proposed a 6% levy on audiovisual media service providers, to be paid from their gross annual revenue, to finance a special fund for European audiovisual production. While this was approved in the first parliamentary procedure, it was eventually excluded from the final version of the Audiovisual Media Services Act. The government's proposal was seen as a **tool of the government to influence the media market by introducing financial burdens which would most significantly affect the market leader Pro Plus and their most popular television channels, which produce independent news and analyses.**<sup>15</sup>

In 2021, the annual state aid scheme, which provides **direct subsidies to media for their**

12 For more information see: <https://www.zurnal24.si/slovenija/tako-telekom-pojasnjuje-zakaj-so-novo24-dvignili-med-prve-kanale-367950>.

13 For more information see: <https://n1info.si/novice/slovenija/bi-lahko-telekom-izlocil-pop-tv-in-kanal-a-iz-osnovne-programske-sheme/>.

14 For more information see: <https://necenzurirano.si/clanek/preiskovalne-zgodbe/novo-darilo-drzavnega-telekoma-televiziji-sds-931387>.

15 For more information see: <https://n1info.si/novice/gospodarstvo/nova-vladna-gorjaca-za-medi-je-pod-krinko-bruseljske-direktive/>.

**projects of content production, was used by the Ministry of Culture to finance mainly projects of the pro-government media,** including those spreading hate speech and smear campaigns, while numerous professional media, including two daily newspapers and investigative outlets, but also radio stations with status of public interest media such as Radio Student, were rejected.<sup>16</sup>

### ***Transparency of media ownership***

As we highlighted in last year's country submission to Liberties' Rule of Law Report, there are no specific obligations of the state bodies or media to report on allocation of state advertising in order to provide transparency and safeguards against political interference.

As an instrument of transparency of transactions from the state budget, there is an online database ("Erar")<sup>17</sup> updated regularly with data on all transactions from the state budget. This allows a search of state bodies and recipients to obtain certain data on transactions between state bodies and media. The system is conceived in such way that, if the advertising agencies are recipients of funds from state bodies, the media as final beneficiary of the advertisement revenues are not listed in the

database as recipient of subsidies from the state budget.

For a long period, there have been indications that various governments in Slovenia have influenced distribution of advertisements from state bodies and public companies to the media by engaging as an intermediary particular advertising agencies owned by businessmen close to the political grouping in power.<sup>18</sup> This has been done with the intention to channel the advertising funds to media close to that specific political grouping.

There is growing concern over the political instrumentalisation of state advertising – an issue which we already raised in last year's country submission to Liberties' Rule of Law Report. The ruling party, SDS, co-owns a number of media where advertisements of government bodies and publicly owned companies are disseminated without proper economic justification. This has also led to **public funds being used for funding hate speech and propaganda.** Research carried out in 2020 and 2021 by an independent journalist and researcher drew attention to how advertisements of state bodies and public companies disseminated by media affiliated to the ruling party are regularly spreading hate speech and smear campaigns against individuals and

16 <https://insajder.com/slovenija/drzavni-denar-za-provladne-medije-na-ministrstvu-za-kulturo-zavracajo-ocit-ke-razdelitev>

17 The online tool for following state budget transactions is available at: <https://erar.si/>.

18 For more information see: [http://mediawatch.mirovni-institut.si/eng/you\\_call\\_this\\_a\\_media\\_market.pdf](http://mediawatch.mirovni-institut.si/eng/you_call_this_a_media_market.pdf).

organisations critical to the government or the ruling party.<sup>19</sup>

There are provisions in the Mass Media Act obliging the media outlets to report media ownership above 5 percent in the Media Register administered by the Ministry of Culture, and also to annually publish the data on ownership and updates on the ownership changes in the Official Gazette. However, the register is not accurate, and the beneficiary owners are often hidden, as exposed by journalistic investigations.<sup>20</sup>

### **Public service media**

Public service media, particularly STA, but also RTV Slovenija, have been the main targets of government pressure and harassment since the new government took power in March 2020. The situation worsened in 2021.

**National press agency STA was left without monthly payments** of their public service operations from the Government Office for Communication (UKOM) **for almost the entire year** (the STA's business plan envisaged EUR 169,000 in monthly costs for public service). The government office was adducing

various false arguments for delaying the payments, and conditioning it with requirements harmful for editorial independence and for the established sustainability model of the agency. The STA director was forced by such circumstances to resign. The agency brought a lawsuit against the government office for not respecting the legal obligations to pay invoices for STA's public service, the outcome of which was expected in late 2021. Meanwhile, the new director of STA agreed to sign a new contract with UKOM, which paid the invoices, and as a result the lawsuit was dismissed. However, the Slovenian Association of Journalists and the STA staff warned that certain solutions in the new contract could indirectly affect the editorial autonomy and negatively affect the agency's finances, especially if these were permanent changes to the agency's business model. The staff also warned that the STA had paid a very high price for the one-year financial exhaustion: *"A number of excellent staff have left us, the agony has compromised the quality of the agency's service to the public, halted a number of development projects and, last but not least, has left us psychologically exhausted."*<sup>21</sup>

On a positive note, while the government tried to achieve the financial exhaustion of

19 See sources in English by Domen Savič, an independent journalist and researcher: 1) <https://eu.boell.org/en/2021/06/07/publicly-funded-hate-slovenia-blueprint-disaster> and 2) [https://eu.boell.org/sites/default/files/2021-07/Spreading\\_propaganda\\_Slovenia\\_Domen\\_Savi%C4%8D\\_FINAL.pdf?dimension1=democracy](https://eu.boell.org/sites/default/files/2021-07/Spreading_propaganda_Slovenia_Domen_Savi%C4%8D_FINAL.pdf?dimension1=democracy). See also 3) a series of his reports and analyses in Slovenian language in the project »Viewership of the Hate in Slovenia« (Gledanost sovraštva v Sloveniji) at <https://www.dsavic.net/>.

20 For more information see: <https://podcrto.si/oznaka/medijsko-lastnistvo/>.

21 For more information see: <http://agency.sta.si/2963975/sta-signs-deal-on-public-service-with-ukom-valid-until-end-of-the-year>.

STA, threatening to collapse the public media service, the crowdfunding campaign “zaobS-TAnek” was organised twice by the Slovenian Association of Journalists. Supported by many media and civil society organisations, the campaign managed to collect from citizens and organisations more than 385,000 EUR. This significantly contributed to saving STA from bankruptcy and offered moral support to STA journalists and other workers, which helped them sustain the pressure.

Simultaneously, at the public service broadcaster RTV Slovenija, **the key personnel in the governing bodies (Programming Council<sup>22</sup> and Supervisory Council) and management was changed (Director General and Director of TV Slovenia, with the exception of Radio Slovenia) to align management with the interests and preferences of the government and the coalition parties.** This happened in parallel with the appointment of a new pro-government ombudsman, as mentioned above. The new management introduced changes in the TV news program at the start of 2022, provoking a protest by more than 100 journalists at TV Slovenia newsroom that was also reflected in the resignations of news editor and sub-editors. The new editorial team, mostly aligned with the political profile of the government, was appointed in late 2021. It is to be noted that RTV Slovenija is the biggest media organisation in the country: at RTV Slovenija,

there are more than 2,200 employees and the annual budget is around 125 million EUR (while, by means of comparison, at STA there are fewer than 100 employees and the annual budget is around 4 million EUR).

While the government financial pressure cannot be exerted on RTV Slovenija to such extent as it is the case with STA, since RTV Slovenija is mostly financed by license fee paid by households, such pressure still exists. **The increase of license fee depends on the government** and the parliament, and has not been adjusted for years, causing problems of financial sustainability for RTV Slovenija. The current ruling party has been clearly advocating not only against increase of the license fee but also some leading representatives of the ruling party have been inviting citizens not to pay license fee at all.

Both public service media, STA and RTV Slovenija, managed, in 2021, to preserve their professional standards to a high degree. Numerous cases of potential violations of professional standards at RTV Slovenija were challenged in complaints submitted to the Ombudswoman, and some of them resulted with her calls for more professional debate inside newsrooms, for improved professional conduct and editorial decisions.<sup>23</sup>

22 For more information see: <https://n1info.si/novice/slovenija/sds-si-v-programskem-svetu-rtvs-zeli-jozefa-jerovska/>.

23 Monthly reports of RTV Slovenija Ombudsman for 2021 are available in Slovenian language at <https://www.rtv slo.si/varuh/dokumenti/33/7296>.

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## Online media

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Online media (“electronic publications”) in Slovenia are subject to the requirement of registering in the media register administered by the Ministry of Culture, ever since the Mass Media Act was adopted in 2001.<sup>24</sup> The registration is a condition for starting dissemination of programming content for any media in Slovenia. The requirement has not been misused for exerting pressure or restrictions by the government so far.

Among the five most visited online media news sites in Slovenia, according to the MOSS measurement tool,<sup>25</sup> four are of a commercial nature (with adequate financing patterns), and one is established by the public service broadcaster RTV Slovenija (financed predominantly by licensing fees paid by households, but also acquiring part of the budget from advertising). Among the four commercial online media, the most visited one is published by the dominant media group Pro Plus and the second most visited by a subsidiary of the state-owned company Telekom Slovenije.

Investigative online media, such as Pod črto and Oštro, are financed by donor support to their projects and by individual donations of their supporters. On the contrary, the investigative online portal Necenzurirano is mainly financed from commercial sources. All of them have been a target of attacks, hostility

and harassment by the government parties’ representatives and their propaganda tools.

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## Public trust in media

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There have been systematic hostility and antagonism by Prime Minister Janez Janša and the ruling SDS party towards professional media and journalists in Slovenia. This has a detrimental impact in terms of public trust in media and leads to a significant level of polarisation of the public debate.

According to the report on an opinion poll of the Valicon agency that measured public trust in institutions and professions, respectively, and was released in March 2021, the trust in public service broadcaster RTV Slovenija increased in comparison to the previous year, but is still slightly “negative” according to the measurement methodology (i.e., there are more respondents who do not have trust in an institution or tend not to have trust, compared to those respondents who do trust very much or tend to trust an institution).

Among institutions, **RTV Slovenija came in 9th among 23 institutions**, one place above the European Commission, which was also included in the survey, while the media in general are positioned in 18th place. While this represents a slight decrease in comparison with 2020, public trust in both RTV Slovenija and media in general is substantially higher in 2021 in comparison with 2019 (a year prior to

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24 For more information see: [https://www.rtvsl.si/files/razno/mass\\_media\\_act.pdf](https://www.rtvsl.si/files/razno/mass_media_act.pdf).

25 For more information see: <https://www.moss-soz.si/rezultati/>.

the COVID-19 epidemic and the mandate of the current government).<sup>26</sup>

Findings on the public trust in professions show journalists positioned in 15th place among 24 professions. The level of trust in journalists slightly decreased in comparison with 2020, but is significantly higher than in 2019.<sup>27</sup>

### ***Safety and protection of journalists and other media activists***

There is a continuing hostile environment for journalists in Slovenia incited by the actions and rhetoric of the government, particularly the ruling party and Prime Minister Janez Janša.

Online harassment and smear campaigns are routinely used against critical journalists and media. Such attacks have also been directed at **public service media STA and RTV Slovenija and their journalists and (previous) managers, which were the targets of smear campaigns and online harassment** by the ruling party representatives and supporters,

particularly online in the party's propaganda communication channels.<sup>28</sup>

The misuse of legal instruments to intimidate journalists is also on the rise, including through Strategic Lawsuits Against Public Participation (SLAPPs). Actions brought against Necenzurirano, an investigative portal systematically reporting about the misuse of power and financial misconduct of the ruling party, are an emblematic example. The 39 abusive lawsuits brought by Rok Snežič, a tax expert close to the Prime Minister, against three journalists of Necenzurirano **continued in 2021**, exerting continued pressure and severely affecting the human and financial resources of the investigative media outlet. In addition to that, Mr. Snežič submitted, in 2021, **false criminal charges to police and tax authorities against Necenzurirano**.<sup>29</sup>

In 2021, the Slovenian Association of Journalists – following their report on attacks on journalists, released in December 2020<sup>30</sup> – established an **online platform “Report Attack” for reporting attacks on media and journalists, registering 33 attacks by January 2022**.<sup>31</sup> These include several systemic measures threatening freedom and safety of

26 For more information see: <https://www.valicon.net/sl/2021/03/valicon-ogledalo-slovenije-marec-2021-ii/>.

27 Ibid.

28 For more information see: <https://www.politico.eu/article/slovenia-war-on-media-janez-jansa/>.

29 For more information see: <https://necenzurirano.si/clanek/aktualno/kako-nas-zelijo-snezic-in-prijatelji-uniciti-919562>

30 For more information see: [https://novinar.com/wp-content/uploads/2021/01/Zakljucno-porocilo\\_Spremljanje\\_napadov2.pdf](https://novinar.com/wp-content/uploads/2021/01/Zakljucno-porocilo_Spremljanje_napadov2.pdf).

31 For more information see: <https://novinar.com/prijavi-napad/>.

journalists, as well as physical attacks. Among the most concerning incidents recorded, it is worth mentioning:

- Violence targeting TV cameramen and reporters perpetrated by demonstrators protesting against COVID-19 containment measures and the vaccination campaign. RTV Slovenija in particular was targeted by demonstrators which protested in front of RTV Slovenija headquarters for four months, storming the headquarters on 3 September 2021, and demanding air time to present their truth to the public, until the police intervened and removed the protesters from the newsroom studio.<sup>32</sup>
- Death threats and a smear campaign against a reporter publishing a story about neo-Nazi groups and their connections to the ruling party
- Use of tear gas by police against a veteran photographer during protests
- Legal actions against media or journalists by government institutions or politicians, including: criminal proceedings launched by the Government Office for Development and Cohesion Policy against the weekly magazine Mladina after it made

public a draft plan for recovery and resilience from the epidemic; a lawsuit filed by a member of parliament against the then editor-in-chief of the TV Slovenia news program, Manica J. Ambrožič, because his party, the Slovenian National Party-SNS, was not invited to the talk show Conversation with the opposition

- verbal attacks and threats to journalists and editors of RTV Slovenija, including discrediting messages by Prime Minister, but also verbal attacks on journalists of private media (such as Delo, POP TV, N1 etc.)

**Self-censorship** continues to be practiced among journalists under attack, particularly on local level, as it is emphasized in the monitoring report on attacks on journalists “From physical violence and threats, to defamations, online harassment and systemic pressures”, published in December 2020 by the Slovenian Association of Journalists.<sup>33</sup> Journalists exposed to online attacks and harassment react also by closing their social media accounts and retreating from online communication to protect own safety and mental health. Women journalists are particularly harassed.<sup>34</sup>

32 For more information see: <https://www.total-slovenia-news.com/politics/8837-anti-vaccine-protesters-break-into-rtv-slovenija-hq> and <https://europeanjournalists.org/blog/2021/09/06/slovenia-mfrr-calls-for-a-firm-response-after-storming-of-public-broadcaster-rtv/>.

33 For more information see: [https://novinar.com/wp-content/uploads/2021/01/Zakljucno-porocilo\\_Spremljanje\\_napadov2.pdf](https://novinar.com/wp-content/uploads/2021/01/Zakljucno-porocilo_Spremljanje_napadov2.pdf).

34 Ibid.

**The protection of whistleblowers is not ensured** in Slovenia. The EU directive has not been transposed yet. Such delays have been criticized by non-governmental organisations and by the Commission for the Prevention of Corruption.<sup>35</sup> The draft law was released by the Ministry of Justice for public discussion for a short time in late December 2021. The non-governmental organisations see **the draft law as insufficient for protecting whistleblowers**.<sup>36</sup> In 2021, the **Center the Protection of Whistleblowers was established** as a new non-governmental organisation in Slovenia. Among the founders is Ivan Gale, a whistleblower who disclosed alleged misconduct in purchasing protective equipment at the beginning of the epidemic, involving reportedly corrupt actions and relations of government representatives. In 2021, the Center reported that 10 people requested their protection and support.<sup>37</sup>

## ***Freedom of expression and of information***

### ***Access to public interest information***

Access to information of public interest (freedom of information) is provided for by law, with the Information Commissioner playing the role of an appeal body, and often being a last resort for journalists to make sure that

the right to access and disclose public interest information is effectively protected.

### ***Restrictions on freedom of expression***

Freedom of expression has been under threat not only because of the hostile environment and attacks affecting media and journalists, as illustrated above, but also because of the restrictions imposed on the right to assembly and to protest. This has been the case since the start of regular peaceful protests, which have been continuously held on a weekly basis since April 2020. The report elaborates more on this issue in the section on civic space.

In 2021, the government proposed an amendment to the Protection of Public Order and Peace Act, according to which a person “arguing with, shouting at or behaving indecently towards a public official who is conducting their official duties, or to a high-level representative of the state, MP, member of the National Council or the government, a Constitutional Court or Supreme Court judge, or their family members” could face a fine of up to €1,000. When introducing the amendment, the government stated that “threats against MPs and other senior representatives of the state have intensified lately”. The amendment followed several incidents when COVID-19 vaccine opponents verbally attacked MPs, and, most

35 For more information see: <https://www.rtvsllo.si/slovenija/zakaj-je-slovenija-zavrila-vecjo-pravno-zascito-zvizgacev-ki-jo-je-zapovedal-eu/604288>

36 For more information see: <https://www.dnevnik.si/1042980974>.

37 For more information see: <https://www.rtvsllo.si/slovenija/zakaj-je-slovenija-zavrila-vecjo-pravno-zascito-zvizgacev-ki-jo-je-zapovedal-eu/604288>.

prominently, an incident when anti-government protesters confronted PM Janša at a mountain hut and harshly criticised him.<sup>38</sup> The new legislation would have allowed fines to be handed out on the spot if the authorities detect such behaviour.<sup>39</sup> The government's proposal raised concerns for freedom of expression, and was seen as another attempt to restrict ongoing protests and silence government critics. Eventually, the amendment did not make it to the parliament for further procedure.

### **Online content regulation**

Online media (“electronic publications”) are subject to content regulation and to right to reply. The Mass Media Act also requires that **online media, if they publish sections with comments by readers/visitors, adopt rules and make them available to public.** “A comment that does not comply with the published rules must be withdrawn as soon as possible after the complaint or not later than one working day after the application”, specifies Article 9, para 3 of the Mass Media Act as amended in 2016.<sup>40</sup>

There is no official evidence on the level of implementation of the obligations related to the comment sections of online media. The 2020 report of the Culture and Media Inspectorate does not mention any relevant complaint or case related to that obligation. **There is also a self-regulatory instrument related to hate speech in online media**, developed in cooperation between Spletno oko (a hot line for reporting hate speech and child pornography online operating within the Faculty of Social Sciences at the University of Ljubljana) and several online media.<sup>41</sup>

In the research **report on hate narratives in online media and communication in Slovenia**, published in 2021, the Peace Institute has identified numerous cases of hate narratives targeting refugees, political opposition and journalists, particularly in the online media and communication under control of the ruling party.<sup>42</sup>

38 For more information see: [https://www.euractiv.com/section/politics/short\\_news/slovenia-could-introduce-fines-for-indecent-behaviour-against-public-officials/](https://www.euractiv.com/section/politics/short_news/slovenia-could-introduce-fines-for-indecent-behaviour-against-public-officials/).

39 For more information see: <https://www.rtvsl.si/slovenija/od-500-do-1000-evrov-kazni-za-zaljenje-poslancev-dz-ja-ali-clanov-vlade/592480>.

40 For more information see: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1608>.

41 For more information see: [https://www.mirovni-institut.si/wp-content/uploads/2020/10/Behave\\_summaryENG\\_21-02-05.pdf](https://www.mirovni-institut.si/wp-content/uploads/2020/10/Behave_summaryENG_21-02-05.pdf).

42 For more information see: <https://www.mirovni-institut.si/wp-content/uploads/2020/12/Sovrazni-narativi-v-spletnih-medijih-in-spletni-komunikaciji-s-CIP.pdf>.

## Checks and balances —

### Key recommendations

- The authorities should respect national provisions related to public consultations in the process of adopting laws and regulations.

### Process for preparing and enacting laws

The National Assembly of the Republic of Slovenia adopted in 2009 a Resolution on Legislative Regulation.<sup>43</sup> The resolution was aimed at improving standards for drafting laws and regulations. Among other things, the resolution in question provides for minimum standards as regards public consultations, with a minimum period of 30 to 60 days budgeted for consultation with the public. The Rules of Procedure of the Government of the Republic of Slovenia were later also amended to include the provision related to the minimum period for public consultations.<sup>44</sup>

The Centre for Information Service, Co-operation and Development of NGOs established a violation meter, a mechanism to monitor the frequency of violations of provisions related to public consultations. This

mechanism captures regulations for which the resolution stipulates a minimum time for public consultations. It also captures other acts for which such consultations are provided for in the government rules of procedure. After taking office on 13 March 2020, data gathered through this monitoring mechanism through 15 November 2021 reveal that **the current government did not respect provisions concerning public consultations in 68% of the cases.** The former government, in office from 13 September 2018 to 13 March 2020, did not respect the relevant provisions in 60% of the cases.<sup>45</sup>

In 2021, the Human Rights Ombudsman also established **violations by the Ministry of the Environment and Spatial Planning of the right to participation in public affairs** on at least two occasions. In March, the Ombudsman reported that the ministry submitted on 31 December 2020 draft of the new Environmental Protection Act for public discussion. The draft bill lacked explanatory memoranda, and the Ombudsman found that in this manner the public was not given an opportunity to effectively consider the content of the draft and, as a result, its participation in the process of adoption of the law was unjustifiably hampered.<sup>46</sup> In May, related to the procedure concerning draft amendments to the Water Act, the Ombudsman established

43 Text available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5516>.

44 Text available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=POSL32>.

45 For more information, see <https://www.cnvos.si/stevec-krsitev/>.

46 For more information, see <https://www.varuh-rs.si/obravnavane-pobude/primer/ucinkovito-zagotavljanje-pravice-do-sodelovanja-pri-upravljanju-javnih-zadev-zahteva-tudi-celostno-o/>.

that the authorities only allowed for a short public discussion and importantly changed the draft after public consultations were concluded. According to the Ombudsman, this was contrary to the provisions of national legislation governing public participation as well as the relevant provisions of the Aarhus Convention.<sup>47</sup>

## Enabling framework for civil society

### Key recommendations

- The government and other responsible bodies, including the police, should proactively ensure the free and unhindered exercise of the right to protest.
- The responsible bodies in the government should provide financing mechanisms from public funds for NGOs on a continuous basis and on the basis of objective criteria, without any political interference.
- NGOs at Metelkova 6 building in Ljubljana should be provided with contracts to continue using the premises while the national and local governments should make

available more such subsidised spaces to allow for the autonomous work of NGOs in various fields of public interest.

## Regulatory framework

### *Freedom of assembly*

Since April 2020, informal anti-government protests have been a regular feature of public life in Slovenia, particularly the so-called “Friday cycling protests” in Ljubljana against the government’s downturn of environmental and democratic standards during the epidemic. These protests continued in 2021. In this period, there were various measures adopted by the government to curb the spread of the new coronavirus, including measures relating to public assemblies. These measures were often seen as excessive encroachments on the right to public assembly and freedom of expression, aiming primarily at limiting criticism of the government and to harshly punish those who violate the measures. In March, two petitioners requested review before the Constitutional Court of the constitutionality of a government ordinance banning public gatherings, and later expanded the challenge to another regulation limiting assemblies to a maximum of 10 people.

The Legal Network for the Protection of Democracy, a structure established by four

47 For more information, see <https://www.varuh-rs.si/obravnavane-pobude/primer/razvrednotenje-pravice-javnosti-do-sodelovanja-pri-sprejemanju-okoljskih-predpisov/>.

non-government organisations, provided support to the applicants. The network provided support because it considered necessary that existing regulation be examined with regard to its conformity with the Constitution, so that conditions under which constitutionally protected rights could be restricted and how, if at all, were clear.

**The Constitutional Court assessed the proportionality of the ban on assemblies imposed** from 27 February to 17 March and from 1 April to 18 April 2021 by several provisions of government decrees. The court also reviewed measures adopted in the period from 18 March to 31 March and from 23 April to 14 May 2021, when assemblies were limited to 10 participants. According to the court, it was not demonstrated that the general complete prohibition of public protests or the limitation to up to 10 persons was necessary. Similarly, the necessity of the full ban of unorganised public protests was also not demonstrated. The court found that the government failed to inspect the possibility of imposing milder measures known in comparable legal regulations, including the possibility to seek an agreement with organisers as regards the manner of carrying out a public protest as epidemiologically safely as possible. Indeed, the government had eased the measures in other

fields on the basis of improved epidemiological situation. Finding that the government failed to demonstrate the necessity of the challenged measures, the court established that the challenged measures were not in compliance with the Constitution and annulled them. In its decision, the court stressed the special importance of the right to peaceful assembly and public protests in a free society. Among others, in relation to non-organised protests, it noted that, “Within the context of the right of peaceful assembly, non-organised (i.e. spontaneous) public protests are particularly important; their development has also been enabled by the development of new technologies and communication channels. At spontaneous public protests, participants gather without planning and without an organiser, in order to express opinions and positions on questions of public or joint importance.”<sup>48</sup>

The Legal Network for the Protection of Democracy welcomed the court’s decision but also expressed regrets that many who had been fined on the basis of unconstitutional regulations would not be reimbursed, since the court only abrogated the unconstitutional provisions but did not annul them.<sup>49</sup> **Since 8 November 2021, a complete ban on non-organised, spontaneous public gatherings has been again imposed by the government**, a measure

48 For more information, see <https://pravna-mreza.si/vlo%C5%BEena-pobuda-za-presoj-ustavnosti-odloka-ki-prepoveduje-shode/> and <https://www.us-rs.si/decision/?lang=en&q=U-I-50%2F21&caseId=&df=&dt=&af=&cat=&pri=1&vd=&vo=&vv=&vs=&ui=&va=&page=1&sort=&order=&id=116659>

49 For more information, see <https://pravna-mreza.si/izjava-pmvd-ob-odlo%C4%8Ditvi-ustavne-ga-sodi%C5%A1%C4%8Da-o-neustavnosti-odlokov-ki-prepovedujejo-ali-omejuje-shode/>.

which is hardly in line with the position of the Constitutional Court.<sup>50</sup>

The government has **also continued to restrict protests by introducing various repressive measures** implemented by the police, where the key personnel had been replaced on various levels.<sup>51</sup> The protesters attending regular weekly protests (“Friday cycling protests”), particularly those having more visible role in the protests, have been continuously fined by the police.<sup>52</sup> Video recording of the protests by a special police vehicle have been made on regular basis.

Particularly disproportionate use of repressive measures, including **massive use of tear gas and water canons against protesters**, occurred **at the protests against COVID-19 containment measures** and vaccination held in Ljubljana on 5 October 2021.<sup>53</sup>

### **Financing framework**

While the attempt by the government and the ruling party to abolish the fund for the development of non-governmental organisations, reported in our submission to Liberties’ Rule

of Law Report 2020, was eventually rejected in the parliament after the mobilisation of civil society,<sup>54</sup> the year 2021 saw another attempt to limit the access to funds for non-governmental organisations.

In June, the Centre for Information Service, Co-operation and Development of NGOs reported that the **Office of the Government of the Republic of Slovenia for Development and European Cohesion Policy**, led by a representative of the major government party, **introduced discriminatory conditions in a call under the Norway Grants and European Economic Area (EEA) Grants mechanism aiming to limit the access to such funds by NGOs**. According to this set of new conditions, NGOs established as associations must have 50 active members, namely, individuals who paid membership fees in the current year and the two preceding years, while NGOs set up as institutes must have at least three full-time staff achieving level 7 of the Slovenian qualification framework in the field in which the organisation is active. There are, on the other hand, no similar conditions in place for other applicants, such as, for example, private enterprises. The Centre for Information

50 For more information, see the text of this government regulation at <http://pisrs.si/Pis.web/pregledPredpisa?id=ODLO2622>.

51 For more information see: <https://www.rtvsllo.si/slovenija/zamenjava-v-vrhu-ljubljanske-policije-vodenje-zacasno-prevzema-janez-rupnik/595861>.

52 For more information see: <https://365.rtvsllo.si/arhiv/studio-city/174840339>

53 For more information see: <https://www.dw.com/en/slovenia-police-disperse-protesters-ahead-of-eu-summit/a-59417845>

54 For more information, see <https://www.cnvos.si/novice/2687/sds-ov-pogrom-nad-nvo-v-pkp7-ukinitev-sklada-za-nvo/> and <https://www.cnvos.si/novice/2692/sklad-za-nvo-ostaja/>.

Service, Co-operation and Development of NGOs reported that donor countries were not informed about this. The organisation also reported that similar conditions were put in place in 2020 as an attempt to limit the participation of civil society organisations in procedures relating to the issuance of building permits, and that the Constitutional Court suspended the implementation of these provisions until it fully assesses their compliance with the Constitution. The government body claimed, among other things, that the criteria for NGOs would help the available funds grow because Slovenia had a responsibility towards that fund would be used efficiently. It further stated that these conditions were allegedly introduced with the consent of the donors. Eventually, these discriminatory criteria were later abolished.<sup>55</sup>

Despite an increase in 2021, in terms of the percentage of GDP, Slovenian NGOs have had access to fewer funds over recent years, compared to their international counterparts. According to the data published by the Centre for Information Service, Co-operation and Development of NGOs, in 2020, Slovenia allocated only 0.90% (0.77% in 2019) of its GDP to non-governmental organisations. According to the latest available global data,

the global average was 1.38% in 2013, and the EU countries allocated an average of 2.20% of GDP to their non-governmental organizations in the year in question.<sup>56</sup>

The De-Bureaucratisation Act, adopted at the beginning of January 2022, includes amendments to the Act on the Realisation of the Public Interest in Culture (ZUJIK), erasing the provisions which limit the power of the Minister of Culture in decision-making on funding cultural projects. These projects are proposed – within open calls for project proposals – by, among others, non-governmental organisations in the field of culture. According to the ZUJIK, the Minister of Culture had to follow the expert committee's recommendation which projects to fund. The Minister could object once, but when the expert committee issued the opinion for second time, the Minister had to follow it. Now, according to the De-Bureaucratisation Act, the Minister still receives recommendations from the expert committee, but can decide autonomously which projects should be funded. The Association of non-governmental organisations and individuals in the field of culture, has objected to such a provision, warning that it will result in diminishing the role of professionalism and increasing the level of political

55 For more information, see <https://www.cnvos.si/novice/2844/sloveniji-grozi-blokada-34-milijonov-evrov-zaradi-diskriminatornih-pogojev-svrk-ki-izkljucejejo-sodelovanje-nvo-na-razpisih-norveske-islandije-in-lihtenstajna/> and <https://www.norwaygrants.si/wp-content/uploads/Spremembe-razp.dok.-9.9.2021.pdf>.

56 For more information, see [https://www.cnvos.si/media/filer\\_public/db/6e/db6ebaac-f2c9-46ab-9dc7-a63e-4294da38/analiza\\_obseg\\_javnega\\_financiranja\\_nvo\\_2020\\_1.pdf](https://www.cnvos.si/media/filer_public/db/6e/db6ebaac-f2c9-46ab-9dc7-a63e-4294da38/analiza_obseg_javnega_financiranja_nvo_2020_1.pdf).

interference in decision-making process on funding the projects in the field of culture.<sup>57</sup>

At the same time, the 2022 state budget was amended in a way to increase the budget for culture, but **substantially decrease budget lines which are sources of funding for independent culture** (including **NGOs in the field of culture**) – from 6.4 million to 3.6 million EUR. The Association of non-governmental organisations and individuals in the field of culture made a statement saying the government’s step should be understood as a continuation of the process of destabilizing the NGO sector in the field of culture, which began with the attempt to evict organizations from Metelkova 6 building in Ljubljana.<sup>58</sup>

In January 2022, the Ministry of Culture did not approve program financing for a number of established and internationally renowned NGOs in the field of culture, including numerous NGOs located at Metelkova Street 6 building.<sup>59</sup>

The **public funding for the projects of environmental NGOs has also been cut**. The environmental organisations describe the situation as “probably the worst in a decade, or more”. Gaja Brecelj, director of environmental

organisation Umanotera, stated in this respect that “Under the current minister there have been no more project calls, and in the new state budget there are literally no funds for projects for this and the next year. From the Climate Fund, where environmental NGOs are also eligible, the funding has been cut down by 70%, leaving the budget only on what was in a call for proposals under the previous minister’s mandate. No calls and no money for projects or programmes for environmental NGOs are being planned – this is the official information we received from the ministry”.<sup>60</sup>

## **Attacks and harassment**

### **Administrative and legal harassment**

As reported in our contribution to Liberties’ 2020 Rule of Law Report, around **20 non-governmental organisations operating at Metelkova Street 6** in Ljubljana received a proposal, in October 2020, for an amicable termination of the lease from the building manager of the Ministry of Culture and an order to vacate the building by 31 January 2021, failing which they would take the case to court and enforce the eviction at the expense of the NGOs concerned.

57 For more information see: <https://monitor.civicus.org/updates/2022/01/11/independence-rtv-slovenija-under-threat-culture-and-environmental-csos-face-funding-cuts/>

58 For more information see: <https://www.delo.si/kultura/razno/vec-denarja-za-kulturo-a-ne-za-vse/>

59 For more information see: <https://www.24ur.com/novice/slovenija/brez-sredstev-ministrstva-ostali-gledalisce-glej-gala-hala-carmina-slovenica-in-laibach.html>

60 For more information see: <https://monitor.civicus.org/updates/2022/01/11/independence-rtv-slovenija-under-threat-culture-and-environmental-csos-face-funding-cuts/>

In response, the internationally renowned NGOs occupying the building – which include the Peace Institute and other human rights organisations like the Legal Information Centre, as well as numerous NGOs engaged in independent cultural and artistic production – noted that the termination of the leases came to their addresses “unannounced and on the very day when the SARS-CoV-2 virus epidemic and curfew were declared.” The organisations have therefore been strongly opposing the actions of the Ministry of Culture, informing it that they have no intention of leaving Metelkova 6 and that they “will resist with all possible means these attacks on civil society, independent culture, and democracy.”<sup>61</sup>

In 2021, the **court procedure for eviction started on the initiative of the Ministry of Culture**. A decision on the eviction is expected for some of the organisations in early 2022. A court procedure has been introduced separately for each organisation with slightly different dynamics, resulting in significant legal costs to NGOs.

This eviction procedure has been one of the major attacks of the current government on NGOs among a number of hostilities against them, and an additional difficulty for these organisations in the circumstances of the COVID-19 pandemic. The search for offices on the commercial market will strongly affect

the organisations and may lead to the collapse of some of them.<sup>62</sup>

As Tadej Meserko of the Association of non-governmental organisations and individuals in the field of culture reported to Civicus, “the eviction was discussed in parliament, in a special body for culture that issued a non-binding decision that the government should help the NGOs evicted to find new accommodation. But the government decided to sue all NGOs in the building instead. This is a long and expensive process, and it’s taking a turn for the worse for the NGOs. Some of them received the order to leave the building by March 2022, but they can probably appeal this decision to postpone the deadline.”<sup>63</sup>

In December 2021, the State Attorney’s Office, upon instruction by the Ministry of the Interior, filed the first **lawsuit against one of the most prominent anti-government Friday protesters**, claiming the recovery of costs of police protection of a public gathering. The lawsuit adduced that the protester in question organised the protest and that according to the Public Assembly Act, when the police assistance is necessary at an event, the organiser shall reimburse all the costs incurred in connection with this event. According to the law, however, the police are also obliged to maintain public order at unorganised assemblies and to dedicate sufficient staff for

61 For more information see: <https://www.mirovni-institut.si/en/metelkova6/>

62 For more information see: <https://monitor.civicus.org/updates/2022/01/11/independence-rtv-slovenija-under-threat-culture-and-environmental-csos-face-funding-cuts/>

63 Ibid.

this task.<sup>64</sup> The lawsuit has been perceived as another government attempt to silence the protesters, with the affected protester stating that the lawsuit was aiming to intimidate those who express their opinion publicly and were a thorn in the side of the government. Indeed, the Legal Network for the Protection of Democracy noted that there was no legal basis for such proceedings. According to the organisation, most anti-government rallies since March 2020 have been spontaneous and unorganised. These events did not have an organiser, as defined by the current law on public gatherings. The organisation considers that such lawsuits do not fall within the rule of law framework and constitute a serious violation of the fundamental human rights and freedoms guaranteed by the Constitution.<sup>65</sup>

### **Smear campaigns**

In 2021, the prime minister and the ruling party continued spreading **misinformation about non-governmental organisations** and discrediting their work. During this year, the privileged target of their attacks seemed to be organisations from **Metelkova Street in Ljubljana**. In January 2021, for example, after unknown perpetrator(s) damaged a Ljubljana

Cathedral fresco, there was a tweet by the PM claiming that, “[i]ntolerance towards Christians and towards dissidents in general in Slovenia began to increase drastically in parallel with the emergence of @strankalevica (i.e. the Left, a political party) and substantial state funding of so-called # NGOs from Metelkova 6, Ljubljana.”<sup>66</sup> In March, the PM stated at a press conference that “[o]ne of the goals that has been included in all coalition agreements for a long time is to regulate long-term care. The fact is that in the last 10-15 years Slovenia has not invested in long-term care for the elderly and that more money has been allocated for some non-governmental organisations on Metelkova than for the construction of homes for the elderly. There is a big shortage here, which, in the fight with the epidemic, has also greatly affected the victims.” An online platform with a fact-checking component found that the PM manipulated the facts. They used known and accurate data but explained them in a misleading way, leading a distortion of the facts.<sup>67</sup>

The year 2021 also saw the major government party launching the so-called 2021 consultations with voters. As part of this consultation, a questionnaire was sent to Slovenian households which included highly suggestive questions,

64 The text is available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1455>.

65 For more information, see <https://www.delo.si/novice/slovenija/drzavno-odvetnistvo-terja-stroske-polici-je-na-protestih/> and <https://www.delo.si/novice/slovenija/jenuill-prejel-tozbo-zaradi-domnevne-organizacije-protesta/>.

66 For more information, see <https://twitter.com/jjansasds/status/1354028086812160000>.

67 For more information, see <https://www.gov.si/novice/2021-03-12-predsednik-vlade-janez-jansa-spopad-z-epidemijo-koronavirusa-je-vladi-vzel-80-casa-in-energije/> and <https://www.ostro.si/si/razkrinkavanje/objave/iz-proracuna-vec-za-dolgotrajno-oskrbo-kot-za-nevladne-organizacije-na-metelkovi>.

one of which was related to civil society organisations, formulated as follows: “From 2009 to 2019 inclusive, 31,841,020 € were allocated from the Republic of Slovenia budget for the renovation of homes for the elderly, and we did not build any new ones. At that time, only 35,672,609 € were earmarked for the maintenance and construction of student dormitories. At the same time, the 20 best-funded so-called ‘non-governmental organisations’, mostly from Metelkova 6 in Ljubljana, received as much as 70,481,020 € from the budget. This order of funding seems to me to be: a) fully appropriate, ‘non-governmentalists’ are the most important; b) inappropriate, the essential needs of students and pensioners must be given priority; c) scandalous, because they are pointlessly spending our money.” Interestingly, those who returned the questionnaire could participate in a prize competition.<sup>68</sup> In December, the PM commented on the 2022 parliamentary elections and stated in an interview that, “[t]hese elections will decide whether the money will go to the people who create it or to the NGOs at Metelkova 6 (...) who have not contributed any national achievement so far, but have spent tens of millions belonging to workers, entrepreneurs and pensioners.”<sup>69</sup>

## **Disregard of human rights obligations and other systemic issues affecting the rule of law framework** –

### **Key recommendations**

- The pushbacks to Croatia must be stopped immediately as there is a serious risk of people being subjected to torture and inhuman treatment; an effective screening and identification mechanism must be put in place, since this is seen as one of the key issues when it comes to systematic pushbacks from Slovenia. It is equally necessary to strictly respect the right of access to international protection, and to inform persons about their rights, as provided for in the EU Asylum Procedures Directive.
- The state must urgently ensure that the persons who were illegally erased from public registries 30 years ago, who have been living in Slovenia for decades, arrange a permanent residence permit, so that their special position is acknowl-

68 For more information, see <https://www.rtvsllo.si/slovenija/sds-na-domove-vnovic-poslal-vprasanik-o-prihodnosti-vprasanja-precej-sugestivna/570191>.

69 For more information, see <https://demokracija.si/fokus/intervju-janez-jansa-dokazali-smo-da-slovenija-zmore-vec/>.

edged and their right to private and family life and their dignity is respected. The state must also provide such legal remedies to all individuals who, due to various circumstances, have long-term undocumented residence in the country, as required by international human rights standards and the case law of the European Court of Human Rights.

- Slovenia should assume its responsibility and immediately ratify the 1961 Convention on the Reduction of Statelessness.

## ***Systemic human rights violations***

### ***Widespread human rights violations and persistent protection failures***

In 2021, the police apprehended 10,067 migrants irregularly crossing the Slovenian border<sup>70</sup> and 5,301 of them applied for asylum, amounting to around 53%. Compared to 2020, this is a significant increase (in 2020, among the 14,592 migrants apprehended by the police in 2020, only 24% applied for asylum). Among those who applied for asylum, a large majority immediately left Slovenia,

therefore a large majority of procedures were suspended. Still, in 2021 only **19 people were effectively granted international protection**.<sup>71</sup> As already reported in our submission to Liberties' 2020 Rule of Law Report, the discrepancy in the number of irregular crossings and the number of people that actually apply for international protection, coupled with reports on pushbacks, indicate that the lack of screening and identification mechanisms is one of the key issues when it comes to systematic pushbacks from Slovenia. This issue was also highlighted by the Slovenian Ombudsman in his 2021 report.<sup>72</sup>

The official statistics show that the number of asylum seekers has dropped in 2020 and then significantly increased in 2021. Representatives of NGOs explained that according to their information from the field this is only in part due to COVID-19-related restrictions and effects. This decline in 2020 is mainly related to the opening of a new route through Romania and Ukraine and to the effectiveness of **restrictions to access to asylum** through abuse of the readmission mechanism between Slovenia and Croatia. Due to the COVID-19 lockdown in April 2020, applications for international protection were not processed, causing a major backlog in both the lodging of the applications and first personal interviews that follow the lodging (where the applicants

70 For more information see: <https://www.policija.si/images/stories/Statistika/MejnaProblematika/IlegalneMigracije/2021/December2021.pdf>.

71 For more information see: <https://www.gov.si/assets/vladne-sluzbe/UOIM/STATISTIKA/Januar-2022/Osebe-s-priznано-mednarodno-zascito-po-mesecih-2021-12.pdf>.

72 For more information see: <http://ennhri.org/wp-content/uploads/2021/07/Slovenian-National-Report.pdf>.

have the opportunity to explain the grounds for their application in detail). The Ombudsman responded to this situation by issuing an opinion<sup>73</sup> where he stated that asylum procedures are urgent and should not be interrupted due to the COVID-19 preventive measures. The fact that applicants for international protection entering the territory of Slovenia are since April 2020 put into a 10 to 14 day quarantine should be a sufficient preventive measure to allow the procedures to continue regardless of the pandemic.

As mentioned, in 2021 there was a significant rise in the number of asylum applications filed. This is a result of the changed political decision of Croatia and changed praxis of the Croatian police at the Croatian-Slovenian border: when Slovenian police tried to return (push back) people to the Croatian side, the Croatian police would first ask them whether or not they want to apply for asylum in Slovenia. To avoid push-backs, the majority replied that they did wish to apply in Slovenia, after which the Croatian police denied their readmission. In such case, the Slovenian police were then forced to take them to the asylum center.

One of the main issues related to the asylum procedure is a lack of cooperation and the will of the authorities to consult with NGOs that offer support to asylum seekers. The International Protection Act does not guarantee free legal assistance at the first instance.

Regardless, from 2007 until 2020, asylum seekers had access to free legal assistance provided by an NGO based on a project financed by AMIF and administered by the Ministry of the Interior. The NGO employed several lawyers and even held an office inside the asylum home so asylum seekers could reach them on a daily basis. The employees of this NGO also held information sessions with asylum seekers prior to the lodging of the asylum application. During this information session, which was carried out either individually or in small groups, and with translators, they were informed about the procedure, their rights and obligations. The project of the mentioned NGO ended right after the government changed in March 2020, and since then there was no support for this purpose from the MoI. The NGO had to cut down severely on its assistance, as the very limited funds from UNHCR only allow it to offer very limited legal aid, mostly focusing on vulnerable groups such as families, unaccompanied children and single women. Thus, the in-person information sessions were discontinued and information has been since then provided through a video recording. The video is shown to asylum seekers in the waiting room, prior to their lodging of the application. Not only is this method inappropriate (the info video is screened in a busy waiting room, with no possibility to ask questions); the video is also not offering complete information, as the grounds for international protection are not explained. The lack of information and absence of legal aid have detrimental effects on the applicants' ability to succeed with their

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73 For more information see: <http://ennhri.org/wp-content/uploads/2021/07/Slovenian-National-Report.pdf>.

applications and is causing a lot of frustration among asylum seekers.

Another issue is the length of the procedures. According to Article 47 of the International Protection Act, the decision should be made at the latest within six months from the lodging of the application, or in two months in accelerated procedures. However, in practice, these deadlines are mostly not respected and the duration of the procedure is seen as one of the biggest shortcomings of the Slovenian asylum system, also by the Ombudsman.<sup>74</sup>

### ***Impunity and lack of accountability for human rights violations***

February 2022 will mark 30 years since the authorities illegally erased 25,671 individuals from the register of permanent residents of the Republic of Slovenia. The erasure was not a mere administrative error but a systematic and deliberate removal of what was seen as an ‘undesirable’ part of the population, as confirmed in a decision of the European Court of Human Rights (*Kurić and Others v. Slovenia*). The consequences for the victims of the erasure did not disappear over the years, especially since the state decided to implement only the minimum measures required by the European Court of Human Rights. More than half of the erased did not receive any form of redress – neither the restitution of the illegally taken away status nor the financial compensation for the damage suffered. There are still some erased persons who have lived

in Slovenia without regulated status since the erasure. The remedies available to them are very limited, do not acknowledge the injustice done to them and disregard their long stay in the country. Their distress is great, many of them are elderly and sick people, who, without permanent residence, cannot rely on social assistance services. The state must urgently ensure that these people, who have been living in Slovenia for decades, arrange a permanent residence permit, so that their special position is acknowledged and their right to private and family life and their dignity is respected. The state must also provide such legal remedies to all individuals who, due to various circumstances, have long-term undocumented residence in the country, as required by international human rights standards and the case law of the European Court of Human Rights. In addition to erasure, some individuals have also been affected by statelessness. The issue of statelessness is persistently ignored by the state, even when the victims are children. Slovenia should assume its responsibility and immediately ratify the 1961 Convention on the Reduction of Statelessness.

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74 For more information see: <http://ennhri.org/wp-content/uploads/2021/07/Slovenian-National-Report.pdf>.

## **Fostering a rule of law culture**

### **Contribution of civil society and other non-governmental actors**

In March 2021, the National Assembly adopted amendments to the **Water Act** by means of an accelerated procedure. This prompted 11 non-governmental organisations, mostly environmental organisations, but also feminist groups, to set up the Movement for Drinking Water in an attempt to collect at least 40,000 signatures of voters for the National Assembly to call a legislative referendum on the amended law. The civil society organisations were concerned that adopted amendments threatened the safety of Slovenian waters. In particular, amended provisions allowing for construction of public use infrastructure (e.g. inns, business and administrative facilities, shops) on water land and coastal areas could limit public access to water and could increase the risk of contamination of surface and groundwater and, as a result, of drinking water. The civil society organisations collected a sufficient number of signatures and the referendum was called for July. The organisation further mobilised to bring sufficient numbers of voters to ballot boxes, as the Constitution stipulates that a law is rejected in a referendum when a majority of voters oppose it, provided that at least 20% of all qualified voters have voted against the

law. The July referendum eventually saw the second largest turnout for a legislative referendum since independence (46.46% of all voters voted), with 86.75% rejecting amendments to the Water Act.<sup>75</sup>

In early 2021, Amnesty International Slovenia, the Legal Centre for the Protection of Human Rights and Environment, Today Is a New Day and the Institute for Culture of Diversity Open established the **Legal Network for the Protection of Democracy**. The structure provides legal assistance to individuals and organisations involved in legal proceedings due to non-violent public action. According to the initiative, the imbalance of access to finance and legal means between the state and individuals is substantial, so it is necessary to strengthen the position of those whose human rights are violated. Within the network, professional assistance is provided by highly qualified lawyers and law firms, and, until November 2021, the network of lawyers provided support in about one thousand cases. In May, the network set up a mechanism for monitoring protests. This tool, the first in the country, was established after protesters' claims that the police used excessive force and treated them selectively, contrary to the principle of equality. The monitoring is based on tools for monitoring assemblies made available by the Organization for Security and Co-operation in Europe.<sup>76</sup>

75 For more information, see <https://zaitnovodo.si/> and <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2021-01-2844?sop=2021-01-2844>.

76 For more information, see <https://pravna-mreza.si/>.

The Association of Slovenian Journalists, the Bottom Line, a non-profit media portal, and the Peace Institute, an NGO, continued the project “**Defending watchdog role of civil society and journalists in Slovenia**” in 2021. In this period, among others, an online platform for monitoring and reporting attacks on journalists was launched. A cartoon presenting the role of NGOs in society, which was produced in 2020, was on display in Slovenian urban centres such Maribor, Murska Sobota and Ptuj, after a similar exhibition was held in Ljubljana in 2020. In terms of capacity building, a workshop on how to deal with online harassment of journalist took place. Online discussion about how the right to protest was exercised and defended in Poland and France, and what could be lessons for Slovenia was also organised.<sup>77</sup>

In the second half of 2021, a number of civil society organisations came together in the **Voice of the People initiative**. With Slovenia entering a super election year in 2022, the initiative had been working for several months on demands related to, e.g., access to public healthcare services for all, freedom of media and culture, fair climate transition and the environment protection, more democracy and reform of the political system, global justice, rule of law and human rights. After

receiving numerous comments and suggestions during the public discussion on the first list of demands, held in November and December 2021, the initiative elaborated a final document with more than 130 demands. In January 2022, the demands were presented to the political parties calling them to provide their answer on each demand in an online tool. All registered political parties were invited to the presentation of the demands, but the political parties of the government coalition did not respond to the invitation.<sup>78</sup> Based on the responses of the parties, an online tool shall be set up for voters to check the extent to which their personal political views are in line with those of the parties. The initiative shall organise a web-based campaign as well as field visits to encourage people to take part in the elections. The initiative’s website shall record party commitments during the election year and provide all the necessary practical information so that voters can participate in the elections in an informed manner. There are more than 100 organisations involved in the initiative.<sup>79</sup>

77 For more information, see <https://novinar.com/prijavi-napad/>, <https://novinar.com/drustvo-novinarjev-slovenije/projekti/pretekli-zakljuceni-projekti/zascita-nadzorne-vloge-civilne-druzbe-in-novinarjev-v-sloveniji-podaljsana-faza/> and <https://www.mirovni-institut.si/projekti/zascita-nadzorne-vloge-civilne-druzbe-in-novinarjev-v-sloveniji-podaljsana-faza/>.

78 <https://www.24ur.com/novice/slovenija/glas-ljudstva.html>

79 For more information, see <https://glas-ljudstva.si/>.

# **LIBERTIES RULE OF LAW REPORT 2022**

**SPAIN**



# Spain

## About the authors

rights  
international  
spain

**Rights International Spain (RIS)** is a Spanish independent, not-for-profit NGO working to hold the Spanish State accountable for its obligation to protect and respect human rights and civil liberties through a more effective use of international law principles and mechanisms. RIS's mission is to strengthen human rights accountability in Spain by monitoring government activity, with a particular focus on rule of law and access to justice, as well as raising civil society's awareness and mobilize support to demand justice. To accomplish its mission, RIS develops timely and rigorous policy and legal analysis, produces other advocacy and communications resources and tools for the general public, and supports strategic litigation initiatives.

## Key concerns

In the area of justice, concerns remain regarding the respect of standards of the independence of the judiciary, particularly due to the persisting failure to renew the General Council of the Judiciary (CGPJ) on hold since

2018, gaps in the applicable legal regime, and the appointment of its spokespersons.

As regards the media environment, the highly polarized political context negatively affects the work of journalists targeted by smears and attacks, particularly by the far right. This has resulted in campaigns of hatred and intimidation towards journalists, especially online.

In addition, journalism professionals reported barriers to carry out their work including sanctions and judicial prosecutions, issued in response to denunciations of harassment and police brutality. They have highlighted an increased level of difficulty covering protests and reporting on migrants' crossings from the borders of Spain with Morocco (Ceuta, Melilla and the Canary Islands) due to repressive provisions of the Law on the Protection of Citizen's security. Many digital media also suffered cyberattacks that affected their work, and politicians have been taking legal action that may qualify as SLAPPs against journalists, putting them under unwanted scrutiny at odds with legal requirements on the protection of journalists' sources. Some governments reportedly used Pegasus, an Israeli spyware, to spy on journalists including within Spain.

Timid reforms initiated by the Law on the Protection of Citizens' Security are insufficient to dispel the serious concerns over the negative impact of such instrument on civic space and on the activities of civil society organisations

in Spain. Restrictions imposed in the context of the COVID-19 pandemic further restrict the exercise of the right to freedom of assembly, with uneven practices by local and regional authorities in their application, thus undermining legal certainty.

Systemic human rights violations and the failure to ensure redress for such violations, as denounced by international and regional human rights monitoring bodies, negatively affect the rule of law framework. These include the lack of exhaustive investigation into police ill-treatment allegations and systematic push-backs of migrants and asylum seekers at external borders, also due to provisions of the so-called Law on the Protection of Citizens' Security which hinders effective monitoring and reporting of violations. Efforts to provide for reparation for human rights violations committed during the Civil War and the dictatorship continue to be considered insufficient.

### State of play

- ⊖ Justice system
- N/A Anti-corruption framework
- ⊖ Media environment and freedom of expression and of information
- N/A Checks and balances
- ⊖ Enabling framework for civil society
- ⊖ Systemic human rights issues

#### Legend (versus last year)

- Regression: ↓
- No progress: ⊖
- Progress: ↑

## Justice system ⊖

### Judicial independence

#### Appointment and selection of judges, prosecutors and court presidents

The renewal of the General Council of the Judiciary (CGPJ) is due to take place every five years (art. 568 Ley Orgánica del Poder Judicial 6/1985, LOPJ). However, the process is still on hold since 2018<sup>1</sup> given the lack of political agreement due to discrepancies around the conditionality of the opposition party that demands the reform of the LOPJ (regulating the constitution, functioning and governing of courts). The disagreements revolve around

1 Out of the six previous renewals, three times it was done belatedly (with delays of eight, four and 22 months).  
Source: <https://www.newtral.es/cgpj-renovacion-en-plazo-anomalia-sin-precedentes/20210721/>

enabling judges to choose 12 out of the 20 representatives in the governing body,<sup>2</sup> instead of the Parliament choosing them.<sup>3</sup>

During its most recent congress the Independent Judicial Forum (*Foro Judicial Independiente*) ratified its position regarding the need to renew the law regulating the judiciary (LOPJ) before renewing the Council.<sup>4</sup> However, the Government and the main opposition party reached an agreement by which the renewal of certain appointments of constitutional organs (Constitutional Court, Court of Auditors, Ombudsman, and the Agency for Data Protection) would precede the changes in the system of election of those nominations. In November, the four candidates to the Constitutional Court presented by the opposition party in agreement with Government were ratified by Congress<sup>5</sup> (its twelve members are appointed for a period of nine years and shall be renewed by thirds every three years).<sup>6</sup> The endorsement of the

suitability of the candidates was highly controversial, especially regarding the impartiality and independence of one of the candidates nominated by the opposition party. Despite this agreement, the negotiation has not led to the reactivation of the discussions for the renewal of the CGPJ.

The progressive association of Judges for Democracy (*Juezas y Jueces para la Democracia*, JJpD) has called for the members of the CGPJ to resign<sup>7</sup> in order to force the renewal of the council. The renewal has also been demanded by the Progressive Association of Prosecutors (*Asociación Progresista de Fiscales*).

### ***Independence and powers of the body tasked with safeguarding the independence of the judiciary***

The Report adopted in June 2021 by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the

2 Art 122.3 Spanish Constitution. Art. 567 LOPJ 6/1985 establishes the election of the 20 members of the CGPJ by the Parliament (10 by each chamber, the Congress and the Senate).

3 According to the Consultative Council of European Judges CCJE Opinion No. 24 (2021) para 29: “The CCJE recommends that Councils for the Judiciary should be composed of a majority of judges elected by their peers.”

4 <https://www.forojudicialindependiente.es/2021/11/08/conclusiones-xvii-congreso-de-fji-2021-jerez/>

5 <https://elpais.com/espana/2021-10-14/el-gobierno-y-el-pp-llegan-a-un-acuerdo-para-renovar-todas-las-altas-instituciones-salvo-el-poder-judicial.html>

6 Spanish Constitution Art. 159.1 establishes that four of its members shall be proposed by Congress and four by the Senate (in both cases with a three-fifths majority), two by Government and another two by the CGPJ (the Council would need to recover its ability to make appointments, currently on hold awaiting for resolution of appeals to the law that prevents this body to nominate members under this interim situation).

7 <http://www.juecesdemocracia.es/2021/12/04/comunicado-jjpd-exigiendo-la-dimision-vocales-del-cgpj-consejo-inmediata-renovacion/>

Council of Europe<sup>8</sup> regarding judicial impartiality states the following in paragraph 91:

“doubts have been raised due to the direct contacts which allegedly took place between the judges of the [Spanish] Constitutional Court and members of the national government. Also, the President of the Constitutional Court publicly stated that the judiciary’s mission was to guarantee the unity of Spain. This has been understood as openly taking a stand against the political positions defended by the indicted Catalan leaders, whose court cases were still pending. Furthermore, as the Supreme Court in its judgment of 14 October 2019 (page 114) admits, an investigating judge involved in the case, Mr Pablo Llarena, had referred in one of his decisions to “the strategy targeting us”, thus admitting that he felt like one of those “targeted” by the strategy used by the accused. The impartiality of the Spanish Supreme Court is finally put into doubt by a message of a senior senator bragging that they could control the Supreme Court and the General Council of the Judiciary “through the back door”.<sup>9</sup>

Despite affirming that the decision on the fairness of the proceedings is the responsibility

of the Constitutional Court and ultimately the European Court of Human Rights, the report mentions several condemnation by human rights organisations and parliamentarians on the issue of the arrest, detention and prosecution of former Catalan government members.

Several organisations of judges signed a communication<sup>10</sup> asking politicians to be cautious and refrain from acts that could undermine the reputation of judicial institutions, as a result of several statements by political representatives questioning judicial resolutions lately.

The Plataforma Cívica por la Independencia Judicial addressed the Petitions Committee of the European Parliament to request the European Commission to investigate the structural legal reforms affecting the judiciary, its independence, and the separation of powers, namely: regarding the applicable legal regime of the CGPJ and concerning the election procedure of its spokespersons. The petition alleged the omission of due process of prior hearing of involved actors, as required by EU legislation. In response, the Petitions Committee decided to examine the submission and request the European Commission to conduct a preliminary investigation and forwarded the petition to the working group on democracy and the rule of law within the Committee on Civil

8 AS/Jur (2021) 07.

9 <http://assembly.coe.int/LifeRay/JUR/Pdf/TextesProvisoires/2021/20210603-ProsecutionPoliticians-EN.pdf>

10 <https://www.forojudicialindependiente.es/2021/11/15/las-asociaciones-judiciales-ante-las-manifestaciones-de-responsables-politicos-sobre-resoluciones-judiciales/>

Liberties, Justice and Home Affairs (LIBE) of the European Parliament.<sup>11</sup>

Several associations of prosecutors (*Asociación de Fiscales and the Asociación Profesional Independiente de Fiscales APIF*) have criticized appointments by the State General Prosecutor due to their alleged ideological nature,<sup>12</sup> having requested her resignation<sup>13</sup> for what they considered to be “erratic and sectarian behaviour and conflict of interests”.

In the “Second Compliance Report of ‘GRECO 4th Round Evaluation Report 2013,’”<sup>14</sup> GRECO notes that its concerns regarding the lack of any new information provided by the Spanish authorities “remain as prevalent, if not more, than before,” regarding the legislative framework governing the General Council of the Judiciary Power (CGPJ) and its effects on its independence to remedy any shortcomings (recommendation V). It underlines that the main aim of the CGPJ of safeguarding the judiciary’s independence is compromised, “as evidenced by the recurrent public disquiet,”<sup>15</sup> and the criticisms on the

perceived politicisation of the CGPJ in citizens’ eyes and within international fora. Thus, regretting the lack of positive developments in that regard leads to the conclusion that the recommendation has not been implemented. This is further underpinned by the standards of the Council of Europe which advises that “judges are elected by their peers” (Opinion No. 10, 2007 of the Consultative Council of European Judges CCJE, paragraph B.c.),<sup>16</sup> and the prime relevance of the composition of the CGPJ.

The Special Rapporteur on the independence of judges and lawyers referred to this warning in his 2021 report, “Impact and challenges of the coronavirus disease (COVID-19) pandemic for independent justice.”<sup>17</sup>

11 <https://plataformaindependenciajudicial.es/2021/07/15/la-plataforma-interviene-en-parlamento-europeo-15-vii-2021/>

12 <https://conflegal.com/20210507-la-apif-afirma-que-los-nombramientos-buscan-controlar-politicamente-el-funcionamiento-del-ministerio-fiscal/>

13 [Conclusions of the XXIII Congress of the Association of Attorneys](#) (November 2021).

14 Adopted by GRECO at its 87th Plenary Meeting (March 2021) <https://rm.coe.int/0900001680a3fd50>

15 Ibid p. 8

16 CCJE Opinion No. 24 (2021): conclusions and recommendations: 10: The members of the Council must be selected in a transparent procedure that supports the independent and effective functioning of the Council and the judiciary, and avoids any perception of political influence, self-interest or cronyism (paras 27, 29, 31, 34).

17 [A/HRC/47/35](#)

## **Media environment and freedom of expression and of information –**

### **Independence and public trust in media**

In its ‘Annual Report on the Journalistic Profession’,<sup>18</sup> the Madrid Press Association highlights among the main problems of journalism in Spain the lack of independence of the media and the precarious employment of the sector.

65% of the journalists surveyed pointed to the lack of press freedom caused by political and economic pressure. If last year the level of media freedom was rated 4.6 (on a scale of 1 to 10), this year the score has dropped one tenth (4.5). In addition, media professionals denounce the high political polarization as a risk for their journalistic work. At the same time, the research indicates a slight increase in confidence in information, going from 5.2 to 5.4.

### **Safety and protection of journalists and other media activists**

#### **Smear campaigns**

The current climate of constant political tension puts journalists in the spotlight. A trend is emerging of attacks against journalists and media moving away from online platforms to other spaces, as Reporters Without Borders reports. Reporters Without Borders has in particular raised concerns over smears and attacks by the far-right political party VOX, which reportedly, “insists on a strategy of stigmatizing journalists by calling them ‘enemies’ and intensifies online harassment and intimidation strategies”.<sup>19</sup> Journalists have become the target of attacks by organized groups on social networks. These groups have the purpose of limiting the voices that cover certain information. These attacks are most offensive when they are directed against women journalists, as in the case of Anna Bosch.<sup>20</sup>

#### **Lawsuits and prosecutions against journalists (including SLAPPs)**

Organic Law 4/2015 of March 30 on the Protection of Citizens’ Security, socially known

18 Madrid Press Association: [2020 Annual Report of the Journalism Profession](#).

19 Reporters Without Borders (RSF) published the new edition of its [World Press Freedom Index 2021](#) (April 21, 2021).

20 Personal account of the journalist Anna Bosch: “I am not the first, before many other #women (sports journalists, actresses, writers ...) have suffered and continue to suffer. But this is the first time that has happened to me: For more than 12 hours I have been suffering a virtual rape in a herd here, on @TwitterEspana”. Seen on Twitter: <https://twitter.com/annabosch/status/1462003100001132548>

as the “Gag Law” (Ley Mordaza, in Spanish), states in its Article 36 that the unauthorized use of images or personal and professional data of police officers that could put the safety of the agent or their family at risk, constitutes a serious offense. The penalties are included in Article 37 and vary from €601 to €30,000.

This law has been highly criticized by press associations and fundamental rights organizations in and outside Spain. These organizations have denounced that this norm impacts journalism and activism through sanctions that limit press freedom. As reported by the Platform for Freedom of Information,<sup>21</sup> since 2015 there have been 98,586 sanctions.

The Ministry of the Interior has recognized that more than 200 people have been denounced since 2015 for disseminating images of police actions. This information,<sup>22</sup> which was given by the Ministry at the request the deputy from the party EH Bildu, Jon Iñarritu, also contains the case of two graphic journalists from the Navarrese media (Ahotsa.Info and Ekinklik) who on April 9 were covering a protest against an urban project. Consequently, the police officers sanctioned them for having published images of the protest in their media outlet. According to the Basque police press release,

the reason was that, “both photojournalists were in a private property against the will of the owner.”

The government of Spain has initiated the revision of the Law on the Protection of Citizens’ Security. However, organizations such as International Amnesty have pointed out that, “the proposal is closer to being a make-up of the current version rather than a modification of articles of concern for freedom of assembly, expression and information.”<sup>23</sup> The organization explains that the norm leaves police intervention uncontrolled, since police agents can continue to limit freedom of expression, information and peaceful protest without justification.

Guillermo Martínez is a journalist who reported<sup>24</sup> having suffered an attack by a policeman who asked him for his press accreditation. However, despite the medical report and videos that confirm his account, a judge believed the agent’s version and asked to open criminal proceedings for the crime of false testimony against Martínez and three other journalists who witnessed the incident.

The trial against the photojournalist Albert García was held in 2021. He was arrested while

21 See for example: [International consensus against the Gag Law](#) (December 15, 2021).

22 See for example: [More than 200 people reported since 2015 for disseminating images of police actions in the heat of the ‘gag law’](#) (December 1, 2021).

23 See for example: [Amnesty International regrets that the proposed reform of the Citizen Security Law continues to constitute a “gag in the face of peaceful protest”](#) (13 December 2021).

24 See for example: [Four journalists, investigated for false testimony after reporting a police attack on one of them](#) (November 23, 2021).

working for the newspaper El País covering the protests against the sentence against the Catalan independence movement on October 18, 2019. The Prosecutor’s Office asked that García be sentenced to 18 months in prison and fined a penalty €480 for allegedly attacking two riot agents of the National Police. García denied the allegations, explaining that photographing “irregular” policing had been the reason for his arrest. During the trial, the Prosecutor changed the charges and withdrew the prison sentence request: initially, García was accused of a crime of attack and minor injuries, but the Prosecutor modify the charges into an offense of disobedience and resistance to authority and requested a fine amounting to €4,800. Finally, the judge acquitted the photojournalist for lack of evidence.<sup>25</sup> Several journalists’ organizations launched a note in which they described this case as, “a trial against the entire profession and an attack on the freedom of the press.”

### ***Confidentiality and protection of journalistic sources***

The deadline to transpose Directive 2019/1937 of the European Parliament and Council,<sup>26</sup> which refers to the protection of persons who report on violations of Union law in the fight

against corruption, expired on December 17 2021 and Spain has not yet taken any implementation measures. The Directive establishes as mandatory the requirement to have internal reporting channels —within the organizations—and external — before independent authorities— in order to be able to formulate alerts about infractions of the law.

At the same time the directive contemplates: public disclosure to the media as a legitimate channel, as long as identity protection is guaranteed; the prohibition of retaliation in the workplace if it is indicated while exercising this civic action, as well as protection and reparation measures for those who bring the matter to public attention. The Platform for the Defence of Freedom of Information (PLI)<sup>27</sup> proposed that the scope of the directive be extended to all citizens and should guarantee anonymity, protecting not only journalists, but also their sources.

In this sense, the judicial proceedings that the digital newspaper eldiario.es<sup>28</sup> has been facing since October 2021 is noteworthy. A judge asked the digital newspaper to identify the sources that allowed them to publish the information about the assets in the Pazo de Meirás, in the middle of a dispute over ownership of

25 See for example: [EL PAÍS photojournalist Albert García acquitted for “lack of evidence”](#) (November 2, 2021).

26 Directive 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the protection of persons who report infringements of the right to the Union. Seen in the Official Journal of the European Union: <https://www.boe.es/doue/2019/305/L00017-00056.pdf>

27 See for example: [The PLI regrets the unjustified delay in the transposition of the whistleblower protection directive](#) (December 17, 2021).

28 See for example: [Protecting our sources is a constitutional right](#) (October 14, 2021).

the property between the Spanish State and the family of the dictator Francisco Franco. [eldiario.es](#) refused to disclose any information about the source, a right guaranteed by article 20.1 of the Spanish Constitution. The main Spanish press associations<sup>29</sup> and the International Federation of Journalists<sup>30</sup> have supported [eldiario.es](#) in its right to protect its sources of information. In addition, in January 2021 the Investigative Court (*Juzgado de Instrucción*) No. 29 of Madrid already suspended the criminal case against this digital media for publishing a scoop on a case of corruption that involved the former president of the Community of Madrid, Cristina Cifuentes. The director of the newspaper and several journalists were then accused, without success, of illegally obtaining academic and personal documents of Ms. Cifuentes.

Also relevant is the complaint against the journalist of the digital newspaper InfoLibre, Alicia Gutiérrez,<sup>31</sup> who went to court in December 2021 to face a complaint filed by the secretary general of the Popular Party, Teodoro García Egea, and the president of the region of Murcia, Fernando López Miras. The alleged crime of Gutiérrez denounced by the

leaders of the PP is “revelation of secrets”, and could carry a sentence of five years in prison for her. The reason was the publication of a scoop on alleged favouritism that allowed a relative of the secretary general to skip the waiting list and be treated with priority in a public hospital in Murcia, information which was verified before its publication. The case reflects what seems to be a pattern of judicial complaints being filed by politicians of the PP against progressive media and journalists who report on their alleged wrongdoings to discredit them, that could qualify as SLAPPs.

Recently, several digital media, including La Marea, El Salto, Kaosenlared, AraInfo, La Ultima Hora, and Nodo50 suffered several continuous DDoS cyberattacks that caused intermittent drops of their web pages. The affected media outlets described the events as “an attack of an ideological nature” that had the intention of silencing them.<sup>32</sup>

### **Surveillance**

In addition, 2021 has also been marked by the news published by Forbidden Stories, an international journalism network, on

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29 See for example: [Press associations support the right of elDiario.es not to reveal the sources to the judge of the Franco case](#) (October 15, 2021).

30 See for example: [The International Federation of Journalists supports elDiario.es in front of the judge who demands to reveal the sources](#) (October 19, 2021).

31 See for example: [infoLibre defends the public interest in court before the complaint of García Egea and López Miras](#) (December 02, 2021).

32 See for example: [The websites of La Marea and El Salto suffer a computer attack](#) (November 22, 2021).

the Israeli NSO's spyware, Pegasus.<sup>33</sup> This program infected mobile phone of activists, politicians and journalists. The consortium unveiled a list with more than 50,000 phone numbers that from 2016 to 2021 were targeted by NSO clients, mainly authoritarian regimes but also European countries. Several Spanish politicians and journalists were victims of this espionage.

## ***Freedom of expression and of information***

### ***Restrictions on access to information***

According to Reporters Without Borders, the political party VOX insists on its strategy of prohibiting journalists from covering its events such as political meetings or rallies.<sup>34</sup> Photojournalists on the other hand have been denouncing for more than a year that the Ministry of the Interior prevents covering the arrivals of immigrants,<sup>35</sup> while it has stopped giving information about the number of migrants rescued at sea trying to reach our coast, information of public interest that was previously shared.

This year again, the impossibility for journalists to access Foreigners Internment Centers (*Centros de Internamiento de Extranjeros*)<sup>36</sup> has been denounced, which represents a limitation to the right to information and prevents independent monitoring.

### ***Insufficient protection of freedom of expression***

Unlawful restrictions to freedom of expression have been identified by the ECtHR in two judgements issued against Spain in 2021: Case Benítez Moriana e Iñigo Fernández (nº36537/15 and 36539/15, March 9) and Case Erkizia Almandoz (nº5869/17, June 22). The first judgment concludes that the criminal conviction of the applicants for an offense of serious insults to a judge committed publicly (*delito de injurias con publicidad*) amounted to a violation of Art. 10 ECHR in so far as, “while it may prove necessary to protect the judiciary against gravely damaging attacks (...) this cannot have the effect of prohibiting individuals from expressing their views, through value judgments with sufficient basis, on matters of public interest related to the functioning of the justice system”. The second case deals with a conviction for an offense of glorification

33 See for example: [A leak uncovers the use of Pegasus spyware against activists and journalists around the world](#) (July 13, 2021).

34 Reporters Without Borders (RSF) published the new edition of its [World Press Freedom Index 2021](#) (April 21, 2021).

35 See for example: [Javier Bauluz denounces that they are prevented from photographing the disembarkation of migrants in the Canary Islands: “They do not want us to see what is happening”](#) (October 28, 2020).

36 See for example: [An “escalation of violence” against inmates of the Madrid CIE is reported to the Hate Crimes Prosecutor’s Office](#) (July 7, 2021).

of terrorism, considered by the Court as an unlawful restriction of the freedom of speech, given that there had been no direct incitement to violence nor glorification of any specific terrorist action.

From the report of the European Agency for Fundamental Rights (FRA) on Directive (EU) 2017/541 on combating terrorism,<sup>37</sup> published in November, the conclusion can be drawn that the offense of glorification of terrorism contained in the Spanish Criminal Code, which does not require “that the speech or content cause a danger that a terrorist act may be carried out as a result”,<sup>38</sup> and the interpretation given to it by national Courts does not comply with the Directive 2017/541. In a similar sense, the FRA Report points out that the offense of humiliation of victims, which only exists in Spain, may imply a risk to fundamental rights in so far as its wording does not require intent or danger.<sup>39</sup>

In a letter to the Spanish Minister of Justice, the Commissioner for Human Rights of the Council of Europe<sup>40</sup> expressed concern over several provisions of Spain’s criminal legislation, “which have a negative impact, including a chilling effect, on the exercise of freedom of expression”, namely offenses of glorification of terrorism, libels and insults to the Crown, insults to religious feelings and defamation, as

well as over “the excessively wide interpretation which has at times been given by some Spanish Courts to the notion of hate speech”. Therefore, the Commissioner recommends that the Criminal Code be amended and that the Courts make their decisions in line with art. 10 ECHR as interpreted by the Court.

## **Enabling framework for civil society** —

### **Regulatory framework**

During 2021 Government Delegates to the autonomous communities (*Delegados de Gobierno*) and Regional Courts of Justice (*Tribunales Superiores de Justicia Autonómicos*) have held diverging criteria in different regions, thus generating legal uncertainty as regards the conflict of rights between the protection of public health and the exercise of the right to freedom of peaceful assembly.

The Government Delegate to the autonomous community of Madrid prohibited demonstrations and parades organised to commemorate International Women’s Day. The prohibition was up-held by the Regional Court of Justice (*Tribunal Superior de Justicia de Madrid*) on the ground that the protection of public health

37 <https://fra.europa.eu/en/publication/2021/combating-terrorism-rights-impact>

38 See page 59 of the FRA Report.

39 See page 62 of the FRA Report.

40 <https://rm.coe.int/letter-to-mr-mr-juan-carlos-campo-minister-of-justice-of-spain-by-dunj/1680a1c05e>

should prevail over the exercise of the right to freedom of assembly.<sup>41</sup> A request for an interim measure against this judicial decision was filed before the Constitutional Court, which was rejected.<sup>42</sup>

However, in other regions authorities raised no concerns; static demonstrations, as well as cars- or bikes-parades, were allowed provided organisers had established certain protocols (i.e. limited number of participants, masks wearing, social distance).<sup>43</sup> The decision taken by the Government Delegate to Madrid to prohibit the demonstrations on the Women's Day was perceived by civil society as particularly striking, because a large number of demonstrations had taken place in Madrid in the previous months towards which authorities had raised no concerns.<sup>44</sup>

The Law 14/2015 on the Protection of Citizen's security (hereinafter, Law 14/2015) is the legal instrument that most negatively impacts on civic space and on the activities of civil society organisations in Spain. The Law 14/2015 regulates a vast number of issues: among others, general principles governing

the exercise of police powers, personal identification documents and identity checks, body searches by police, control of demonstrations and other public events. It defines the regime of administrative infractions and fines. The Law also contains a provision allowing the police in the autonomous towns of Ceuta and Melilla to prevent illegal border-crossing by migrants.

The process to amend the Law 14/2015, which was initiated in 2019, has been reactivated on November 2021.<sup>45</sup> However, the amendments proposed by the majority of the parliamentary groups do not tackle some of the most restrictive aspects of the text.

- *Identification and identity checks*

An amendment has been proposed to introduce the request that any time an individual is transferred to police premises in order to proceed to an identity check, police agents shall state in written the grounds that motivated the identification. However, there is no proposal to make such a safeguard extensive to identity checks carried out in the street, which

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41 Decisions issued by the Regional Court of Justice can be downloaded [here](#).

42 [https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP\\_2021\\_020/P%201293-2021.pdf](https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2021_020/P%201293-2021.pdf)

43 <https://www.lavanguardia.com/vida/20210308/6265665/espana-8m-prohibiciones-madrid-ausencia-grandes-manifestaciones-covid.html>

44 <https://www.publico.es/politica/8m-son-manifestaciones-han-autorizado-madrid-pandemia.html>

45 [https://www.congreso.es/iniciativas-organo?p\\_p\\_id=iniciativas&p\\_p\\_lifecycle=0&p\\_p\\_state=normal&p\\_p\\_mode=view&iniciativas\\_mode=mostrarDetalle&iniciativas\\_legislatura=XIV&iniciativas\\_id=122/000003](https://www.congreso.es/iniciativas-organo?p_p_id=iniciativas&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&iniciativas_mode=mostrarDetalle&iniciativas_legislatura=XIV&iniciativas_id=122/000003)

in many occasions are based on racial profiling and imply serious risks of arbitrariness and discrimination.

- *Freedom of assembly*

- **Spontaneous gatherings**

Complying with recommendations issued by regional and international human rights monitoring bodies, an amendment has been proposed to include an express mention that spontaneous gatherings should not be impeded for the sole reason that they had not been previously notified. However, there are no proposals to eliminate the liability of organizers for failing to notify a demonstration or assembly.

- **Broad definition of organizer or promoter**

There are no proposals to amend the broad definition of organizer or promoter of assemblies currently contained in the Law and according to which, in the absence of prior notice duly signed by an individual or an organisation, authorities may decide who they consider to be the organizer by relying on the slogans chanted, on signs or flags carried by demonstrators, or on “any other elements”.

The parliamentary groups that form the Government coalition (Socialist Party and Unidas Podemos) have proposed to amend the

text of the Law 14/2015 to include liability for organisers of demonstrations who, although complying with the request to notify authorities in advance, declare their gathering to have an objective or message different than their real intentions. Apparently, the abovementioned parties intend to introduce a legal basis to proceed in cases such as a demonstration organised by an extreme-right group, allegedly to protest against the Agenda 2030, but which turned out to be a homophobic march in a mainly gay area in Madrid.<sup>46</sup> Regardless of the underlying intentions of legislators, the adoption of this amendment and the consequent introduction of such a case of liability in the Law 14/2015, without further details and safeguards, may imply serious risks of arbitrariness in the application of this provision.

- *Freedom of expression*

Amendments to the Law have been proposed to make the description of the offense of “unauthorised use of images of police agents on duty” compliant with the ruling of the Constitutional Court on November 19 2020, that held that the reference to “unauthorised images” is a form of censorship and only the use of the images in a way that may endanger protected interests can be lawfully restricted. However, there are already other provisions within the Spanish legal framework (namely, the Law for the civil protection of honour and several articles of the Criminal Code) that allow for the protection of the honour and

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46 [https://www.abc.es/espana/madrid/abci-grupos-neonazis-estan-detras-manifestacion-chueca-202109191942\\_noticia.html](https://www.abc.es/espana/madrid/abci-grupos-neonazis-estan-detras-manifestacion-chueca-202109191942_noticia.html)

integrity of police agents, making this provision contained in the Law 14/2015 totally unnecessary.

- *Administrative offenses for disobedience and disrespect towards law enforcement officials*

No amendments have been proposed to eliminate such offenses or to clarify their definition. The formula used by the Law is open to subjective interpretation and, in practice, has been used by police agents to sanction a vast array of behaviours, occasionally incurring in arbitrariness.

- *Fines*

In addition, no amendments to the Law have been proposed to reduce the amounts of the fines, in spite of the recommendations in this sense issued by, among others, the Venice Commission. (See below, Section “Other systemic issues”)

## **Disregard of human rights obligations and other systemic issues affecting the rule of law framework** —

Five specific systemic issues have caught the attention of international and regional human rights monitoring bodies in 2021.<sup>47</sup>

### ***Lack of exhaustive investigation of ill-treatment allegations***

The European Court of Human Rights issued two judgements in 2021 against Spain for violation of Art. 3 ECHR, Case González Etayo (n° 20690/17, January 19) and Case López Martínez (n° 32897/16). In both cases, the Court concluded that the judicial investigations following allegations of ill-treatment by police agents had not been exhaustive enough.

Similar conclusions were reached by the Committee for the Prevention of Torture (CPT) of the Council of Europe in its report published on November, following its visit in 2020 to a number of Spanish prisons and police premises. The CPT stressed the need that effective investigations of complaints for abuse and ill-treatment made by detainees and prisoners be systematically carried out.

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47 For more details, please see Rights International Spain, [Balance de los Derechos Humanos en España 2021](#).

### *Citizens' security act as a potentially restrictive instrument*

Since it was approved in 2015, the Spanish Organic Law 4/2015 on the Protection of Citizen's Security (hereinafter, Law 4/2015) has been an object of concern for both civil society organisations and European and international human rights monitoring bodies.

2021 saw again a number of UN mechanisms have issued recommendations to modify the text of the Law 14/2015, or at least to introduce safeguards to limit restrictive effects of its application.

In a joint communication issued by the UN Special Rapporteurs on the Human Rights of Migrants concerning the promotion and protection of the right to freedom of expression, the situation of Human Rights Defenders, and torture and other cruel, inhuman or degrading treatment or punishment,<sup>48</sup> the Rapporteurs expressed concern over the potential restriction of the right to freedom of expression that the Law 14/2015 implies when used to prevent journalists from recording or taking photographs of police agents while on duty, and recommended that the Law be amended in order to make it compliant with the International Covenant on Civil and Political Rights.

On March 22 the Venice Commission issued an Opinion<sup>49</sup> on the Law 14/2015 at the request of the Monitoring Committee of the

Parliamentary Assembly of the Council of Europe. The document focuses on regulations of checks and body searches in public places, policing of spontaneous demonstrations and liability of organisers thereof, severe administrative penalties provided by the Law, and the rejection of migrants at the Spanish border in the autonomous towns of Ceuta and Melilla.

The Commission concluded that the Law 14/2015 has a “repressive potential”, as it contains a number of open-ended provisions which entrust the police with broad powers but do not indicate in which situations these powers may be used or what specific measures can be taken by police agents. It also points out that some offenses are formulated in the Law in an overly extensive manner and hence do not respect the principles of clarity and foreseeability, giving raise to a risk of arbitrariness in the exercise of coercive powers by the police.

The Venice Commission also recommends: (i) adopting detailed regulations to serve as guidance to the police in their daily work, (ii) linking personal checks and external body searches to the purpose of discovery and prevention of offences of a certain gravity, always on the basis of individual suspicion, (iii) specifying in the Law that authorities should tolerate demonstrations, even those which were not notified in advance (“spontaneous assemblies”) and that organisers of demonstrations cannot be brought to liability for the failure to notify the authorities spontaneous gatherings

48 <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26327>

49 [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)004-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)004-e)

or unforeseeable deviations and, finally (iv) reconsidering the amount of the fines provided by the Law, which can go up to €600,000 in the case of very serious offences.

### ***Pushbacks at the border***

As mentioned above, the Law 14/2015 on the Protection of Citizens' Security contains a provision allowing the police in the autonomous towns of Ceuta and Melilla to prevent illegal border-crossing by migrants.

The UN Committee on Enforced Disappearances in its report on the measures taken by the Spanish Government to implement the provisions of the International Convention for the Protection of all Persons from Enforced Disappearance,<sup>50</sup> issued in September, pointed out that these “pushbacks” of migrants trying to illegally cross the borders at the autonomous towns of Ceuta and Melilla, allowed by the Law 14/2015, prevented the identification of persons in danger of being subject to enforced disappearance, as Spanish authorities are not carrying out exhaustive individual evaluations of each case. Therefore, the Committee recommends that an express prohibition of pushbacks should be introduced within the Law for those cases where there are reasons to believe that there are risks that a person might be subject to enforced disappearance.

The UN Special Rapporteurs in their joint communication, aforementioned, also expressed concern over the use of the Law 14/2015 to authorise or “legitimise” pushbacks of migrants at the border of the Autonomous towns of Ceuta and Melilla, carried out by Spanish police agents without individual examination of specific protection needs, hence violating the principle of *non-refoulement* and, in the case of minors, with disregard to their superior interest, exposing them to potential risks of violence and inhuman, degrading or cruel treatment in Morocco.

### ***Insufficient reparation for the victims of the Civil War and the dictatorship***

The UN Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, in his Report on follow-up on his last visit to Spain<sup>51</sup> concluded that victims of the Civil War and dictatorship, “have continued to be denied of their rights to truth, justice, full reparation, memory and guarantees of non-recurrence”. He reiterated his recommendation that the amnesty law, in force since 1977, be repealed and noted that, although the bill on democratic memory submitted to the Congress of Deputies “could address many of the concerns raised in the visit report”, it still “leaves several important areas without adequate resolution, specifically regarding obstacles to achieving criminal accountability for serious human rights violations and economic

50 [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CED/C/ESP/OAI/1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CED/C/ESP/OAI/1&Lang=en)

51 A/HRC/48/60/Add.1, August 5, 2021.

liability of the State regarding the reparations owed to those wrongfully convicted.”

In September the UN Committee on Enforced Disappearances issued its Final Observations in response to the additional information provided by Spain. It referred to the proposed bill on democratic memory, urging the State to include measures that allow for effective investigations of serious human rights violations occurred during the Civil War and the dictatorship, recommending in this sense the abrogation of the 1977 amnesty Law.

# **LIBERTIES RULE OF LAW REPORT 2022**

**SWEDEN**



# Sweden

## About the authors



**Civil Rights Defenders (CRD)** is a politically and religiously independent international human rights organisation. Our mission is to defend civil and political rights together with local human rights defenders in order to increase their security, capacity and access to justice. We work as part of a global movement of human rights defenders, and we partner with those at risk. Through legal means and public advocacy, we hold states, individuals, and non-state actors accountable for human rights violations. We advocate for the norms and values of the International Covenant on Civil and Political Rights and other relevant human rights standards, and we encourage people to use these rights to promote democratic societies.



Svenska Avdelningen av Internationella Juristkommissionen  
Swedish Section of the International Commission of Jurists

**The Swedish Section of the International Commission of Jurists (ICJ-Sweden)**, whose members are lawyers, works to promote human rights and the rule of law in Sweden and internationally. At the national level, ICJ-Sweden monitors Sweden's international and regional constitutional obligations in the field

of human rights and ensures that the rights of individuals are observed. It also keeps checks on whether judiciary is independent, accountable and working to strengthen its compliance with fundamental rights. ICJ-Sweden works towards equality before the law and non-discrimination. It declares the right to a fair trial a right in itself and promotes active resistance when violations of rights occur. ICJ-Sweden is designing a program for justice in Sweden, organising debates and seminars on current issues and collaborating with other rights organisations when individual and structural violations in society have been identified. At the international level, ICJ-Sweden monitors trials in order to promote human rights and the rule of law.

## Key concerns

The Swedish constitution stipulates the country's basic regulations within the justice system for protecting human rights and democratic values, which are also enshrined in international human rights law. However, with the current legal framework, these values, which are the foundation of a democratic and open society, are far too easy to undermine. The growth of far-right populist movements around Europe and in Sweden is of utmost concern, in particular because these groups threaten to take advantage of the current regulations and they also threaten our democracy.

Sweden continues to be one of the least corrupt countries in the world, but recent revelations about high-level corruption point to the need to be more alert to the risk of corruption and the ability of authorities to prevent and tackle corrupt practices.

In 2021, Sweden witnessed a regression in regulations concerning its media environment. A proposal to include the protection of public service media in the constitution has been denied by several political parties in Parliament. To add to this, no progress has been made on successfully prosecuting online threats and hate crimes.

Sweden's civil society organisations, in particular those supporting LGBTQI+ groups, ethnic minorities and people with disabilities, continue to face verbal abuse, threats and harassment. And authorities are still unsure how to adequately identify and prosecute hate crimes.

The Swedish government has intensified its opposition to undocumented migration, thus neglecting its obligations under international human rights instruments and conventions. Asylum seekers are regularly confronted with structural rule of law challenges. Indigenous rights are also under threat due to land exploitation and the continued extraction of natural resources. Lastly, existing inequalities in Swedish society have intensified during the COVID-19 pandemic.

### State of play

- Justice system
- Anti-corruption framework
- ↓ Media environment and freedom of expression and of information
- ↑ Checks and balances
- Enabling framework for civil society
- ↑ Systemic human rights issues

#### Legend (versus 2020)

Regression: ↓

No progress: —

Progress: ↑

## Justice system —

### Key recommendations

- We recommend stronger constitutional protection against the passage of laws contradicting democratic values and human rights. This should be backed by at least a qualified majority in Parliament.
- We recommend increased independence for the courts.
- We recommend increased attentiveness to individual human rights and a better legal aid system for those who need it.

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## **Judicial independence**

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### ***Appointment and selection of judges, prosecutors and court presidents***

Judges in Sweden are appointed by the government following proposals from a panel, whose purpose is to minimise political influence in government judicial appointments. The judging panel, however, is regulated by ordinary law, so it can be changed by a 51% majority in the Parliament, and the government tends to appoint its own as members. Real protection against political influence presupposes that the independence and representative composition of such panels are regulated and secured in the constitution, that the appointment of judges by the government only takes place following a binding proposal from the panel, and that merit forms the only basis for assessing suitability. A representative composition of the judging panel would mean that the Parliament, the bar association, the judiciary and the highest courts are represented in, and constitute the majority of the judging panel.

Another way to protect the independence of the supreme court is to regulate of the number of members. Under ordinary law, the current regulation sets a minimum number of members on the supreme court. It is worth considering introducing rules in the constitution establishing a minimum and maximum number of members, proposed in 11 Cape. 1 § RF. One way for an authoritarian regime to seize control of the justice system could be to appoint extra loyalist judges to form a majority in the supreme court.

### ***Irremovability and disciplinary regime of judges***

The Swedish Chancellor of Justice is tasked with monitoring and taking actions against judges in the courts when needed. The Chancellor of Justice is appointed by and reports to the government. In effect, it is the government's duty to monitor the courts and its judges and lawyers, meaning that the independence of the judiciary would be uncertain if a populist and authoritarian government were to come to power. This power should be transferred to an independent panel within the judiciary, formed by judges and regulated in the constitution.

### ***Independence and powers of the body tasked with safeguarding the independence of the judiciary***

An important part of the independence of the courts is, of course, how the National Courts Administration's governance and activities are designed. The Swedish National Courts Administration should be led by one Council for the Judiciary, in which the majority of members are judges. The board should also be given a mandate to appoint the head of the authority, which could improve its independence.

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## **Quality of justice**

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### ***Accessibility of courts***

Many people in Sweden do not have access to justice through the courts because court fees are far too high. Their rights on paper cannot, for the most part, be put into court practice,

even though the European Convention, which is enshrined in Swedish law, includes the right to a fair trial regarding suspected violations of civil rights.

The rules on Swedish court costs are based on the assumption that the two parties involved are on an equal footing financially, while disputes over freedoms, civil rights and other human rights are often waged between individuals and the state or other parties with completely different economic conditions. In particular, discrimination cases are subject to civil procedure rules, even if the defendant is a state agency or an entity with strong financial resources. These rules need to be changed to achieve balance. In practice this means that the lower limit on the income individuals must have to qualify for legal aid needs to be raised, something that has not been done in 20 years. As there is legal aid in criminal cases, which is often about human rights, it is logical to meet the need for legal aid in the same way in cases of freedom and civil rights. In freedom and civil rights cases, plaintiffs should also be guaranteed a representative or assistant paid for by the state, and only in exceptional cases should they have to cover their legal costs. The low remuneration paid to public defenders means that it is also difficult to get good lawyers who want to address these goals. All in all, this means that many people do not have access to general legal aid and thus have no means of having their cases tried before national authorities and courts. This may mean that Sweden violates the rules of the European Convention on the right to a fair trial under Article 6 and the right to an effective remedy under Article 13.

In administrative cases, the general rule is that each party bears its own costs. Administrative cases often contain human rights aspects as they are disputes between the state and the individual. Consequently, even if an individual manages to demonstrate that the state's actions were unlawful, he or she cannot be compensated for the costs of proving this in court. We thus recommend an adequate and affordable legal aid system which enables individuals' effective rights and ensures their ability to claim those rights in administrative courts.

#### ***Training of justice professionals (including judges, prosecutors, lawyers and court staff)***

Among judges and judicial representatives, in particular judges of administrative courts, there is an identifiable, widespread ignorance and lack of will to adopt the new international and European influence in the Swedish legal environment (the European Convention on Human Rights and the UN Convention on the Rights of the Child are enshrined in Swedish law). To remedy this judges and judicial representatives should receive regular, recurrent training on the constitution, the European Convention, the EU Charter of Fundamental Rights and the UN Basic Conventions, and on conformity to these conventions.

#### ***Digitalization***

Although the courts never actually stopped handling cases at any time during the pandemic, it brought changes to the format of legal proceedings, including the preliminary investigation stage. In particular, these

changes concerned extended use of electronic communication tools at interrogations and oral hearings. For example, in 2020, the courts conducted 127,553 video conferences, compared to 70,004 in 2019.<sup>1</sup> The preliminary numbers for 2021 indicate that the demand for electronic communication tools continues to rise. This is especially concerning when the legal proceedings concern the rights of vulnerable groups, for example forced psychiatric care cases.

The Swedish Bar Association conducted a survey in June 2020 regarding the COVID-19 pandemic. Some of the questions concerned the effects of COVID-19 in terms of access to justice. Twenty-four percent of Bar Association respondents considered the pandemic to have had a negative impact on fair trial standards and access to justice for their clients. On the question of in what way their clients had been negatively impacted, 78% of respondents answered that it was because of cancelled proceedings, 64% that it was because of the use of remote technology and 58% that the lengthy proceedings had negatively impacted their clients' rights.<sup>2</sup>

There is currently no comprehensive data on how electronic means of communication impact the quality of proceedings or procedural rights. However, digital tools certainly are a risk factor when it comes to guaranteeing

procedural rights, especially for vulnerable groups. We recommend that the use of electronic means of communication remains an exception in legal proceedings and that the authorities give the matter special consideration when the proceedings concern the rights of vulnerable groups.

### ***Fairness and efficiency of the justice system***

#### ***Respect for fair trial standards including in the context of pre-trial detention***

No further measures have been taken to ensure procedural rights in practice when it comes to persons with disabilities. A related area of concern is that the Discrimination Act does not explicitly cover discrimination when it comes to court proceedings or other criminal proceedings. This makes it difficult to investigate discriminatory practices, including the lack of reasonable accommodation, which was officially recognised as a form of discrimination in 2015, or to provide redress for victims. The shortcomings due to procedural safeguards were highlighted by the Committee Against Torture and its concluding observation about Sweden in December 2021.<sup>3</sup> The Committee also explicitly recommends that the state ensure that the new Human Rights Institute can carry out its mandate independently and effectively when it comes to the implementation

1 Official court statistics of number of video conferences at oral hearings (in Swedish), Statistik Salar\_Antal\_Veckovis\_2018-2021.xlsx (domstol.se).

2 Advokatsamfundet COVID-19 studie.

3 CAT/C/SWE/CO/8/47274/E, item 11 and 12.

of the six EU Directives governing procedural rights, and that “the Equality Ombudsman has been given a broader mandate to combat discrimination and work for equal rights and opportunities” (see item 6).

The Council of Europe and the UN have also criticised Sweden for long detention periods. This is especially true in cases in which the suspect has been subject to restrictions and isolated from the outside world, which can be stressful both mentally and physically. In 2013, a working group commissioned by the public prosecutor submitted a report that proposes, among other things, home arrest and house arrest as an alternative to detention, a maximum limit on detention time, and a special youth home for detainees under 18. However, no further time limits for detention have been introduced.

In recent years, the discourse in the area of criminal policy has hardened and both the ruling party and the opposition have presented a number of legislative amendments leading to harsher punishments, new coercive measures considerably restricting privacy rights, and changes to the principles of the Swedish criminal procedure. The human rights perspective is often lacking in such legislative proposals, and the speed with which proposals become legislative bills raises concerns as to whether a proper impact assessment of the measures has been conducted. The area of criminal policy should therefore be monitored further to review whether the proposed measures are proportional to the limitations of procedural rights and whether they are adequate in relation to the desired results.

As a part of the EU-funded research project “Defence Rights in Evidentiary Proceedings” (DREP), Civil Rights Defenders has studied regulations on the admissibility and rejection of evidence in Sweden. The aim was to examine the extent to which suspects and accused persons are able to participate in and influence procedures related to the gathering of evidence, and how easily they can gain access to such evidence and challenge evidence that was unlawfully obtained. In the third instance, the investigation shows that the current system does not meet the requirement for an effective remedy, in the sense that an individual’s circumstances are restored to what they were prior to the violation. This is partly because the most effective evidentiary remedies (such as rejection) are only rarely applied, and partly because the use of remedies can be unpredictable, as actors in the judicial system have a wide margin for discretion in this matter. It is also noted that the investigating authorities have little incentive to avoid violating the rules, as even improper evidence may serve as grounds for a conviction. Other tools, such as filing a complaint with the Parliamentary Ombudsman (JO) or the Chancellor of Justice (JK), or reporting misconduct by the police, are intended to prevent systematic violations, but are not effective in restoring the individual’s circumstances to what they were before the violation. It is also uncertain whether these remedies actually lead to a change in the application of the law.

## **Anti-corruption framework** ➔

Sweden continues to be one of the least corrupt countries in the world. This is shown by the latest result of Transparency International's corruption index for 2021, which ranks the country fourth. Sweden was ranked third in the 2020 index and fourth in 2019.

Corruption is not only a matter of public servants demanding or taking money or favours in exchange for services. Corruption can also include conflict of interests, nepotism and politicians misusing public money or granting public jobs or contracts to their sponsors, friends and families. Despite Sweden's high ranking in the corruption index, many corruption cases show that Sweden is far from a corruption free utopia.

Recent revelations on corruption include high level actors such as the telecom provider Telia Company AB. Corruption at such a high level tends to entail transnational elements, meaning it affects the corruption level in other countries. So when assessing whether or not Sweden has made progress in combatting corruption, our relationships with, and activities in other countries must be considered and included in the assessment.

It is crucial that we do not become blinded by international index rankings, as corruption can take many shapes and forms, and thrives wherever possible.

## **Media environment and freedom of expression and of information** ⬇

### **Key recommendations**

We recommend a constitutional protection for public service broadcasting, which would limit the possibility of decisions to shut it down, to stop funding it, to attack its independence or to install political steering. This protection should be based on a decision with at least be a qualified majority in Parliament.

### **Public service media**

#### **Independence of public service media from governmental interference**

Public service media, which includes radio and TV services, is run by Swedish Radio (SR), Swedish Television (SVT) and Swedish Educational Radio (UR), all three of which are owned by the Administrative Foundation. The media companies' broadcasting services are regulated by the Radio and Television Act (2010: 696, amended no later than 2019: 654).

The public service media has a democratic mission and should benefit everyone in Sweden. This mission requires independence from both political and commercial interests. According to Chapter 5 of the Radio and Television Act. Section 1 (2010: 696), "program activities as a whole shall be characterised by the basic ideas

of the democratic state and the principle of the equal value of all human beings and the freedom and dignity of the individual.” To what extent this is complied with and how these principles, the pursuit of independence and the democracy clause relate to each other is currently under discussion. It has been emphasised that impartiality cannot imply neutrality in relation to values regarding human dignity. The risk of misrepresentative balance and the dissemination of anti-democratic and false messages is imminent unless the democracy clause is applied properly.

From an international perspective, the importance of the ongoing work to strengthen the independence of public service media in our country should be emphasised, not only in light of developments taking place in countries with authoritarian regimes, which have sought control over public service broadcasters, but also because of developments closer to home. Current experiences from Denmark, where, among other things, sharp budget cuts have been made, also show with frightening clarity what can happen when the independence of public services media is not guaranteed. The danger to the independence and finances of SR, SVT and UR may also have increased. The tendencies towards authoritarian and populist right wing support and the lack of will to protect public service media in the constitution through a majority in parliament have put the public service media in a dangerous position.

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## **Online media**

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*There is a need for a new set of human rights rules to protect people using social media.*

We consider the following fundamental rights, in addition to the Universal Declaration of Human Rights, the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and the constitutions of its Member States, to be self-evident:

1. Digital self-determination - Everyone has the right to digital self-determination. Harvesting people’s personal data or manipulating people through ad content, algorithms or any other method should be forbidden.
2. Artificial intelligence - Everyone has the right to trust that the algorithms imposed on them are transparent, verifiable, and fair. Key decisions must be made by a human beings.
3. Truth - Everyone has the right to trust that statements made by the holders of public office are true.

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## **Safety and protection of journalists and other media activists**

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Hate crimes and cyberbullying such as slander, unlawful threats, harassment, unlawful persecution, and unlawful invasion of privacy threaten democracy. In particular, it is important that journalists are protected. A

prerequisite for a functioning democracy is that journalists, researchers, and civilians can all participate in and use their freedom of expression.

Everyone, including journalists, and not just elected representatives, must be offered satisfactory protection. At present, the exposure to verbal and physical attacks is very high, as a report on the situation of independent opinion leaders by Civil Rights Defenders from May 2019 shows.<sup>4</sup>

Hate crimes are rarely prosecuted and compensation tends to be very low. The police's failure to investigate hate crimes has led to demands for the appointment of a special crime commission, but the problems not only lie with the police authority but exist throughout the legal chain. The same applies to a large extent to other network violations. The fact that the police all too often fail to investigate these crimes is supported by report findings.

The police authority's work with democracy and hate crimes has faced major obstacles, especially when up against uncertainty about whether crimes on Facebook, Twitter and similar platforms can even be prosecuted in Sweden. The way that police, prosecutors and the courts in different regions deal with crime varies wildly, which makes it doubtful as to whether the principle of equality before the law is applicable to today's context.

With a lack of prioritisation, resource allocation and ignorance of basic procedures, civil society has had to bear a heavy burden, not least when it comes to registering hate crimes.

For example, for the past couple of years, several employees of a small organisation have filed over 1,200 police reports, which so far has led to over 200 convictions for incitement against ethnic groups on social media. Although the number of blackouts is still very high, this has made an impression online. The reports have included evidence in the form of screenshots and likes as well as information about the identity of the suspected perpetrators. We would see a significant improvement if the police were to prioritise the issue and employ at least five to ten people to actively scout the internet. It is not reasonable that the important task of detecting and reporting crimes that threaten democracy lies with civil society. Rather it should be the responsibility of the state.

With regard to incitement against ethnic groups, the system should adjust the scope of sentences. Currently, a person who has spread hundreds of inflammatory messages via various channels on the Internet will only be punished to about the same extent as someone who has only written one or two provocative comments. Unsettling and illegal online harassment should be tried more often. The question remains at what point systematic cyberbullying leads to unlawful persecution. The application of the relatively new penal provision for

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4 <https://crd.org/sv/2019/05/13/ny-rapport-nar-samhallet-tystnar/>.

unlawful persecution has so far been characterised by excessive caution. Something similar applies to the crime of incitement, which, for reasons that remain unclear, is not considered by the legal community to be as serious when it takes place online as it is in traditional media. Online incitement should be tried in court more often than it currently is. Also worrying is the police's lack of work during criminal investigations to develop situation reports. In cases in which individuals with roots in violent extremist environments (for example IS and NMR) are responsible for hate crimes and cyberbullying, the investigation work should be more systematised. Scouting and producing an investigation position report must be an integral part of the work. Furthermore, links to violent extremism regarding cyberbullying should lead to public prosecutions. A greater responsibility should be placed on the major platform owners so that they have more incentive to remove obvious criminal content. They should also be more motivated to cooperate with law enforcement authorities. The Digital Internal Market Copyright Directive (especially Article 17), adopted on 15 April 2019, provides guidance in this area.

Inspiration can also be drawn from countries such as France and Germany, which have passed new legislation in this area. The EU directive for audio-visual services has been strengthened, but there is room for greater EU collaboration in this area, for example, in that translations of criminal laws are published on the authorities' websites to make the content available to more stakeholders. The problem is cross-border. The Act (1998: 112) on electronic bulletin boards, which can be considered a

legal instrument at the intersection of general criminal law and freedom of the press, has so far been used very sparingly. Perhaps this indicates the beginning of a practice being developed, but the law should be modernised and developed to include more types of crime, such as gross slander.

The provision on incitement against ethnic groups should also be designed so that the legislation complies with the UN Convention on Racial Discrimination's ban on spreading racist propaganda. There is also a need to investigate whether the provision should include legal protection for people with disabilities. Finally, it has also been discussed whether the notion of crimes against democracy should serve as grounds for severe punishment and what the delimitation would look like in such cases. It is important here to avoid pitting different groups against each other as democracy presupposes broad participation.

## ***Freedom of expression and of information***

### ***Censorship and self-censorship, including online***

It has become an increasing problem that people are silenced on social media by being exposed to threats and systematic, campaign-driven and propaganda-like claims that constitute defamation. At present, it is not only people with limited resources who are more or less considered lawless in this context, but in practice every citizen is, due to the lack of effective legal instruments in the administration of justice. There is a lack of knowledge,

prioritization and personal resources within the police and the courts, on top of the lack of financial resources in terms of legal aid.

## Checks and balances

### Key recommendations

Amend relevant regulations (kommittéförordningen) to ensure that impact assessments are systematically carried out for all new legislative proposals.

Even though Sweden has a well-established democratic process in terms of legislation, governmental inquiries are often initiated without adequate consideration being given to Sweden's international agreements on human rights. ICJ-Sweden and Civil Rights Defenders believe that relevant regulations (kommittéförordningen) need to be amended and impact assessments need to be carried out to ensure that international human rights

in ratified conventions are naturalized and included in all new legislative proposals.

To enable the Government to take more restrictive actions regarding the COVID-19 pandemic, new legislative measures entered into force on 10 January 2021.<sup>5</sup> For particularly restrictive measures, such ordinances must be submitted to Parliament within one week of their adoption for ratification, and these short timeframes have been criticized.<sup>6</sup> This legislation was originally scheduled to expire in late September 2021, but it has since been prolonged until the end of January 2022 (EU-kommissionens rapport 2021, s. 13 f.).<sup>7</sup>

It has been discussed whether the Swedish constitution would allow the government to issue compulsory measures to limit the spread of COVID-19.<sup>8</sup> According to Mark Klamberg, professor in international law at Stockholm University, the Swedish government has extraordinary powers in an emergency. Klamberg argues that the temporary changes in relation to the Act on Communicable Disease Control,<sup>9</sup> which

5 Act (2021: 4) on special restrictions to prevent the spread of the disease covid-19 (lagen [2021:4] om särskilda begränsningar för att förhindra spridning av sjukdomen COVID-19).

6 En tillfällig covid-19-lag, Konstitutionsutskottets yttrande 2020/21:KU6y.

7 Fortsatt giltighet av covid-19-lagen och lagen om tillfälliga smittskyddsåtgärder på serveringsställen, Socialutskottets Betänkande 2021/22:SoU3.

8 Dahlström, C. & J. Lindvall, "Sverige og covid-19-krisen", pp. 505–534, in *Håndteringen af covid-19 i foråret 2020 Rapport afgivet af den af Folketingets Udvalg for Forretningsordenen nedsatte udredningsgruppe vedr. håndteringen af covid-19*, Folketinget, 2021, p. 516 f.

9 Lag om ändring i smittskyddslagen, SFS 2020:241.

granted the government broader “lock-down powers”, were similar to measures taken in a state of emergency.<sup>10</sup> Furthermore, Parliament could impose restrictions on, for example, freedom of movement if there was a majority vote for the measure (OSCE rapporten s. 148 f.).<sup>11</sup>

## Enabling framework for civil society –

### Key recommendations

- The Swedish government must ensure that the judicial authorities have the right competence and enough resources to identify, prevent and obviate crimes and threats against civil society actors.
- The national safety net for civil society must be strengthened and must include support for self-employed actors.

## Attacks and harassment

### Verbal and physical attacks

A report by Civil Rights Defenders, “När samhället tystnar,” revealed that people who work in independent opinion-building (for example online-activists or freelance journalists) have reported incidents of hate and threats directed at them. These incidents include hateful comments on Facebook or Flashback and people sending threatening letters to their home addresses. The shift towards an anti-democratic and racist political climate is mentioned as a contributing factor to this trend. According to the report, “[w]hen trustees use hateful language, it encourages others to follow.”<sup>12</sup>

In a report from 2020, the National Council for Sweden’s Youth Organisations (LSU) writes that hate and threats against members and activists in youth organisations have intensified. Those who are the most exposed to hate are women and people that belong to minority groups, including the LGBTI+ community, ethnic minorities and people with disabilities.<sup>13</sup> The consequences of this are severe, with the organisations withdrawing from their public activities.

10 Klamborg, M. (2021). “Challenges to rule of law, democracy and human rights after the outbreak of COVID-19 from a Swedish perspective”, in Democracy for the future, 2021.

11 *Experts: Sweden could bring in lockdown if Parliament wanted to*, Sveriges Radio, 18 November 2020.

12 *När samhället tystnar*, Civil Rights Defenders, p. 12.

13 *Vi sluter oss inåt – En kartläggning av hat och hot mot Sveriges ungdomsrörelse*, [www.lsu.se](http://www.lsu.se), 2020.

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***Law enforcement capacity to ensure the safety of civil society actors and to investigate attacks and harassment***

There is a lack of understanding as to what constitutes hate against civil society actors and what countermeasures could be taken to ensure their safety. The police must be trained to develop skills concerning both issues of equality and discrimination, and to identify incidents of hate and threats against, for example, racialised minorities and national politicians.<sup>14</sup>

Public prosecutors should handle cases of gross defamation, and the Swedish police should, to a larger extent, investigate allegations of hate against journalists and other public figures. People exposed to this kind of harassment have suggested that the police should deepen their knowledge on these issues. They have also proposed that the police should have an expertise-hotline, which people who have been exposed to hate or threats can call.<sup>15</sup> The special “democracy and hate-crime units” within the Swedish police work with so-called crimes against democracy. There is actually no crime with this name in the Swedish Criminal Code, but the police use this term to underline the severity of crimes against politicians, journalists or other public figures that are attacked in their professions. These units only exist in Swedish conurbations and

should be established in the rest of the country to strengthen the work they are doing.<sup>16</sup>

The growing far-right populist movements in Europe, and in Sweden, threaten our democracy and core human rights. These extreme right-wing movements negatively impact the rights to freedom of speech and assembly and threaten people who choose to organise themselves peacefully for human rights by misusing what they claim is their right to exercise their freedom of speech, assembly, and manifestation. The Swedish government has acted to mitigate this impact by putting together a parliamentary committee to look into the possibility of prohibiting certain racist and militant organisations as being unconstitutional.<sup>17</sup> The committee suggests that a prohibition of racist organisations should be implemented through changes to the Swedish Criminal Code in July 2022. Civil society organisations, including Amnesty and Civil Rights Defenders, have criticised the committee report and are against the proposal for a new legislation. The work against racist organisations is a human rights issue. There is a broader need for prioritisation by the Swedish police and other relevant authorities to work with these issues, and new legislation is not enough. Furthermore, there is great capacity to develop cooperation between the authorities and civil society in the fight against racist organisations.

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14 *När samhället tystnar*, Civil Rights Defenders, s. 24.

15 *När samhället tystnar*, Civil Rights Defenders, s. 21.

16 *När samhället tystnar*, Civil Rights Defenders, p. 15.

17 Kommittén för förbud mot rasistiska organisationer, Ju 2019:02.

## **Disregard of human rights obligations and other systemic issues affecting the rule of law framework**

### **Systemic human rights violations**

#### **Widespread human rights violations and/or persistent protection failures**

The Swedish government advocates a more active stance on their migration policy and have ordered the police to intensify their work on executing deportation decisions. Furthermore, the government has ordered The Swedish International Development Cooperation Agency (SIDA) to chart the national deportation and “tenable” reintegration process.<sup>18</sup> The Swedish government has proclaimed that development assistance money will be used to prompt countries to repatriate their citizens from Sweden. This governmental spin has been criticised by the leaders of several Swedish NGOs, who argue that global needs are increasing and that using development assistance money to lever other countries goes against the fundamental purpose of that kind of funding. Today we have the highest number of people in need of humanitarian support and protection since the Second World War. This is due to circumstances such as the COVID-19

pandemic, climate change and the rising number of armed conflicts.<sup>19</sup>

A non-citizen in Sweden can be deprived of their residence permit for national security reasons. The legal proceedings in such cases do not live up to the requirements of the European Convention of Human Rights. The main challenge is that individuals considered a security threat cannot access the evidence on which the Security Police bases its accusations. Moreover, the court hierarchy in these cases consists of the Migration Agency and the Swedish government, while the Migration Court of Appeal issues a non-binding opinion. So in some instances there is no judicial authority assessing the case. Instead, the decision lies solely in the hands of the executive. Swedish legislation also contains a discriminatory element, since EU-citizens are able to apply for review at the Supreme Administrative Court, whereas non-EU-citizens who had a residence permit before the start of the proceedings do not have this possibility. The European Court has awarded compensation for rights violations due to limited access to evidence in at least one case against Sweden (X. against Sweden). At the same time, a state inquiry (SOU 2020:16) is proposing further restrictions on non-citizens’ rights in security cases. It is recommended that the procedure in migration cases with a security aspect is re-evaluated so that the basic rights of undocumented immigrants are protected.

18 *Flera initiativ för att personer med ett återvändande lämnar Sverige*, Justitiedepartementet, 29 December 2021.

19 Matilda Ernkrans, är detta utspel regeringens nya biståndspolitik?, [www.omvarlden.se](http://www.omvarlden.se), 31 December 2021.

The long-term cultural survival of the indigenous Sámi People in Sweden is threatened by cumulative effects of natural resource extraction, growing infrastructure, large-scale tourism, climate change, insufficient access to language education, racism, hate crime and more. Discrimination, and violations of Sámi indigenous rights occur both in relation to the inadequate protection offered by national legislation and the implementation of existing legislation by the authorities and courts. In 2021, a government inquiry was initiated to analyse the scope of Sámi land rights as part of proposed legislation.<sup>20</sup> The government directives for a Sámi truth commission<sup>21</sup> was another positive step. Furthermore, a government bill to strengthen the Sámi right to influence through the establishment of a general consultation procedure was presented.<sup>22</sup> However, the bill has been criticised for not guaranteeing real influence for the Sámi People in practice. Also, the directives for government

inquiries on legislation that concern Sweden's supply of metals and minerals<sup>23</sup> have been criticised for largely overlooking Sámi rights, even though mining and other projects centred on land exploitation are an urgent human rights challenge for the Sámi People. In connection with this, the UN CERD recently criticised Sweden after it received an individual complaint on mining concessions and considered Sweden's legislation too weak.<sup>24</sup>

### ***Impunity and/or lack of accountability for human rights violations***

The Swedish Discrimination Act,<sup>25</sup> which was enacted in 2008, prohibits discrimination in the labour market and in the provision of goods, services and housing within the private sector, as well as discrimination and discriminatory harassment within several public service institutions. However, the protection against discrimination by public sector employees

20 Government of Sweden, Dir. 2021:35. The inquiry will be presented in November 2022 and in May 2025.

<https://www.regeringen.se/49b171/contentassets/871d8cb88bdc4509a90f5ef01219a6f6/en-ny-renskotsellagstiftning--det-samiska-folkets-ratt-till-renskotsel-jakt-och-fiske-dir.-202135.pdf>

21 Government of Sweden, Dir. 2021:103. <https://www.regeringen.se/4aab29/contentassets/4712a7127d6a4a30954004aa010c1af7/kartlaggning-och-granskning-av-den-politik-som-forts-gentemot-samerna-och-dess-konsekvenser-for-det-samiska-folket-dir.-2021103.pdf>

<https://www.regeringen.se/4a81d4/contentassets/cdf-f655ac2ed4b5885a00ae8fa82154c/en-konsultationsordning-i-fragor-som-ror-det-samiska-folket-prop.-20212219.pdf>

22 Government of Sweden, proposition 2021/2022:19. <https://www.regeringen.se/4a81d4/contentassets/cdf-f655ac2ed4b5885a00ae8fa82154c/en-konsultationsordning-i-fragor-som-ror-det-samiska-folket-prop.-20212219.pdf>

23 Dir. 2021:16. The inquiry will be presented in October 2022. <https://www.regeringen.se/494806/contentassets/9aab1c77410c4230aec3585a8690296b/provningsprocesser-och-regelverk-for-en-hallbar-forsorjning-av-innovationskritiska-metaller-och-mineral-dir.-202116.pdf>

24 [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2F-C%2F102%2FD%2F54%2F2013&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2F-C%2F102%2FD%2F54%2F2013&Lang=en)

25 Diskrimineringslag (2008:567), Accessible [here](#) (10.01.2022).

within most institutions is limited to discriminatory *treatment* rather than discriminatory *measures*.<sup>26</sup> As such, discriminatory measures taken by actors in the criminal justice system are not prohibited under the Discrimination Act. Coupled with the high threshold needed to investigate and punish acts of misconduct by police officers, this constitutes a serious accountability gap, with limited possibilities for individuals who have been subjected to discriminatory human rights violations committed by police officers to receive redress.<sup>27</sup> In 2020, the government appointed a senior judge to conduct an inquiry into whether the scope of prohibition should be widened.<sup>28</sup> The inquiry was finished in December 2021 and includes a legislative proposal which widens the scope of prohibition in the Discrimination Act to include measures taken by all public service employees, with the exception of measures taken by the Swedish Security Service (SÄPO).<sup>29</sup> If adopted, the proposal will constitute clear progress in holding public sector employees, including police officers, to account for discriminatory practices.

### *Other systemic human rights issues*

There are various structural rule of law challenges in connection to the asylum process in Sweden. These regularly result in violations of the principle of non-refoulement regarding asylum seekers. One example concerns arbitrary substantial assessments of asylum applications, such as non-objective credibility assessments of verbal accounts and the disregard for the principle of the benefit of the doubt.<sup>30</sup> A second example concerns insufficient identification of torture or trauma victims and inadequate adaption of interviews and other procedural aspects, which are necessary for the individual asylum seeker to access justice.<sup>31</sup> A third example regards the arbitrary process of handling asylum applications from countries that are on the Swedish Migration Agency's (SMA) list of safe countries of origin. The list of safe countries of origin creates a presumption that asylum seekers can be protected by their country of origin.<sup>32</sup>

In 2021, there were two significant developments that affected those who sought asylum

26 See section 17, chapter 2 in the Swedish Discrimination Act (Diskrimineringslag, SFS 2008:567), Accessible [here](#) (10.01.2022).

27 See section 1, chapter 20, Swedish Criminal Code (Brottsbalk, SFS 1962:700), Accessible [here](#) (10.01.2022).

28 Government of Sweden, Dir. 2020:102, Accessible [here](#) (10.01.22).

29 Government of Sweden, SOU 2021:94, Accessible [here](#) (10.01.22).

30 See recommendations by the UN Committee Against Torture, Concluding observations on the eighth periodic report of Sweden, CAT/C/SWE/CO/8, 2021. [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/SWE/CO/8&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/SWE/CO/8&Lang=En); For instance, see a [report](#) (2019) by Refugee Law Center.

31 CAT/C/SWE/CO/8.

32 CAT/C/SWE/CO/8. See a [report](#) (2021) by Refugee Law Center.

without their families in 2015 and 2016. The majority of these people were young Afghan nationals, and those who, due to various challenges to the rule of law, lost access to international protection and have experienced serious hardships in Sweden.<sup>33</sup> Firstly, there is a new humanitarian ground in the Aliens Act for adults that legally reside in Sweden and have developed a special connection to Swedish society, and would experience particularly distressing circumstances in their home countries upon return.<sup>34</sup> Secondly, after the recent political change in Afghanistan, the Swedish Migration Agency (SMA) has published a new legal position on the assessment of asylum applications from Afghanistan. Effectively, the SMA is expected to reconsider the asylum applications of Afghan nationals whose requests have previously been denied.<sup>35</sup> The practical consequences of these two developments for the human rights situation remain to be seen.

### ***The impact of COVID-19 pandemic and the measures taken to address***

#### ***The extent to which emergency measures have or have not been phased out***

In comparison to most other countries, Sweden has handled the COVID-19 pandemic through a series of non-binding recommendations instead of implementing repressive measures. These recommendations have, to a significant extent, relied on advice from expert authorities like the Public Health Agency (Folkhälsomyndigheten). Until early autumn 2021, the Public Health Agency recommended that people stay at home if they had any symptoms of COVID-19. It also recommended hand washing, social distancing and avoiding crowded settings, working from home as often as possible and ensuring that people travel in a way that minimises the risk of infection.

#### ***The medium and long-term implications of COVID-19 related measures on rule of law and human rights protection***

Recommendations from the Swedish Public Health Agency on social distancing cannot be

33 Today persons in this group have different legal conditions, many of them living, or are expected to soon live, in Sweden undocumented.

34 Section 6 Chapter 5 Aliens Act (2005:716). See also the Government bill, proposition 2020/21:191.

35 Swedish Migration Agency, Rättsligt ställningstagande. Prövning av skyddsbehov för medborgare från Afghanistan - RS/089/2021. <https://lifos.migrationsverket.se/dokument?documentSummaryId=45964>.

followed by everyone, which means that some groups have been unable to protect themselves from contagion.<sup>36</sup> The Public Health Agency has collected data from March 2020 to February 2021 in the report “Foreign-born people and COVID-19”. The report explains that foreign-born people in Sweden have been hit harder by the pandemic than Swedish-born people. This has been explained by the Agency as a consequence of sociodemographic and socioeconomic factors, including the fact that people who have migrated to Sweden are less likely to be able to work from home and are more likely to live in crowded housing conditions.<sup>37</sup>

The Swedish Agency for Equality (Jämställdhetsmyndigheten) has noted several consequences of the self-isolation recommendations issued by the Public Health Agency, such as an increase in domestic violence against women. Women also showed higher rates of depression and anxiety due to the restrictions.<sup>38</sup> The agency also reported that the pandemic has affected the economic equality between men and women.<sup>39</sup>

A report by the Swedish children’s ombudsman (Barnombudsmannen) explains the consequences of the pandemic on children in vulnerable situations. For many children the home environment has worsened during the pandemic. One explanation for this is that, because schools were closed, children were deprived of a place to escape to and lost contact with other adults, such as teachers.<sup>40</sup> The Public Health Agency of Sweden has also examined the special needs of children with disabilities during the pandemic. These include the need to adapt information about the pandemic for children with intellectual disabilities.<sup>41</sup>

The Swedish National Association for People with Intellectual Disabilities (FUB) has reported that adults with mental disabilities have been especially affected by the social distancing recommendations during the pandemic. At special accommodation (LSS-boenden), daily activities, access to social areas and visitations have been curbed due to restrictive measures. The lack of social contact and physical activities has led to increased

36 *Coronapandemin och socioekonomiska skillnader*, Centrum för epidemiologi och samhällsmedicin, Stockholm April 2020.

37 *Utrikesfödda och covid-19 – Konstaterade fall, IVA-vård och avlidna bland utrikesfödda i Sverige, 13 mars 2020 – 15 februari 2021*, Folkhälsomyndigheten, p. 11, 13 and 29.

38 *Kvinnor rapporterar negativa effekter i högre utsträckning än män*, [www.jamstalldhetsmyndigheten.se](http://www.jamstalldhetsmyndigheten.se), 19 November 2021.

39 *Hur har covid-19-pandemin påverkat den ekonomiska jämställdheten?*, [www.jamstalldhetsmyndigheten.se](http://www.jamstalldhetsmyndigheten.se), 20 December 2021, see also *Vi som inte jobbade hemma under pandemin*, [www.lo.se](http://www.lo.se), 9 March 2021.

40 *Covid-19-pandemins konsekvenser för barn – slutredovisning av regeringsuppdrag*, Barnombudsmannen, Dnr 2020-0218, 30 June 2021.

41 *Upplevelser av covid-19-pandemin bland barn med funktionsnedsättning*, [www.folkhalsomyndigheten.se](http://www.folkhalsomyndigheten.se), 2021.

physical and mental illness among this already vulnerable group of people.<sup>42</sup>

During the pandemic, the Swedish government took several measures to strengthen the social safety net, including universal health care and universal basic sick leave. The unemployment benefit was raised twice and, Parliament adopted a government proposal that the condition of being a member of the unemployment fund (A-kassa) would be fulfilled more quickly. Another improvement was made to the sick pay system. Normally, sick pay is calculated as 80 percent of the salary, but only from the second day of absence from work. Employees are not covered for the first day of their absences. The Municipal Workers Trade Union Kommunal has raised this as a factor that potentially contributes to people going to work despite having symptoms of infection. Essentially they feel they cannot afford to stay at home.<sup>43</sup> The first-day sickness leave deduction was cancelled by the government for the second time on 8 December 2021 and is planned to remain until 31 March 2022. Other measures taken by the government include the temporary suspension of the need for a doctor's certificate during the first 14 days of sick leave. This has managed both to reduce

the burden on the health care system and to limit the spread of infection.<sup>44</sup>

The Swedish government has consistently argued that it would not adopt a formal strategy to deal with the spread of COVID-19. This argument was made, for instance, when several government ministers were questioned by the Committee on the Constitution of the Swedish Parliament in April 2021 (*Konstitutionsutskottet*).<sup>45</sup> Instead, the government argued that it has responded to a series of events, one by one, according to needs as they arise, and in conformity with its obligations and responsibilities.

The Swedish government has advocated more active work by the police in finding undocumented people living in Sweden.<sup>46</sup> The fear of being caught by the authorities means undocumented people are less likely to contact health care facilities and vaccination centres. There are regional health care-initiatives in Sweden cooperating with various NGOs to reach out to people with information about vaccine and disease controlling measures.<sup>47</sup>

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42 *Efter pandemin vill jag leva som vanligt*, Riksförbundet FUB:s enkät om pandemins effekter för personer med intellektuell funktionsnedsättning, October.

43 *On the Corona Frontline – The experiences of care-workers in Sweden*, Mari Huupponen, Friedrich-Ebert-Stiftung, Arena Idé, Kommunal, 2021.

44 Åtgärder på socialförsäkringsområdet med anledning av Coronaviruset, [www.regeringen.se](http://www.regeringen.se), 10 January 2022.

45 Hallengren: Regeringen har gjort vad som krävs, [www.dn.se](http://www.dn.se), 9 April 2021.

46 *V: Sätt dit oseriösa arbetsgivare – inte papperslösa*, Sveriges Radio, 29 December 2021.

47 *Så försöker VGR nå alla i samhället om vaccination mot covid-19*, [www.vgrfokus.se](http://www.vgrfokus.se), 4 May 2021.

## **Fostering a rule of law culture**

### ***The contribution of civil society and other non-governmental actors***

Throughout 2021, Civil Rights Defenders organised and took part in several seminars and events focusing on the rule of law and human rights. For example, in November 2021, CRD organised a one-day conference, the Nordic Rule of Law Forum, focusing on access to justice for victims of human rights violations.<sup>48</sup> The forum included participants from the judiciary, lawyers, national human rights institutions, parliamentarians and government representatives, academia and civil society. CRD also carried out two major public awareness campaigns. One of these focused on the topic of universal jurisdiction and the other focused on democratic backslide.

In the spring of 2021, CRD filed a complaint with the Swedish police, together with Syrian and international NGOs, against representatives of the Syrian government regarding the use of chemical weapons in al-Ghouta in 2013 and Khan Sheikhoun in 2017. At the same time, we launched a public petition targeting Sweden's Minister of Foreign Affairs Ann Linde, urging her to step up Sweden's role in the international community and call for a dedicated session in the UN General Assembly. The campaign received widespread media attention and the petition gathered more than 13,000 signatures before

it was handed over to the Ministry of Foreign Affairs.

In November, CRD launched a major public awareness campaign centred around a board game called Dictator of Sweden created by CRD. The game illustrates how Swedish democracy could be dismantled, one right step at a time, by drawing inspiration from the various countries we work in internationally and applying those policies in a Swedish context. The game is a social deduction game played in two teams; Anti-Democrats (whose goal is to adopt enough authoritarian policies to abolish democracy and have the dictator win) and Democrats (whose goal is to adopt democratic policies to stop the dictator before it's too late). During the launch, we arranged for a gaming session in the Parliament in which representatives from five parties participated. Thankfully, the Democratic team managed to find out who the dictator was in time. The campaign received a lot of media attention and generated widespread discussion on what makes a democracy democratic. Over 3,500 games have been sold so far, and the response from the general public has been overwhelmingly positive. Considering that at least five players are needed to play the game, and based on the assumption that every buyer plays the game once, at least 17,500 people will sit down and discuss the importance of protecting basic human rights and the rule of law in Sweden. The game will continue to be a key instrument in our intensified work regarding human rights in Sweden during the upcoming election cycle, with more activities planned to keep the topic high on the agenda.

48 <https://crd.org/2021/09/29/nordic-rule-of-law-forum-2021/>.

## **Contact**

### ***The Civil Liberties Union for Europe***

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of 19 national civil liberties NGOs from across the EU.

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