

# STATE OF DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW

## Role of institutions Threats to institutions

*Report by the Secretary General  
of the Council of Europe*

An analysis of democracy,  
human rights and the rule  
of law in Europe,  
based on the findings of  
the Council of Europe  
monitoring mechanisms  
and bodies

**Thorbjørn Jagland**

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Threats to institutions

*Report by the Secretary General  
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2018

**French edition**

*Situation de la démocratie, des droits de l'homme et de l'État de droit – Rôle des institutions – Menaces aux institutions*

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# INTRODUCTION

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**Thorbjørn Jagland**  
Secretary General of the Council of Europe

- This is my fifth annual report on the state of democracy, human rights and the rule of law in Europe.
- The five chapters look at the key building blocks of democratic security: efficient, impartial and independent judiciaries; freedom of expression; freedom of assembly and freedom of association; democratic institutions; and inclusive societies. In line with previous editions, this report finds many good examples of Council of Europe member states carrying out reforms in line with their obligations and to the direct benefit of their citizens. The Council of Europe and the European Court of Human Rights (the Court) remain the bedrock of human rights, democracy and the rule of law in Europe. Their positive impact can be very easily taken for granted, but read this report – or others from this Organisation – and the proof is vivid and clear.
- Nonetheless, this report also brings into sharp relief the challenges facing the Council of Europe.
- As you will read, some of these are long-term, recurring issues. For example, the lack of enforcement of domestic judicial decisions and the excessive length of proceedings remain, together, the most frequently invoked complaint in applications before the Court.
- However, there are also new and disturbing challenges at our door and to which we must respond.
- In last year's report, I outlined the challenge posed by the rise of populism and asked how strong Europe's checks and balances are. It is of little surprise that just 12 months later we are still living with this resurgence. But this year's report draws attention to one of its disturbing outcomes.
- Our human rights, democracy and the rule of law depend on the institutions that give them form. But for populists, who invoke the proclaimed "will of the people" in order to stifle opposition, these checks and balances on power are often seen as an obstacle that should be subverted. This year's report finds nascent trends – illuminated by alarming examples – of exactly this. There have been attempts to undermine institutions at the European level, namely the Council of Europe and the European Court of Human Rights themselves, and at the level of member states which, under the principle of subsidiarity, are at the vanguard of upholding our laws, standards and values.



■ Among the findings in this year's report, we see:

- ▶ on efficient, impartial and independent judiciaries: there are increased attempts to challenge judicial independence, including through political influence over appointments, weakening the security of judges' tenure and empowering the executive to replace court presidents at its own discretion. Similarly, at the international level, we have witnessed member states challenging the primacy of the European Convention on Human Rights (ETS No. 5, the Convention), seeking to empower national courts to overrule judgments from the Court, and refusing to implement such judgments for political reasons;
- ▶ on freedom of expression: the number of offences reported to the Council of Europe's Platform to promote the protection of journalism and safety of journalists remains on an upward trajectory. Physical attacks on journalists have increased. Last year, five journalists were killed in the Council of Europe region and 125 were reported to be in detention: a record high. The arbitrary shutdown of organisations, the subjective blocking of online content and problems related to the lack of transparency of media ownership are also troubling;
- ▶ on freedom of assembly and freedom of association: human rights non-governmental organisations (NGOs) and defenders have experienced a clampdown as a number of countries have drafted or passed oppressive legislation or undermined them by a range of other means. In an increasing number of states, the space for civil society is shrinking, and peaceful public events are viewed and treated as dangerous;
- ▶ on democratic institutions: there is an increasingly aggressive use of technology to influence electoral processes and outcomes and which threatens to undermine public trust in the electoral system. Too often, public access to political party accounts is limited, electoral oversight bodies lack independence and sanctioning systems are inadequate. Corruption – sometimes pervasive – continues to be a problem and member states' compliance with the Council of Europe's Group of States against Corruption (GRECO) recommendations is slowing down. No institution is naturally immune and in the week in which this report was finalised the Independent Body on the allegations of corruption within the Parliamentary Assembly of the Council of Europe found evidence of misconduct involving multiple members or former members of the Assembly: this is of course unacceptable and the Parliamentary Assembly must act on the Independent Body's recommendations without delay;
- ▶ on inclusive societies: findings show the growing influence of xenophobic and populist rhetoric in public opinion. We continue to observe a surge in hate speech, often enhanced through a malevolent use of new technology. Gender inequality and the persistence of gender-based violence remain top concerns, and cases of pushbacks of migrants and refugees, sometimes accompanied by violence, were reported.

■ The Council of Europe has equipped member states to take on many significant challenges in the past. Together, we can also address the challenges outlined in this report. That requires a recommitment to our shared values, reflected in the terms of the Convention and the judgments of the Court, including the defence of our institutions. Such a recommitment is in the interests of every European. It is our means to prevent the ghouls of the past returning to torment us, and a way to provide one another with the freedom and security we all deserve.



Thorbjørn Jagland  
Secretary General of the Council of Europe

## GUIDE TO THE REPORT

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**A**s with previous reports, the five chapters look at the key building blocks of democratic security: efficient, impartial and independent judiciaries; freedom of expression; freedom of assembly and freedom of association; democratic institutions and inclusive societies.

■ Each pillar of democratic security is explored in its own chapter and broken down into parameters and measurement criteria.

■ The parameters have been selected in accordance with Council of Europe legal standards and norms and reflect the reports and recommendations of relevant Council of Europe institutions and bodies.

■ The methodology and the overall structure of the report remain unchanged. Some of the parameters have been updated. In some cases, the criteria used to assess the states' performance have been refined in order to

better reflect developments over the past 12 months. In order to improve the readability of the report, several key parameters (such as access to legal aid or lawyer professionalism of the chapter on judiciaries), where the findings have not changed significantly, are not presented this year.

■ These assessments, as well as the country-specific examples used throughout the report, are based exclusively on relevant Council of Europe reports and documents, notably from the Committee of Ministers, the European Court of Human Rights, the Parliamentary Assembly and the Congress of Local and Regional Authorities, in addition to reports and opinions of the Commissioner for Human Rights, the Venice Commission and the Council of Europe's monitoring bodies.

■ Thematic boxes have been included throughout the report in order to highlight Council of Europe standards on issues of particular importance.



# PROPOSALS FOR ACTION

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**P**revious reports also included a range of proposals for action. These proposals have been reflected in the Council of Europe Programme and Budget, other activities are part of the bilateral co-operation programmes with the member states or have been integrated in the work plans of our advisory bodies and monitoring structures. Many require follow-up action. They need to continue to be implemented, fully and with vigour.

■ In addition, we have identified a number of new challenges, stemming in particular from the effect of rapid advances of technology on democratic institutions and human rights. Abuse of data, misuse of the internet, ethical and legal challenges related to bioethics and artificial intelligence are among topics that will require particular attention in the future.

■ In view of this year's findings, the Council of Europe, with its member states, should pay special attention to the following recommendations:

- ▶ implement fully the Plan of Action on Strengthening Judicial Independence and Impartiality, in order to ensure compliance with Council of Europe standards and taking into account the assessments of our intergovernmental and advisory bodies on the alleged infringements concerning the independence and impartiality of judges;
- ▶ implement, as a matter of urgency, measures to secure a more favourable environment for the safety of journalists in our member states, according to the guidelines set out in Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors and follow up on the alerts received on the Council of Europe Platform to promote the protection of journalism and safety of journalists;
- ▶ step up the implementation of recommendations set out in GRECO's evaluation rounds and its compliance reports;
- ▶ support dialogue between governments, media organisations, journalists and internet platforms, in order to identify solutions on the editorial responsibility for the distribution of news;
- ▶ assist member states in strengthening – in legislation and in practice – guarantees for the freedoms of assembly and association;
- ▶ protect the integrity of the democratic process by identifying and implementing effective responses to multiple threats that interfere with our electoral processes and manipulate voter behaviour, notably through the use of technologies and social media;
- ▶ use Council of Europe legal instruments to promote and protect the human rights of persons affected by the refugee crisis, with particular attention to the most vulnerable, notably women and children;
- ▶ step up the fight against all forms of xenophobia and discrimination, notably through targeted co-operation within the Council of Europe Action Plan on Building Inclusive Societies;
- ▶ assist member states in the sustainable implementation of the national Roma integration strategies, notably with good practices to address issues related to preschool and primary school enrolment, school absenteeism and early dropout and social services provision;
- ▶ work with the member states on the effective implementation of policies in the framework of education for democratic citizenship.



# CHAPTER 1

## EFFICIENT, IMPARTIAL AND INDEPENDENT JUDICIARIES



# INTRODUCTION

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## Chapter 1 – Efficient, impartial and independent judiciaries

**A**n independent judiciary is essential to a functioning democracy.

Alongside the executive and legislature, it is one of the three essential branches of government. The separation of powers ensures that these three branches work free from each other's direct control as part of a system of checks and balances.

For the judiciary, this is vitally important. Public trust in the judicial system relies on its impartiality: its capacity to uphold the rule of law free from political pressure or bias. It is on this basis that its judgments command respect, crime is fought and individuals' rights are upheld. This includes, of course, our human rights as defined in the European Convention on Human Rights (ETS No. 5, the Convention) and the case law of the European Court of Human Rights (the Court).

Because our mandate at the Council of Europe is to uphold human rights, democracy and the rule of law, preserving judicial independence is at the very heart of what we do.

But the judiciary is not immune to the environment in which it operates.

In recent years, creeping populism and attempts to limit political freedoms among some member states have resulted in challenges to the judiciary's independence at home – and at the international level too.

For example, we have seen draft legislation which allows political influence over appointments or disciplinary procedures, politically motivated changes to the composition of judicial self-governing bodies, and proposals to weaken the security of judges' tenure or empowering the executive to discretionally replace court presidents. We have also witnessed attempts to challenge the primacy of the Convention and to

give national courts the power to over-rule judgments from the Court.

We have also seen examples of member states refusing to implement Court judgments for political reasons.

Unchecked, these practices would undermine the rule of law and, with it, the European human rights system. In the interest of the 830 million people covered by the Convention, this is not something that can be allowed to happen. People must be protected against the arbitrary use of power by government.

In addition to this, long-standing challenges to judicial systems in Europe persist.

Corruption is one of them. Where corruption takes root within the judiciary itself, it impedes access to justice and a fair trial. Furthermore, judges should be appointed and promoted transparently, and be subject to non-political disciplinary measures.

Judicial systems must pursue corruption effectively throughout society and judges cannot credibly pursue others for corruption where their own profession is tainted. States should enact – and implement – stricter laws and push for greater transparency in the financial sector, so that investigators can “follow the money”.

The judiciary must be efficient, too. While the executive and legislature must not seek undue influence, they must provide adequate funding. The judiciary must have adequate powers to address disputes, including in areas relating to human rights and fundamental freedoms. The judiciary's ultimate efficiency is contingent on the quality and authority of its jurisprudence. Setting a high professional standard for judges throughout Europe is therefore another major challenge to be addressed, especially through professional training.

■ Judicial decisions must be respected by the state authorities and supported by adequate enforcement structures. The judiciary should be able to provide justice – within a reasonable time – an ongoing concern for member states as the number of cases brought before the courts may evolve rapidly with changing societal conditions.

■ Last year this chapter of the report identified the main parameters of an efficient, impartial and independent judiciary. This year the focus is on judicial independence. Since the previous findings have not changed significantly as regards legality and legal certainty, access to legal aid and lawyer professionalism, these parameters have not been presented this year.



# JUDICIAL INDEPENDENCE

## Chapter 1 – Efficient, impartial and independent judiciaries

Judicial independence goes hand in hand with judicial integrity. As the guarantors of independence in the legal process, judges have important responsibilities and the Council of Europe is working with several member states to consolidate their systems governing the accountability of judges and in particular the rules for deciding upon disciplinary proceedings.

— A negative trend can be observed in a small number of countries, where the executive's interference or powers in self-governing bodies such as judicial councils risks undermining the very foundations of the separation of powers. Measures such as appointing the Minister of Justice as a member or the chair of these councils or reducing the number of judges elected by their peers as opposed to those appointed by the executive or parliament may not seem alarming on their own. However, when taken together, they become problematic.

— Protection against undue dismissals of judges is an important element of judicial independence. Decisions terminating a judge's term of office can only be made in accordance with clear criteria set out in law and following a fair procedure before a body that is independent of both the executive and the legislature.<sup>1</sup> The same protection must apply in case of other more serious disciplinary sanctions,<sup>2</sup> or of premature terminations of mandates of court presidents.<sup>3</sup>

— Well-trained judges, with a high level of professional competence, are more likely to withstand improper attempts at influencing their decision making, as well as to ensure more generally that justice is delivered in a fair and independent trial.<sup>4</sup> This is why

the Council of Europe also engages in supporting member states in their efforts to strengthen the professional skills and knowledge of judges. Much has been achieved in co-operation with the European Union and its European Judicial Training Network to ensure a coherent approach to human rights training. The Human Rights Education for Legal Professionals (HELP) Programme has developed novel online techniques to cover wider professional audiences in each of our 47 member states.

— Methods for the allocation of cases within a court are important for internal judicial independence.<sup>5</sup> Such methods constitute a safeguard for the integrity of the judicial process and for securing public trust that justice is administered fairly and impartially. The allocation of cases should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge and to help protect against attempts by the parties or anyone otherwise interested in the outcome of the case to influence it.<sup>6</sup>

— Member states should be cautious about leaving significant numbers of judicial vacancies unfilled. Not only does this impact negatively on the courts' capacity to administer justice fairly and within a reasonable time; depending on the procedures in place, it may also allow the executive or the legislature to stack the courts in their favour through large numbers of new appointments, working through judicial self-governing bodies whose membership, through lack of adequate judicial representation, does not provide the necessary safeguards for judicial independence.

1. *Paluda v. Slovakia*, 33392/12, 23 May 2017, paragraph 45.  
2. *Ramos Nunes de Carvalho e Sa v. Portugal*, 55391/13, 57728/13, and 74041/13, 21 June 2017, referred to the Grand Chamber on 17 October 2016, paragraphs 81 and 89.  
3. *Baka v. Hungary*, 20261/12, 23 June 2016.  
4. GRECO Compliance report in respect of "the former Yugoslav Republic of Macedonia" (GrecoRC4(2016)8), adopted 1 July 2016, published 12 October 2016, paragraph 34.

5. See *Agrokompleks v. Ukraine*, 23465/03, 6 October 2011.  
6. Committee of Ministers Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, paragraph 24. Cf. also GRECO Evaluation report in respect of the Republic of Moldova (GrecoEval4Rep(2016)6), adopted 1 July 2016, published 5 July 2016, paragraph 111; GRECO Evaluation report in respect of Georgia (GrecoEval4Rep(2016)3), adopted 2 December 2016, published 17 January 2017, paragraphs 101.

## MEASUREMENT CRITERIA

### Institutional independence

#### Legal criteria

- ▶ The judiciary is administratively and financially independent.
- ▶ The judiciary has independent decision-making powers, and its decisions are respected.
- ▶ The judiciary has independence in determining jurisdiction.

#### Institutional criteria

- ▶ The judiciary is provided sufficient funds to carry out its functions and decides how these funds are allocated.
- ▶ More than half of the Judicial Council is composed of judges who are chosen by their peers.

### Individual independence

#### Legal criteria

- ▶ The length of a judge's term of office is secured by law.
- ▶ Judges' remuneration is set by law.

#### Institutional criteria

- ▶ Decisions on judges' careers are taken independently of the executive and legislative powers.
- ▶ Decisions on the selection and promotion of judges are made on merits, transparently, based on objective criteria and are subject to review.
- ▶ Ethical principles of professional conduct are established for judges.
- ▶ Removal offences are precisely defined.
- ▶ Disciplinary proceedings against judges and decisions to remove court presidents respect the principle of judicial independence and are conducted or controlled by independent self-governing bodies.

## FINDINGS

### Appointments

Having efficient safeguards in place to protect against the risk incurred by appointments based on arbitrary criteria is the main requirement for the domestic process of appointing judges. Several member states have taken steps in this direction. However,

even where systems are merit-based and competitive, additional measures still appear necessary to make the self-governing bodies in charge of the recruitment process truly independent and effective.

GRECO recommended to Austria<sup>7</sup> that the method for selecting candidates and administrative court judges be changed and formalised. The need for pre-established, objective and merit-based criteria for the recruitment and promotion of judges has also been identified in respect of the Czech Republic<sup>8</sup> and Georgia.<sup>9</sup> GRECO also recommended that the Russian Federation review the recruitment process for judges so as to better preserve the separation of powers and the independence of the judiciary vis-à-vis the executive.<sup>10</sup> For the selection of the most senior judges and prosecutors in Greece, GRECO highlighted the need to involve their peers in the process.<sup>11</sup> In the case of Turkey, GRECO recommended strengthening the role of the judiciary in the recruitment of candidates to become judges.<sup>12</sup>

Legislative changes were adopted by the Polish Parliament, transferring the power to appoint members of the National Judicial Council from the judiciary to the legislature, giving politicians a decisive role in the procedure for appointing judges.<sup>13</sup> The Polish law on the Supreme Court, adopted in December 2017, would entail the immediate retirement of a significant number of judges of the Supreme Court. Other legislative changes have given the Minister of Justice the authority to replace court presidents. As the Consultative Council of Europe Judges (CCJE) has pointed out, such changes undermine the separation of powers in Poland.<sup>14</sup> As regards the retirement age of judges, the European Commission for Democracy through Law (Venice Commission) has pointed out that, while it is up to the democratic legislator to

7. GRECO Evaluation report in respect of Austria (GrecoEval4Rep(2016)1), adopted 21 October 2016, published 13 February 2017, paragraphs 86-90.

8. GRECO Evaluation report in respect of the Czech Republic (GrecoEval4Rep(2016)4), adopted 1 July 2016, published 2 November 2016, paragraph 105.

9. GRECO Evaluation report in respect of Georgia (GrecoEval4Rep(2016)3), op. cit., paragraphs 93-94.

10. GRECO Evaluation report in respect of the Russian Federation (GrecoEval 4Rep(2017)2), adopted 18 October 2017, published 22 March 2018, paragraph 150.

11. GRECO 4th round Compliance report in respect of Greece (GrecoRC4(2017)20), adopted 18 October 2017, published 1 March 2018, paragraphs 55-58.

12. GRECO 4th round Compliance report in respect of Turkey (GrecoRC4(2017)16), adopted 18 October 2017, published 15 March 2018, paragraphs 48-50.

13. Polish Act on the National Council of the Judiciary, adopted on 23 January 2017.

14. Opinion of the Bureau of the CCJE following the request of the Polish National Council of the Judiciary to provide an opinion with respect to the Draft Act of September 2017 presented by the President of Poland amending the Act on the Polish National Council of the Judiciary and certain other acts, CCJE-BU(2017)9REV, 12 October 2017.

define that age, reducing it for the judges of highest instance courts to below that of lower courts, with *ex nunc* effect, undermines the security of tenure of judges and, more generally, the independence of the courts concerned.<sup>15</sup> Discussions with the Polish authorities are underway, with a view to addressing the concerns formulated by the Venice Commission.

■ In December 2017, GRECO decided to carry out ad hoc evaluations of the draft laws concerning the judiciary in Romania, and of the draft laws on the re-organisation of the Supreme Court and of the National Council of the Judiciary in Poland. It adopted both ad hoc evaluation reports on 23 March 2018. In the report on Poland, published on 29 March 2018,<sup>16</sup> GRECO noted that several basic principles of the judicial system had been affected in a critical way, requiring a re-assessment of the corruption prevention in the judiciary.

■ Regarding Switzerland, where the Federal Assembly elects the judges of the federal courts, on the proposal of the Judiciary Committee, GRECO has recommended measures to strengthen the objectivity of the recruitment of judges by revising or eliminating the procedure for their re-election. It has also recommended eliminating the practice of judges of the federal courts paying a fixed or proportional part of their salary to political parties.<sup>17</sup>

■ An entire new body of judges has been appointed to the Supreme Court of Ukraine after successfully completing a thorough procedure aimed at selecting candidates with the highest level of professional competence and personal integrity, following constitutional amendments and legislative changes introduced in 2016. An important consequence of the constitutional changes in Ukraine has been to sever the link between parliament and the judiciary and its self-governing structures, one of the issues at the origin of the finding of a violation by the European Court of Human Rights in the case of *Oleksandr Volkov v. Ukraine*.<sup>18</sup> These welcome developments are illustrative both of how change can be brought about if the necessary political will is there, and of the role of the Court as a facilitator of structural changes.

## Disciplinary matters

■ Additional measures need to be taken in Belgium to ensure that reliable and sufficiently detailed information and data are kept on disciplinary proceedings concerning judges and prosecutors, including possible publication of the relevant case law, while respecting the anonymity of the persons concerned.<sup>19</sup>

■ In Bulgaria, the CCJE has pointed out that the suspension or removal of judges from office should not be a disciplinary reaction to be automatically and generally imposed on judges alleged to have committed criminal acts, even in cases of alleged intentional or premeditated crimes. Each case should be dealt with individually, by an independent tribunal, taking into account fair trial requirements, including the right to appeal, the presumption of innocence and the requirement of proportionality of sanctions. Judicial review of such decisions should be available.<sup>20</sup>

■ In Slovakia, the inability of a judge to obtain judicial review of his suspension from office while disciplinary proceedings were pending amounted to a violation of Article 6 of the Convention.<sup>21</sup> The Court noted that the judge's suspension had been imposed by the Judicial Council – which is technically not a judicial body and did not provide the institutional and procedural guarantees called for in Article 6.1 – within disciplinary proceedings the Judicial Council had itself instituted.

■ The Venice Commission recommended to Poland that dismissals of, and sanctions against, court presidents should not be decided by the Minister of Justice alone and that the National Council of the Judiciary should play a decisive role in this process.<sup>22</sup>

■ In the Republic of Moldova, further efforts are needed to strengthen the judiciary's efficiency and impartiality, and to restore public trust.<sup>23</sup> The Superior Council of Magistracy faced criticism as regards its composition and operation. Its decisions need to offer sufficient guarantees of objectivity and transparency, especially concerning the recruitment, promotion and disciplinary liability of judges.<sup>24</sup>

15. Opinion on the Draft Act amending the National Council of the Judiciary and on the Draft Act amending the Act on the Supreme Court proposed by the President of Poland, and on the Act on the organisation of the ordinary courts, adopted by the Venice Commission at its 113th plenary session, CDL-AD(2017)031 of 11 December 2017, paragraphs 44-48 and 52.

16. GRECO ad hoc evaluation of Poland (Greco-AdHocRep(2018)1), adopted 23 March 2018, published 29 March 2018.

17. GRECO Evaluation report in respect of Switzerland (GrecoEval4Rep(2016)5), adopted 2 December 2016, published 15 March 2017, paragraphs 91-101.

18. *Oleksandr Volkov v. Ukraine*, 21722/11, 9 January 2013.

19. GRECO Evaluation report in respect of Belgium (Greco Eval IV Rep (2013) 8), adopted 28 March 2014, published 28 August 2014, paragraph 130 (latest update October 2016).

20. Opinion of the Bureau of the CCJE following the request of the Bulgarian Judges Association to provide an opinion with respect to amendments of 11 August 2017 of the Bulgarian Judicial System Act, CCJE-BU(2017)10, 31 October 2017.

21. *Paluda v. Slovakia*, 33392/12, 23 May 2017, paragraph 45.

22. Opinion on the Draft Act amending the National Council of the Judiciary and on the Draft Act amending the act on the Supreme Court proposed by the President of Poland, and on the Act on the organisation of the ordinary courts, CDL-AD(2017)031, op. cit., paragraphs 100-108.

23. Statement of the Council of Europe Commissioner for Human Rights, 13 October 2017.

24. GRECO Evaluation report in respect of the Republic of Moldova (GrecoEval4Rep(2016)6-rev), op. cit., paragraph 4.

## Councils for the judiciary

■ The High Judicial and Prosecutorial Council of Bosnia and Herzegovina requested that the Ministry of Justice, the Council of Ministers and the Parliament of the Federation of Bosnia and Herzegovina amend by urgent procedure the Law on the High Judicial and Prosecutorial Council and introduce the extraordinary possibility of dismissing a judge or a prosecutor without conducting disciplinary proceedings. Such a change would be contrary to the Council of Europe's standards on disciplinary proceedings against judges and prosecutors.

■ In Georgia, the Venice Commission welcomed the provision of the draft revised constitution which states that the Supreme Court judges would be appointed for life. It has assessed, however, that direct appointment of judges by the High Council, or by the president upon proposal by the High Council, would better guarantee the independence of those judges.<sup>25</sup>

■ The Venice Commission urged the authorities of Poland to abandon the proposal to amend the Act on the National Council of the Judiciary, regarding the appointment of the judicial members of the council,<sup>26</sup> due to the possible consequences of the draft act for the constitutional principle of the separation of powers. GRECO recommended that Poland ensure that at least half of the members of the National Council of the Judiciary are judges elected by their peers. Relatedly, the CCJE concluded that the proposed division of the council into two assemblies and the proposed new procedure for the appointment of judges may infringe upon judicial independence insofar as the legislative and executive powers would have a decisive role in the procedure for appointing judges. The CCJE stressed that the pre-term removal of the sitting judge members of the council would not be in accordance with European standards.<sup>27</sup>

■ Proposals have been put forward in Romania to transfer the judicial inspection unit to the Ministry of Justice. The judicial inspection unit is currently

part of the Superior Council of Magistrates, which is responsible for sanctioning professional misconduct and disciplinary offences by judges, while the investigation of such cases is carried out by the judicial inspection unit. The Secretary General urged the authorities to submit the draft texts for review by the Venice Commission.<sup>28</sup> GRECO noted that more than half of Romanian judges and prosecutors called to abandon this legislative initiative.<sup>29</sup>

■ Following the constitutional amendments adopted in Turkey in 2017, the Council of Judges and Prosecutors has four members appointed directly by the President of Turkey and seven members elected by parliament "without a procedure guaranteeing the involvement of all political parties and interests".<sup>30</sup> Both the Commissioner for Human Rights and the Venice Commission<sup>31</sup> held that it did not offer adequate safeguards for the independence of the judiciary, increasing the risk of decisions and appointments being subject to political influence.

## Judicial integrity

■ Systems of random case allocation protect judges from arbitrary case assignment decisions that can serve to reward or punish them. Such systems reassure the public that cases are heard by an impartial arbiter.<sup>32</sup> In the new judicial code of Armenia, provisions have been made for the distribution of cases based on random selection conducted automatically.<sup>33</sup>

■ Azerbaijan saw some improvements related to the budgetary independence of the judiciary; however, problems of arbitrary application of the law by the courts persist.<sup>34</sup>

25. Opinion on the draft revised constitution as adopted by the Parliament of Georgia at the second reading on 23 June 2017, adopted by the Venice Commission at its 112th Plenary Session, Venice (6-7 October 2017), CDL-AD(2017)023, paragraph 45 and Opinion on the draft revised constitution adopted by the Venice Commission at its 111th Plenary Session (Venice, 16-17 June 2017), CDL-AD(2017)013, paragraphs 78-81.

26. Opinion on the Draft Act amending the National Council of the Judiciary and on the Draft Act amending the act on the Supreme Court proposed by the President of Poland, and on the Act on the organisation of the ordinary courts, CDL-AD(2017)031, op. cit., paragraphs 19-31.

27. Opinion of the Bureau of the CCJE following the request of the Polish National Council of the Judiciary to provide an opinion with respect to the Draft Act of September 2017 presented by the President of Poland amending the Act on the Polish National Council of the Judiciary and certain other acts, CCJE.-BU(2017)9REV, 12 October 2017.

28. Letter of 22 December 2017 to President of Romania Klaus Iohannis.

29. GRECO 4th round compliance report in respect of Romania, adopted by GRECO at its 78th Plenary Meeting in December 2017, published on 18 January 2018 Greco RC4(2017)24, paragraph 82. GRECO's ad hoc evaluation in respect of Romania, adopted on 23 March 2018.

30. Statement of the Council of Europe Commissioner for Human Rights, 7 June 2017.

31. Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017, adopted by the Venice Commission at its 110th plenary session (Venice, March 2017), CDL-AD(2017)005, paragraph 119.

32. GRECO (2017), "Corruption prevention – Members of parliament, judges and prosecutors – Conclusions and trends" (<https://rm.coe.int/greco-fourth-evaluation-round-conclusions-and-trends/16807b8ae8>).

33. Venice Commission Opinion No. 893/2017 on the draft judicial code of Armenia, CDL-AD(2017)019, 9 October 2017, paragraph 53.

34. *Ilgar Mammadov v. Azerbaijan*, 15172/13, 22 May 2014.

■ The steps taken by Bulgaria regarding objective criteria for the allocation of cases were welcomed by GRECO.<sup>35</sup>

■ In an application against Croatia, the European Court of Human Rights found that the appellate court's impartiality had been compromised because of the close working ties between one of the appeal judges and one of the parties, which led to a violation of the

right to a fair trial guaranteed by Article 6.1 of the Convention.<sup>36</sup>

■ In Italy<sup>37</sup> and the Netherlands,<sup>38</sup> GRECO observed that the legal system allows judges to hold simultaneously the post of Member of Parliament or local elected representative, and has recommended that legal restrictions be laid down regarding such possibilities.

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35. GRECO Compliance report in respect of Bulgaria (GrecoRC4(2017)9), adopted 23 June 2017, published 25 July 2017, paragraphs 50-51.

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36. *Ramljak v. Croatia*, 5856/13, 27 June 2017.

37. GRECO Evaluation report in respect of Italy (GrecoEval4Rep(2016)2), adopted 21 October 2016, published 19 January 2017, paragraph 153.

38. GRECO Evaluation report in respect of the Netherlands (Greco Eval IV Rep (2012) 7), adopted 21 June 2013, published 18 July 2013, paragraph 96 (latest update December 2016).



## Implementation of the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality

The adoption of the Plan of Action on Strengthening Judicial Independence and Impartiality by the Committee of Ministers of the Council of Europe<sup>39</sup> was a response to threats to judicial independence, as well as a means of providing guidance to member states on processes and situations where judicial independence needs to be reinforced.

This initiative builds upon the case law of the European Court of Human Rights in the field of independence and impartiality of the judiciary and encapsulates the Council of Europe standards in this field by emphasising how to safeguard and strengthen the judiciary in its relations with the executive and the legislature, and how to protect the independence of individual judges.

Many Council of Europe entities contribute to the implementation of the principles the Convention sets out. The Court's case law continues to shed light on the requirements laid out in Article 6 for judicial independence, while the execution of its judgments under the supervision of the Committee of Ministers ensures that action is taken to solve the issues revealed.

The Parliamentary Assembly of the Council of Europe (PACE) has made its observations on the situation in a number of member states in relation to what it sees as a tendency to limit the independence of the judiciary, pointing out attempts to politicise judicial councils and courts and widespread dismissals of judges and prosecutors. It has called upon member states to implement fully the principles of the rule of law, in line with Council of Europe instruments.<sup>40</sup>

The Commissioner for Human Rights has examined this issue in depth through his country monitoring work. GRECO has assessed the situation in member states as part of its 4th evaluation round, focusing on corruption prevention in respect of judges and prosecutors, and has drawn up numerous findings and recommendations. The Venice Commission has provided extensive input on specific legal issues upon the request of member states and of the Parliamentary Assembly. The work of the European Commission for the Efficiency of Justice (CEPEJ) on the quality and efficiency of justice in Europe also provides important insights.

The Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) have drawn up situation reports on judicial independence and impartiality in member states, in which they highlight challenges – based on information submitted by CCJE and CCPE members and observers, as well as by judicial bodies and associations – concerning alleged infringements in member states of standards governing judicial independence and impartiality.<sup>41</sup>

Ongoing Council of Europe projects provide expert support in drafting legislation, guidelines and codes of ethics in respect of, or for, judges, notably in the Western Balkans, Turkey and the Eastern Partnership countries.<sup>42</sup>

More and more relevant training programmes for judges and prosecutors for compulsory initial and continuous training are being set up, in line with the priorities identified by member states, and benefit from the support of the Council of Europe's pan-European HELP network.

The Council of Europe observes a strong commitment in many member states to creating the necessary conditions, legislatively, structurally and financially, to comply with the principles set out in the plan of action. The main challenges continue to arise from the implementation of regulatory frameworks.

39. Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality (CM(2016)36 final) (<https://rm.coe.int/1680700285>).

40. PACE Resolution 2188 (2017) "New threats to the rule of law in Council of Europe member States: selected examples", 11 October 2017.

41. CCJE (2017), "Judicial independence and impartiality in the Council of Europe member States in 2017", 7 February 2018.

42. Council of Europe co-operation projects: "Support to the implementation of the judicial reform in Armenia"; "Accountability of the Judicial system in Montenegro"; "Strengthening the capacity of the High School of Justice of Georgia" and "Support to the implementation of the judicial reform in Georgia"; "Strengthening legal guarantees for independent and impartial tribunals in Serbia"; "Strengthening judicial ethics in Turkey"; "Support to the implementation of the judicial reform in Ukraine".



# ENFORCEMENT OF COURT DECISIONS

## Chapter 1 – Efficient, impartial and independent judiciaries

**T**he concept of an independent tribunal set out in Article 6 of the Convention implies the power of a court to adopt a binding decision, which cannot be subject to any change, approval or ratification by a non-judicial authority.<sup>43</sup> Failure to execute judicial decisions, or their protracted non-execution, puts the credibility and stability of the justice system at risk and can ultimately undermine the key values necessary to preserve our democracies. Enforcement is especially important when it comes to maintaining public trust in the judicial system.<sup>44</sup> Such trust cannot be sustained if judicial decisions are not executed promptly and in full.

Member states have a duty to ensure that all persons who receive a final and binding court judgment have the right to its enforcement.<sup>45</sup> Public entities are bound to respect and to implement judicial decisions in a rapid way *ex officio*. The very idea of a state body refusing to obey a court decision undermines the concept of primacy of the law.<sup>46</sup>

Even though constitutional courts have a special position in the state structure of the countries where they exist, the execution of their judgments is at least as important as that of judgments of the ordinary judiciary. In this respect, the publication of the judgments is essential, not only to inform the public of the decisions of the court, but also as a necessary step for their execution.<sup>47</sup> Judgments of constitutional courts in several member states remain non-executed.

Judicial decisions may also be binding at international level and are certainly so in the case of the European Convention on Human Rights. The binding force of the Court's judgments is based on the fundamental principle of international law that agreements must be respected. When ratifying the Convention, states parties explicitly undertake to implement, acting in good faith, all judgments of the European Court of Human Rights, in cases to which they are parties. The Committee of Ministers, acting on the basis of the collective responsibility for the enforcement of the rights and freedoms guaranteed by the Convention, has underlined on numerous occasions the unconditional duty of member states to execute the Court's judgments.

### MEASUREMENT CRITERIA

#### Legal criteria

- ▶ Enforcement is carried out within a "clear legal framework", which is detailed enough to provide legal certainty.
- ▶ The law provides for a right for persons concerned to request suspension of the enforcement process in order to protect their rights and interests and, as appropriate, a right to have decisions taken during the enforcement process subjected to judicial review or control by another independent body.
- ▶ The law provides for a right to compensation or other redress in case of unreasonably lengthy execution processes, including in cases against the state itself.

43. CCJE Opinion No. 13 (2010) on the role of judges in the enforcement of judicial decisions, Section VII(B).

44. *Ibid.*, Section VII(A).

45. Committee of Ministers Recommendation Rec(2003)17 on enforcement, Preamble.

46. CCJE Opinion No. 13 (2010), *op. cit.*, Section VII(F).

47. Venice Commission Rule of Law Checklist (CDL-AD(2016)007), II.E.2.d.i, II.E.3.iii, II.E.3.iv and § 110.

## Institutional criteria

- ▶ Enforcement of judicial decisions against the state is automatic, requiring no additional procedures.
- ▶ Enforcement is generally fair, swift, effective and proportionate.
- ▶ Enforcement strikes a balance between the needs of the claimant and the rights of the defendant.
- ▶ Access to information on the enforcement process is available, and enforcement activities are carried out in a predictable manner and are transparent.
- ▶ Enforcement takes place within a reasonable period of time, with no interference by other state authorities, and no postponement except where provided for by law and subject to a judge's assessment.
- ▶ Enforcement measures respect the principle of proportionality.
- ▶ Authorities supervise implementation and are held liable when judicial decisions are not implemented.

## FINDINGS

■ The non-enforcement of domestic judicial decisions currently shares the first place – with excessive length of judicial proceedings – among the issues most frequently raised in the applications lodged before the Court. The high number of violations and the steady influx of new complaints in this respect reveal an important structural problem in some member states.

■ The absence of remedial action in the case of *Ilgar Mammadov v. Azerbaijan*,<sup>48</sup> whether by the courts or by any other state authority, to ensure the release of the applicant, an Azerbaijani opposition politician held in continued detention despite the fundamental flaws in the underlying criminal proceedings revealed by the Court's judgment, has led the Committee of Ministers to engage infringement proceedings against Azerbaijan before the Court. The matter is presently pending before the Grand Chamber of the Court.

■ Recent legislation whereby the Constitutional Court of the Russian Federation is empowered to declare that no steps to enforce an international judgment may or should be taken if execution would raise issues of constitutionality has raised serious concerns

with regard to the execution of Court judgments.<sup>49</sup> The Secretary General declared that it would be up to the Constitutional Court of Russia to ensure respect for the European Convention on Human Rights if it was called upon to act under the new provisions.<sup>50</sup> The Venice Commission has observed that such legislation does not absolve the Russian Federation from its obligation to abide by Court judgments but that the authorities have to find alternative measures to give effect to them.<sup>51</sup>

■ In Slovakia, the president has refused to appoint judges to the Constitutional Court, even though that court had decided that he was obliged to do so. The Venice Commission underlined that the Constitutional Court is the authority empowered to give a final decision on the interpretation and application of the constitution, and recommended an improvement of the domestic constitutional and legal framework regarding the appointment of judges of the Constitutional Court.<sup>52</sup>

■ In January 2018, the Constitutional Court of Turkey ruled that there had been a violation of the right to liberty and security, and of the right to freedom of expression with regard to two journalists held in pre-trial detention on terrorism-related charges.<sup>53</sup> Despite these judgments, the criminal courts rejected the journalists' requests for release. One of the journalists was later handed an aggravated life sentence by a first instance criminal court.<sup>54</sup> The other was released from pre-trial detention after a second judgment of the Constitutional Court which concluded that his right to liberty and security had been violated due to the non-implementation of its previous judgment.<sup>55</sup> On 20 March 2018 the European Court of Human Rights held that the pre-trial detention of both journalists was a violation of their right to liberty and security and of their freedom of expression.<sup>56</sup> The Secretary General declared that he would closely follow the situation.<sup>57</sup>

■ Thousands of applications have reached the Court as a result of the prolonged non-enforcement or delayed enforcement of final judicial decisions in Ukraine, following the 2009 pilot judgment of

49. *OAO Neftyanaya Kompaniya Yukos v. Russia*, 14902/04, 31 July 2014, and decisions adopted by the Committee of Ministers in March 2016 (1280th HR Meeting) and December 2017 (1288th HR meeting).

50. See <https://goo.gl/kYLtig>.

51. Venice Commission Final Opinion No. 832/2015 on the amendments to the Federal Constitutional Law on the Constitutional Court, 13 June 2016, CDL-AD(2016)016.

52. Venice Commission Opinion No. 877/2017 on questions relating to the appointment of judges in the Slovak Republic, 13 March 2017, CDL-AD(2017)001, paragraph 69.

53. Judgments of 11 January 2018.

54. Judgment of 16 February 2018.

55. Judgment of 15 March 2018.

56. *Mehmet Hasan Altan v. Turkey*, 13237/17, 20 March 2018, and *Şahin Alpay v. Turkey*, 16538/17, 20 March 2018.

57. See <https://goo.gl/YXutXD>.

48. *Ilgar Mammadov v. Azerbaijan*, op. cit.

*Yuriy Nikolayevich Ivanov v. Ukraine*.<sup>58</sup> In that decision, the Court identified a series of shortcomings in the Ukrainian judicial system which hinders the enforcement of final decisions. Unable to obtain appropriate redress at domestic level, a growing number of applicants have instead sought relief before the Court. Such systemic problems require the implementation of comprehensive measures and the determination of the government to honour its debts arising from outstanding judgments and bring about the necessary changes of law and budgetary procedures to ensure that legislative undertakings may be adequately enforced, where needed through the judicial system.

■ The absence of efficient responses and the massive influx of new applications have led the Court to take the unprecedented decision to send back over 12 000 pending and new applications to be dealt with on the merits by the domestic authorities under the Committee of Ministers' supervision. In the absence of progress in the domestic handling of these cases within a period of two years, the Court has indicated that it may decide to restore cases to its list.<sup>59</sup>

■ The increased interest on the part of national parliaments in following the execution of Court judgments, often in the form of specific structures set up for this purpose, is positive and should be encouraged.<sup>60</sup> For example, the Parliament of Ukraine has set up a parliamentary committee on the execution of the judgments of the European Court of Human Rights.

58. *Yuriy Nikolayevich Ivanov v. Ukraine*, 40450/04, 15 October 2009. The first case on this matter was decided in 2001, *Kaysin and others v. Ukraine*, 46144/99, 3 May 2001.  
59. *Burmych and Others v. Ukraine*, 46852/13, 12 October 2017.

60. Committee of Ministers (2016), "Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights – 2016", 10th Annual Report of the Committee of Ministers, page 12.

# EFFICIENCY OF COURT PROCEEDINGS

## Chapter 1 – Efficient, impartial and independent judiciaries

**A**ccording to the CEPEJ's latest available report,<sup>61</sup> there is an overall positive trend as regards the ability of European courts to cope with incoming cases in the long term.

— The speed with which cases are completed by national courts is a key indicator of the efficiency of justice, but other factors also play an important role. The budgets allocated to judicial systems, the staffing and infrastructure available to courts, and the provision made for individuals to pursue a case through the system also affect the efficiency of a judicial system.

— Article 6 of the Convention guarantees the right to a fair trial within a reasonable time. What is reasonable, according to the Court's case law, is determined by the complexity of the case, the conduct of the applicant and of the relevant authorities, and what is at stake for the applicant in the dispute.<sup>62</sup> This requirement continues to generate large numbers of applications from individuals and numerous findings of violations by the Court, although progress has been made in a number of member states.

### MEASUREMENT CRITERIA

#### Legal criteria

- ▶ Cases are decided by courts within a reasonable time, also taking into account possible preceding administrative procedures.

61. CEPEJ (2016), *European judicial systems – Efficiency and quality of justice*, Council of Europe Publishing, Strasbourg.  
62. *Sürmeli v. Germany*, 75529/01, 8 June 2006, §128.

#### Institutional criteria

- ▶ The state allocates adequate human and financial resources, facilities and equipment to the courts to enable them to function efficiently.
- ▶ Objectives of agencies are co-ordinated in the broader framework of ensuring accelerated justice without compromising fairness.
- ▶ Regular monitoring activities are implemented to evaluate efficiency.
- ▶ Discretionary prosecution is encouraged where appropriate.
- ▶ Offences that are inherently minor are primarily settled using simplified procedures, without any court hearing.
- ▶ Simplified procedures are in place also in respect of other types of legal proceedings.
- ▶ Civil and administrative courts are sufficient in number and geographically distributed to provide easy access for litigants.
- ▶ The use of information technology in court systems facilitates the full enjoyment of access to justice.

#### FINDINGS

— Substantial reforms have been adopted in several member states such as Latvia,<sup>63</sup> Montenegro,<sup>64</sup> Poland<sup>65</sup>

63. Kornvakovs group of cases against Latvia, CM/ResDH(2017)122 (<https://bit.ly/2GGvXq>) and Sviþsta against Latvia CM/ResDH(2017)123 (<https://bit.ly/2GDrF8l>).

64. Stakić group of cases against Montenegro, CM/ResDH(2017)38 (<https://bit.ly/2qapqqt>).

65. Fuchs group of cases against Poland, CM/ResDH(2016)359 (<https://bit.ly/2HiA0eJ>).

and “the former Yugoslav Republic of Macedonia”<sup>66</sup> This has allowed the Committee of Ministers to close its supervision of a number of judgments where the Court had identified important systemic and endemic problems of unreasonably lengthy judicial proceedings.

■ In the case of Greece, GRECO’s recommendation that procedural rules provide for further guarantees against delays in court proceedings and that channels for complaints against undue delays be clarified and properly communicated to the public, has not been implemented at this stage.<sup>67</sup>

■ Regarding Italy, the Committee of Ministers acknowledged in particular the allocation of additional funds to the Ministry of Justice between 2015 and 2017 and the assistance provided by the Bank of Italy in handling the payments, which have produced significant results, particularly in the settlement of the arrears of the “Pinto” debt.<sup>68</sup>

■ Norway has established a commission tasked with exploring how courts should be organised to be best equipped to meet expectations as regards efficiency and quality and ensure their independence at a time when conditions in society are changing and evolving.

■ In Poland, by amending the Law on Proceedings before Administrative Courts, the authorities introduced several important changes aimed at simplifying and shortening administrative proceedings, in accordance with the shortcomings identified by the judgments of the Court.<sup>69</sup> As regards unreasonable length of judicial proceedings, the Polish Parliament has enacted new legislation following the pilot judgment *Rutkowski and Others v. Poland*,<sup>70</sup> in order to eliminate systemic dysfunctions that result in excessively long proceedings. This step has enabled the Court to strike out a large number of applications in respect of Poland raising similar issues to those in the pilot judgment.<sup>71</sup>

■ The Venice Commission nevertheless expressed reservations about the proposed special chamber of the Supreme Court competent to examine the length of the proceedings. While accepting that measures against excessive length of proceedings may be organised in different ways, the Venice Commission stressed that there must be a clear procedure which is followed in this type of proceedings. It noted in this regard that the draft law did not specify whether the parties to the proceedings may introduce a complaint before the Disciplinary Chamber.<sup>72</sup>

66. Atanasovic group of cases against “the former Yugoslav Republic of Macedonia”, CM/ResDH(2016)35 (<https://bit.ly/2ltxxx2>).

67. GRECO 4th round compliance report in respect of Greece (GrecoRC4(2017)20), op. cit., paragraphs 59-69.

68. *Mostacciolo Giuseppe v. Italy*, CM/ResDH(2017)289 (<https://bit.ly/2HhUeFm>).

69. See Poland’s Action Plan on the measures aiming to comply with the judgments in the Fuchs group of cases concerning excessive length of proceedings related to civil rights and obligations before administrative authorities and courts (<https://bit.ly/2Jy6ORA>).

70. *Rutkowski and Others v. Poland*, 72287/10, 13927/11 and 46187/11, 7 July 2015.

71. *Zaluska v. Poland*, 53491/10, and *Rogalska v. Poland*, 72286/10, 22 June 2017.

72. Opinion on the Draft Act amending the National Council of the Judiciary and on the Draft Act amending the act on the Supreme Court proposed by the President of Poland, and on the Act on the organisation of the ordinary courts (CDL-AD(2017)031), op. cit., paragraphs 38 and 42.

## The judiciary and the challenge of electronic evidence

Judges and prosecutors must handle electronic evidence more and more frequently. Any type of crime – and not only cybercrime, in which computers are the object of a crime or the means by which an offence is committed – may involve evidence on a computer system: an extortion e-mail in connection with a kidnapping; location data related to a mobile phone of a suspect in a case of rape; social media data proving that a suspect has groomed a child for the purpose of sexual violence; traffic data indicating that suspects in a corruption case have communicated with each other, and when; e-mail exchanges showing how an individual was recruited to a terrorist organisation, etc. Similar issues are increasingly arising in civil and administrative law cases.

When confronted with electronic evidence, judges and prosecutors have to decide whether such evidence has been collected in accordance with the law, whether the applicable procedures have been followed to ensure the chain of custody and thereby the integrity of the data, and whether the evidence is admissible or is to be excluded.

Additional challenges arise because electronic evidence is volatile and may be subject to manipulation. A specific internet protocol address which seemingly identifies an individual suspect may have been assigned by a service provider to multiple other users at the same time.

Domestic law and procedures have not always kept pace with these new technological challenges. Data presented as evidence may have been gathered by a national security or intelligence body outside the detailed procedures and computer forensic processes usually followed by criminal justice authorities. The simple fact that individuals have used encrypted applications to communicate in private may be presented as evidence of membership of a criminal organisation in some member states, but not in others.

In order to avoid miscarriages of justice, it is important for judges and prosecutors to acquire certain skills to enable them to assess electronic evidence. The Council of Europe is providing support for judges and prosecutors to be able to meet this challenge. The Convention on Cybercrime sets out procedural powers which provide the criminal justice authorities with a specific legal basis for the collection of electronic evidence. These powers are to be limited by rule of law safeguards.<sup>73</sup>

It is of the utmost importance that the Council of Europe draw up further guidelines for judges and lawyers on how to manage the impact of the internet and new technologies regarding the rules governing evidence; the collection, seizure and safeguard of electronic evidence; its reliability and admissibility during the trial. Additional tools in this area should be developed to complement the “Electronic Evidence Guide” and the “Digital Forensic Laboratory Guide” that have already been made available.<sup>74</sup>

In 2018, the European Committee on Legal Co-operation (CDCJ) will draw up guidelines for the use of judges and lawyers, providing them with practical advice on how to manage the impact of the internet and new technologies on rules of evidence and modes of proof, primarily in the areas of civil and administrative law proceedings. Particular attention will be paid to the collection, seizure and safeguarding of electronic evidence, to its relevance, its reliability, and its admissibility.

73. Convention on Cybercrime (ETS No. 185), Articles 15-21.

74. Global Action on Cybercrime (2016), “Digital forensics laboratory management and procedures guide”, information at <https://rm.coe.int/16806b3058>.



From “open data” to “big data”, justice systems are increasingly called upon to respond to the challenges of the digital transformation of societies.

Predictive justice is just one such response, whereby artificial intelligence (AI) technologies are developed in order to increase the foreseeability of the judicial process by assessing the chances of success of a particular trial, by ensuring greater transparency of the work of judges and by harmonising the development of case law.

A University College London research team, using a sample of 584 decisions of the European Court of Human Rights, claims that it can reproduce those decisions with 79% accuracy on the basis of the facts described in the decisions. At first glance, this could inspire thoughts of the imminent redundancy of the traditional adjudication process and perhaps of significant financial savings. A closer look tends to temper that view. What the study shows is that, for facts described in the same way, the Court tends to decide in a certain way. Given that, in the case of the judicial process, an extremely important part of the work done by a judge is not learned by these machines, it would be a mistake to believe that the results produced by AI tools can provide insights into the real causality of the situations submitted to them. AI systems are extremely sophisticated statistical machines, directed towards the past, operating by correlation, and without any understanding of the rules applied. This is not unlike some automatic language translation tools available online which draw up correlations between groups of words, but do not grasp the meaning of what is being translated. The performance of a predictive justice tool is similarly a mechanical one; it does not judge, assess or weigh the facts, issues or circumstances.

Still, there is agreement in academic circles and among practitioners in this field that AI tools will be highly important for many justice-related processes. Their use can be effective, for example in increasing the search capabilities in case law databases using natural language queries, or establishing scales of compensation on the basis of a rigorous selection of representative decisions.

It is important that member states approach the use of AI in a manner that also takes into account the risks, notably in respect of inequality by way of disparities in access to AI tools and the ability to challenge the results of their use. In the criminal justice field, predictive analytics are used in the United States to assess the risk of reoffending, as calculated on the basis of a range of social factors. The risks in terms of presumption of innocence and offender stereotyping are clear. Public policy makers must co-operate with all the stakeholders, including judges, prosecutors, lawyers, litigants and defendants to ensure that the use of AI in the justice sector, where fundamental individual rights are at stake, are subject to the necessary regulation and safeguards.

The Council of Europe has asked the CEPEJ to examine the implications of the use of AI in the justice sector, both from the point of view of efficiency and of quality of justice, and to issue guidance to member states.



## CHAPTER 2

# FREEDOM OF EXPRESSION



# INTRODUCTION

## Chapter 2 – Freedom of expression

Individuals have the right to speak their minds, even when their opinions are offensive or shocking to others – provided that they do not incite violence or hatred. Free speech, supported by a diverse and independent media, allows citizens to make informed choices and helps ensure that powerful interests are held to account.

The trend of growing distrust in democratic institutions has not spared traditional or new media. Growing partisanship, populist attacks and the fragmentation of public discourse into ideologically charged echo chambers have contributed to delegitimising the press. At the same time, the competitive pressures produced by the digital revolution have seriously threatened the financial viability of traditional media, forcing painful adaptations and making quality journalism less affordable. On the other hand, online media are increasingly accused of cutting corners in terms of ethics and failing to abide by professional standards.

The great democratisation of information brought about by the internet can be no substitute for good journalism. Corrupt officials are unlikely to be scared by casual online opinion, but they will use everything in their power to thwart serious investigative reporting into their affairs.

The narratives highlighted in this chapter demonstrate that free and independent media continue to be essential in the fight against abuse and corruption, sometimes at high personal cost to the journalists and editors behind the stories. They are also a reminder that serious journalism is not possible without a protective legal and institutional environment. Flawed defamation laws, impunity for attacks against and intimidation of media professionals, failure to guarantee the confidentiality of sources and legal protection for whistle-blowers, or the denial of access to information held by public authorities – all inhibit free speech and, ultimately, undermine accountability.

Oversight by the European Court of Human Rights ensures that national laws and practices are consistent with the standards set out in Article 10 of the Convention. The Court issued close to 50 judgments in Article 10 cases in the course of 2017, finding a violation in about two thirds of them. The legal issues before the Court were diverse, ranging from high damage awards in libel cases to responsibility

for anonymous users comments online, and the banning of so-called “gay propaganda” affecting minors.

Impunity remains a serious concern, as demonstrated by the Council of Europe’s Platform to promote the protection of journalism and safety of journalists, and its growing number of partner organisations. As alerted on the platform, five journalists were killed in the territory of Council of Europe member states in 2017 and 13 murder cases from previous years remain unpunished. The assassinations of Maltese journalist Daphne Caruana Galizia in October 2017 and of the Slovak investigative journalist Ján Kuciak in February 2018 served as a reminder that journalists all over the continent are potentially exposed to deadly violence.

The situation in Turkey, Azerbaijan and the Russian Federation is of concern due to the number of journalists in detention.<sup>75</sup> Harassment by officials and expanded surveillance powers are among the general threats to the safety of journalism within the Council of Europe region.

Media independence is undermined by the arbitrary shutdown of media organisations, attempted financial manipulation by government and commercial entities, and widespread pressure on public service media in many member states. Media pluralism must be protected against the existential threats to traditional media in the digital age, and a number of efforts have been made in member states to address the media owners’ conflicts of interest and excessive concentration of ownership.

Freedom of expression on the internet is threatened by arbitrary blocking of online content, through administrative decisions or pursuant to flawed legal frameworks. Certain member states have passed laws or issued court judgments imposing stricter legal obligations on intermediaries, driven by concerns over the spread of illegal online content that causes serious harm to individuals or collective interests. This complex policy area calls for great care in designing liability and self-regulation models that safeguard basic rights without impeding the free flow of information and ideas or weakening due process guarantees.

<sup>75</sup> PACE Resolution 2141 (2017) on attacks against journalists and media freedom in Europe (<https://bit.ly/2GPgm96>).

# LEGAL GUARANTEES FOR FREEDOM OF EXPRESSION

## Chapter 2 – Freedom of expression

**A**n enabling legal and regulatory environment is essential for guaranteeing freedom of expression and, in particular, media freedom. Laws on defamation, hate speech and other areas, which restrict free speech rights, must be drafted with great care as narrow exceptions to the cardinal principle of the free flow of information and ideas. This is especially the case for any criminal sanctions, given their high potential for inhibiting legitimate expression in a democratic society.

However, well-drafted laws are not enough. They can still cause significant harm if they are not applied – by courts, regulators and executive officials – with proper sensitivity, and awareness that all restrictions on free speech must be limited by the principles of necessity and proportionality.

The case law of the European Court of Human Rights provides essential guidance in this respect. In one case involving the expression of religious extremism online, the Court held that calling for the violent imposition of Sharia law did not fall under the protection of Article 10; instead, such speech comes under the remit of Article 17 of the Convention, which prohibits the abuse of Convention rights by an activity that is aimed at the destruction of the Convention rights of others.<sup>76</sup>

### MEASUREMENT CRITERIA

- ▶ There is no criminal prosecution in defamation cases except where the rights of others have been seriously impaired.
- ▶ Defamation laws and practices explicitly allow for legitimate criticism and are not misused to influence the debate on issues of public interest.

- ▶ Awards of damages or legal costs in defamation proceedings are proportionate to the injury to reputation.
- ▶ Political or public officials do not enjoy a higher level of protection against criticism and insult than ordinary people.
- ▶ Blasphemy is not a criminal offence. Religious insult is not a criminal offence except where incitement to hatred is an essential component.
- ▶ Criminal laws aimed at combating hate speech are clear and precise so as to enable individuals to regulate their conduct, and include adequate safeguards for freedom of expression, in compliance with Article 10.2 of the Convention.
- ▶ Laws restricting the right to information on grounds of public order or national security are clear and precise so as to enable individuals to regulate their conduct, and have adequate safeguards for freedom of expression, in compliance with Article 10.2.
- ▶ There are effective self-regulatory measures as a means of balancing media rights and responsibilities.

### FINDINGS

Flawed defamation regimes represent an especially difficult challenge for journalistic efforts to investigate corruption and abuse. High defamation awards, in particular, are part of a growing trend that creates a significant chilling effect. In Latvia, an online news portal was ordered to pay a €50 000 fine in connection with an article that was found to harm the reputation of the National Opera;<sup>77</sup> the court's ruling is not yet final. In Albania, a senior judge requested a total of €84 000 in damages in a defamation lawsuit

<sup>76</sup> *Fouad Belkacem v. Belgium*, 34367/14, 27 June 2017.

<sup>77</sup> Statement of Council of Europe Commissioner for Human Rights, 26 January 2017.



filed against two media outlets and four reporters, which is still pending. The lawsuit targeted media investigations into the judge's and his family's asset declarations, and previously failed official investigations into the same matter.<sup>78</sup> The Commissioner for Human Rights found, during a visit to Bosnia and Herzegovina, that defamation-related pressure was routinely employed in efforts to silence reporters investigating corruption, organised crime and past human rights abuses.<sup>79</sup>

■ The Court considered the question of high defamation awards in *Independent Newspapers (Ireland) Limited v. Ireland*, a case concerning a €1 250 000 award against a national media outlet, the highest ever approved by the Supreme Court of Ireland. The Court found that the damages violated Article 10 in view of the fact that domestic law prevented the trial judge from giving the jury sufficiently specific instructions on the amount of damages, and that the highest national court had failed to provide adequate reasoning for setting the final amount of damages.<sup>80</sup>

■ Criminal sanctions and court injunctions severely affect critical reporting. In Italy, a reporter was sentenced to a total of 30 months in prison in relation to four libel cases filed by local officials. He remains free, however, while he awaits the results of his appeal.<sup>81</sup> A libel reform bill, which would repeal prison terms for defamation in the press, has been pending in the Italian Senate for several years. In Iceland, a district commissioner barred two local media outlets from future reporting on the prime minister's and his family's financial dealings with a bank prior to the 2008 financial crisis, arguing for the confidentiality of financial information. In February 2018, the Reykjavik District Court rejected the injunction on the basis that the reporting did not interfere with the right to privacy.<sup>82</sup>

■ In June 2017, the Court held that the conviction of a newspaper for publishing criminal procedural documents before they had been read out in open court, did not violate Article 10,<sup>83</sup> nor did the issuance of a restraining order against the publication of

tax information.<sup>84</sup> It also held, in October 2017, that compelling a journalist to give evidence against a source who had already come forward constituted a violation of Article 10.<sup>85</sup>

■ Adequate protections for whistle-blowers, including from any form of retaliation, are another important tool for combating corruption and malfeasance. They promote a culture that deters corruption, assist journalistic investigations, and help shed light on often secretive dealings that are notoriously difficult to expose.

■ The Council of Europe's Civil Law Convention on Corruption (ETS No. 174) requires states parties to ensure protection from any unjustified sanctions against employees, both in the public and private sectors, who report their suspicions in good faith, whether internally or externally to authorities. In addition, the Committee of Ministers Recommendation CM/Rec(2014)7 on the protection of whistleblowers urges states to put in place a normative, institutional and judicial framework that protects individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest.

■ During its second evaluation round, GRECO issued recommendations to introduce or enhance protection for whistle-blowers in 34 of its 49 member states. Since then, 21 countries have fully complied with GRECO's recommendations, while in 11 countries its recommendations have been partly implemented.

■ In November 2017, Italy adopted a new law expanding existing protections for whistle-blowers in the public sector and extending those safeguards to private-sector employees. This is a positive development called for by GRECO in its "Summary analysis of selected private sector bribery cases" published in December 2017.<sup>86</sup>

■ Effective implementation of whistle-blowing laws often requires the revision of outdated legislation on official and state secrets, or corporate confidentiality, which in some countries includes strict prohibitions on disclosure of any official or corporate data without permission. In 2016, courts in Luxembourg convicted two former employees of an accounting firm that helped expose an intricate system that facilitated tax avoidance by multinational companies. Their convictions were overturned on appeal in January 2018.<sup>87</sup>

78. Alert on the Council of Europe Platform to promote the protection of journalism and safety of journalists, "Two media outlets and four journalists sued by judge", 15 June 2017.

79. Commissioner statement following a visit to Bosnia and Herzegovina, 16 June 2017.

80. *Independent Newspapers (Ireland) Limited v. Ireland*, 28199/15, 15 June 2017.

81. Platform alert, "Italian journalist risks being jailed for thirty months for libel", 19 May 2017. A state reply was received on 27 June 2017.

82. Platform alert, "Injunction prohibiting media from reporting on the financial dealings of Iceland Prime Minister Bjarni Benediktsson", 18 October 2017. A state reply was received on 12 February 2018.

83. *Giesbert and Others v. France*, 68974/11 et al., 1 June 2017.

84. *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], 931/13, 27 June 2017.

85. *Becker v. Norway*, 21272/12, 5 October 2017.

86. GRECO (2017), "Summary analysis of selected private sector bribery cases" (Greco-Inf(2017)2) (<http://bit.ly/2K7j1Mw>).

87. Platform alert, "French Journalist at the Origin of LuxLeaks Revelations Charged in Luxembourg", 23 April 2015, updated last on 18 January 2018. State replies were received in June 2015 and July 2016.

Journalists are facing increasing legal obstacles, especially in the course of reporting on national security matters, as states consider stiffer sanctions for disclosure of state secrets. An alert published on the platform denounced proposals by the Law Commission in the United Kingdom to impose prison terms of up to 14 years for “obtaining or passing on sensitive information”.<sup>88</sup>

The year 2017 witnessed a trend across Council of Europe member states to restrict the media’s ability to carry out its watchdog function. The issues reported on the Organisation’s Platform to promote the protection of journalism and safety of journalists range from the immediate closure of media outlets by way of decree – to the possibility for a national parliament to put an

end each year, without clear criteria, to the mandate of the director general of the public service media, or the requirement falling on foreign-funded media outlets to register as “foreign agents”. In the name of defending other legitimate values, such as the prevention of hate speech and disinformation online, some member states introduced legislative proposals which could encourage censorship and endanger freedom of expression through the lack of judicial control and ambiguous formulations of the law.

Several member states have taken initiatives to evaluate their legislative frameworks in the field of media, often through co-operation activities with the Council of Europe, and to align them with European standards.

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88. Platform alert, “Proposal Set To Increase Prison Sentences For Leaking Official Documents”, 14 February 2017.

# SAFETY OF JOURNALISTS AND OTHER MEDIA ACTORS

## Chapter 2 – Freedom of expression

**A**s proxies for the public, the press plays a fundamental role in holding governments and other powerful actors to account. However, the free flow of information and ideas suffers greatly in an environment in which media professionals are subjected to physical attacks, intimidation and arbitrary or selective prosecution. Any such offences must be effectively and promptly prosecuted, as impunity deters rigorous journalism, and exposes reporters to even greater dangers in the future. Protection of confidential sources and unhindered access to public records are essential tools of journalism that must be guaranteed in law and practice.

Legal protections for “other media actors” – including bloggers, online reporters or other contributors who do not meet the definition of mainstream journalism in national laws – remain insufficient due to the failure to upgrade existing legal regimes in ways that adequately cover new media players. As a result, non-traditional media actors are often unable to benefit from recognised journalistic privileges, ranging from protection of confidential sources, to personal safety, and protection from unlawful interference with their journalistic work, despite their growing contribution to the dissemination of information and ideas. Much remains to be done in this area to live up to the commitments in Committee of Ministers Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors.<sup>89</sup>

The great majority of member states have laws that recognise the right of access to information held by public authorities. The case law of the Court

has further strengthened protection for the right of access as a fundamental right, acknowledging that it is guaranteed by Article 10 of the Convention, subject to certain threshold conditions. These conditions include a requirement that the requested information be of public interest and that the requester act as a “watchdog” in the interest of further dissemination of the data at stake.<sup>90</sup> Requests by journalists and other media actors should normally meet these conditions. Any refusals to provide information that are found to interfere with Article 10 rights must be justified under paragraph 2 of Article 10, including as being “necessary in a democratic society.”

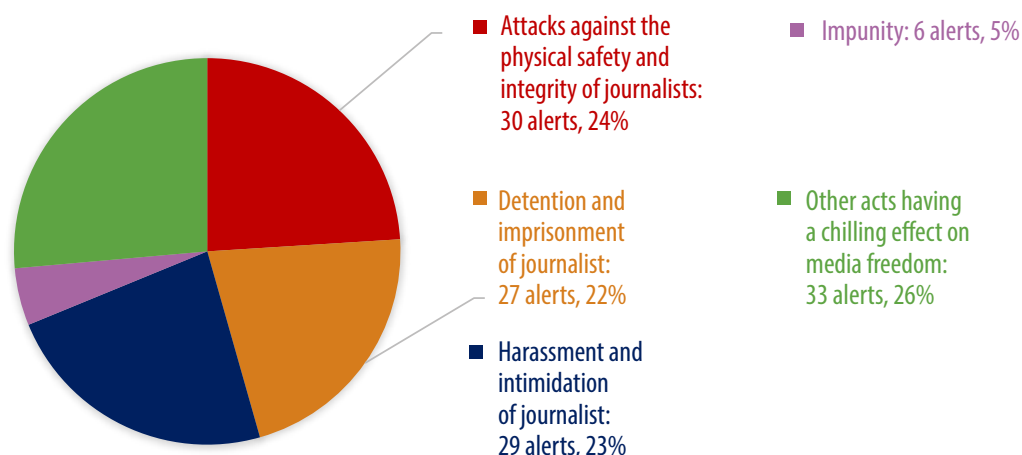
### MEASUREMENT CRITERIA

- ▶ There are no killings, physical attacks, disappearances or other forms of violence against journalists.
- ▶ Journalists are provided with police protection when requested because of threats.
- ▶ Journalists are not arrested, detained, imprisoned or harassed because of critical reporting. There are no selective prosecutions, sanctions, inspections or other arbitrary interference against journalists and other media actors.
- ▶ Journalists are not subjected to verbal intimidation that is instigated or condoned by authorities, or to harmful rhetoric in political discourse.
- ▶ There is no impunity for crimes against journalists. There are independent, prompt and effective investigations of all crimes against journalists committed either by state or non-state actors.

<sup>89</sup>. Committee of Ministers Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors, 13 April 2016.

<sup>90</sup>. *Magyar Helsinki Bizottság v. Hungary* [GC], 18030/11, 8 November 2016.

## Alerts submitted in 2017, distributed by category



- ▶ Journalists are not subjected to state surveillance in the exercise of their profession.
- ▶ The confidentiality of journalists' sources is protected in law and in practice, subject to clear and narrow exceptions.
- ▶ Access to information and documents held by public authorities is guaranteed in law and in practice.
- ▶ Journalists are not subjected to undue requirements before they can work. Foreign journalists are not refused entry or work visas because of their potentially critical reports.

## FINDINGS

By the end of 2017, five journalists had been killed in the Council of Europe area and 13 murder cases from previous years remained unpunished, contributing to a climate of impunity for serious attacks on media professionals.<sup>91</sup> By the end of 2017, the Platform to promote the protection of journalism and safety of journalists registered a total of 125 journalists in detention and 128 incidents involving alleged threats to the physical integrity and harassment of journalists in 29 member states. The rate of the most serious incidents, categorised by the platform as Level 1, went up in absolute and relative terms (from 38% to 48%).

Killings of journalists are the ultimate form of censorship, and often the highest price paid for courageous reporting on corruption and organised crime. On 16 October 2017, Daphne Caruana Galizia, a Maltese blogger and veteran investigative journalist,

was killed in a car bomb attack. On 18 February 2018, the Slovak investigative journalist Ján Kuciak and his partner were assassinated. The Council of Europe's Secretary General called for a thorough investigation to find those responsible for these crimes.<sup>92</sup>

In May 2017, the Commissioner called on Azerbaijan to release all persons detained because of their views or legitimate civic activity.<sup>93</sup> The Commissioner also expressed concern about the treatment of Afgan Mukhtarli, an Azerbaijani journalist and activist who was reportedly abducted while living in Georgia, ill-treated by his kidnappers and forcibly taken to Azerbaijan.<sup>94</sup>

In a number of alerts, platform partners reported alleged harassment by government officials with a chilling effect on media freedom. In Hungary, a government spokesperson repeatedly attacked the integrity of a correspondent for a news site as being "on drugs" and "not a journalist." At least eight other reporters were accused by pro-government media of serving anti-Hungarian interests.<sup>95</sup> In Poland, the Minister of Defence brought several criminal charges, including "publicly insulting a constitutional authority," against the author of a book making allegations of illicit dealings by the minister's associates.<sup>96</sup>

91. "Safety of journalists weekly", Council of Europe Platform to promote the protection of journalism and safety of journalists, 4 December 2017.

92. Statement of Secretary General Thorbjørn Jagland, 17 October 2017.

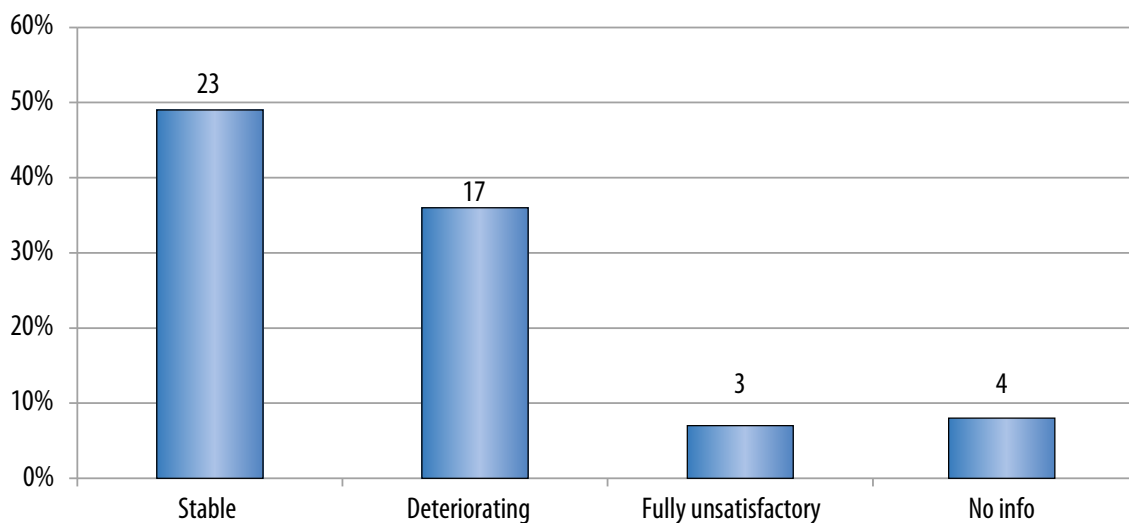
93. Commissioner statement, 17 May 2017.

94. Commissioner statement, 31 May 2017.

95. See platform alerts, "Journalist Lili Bayer verbally attacked by government spokesperson", 3 October 2017; and "The website 888.hu publishes a list of eight journalists described as 'propagandists'", 8 September 2017.

96. Platform alert, "Polish Defence Minister seeks criminal charges against journalist for 'coercion', 'insult' over exposé of associates' contacts", 13 July 2017. A state reply was received on 3 August 2017.

### Ranking of the situation in Council of Europe member states with regard to the safety of journalists and other media actors



— The Council of Europe Commissioner for Human Rights has expressed concerns about the Turkish authorities' overbroad interpretation of the concept of terrorist propaganda and support for a terrorist organisation, including in cases where there is clearly no incitement to violence.<sup>97</sup> The Venice Commission also criticised criminal prosecutions of journalists under the heading of "membership" of terrorist organisations.<sup>98</sup>

— In co-operation with the Council of Europe, a number of events have been organised at the National Academy of Internal Affairs of Ukraine to promote awareness among law-enforcement officers of the importance of journalistic activities and the safety of journalists.

— The expansion of surveillance powers continues to generate serious concerns, including as a threat to journalists' confidential sources and their ability to do their job free from government surveillance.

— In the Netherlands, a law that grants intelligence agencies new powers of bulk interception of internet and other cable communications, with allegedly insufficient oversight, was put to a national referendum in March 2018.

— The Court held a hearing on the three cases stemming from Edward Snowden's revelations challenging the bulk interception of external communications

by the United Kingdom intelligence services, and their intelligence sharing with the United States. The applicants include a media organisation that reports on national security issues.<sup>99</sup>

— The recognition of the right of access to state-held information under Article 10, at least in certain cases, raises questions about the compatibility of a number of laws and practices of member states with the Convention. The issue arises most sharply in relation to so-called absolute exemptions, which preclude the application of right to information laws to certain categories of information or data held by certain agencies, such as intelligence services. A case currently pending before the Court challenges the existence of absolute exemptions under the United Kingdom's freedom of information regime.<sup>100</sup>

— In 2017, eight alerts referred to journalists being denied the possibility of accessing information. Marking an increase from previous years, they point to reporters having their accreditations turned down at public events, party rallies and high-level conferences they were trying to cover. Others were denied entry to a member state or placed under country bans on the grounds of endangering national security.

97. Third-party intervention in the case of *Ahmet Hüsrev Altan v. Turkey* (13252/17) and nine other cases, Human Rights Commissioner, CommDH(2017)29, 10 October 2017, (<https://bit.ly/2hPotr0>).

98. Venice Commission Opinion No. 872/2016 on the measures provided in the recent Emergency Decree Laws with respect to freedom of the media (CDL-AD(2017)007), 13 March 2017.

99. *Big Brother Watch and Others v. the United Kingdom*, 58170/13, 7 January 2014; *Bureau of Investigative Journalism and Alice Ross v. the United Kingdom*, 62322/14, 5 January 2015; and *10 Human Rights Organisations and Others v. the United Kingdom*, 24960/15, 24 November 2015.

100. *Privacy International v. the United Kingdom*, 60646/14, 3 January 2017.

# MEDIA INDEPENDENCE

## Chapter 2 – Freedom of expression

**G**uaranteeing a favourable environment for genuinely independent media is a major challenge for all democracies. Government influence and powerful commercial interests must be constrained – through adequate laws, practices and an overall democratic culture that is conducive to free expression – for the media to be able to fend off attempts to control them.

■ In new and sometimes older democracies, ambiguous ownership structures and the business interests of unscrupulous media owners and managers can be major factors of self-censorship as they fail to provide their journalists with adequate working conditions. The Parliamentary Assembly has repeatedly called on states to “improve the legal provisions concerning transparency of formal and beneficial ownership, as well as of funding mechanisms and organisational and managerial structures of the media, including online media.”<sup>101</sup>

■ Broadcast media, which continue to be major sources of information and which the general public uses to form its opinions, are especially vulnerable to pressure, owing to their reliance on licensing regimes and oversight by regulatory authorities. It is essential that broadcast licensing procedures are fair and transparent, and that media regulatory bodies are truly independent in law and in practice.

■ Public service media have an important role to play in our democracies, despite (and sometimes because of) the disruptive effects of new technologies and the direct, unmediated forms of communication that are made possible by online media and that are increasingly favoured by political actors. The ability of public service media to keep asking rigorous questions and to fulfil their remit will ultimately depend on continued guarantees of institutional autonomy, sufficient funding and technical resources.

101. PACE Resolution 2179 (2017) on political influence over independent media and journalists, 29 June 2017, paragraph 7.3. See also PACE Resolution 2065 (2015) on increasing transparency of media ownership, 24 June 2015.

### MEASUREMENT CRITERIA

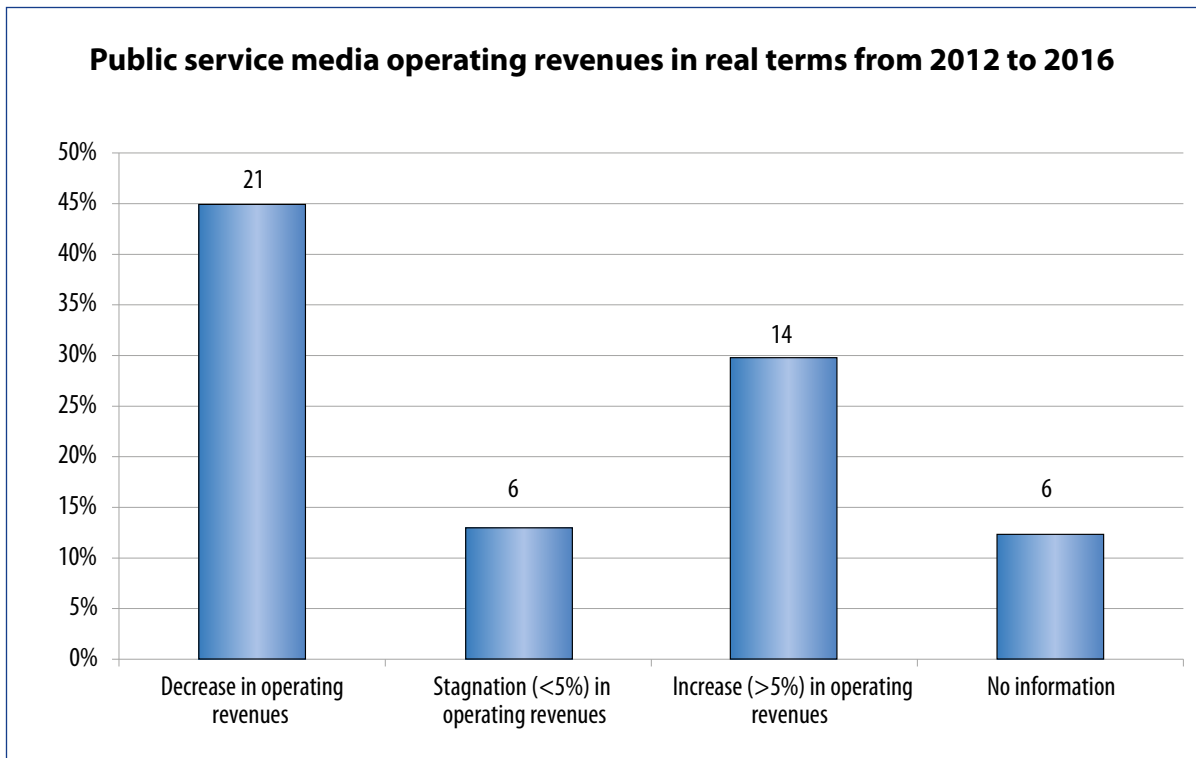
- ▶ Regulatory frameworks safeguard the editorial independence of media outlets from government, media owners and political or commercial interests and are respected in practice.
- ▶ Information about media ownership is easily accessible to the public.
- ▶ Print, broadcast and internet-based media are not subject to direct or indirect censorship. There is no indication of self-censorship in either private or state-owned media.
- ▶ Broadcasters are subject to licensing procedures which are open, transparent and impartial, and decisions are made public. Print and online media are not required to hold a licence which goes beyond mere business or tax registration.
- ▶ Media, including public service media, have fair and equal access to state advertising and state subsidies.
- ▶ The independence of the media regulatory bodies is guaranteed in law and in practice.
- ▶ Public service broadcasting has institutional autonomy, secure funding and adequate technical resources to be protected from political or economic interference.
- ▶ Journalists have satisfactory working conditions with adequate social protection.

### FINDINGS

■ Direct government censorship, including through the arbitrary shutdown of media outlets, is one of the most serious threats to media freedom and independence. The existence of a strict legal framework and judicial safeguards against executive overreach are essential in this regard.

■ The Court has long held that the significant dangers inherent in prior restraint of expression require a





Source: the European Broadcasting Union (EBU), based on data from EBU Members and the IMF.

“particularly strict” legal framework at national level, ensuring both tight control over the scope of the bans and effective judicial review to prevent abuse.<sup>102</sup>

— The Court’s jurisprudence has condemned the practice of banning future publications by news outlets, which go “beyond any notion of ‘necessary’ restraint in a democratic society.”<sup>103</sup>

— Based on these principles, the Venice Commission has expressed criticism of Turkey’s emergency decree laws, which have laid the basis for “mass liquidations of media outlets ... without individualised decisions, and without the possibility of timely judicial review.”<sup>104</sup> According to the Commissioner for Human Rights,<sup>105</sup> more than 150 media outlets have been shut down in Turkey and assets liquidated under state of emergency powers, leaving hundreds of journalists out of work.

— The past year has also seen an increase in attacks against the public service media. In April 2017, the

platform partners published an alert following a call by the Slovak Prime Minister to change the leadership of Radio and Television of Slovakia, which he accused of being “no longer a public service” and “opposition-oriented.”<sup>106</sup> In October 2017, another alert criticised a bill which was approved by the Romanian Senate that would reportedly make it easy for a government majority to replace the management of the national news agency AGERPRESS, by rejecting the agency’s annual report to parliament. The management boards of Romania’s two public broadcasters are already dependent on the parliamentary majorities: they can be legally dismissed after each election, before completing their statutory mandates.<sup>107</sup>

— In a positive development, a draft bill of Ukraine’s Verkhovna Rada, which contained provisions that would prescribe how the public broadcaster should cover the activities of MPs, was withdrawn after a public debate that questioned its compatibility with international standards for the editorial independence of public service media.<sup>108</sup>

102. *RTBF v. Belgium*, 50084/06, 29 March 2011 (concerning an injunction against a public broadcaster’s programme on patient complaints against a surgeon); and *Obukhova v. Russia*, 34736/03, 8 January 2009 (interlocutory injunction barring journalist from reporting on an accident involving a judge and the related court case).

103. *Ürper and Others v. Turkey*, 14526/07 et al., 20 October 2009 (concerning court orders suspending publication of newspapers for up to a month under terrorism laws).

104. Venice Commission Opinion No. 872/2016, op. cit.

105. Commissioner for Human Rights, Memorandum on freedom of expression and media freedom in Turkey, 15 February 2017 (<https://bit.ly/215mPpp>).

106. Platform alert, “Pressure by prime minister on public broadcaster over coverage”, 13 April 2017. A state reply was received on 12 May 2017.

107. Platform alert, “Draft law threatens independence of AGERPRES news agency”, 9 October 2017.

108. Platform alert “Ukraine: new draft bill risks interfering with the editorial policy of the public service media”, 7 February 2018, resolved on 22 February 2018.

Financial strains on public service media, whether as a result of government policies or market forces, can equally affect their independence.

In an alert concerning Azerbaijan, the partner organisations reported that more than 400 journalists working for print, broadcasting and online media have benefited from free government housing grants in recent years, a policy which, according to them, risks softening critical coverage of the government.<sup>109</sup> Government advertising and subsidies, and government contracts offered to media owners in exchange for favourable coverage, remain common in several member states.

In Bosnia and Herzegovina, the national broadcaster is facing possible shutdown due to accumulated debts and the absence of an agreed plan to secure the sustainability of its funding. It has been providing a considerably reduced service since June 2016.<sup>110</sup> In August 2017, an agreement was reached, establishing the collection of TV licence fee through electricity bills. In Ukraine, the government proposed a 50% reduction of the 2018 budget for the public broadcaster UA:PBC, which is significantly lower than the budgets of public service media in other European countries of similar sizes.<sup>111</sup>

109. Platform alert, "Azerbaijan offers journalists free apartments", 17 July 2017.

110. Platform alert, "Threat of closure of the public broadcast media service", 18 April 2017, updated in August 2017.

111. Platform alert, "Government plan to strongly reduce funding for public service broadcasting", 20 September 2017, a state reply was received on 18 December 2017.

# MEDIA PLURALISM AND DIVERSITY

## Chapter 2 – Freedom of expression

Independence and pluralism of the media go hand in hand; they ensure that the public has access to a wide range of political and social viewpoints, including the perspectives of minorities and under-represented communities.

Guaranteeing media diversity requires states to adopt positive and often sector-specific measures, including in relation to structural aspects of the media sector, content diversity and ownership transparency.<sup>112</sup> Limiting the influence that a small number of persons or entities may have within or across media sectors using objective thresholds such as audience, revenue or advertising market shares is important to prevent excessive concentration. However, a substantial number of member states fail to enforce their anti-concentration laws effectively.

In March 2018, the Committee of Ministers adopted Recommendation CM/Rec(2018)1 on media pluralism and transparency of media ownership, which updates standards to ensure a pluralist media landscape, transparency of media ownership, diversity of media content, and inclusiveness in public service media.<sup>113</sup> The Committee of Experts on Media Pluralism and Transparency of Media Ownership published a study on media coverage of elections with a specific focus on gender equality, as well as a study on the use of the internet in electoral campaigns.<sup>114</sup>

112. Committee of Ministers Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content.

113. Committee of Ministers Recommendation CM/Rec(2018)1 on media pluralism and transparency of media ownership (<https://bit.ly/2GJTHdX>).

114. Committee of experts on Media Pluralism and Transparency of Media Ownership (MSI-MED), "Study on media coverage of elections with a specific focus on gender equality" (MSI-MED (2016)11rev5) (<https://rm.coe.int/study-gender-equality-in-media-coverage-of-elections/1680776164>); and MSI-MED, "Study on the use of internet in electoral campaigns" (MSI-MED (2016)10rev4) (<https://rm.coe.int/study-use-of-internet-in-electoral-campaigns/1680776163>).

The internet has democratised access to information and the inexpensive dissemination of viewpoints to large audiences. However, it has also led to greater fragmentation of public discourse and, perhaps paradoxically, to the domination of many key sectors by powerful global corporate actors. It has also made it easier to spread malicious disinformation.

A Council of Europe report on tackling disinformation in the global media environment, published in October 2017, includes a set of recommendations on how to address "information pollution."<sup>115</sup> The report seeks to respond to growing concerns about the long-term implications of disinformation campaigns that are designed to sow mistrust and confusion, and to sharpen existing divisions by exploiting ethnic, racial and religious tensions (see Box on Information Disorder).

### MEASUREMENT CRITERIA

- ▶ The public has access to a variety of print, broadcast and online media that represent a wide range of political and social viewpoints, including foreign or international resources.
- ▶ Media concentration is addressed through effective regulation and monitored by state authorities vested with powers to act against concentration.
- ▶ All types of media (public service, private and community) have fair and equal access to technical and commercial distribution channels and electronic communication networks.
- ▶ Media outlets represent diverse interests and groups within society, including local communities, minorities and those with specific needs. All

115. Council of Europe report, "Information Disorder: Toward an interdisciplinary framework for research and policy making", DGI(2017)09.

media outlets actively promote the representation of minorities and diversity in their internal organisation, including in media governing boards and self-regulatory mechanisms.

- ▶ Public service media play an active role in promoting social cohesion and integration through proactive outreach to diverse sectors and age groups of the population, including minorities and those with special needs.
- ▶ The operating environment for independent and community media is favourable and media literacy and critical understanding are promoted through formal and informal education systems.
- ▶ Political parties and candidates have fair and equal access to the media. Coverage of elections by broadcast media is balanced and impartial.

## FINDINGS

Financial pressures and online competition continued to threaten the viability of traditional media. The Commissioner for Human Rights expressed concern about the suspended publication of the Greek newspapers *Ta Nea* and *To Vima*, due to a failure to reach an agreement with their lenders.<sup>116</sup> Earlier, one of Hungary's top opposition dailies, *Népszabadság*, ceased publication, reportedly due to a decision by its owners to cut losses. A Budapest court ruled that the shutdown was in violation of the country's labour laws.<sup>117</sup> In January 2017, the Parliamentary Assembly called on Hungary to strengthen media pluralism and diversity and to ensure transparency of media ownership, especially where a media outlet was effectively held or controlled by a commercial entrepreneur who had been awarded public contracts.<sup>118</sup>

Ownership concentration and conflicts of interest remain challenges for policy makers at a time of steady technological convergence and growing involvement of media actors in politics. In January 2017, the Czech Republic adopted legislation which prevents cabinet members from owning media companies; it also bans companies in which they have a greater than 25% stake from bidding for public contracts and subsidies.

Concerns over excessive concentration in the Irish media market led to proposals by the opposition to amend competition laws to allow for retroactive review of the effects of media mergers and acquisitions. In Albania, the Constitutional Court struck down a legal provision that prohibited any person or entity from owning more than 40% of a company holding a national radio or television licence. The judgment followed a failed effort to repeal the same provision in parliament, and paved the way for the granting of new digital licences to existing operators.

The Commissioner for Human Rights has highlighted the important link between strong public service media and pluralism of information, referring to research showing that countries with popular, well-funded public service broadcasters encounter less political extremism and corruption, and have greater press freedom.<sup>119</sup> However, the situation on the ground shows emerging threats to the independence of public broadcasters or their regulatory bodies. These include political interference in the editorial line of public broadcasters, poor legislative safeguards against political bias, or financial asphyxiation through reduced funding at a time of greater investment needs. For their part, public service media must do more to adapt to the new business environment and develop a strong online presence, including as a defence against malicious disinformation.<sup>120</sup>

116. Commissioner statement, 30 January 2017.

117. Platform alert, "Largest opposition daily suspended in Hungary," 12 October 2016, updated on 3 November 2016.

118. PACE Resolution 2141 (2017) on attacks against journalists and media freedom in Europe (<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23400&lang=en>).

119. The Commissioner's Human Rights Comment, "Public service broadcasting under threat in Europe," 2 May 2017.

120. Ibid.

## Tackling information disorder and pollution in the global media environment

False and misleading information, rumours and propaganda have always existed and their impact on developments and events are well documented. New technologies, however, have catapulted these phenomena onto the list of priorities for policy makers around the world. Today, we are witnessing information pollution at a global scale: a complex web of motivations for creating and disseminating these “polluted” messages; a myriad of content types and techniques for “content amplification”; platforms hosting and reproducing this content; and breakneck speeds of communication between trusted peers that strengthen messages and multiply impact.

The direct and indirect impact of targeted disinformation campaigns may be difficult to quantify as we are only at the early stages of understanding the implications. There has been extensive discussion of how information pollution may influence democratic processes, how it may even affect national sovereignty and security. However, we do not know the possible longer-term implications: fragmentation of public discourse in ideologically charged echo chambers; growing distrust in democratic institutions and the media; and sharpening divisions in society and heightened nationalistic, ethnic, racial and religious tensions as a result of mistrust and confusion.

A report commissioned by the Council of Europe Media and Internet Division in response to the growing concerns in member states examines information disorder and its related challenges. Entitled “Information Disorder: toward an interdisciplinary framework for research and policy making”, the report identifies three different types of information pollution: misinformation (which is false and misleading but was created without intention to harm); disinformation (which is false and deliberately produced to manipulate and inflict harm); and mal-information (which is based on fact but used to harm, such as leaks, harassment or racially based incitement to violence).

The most “successful” problematic content is that which plays on people’s emotions and encourages feelings of superiority, anger or fear. This is also the type of content that is most liked and shared, often without actually having been read or understood. Images are particularly powerful. As they are processed by the brain much faster than text, they are less likely to be questioned through critical reasoning. However, technical means for identifying fabricated images lag behind those for analysing text.

Lengthy fact-checking and debunking of false information often come too late or do not reach the intended audience because the item is not liked and shared. There is an urgent need to understand the most effective formats for sparking curiosity and scepticism among audiences about the information they consume and the sources of that information. The collapse of local journalism is viewed as an important reason why mis- and disinformation have taken hold, as these grow much faster among marginalised communities who do not feel represented in the mainstream media. Media initiatives that draw these communities into the public communication space and help diversify content through the amplification of alternative and counter-narratives are therefore one means of tackling “information pollution”.

The Council of Europe will continue to address this phenomenon. Two expert groups under the Steering Committee on Media and Information Society, the Committee of Experts on Quality Journalism in the Digital Age and the Committee of Experts on the human rights impact of algorithms and different forms of artificial intelligence, will explore in more detail what member states can do to promote a favourable environment for an independent, diverse and pluralistic media landscape that citizens trust and in which they can actively participate.

# FREEDOM OF EXPRESSION ON THE INTERNET

## Chapter 2 – Freedom of expression

**T**he development of the internet has had a profound effect on human communication, granting billions of people around the world access to an unprecedented amount and diversity of news, information and ideas, regardless of frontiers. In view of its immense impact, it has become the largest free speech battleground of our times, with states and other actors seeking to control or manage the dissemination of online content, driven by both legitimate concerns and non-democratic designs.

Internet-based expression is entitled to all the protections of Article 10: restrictions of online content must be prescribed by law, and should be necessary in a democratic society to secure a legitimate aim recognised by the Convention. A majority of member states tend to apply general legal rules also to online expression, while some countries have adopted internet-specific legislation to regulate aspects such as the ability to block the dissemination of unlawful speech.

Social networks, search engines and other online operators have come under increasing public and government pressure to monitor and take action against harmful speech generated by users or other third parties, including foreign government-sponsored actors. However, imposing policing obligations on intermediaries creates risks of private censorship and surveillance, which can impede legitimate expression and must therefore be considered with great care. Similarly, legitimate concerns about misleading information and malicious disinformation campaigns have also been used by certain political actors to delegitimise media scrutiny.

The Court has adopted a graduated approach to the question of intermediary liability for third-party content, an area of law that is still evolving. While affirming the responsibility of large online media for extreme, hateful or threatening comments posted by their users,<sup>121</sup> it has also decided in favour of a

non-profit website where third-party comments were not manifestly illegal or unjustified.<sup>122</sup> In March 2017, the Court further underlined the limited possibilities, in particular of small blogs and online platforms, to prevent defamatory third-party comments, establishing no liability in case of speech that had not amounted to hatred.<sup>123</sup> In late 2017, the Court re-emphasised the role of intermediaries for the freedom of expression of their users and underlined the need to differentiate between publishers that exercise substantial control over third-party comments and platforms where users can freely set out their ideas on any topics without the discussion being channelled by a forum's manager.<sup>124</sup>

A new Parliamentary Assembly resolution focused on the challenges of online journalism, including the growing number of online media that fail to meet professional standards. It welcomed new features developed by major online platforms that allow users to report factually inaccurate posts, and urged member states to work with service providers to develop codes of conduct on countering illegal hate speech.<sup>125</sup>

### MEASUREMENT CRITERIA

- ▶ The internet is available, accessible and affordable to everyone without discrimination.
- ▶ Restrictions of internet content are prescribed by law, pursue the legitimate aims set out in Article 10 of the Convention, and are necessary in a democratic society. The law provides for sufficient safeguards against abuse, including control over the scope of restriction, and effective judicial review.

121. *Delfi AS v. Estonia* [GC], 64569/09, 16 June 2015.

122. *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, 22947/13, 2 February 2016.

123. *Pihl v. Sweden*, 74742/14, 7 February 2017.

124. *Tamiz v. the United Kingdom*, 3877/14, 19 September 2017.

125. PACE Resolution 2143 (2017) "Online media and journalism: challenges and accountability", 25 January 2017.



- ▶ The state does not restrict access to social media or other internet platforms.
- ▶ Effective remedies and complaints mechanisms are in place for online violations of human rights to be addressed and prosecuted.
- ▶ Internet intermediaries do not generally monitor or censor content generated or transmitted by their users, whether for commercial, political or other purposes.
- ▶ Internet intermediaries are not held responsible for the content that is disseminated via the technology they supply except when they have knowledge of illegal activity and content and do not act expeditiously to remove it.
- ▶ Any surveillance of users' communication and activity online is in compliance with Article 8 of the Convention.
- ▶ Educational policies are in place to further media and information literacy and improve users' skills, knowledge and critical understanding of content online.

## FINDINGS

Blocking of content, throttling of internet traffic and shutdowns of entire websites constitute the most serious interference with online expression insofar as they prevent information from reaching its intended audience altogether, akin to prior restraint.

An extensive comment by the Commissioner for Human Rights found that blocking is widespread among Council of Europe member states. Turkey appears to practice disproportionate blocking and filtering, with scores of pro-Kurdish media, supposedly atheist and LGBTI websites, and even entire social networks have been blocked by courts or administrative authorities in recent years.<sup>126</sup> In May, an Azerbaijani court, relying on public order grounds, blocked a number of opposition websites, including the newspaper *Azadliq* and online channel Meydan TV, leaving virtually no space for independent online news in the country.<sup>127</sup> Those blocking orders are being challenged before the Court.

France, Poland, the Russian Federation and Ukraine have also passed laws authorising administrative authorities to block online content without a court order, often as part of anti-terrorism measures. Once states have introduced blocking mechanisms against harmful content, such as child sexual abuse material or racially motivated incitement to violence,

126. Commissioner's Human Rights Comment. "Arbitrary Internet blocking jeopardises freedom of expression", 26 September 2017 (<https://bit.ly/2Ju9D5Y>).

127. Ibid.

there is a tendency to extend it to other types of content that they dislike.<sup>128</sup>

The regulation of intermediary liability, particularly in relation to third-party content, remains one of the most complex policy questions. In a significant number of member states, intermediaries enjoy qualified immunity, provided they do not directly interfere with illegal third-party content and that they take expeditious steps to disable such content once they obtain "actual knowledge" of illegality.<sup>129</sup> However, the legal safe harbour for intermediaries is increasingly put into question, as states begin to impose direct obligations on online platforms.

In Germany, the Federal Parliament adopted, in July 2017, the Network Enforcement Act, which introduces statutory compliance rules for social networks in order to ensure that they swiftly and effectively process complaints with regard to hate crimes and other content that is punishable under the German Criminal Code. In an alert published on the Platform to promote the protection of journalism and safety of journalists, partner organisations argued that the act may lead social networks to over-zealously delete or block content and that "regulated self-regulatory" mechanisms foreseen in the act may place decisions on the legality of speech outside the remit of courts.<sup>130</sup> According to the German Government, this act includes robust safeguards to avoid any restrictions to the freedom of expression, such as a requirement of preliminary court rulings to confirm the unlawfulness of content prior to any fines being issued.

In the Netherlands, the Supreme Court upheld a "right to be forgotten" action under the *Google Spain* judgment of the European Court of Justice, deciding in favour of a criminal suspect who requested removal of certain search engine results.<sup>131</sup> The decision of the highest court overruled lower court judgments, which had concluded that the public interest in the circumstances of the case ought to prevail.

Given the salience of these issues, the Committee of Ministers of the Council of Europe adopted, in early March 2018, Recommendation CM/Rec(2018)2 on the roles and responsibilities of internet intermediaries.<sup>132</sup> The Committee of Experts on Internet Intermediaries also published a study on the human

128. Ibid.

129. See also Committee of Ministers Recommendation CM/Rec(2011)7 on a new notion of media, 21 September 2011.

130. Platform alert, "Germany: draft bill on social networks raises serious free expression concerns", 28 April 2017, updated on 5 October 2017. A state reply was received on 29 August 2017. See also the Commissioner's Human Rights Comment on arbitrary internet blocking, op. cit.

131. European Audiovisual Observatory, IRIS Legal Observations: "Dutch Supreme Court applies *Google Spain* and overturns lower court judgments" (IRIS 2017-4:1/28).

132. See [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=0900001680790e14](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14).

rights dimensions of automated data processing techniques, particularly algorithms and their regulatory implications.<sup>133</sup> A follow-up group will explore in more detail the human rights impact of algorithms and different forms of artificial intelligence in 2018/2019, with a view to developing standard-setting instruments

for member states. It will also take into account the findings of the study on the use of the internet in electoral campaigns, prepared by the Committee of Experts on Media Pluralism and Transparency of Media Ownership.<sup>134</sup>

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133. Committee of Experts on Internet Intermediaries (MSI-NET), "Study on the human rights dimensions of automated data processing techniques (in particular algorithms) and possible regulatory implications" ([www.coe.int/en/web/freedom-expression/reports](http://www.coe.int/en/web/freedom-expression/reports)).

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134. See <https://rm.coe.int/study-use-of-internet-in-electoral-campaigns/1680776163>.

## CHAPTER 3

# FREEDOM OF ASSEMBLY AND FREEDOM OF ASSOCIATION



# INTRODUCTION

## Chapter 3 – Freedom of assembly and freedom of association

**P**olitical freedoms are not a luxury in a democratic state; they are a necessity. A democratic society cannot be built or preserved if freedom of assembly and freedom of association are not guaranteed, encouraged and respected. These political freedoms are an indispensable check on any democratic power.

— A modern democratic state owes its stability and legitimacy to its own capacity to defend and promote the values which it proclaims. The peaceful cohabitation of all the members of a society is achieved through the recognition that fundamental freedoms are the inalienable right of each individual within that society. The dialectic relationship between agreement and dissent enables civil society to thrive, to defend the views of minority groups and to propose constructive alternatives. When dissent is not allowed to be collectively expressed and channelled, it increases the likelihood of friction and conflict between the state and the people.

— The Council of Europe has always promoted and defended political freedoms. Today, these freedoms are well accepted in most Council of Europe member states, in particular those where these values have been long and deeply embedded. In these countries, legislation is interpreted and applied on the basis of a presumption in favour of the unhindered exercise of these freedoms.

— However, this is not the case everywhere. There is a contradiction between the political programmes of certain governments purporting to represent and defend the interests of the people and these same governments' action to silence critical or opposing voices. In an increasing number of states, the space for civil society is shrinking, and peaceful public events are viewed and treated as dangerous. Oppressive

legislation has been introduced in recent years, despite the Council of Europe's attempts at persuading those governments to change course. In addition, a new, more insidious way of undermining these fundamental freedoms has emerged: invoking legitimate concerns such as the fight against corruption or against terrorism and the need for more transparency, while in fact distorting them and using them to attack selected NGOs and public events. Discrimination, notably on grounds of political views, religion, ethnic background or sexual orientation, is inflicted on the pretence of protecting the interests of society at large or of moral imperatives such as religious and traditional family values.<sup>135</sup>

— Virulent government-led campaigns against selected associations, human rights defenders or civil society leaders at times amplify the adverse effects of such legislation.

— There can be no complacency with regard to these kinds of attacks on political freedoms: the Council of Europe must react by firmly rejecting them. We must put resources into helping member states to reverse this trend and assisting them to reinstate legislation and practice that fully protect and guarantee the freedoms of assembly and association.

135. *Bayev and Others v. Russia*, 67667/09, 20 June 2017. The Court expressed the view that "there is an important difference between giving way to popular support in favour of extending the scope of the Convention guarantees and a situation where that support is relied on in order to narrow the scope of the substantive protection. The Court reiterates that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority." (paragraph 70).



# FREEDOM OF ASSEMBLY

## Chapter 3 – Freedom of assembly and freedom of association

**T**he right to assemble peacefully rests at the core of any functioning democratic system. As the Court has recently re-affirmed, “the protection of personal opinions, secured by Article 10 of the Convention, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 of the Convention ... In the sphere of political debate the guarantees of Articles 10 and 11 are often complementary ... and the link between Article 10 and Article 11 is particularly relevant where the authorities have interfered with the right to freedom of peaceful assembly in reaction to the views held or statements made by participants in a demonstration or members of an association”.<sup>136</sup>

Public demonstrations and rallies are part of what makes up a pluralistic democracy, in which equality, pluralism and tolerance are inherent.<sup>137</sup> Many purposes can be served by assemblies, including the expression of views and the defence of common interests, celebration, commemoration, picketing and protest, as well as the expression of diverse, unpopular, shocking or minority opinions.

The right to assemble peacefully is not an absolute right, and may be subject to limitations. These must meet the requirements set out in national constitutions and in Article 11 of the European Convention on Human Rights. States have a duty not only to refrain from interfering unduly with the exercise of the right to freedom of assembly, but also to put in place adequate mechanisms and procedures to ensure that it is enjoyed in practice and by all, without discrimination.

Interference with the right to freedom of assembly does not need to amount to an outright ban, legal or *de facto*, but can consist in various other measures taken by the authorities. “Restrictions” include both

measures taken before or during a gathering and those, such as punitive measures, taken afterwards.

State authorities may require that reasonable and lawful regulations on public events, such as a system of advance notification, be respected and may impose sanctions on organisers for failure to do so. When rules are deliberately circumvented, it is reasonable to expect the authorities to react. However, the Court and the Venice Commission have emphasised that the enforcement of these regulations cannot become an end unto itself. Notification of an event must not be transformed into a request for authorisation. The absence of prior notification and the ensuing “unlawfulness” of the action do not give carte blanche to the authorities; they are still restricted by the proportionality requirement of Article 11. Peaceful public events should thus not be dispersed, even if unlawful, as long as they do not pose a threat to public order. Peaceful participants should not be arrested or prosecuted. Peaceful demonstrations that do not threaten public order should be facilitated by the police.

The right to freedom of assembly includes the right to choose the time, place and manner of conduct of the assembly, within the limits established in paragraph 2 of Article 11. The Court has stressed in this connection that the organisers’ autonomy in determining the assembly’s location, time and manner of conduct, such as, for example, whether it is static or moving or whether its message is expressed by way of speeches, slogans, banners or by other means, are important aspects of freedom of assembly. Thus, the purpose of an assembly is often linked to a certain location and/or time, to allow it to take place within sight and sound of its target object and at a time when the message may have the strongest impact. As a consequence, restrictions on time, place or manner of the assembly should not interfere with the message communicated. The regulatory framework should also effectively prevent arbitrary or abusive restrictions.<sup>138</sup>

136. *Lashmankin and Others v. Russia*, 57818/09, 7 February 2017; *Bayev v. Russia*, op. cit.

137. *Bayev v. Russia*, op. cit., §§ 82-83.

138. *Lashmankin and Others v. Russia*, op. cit.



■ In particular, the mere existence of a risk of clashes between the demonstrators and their opponents is insufficient as justification for banning an event. If every possibility of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion. Participants in peaceful assemblies must be able to hold demonstrations without having to fear that they will be subjected to physical violence by their opponents. It is thus the duty of states to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, including by providing adequate police protection against possible conflicts with counter-demonstrators.

■ Freedom of assembly laws which allow for severe sanctions (both pecuniary and non-pecuniary) in situations where there has been no use of violence or threats to public order have a strong chilling effect on potential organisers and participants and on open political debate in general. Disproportionate measures targeting well-known public figures, bound to attract wide media coverage, do the same.<sup>139</sup> Legislators, courts and law-enforcement bodies should take all necessary action to avoid this.

## MEASUREMENT CRITERIA

- ▶ There is an appropriate legal basis for the exercise of freedom of assembly, subordinating the possibility to limit it to respect for proportionality and appropriate procedures.
- ▶ The implementation of the legislation on freedom of assembly is guided by a presumption in favour of holding assemblies.
- ▶ Peaceful demonstrations are not dispersed merely on the ground of irregularities in form.
- ▶ Participants in peaceful demonstrations who do not pose threats to public order are not arrested and convicted if they have not committed a violent act.
- ▶ The administrative authorities are not given excessive discretionary powers, nor do they assume such powers.
- ▶ The procedure is carried out in accordance with the standards of good administration.
- ▶ Legislation provides for pecuniary and non-pecuniary sanctions for non-respect of the legislation on freedom of assembly that are proportionate and non-discriminatory.

139. *Navalnyy v. Russia*, 29580/12 and four others, 2 February 2017, referred to Grand Chamber on 29 May 2017 at the request of both the applicant and the government.

- ▶ Effective judicial review mechanisms are available.
- ▶ Law-enforcement officials are held accountable for abuses.
- ▶ Media professionals are guaranteed access to assemblies.

## FINDINGS

### Legal guarantees and favourable implementation of the law

■ A number of states, notably Armenia,<sup>140</sup> Georgia,<sup>141</sup> Moldova<sup>142</sup> and Poland,<sup>143</sup> have over recent years amended their relevant legislation or ensured, where appropriate, pertinent guidance from their supreme courts, to better align practices with respect to the notification procedures and the practical handling of public assemblies with the European Convention on Human Rights standards.

■ In December 2017, the Committee of Ministers invited the authorities of Azerbaijan to provide, without further delay, a comprehensive action plan on changes taken or envisaged to the law on public assemblies and police and court practice and to align these with the Court's requirements, including as regards excessive use of force and undue administrative sanctions.<sup>144</sup> Shortly before, in October 2017, the Parliamentary Assembly had made a similar call.<sup>145</sup>

■ Despite an encouraging assessment of two draft laws by the Venice Commission, the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law and the OSCE/ODIHR in 2016,<sup>146</sup> Ukraine has still to adopt a comprehensive law on freedom of peaceful assembly.

■ In Armenia, a reform of the Law on the Military Service is underway. It mainly concerns the freedom of assembly, and benefits from the assistance of a Council of Europe project on strengthening the application of European human rights standards in the armed forces.

140. *Helsinki Committee of Armenia v. Armenia*, 59109/08, 31 March 2015, final resolution CM/ResDH(2017)297.

141. See *Kakabadze and Others v. Georgia*, 1484/07, 2 October 2012, final resolution CM/ResDH(2017)77.

142. See *Christian Democratic People's Party v. Moldova*, 28793/02, 14 February 2006, final resolution CM/ResDH(2017)410.

143. See *Bączkowski and Others v. Poland*, 1543/06, 3 May 2007, final resolution CM/ReDH(2015)234.

144. See the decision adopted in the context of its supervision of execution in the Gafgaz Mammadov case at the Deputies 1302nd meeting (HR) ([https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=090000168071b791](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168071b791)).

145. PACE Resolution 2184 (2017) on the functioning of democratic institutions in Azerbaijan, paragraph 16.7.

146. See [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)034-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)034-e).

## Location, time and manner of assemblies

■ In France, in relation to a bill strengthening internal security and anti-terrorism measures, the Commissioner expressed concern in July 2017, *inter alia*, about the bill's lack of detailed criteria and adequate legal safeguards governing the powers given to prefects to set up protective perimeters within which searches and frisking can be organised, which may seriously undermine the right to peaceful assembly. He called on French senators to improve the bill so as to bring it fully in line with Council of Europe standards.<sup>147</sup> Additional safeguards were later introduced by the Senate.

■ In December 2016, the Sejm of Poland adopted a set of amendments to the Law on Assemblies, stipulating, *inter alia*, that assemblies can be prohibited if they coincide with so-called cyclical or recurrent assemblies, which are defined as assemblies organised by the same organiser and at the same location at least four times a year, or annually on national or public holidays, for at least three years. The Commissioner expressed concern over these amendments, noting that they gave priority to certain types of gatherings to the possible detriment of the right of assembly of others.<sup>148</sup> The Parliamentary Assembly assessed that the main effect of this law was to counter demonstrations that are not allowed to take place within a 100-metre perimeter of the demonstration against which they are held. This would not be problematic, unless cyclical status would only be available to a limited group/type of organisation or demonstration. The Assembly called upon the authorities to ensure that no discriminatory practices occur when attributing cyclical status to demonstrations.<sup>149</sup>

■ In the case of *Lashmankin v. Russia*, the Court found that the domestic legal provisions governing the power to propose a change of location, time or manner of conduct of public events did not meet the Convention's "quality of law" requirements, in Article 11, as they lacked adequate and effective legal safeguards against arbitrary and discriminatory exercise of the wide discretion left to the executive.<sup>150</sup> The Committee of Ministers is presently awaiting information on measures taken or planned to remedy this situation.

147. <https://rm.coe.int/lettre-au-senat-francais-sur-le-respect-des-droits-de-l-homme-dans-le-/1680731105>.

148. [www.coe.int/en/web/commissioner/-/european-human-rights-officials-voice-serious-concerns-over-changes-to-polish-laws-on-freedom-of-assembly](http://www.coe.int/en/web/commissioner/-/european-human-rights-officials-voice-serious-concerns-over-changes-to-polish-laws-on-freedom-of-assembly).

149. Monitoring Committee, The functioning of democratic institutions in Poland – Co-Rapporteurs' Information note on their fact-finding visit to Warsaw (3 to 5 April 2017) AS/Mon(2017)14 (<https://bit.ly/2HwmLHe>).

150. *Lashmankin and Others v. Russia*, op. cit.

■ The problem of ensuring adequate police protection for spontaneous assemblies is presently being examined by the Committee of Ministers in the context of a judgment against the Republic of Moldova.<sup>151</sup>

## Domestic remedies

■ Following the above-cited *Lashmankin* case, where the Court pointed out the lack of an effective remedy, in the Russian Federation, allowing an enforceable judicial decision against a possible refusal of the domestic authorities to approve the location, time or manner of conduct of a public event before its planned date,<sup>152</sup> new legislation (the new 2015 Code of Administrative Procedure) was introduced and court practice developed to improve proportionality tests. The effectiveness of these measures is currently being examined by the Committee of Ministers.<sup>153</sup>

■ The problem of ensuring that complaints are decided before the events concerned has also been raised in a case against Poland and the efficiency of the measures adopted is presently being examined by the Committee of Ministers.<sup>154</sup> The problem is also raised in a case against the Republic of Moldova.<sup>155</sup>

## Banning of public assemblies

■ Ensuring that the holding of public assemblies is banned only in a limited number of circumstances that are acceptable under the Convention is a central Council of Europe concern. Numerous judgments of the Court have also dealt with complaints about undue bans, notably where adopted with respect to assemblies organised by specific groups such as LGBTI people – see more below, under "Content-based restrictions".

■ Recent cases against Hungary illustrate more common grounds invoked and the necessity to substantiate reasons for any kind of ban. In the cases at issue, the Court found that a ban on a demonstration based solely on traffic issues did not rest on substantiated and convincing arguments, notably because the demonstration was planned to be held in a dead-end street.<sup>156</sup> Information on remedial action is awaited by the Committee of Ministers.

151. *Promo Lex and Others v. the Republic of Moldova*, 42757/09, 24 February 2015.

152. *Lashmankin and Others v. Russia*, op. cit.

153. *Lashmankin and Others v. Russia*, op. cit.– see status of execution in HUDOC Exec.

154. *Stowarzyszenie Wietnamczyków w Polsce 'Solidarność i Przyjaźń' v. Poland*, 7389/09, 2 May 2017.

155. *Genderdoc-M v. Moldova*, 9106/06, 12 June 2012, see CM decision of March 2016 (1280th meeting), at <https://rm.coe.int/compilation-decisions-2014-2018-en-/168077e33a>.

156. *Körtvélyessy v. Hungary* (No. 2), 58271/15, 18 July 2017, and (No. 3), 58274/15, 3 October 2017.

## Dispersal of peaceful events, and arrest and conviction of peaceful participants in a demonstration

■ In 2017, there were several Court judgments finding violations of the right to freedom of assembly on the ground of arrests and convictions of participants in peaceful assemblies not posing any threats to public order, despite the lack of violent conduct on their part. The importance and extent of this problem warrants adding two new, specific measurement criteria.

■ The Court, in a chamber judgment, found a violation of Article 11 of the Convention in the case of *Navalnyy v. Russia* because the formal unlawfulness of a gathering had been the main justification for the police stopping and arresting protesters on administrative charges. Moreover, the measures also had the potential to deter other opposition supporters and the public at large from attending demonstrations and, more generally, from participating in open political debate. This dissuasive effect was strengthened by the fact that they targeted a well-known public figure, whose deprivation of liberty was bound to attract wide media coverage.<sup>157</sup>

■ The Commissioner for Human Rights expressed concern for the dispersal of peaceful assemblies and arrests of participants, including journalists, human rights defenders and minors in Russia on several occasions in 2017.<sup>158</sup> The Commissioner welcomed, however, the adoption in April 2017 of legislative amendments criminalising the forgery of evidence, to address the phenomenon of unsubstantiated prosecution and punishment for participation in public events.<sup>159</sup>

■ In the case of *Işıkırık v. Turkey*, the Court found that the applicant's criminal conviction of membership in an illegal organisation, on the sole ground of his participation in the funeral of four members of the PKK (Kurdistan Workers' Party) and in a related peaceful demonstration, had violated the applicant's right to both freedom of assembly and freedom of association.<sup>160</sup> The domestic courts had made no distinction between the applicant who was only a peaceful demonstrator and an individual who had committed offences within the structure of the PKK, which had a deterrent effect on the exercise of the rights to freedom of expression and assembly.

157. *Navalnyy v. Russia*, op. cit. See also *Lashmankin and Others v. Russia*, op. cit.

158. Commissioner for Human Rights, Follow-up Memorandum on freedom of assembly in the Russian Federation, <https://rm.coe.int/follow-up-memorandum-on-freedom-of-assembly-in-the-russian-federation-/16807517aa>, paragraph 22.

159. Ibid., paragraph 30.

160. *Işıkırık v. Turkey*, 41226/09, 14 November 2017.

## Conviction for failing to comply with domestic regulations and for wearing prohibited symbols.

■ In the case of *Şolari v. the Republic of Moldova* the Court considered that the imposition of a fine on the applicant on the grounds that he had been present in a place other than the authorised site for a demonstration and that he had displayed unregistered communist symbols, in the absence of any wrongdoing on his part, even if the fine was the minimum amount provided for, was not proportionate to the legitimate aim pursued. The Court concluded that the applicant's conviction could not be regarded as responding to a "pressing social need".<sup>161</sup>

■ The Parliamentary Assembly expressed concern over allegations that the lack of foreseeability and precision of the legislation and practice governing public assemblies in Azerbaijan led to public assemblies allegedly being banned, and to the arbitrary arrest and detention of protesters.<sup>162</sup> This problem is also before the Committee of Ministers in the context of its supervision of judgments.

## Conviction of organisers for conduct of participants in an assembly

■ In the recent case of *Mesut Yldiz and Others v. Turkey*,<sup>163</sup> the European Court of Human Rights found that the applicants' conviction, in their capacity as organisers of an assembly, on account of the chanting by some participants of illegal slogans during the event was in breach of Article 11 of the Convention. In addition, the sentence (a prison sentence and a fine) was considered excessive and likely to have a deterrent effect.

## Administrative sanctions imposed on demonstrators without adequate judicial review

■ The problems previously observed in respect of several countries concerning insufficient judicial scrutiny of the justification and proportionality of administrative sanctions (Armenia,<sup>164</sup> Azerbaijan, Georgia,<sup>165</sup> Republic of Moldova,<sup>166</sup> Russia and Ukraine), were also highlighted by two cases against Turkey in 2017. In the case of *Öğrü v. Turkey*, the Court concluded that

161. *Şolari v. the Republic of Moldova*, 42878/05, 28 March 2017.

162. PACE Resolution 2184 (2017), op. cit., paragraph 14.

163. *Mesut Yldiz and Others v. Turkey*, 8157/10, judgment of 18 July 2017.

164. Remedial action taken – see *Stepanyan v. Armenia*, 45081/04, 27 October 2009, final resolution CM/ResDH(2015)38.

165. Remedial action taken – see *Kakabadze and Others v. Georgia*, 1484/07, 2 October 2012, final resolution CM/ResDH(2017)77.

166. Remedial action has been reported taken – see *Gumeniuc v. the Republic of Moldova*, 48829/06, 16 May 2017, see status of execution in HUDOC Exec.

the legislative provision prohibiting the making of public statements to the press near judicial buildings constituted an interference with Article 11 of the Convention and that interference was not “necessary in a democratic society” as a fair balance had not been struck between the general interest in maintaining public order and the applicant’s freedom to protest. It also held that the imposition of an administrative fine pursuant to legislation prohibiting making statements to the press near judicial buildings had not been necessary in a democratic society.<sup>167</sup>

■ In the case of *Öğrü and Others v. Turkey*, the Court found that the imposition on the applicants of fines on account of their participation in peaceful demonstrations had not been the object of sufficient judicial review, as the courts had failed to balance the competing interests and in particular to take into account the peaceful nature of the demonstrations. There had therefore been a breach of Article 11.<sup>168</sup> The judgment is not final as a request for referral to the Grand Chamber is pending.

### Content-based restrictions

■ Problems with respect to LGBTI persons’ right to peacefully assemble, notably for gay pride parades, have been raised by judgments of the European Court of Human Rights in respect of several countries, notably Georgia, the Republic of Moldova and Russia. Remedial action is under way in all three states and the adoption of necessary measures and progress made continue to be monitored by the Committee of Ministers.

■ Positive results have been noted in particular as regards the situation in the Republic of Moldova.<sup>169</sup> The situation remains a source of concern in Georgia,<sup>170</sup> and in particular in Russia despite a series of measures to come to grips with the problem, including guiding principles from the Supreme Court.<sup>171</sup> Specific problems stem from the law prohibiting sexual propaganda aimed at minors, which was already criticised by the Venice Commission in 2013,<sup>172</sup> and recently found by the Court to violate the Convention.<sup>173</sup> It is welcome

that the Moldovan Government has rejected proposals to introduce a similar law in Moldova.<sup>174</sup>

■ As for Turkey, the Commissioner denounced the ban by the authorities on the gay pride march in Istanbul for the third consecutive year<sup>175</sup> and called on the Ankara governor’s office to reverse their decision to ban all events by lesbian, gay, bisexual, transgender and intersex rights groups.<sup>176</sup> The President of the Conference of INGOs of the Council of Europe also called on Ankara to rescind the ban.<sup>177</sup>

■ The recent ban imposed on all activities of the Jehovah’s Witnesses in Russia, through the liquidation of the central organisation and all its constituent entities by the Supreme Court, also appears to have freedom of assembly dimensions in view of the Court’s judgment in the *Krupko and Others* case.<sup>178</sup> The Committee of Ministers made a first examination of this ban in the context of its supervision of the execution of two cases against the Russian Federation concerning violations of the rights of Jehovah’s Witnesses under Articles 9 and 11 of the Convention, namely the case of *Jehovah’s Witnesses of Moscow and Others*<sup>179</sup> and the above-mentioned *Krupko and Others* case.

### Proper conduct of authorities during public events

■ Following a recommendation by the Commissioner for Human Rights in relation to disproportionate and excessive use of violence by the police in Armenia,<sup>180</sup> a special unit was established within the police force to investigate any complaints made against police officers for abuse of power or excessive use of force in the context of protests and demonstrations. Since its establishment, this special unit has recommended disciplinary action against police officers in 1 584 cases and opened 11 criminal investigations. However, the rapporteurs of the Monitoring Committee of the Parliamentary Assembly called on the Armenian authorities to establish an

167. *Öğrü v. Turkey*, 19631/12, 17 October 2017.

168. *Öğrü and Others v. Turkey*, 60087/10, 12461/11, 48219/11, 19 December 2017.

169. *Genderdoc-M v. Moldova*, 9106/06, 12 June 2012, CM decision of December 2016 (1302nd meeting).

170. *Identoba and Others v. Georgia*, 73235/12, 12 May 2015, CM decision of December 2016 (1302nd meeting).

171. *Alekseyev v. Russia*, 4916/07, 25924/08 and 14599/09, 21 October 2010, CM decision of December 2016 (1302nd meeting).

172. Venice Commission, Opinion on the issue of the prohibition of so-called “Propaganda of homosexuality in the light of recent legislation in some Council of Europe member states, CDL-AD(2013)022-e.

173. *Bayev and Others v. Russia*, op. cit.

174. *Genderdoc-M v. Moldova*, op. cit.

175. See <https://bit.ly/2GA3De2>. See also the declaration by some members of the Parliamentary Assembly: Written declaration No. 636 on Turkish violations against the Istanbul Pride 2017 (Doc. 14374, 29 June 2017).

176. See [www.facebook.com/CommissionerHR/posts/891703727672205](http://www.facebook.com/CommissionerHR/posts/891703727672205).

177. See “Rescind the ban on events by LGBTI organisations in Ankara”, 20 November 2017.

178. *Krupko and Others v. Russia*, 26587/07, 26 June 2014, see also status of execution in HUDOC Exec.

179. *Jehovah’s Witnesses of Moscow and Others v. Russia*, 302/02, 10 June 2010.

180. See [www.coe.int/en/web/commissioner/-/armenia-should-intensify-its-efforts-to-ensure-gender-equality-and-protect-human-rights-in-the-justice-system](http://www.coe.int/en/web/commissioner/-/armenia-should-intensify-its-efforts-to-ensure-gender-equality-and-protect-human-rights-in-the-justice-system).



independent complaints mechanism.<sup>181</sup> The effectiveness of investigations into alleged abuses by security forces is being followed by the Committee of Ministers in the context of its supervision of the execution of a number of Court judgments against Armenia.<sup>182</sup>

■ The Parliamentary Assembly expressed concern regarding the abuse of identity checks by the law-enforcement agencies in France as a means of crowd control during demonstrations.<sup>183</sup>

■ Certain issues concerning the handling of mass riots, notably the conditions in which force can be used by the police, pre-event assessments of the proportionality of force to be used and training activities remain outstanding as regards the Republic of Moldova.<sup>184</sup>

■ Questions with respect to the state's obligation to ensure the peaceful conduct of assemblies, to prevent disorder and to secure the safety of citizens involved,

and with respect to the proportionate use of force and of sanctions imposed have been raised before the European Court of Human Rights in a number of cases against Russia,<sup>185</sup> and the information received is being assessed by the Committee of Ministers.

■ The Commissioner for Human Rights voiced his concerns regarding allegations of disproportionate use of force by law-enforcement authorities in Catalonia on 1 October 2017 in a letter sent to the Minister of the Interior of Spain.<sup>186</sup>

■ In Turkey, the issue of disproportionate reactions by security forces when dispersing peaceful assemblies remains outstanding. The Committee of Ministers urged the Turkish authorities, in June 2017, to ensure effective investigations into the reported abuses and invited them to provide detailed information on the new directive called for to harmonise the legislation on the use of tear gas.<sup>187</sup>

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181. PACE Monitoring Committee, Honouring of obligations and commitments by Armenia – Co-Rapporteurs' Information note on their fact-finding visit to Yerevan (22 and 23 November 2016).

182. *Virabyan v. Armenia*, 40094/05, 2 October 2012 (police); *Muradyan v. Armenia*, 11275/07, 24 November 2016 (military).

183. PACE Resolution 2149 (2017) on the progress of the Assembly's monitoring procedure (September 2015–December 2016) and the periodic review of the honouring of obligations by Austria, the Czech Republic, Denmark, Finland, France and Germany, paragraph 13.5.7.

184. *Taraburca v. Moldova*, 18919/10, 16 December 2011, see status of execution in HUDOC Exec.

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185. *Malofeyeva v. Russia*, 36673/04, 30 May 2013, and notably *Frumkin v. Russia*, 74568/12, 5 January 2016, see status of execution in HUDOC Exec.

186. Commissioner for Human Rights, Letter to the Spanish Minister of Interior, 4 October 2017 (<https://rm.coe.int/letter-to-the-spanish-authorities-concerning-disproportionate-use-of-f/168075ae1a>).

187. *Oya Ataman group v. Turkey*, 74552/01, 5 December 2006, CM decision on 7 June 2017 (1288th meeting) ([https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=090000168071bca0](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168071bca0)) and ([https://search.coe.int/cm/pages/result\\_details.aspx?objectid=0900001680721de8](https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680721de8)). On 20 December 2017, the Turkish Government submitted a revised action plan (<https://rm.coe.int/168077c5dc> paragraphs 23 and 31–42) and the group of cases was examined in the Ministers' deputies meeting of 13–15 March 2018 ([http://hudoc.exec.coe.int/FRE?i=CM/Del/Dec\(2018\)1310/H46-21E](http://hudoc.exec.coe.int/FRE?i=CM/Del/Dec(2018)1310/H46-21E)).

## Freedoms of assembly and association and the fight against corruption

The freedoms of assembly and association are key elements to preventing and combating corruption: NGOs play a decisive role in ensuring accountability of public or elected officials. Indeed, anti-corruption demonstrations took place in a number of member states in 2017. In some cases, they called for integrity in political life, in others, for the effectiveness of the anti-corruption framework to be preserved. They all represent a growing, legitimate concern of the public at large for greater integrity and transparency in the management of public affairs.

Civil society empowerment is an essential element to the legitimacy and effectiveness of anti-corruption reforms, and is one of the cornerstones of any genuine democracy. GRECO has consistently recommended that national authorities give proper attention to civil society concerns. Transparency and accountability must go hand in hand as they are inseparable instruments to help uncover wrongdoing. In addition to reporting cases of inappropriate conduct, civil society must be in a position to provide input and make its views known on the practical impact of anti-corruption measures. Any co-ordination structure for the fight against corruption must provide for the broad representation of the non-governmental sector.

Consequently, it is crucial that adequate tools are in place for society to be made aware of, and engage in, the prevention and the fight against corruption. Providing comprehensive systems to report cases of corrupt conduct, and ensuring that whistle-blowers are appropriately protected against reprisal, are of paramount importance.<sup>188</sup>

The interaction between public or elected officials (for example, judges, prosecutors, MPs) and third parties, including civil society organisations, continued to be a source of confusion across most member states, both for public or elected officials themselves and for the groups that seek to interact with them. The challenges and the impact of lobbying on public decision making are significant and this inevitably requires regulation, which only a limited number of Council of Europe member states have adopted to date.<sup>189</sup> Democratic principles and good governance can be undermined in the absence of regulation. In light of the legitimate role of lobbying in public life, regulations should seek to strengthen its transparency and accountability. However, any rules in this regard should not inappropriately limit access to public or elected officials or access to a wide range of views and expertise. This is clearly indicated in the new Committee of Ministers Recommendation CM/Rec(2017)2 on the legal regulation of lobbying activities in the context of public decision making.

188. See, for instance, "Lessons learnt from the three Evaluation Rounds (2000-2010) – Thematic Articles" (<https://rm.coe.int/16806cbfc6>).

189. See Explanatory Memorandum to the Committee of Ministers Recommendation CM/Rec(2017)2 on the legal regulation of lobbying activities in the context of public decision making.



# FREEDOM OF ASSOCIATION

## Chapter 3 – Freedom of assembly and freedom of association

**F**reedom of association is an essential condition for the exercise of other human rights. Associations play an important role in achieving goals that are in the public interest and in supporting the protection of human rights. Their functions cover many fields, notably lobbying for better health, protection of the environment, advancement of education for all, humanitarian relief, and securing and protecting basic civil and political rights. NGOs, particularly those involved in human rights advocacy, play an important role in public monitoring of state action and in exposing human rights abuses. They are more vulnerable and thus need enhanced protection. The way in which national legislation enshrines the freedom of association and its practical application by the authorities reveals the state of democracy in a country.

International human rights law explicitly recognises the right to participate in public affairs, and associations should be free to pursue their goals related to the normal functioning of a democratic society; refusal to register them on account of the “political” nature of their goals or in order to prevent a certain religious faith from organising itself would violate the freedom of association. Only those associations that wish to take part in elections may be asked to register in the form of political parties and to meet the more stringent conditions applicable to such parties. Portraying advocacy NGOs as masked “political parties” is a false justification for restricting their legitimate watchdog function in a democratic society as NGOs do not participate in elections, though they can conduct election monitoring.

A restrictive approach to NGOs, particularly those pursuing a public watchdog function, is incompatible with a pluralist democracy, which should guarantee the work of all NGOs, without undue interference in their internal functioning. For instance, an NGO may campaign for a change in the legal and constitutional structures of the state so long as the means used to that end are in every respect legal and democratic and if the change proposed is itself compatible with fundamental democratic principles.

Unduly restrictive laws and practices have a strong adverse effect on freedom of association and democracy itself. Legitimate concerns such as

protecting public order or preventing extremism, terrorism and money laundering cannot justify controlling NGOs or restricting their ability to carry out their legitimate watchdog work, including human rights advocacy.

It is therefore essential that states first put in place a legal framework to enable the unimpeded exercise of freedom of association, and subsequently implement it, and create an enabling environment based on a presumption in favour of the freedom to form and run an association. This includes a favourable legal framework for the registration and functioning of NGOs and sustainable mechanisms for dialogue and consultation between civil society and public authorities.

This also means that, in order to carry out their activities, NGOs should be free to solicit and receive funding not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties.<sup>190</sup>

Even assuming that ensuring transparency of NGOs that receive funding from abroad pursues a legitimate aim of preventing them from being misused for foreign political goals, no legitimate aim should be used as a pretext to control NGOs or to restrict their ability to accomplish their legitimate work, and should not result in seeking to stigmatise and ostracise some civil society organisations solely on the basis of foreign funding. For instance, where combating money laundering or terrorist financing is cited as the aims for such measures, it should be ensured that such laws are based on previously identified risks.<sup>191</sup> This would otherwise result in discriminatory treatment and to the extent that it targets NGOs expressing criticism of governmental action, it would also

190. Committee of Ministers Recommendation CM/Rec(2007)14 on the legal status of non-governmental organisations in Europe. See also the OSCE/ODIHR-Venice Commission Guidelines on Freedom of Association, Principle 7 ([www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)020-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)020-e)).

191. See, *mutatis mutandis*, for money laundering, Recommendation 8 of the Financial Action Task Force (FATF).

jeopardise an essential check on executive power in a democratic state.

Because of the vulnerability of NGOs engaged in human rights advocacy, special instruments that codify standards applicable to human rights defenders have been adopted over the past decades both at global and European levels.<sup>192</sup>

## MEASUREMENT CRITERIA

- ▶ The free exercise of freedom of association does not depend on registration.
- ▶ There is an appropriate legal basis for registration of NGOs, restricting any limitations on such registration in order to respect the principle of proportionality and appropriate procedures.
- ▶ The legislation is precise and specific, and the outcomes of its application are foreseeable.
- ▶ Prohibition or dissolution of associations is a measure of last resort.
- ▶ Sanctions for non-respect of the legislation are foreseeable and proportionate and are not applied in an arbitrary or discriminatory manner.
- ▶ The implementation of the legislation on freedom of association is guided by a presumption in favour of the lawfulness of associations' creation, objectives and activities.
- ▶ The administrative authorities do not have excessive discretion and procedures are carried out in accordance with the standards of good administration.
- ▶ Effective judicial review mechanisms are available.
- ▶ NGOs are free to express their opinions through their objectives and activities, without hindrance or adverse consequences resulting from the content of such opinions.
- ▶ NGOs have the right to participate in matters of political and public debate, irrespective of whether their views are in accordance with those of the government.

192. The Declaration on the Council of Europe on action to improve the protection of human rights defenders and promote their activities, of 6 February 2008, stresses the contribution of human rights defenders to the protection and promotion of human rights and calls upon states to "create an environment conducive to the work of human rights defenders, enabling individuals, groups and associations to freely carry out activities, on a legal basis, consistent with international standards, to promote and strive for the protection of human rights and fundamental freedoms without any restrictions other than those authorised by the European Convention on Human Rights." (paragraph 2.i).

- ▶ NGOs have the right to peacefully advocate changes in legislation.
- ▶ Associations are free to seek, receive and use financial, material and human resources, whether domestic, foreign or international, for the pursuit of their activities, subject to respect for legal requirements which are in compliance with international standards.
- ▶ Public funding is available and is provided in a non-discriminatory manner.

## FINDINGS

In November 2017, the Commissioner for Human Rights underlined the backsliding in freedom of association in several European countries. "The growing pressure and increased obstacles can take a variety of forms: legal and administrative restrictions; judicial harassment and sanctions, including criminal prosecution for failure to comply with new restrictive regulations; smear campaigns and orchestrated ostracism of independent groups; and threats, intimidation and even physical violence against their members. In some cases, the climate is so negative that it forces human rights work to the margins or even underground."<sup>193</sup>

The Commissioner's Human Rights Comment mentions notably nine member states<sup>194</sup> where NGOs were stigmatised by "official" rhetoric, often denouncing them as unpatriotic or politically biased. The Conference of INGOs of the Council of Europe also highlighted this trend in its reports and statements in 2017.<sup>195</sup> It is particularly worrying that these campaigns are promoted by public officials due to their potential influence on public opinion. At the same time, the governments' high degree of sensitivity to criticism on the respect of human rights in their countries is a direct recognition of the importance of these issues – no matter what the official rhetoric proclaims – and of the role of civil society as a watchdog.

193. Commissioner for Human Rights, Human Rights Comment, "The Shrinking Space for Human Rights Organisations" ([www.coe.int/en/web/commissioner/-/the-shrinking-space-for-human-rights-organisations](http://www.coe.int/en/web/commissioner/-/the-shrinking-space-for-human-rights-organisations)).

194. Azerbaijan, Bulgaria, Hungary, Poland, Romania, Serbia, Slovak Republic, "the former Yugoslav Republic of Macedonia" and Turkey.

195. See for instance: Statement by the President of the Conference of INGOs and the President of the Expert Council on NGO Law on non-governmental organisations labelled as foreign agents in Hungary (7 March 2017) (<https://goo.gl/DdGEVx>); Report on the fact-finding visit to Serbia on "Civil participation in the decision making process" on 13-14 November 2017 (published on 12 January 2018), pages 16-17 (<https://rm.coe.int/report-visit-of-the-conference-of-ingos-to-serbia/168077c8de>).

## Legal basis

■ In 2017, the Parliamentary Assembly stated that “some of the arrests, detentions and convictions of human rights defenders in Azerbaijan appear to be the result of shortcomings in the NGO legislation and how it is implemented”. The Assembly welcomed the presidential order on the establishment of a single-window system for procedure of delivery of grants by foreign donors in the territory of the Republic of Azerbaijan but called on the authorities to review the law on NGOs taking into account the recommendations from the Venice Commission.<sup>196</sup>

■ In the Russian Federation, the law concerning non-commercial organisations “performing functions of foreign agents” has not been amended.<sup>197</sup> In 2017, the Parliamentary Assembly deplored the continuing deterioration of the political environment, the harassment of opposition supporters, and the rapidly decreasing space for civil society to operate and enjoy its rights to freedom of expression and association. It called on the Russian authorities to reform the NGO legislation in line with Council of Europe standards and principles, abrogate the Law on Foreign Agents and the federal law on undesirable activities of foreign and international non-governmental organisations on the territory of the Russian Federation, end the harassment of opposition activists and fully and transparently investigate attacks made on them.<sup>198</sup>

## Registration

■ In 2017, significant progress was made in a number of high-profile cases pending before the Committee of Ministers for supervision of the adoption of necessary measures allowing the groups concerned to obtain the registration and thereby the legal recognition of their associations, and to prevent new undue refusals.

■ The new legislative framework for the registration of non-profit associations put in place in Bulgaria,

aimed at facilitating the registration of the applicant organisation in the case of *UMO Ilinden*,<sup>199</sup> is now in place and should be operational in 2018. These changes have been accompanied by positive developments in the case law of the domestic courts, limiting the impact of the constitutional prohibition on non-profit organisations to pursue “political” aims.<sup>200</sup>

■ Similarly, the legal obstacles preventing a revision of the refusal to register the applicant associations in the *Bekir-Ousta and Others* group against Greece have now also been lifted through new legislation. The Committee of Ministers invited the Greek authorities to take the necessary measures to ensure that the relevant case law of the Court is disseminated to all competent courts of all levels in line with Committee of Ministers Recommendation Rec(2002)13 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights.<sup>201</sup> There was a similar situation in respect of “the former Yugoslav Republic of Macedonia” – the *Radko* case was resolved, in line with the Convention, with the registration of the applicant association in 2017, leading to the closure of the supervision procedure.<sup>202</sup>

■ These encouraging developments aside, several 2017 judgments of the Court related to refusals to register associations or to developments that raise new issues under the Convention.

■ As regards religious associations in Bulgaria, in the case of *Genov v. Bulgaria*, the Court found that the refusal to register the applicant religious association on the grounds that its name was similar to that of a pre-existing association and that the adherents shared the same beliefs and rites as those of the pre-existing association was incompatible with the freedom of religion read in light of the freedom of association.<sup>203</sup>

■ In the case of *Metodiev and others v. Bulgaria*, the applicants had been denied registration of a new religious association on the ground that there was no specific statement of the association’s beliefs and rites. The Court held that the right to freedom of religion excluded in principle any assessment by

196. PACE 2184 (2017) on the functioning of democratic institutions in Azerbaijan.

197. On 5 July 2017, the Commissioner submitted his written observations to the European Court of Human Rights in the proceedings relating to *Ecodefence and others v. Russia* (9988/13) and 48 other applications concerning the Russian law on non-commercial organisations “performing functions of foreign agents”. In particular, the Commissioner described the negative consequences of being labelled a “foreign agent” (paragraphs 8, 33-35) and underlined that the broad definition of “political activity” – which covers legitimate human rights activities – contributed to the law’s arbitrary application (paragraph 21). The document also contains observations on the sanctions applied against NGOs and their leaders (paragraph 29), which have included criminal prosecution for non-compliance with the Law on Foreign Agents (paragraphs 36-37).

198. PACE Resolution 2149 (2017) op. cit., paragraphs 10.7 and 11.7.

199. *UMO Ilinden v. Bulgaria*, 34960/04, 30 September 2008.

200. *Zhechev v. Bulgaria*, 57045/00, 21 June 2007, see final resolution Res/DH(2017)360 closing supervision of parts of the problem – see also *National Turkish Union and Kungyun v. Bulgaria*, 4776/08, 8 June 2017, status of execution in HUDOC Exec.

201. See the CM decision adopted at its 1302nd meeting (5-7 December 2017) in *Bekir-Ousta and Others group v. Greece* ([https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=090000168076d2f1](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168076d2f1)).

202. See the CM decision adopted at its 1294th meeting (19-21 September 2017) in the case of *Association of Citizens “Radko” and Paunkovski v. “the former Yugoslav Republic of Macedonia”*, 74651/01 ([https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=090000168074a24f1](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168074a24f1)).

203. *Genov v. Bulgaria*, 40524/08, 23 March 2017.

the state of the legitimacy of religious beliefs or the forms of expression of those beliefs, even if the aim was to preserve unity within a religious community. The alleged lack of precision in the description of the religious association's beliefs and rites in its constitution did not justify the denial of the registration in question, which was accordingly not necessary in a democratic society.<sup>204</sup>

■ In the case of *Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy) v. "the former Yugoslav Republic of Macedonia"*, a chamber of the Court found that the refusal to register the applicant as a religious association had been in violation of Article 11 interpreted in the light of Article 9 of the Convention, as it was not necessary in a democratic society.<sup>205</sup> In particular, the reasons given by the authorities were deemed insufficient, the alleged foreign origin of the applicant had not been proven and the choice of the name did not appear to violate the rights and freedoms of others. The Court found that while it was apparent that the autocephaly and unity of the Macedonian Orthodox Church was a matter of utmost importance for adherents and believers of that Church, and for society in general, that could not justify the use of measures which went so far as to unconditionally prevent the association from commencing any activity. The role of the authorities in a situation of conflict between or within religious groups is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other. Furthermore, there could be no justification for measures of a preventive nature to suppress the freedoms of assembly and expression, other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used might appear to the authorities, and however illegitimate the demands made might be. At no stage was it alleged that the applicant association advocated the use of violence or any anti-democratic means in pursuing its aims. The judgment is not final as a request for referral to the Grand Chamber is pending at the writing of this report.

■ The forced liquidation of the central association of the Jehovah's Witnesses in Russia raised new issues under the Convention as it led to the liquidation of the applicant association in the case of *Jehovah's Witnesses of Moscow (re-registered in 2015 following a first judgment by the Court in 2010)*.<sup>206</sup> When supervising the execution of this case the Committee of Ministers expressed concerns in face of the information submitted about the new situation, without

prejudice to the result of the new complaint lodged by the central organisation to the Court.<sup>207</sup>

### Impossibility to challenge expulsion from associations before the courts

■ In the case of *Lovrić v. Croatia*, the Court found that the inability of the applicant to challenge, before the courts, the resolution of a hunting association whereby he had been expelled amounted to a violation of Article 6. Measures are being taken to ensure a change of case law.<sup>208</sup>

### Financial and reporting requirements/Foreign funding

■ On 3 May 2017, the Commissioner for Human Rights published a letter addressed to the Speaker of the National Assembly of Hungary, noting that the Law on the Transparency of Organisations Supported from Abroad carried a clear risk of stigmatising a large number of organisations pursuing lawful activities in the field of human rights, and provoking a dissuasive effect on their activities.<sup>209</sup> The Commissioner expressed concern at the apparent absence of meaningful public consultation on the draft law, which would create additional administrative burdens on NGOs falling within its scope, obliging them to register and self-label as "foreign-funded", and introduce sanctions for non-compliance. In addition, according to criteria which were not immediately clear, the draft law excluded from its scope other types of NGOs, such as those pursuing sports or religious activities. The Commissioner stressed that foreign-funded NGOs should not be stigmatised or put at any disadvantage whatsoever on the basis of the foreign origin of their funding and urged the members of the National Assembly to reject the draft law.

■ The Parliamentary Assembly expressed concerns over the assumption that civil society organisations serve foreign interests rather than the public interest and may endanger the national security and sovereignty of a country simply because they receive foreign funding over a certain yearly threshold and sought an opinion of the Venice Commission.<sup>210</sup>

■ In its opinion, the Venice Commission underlined that while the provisions of the law could in theory appear to be in line with international standards,

204. *Metodiev and Others v. Bulgaria*, 58088/08, 15 June 2017.

205. *Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy) v. "the former Yugoslav Republic of Macedonia"*, 3532/07, 16 November 2017.

206. *Jehovah's Witnesses of Moscow and Others v. Russia*, op. cit.

207. *Jehovah's Witnesses of Moscow and Others v. Russia*, op. cit., and *Krupko and Others v. Russia*, op. cit.

208. *Lovrić v. Croatia*, 38458/15, 4 April 2017, see status of execution in HUDOC Exec.

209. Commissioner for Human Rights, Letter to the Speaker of the National Assembly of Hungary, published on 3 May 2017 (<https://rm.coe.int/168070ce6d>).

210. PACE, Resolution 2162 (2017) "Alarming developments in Hungary: draft NGO law restricting civil society and possible closure of the European Central University".



particularly after they had been significantly improved in consultation with the Venice Commission, they had to be examined against the background of the adoption of the relevant law and specifically a virulent campaign by some state authorities against civil society organisations receiving foreign funding, portraying them as acting against the interests of society, which rendered such provisions problematic, raising a concern as to whether they breach the prohibition of discrimination. The Venice Commission also stressed that the legitimate aim of transparency, which was alleged to be the only aim of the law, cannot be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work, as this effect would go beyond the legitimate aim itself. The Venice Commission questioned in particular the broad and even increased exceptions to the application of the law which called into question the genuine nature of the aim of general transparency. It recommended specifically removing the obligations for associations funded from abroad to mention this on all their press products.<sup>211</sup>

■ The question of financial reporting requirements of associations is also raised in the case of *National Turkish Union and Kungyun v. Bulgaria* mentioned previously. The Committee of Ministers is presently awaiting information on measures taken or planned in response to this judgment.

■ Following a request by the Secretary General, the Venice Commission is carrying out an in-depth study, in consultation notably with several NGOs, the OSCE/ODIHR, the Conference of INGOs, the Fundamental Rights Agency of the European Union and state representatives, on the standards that should apply to foreign funding of NGOs. A report on this matter should be issued in 2018.

### Financial and reporting requirements/Assets declarations

■ In Ukraine, a law was passed in 2017 requiring civil society representatives or other persons working on anti-corruption issues to declare their assets in the same way as state officials or public servants. In a letter addressed to the Ukrainian authorities, published on 24 May 2017, the Commissioner for Human Rights recommended removing such legislative provisions.<sup>212</sup> GRECO expressed concern about the discriminatory nature and intimidating intent of such a requirement solely targeting anti-corruption activists and

urged the authorities to reconsider their position.<sup>213</sup> In December 2017, two draft laws were submitted to parliament; they would abrogate the amendments regarding e-declaration for anti-corruption activists but impose new obligations such as public reporting of a considerable amount of financial and personal data. The Monitoring Committee of the Parliamentary Assembly has requested an opinion of the Venice Commission on these draft laws. The opinion was adopted by the Venice Commission in March 2018.<sup>214</sup>

■ In 2017, draft legislation amending the Law on Associations and Foundations was proposed in Romania which, among other things, would amend the conditions for obtaining the status of public utility (prohibition for associations that engage in any kind of political activity) and would introduce additional reporting obligations for all NGOs under threat of dissolution. The Expert Council of the Conference of INGOs of the Council of Europe issued an opinion expressing severe criticism of this draft legislation, recalling in particular the distinction between political activities in the broad sense and party politics, the risk of discriminatory application of the law and the need under international standards for reporting requirements not to be excessively burdensome.<sup>215</sup> The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly requested the Venice Commission's opinion on this draft law, which was adopted by the Venice Commission in March 2018.<sup>216</sup>

### Declaration by judges of membership in professional organisations

■ Following amendments adopted in 2017, judges in Bulgaria are now required by law to declare their membership in professional organisations. The Bureau of the Consultative Council of European Judges (CCJE) has expressed the view that an obligation for judges to disclose their membership in judges' associations could be regarded as an interference with the

211. Venice Commission, Opinion No. 889/2017 on the Draft Law of Hungary on the Transparency of Organisations receiving support from abroad (CDL-AD(2017)015).

212. See <https://rm.coe.int/letter-from-nils-muiznieks-council-of-europe-commissioner-for-human-ri/168070ed60>.

213. GRECO Evaluation report in respect of Ukraine (GrecoEval4Rep(2016)9), adopted on 23 June 2017 and published on 8 August 2017, paragraph 34 (<https://rm.coe.int/grecoeval4rep-2016-9-fourth-evaluation-round-corruption-prevention-in-/1680737207>).

214. Venice Commission, Ukraine – Joint Opinion 912 on Draft Law No. 6674 “On Introducing Changes to Some Legislative Acts to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of International Technical Assistance” and on Draft Law No. 6675 “On Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations and of the Use of International Technical Assistance (CDL-AD(2018)006).

215. See <http://goo.gl/iMf3X6>.

216. Venice Commission, Romania – Joint Opinion 914 on Draft Law No. 140/2017 on amending Governmental Ordinance No. 26/2000 on Associations and Foundations (CDL-AD(2018)004).

right to form and freely join such associations, thus having an adverse effect on judicial independence.<sup>217</sup>

### Mass closures of associations and liquidation of their assets

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■ In Turkey, following the failed coup of July 2016, executive decrees issued under the state of emergency have led to the closure or liquidation of some 1 400 associations, including NGOs, under a simplified administrative procedure for disbanding such groups and the transfer of their assets to the state treasury. The Commissioner stressed that “closing NGOs without judicial proceedings is unacceptable under international human rights law”.<sup>218</sup> The Venice Commission regretted that this was done without any individualised decisions, was not based on verifiable evidence

and that due process requirements were seemingly not fulfilled. Stressing that these measures affect not only the legal entities concerned, but thousands of people related to them, the Venice Commission urged the authorities to reverse or remedy unjustified measures already taken.<sup>219</sup>

■ The Secretary General expressed his concerns to the Prime Minister of Turkey as regards the pre-trial detention on 18 July 2017 of human rights defenders, including the Director of Amnesty International Turkey along with two trainers from Germany and Sweden for, allegedly, having given support to a terrorist organisation.<sup>220</sup> On 18 October 2017, the Secretary General had an exchange with the Turkish Minister of Justice to discuss the latest developments regarding the human rights defenders and called for their release.<sup>221</sup>

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217. Opinion of the Bureau of the Consultative Council of European Judges (CCJE) following the request of the Bulgarian Judges Association to provide an opinion with respect to amendments of 11 August 2017 of the Bulgarian Judicial System Act, CCJE-BU(2017)10, 31 October 2017.

218. Commissioner for Human Rights, Human Rights Comment, “The Shrinking Space for Human Rights Organisations”, op. cit.

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219. Venice Commission, Opinion 865 on Emergency Decree Laws Nos. 667-676 of Turkey adopted following the failed coup of 15 July 2016, CDL-AD(2016)037, paragraph 182. See also INGO Conference Expert Council on NGO Law opinion on the impact of the state of emergency on freedom of association in Turkey (<https://rm.coe.int/expert-council-conf-exp-2017-2-opinion-impact-state-of-emergency-on-fr/168076cf14>).

220. See <http://bit.ly/2jHrive>.

221. See <http://bit.ly/2la5umz>.



## Public discussion of legislation affecting NGOs

Participation of citizens in political decision making is at the very heart of the idea of democracy. As stated in the Venice Commission's Rule of Law Checklist,<sup>222</sup> public debate of legislation by parliament and the possibility for the public to have access to draft legislation, with a meaningful opportunity to provide input, are two crucial aspects of legality.

Public consultation is all the more important for legislation directly concerning NGOs. Their contribution is of historical importance and the success of the efforts to bring about societies committed to democracy and human rights in the Council of Europe member states owes much to their activities. They have a significant role to play in ensuring that this commitment is not weakened and that democracy and human rights remain effectively secured.

Committee of Ministers Recommendation CM/Rec(2007)14 to member states on the legal status of non-governmental organisations in Europe stipulates that "NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation". The explanatory memorandum to the recommendation underlines that "it is essential that NGOs not only be consulted about matters connected with their objectives but also on proposed changes to the laws which have the potential to affect their ability to pursue those objectives. Such consultation is needed not only because such changes could directly affect their interests and the effectiveness of their contribution to democratic societies, but also because their operational experience is likely to give them useful insight into the feasibility of what is being proposed."<sup>223</sup>

Conducting a public consultation with civil society organisations prior to the adoption of legislation directly concerning them therefore constitutes part of the good practices that the Council of Europe member states should strive to adhere to in their domestic legislative processes.<sup>224</sup> Failure to do so has been severely criticised by the Parliamentary Assembly, the Commissioner for Human Rights, the Venice Commission and the Conference of INGOs.

In September 2017, the Committee of Ministers adopted the Guidelines on civil participation in political decision making.<sup>225</sup> They call for genuine participation of civil society in public policy and law making at all levels of government, a step further than mere formalistic or superficial consultation processes. To enable civil participation, member states should make the widest possible use of these guidelines and ensure their dissemination to enable public authorities to take awareness-raising measures and widely disseminate the guidelines themselves, where necessary, in their official language(s). This may include user-friendly guides, brochures or other tools, both offline and online, training for civil servants and support for training measures for members of civil society. Where appropriate, member states should adopt or adapt any rules and measures to enable public authorities to make use of these guidelines.

222. Venice Commission, Rule of Law Checklist, Benchmark A.5.iii and iv ([www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e)).

223. Explanatory Memorandum to Recommendation CM/REC(2007)14, op. cit., paragraph 139.

224. Venice Commission, Opinion on the Draft Law of Hungary on the Transparency of Organisations receiving support from abroad (CDL-AD(2017)015), paragraph 27.

225. See [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016807509dd](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807509dd).



## CHAPTER 4

# DEMOCRATIC INSTITUTIONS



# INTRODUCTION

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## Chapter 4 – Democratic institutions

**D**emocracies are built through strong democratic institutions at central, regional and local level. Democracy cannot be imposed from the outside; it must be embraced by the domestic political leadership and the electorate, and supported and protected by fully functioning institutions. However, we have learned through bitter historical experience that deliberate, grave and persistent defiance of fundamental democratic norms, human rights and the rule of law by one country, or a group of countries, will not only harm these states and their citizens, but may have negative consequences for the stability and security of their neighbours, the entire continent and the international community as a whole.

It was this historical experience which led to the setting up of the post-Second World War international legal order, based on commonly agreed international norms of conduct and international institutions. These institutions were never meant to substitute national governments in discharging responsibilities towards citizens, but were created to provide a framework for international dialogue and co-operation. They also provide assistance, supervision and, where necessary, the pressure required to ensure internationally agreed standards are observed at national level.

These standards and norms not only apply to interaction between states, preventing and managing conflicts, but also to the relationship between national governments and individuals under their jurisdiction, protecting the latter's rights and freedoms against the misuse or arbitrary use of state power. At the global level, international standards regulating the relationship between the state and the individual have been codified in the Universal Declaration of Human Rights by the United Nations and at the European level by the Council of Europe in the European Convention on Human Rights and its protocols.

In this year's report, the chapter on the functioning of democratic institutions will focus in particular on the capacity of Council of Europe member states

to hold free and fair elections and the functioning of their democratic institutions.

For the two other key parameters of this chapter, decentralisation and good governance, the report confirms the trends identified in the previous reports and strongly urges the member states to respond to the recommendations already made. These concern in particular the need to fully implement their commitments under the European Charter of Local Self-Government (ETS No. 122), notably with regard to the allocation of financial resources corresponding to the share of responsibilities.

Stable democracies are those which have strong institutional checks on power. This means free and fair elections which allow citizens to choose their representatives and parliaments able to scrutinise and shape legislation, with opposition parties able to hold government to account. An effective separation of powers is required in order to prevent conflicts of interest between the executive, legislative and judicial branches of the state. All democratic institutions must uphold the rule of law, including international law and, notably in Europe, the European Convention on Human Rights. Europe's constitutional, parliamentary democracies depend on these checks and balances in order to restrain abuses of power and to protect the pluralism which characterises our societies.

To continue enjoying legitimacy and credibility in the eyes of the electorate, democratic institutions must comply with ethical standards and be free from corruption. Failure to do so emboldens populists seeking to exploit people's disenchantment with the "corrupt elite". The perception of corruption or misconduct also negatively affects voter turnout and conditions citizens' judgment regarding incumbent leaders and political institutions. Stepping up the fight against corruption and restoring trust in the transparency, efficiency and effectiveness of democratic institutions must be a priority for all European democracies, as well as for European institutions.

■ As in other chapters of this year's report, special attention is paid to the role of the Council of Europe in accompanying and assisting its member states in their compliance with relevant Council of Europe standards. Among the highlighted issues is the record of member states in the implementation of GRECO's recommendations on transparency of party funding, questions arising from the recourse to forms of direct democracy, and concerns regarding the ways in which some member states are tackling rule of law questions, notably the fight against corruption and respect for the separation of powers.

■ We look at positive examples of progress resulting from consultation and co-operation, but also at cases where compliance with standards is under scrutiny and a matter of concern, requiring further action from the authorities along the lines advocated by the Council of Europe and its respective bodies, in order to ensure that democratic institutions and processes are fully functional.



# FREE AND FAIR ELECTIONS

## Chapter 4 – Democratic institutions

**P**olitical parties are the fundamental channel for citizens to express and catalyse their political will through elections. Party funding and election campaigns are a necessity, of course, but they should be transparent and regulated to prevent corruption. Indeed, when corruption infiltrates the political system, citizens' trust collapses with immediate and negative consequences on free and fair elections, democracy in general and the enjoyment of human rights and the rule of law.

Ensuring transparent party funding is not the responsibility of government alone. It requires firm commitment and substantial input from all those involved in political activity, including parties and candidates, whether in government or the opposition.

A comprehensive approach to dealing with transparency of party financing is needed. A system that fails to ensure that sources of income and accounts are properly disclosed makes it much harder to monitor the application of the law and apply sanctions. A full range of legal sanctions serves little purpose if the supervisory body is not empowered to apply them. At the same time, that body's authority may be totally illusory if it is unable to "penetrate the fog" surrounding the financing of a particular party or electoral campaign, and if the sources of this income are not made public. Full disclosure of accounts is, therefore, the precondition for the effective application of the law by any supervisory body.

### MEASUREMENT CRITERIA

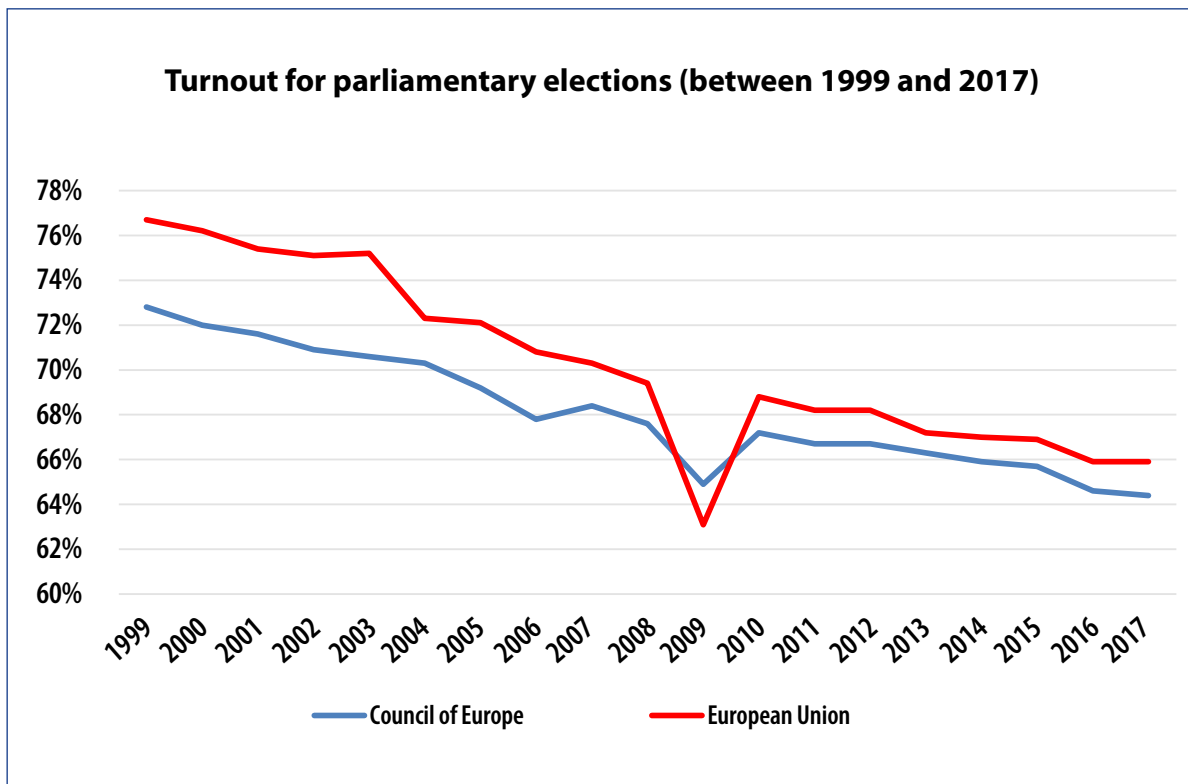
Under Article 3 of the Protocol to the Convention (ETS No. 9), Council of Europe member states undertake to guarantee free and democratic elections, at reasonable intervals, by secret ballot, under conditions which ensure the free expression of the opinion of all people in the choice of the legislature. The Venice Commission's Code of Good Practice in Electoral Matters complemented these principles. Furthermore, Committee of Ministers Recommendation Rec(2003)4

on common rules against corruption in the funding of political parties and electoral campaigns<sup>226</sup> is the main reference document in this area.

In order to be recognised as complying with the provisions of Article 3 of the Protocol to the Convention, the organisation of a poll must meet the following criteria.

- ▶ **Universal suffrage:** all adult citizens have the right to vote and stand for election; electoral registers are public, permanent and regularly updated, the registration process of electoral candidates is guided by an administrative or judicial procedure with clear rules and no excessive requirements.
- ▶ **Equal suffrage:** each voter has the same number of votes, seats are evenly distributed between constituencies and equality of opportunity is guaranteed for parties and candidates alike through the electoral campaign, media coverage and the funding of parties and campaigns.
- ▶ **Free suffrage:** voters can freely form an opinion, they are offered a genuine choice at the ballot box and they can vote freely, without threats of violence at the polls, and the counting of results takes place in a transparent way.
- ▶ **Secret suffrage:** voting is individual; no link can be established between the content of the vote and the identity of the voter who cast it.
- ▶ **Direct suffrage:** at least one chamber of the national legislature, subnational legislative bodies – if any – and local councils are elected directly.
- ▶ Elections are conducted at regular intervals.

226. Committee of Ministers Recommendation Rec(2003)4 on common rules against corruption in the funding of political parties and electoral campaigns (<https://bit.ly/2GHnGU5>).



- ▶ Electoral law: fundamental elements of the electoral law are not open to amendment less than one year before an election.
- ▶ The body organising elections is impartial and independent.
- ▶ National and international observers may observe the whole electoral process.
- ▶ There is an effective remedy system.

## FINDINGS

— The 2017 electoral observation mission reports of the Parliamentary Assembly, along with other international observation missions show that the elections held in Europe are broadly in line with democratic standards and generally respect the principles defined in the Venice Commission’s Code of Good Practice in Electoral Matters.

— At the same time, public confidence in the electoral process is falling, as shown by continually decreasing voter turnout. If the trend is not reversed, the general turnout could fall below 50% in the next 15 years.

— Substantial flaws in member states’ legislation throughout Europe were noted with regard to the transparency of party funding. A large number of member states have had problems complying with GRECO’s recommendations in this area and many of

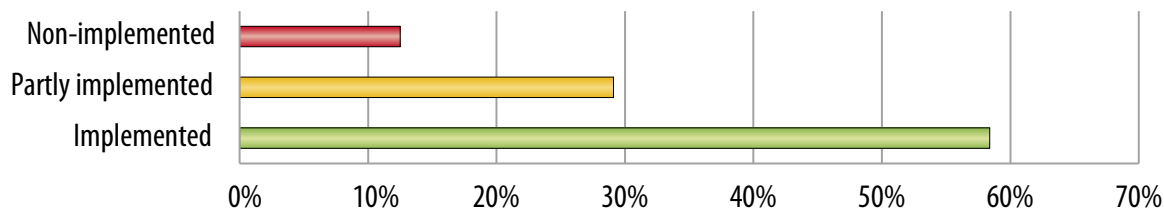
them have been subject to a non-compliance procedure. On a positive note, regarding the key issues of (i) ensuring public access to party accounts, (ii) effective independence of the body responsible for overseeing political accounts; and (iii) adequate sanctioning systems, member states have, since the beginning of GRECO’s 3rd evaluation round in 2007, managed to achieve results and carry out reforms to align their electoral systems with GRECO recommendations.

— In certain countries, new legislative initiatives reversed reforms previously undertaken to comply with GRECO recommendations, leading GRECO to reassess the legislation. Greece, for instance, was subject to a re-assessment of transparency of party funding in 2017.<sup>227</sup> Other countries continue to feature in a non-compliance procedure: Switzerland, for instance, where none of GRECO’s recommendations regarding transparency of party funding have been implemented<sup>228</sup> (a popular initiative “For greater transparency in the financing of public life” is, however, underway); Belgium, where there has been little progress in preventing corruption among members of

227. GRECO compliance report with respect to Greece (GrecoRC4(2017)20), adopted 18 October 2017, published 1 March 2018 (<https://bit.ly/2Jqc4GM>).

228. GRECO evaluation report with respect to Switzerland (GrecoEval4Rep(2016)5), adopted 2 December 2016, published 15 March 2017 (<https://rm.coe.int/16806fceda>).

### Overall level of implementation of GRECO'S recommendations on transparency of party funding, as of 31 December 2017



parliament,<sup>229</sup> or Spain, where compliance with GRECO recommendations in the 4th evaluation round remains “globally unsatisfactory” and a stepped-up measure in the non-compliance procedure has been taken.<sup>230</sup>

On the positive side, considerable progress has been made in all member states in defining what exactly constitutes parties’ sphere of activity, the presentation and publication of their accounts, the independence of the relevant supervisory bodies, the focus of that supervision and the flexibility of the sanctions available. In Cyprus, the new obligation for political parties and candidates for election to draft and submit specific reports relating to election

campaigns is a very positive step. In Norway, amendments to the Political Parties Act have established new supervisory arrangements. In Sweden, in 2018, new legislation on transparency of party funding was adopted, obliging more entities (regional and local branches of parties, entities connected to parties) to report political financing and banning anonymous donations to political parties, their organisations and candidates, as GRECO recommended.

The chart above shows the level of compliance with GRECO’s recommendations in the 3rd evaluation round on the transparency of party funding only as of 31 December 2017.

229. GRECO compliance report with respect to Belgium (GrecoRC4(2016)9), adopted 21 October 2016, published 11 January 2017 (<https://rm.coe.int/16806ee291>).

230. GRECO compliance report with respect to Spain (GrecoRC4(2016)1), adopted 1 July 2016, published 10 October 2016 (<https://rm.coe.int/16806ca04a>).

## Disinformation, hacking and computational propaganda in elections

The freedom and fairness of elections, being a central element of the democratic process, are jeopardised by broad and increasingly aggressive attacks against all societal players from governments down to individuals.

Disinformation is one of the most important forms of attack: it is disseminated through websites that deliberately publish hoaxes, propaganda and misleading information or disinformation purporting to be real news – often misusing social media to drive web traffic and amplify their effect. Disinformation websites intentionally mislead their readers for political, financial or other gain.

Trolls post disruptive comments on social media, make mischief by starting arguments, producing incendiary or off-topic postings in an online discussion with the intention of provoking emotional responses, or otherwise breaking up the flow of a focused discussion. So-called troll factories can host several hundred people, employed as professional trolls who post thousands of comments, in different European languages, on relevant internet sites daily. Social bots disseminate propaganda through countless automated messages on social media such as Twitter or Facebook. These messages are disguised as personal comments, and serve many purposes, including to feign fame (bots can simulate large numbers of followers), to spam other users (advertising bots produce pop up ads on online chats), to discredit others (for example by signing up under a false identity), and to influence public opinion (by simulating trends through countless messages of similar content). An intended effect of social bots is to limit free speech, because real or important messages are drowned in a deluge of automated bot messages.

A powerful method for influencing people (voters or consumers, for example) is the use of big data (shorthand for the aggregated digital traces every internet user leaves with regard to activities either online or offline) in combination with psychometrics or psychographics. Specialised companies have developed approaches combining behavioural science, big data analysis and targeted advertising, which can be efficiently used to influence voter behaviour during election campaigns.

The different aspects of hacking are of special interest in this context for a variety of reasons. For the most direct interference with the electoral process, hackers could break into voting machines or other vital elements of the election system. The other form of hacking that can have a tangible influence in an election is the hacking of specific sites, especially in combination with the subsequent dissemination of content found on these sites or e-mail accounts.

It is still too early to know how efficient these techniques are in influencing the behaviour of voters, however there is good reason to believe that their impact is set to grow. Already in 2014, the World Economic Forum considered the rapid spread of misinformation online as one of the top 10 perils to society. The use of these techniques could be decisive in majority voting systems, especially in electoral districts where elections are won by small margins.

Governments and civil society, thanks to media reports, reports of security services and debate in the general public are increasingly taking measures to fight back. The rapid development of new technologies, and the ill-intentioned use of them, will require new and creative answers in the near future.

Countering computational propaganda should be understood as an important challenge for our member states. So far, no targeted pan-European standards exist that provide member states with effective protection.

In the past, the Council of Europe has demonstrated an exceptional ability to produce early, effective responses to technological challenges, breaking new ground in international law and significantly influencing the bulk of subsequent international and national initiatives.

It is essential to maintain and strengthen the role of the organisation in this regard, because it provides a very broad geographical scope for co-operation, going beyond the 47 member states, and ensures that any responses to new challenges will respect the democratic and human rights standards guaranteed by the European Convention on Human Rights.

# FUNCTIONING OF DEMOCRATIC INSTITUTIONS

## Chapter 4 – Democratic institutions

**N**ational parliaments are the institutions which embody diversity of opinion within a society. Their role is to manage and defuse tensions and to maintain balance between competing claims. This in turn creates a sense of fair process, social cohesion and solidarity.

Effective public participation and transparent decision making increase public trust, and improve the quality of policy and legislative decisions which, in turn, makes them easier to implement. Abusive or excessive recourse to some forms of participative democracy, such as popular referendums or consultations, can jeopardise the proper functioning of democracy. As the Venice Commission has pointed out,<sup>231</sup> there is a strong risk that referendums might be turned into plebiscites or manipulated to force decisions that should be taken through a process of inclusive political negotiation and based on detailed legal analysis.

Enjoying a large majority does not absolve a ruling party or coalition from the obligation to engage in an inclusive political process, particularly when tackling fundamental reforms, and to respect and accommodate minority views and interests.

To enjoy legitimacy and credibility in the eyes of the electorate, democratic institutions must comply with ethical standards and be free from corruption and undue influence. Failure to do so can affect the good functioning of democracy and strengthen populism in society. It can also lead to people's disenchantment with politics and lower electoral turnout, which in turns undermines the political legitimacy of electoral results.

The proper functioning of democratic institutions can only be effectively secured in a democracy which fully respects the rule of law, even in times of war or public emergencies. Responses to emergency situations can be an important challenge to the principle of the separation of powers, due to the concentration of exceptional powers in the hands of the executive

branch. This is why emergency legislation requires the particularly vigilant application of constitutional checks and balances and the respect of due process and freedom of expression, as provided for by the Court and its case law.

### MEASUREMENT CRITERIA

- ▶ The principle of separation of powers is enshrined in domestic law and duly applied in practice.
- ▶ The parliamentary role of the opposition is regulated and respected. Political forces and individuals representing the opposition are able to participate meaningfully in the work of the parliament, without fear of harassment or undue interference from the executive or the courts.
- ▶ Parliamentary immunity is an integral part of the European constitutional tradition. It is not meant to place members of parliament above the law, but rather to provide certain guarantees so that they can effectively fulfil their democratic mandate, without fear of harassment or undue interference from the executive or the judiciary.
- ▶ An inclusive political process is applied. Open and transparent public decision-making processes lead to effective and genuine involvement of those directly affected by the policy and legislative decisions.
- ▶ Clear and predictable rules on parliamentary immunity, including procedures explaining how it may be lifted, are prescribed by law and applied. Such procedures are transparent and respect the principle of the presumption of innocence.
- ▶ Parliaments have a code of conduct for their members and a transparent system for the declaration of interests.
- ▶ Legislation on the financing of political parties and election campaigns is apt to deter corruption and is effectively applied in practice.
- ▶ Different forms of political participation are in place and are used.

231. Compilation of Venice Commission Opinions and Reports Concerning Referendums (CDL-PI(2017)001) ([www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2017\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2017)001-e)), page 18.

- ▶ Derogations from certain international commitments are possible only in exceptional situations, where parliamentary control and judicial review are guaranteed.

## FINDINGS

### Direct consultations

■ At national level, the trend, already noticed in the last two years, towards a diversification of forms of political participation, continued in 2017, with the recourse to forms of direct democracy or consultations. Sometimes this polarised opinions, such as in the constitutional referendum in Turkey – held during the state of emergency – and the controversial referendum in Catalonia – held outside the constitutional framework. In 2017, the Hungarian Government organised a series of national consultations in the form of surveys asking people’s opinions on subjects of importance to them. These included one on the plan to relocate refugees and asylum seekers and one with the title “Stop Brussels”.

### State of emergency

■ Of the three Council of Europe member states which, for different reasons, had put in place derogations from the European Convention on Human Rights under its Article 15 due to a state of emergency, only France brought its derogation to an end (on 1 November 2017), while Ukraine and Turkey have continued to renew theirs.

### Majority–minority relations

■ As regards the interaction between parliamentary majorities and the opposition, a positive development took place in “the former Yugoslav Republic of Macedonia”, where the political crisis that started in 2014 and had dominated political life since, came to an end.<sup>232</sup> The political climate, however, remains tense. Political parties are widely perceived in the country as having taken control of the state institutions.<sup>233</sup> In Albania, the polarised political climate between the main political parties and the parliamentary boycott by the main opposition party has resulted in considerable delays in the implementation of important

232. PACE Resolution 2203 (2018) on the progress of the Assembly’s monitoring procedure (January–December 2017) and the periodic review of the honouring of obligations by Estonia, Greece, Hungary and Ireland.

233. European Commission (2017), “The former Yugoslav Republic of Macedonia”, Assessment and recommendations of the Senior Experts’ Group on systemic rule of law issues, September 2017.

reforms, including with regard to the judiciary.<sup>234</sup> In Montenegro, the boycott of parliament by the opposition has had a negative impact on the reform process and the credibility of institutions.<sup>235</sup> In the Russian Federation, the Central Electoral Commission excluded the opposition figure Alexei Navalny from running in the March 2018 presidential election.

■ France saw the landslide electoral victory of a new civic political movement, *En marche!*, which obtained a clear-cut victory in both presidential and parliamentary elections. This development shows that the call for renewal of political forces and political figures expressed by the electorate does not necessarily result in support for populist parties.

### Rule of law and corruption

■ Corruption continued to be a serious problem across member states. Calls for reform and anti-corruption efforts have resulted in street protests and demonstrations in several countries. The wide media coverage of the Panama Papers and the Laundromat scandals has alerted European public opinion to the prevalence of corruption, highlighting the involvement of high-level political figures and undermining trust in the political system.

■ In December 2017, the Secretary General sent a letter to the President of Romania, Klaus Iohannis, urging the authorities to seek the expertise of the Council of Europe Venice Commission regarding the legislative reforms on the judiciary adopted by the Romanian Parliament, concerning the Superior Council of Magistracy, the status of judges and prosecutors and the judicial organisation.

■ The monitoring work conducted by GRECO indicates that a gap remains between the legal framework and its effective implementation. The information gathered during GRECO’s 4th monitoring cycle, devoted to the issue of the prevention of corruption in respect of members of parliament, judges and prosecutors, showed that parliamentarians were, on average, the least trusted of the three groups.

■ Despite the prominence of the issue of corruption in the media and public debate, member states’ compliance with GRECO recommendations is slowing down. While the implementation rate of GRECO’s recommendations for the first two rounds was very high, it has been slowly decreasing in the last two cycles. In March 2017, while the 4th cycle still continued, GRECO initiated the 5th cycle, devoted to preventing corruption and promoting integrity in central governments (top executive functions) and law-enforcement agencies.

234. PACE Resolution 2203 (2018) on the progress of the Assembly’s monitoring procedure, op. cit.

235. Ibid.



## Main principles, specific rules and guidelines on the holding of referendums

The Code of Good Practice on Referendums, adopted by the Council for Democratic Elections and the Venice Commission,<sup>236</sup> lays down clear and comprehensive guidelines on the organisation of referendums and is recognised by the Committee of Ministers as a reference document for the Council of Europe. Given that the calls for and recourse to public consultations and referendums in the member states have increased in the recent years, it is important to recall the main guiding principles of the code.

### Rule of law

The use of referendums must comply with the legal system as a whole and with procedural rules. In particular, referendums cannot be held if the constitution or a statute in conformity with the constitution does not provide for them, for example where the text submitted to a referendum is a matter falling within the exclusive jurisdiction of the parliament. Referendums within federated or regional entities must comply with the law of the central state.

### Respect for fundamental rights

Democratic referendums are not possible without respect for human rights, in particular freedom of expression and of the press, freedom of movement inside the country, freedom of assembly and freedom of association for political purposes, including freedom to set up political parties. Restrictions on these freedoms must have a basis in law, be in the public interest and comply with the principle of proportionality.<sup>237</sup>

### Rank and stability of referendum law

Laws governing referendums should have at least the rank of a statute. The fundamental aspects of referendum law – which govern, in particular, the composition of electoral commissions or any other body responsible for organising referendums, franchise and electoral registers, the procedural and substantive validity of texts put to a referendum and the effects of the referendum – should not be open to amendment less than one year before a referendum, or should be written in the constitution or at a level superior to ordinary law.

### Procedural guarantees

An impartial body must be in charge of organising the referendum. Political parties or supporters and opponents of the proposal put to the vote must be equally represented on electoral commissions or must be able to observe the work of the impartial body. Equality between political parties may be construed strictly or on a proportional basis. The bodies appointing members of commissions must not be free to dismiss them at will. It is desirable that commissions take decisions by a qualified majority or by consensus.

### Substantive validity of texts submitted to a referendum

Texts put to a referendum must comply with all superior law (principle of the hierarchy of norms). They must not be contrary to international law or to the Council of Europe's statutory principles (democracy, human rights and the rule of law).

### Procedural validity of texts submitted to a referendum

Questions put to the vote must respect three principles of unity: "unity of form" (the same question must not combine a specifically worded draft amendment with a generally worded proposal or a question of principle); "unity of content" (except in the case of total revision of a text such as a constitution or a law, there must be an intrinsic connection between the various parts of each question put to the vote, in order to guarantee the free suffrage of the voter, who must not be called to accept or refuse as a whole provisions without an intrinsic link); and "unity of hierarchical level" (it is recommended that the same question should not apply simultaneously to legislation of different hierarchical levels).

236. Venice Commission (2006), Code of Good Practice on Referendums (CDL-AD(2007)008) ([www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282007%29008-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282007%29008-e)).

237. In particular, street demonstrations to support or oppose the text submitted to a referendum may be subject to authorisation: such authorisation may only be refused on the basis of overriding public interest, in accordance with the general rules applicable to public demonstrations.

### **Parallelism in procedures and rules governing the referendum**

When a referendum is legally binding, a text that has been rejected in a referendum may not be adopted by a procedure without referendum until after a certain period of time (a few years at most). During the same period of time, a provision that has been accepted in a referendum may not be revised by another method. When a text is adopted by referendum at the request of a section of the electorate, it should be possible to organise another referendum on the same issue at the request of a section of the electorate, after the expiry, where applicable, of a reasonable period of time.

### **Opinion of parliament**

The parliament's opinion is necessary when the referendum is requested by the executive. Electors must be informed of parliament's position. Consulting parliament must not give rise to delaying tactics. The law must set a deadline for parliament to give its opinion, and a deadline for the popular vote to take place, if the opinion is not given in time. In the case of regional or local referendums, the regional or local assembly shall take over the role played by parliament at the national level.

### **Effects of referendums**

It must be clearly specified in the constitution or by law whether referendums are legally binding or consultative. Where a legally binding referendum concerns a question of principle or a generally worded proposal, it is up to parliament to implement the people's decision. The subsequent procedure should be laid down in specific constitutional or legislative rules. It should be possible to appeal before the courts in the event that parliament fails to act.

### **Duty of neutrality**

Administrative authorities must observe their duty of neutrality, which is one of the means of ensuring that voters can form an opinion freely. Contrary to the case of elections, it is not necessary to prohibit completely intervention by the authorities in support of or against the proposal submitted to a referendum. However, the public authorities (national, regional and local) must not influence the outcome of the vote by excessive, one-sided campaigning. In order to guarantee equality of opportunity, the authorities shall not use public funds for campaigning purposes.

### **Effective system of appeal**

The appeal body should be either an electoral commission or a court. In any case, final appeal to a court must be possible. The procedure must be simple and devoid of formalism, in particular where the admissibility of appeals is concerned. The appeal procedure and, in particular, the powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). The law must specifically designate the competent body in each case. The appeal body must have authority to annul the referendum where irregularities may have affected the outcome. All voters must be entitled to appeal.

# DECENTRALISATION

## Chapter 4 – Democratic institutions

**T**o enable local and regional government institutions to deliver the best possible services to their citizens, they must have the necessary competences, financial resources and qualified staff. They also need to be resilient in order to cope with the various threats to democratic institutions by ensuring openness, transparency, accountability and integrity, and by fighting corruption.

According to polls, populations in all European countries tend to trust local governments more than central governments. At the same time, subnational authorities are apportioned significant public funds. The proximity to citizens, the large number of authorisations, permits and facilities granted and the lesser media scrutiny over local activity make it necessary to create adequate checks and balances in order to minimise corruption at local and regional levels.

Decentralisation must go hand in hand with the creation of the proper checks and balances in the form of popular oversight, legality and financial supervision. Such supervision has to follow the provisions of Article 8 of the European Charter on Local Self-Government (ETS No. 122) in order to ensure transparency and accountability without unduly interfering in the activity of local elected bodies. Several countries are looking to improve supervision mechanisms. In Ukraine, the question of legality supervision is one of the most disputed issues of the decentralisation reform, as the former mechanism was abolished in June 2016 with the adoption of constitutional amendments on justice but a new mechanism, provided for in the constitutional amendments on decentralisation, had not yet been set in place. The Council of Europe is leading the debates on this issue.

### MEASUREMENT CRITERIA

The European Charter on Local Self-Government is the only international treaty in the field of local self-government. It has a total number of 30 substantial paragraphs, each creating an obligation for the states who accept them. The main obligations that states enter into when ratifying the charter form a set of indicators in this area.

- ▶ The principle of local self-government is recognised in the constitution or at least in law.
- ▶ Local authorities regulate and manage a substantial part of public affairs; local authorities are freely elected.
- ▶ Basic competences are provided for in the constitution or in law; local authorities can exercise any initiative which is not excluded from their competences; public responsibilities are exercised by authorities that are closest to citizens; powers given to local authorities are full and exclusive or delegated powers; local authorities can adapt their exercises to local conditions; local authorities are consulted on decisions affecting them.
- ▶ Local boundaries are not changed without the prior consultation of concerned authorities, if possible by referendum.
- ▶ Administrative supervision is only exercised according to law.
- ▶ Local authorities have adequate resources of their own and of which they can dispose freely; financial resources are commensurate with responsibilities and sufficiently buoyant; there are some own resources and a financial equalisation mechanism.
- ▶ Local authorities can form consortia and associate for tasks of common interest.
- ▶ Local authorities have the right of recourse to judicial remedy.

The Additional Protocol to the Charter of Local Self-Government (CETS No. 207) defines the right to participate in the affairs of a local authority.

As GRECO does not monitor compliance of local and regional authorities with ethical standards, the Council of Europe has developed and made use of other instruments for strengthening ethics in subnational governments:

- ▶ Committee of Ministers Recommendation No. R (98) 12 on supervision of local authorities' action;

- ▶ The Handbook of public ethics at local level, adopted at a high-level conference in 2004, which presents a very extensive and structured list of recommendations in the light of the very best of European practice in fostering public ethics. This handbook has been used to develop and implement in many countries (such as Greece, Moldova, Romania, Spain, Ukraine) a benchmark of public ethics at local level, which has helped local authorities to evaluate and improve their policies aimed at fostering public ethics in general and fighting corruption in particular.

■ In 2018, both the Recommendation No. R (98) 12 and the handbook are to be revised.

## FINDINGS

■ Many countries have undertaken public administration reforms leading to increased decentralisation. This trend continued in 2017 (albeit with a slower pace than before) as illustrated by the Slovak Republic<sup>238</sup> and Serbia,<sup>239</sup> where local, regional and district authorities discharge competences previously belonging to central government. On the other hand, reform processes in Italy,<sup>240</sup> for example, have been delayed recently, and further decentralisation of public administration in Switzerland<sup>241</sup> has stalled. Ukraine continues its decentralisation and local government reform.<sup>242</sup> Slovenia's Strategy on Development of Local Self-Government 2020 focuses on elections, financing and transparent decision making.<sup>243</sup>

■ Several states are working on implementing territorial consolidation reforms of their various tiers of government and strengthening the horizontal co-operation on those levels. Consisting either in amalgamation into larger communities or in arrangements for intermunicipal co-operation, these efforts are aimed at ensuring capacity or efficiency in the delivery of public services. Such programmes have

been implemented in Armenia, France,<sup>244</sup> Iceland,<sup>245</sup> Norway, Switzerland, the Slovak Republic and Ukraine. Other countries also feel committed to implementing territorial reforms, but are confronted with additional challenges; in the Republic of Moldova, for example, political instability has made such reforms difficult to start, and in Croatia<sup>246</sup> the highly complex administrative and territorial structure makes effective management difficult.

■ There have been initiatives devolving, in an asymmetric manner, further competences to regional authorities. In France, elections to the Corsican Assembly resulted in the creation of a single territorial collectivity. In Italy, non-binding referendums organised on 22 October 2017 in Lombardy and Veneto called for further decentralisation, in particular fiscal, to these regions.

■ The inadequacy of resources available to local and regional authorities in the exercise of their powers remains, according to Congress monitoring, a recurring problem in most of the member states and has been exacerbated by inadequate equalisation systems, for example in Croatia, Cyprus,<sup>247</sup> Greece<sup>248</sup> and France.<sup>249</sup>

■ The perception of local government integrity depends on the allocation and use of public funds. This is the administrative tier where citizens and public servants have the closest interaction and where the impact of corruption is most visible.<sup>250</sup> The example of Greece illustrates a good practice: each municipal council keeps an updated code of conduct for its elected representatives. In Finland, municipalities are listed according to their budget deficit, to ensure transparency of public spending.<sup>251</sup> In Germany and Hungary, government agencies have implemented integrity pacts, monitored by Transparency International, with bidders for procurement contracts agreeing to refrain from corrupt practices.<sup>252</sup>

238. Congress Recommendation 387 (2016) on local and regional democracy in the Slovak Republic (<https://goo.gl/oXoVZM>).

239. Congress Recommendation 403 (2017) on local and regional democracy in Serbia (<https://rm.coe.int/local-and-regional-democracy-in-serbia-/168074fb82>).

240. Congress Recommendation 404 (2017) on local and regional democracy in Italy (<https://rm.coe.int/local-and-regional-democracy-in-italy-monitoring-committee-rapporteurs/1680759b3b>).

241. Congress Recommendation 407 (2017) on local and regional democracy in Switzerland (<https://rm.coe.int/local-and-regional-democracy-in-switzerland-monitoring-committee-rappo/1680750d61>).

242. Centre of Expertise for Local Government Reform: Annual Activity Report 2017 ([www.coe.int/en/web/good-governance/centre-of-expertise](http://www.coe.int/en/web/good-governance/centre-of-expertise)).

243. European Committee on Democracy and Governance (CDDG) (2017), "Implementation of the Twelve Principles of Good Governance" (CDDG(2017)28), 5 December 2017 (<https://rm.coe.int/implementation-of-the-twelve-principles-of-good-democratic-governance/168076e9c2>).

244. Congress Recommendation 384 (2016) on local and regional democracy in France (<https://rm.coe.int/1680718de2>).

245. Congress Recommendation 402 (2017) on local democracy in Iceland (<https://rm.coe.int/16806fc29b>).

246. Congress Recommendation 391 (2016) on local and regional democracy in Croatia (<https://rm.coe.int/168071a157>).

247. Congress Recommendation 389 (2016) on local democracy in Cyprus (<https://rm.coe.int/16807188dc>).

248. Bureau of the Congress (2017), Recurring issues based on assessments resulting from Congress monitoring and election observation missions (reference period 2014-2016) (CG/BUR08(2016)INF78), 30 November 2016 (<https://rm.coe.int/16806c5b4e>).

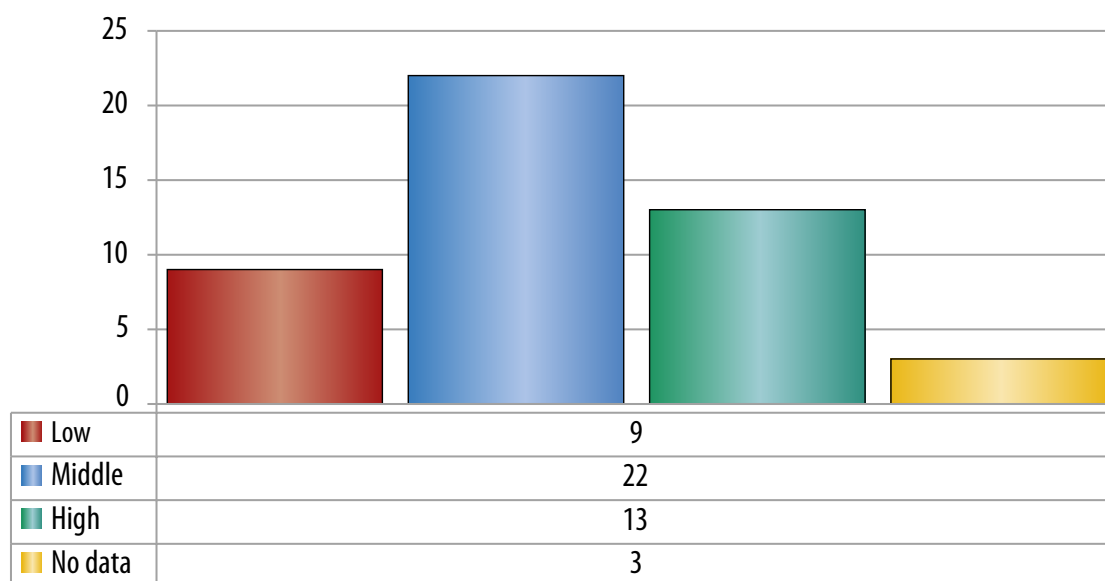
249. Congress Recommendation 384 (2016), op. cit.

250. Transparency International, Strengthening local government integrity ([www.transparency.org/whatwedo/activity/strengthening\\_local\\_government\\_integrity](http://www.transparency.org/whatwedo/activity/strengthening_local_government_integrity)).

251. CDDG (2017), "Implementation of the Twelve Principles of Good Governance", op. cit.

252. Congress Recommendation 405 (2017) on making public procurement transparent at local and regional level (<https://rm.coe.int/168075fbda>).

### Distribution of member states rated by their performance in implementing the European Charter of Local Self-Government



Legend: Low = 0 to 2.5; Middle = 2.5 to 3.49; High = 3.5 to 5 (based on the monitoring reports and the conclusions adopted by the Congress of Local and Regional Authorities. Each one of the “obligations” included in the 30 substantial paragraphs of the charter is evaluated on a scale of 0 to 5.)

Engagement of citizens and civil society has recently been receiving more attention from governments: Slovenia and Germany have used the new Council of Europe Guidelines for civil participation in political decision making, adopted by the Committee of Ministers in September 2017, the first in the drafting of a handbook for municipalities and the second in a pilot project on open government. Participation

is key to the design and implementation of public administration reform in “the former Yugoslav Republic of Macedonia”,<sup>253</sup> Iceland and Switzerland also ratified the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority in 2017, bringing the number of contracting parties to 16, while six countries have signed but not yet ratified the protocol.

253. CDDG, 8th Meeting Report of the CDDG (CDDG(2017)29) ([www.coe.int/en/web/good-governance/8th-cddg-session](http://www.coe.int/en/web/good-governance/8th-cddg-session)).

# GOOD GOVERNANCE

## Chapter 4 – Democratic institutions

**A** democratically secure society requires both effective democracy and good governance at all levels. Good governance enhances the performance of public administration and the delivery of services which meet citizens' legitimate needs and expectations. Thus, it helps to strengthen democratic institutions from inside and to increase citizens' trust. This is all the more important in times when democratic institutions and society are under threat.

### MEASUREMENT CRITERIA

— The 12 principles of good democratic governance<sup>254</sup> provide indicators as to the performance of public institutions. The following principles are of particular relevance.<sup>255</sup>

- ▶ Efficiency and effectiveness: results meet agreed objectives making the best possible use of resources; performance-management systems and evaluation methods are in place; audits are carried out regularly.
- ▶ Sound financial management: charges meet the cost of service provided; budget plans are prepared in consultation with the general public or civil society; consolidated accounts are published.
- ▶ Competence and capacity: public officials are encouraged to improve their professional skills and performance; practical measures and procedures seek to transform skills into capacity and improved results.

- ▶ Fair representation and participation: citizens are at the centre of public activity and have a voice in decision making; there is always a genuine attempt to mediate between various legitimate interests; decisions are taken according to the will of the many while the rights of the few are respected.
- ▶ Openness and transparency: decisions are taken and enforced in accordance with rules and regulations; the public has access to all information which is not classified for well-specified reasons; information on decisions, policies, implementation and results is made public.
- ▶ Accountability: all decision makers take responsibility for their decisions; decisions are reasoned, subject to scrutiny and remedies exist for maladministration or wrongful decisions.
- ▶ Ethical Conduct: the public good takes precedence over individual interests; effective measures exist to prevent and combat corruption.
- ▶ Responsiveness: objectives, rules, structures and procedures seek to meet citizens' legitimate needs and expectations; public services are delivered; requests and complaints are dealt with in a reasonable time frame.
- ▶ Sustainability and long-term orientation: long-term effects and objectives are duly taken into account in policy making, thereby aiming to ensure sustainability of policies in the long run.
- ▶ Innovation and openness to change: new, efficient solutions to problems and improved results are sought; modern methods of service delivery are tested and applied; and a climate favourable to change is created.

254. 12 Principles of Good Governance and European Label of Governance Excellence (ELOGE) ([www.coe.int/en/web/good-governance/12-principles-and-elog](http://www.coe.int/en/web/good-governance/12-principles-and-elog)).

255. The principles covering the fair conduct of elections, human rights, cultural diversity and social cohesion, and rule of law are covered in other chapters of this report.



— The 20 guiding principles for the fight against corruption<sup>256</sup> provide indicators as to the performance of institutions preventing corruption, raising public awareness and promoting ethical behaviour. They, in particular, require to:

- ▶ ensure that the organisation, functioning and decision-making processes of public administrations take into account the need to combat corruption, in particular by ensuring as much transparency as is consistent with the need to achieve effectiveness (principle 9);
- ▶ ensure that the rules relating to the rights and duties of public officials take into account the requirements of the fight against corruption and provide for appropriate and effective disciplinary measures; promote further specification of the behaviour expected from public officials by appropriate means, such as codes of conduct (principle 10);
- ▶ encourage the adoption, by elected representatives, of codes of conduct and promote rules for the financing of political parties and election campaigns which deter corruption (principle 15).

## FINDINGS

— Public administration reforms are being pursued in a significant number of member states with a view to streamlining public administration and enhancing competency, capacity and efficiency. Member states focus, *inter alia*, on human resource management, in Albania and Serbia for example, or on the reform of the professional training system of civil servants, as in Ukraine.<sup>257</sup>

— Member states are continuing their efforts to enhance financial management and long-term financial sustainability. Measures centred mostly on consolidated budgets, accompanied by specific supervisory measures, in Greece for instance, and the introduction of ceilings for expenses at all levels of governance, as in Denmark. Some member states reported measures at the level of local government, for example the introduction of a task-based financing system in Hungary.<sup>258</sup>

— Finland and Greece have taken measures to enhance the participation of both women and men

in decision making.<sup>259</sup> Denmark has set up Vulnerable Community Boards.<sup>260</sup> The newly adopted Guidelines for civil participation in political decision making of the Council of Europe<sup>261</sup> have been introduced in a pilot project for open government initiatives and practices in Germany, in conjunction with the piloting of national e-government initiatives.<sup>262</sup>

— One ratification is still missing for the entry into force of the Council of Europe Convention on Access to Official Documents (CETS No. 205), yet openness is making progress in member states. In this respect, the Freedom of Information Act in Norway contributed to democratic participation, confidence in public authorities and control by the public.<sup>263</sup>

— Openness, along with transparency, is closely connected to accountability. In Montenegro, the parliament published an Action Plan for Strengthening the Legislative and Oversight Role of the Parliament to facilitate scrutiny of government action.<sup>264</sup> Local authorities (“comuns”) in Andorra organised meetings with the residents to evaluate projects that have been implemented, while in Greece special meetings are held in local communities every year to assess the achievements of mayors and heads of the regions.<sup>265</sup>

— The use of information and communication technologies and digitalisation remain a major focal point, primarily with a view to simplified, more resource-efficient public administration and services. This may include greater flexibility and accessibility of services for citizens or business, as in the case of the Simplex Programme in Portugal.<sup>266</sup> In “the former Yugoslav Republic of Macedonia”, the Electronic National Registry of Citizens is a key project that will help the electoral process and will create the basis for the development of an increasing number of e-services.

— Measures adopted by member states include the adoption of codes of ethics for officials and employees in public administration, as in the Czech Republic and

256. Committee of Ministers Resolution (97) 24 on the 20 guiding principles for the fight against corruption (<https://rm.coe.int/16806cc17c>).

257. See <https://rm.coe.int/centre-of-expertise-for-local-government-reform-draft-annual-activity-/1680767fce>.

258. CDDG (2017), “Implementation of the Twelve Principles of Good Governance”, op. cit.

259. Council of Europe Gender Equality Commission (GEC) (2017), “Balanced participation of women and men in decision-making – Analytical Report – 2016 Data”; CDDG (2017), “Implementation of the Twelve Principles of Good Governance”, op. cit.

260. CDDG (2017), “Implementation of the Twelve Principles of Good Governance”, op. cit.

261. Committee of Ministers Guidelines for civil participation in political decision making (CM(2017)83-final), 27 September 2017 ([https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016807509dd](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807509dd)).

262. CDDG (2017), CDDG Activities in 2016-2017: Report to the Committee of Ministers (CDDG(2017)21) (<https://rm.coe.int/cddg-activities-in-2016-2017-report-to-the-committee-of-ministers/168076867e>).

263. CDDG (2017), “Implementation of the Twelve Principles of Good Governance”, op. cit.

264. See [www.skupstina.me/images/documents/action-plan/action\\_plan\\_in\\_2015.pdf](http://www.skupstina.me/images/documents/action-plan/action_plan_in_2015.pdf).

265. CDDG (2017), “Implementation of the Twelve Principles of Good Governance”, op. cit.

266. Ibid.

Serbia,<sup>267</sup> or a tightening of regulations in relation to conflicts of interest. Member states will not reap the full benefits of such measures, however, unless they are accompanied by steps to ensure their effective implementation and the enforcement of applicable regulations and legislation. This can include campaigns and training to raise awareness of public officials' key duties, to clarify their roles and highlight tools and measures to reduce the risk of corruption, as demonstrated in Denmark and Norway, for example, two countries that score well in these fields.<sup>268</sup> Such initiatives also highlight the importance of a broader approach to integrity in public administration.

GRECO highlighted the need for parliamentarians to give consideration to the elaboration of a code

of conduct, to have provisions and regulations on the prevention of conflicts of interest and to establish systems for asset declarations. It also identified good practices in several member states, such as the system of electronic asset declaration for members of parliament and other officials to the Civil Service Bureau in Georgia. GRECO also underlined that the mere existence of codes of conduct, provisions and regulations on the prevention of conflicts of interest as such is not enough. Training or access to advice and monitoring were needed as well. In this respect, the work of specialised anti-corruption bodies such as the National Anti-corruption Authority in Italy, the Commission for the Prevention of Corruption in Slovenia or the Corruption Prevention and Combating Bureau in Latvia<sup>269</sup> is to be welcomed.

267. CDDG (2017), "Implementation of the Twelve Principles of Good Governance", op. cit.

268. Ibid.

269. PACE (2017), "Promoting integrity in governance to tackle political corruption" (Doc. 14344), 16 June 2017 (<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23790&lang=en>, paragraph 101).

# CHAPTER 5

# INCLUSIVE SOCIETIES



# INTRODUCTION

## Chapter 5 – Inclusive societies

**D**emocratic states require institutions and policies built on respect for the right of all persons to the full enjoyment of their human rights. This requires inclusive societies, in which growing diversity is perceived as a resource and not as a weakness or a threat.

Populist rhetoric has led to the development of a sense of competition for jobs and welfare resources, but also to a growing sentiment that human rights and building inclusive societies are redundant obstacles to defending nations against perceived threats. This, combined with austerity measures, has resulted in growing unpopularity of policies and measures promoting diversity and social inclusion, and in decisions to reduce budgets for such policies, for national human rights institutions and equality bodies, limiting the independence of these bodies. The strengthening of institutional mechanisms for equality, including gender equality, at national and local level and the availability of resources dedicated to their mission are critical in order to improve equality on the ground.

Recent history teaches us that corruption and a lack of integrity lead to cynicism, populism, radicalisation and extremism. This boosts inequality in favour of a privileged elite to the detriment of everyone else. Sooner or later, corruption brings down the country's financial and economic systems and ultimately undermines democracy, making democratic values, including respect for human rights and rule of law, vulnerable.

Non-discrimination in the enjoyment of human rights is a fundamental principle reflected in the revised European Convention on Human Rights and the European Social Charter (ETS No. 163, the Charter), and well developed in the case law of the European Court of Human Rights and in the decisions and conclusions of the European Committee of Social Rights. These general instruments have over the years been supplemented by numerous more detailed ones providing guidance in these areas.

The Commissioner for Human Rights and the Council of Europe monitoring bodies on racism and intolerance, on national minorities and on minority

languages, on violence against women, as well as the exchanges carried out through intergovernmental committees of experts, provide expertise and guidance on the way these rights are protected and implemented, and therefore on the state of inclusiveness of our societies. Their reports present a general picture of a growing influence of xenophobic and populist rhetoric in public opinions. Populist political movements, but also some politicians from mainstream political parties, use and fuel the fears spreading in our societies for electoral gain, with media outlets either knowingly or unintentionally acting as a multiplier.<sup>270</sup> The Council of Europe and the member states need an open discussion on the issues that generate such fears, allowing space for critical debate while respecting human dignity and maintaining fundamental rights for everyone.

Hate speech poses a serious threat to democratic security and can pave the way for hate crime. Using hate speech against one group thus risks upsetting the social fabric of society as a whole. Statistics from member states seem to suggest that a rise in hate speech and hate crimes against one particular group (migrants, for instance) correlates positively with a rise in hate speech and hate crimes against others, including national minorities.<sup>271</sup> Hate spreads – and replicates.

Populist ideologies are often based on traditional views of women and men in society which reinforce gender roles, stereotypes and sexism, all root causes of gender-based violence against women and girls. Disguised as efforts to protect family values, attacks on women's rights try to keep violence against women and domestic violence as a private issue which the authorities should avoid. It is therefore necessary to strongly preserve women's rights, including sexual and reproductive rights, from attempts to deny or restrict them.

270. Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC), Fourth opinion on the United Kingdom (ACFC/OP/IV(2016)005), published on 27 February 2017, paragraph 5.

271. ACFC, Fourth opinion on Sweden (ACFC/OP/IV(2017)004), published on 16 October 2017, paragraphs 56-57.



Democracy cannot be built on laws, institutions and mechanisms alone. These need to be underpinned by an understanding of and commitment to the values, attitudes, skills and knowledge required for anyone to be an informed and active participant in our societies. From this point of view, the activities in the areas of education, youth and culture constitute important examples of how a European institution can contribute to repairing the broken links between citizens and decision makers, providing viable alternatives to populist discourse.

Young people are often thought of as “an investment for the future”, but in reality their development

and well-being are also indispensable for the present. In order for young people to understand their rights, accept the accompanying responsibilities and be given opportunities to express themselves, their active and effective participation in decision making must be encouraged from an early age. They must be listened to and provided with the means to actively participate in decisions that affect their lives.

This year’s parameters look at the requirements in the specific area of non-discrimination and integration policies, integration of migrants, social rights, education and culture for democracy, and youth policies.



# NON-DISCRIMINATION AND INTEGRATION POLICIES

## Chapter 5 – Inclusive societies

■ Racism and other forms of discrimination and intolerance continue to be deeply embedded in our societies. People from a range of groups and backgrounds experience social exclusion, marginalisation and discrimination, which contribute to the development of parallel societies and are a root cause of extremism. Increasingly aggressive political discourse and hate speech fuel people's fears and play on instincts that boost intolerance.

■ Against this background, it is important that the Council of Europe and member states develop policies that promote equality and diversity and are inclusive for all the different groups in society.

■ National equality bodies have an important role in making the right to equality a reality. They also play a crucial role in preventing and investigating hate speech, and in implementing the anti-discrimination legislation in general. As pointed out in the European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 15<sup>272</sup> on combating hate speech, parliaments, governments, political parties and media should for their part be encouraged to enact efficient self-regulation against hate speech. Where this is not sufficient, external regulation is needed to prevent and remove hate speech from the public space, and in particular from the internet. However, close monitoring by the Council of Europe, among others, must ensure that such regulations are not misused to overly restrict freedom of expression.<sup>273</sup> The police and prosecution services are, for their part, responsible for enforcing anti-hate-crime legislation and combating violent hate crime and the most harmful cases of hate speech, including on the internet.

■ Twenty years after the adoption of its standards for equality bodies, ECRI published a new edition of its General Policy Recommendation No. 2.<sup>274</sup> The implementation of these standards will help to address the subsisting shortcomings, in particular with regard to the independence and funding of equality bodies in a number of countries.

### MEASUREMENT CRITERIA

#### Legal criteria

- ▶ Ratification of Protocol No. 12 to the European Convention on Human Rights (ETS No. 177) and of the Additional Protocol to the Convention on Cybercrime on the criminalisation of acts of a racist or xenophobic nature committed through computer systems (ETS No. 189).
- ▶ Full execution of the relevant judgments of the European Court of Human Rights.
- ▶ National criminal law punishes public incitement to violence, hatred or discrimination on the grounds of race, colour, language, religion, citizenship, ethnic origin, sexual orientation and gender identity and provides that racist and homophobic or transphobic motivation constitutes an aggravating circumstance.
- ▶ Civil and administrative law prohibits direct and indirect racial and homophobic or transphobic discrimination in all areas of the public and private sectors; it provides for easily accessible judicial and/or administrative proceedings, the sharing of the burden of proof and effective, proportionate and dissuasive sanctions.

272. ECRI General Policy Recommendation No. 15 on combating hate speech, 8 December 2015 (<https://bit.ly/1WCb4PB>).

273. Explanatory Memorandum to ECRI General Policy Recommendation No. 15, paragraphs 130 et seq., 8 December 2015.

274. ECRI General Policy Recommendation No. 2 on equality bodies to combat racism and intolerance at national level, 7 December 2017 (<http://hudoc.ecri.coe.int/eng?i=REC-02rev-2018-006-ENG>).

- ▶ Ratification of the European Charter for Regional or Minority Languages (ETS No. 148) and the Framework Convention for the protection of National Minorities (ETS No. 157).
- ▶ Ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention, CETS No. 210).

### Institutional criteria

- ▶ Effective remedies exist for all who claim to be exposed to discrimination in the enjoyment of their rights protected by the European Convention on Human Rights.
- ▶ Equality bodies are mandated to promote equality and provide assistance to people exposed to discrimination and intolerance; their mandates cover all areas of the public and private sectors.
- ▶ Equality bodies are independent at institutional and operational levels and are provided with the competences, powers and resources to implement all their functions effectively and with real impact.
- ▶ Gender equality bodies and authorities are provided with the powers, competencies and resources to implement gender equality policies, monitor and evaluate progress and co-ordinate and support gender mainstreaming activities carried out by other government departments and civil society organisations.
- ▶ Instances of hate speech are regularly and systematically reported.
- ▶ National integrated policies and co-ordinating bodies are established to prevent and combat violence against women and domestic violence.

### FINDINGS

■ In 2017, Portugal ratified Protocol No. 12 to the European Convention on Human Rights. In recent country monitoring reports, ECRI welcomed planned and adopted amendments to the criminal codes in Andorra, Luxembourg, Montenegro, San Marino and Serbia, and to the anti-discrimination legislation in Andorra, Slovenia and Ukraine.<sup>275</sup> Turkey recently enacted comprehensive anti-discrimination legislation. Such legislative changes have made the legal protection against racism, discrimination and intolerance increasingly solid. At the same time, several member states lack comprehensive anti-discrimination

275. New reports on racism and discrimination in Ukraine, Montenegro and Slovenia (<https://bit.ly/2GtKMxd>).

legislation (among others Iceland, Liechtenstein, Monaco, San Marino, Spain and Switzerland<sup>276</sup>).

■ The major discrimination in the enjoyment of certain political rights in Bosnia and Herzegovina, confirmed by the judgment of the European Court of Human Rights in the *Sejdić and Finci* case, remains unsettled. The Committee of Ministers noted with concern in June 2017 the absence of information on any measures taken to intensify the dialogue of the leaders of the political parties to enable the adoption of the necessary changes to the constitution and electoral legislation. The Ministers exhorted Bosnia and Herzegovina to make necessary arrangements, without further delay. These concerns have also been echoed by the Commissioner for Human Rights and ECRI.<sup>277</sup>

### Gender equality

■ The challenges faced by the member states in the implementation of the Council of Europe Gender Equality Strategy 2014-2017 are related to developments in the wider context, including unequal power structures, the persistence of gender-based violence, threats to women's rights defenders, access to quality employment and financial resources, gender bias and stereotypes, sexism and discrimination against women including sexist hate speech online and offline, and in the political discourse and budgetary cuts applied to gender equality authorities and bodies.<sup>278</sup> The Commissioner for Human Rights' issue paper entitled "*Women's sexual and reproductive health and rights in Europe*"<sup>279</sup> denounces the persistent denial or restrictions of these rights and attempts, in some member states, to introduce retrogressive measures.

■ Targeted co-operation with, among others, Eastern Partnership countries and South Mediterranean

276. ECRI fifth monitoring cycle reports on Iceland (CRI(2017)3), paragraph 9, San Marino (CRI(2018)1), paragraph 19, Spain (CRI(2018)2), paragraph 22, and Switzerland (CRI(2014)39), paragraph 12; ECRI fourth monitoring cycle report on Liechtenstein (CRI(2013)2), paragraph 33; ECRI third monitoring cycle report on Monaco (CRI(2016)3), paragraph 19; Commissioner for Human Rights report on Switzerland (CommDH(2017)26), 17 October 2017 (<https://bit.ly/2mfMSvh>), and press release following his visit to Monaco, 20 January 2017.

277. *Sejdić and Finci v. Bosnia and Herzegovina*, 27996/06 and 34836/06, 22 December 2009; Committee of Ministers decision CM/Del/Dec(2017)1288/H46-6, 7 June 2017 (<http://goo.gl/WHrf3o>); Committee of Ministers Annual Report 2016, p. 254, with reference to *Zornić v. Bosnia and Herzegovina*, 3681/06, 15 July 2014, paragraph 43; Commissioner for Human Rights report following his visit to Bosnia and Herzegovina (CommDH(2017)28), 7 November 2017; ECRI fifth monitoring cycle report on Bosnia and Herzegovina (CRI(2017)2), 28 February 2017, paragraphs 65 et seq.

278. Gender Equality Commission (GEC) (2017), Implementation of the Council of Europe Gender Equality Strategy 2014-2017, annual report 2017 (<https://bit.ly/2q5zOXI>).

279. See <https://bit.ly/2AqW5WU>.

countries, as well as with Bulgaria, the Czech Republic, Poland, Romania and the Slovak Republic, have continued to provide national authorities with tools to comply with gender equality standards and to translate them into tangible measures. The “Training manual for judges and prosecutors on ensuring women’s access to justice”<sup>280</sup> was finalised, and the “HELP online course on violence against women and domestic violence” was launched in November 2017<sup>281</sup> and is currently being adapted to the national legal frameworks of specific countries.

Gender equality rapporteurs have been appointed in 38 Council of Europe committees and other intergovernmental bodies, as well as in seven monitoring mechanisms, which increasingly engage in gender mainstreaming activities. GRECO has mainstreamed gender across its fifth evaluation round questionnaire and evaluation reports in order to analyse legislation and practice as they relate to gender and corruption in governments and law-enforcement authorities. GRECO also adopted gender-based recommendations in the context of its initial fifth round evaluations.

## Hate speech

In 2017, member states improved their legal frameworks by adopting new provisions aiming to curtail hate crime and hate speech. Portugal amended its Criminal Code, introducing imprisonment from six months to five years for anybody who establishes an organisation or develops or encourages propaganda activities inciting to discrimination, hatred or violence against a person or group of persons because of his or her race, colour, ethnic or national origin, ancestry, religion, sex, gender, sexual orientation and physical or psychological disability. Italy increased the penalty for intentionally denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes. The law also introduces administrative responsibility for companies found to have racist and xenophobic conduct. Latvia amended its legislation to prohibit associations from conducting activities aimed at inciting national, ethnic, racial and religious hatred or enmity. Cyprus amended its Criminal Code to empower the national courts to take into account as an aggravating factor the motivation of prejudice on the grounds of race, colour, ethnic origin, religious beliefs, sexual orientation or gender equality. France adopted a law cases of racism, homophobia and sexism aggravating circumstances. Germany passed a law requiring operators of social media networks to remove content that violates the Criminal Code from their platforms.

280. See <https://rm.coe.int/training-manual-final-english/16807626a4>.

281. See <https://rm.coe.int/help-course-in-brief/168076c9b5>.

Implementation of the ECRI General Policy Recommendation No. 15 on combating hate speech was promoted in 2017 by various activities, which also covered tools and mechanisms for reporting hate speech; these activities were based on the updated definition of hate speech which is found in the preamble of this recommendation.

At the end of 2017, which marked the conclusion of the Council of Europe co-ordination of the No Hate Speech Movement Campaign, the campaign was active in 43 countries/territories. A new manual for action against hate speech through counter and alternative narratives entitled “WE CAN!” was published and disseminated in 13 languages in 2017, as a complement to *Bookmarks – A manual for combating hate speech online through human rights education*. “Hate Speech Watch”, a website to report hate speech online and to facilitate reporting to national authorities and social media was also developed.<sup>282</sup>

## Equality bodies

In recent years, equality bodies have been established in Andorra, Liechtenstein, Monaco, Slovenia and Turkey, in some cases also with the support of Council of Europe expertise.<sup>283</sup> In San Marino, which remains the only member state without an equality body covering racism, sexual orientation and gender identity, ECRI took positive note of considerations to extend the powers of the Equal Opportunities Commission to these matters.

During its monitoring of equality bodies, ECRI observed a number of good practices, such as the extension of their competences and budgets<sup>284</sup> and pointed out shortcomings. In a number of member states, equality bodies are not competent for both the private and public sectors; for example, equality bodies cannot work in the area of policing. In some cases, equality bodies lack core competences for efficient work, such as the competence to receive complaints, to provide legal assistance and legal representation to people exposed to discrimination and intolerance, and to bring cases of discrimination before institutions and courts (Luxembourg and Switzerland, for example).<sup>285</sup> In Austria, Switzerland, Spain and Turkey, ECRI noted

282. See [www.nohatespeechmovement.org/hate-speech-watch](http://www.nohatespeechmovement.org/hate-speech-watch).

283. Andorra asked ECRI to produce a legal opinion on its draft law.

284. On competences, see ECRI fifth monitoring cycle report on Denmark (CRI(2017)20), 16 May 2017, paragraph 16; on budget, see ECRI third monitoring cycle report on Serbia (CRI(2017)21), 16 May 2017, paragraph 93; and on counselling of victims of discrimination and intolerance, see ECRI fifth monitoring cycle report on Spain, op. cit., paragraph 24 and ECRI Conclusions on the implementation of the recommendations in respect of Switzerland subject to interim follow-up (CRI(2017)25), on 16 May 2017, under point 1.

285. ECRI fifth monitoring cycle report on Luxembourg (CRI(2017)4), 28 February 2017, and on Switzerland, op. cit.

serious threats to equality bodies' independence, and that a substantial number of bodies do not have sufficient human and financial resources to perform their tasks effectively (Slovakia and Spain, for instance).<sup>286</sup>

## Roma

Many member states have adopted national Roma integration strategies, yet the means for their implementation remain limited in proportion to the wide-ranging exclusion to remedy. Large-scale political action is required, and national, regional and local authorities must play an active role to assure the necessary transformation in the long-run. Good practices, including those developed in joint Council of Europe–EU projects, can help to successfully address issues such as enrolment in pre- and primary school, school attendance, absenteeism, early school dropout and other patterns of structural discrimination and exclusion.<sup>287</sup> Such activities need to be scaled up and consolidated in order to reach all Roma in the member states in a sustainable way.<sup>288</sup>

The Committee of Ministers adopted Recommendation CM/Rec(2017)10<sup>289</sup> on improving access to justice for Roma and Travellers in Europe.

The European Roma Institute for Arts and Culture has been established in Berlin; it is now fully operational and its first activity plan is in preparation. The institute has been endowed with financial contributions from the Council of Europe, the Open Society Foundations and the German Government.

The thematic visits of the Ad hoc Committee of Experts on Roma and Traveller Issues (CAHROM) identified and facilitated exchanges of good practices among member states, such as provisions against forced evictions in the new Albanian Law on Social Housing; the Belgian example of local youth councils and youth ambassadors; Roma youth clubs in

Serbia, Roma education incubators in Slovenia; the Finnish practice of individualised career guidance and incentives to choose employment rather than social benefits; the process of institutionalisation of Roma mediators in Bulgaria, the Republic of Moldova, Portugal, Romania and “the former Yugoslav Republic of Macedonia”; the way the United Kingdom Forced Marriage Unit deals with child and/or forced marriages; reforms in the Czech Republic and Hungary concerning testing and psycho-diagnostic processes; the Slovak practice of mapping Roma settlements; and the introduction of Roma history teaching in school curricula in Hungary and Romania.

There were several positive developments in Roma integration in 2017, including the formal recognition of Irish Travellers as an ethnic group of the Irish nation, the recognition of Roma as a national minority in Albania, and the purchase by the Czech Government of the pig farm on the Romani genocide site in Lety.

In Serbia, the number of unregistered Roma at risk of statelessness was reduced from more than 30 000 to 2 000. In Spain, 99% of Roma children are enrolled in pre- and primary school and the goals of the national Roma strategy are close to being achieved in the field of housing. At the same time, members of the Roma community continue to face deeply rooted structural discrimination and exclusion. In Serbia, only 6% of Roma children are enrolled in pre-school. The enrolment rate in primary school increased from 74% to 88% in 2013, but only half of Roma children finish the eight years of primary schooling. In Spain, only 44% of Roma children complete compulsory education.<sup>290</sup> The situation is similar in many other member states and important efforts have been made to find solutions, also in the context of the execution of judgments of the Court. Significant progress has been noted, but a number of countries remain under supervision by the Committee of Ministers to ensure that reforms adopted are also effective.<sup>291</sup> The insufficient schooling of Roma children carries the risk that the next generation of Roma will also face inequality, exclusion, discrimination and resulting dependency on social welfare.

Several judgments of the European Court of Human in 2017 shed light on domestic practices which

286. ECRI fifth monitoring cycle report on Austria (CRI(2015)34), paragraph 26, on Switzerland, op. cit., paragraph 14, on Spain, op. cit., paragraph 23 et seq., Turkey (CRI(2016)37), 4 October 2016, paragraph 26 et seq., and ECRI's Conclusions on the implementation of the recommendations in respect of Slovakia subject to interim follow-up (CRI(2017)24), 16 May 2017, under point 2.

287. The Commissioner noted, after his 2017 visit to Portugal, positive changes brought about by the participation of Roma mediators in local government and the involvement of community groups in decision making to tackle issues such as discrimination, educational attainment and job opportunities (<https://bit.ly/2H8ZbQt>). On similar programmes see ECRI third monitoring cycle report on Serbia, op. cit., paragraph 81.

288. See, for instance, the Commissioner for Human Rights report following his visit to Ireland (CommDH(2017)8), 29 March 2017 (<https://bit.ly/2EgZfKZ>); ECRI fifth monitoring cycle report on Turkey, op. cit., paragraphs 75 to 77.

289. Committee of Ministers Recommendation CM/Rec(2017)10 on improving access to justice for Roma and Travellers in Europe, adopted on 17 October 2017 (<https://rm.coe.int/168075f2aa>).

290. ECRI third monitoring cycle report on Serbia, op. cit., paragraphs 74 et seq., and ECRI fifth monitoring cycle report on Spain, op. cit., paragraphs 84 et seq.

291. The examination of the cases *Sampani and Others v. Greece* and *Oršuš and Others v. Croatia* has been closed. Even though important progress was made in the cases *D.H. and Others v. the Czech Republic* [GC], 57325/00, 13 November 2007, a Committee of Ministers decision taken at the 1288th meeting (6-7 June 2017) and *Horváth and Kiss v. Hungary*, 11146/11, 29 January 2013, Committee of Ministers decision taken at the 1302nd meeting (5-7 December 2017), the examination of these cases is still under way.



are incompatible with the rights of Roma against exclusion and discrimination.

■ *Ranđelović and Others v. Montenegro* concerned a complaint about the failure of the authorities to conduct a prompt and effective investigation into the death or disappearance of the applicants' family – a group of Roma that had boarded a boat on the Montenegrin coast, with the intention of reaching Italy, and which sank in August 1999. The Court held that there had been a violation of the procedural limb of Article 2 (right to life) of the Convention.<sup>292</sup> It found that the Montenegrin Government had failed to justify the duration of the criminal proceedings, which had lasted more than 10 years and seven months after a new indictment had been issued in 2006. The Court underlined that the passage of time inevitably eroded the quality of evidence and that the appearance of a lack of diligence cast doubt on the good faith of the investigative efforts.

■ In the case of *Škorjanec v. Croatia*<sup>293</sup> the Court held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) in conjunction with Article 14 (prohibition of discrimination) of the Convention. The Court underlined that, under the Convention case law, a person may be a victim of a violent hate crime not only when they have been attacked because they themselves have a certain characteristic, but also when they are attacked because they have an actual or presumed association with another person, who has (or is perceived to have) that characteristic. States have an obligation to recognise both types as hate crimes and to investigate them accordingly.

■ In *Barnea and Caldararu v. Italy*,<sup>294</sup> the Court examined the removal of a 28-month-old girl from her birth family, who had arrived in Italy in 2007 and settled in a Roma camp for a period of seven years and her placement in a foster family with a view to her adoption. The applicant family complained in particular about the child's removal and placement in care by the authorities in 2009, about the social services' failure to execute a Court's judgment ordering that a programme be put in place to reunite the child and her birth family, and about the child's placement in a foster family and the reduction in the number of meetings between the child and her birth family. The Court held that there had been a violation of Article 8 (right to respect for private and family life) of the Convention, finding that the Italian authorities failed to make sufficient efforts to secure the applicants' right to live with their child.

■ To remedy the issue of under-reporting of hate crime, ECRI repeatedly recommended that law-enforcement agencies strengthen their dialogue with

civil society groups (Denmark, Georgia, Luxembourg and Turkey). It also recalled, with respect to a number of member states (Bosnia and Herzegovina, Denmark, Montenegro, Serbia and Turkey), the duty to abide by and execute the various judgments of the Court on the obligation to carry out effective investigations, including on the question whether the perpetrator of a violent crime had a racist motivation.<sup>295</sup>

## LGBTI

■ ECRI welcomed a considerable improvement in the attitudes towards LGBTI persons in many European countries. A number of member states enacted new or improved legislation regulating core issues for homosexual, bisexual and transgender people, such as registered same-sex partnership (bill presented in Serbia), marriage (Luxembourg and Germany) and gender recognition of transgender persons (Denmark, Norway and Sweden). The Commissioner for Human Rights noted that there is a "growing trend" in Europe and beyond towards granting same-sex couples legal recognition for their relationships.<sup>296</sup> There is growing interest, engagement and political commitment from the member states to address sexual orientation and gender identity issues and benefit from Council of Europe co-operation activities and expertise. Albania and Portugal drafted and began implementing national action plans on LGBTI equality. Andorra, Cyprus, France, Georgia, Greece, Lithuania and Montenegro advanced in their work on legal gender recognition. Member states exchanged good practices on inclusive local and regional policy and on combating transphobic and homophobic hate crimes.

■ Judgments of the Court have made important contributions to this development. The Committee of Ministers has thus been able to close its supervision of the execution of a number of related Court cases.<sup>297</sup> Numerous other execution processes have progressed well, even if a number of additional measures are

292. 66641/10, judgment of 19 September 2017.

293. 25536/14, judgment of 28 March 2017.

294. 37931/15, judgment of 22 June 2017.

295. See Committee of Ministers Annual Report 2016, op. cit., p. 28, on the strengthening of procedures to investigate possible racial motives and, for example, *Natchova and Others v. Bulgaria* [GC], 43577/98 and 43579/98, 6 July 2005, paragraphs 160 to 168; *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010, paragraph 81, and *Škorjanec v. Croatia*, 25536/14, 28 March 2017, paragraphs 52 et seq.

296. See Commissioner for Human Rights, Human Rights Comment on "Access to registered same-sex partnerships: it's a question of equality", 21 February 2017 (<https://bit.ly/2JgDyyF>).

297. See Committee of Ministers Annual Report 2016, op. cit., p. 39 and, for example, *Vallianatos and Others v. Greece*, 29381/09 and 32684/09, 7 November 2013; *Oliari and Others v. Italy*, 18766/11 and 36030/11, 21 July 2015; and *Pajić v. Croatia*, 68453/13, 23 February 2016.

required.<sup>298</sup> It is, for example, an encouraging sign that the Government of the Republic of Moldova has recently rejected a legislative initiative aimed at introducing liability for “propaganda of homosexual relations.”<sup>299</sup> Notwithstanding the measures adopted by the Russian Federation to enhance the right of LGBTI persons to hold public events, the fact is that the situation does not attest to any improvement in that country, as the number of such events allowed continues to be very limited and remains a source of serious concern.<sup>300</sup> In 2017 the Court held that the inability of same-sex couples to have marriages they contracted abroad to be registered or recognised as a union in Italy violates the right to respect for private and family life (Article 8 of the Convention).<sup>301</sup>

Attacks and crackdowns on LGBTI people were reported in Russia, Turkey and Azerbaijan.<sup>302</sup> ECRI recommended to a number of member states that they develop and implement comprehensive strategies and action plans for LGBTI people;<sup>303</sup> promote understanding about their specific situation;<sup>304</sup> and build up structures to help young LGBTI persons during their coming out.<sup>305</sup>

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210, Istanbul Convention) has now been ratified by 27 member states (5 more in 2017) and the EU has signed it. The Group of Experts on Violence against Women (GREVIO), which monitors the implementation of this convention, has adopted the first four baseline evaluation reports in respect of states parties (Albania, Austria, Denmark and Monaco).

Several important judgments handed down by the Court in 2017 show the need to step up the effort to end domestic violence. The case *Talpis v. Italy*<sup>306</sup> concerned domestic violence suffered by a mother, resulting in the murder of her son and her own attempted murder. The Court held that there had been a violation of the Convention on account of the failure of the authorities in their obligation to protect the applicant against acts of domestic violence. The case *Bălşan v. Romania*<sup>307</sup> concerned an allegation of domestic abuse, where the Court held that there had been a violation of the Convention because of the authorities’ failure to adequately protect Ms Bălşan from her violent husband.

298. See, for example, *L. v. Lithuania*, 27527/03, 31 March 2008, Committee of Ministers decision taken at the 1294th meeting (19-21 September 2017) (<http://goo.gl/6zBTuD>); *Alekseyev v. the Russian Federation*, 4916/07, 21 October 2010, Committee of Ministers decision taken at the 1273rd meeting (6-8 December 2016) (<http://goo.gl/5uxYTR>); *GENDERDOC-M v. the Republic of Moldova*, 9106/06, 12 September 2012, and the Committee of Ministers decision taken at the 1280th meeting (7-10 March 2017) (<http://goo.gl/zu2riz>), which expressed satisfaction with the progress achieved; *Identoba and Others v. Georgia*, 73235/12, 12 May 2015, Committee of Ministers decision taken at the 1273rd meeting (6-8 December 2016) (<http://goo.gl/LqyRSa>).

299. See the Action report on the execution of the judgment in the case of *GENDERDOC-M v. the Republic of Moldova* (DH-DD(2017)21), submitted 9 January 2017 (<https://rm.coe.int/16806d4751>).

300. See *Alekseyev v. Russian Federation*, 4916/07, 21 October 2010, Committee of Ministers’ decision of December 2016 (1273rd HR meeting) (<https://bit.ly/2qawc6K>).

301. *Orlandi and Others v. Italy*, 26431/12; 26742/12; 44057/12 and 60088/12, 14 December 2017.

302. In this context, the Commissioner for Human Rights sent letters to the Head of the Russian Federal Investigative Committee on 5 April 2017 (<https://bit.ly/2GF9WcA>) and to Azerbaijan on 16 October 2017 (<https://bit.ly/2yoOSU1>) and issued a statement on Turkey on 26 June 2017 (<https://bit.ly/2GA3De2>). See also ECRI fifth monitoring cycle report on Turkey, op. cit., paragraphs 47 et seq.

303. ECRI fifth monitoring cycle reports on Iceland, op. cit., paragraph 92, and Turkey, op. cit., paragraph 105, ECRI second monitoring cycle report on Montenegro (CRI(2017)37), 19 September 2017, paragraph 100.

304. ECRI fifth monitoring cycle reports on Bosnia and Herzegovina, op. cit., paragraph 95, Serbia, op. cit., paragraph 105, Luxembourg, op. cit., paragraph 90, Spain, op. cit., paragraph 104, and Ukraine (CRI(2017)38), 19 September 2017, paragraph 125.

305. ECRI fifth monitoring cycle reports on Luxembourg, op. cit., paragraph 90, and Spain, op. cit., paragraph 104.

306. 41237/14, 2 March 2017.

307. 49645/09, 23 May 2017.



## The role of equality bodies, threats to equality bodies

In recent years, almost all Council of Europe member states have established independent equality bodies. These bodies play an essential role in advancing equality and in assisting people exposed to discrimination and intolerance to protect and enforce their basic rights.

A rich and diverse system of equality bodies has emerged and many good practices have been developed. Many equality bodies suffer from shortcomings, however, and for some their very foundations are under threat, in particular with regard to their independence and funding.

Against this background, the revised ECRI General Policy Recommendation No. 2 on equality bodies to combat racism and intolerance at national level draws on best practices and contains standards to help member states further strengthen their equality bodies.

### Key messages

#### **1. Member states should establish a strong and independent equality body.**

Equality bodies should be established by constitutional provision or parliamentary legislation. Their mandate should cover all areas in the public and private sectors.

Equality bodies should be fully independent at the institutional and operational level, be a separate legal entity and work without interference from the state or political parties.

#### **2. Equality bodies should have the two key functions of promoting equality and assisting people exposed to discrimination and intolerance.**

Equality bodies should promote equality and prevent discrimination by conducting inquiries, pursuing research, raising awareness, supporting good practice, making recommendations and contributing to legislation and policy formation.

Secondly, they should support people exposed to discrimination and intolerance by receiving their complaints, providing them with personal support, legal advice and assistance, providing recourse to conciliation procedures, providing legal representation, pursuing strategic litigation, and bringing cases before institutions and courts.

In addition, equality bodies can be tasked with taking decisions on complaints of discrimination.

#### **3. Member states should establish the necessary framework to ensure the independence and effectiveness of equality bodies.**

Equality bodies should decide independently on their activity programme, internal structure, management of their budget, and recruitment and deployment of staff. Safeguards should be put in place to protect the independence of the persons directing the body.

Equality bodies should develop a strategy for their action, update it regularly and be provided with sufficient staff and funds to carry out all their duties with real impact.

They should be entitled to make statements independently. Parliaments and governments should discuss their reports and contribute to the implementation of their recommendations.

# ACCESS TO RIGHTS AND INTEGRATION OF MIGRANTS AND REFUGEES

## Chapter 5 – Inclusive societies

**M**igrant and refugee flows progressively abated in 2017. Despite this fact, countries of arrival continued to struggle to set up sustainable reception systems while trying to reduce backlogs in the processing of asylum claims, to relocate asylum seekers to other EU member states and to return those who do not qualify for protection. The main challenge for many member states now is how to deal with those who have arrived over the past few years, a number of whom have been granted some form of protection. Another crucial point is ensuring that corruption does not hamper the proper management of the migration flows.

Following his 2016 issue paper “Time for Europe to get migrant integration right”, the Commissioner for Human Rights made 36 recommendations to help member states uphold refugees’ right to reunite with their families in host countries.<sup>308</sup>

In the field of education and recognition of qualifications, the Council of Europe provided resources such as the handbook entitled “Providers of courses for adult migrants – Self-assessment handbook”, the “Guide to policy development and implementation on the linguistic integration of adult migrants” and the European Qualifications Passport for Refugees, which is recognised by accreditation institutions in Europe.<sup>309</sup> Likewise, in November 2017, the Lisbon Convention Committee adopted a recommendation on the recognition of qualifications held by refugees.

The Intercultural Cities programme promoted the adoption of intercultural integration approaches to help local authorities in designing and implementing inclusive and innovative integration policies.<sup>310</sup>

The Gender Equality Strategy 2018-2023, prepared by the Gender Equality Commission, gives priority to protecting the rights of migrant, refugee and asylum-seeking women and girls, in particular with regards to employment, health, housing and education. In July 2017, the Enlarged Partial Agreement on Sport launched a platform for migrant integration via sports.

The protection of children, in particular unaccompanied children, remained a priority for the Organisation. The Special Representative of the Secretary General (SRSRG) on migration and refugees published a thematic report on migrant and refugee children, based on the findings of his missions to member states. Building on this report, the SRSRG prepared the Council of Europe-wide Action Plan on Protecting Refugee and Migrant Children (2017-2019), which was adopted by the Committee of Ministers on 19 May 2017. This action plan includes activities aimed at ensuring access to rights and child-friendly procedures, providing effective protection and integrating these children. Different sectors of the Council of Europe, including those dealing with children’s rights, education, sport, youth participation and the media, are involved in its implementation. Work is under way to devise standards, age-assessment procedures and guidance on guardianship systems, as well as support measures for children’s transition to adulthood.

308. Commissioner for Human Rights, Issue paper, “Realising the right to family reunification of refugees in Europe”, published on 19 June 2017 (<https://bit.ly/2rYAToh>).

309. The Council of Europe developed this project in partnership with the Greek Ministry of Education, Research and Religious Affairs, building on a methodology devised in Norway and the United Kingdom. Some 73 passports have been issued so far.

310. The programme published a new study by the Migration Policy Group entitled “How the intercultural integration approach leads to better quality of life in diverse cities” (<https://bit.ly/2GGE8l6>).

— The practice of administrative detention of migrants and refugees continued in some member states. The general, the automatic and *de facto* deprivation of liberty of asylum seekers and irregular migrants in some member states ranked high among concerns expressed by the Council of Europe about the protection of the rights of migrants and refugees.<sup>311</sup>

— The Organisation's response to administrative detention has been twofold. First, it continued to provide guidance to its member states on international human rights standards, notably through the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment's (CPT) factsheet detailing immigration detention standards.<sup>312</sup> This has been reinforced by the ongoing processes of codification of immigration detention rules by the CDCJ and the development of guidelines on alternatives to detention by the CDDH; the latter builds on a comprehensive study on alternatives to the administrative detention of migrants launched in 2017. Second, the CPT continued to react to the wide use of immigration detention by monitoring the situation during regular and ad hoc visits to frontline and transit countries.<sup>313</sup>

— Finally, GRECO's 5th evaluation round focuses on preventing corruption and promoting integrity in central governments (top executive functions) and law-enforcement agencies. The latter will include agencies responsible for border control, ensuring that corruption does not hamper the proper management of migration flows.

## MEASUREMENT CRITERIA

- ▶ Compliance with relevant obligations under the Convention, as interpreted by the Court, the Charter, as interpreted by the European Committee of Social Rights, the Istanbul Convention, the Lanzarote Convention, and relevant standards of the CPT.
- ▶ Member states that have not ratified certain of the above-mentioned conventions take the necessary measures to prepare for such ratification and eventually do so.

311. See the reports of Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, on fact-finding missions to Italy (SG/Inf(2017)8) (<https://bit.ly/2ICZ3RT>), and to Serbia and two transit zones in Hungary (SG/Inf(2017)33) (<https://bit.ly/2GyWxTi>). See also the Special Report further to a visit undertaken by a delegation of the Lanzarote Committee to transit zones at the Serbian/Hungarian border (5-7 July 2017) (<https://bit.ly/2C6bYyZ>).

312. CPT Immigration detention factsheet (CPT/Inf(2017)3) (<https://rm.coe.int/16806fbf12m>).

313. In 2017 the CPT visited Hungary, Bulgaria, Italy, Turkey, Belgium, Slovenia and Cyprus ([www.coe.int/en/web/cpt/visits?](http://www.coe.int/en/web/cpt/visits?)).

- ▶ Effective access to asylum procedures is provided for new arrivals and effective appeal mechanisms are available.
- ▶ The principle of *non-refoulement*, including the prohibition of arbitrary or collective expulsion, the right to family life and the right to seek asylum, is guaranteed.
- ▶ Migrants and refugees are provided with accurate information about their legal and administrative situation, interpretation services and psycho-social support.
- ▶ Migrants, in particular children and families, receive appropriate accommodation.
- ▶ No child is detained on immigration grounds.
- ▶ An effective guardianship system is established in each member state.
- ▶ Effective integration policies are developed for refugees and migrants who will remain on member states' territories.
- ▶ All refugee and migrant children are provided with education.
- ▶ Member states follow relevant recommendations of the European Commission against Racism and Intolerance.
- ▶ Member states recognise qualifications of refugees and people in a refugee-like situation, as per Article 7 of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region (ETS No. 165, Lisbon Recognition Convention).

## FINDINGS

— The scale and pace of arrivals of migrants and refugees in Europe in the last few years prompted many European countries to step up their action in 2017 to secure their borders, reduce death tolls along migration routes, tackle human trafficking and smuggling of migrants and refugees and strengthen their co-operation with countries of origin or transit with a view to managing migration effectively. In some instances these actions have raised questions as to whether the right to seek asylum, with due respect for the principle of *non-refoulement*, is effectively guaranteed and the prohibition on collective expulsions is upheld. Cases of pushbacks of migrants and refugees, sometimes accompanied by violence, were reported in 2017, for example from Hungary to Serbia, from Croatia to Serbia and from Serbia to Bulgaria.<sup>314</sup>

314. Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Serbia and two transit zones in Hungary, op. cit.

Proposed amendments to the Slovenian Aliens Act regarding conditions of entry into and the expulsion of foreigners from the country prompted the Secretary General to write to the Prime Minister of Slovenia expressing concerns about the protection of asylum seekers and migrants from pushbacks. The Commissioner for Human Rights also wrote to the President of the National Assembly of Slovenia asking for the rejection of the amendments.<sup>315</sup> GRECO issued a number of recommendations to Slovenia to prevent corruption within the police (which performs the country's basic law-and-order functions, including migration and border control), bearing in mind the risks mentioned by the authorities in relation to the exceptional situation caused by the recent migration crisis.<sup>316</sup>

In the light of media and NGO reports on the situation of migrants in Libya, the Commissioner for Human Rights sought clarification from the Italian Government on the kind of support operations provided to Libyan authorities in Libyan territorial waters, as well as on safeguards that Italy has put in place to ensure that people intercepted or rescued by Italian vessels in Libyan territorial waters do not subsequently face a situation in breach of Article 3 of the Convention.<sup>317</sup> Also, the Commissioner expressed concern about reported collective expulsions from Greece of asylum-seeking Turkish nationals. Moreover, the Court has suspended, under Rule 39 of its Rules, expulsions to a number of countries pending its examination of allegations of serious human rights violations.<sup>318</sup> Applications raising allegations of collective expulsions against Hungary,<sup>319</sup> Spain<sup>320</sup> and "the former Yugoslav Republic of Macedonia"<sup>321</sup> are pending before the Court, and a further case against Spain<sup>322</sup> is currently pending before the Grand Chamber.

Some member states, however, made progress by taking action in response to the Court's judgments to prevent collective expulsions and introduce remedies with suspensive effect. This allowed the supervision of the execution of cases in which a violation had been

found by the Court to be closed (notably Belgium,<sup>323</sup> Cyprus,<sup>324</sup> France<sup>325</sup> and Italy<sup>326</sup>).

The reception conditions in some facilities in Italy, being unsuitable for long-term stay, raised issues under Articles 3 and 5 of the Convention.<sup>327</sup> Concerns were expressed about the situation in the "hotspots" on the Aegean islands in particular, overcrowding, insufficient basic health-care provision, inadequate assistance to vulnerable groups and risks of trafficking in human beings and sexual violence,<sup>328</sup> while the Greek authorities were urged to take measures to address the situation.<sup>329</sup> The Court accepted that the situation in the Vial hotspot in Greece in March/April 2016 was not inconsistent with Article 3.<sup>330</sup> Nevertheless, a number of cases are pending against Greece<sup>331</sup> and Italy,<sup>332</sup> which raise allegations of poor conditions of reception or detention, inadequate safeguards for unaccompanied children, including victims of human trafficking, and lack of remedies.

As regards transit countries, notably those on the Western Balkans migration route, the drop in migration pressure during 2017 led to improvements

315. The Slovenian ombudsman has since referred the law to the Constitutional Court on the basis of human rights concerns. A decision is still pending.

316. GRECO Evaluation report in respect of Slovenia (GrecoEval5Rep(2017)2), adopted 8 December 2017, published 8 March 2018, paragraph 148.

317. Commissioner for Human Rights' letter addressed to Marco Minniti, Italian Minister of the Interior, 28 September 2017 (<https://bit.ly/2Ewlb5x>).

318. See statistics on interim measures granted in 2017 on the Court's website: [www.echr.coe.int/Documents/Stats\\_art\\_39\\_02\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_art_39_02_ENG.pdf). This includes transfers between member states under the Dublin Regulation; see in particular *C.A. and P.A. v. Sweden*, 75348/16, 12 September 2017.

319. *HK v. Hungary*, 18531/17; *Khurram v. Hungary*, 12625/17.

320. *Balde Abel v. Spain*, 20351/17; *Donmbe Nnabuchi v. Spain*, 19420/15.

321. *A.A. and others v. "the former Yugoslav Republic of Macedonia"*, 55798/16 et al.

322. *N.D. and N.T. v. Spain*, 8675/15 and 8697/15.

323. *M.S.S. v. Belgium and Greece*, 30696/09, 21 January 2011, Final Resolution CM/ResDH(2014)272; cf. also *Čonka v. Belgium*, 51564/99, 5 February 2002, Final Resolution CM/ResDH(2011)191.

324. *M.A. v. Cyprus*, 41872/10, 23 July 2013; a bill providing for new remedies with suspensive effect is presently before parliament – see notably the latest action plan of 23 March 2017 and the Government's communication of 18 December 2017.

325. *De Souza Ribeiro v. France* 22689/07, 13 December 2012, Final Resolution CM/ResDH(2017)135; cf. also *Gebremedhin v. France*, 25389/05, 26 April 2007, Final Resolution CM/ResDH(2013)56.

326. *Hirsi Jamaa and Others v. Italy*, 27765/09, 23 February 2012, Final Resolution CM/ResDH(2016)221. A number of issues remain, however, outstanding. See in particular the information provided and the decision adopted by the Committee of Ministers at its 1288th meeting in June 2017, notably asking Italy to confirm that the authorities have stopped transferring persons who seek international protection in Italy to Greece.

327. Report of the fact-finding mission to Italy by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, op. cit.

328. Report to the Greek Government on the visits to Greece carried out by the CPT (CPT/Inf (2017) 25) (<https://rm.coe.int/pdf/168074f85d>); Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Greece (GRETA(2017)27) (<https://rm.coe.int/greta-2017-27-fgr-gre-en/168075f2b6>).

329. Ibid.; see also statements by PACE General Rapporteur, Petra De Sutter, on conditions of reception of refugees and migrants (<https://bit.ly/2Gz25Bc> and <https://bit.ly/2q8B8Jl>).

330. *J.R. and Others v. Greece*, 22696/16, 25 January 2018 (not yet final).

331. *Sh.D. and Others v. Greece*, 14165/16; *Kaak and Others v. Greece*, 34215/16; *Ahmadi and Others v. Greece*, 39065/16; *Al Yamani and Others v. Greece*, 26657/16.

332. *Diakite v. Italy*, 44646/17; *Bacary v. Italy*, 36986/17; *Bodiang v. Italy*, 47523/17; *Trawalli and Others v. Italy*, 47287/17; *Dansu and Others v. Italy*, 16030/17; *Darboe and Camara v. Italy*, 5797/17; *Sadio and Others v. Italy*, 3571/17. See also *H and Others v. Switzerland*, 67981/16, pending.



in reception conditions.<sup>333</sup> The material conditions, health-care provision and support services in these countries vary considerably from one establishment to another, with many reception centres providing sub-standard living conditions.<sup>334</sup> Refugees and migrants outside the formal accommodation system often receive little care. Positive examples regarding adequate accommodation and care for asylum seekers and refugees have been noted in respect of Slovenia.<sup>335</sup>

Regarding the administrative detention of migrants and refugees, the Court found a violation of Article 5.2 of the Convention concerning a detention in the Vial hotspot in Greece because of the authorities' failure to provide the applicants with the reasons for their detention.<sup>336</sup> The question of the legality, the adequacy of procedural safeguards and the conditions of detention in hotspots in Italy and Greece is a matter for determination in several cases pending before the Court.<sup>337</sup> Another case pending before the Grand Chamber concerns the legality of alleged *de facto* detention of the applicants in the Röske transit zone in Hungary.<sup>338</sup> The Court has found a violation of Article 3 in respect of conditions of immigration detention of children in Bulgaria.<sup>339</sup>

It should be noted, however, that not all member states resorted to detention. Serbia, for example, has taken a firm approach against detention of migrants and refugees, which should be commended.<sup>340</sup> Other countries, notably Bosnia and Herzegovina,<sup>341</sup> Malta<sup>342</sup> and Italy,<sup>343</sup> in respect of which the Court had found the legal basis for depriving migrants and refugees of their liberty and possibilities of effective judicial review to be lacking, have adopted or are in the process of adopting remedial legislation. Remedial action in respect of continued detention of foreigners despite the absence of any prospects of removal have recently

been taken by Malta,<sup>344</sup> while Italy's responses are presently awaited in the context of the Committee of Ministers' supervision of the execution of Court judgments.<sup>345</sup>

Access to international protection continued to be difficult in transit countries owing to a combination of factors, notably the lack of information provided to them about asylum, the lack of interpretation and the lack of legal aid during asylum procedures. In Serbia, thousands of migrants and refugees continued to be stranded for months in a precarious legal situation, with no possibility to leave the country. In Hungary, border asylum procedures introduced to cope with the challenges of migration have raised concerns as to whether they are accompanied by adequate procedural safeguards and whether they involve an individualised assessment of the risk of a breach of Articles 2 and 3 of the Convention in the case of return to countries of origin or third countries.<sup>346</sup>

A number of member states recognised the need to reform the asylum system with legislative initiatives being taken to make the asylum process more efficient.<sup>347</sup> In 2016 and 2017, the Committee of Ministers closed its supervision of execution of cases in which the Court had found a violation against Bosnia and Herzegovina,<sup>348</sup> France,<sup>349</sup> Slovakia,<sup>350</sup> Sweden<sup>351</sup> and Switzerland.<sup>352</sup> The speed and efficiency of asylum procedures have also been improved, in response to Court judgments, notably in Greece<sup>353</sup> and Malta.<sup>354</sup>

Despite efforts by member states experiencing the arrival or transit of migrants and refugees to ensure adequate protection of unaccompanied children, their guardianship systems continued to provide inadequate support primarily due to insufficient human and financial resources, arbitrary

333. Report of the fact-finding mission report by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Serbia and two transit zones in Hungary, op. cit..

334. *Ibid.*

335. Commissioner for Human Rights report following his visit to Slovenia (CommDH(2017)21), 11 July 2017 (<https://bit.ly/2fA9MaJ>).

336. *J.R. and Others v. Greece*, op. cit.

337. *Kaak and Others v. Greece*, op. cit.; *Ahmadi and Others v. Greece*, op. cit.; *Trawalli and Others v. Italy*, op. cit..

338. *Ilias and Ahmed v. Hungary*, 47287/15.

339. *S.F. and Others v. Bulgaria*, 8138/16, 7 December 2017 (not yet final).

340. Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Serbia and two transit zones in Hungary, op. cit. (<https://bit.ly/2IDE7RQ>).

341. *Al Husin v. Bosnia and Herzegovina*, 3727/08, 7 February 2012. Final Resolution CM/ResDH(2017)28.

342. *Abdullahi Elmi and Aways Abubakar v. Malta*, 22 November 2016. Final Resolution CM/ResDH(2017)366.

343. *Khlaifa and Others v. Italy*, 16483/12, 1 September 2015; see notably the action plan submitted regarding the execution of this judgment.

344. *Abdullahi Elmi and Aways Abubakar v. Malta*, 22 November 2016, 25794/13 and 28151/13. Final Resolution CM/ResDH(2017)366.

345. *Khlaifa and Others v. Italy*, op. cit.

346. Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Serbia and two transit zones in Hungary, op. cit.

347. *Ibid.*

348. See *Al Husin v. Bosnia and Herzegovina*, op. cit.

349. *M.E. v. France*, 50094/10, 6 June 2013. Final Resolution CM/ResDH(2017)261.

350. *Labsi v. Slovakia*, 33809/08, 15 May 2012. Final Resolution CM/ResDH(2017)87.

351. *F.G. v. Sweden*, 43611/11, 23 March 2016, Final Resolution CM/ResDH(2016)355; *J.K. and others v. Sweden*, 59166/12, 23 August 2016, Final Resolution CM/ResDH(2017)171.

352. See *X v. Switzerland*, 16744/14, 26 January 2017, Final Resolution CM/ResDH(2017)28.

353. See recently the notes on the agenda of the Committee of Ministers' 1288th HR meeting in June 2017 (<https://rm.coe.int/168070ec4f>), and the earlier evaluation in H/Exec(2014)4rev of June 2014 (<https://rm.coe.int/16805929b7>).

354. See, for example, *Abdullahi Elmi and Aways Abubakar v. Malta*, 25793/13 and 28151/13, 22 November 2016, Final Resolution CM/ResDH(2017)366.

age-assessment procedures, lack of inter-institutional co-ordination or other administrative difficulties. Practices of detention or confinement of children in transit zones such as those in Switzerland<sup>355</sup> and Hungary,<sup>356</sup> or their accommodation in inappropriate conditions in reception centres in Serbia,<sup>357</sup> often together with unrelated adults, have raised serious concerns about the protection of children's rights. Children's access to asylum procedures and practices of detention have been at the heart of a number of judgments of the Court, which in certain cases have led to improved practices in the countries concerned (Belgium,<sup>358</sup> Greece<sup>359</sup> and Turkey<sup>360</sup>). Many refugee and migrant children who live in reception centres received no or inadequate education despite efforts made in some countries, including Serbia and Hungary, to integrate these children into mainstream education.<sup>361</sup>

■ In some other member states, the focus has shifted to planning and facilitating the integration of those who have a right to remain into the society of their host countries.<sup>362</sup> To this end, countries adopted strategies and action plans for integration<sup>363</sup> and considerable efforts have been made in particular in the areas of housing, learning the local language, education, employment and health.<sup>364</sup>

■ GRETA pays particular attention to the identification of victims of trafficking among asylum seekers and migrants and their referral to assistance and protection, in compliance with the provisions of the Council

of Europe Convention on Action against Trafficking in Human Beings.<sup>365</sup>

■ In January 2017, GRETA published its report on the urgent procedure visit to Italy which addressed challenges in the protection of trafficking victims in the context of increased migration flows. GRETA recommended that efforts to proactively identify victims of trafficking among asylum seekers, irregular migrants and unaccompanied foreign children need to be significantly increased.<sup>366</sup> To address GRETA's recommendations, the Council of Europe supported the project "BESIDE YOU – Building European Systems for Investigation and Defence of Victims of Human Trafficking", implemented in the Piedmont Region between March and October 2017 and designed to increase the capacity of law-enforcement officials and social workers to facilitate the investigation of human trafficking cases.

■ In June 2017, GRETA launched an urgent procedure in respect of Hungary, triggered by concerns around the automatic detention of asylum seekers in transit zones and its implications for the identification and protection of victims of trafficking. GRETA subsequently carried out a visit to Hungary in December 2017.

■ GRETA has also examined the safeguards put in place to prevent the disappearance of unaccompanied and separated children shortly after being placed in reception centres, something which exposes them to further risks of trafficking and exploitation. GRETA has identified good practices when it comes to creating a protective environment for such children. For example, in Ireland, unaccompanied or separated children seeking asylum are provided accommodation in small-scale residential units. All children have an absence management plan and new arrivals are initially accompanied outside of the unit until a review takes place. Children attend school in the community and participate in local sports, cultural and religious activities. After a stay of up to six months at the residential unit, many children are placed in foster care and the remainder move to supported lodgings. Thanks to these measures, the number of children going missing from residential care is very low.<sup>367</sup>

■ In "the former Yugoslav Republic of Macedonia", unaccompanied and separated children are recognised as being at particular risk of trafficking and the national authorities have adopted standard operating procedures for dealing with such children, which were drafted with the support of the United Nations High Commissioner for Refugees (UNHCR).

355. Commissioner for Human Rights report following his visit to Switzerland, op. cit.

356. The Court indicated a measure under Rule 39 of its Rules to suspend the planned placement of unaccompanied asylum-seeking children in closed centres in the transit zones in Hungary; see *Hersi Muhyadin and others v. Hungary*, 22934/17.

357. Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Serbia and two transit zones in Hungary, op. cit. Special Report further to a visit undertaken by a delegation of the Lanzarote Committee to transit zones at the Serbian/Hungarian border (5-7 July 2017), op. cit.

358. *Mubilanzila Mayeke and Kaniiki Mitunga v. Belgium*, 13178/03, 12 January 2007, Final Resolution CM/ResDH(2014)226.

359. *Rahimi v. Greece*, 8687/08, 5 July 2011, examined by the CM in the context of the M.S.S. group; see notably H/Exec(2014)4rev of June 2014.

360. *Abdolkhani and Kariminia v. Turkey*, 30471/08, 22 September 2009, Action report of June 2016.

361. Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Serbia and two transit zones in Hungary, op. cit.

362. Annual report on ECRI's activities, 2016 ([www.coe.int/t/dghl/monitoring/ecri/activities/Annual\\_Reports/Annual%20report%202016.pdf](http://www.coe.int/t/dghl/monitoring/ecri/activities/Annual_Reports/Annual%20report%202016.pdf)).

363. ECRI fifth monitoring cycle report on Iceland, op. cit.

364. ECRI fifth monitoring cycle report on Luxembourg, op. cit.; and fifth monitoring cycle report on Sweden (CRI(2018)3), 27 February 2018 ([www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Sweden/SWE-CbC-V-2018-003-ENG.pdf](http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Sweden/SWE-CbC-V-2018-003-ENG.pdf)).

365. See 5th General Report on GRETA's Activities, 2016 (<https://rm.coe.int/168063093c>).

366. GRETA Report on Italy (GRETA(2016)29) (<https://rm.coe.int/16806edf35>).

367. GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland (GRETA(2017)28) (<https://rm.coe.int/greta-2017-28-fgr-irl-en/168074b426>).



## Meeting the media needs of migrants and refugees

Media continue to face challenges in contextualising developments relating to migration and the integration of refugees and migrants in Council of Europe member states. A 2016 report produced in co-operation with the London School of Economics, entitled “Media coverage of the ‘refugee crisis’: a cross-European perspective”,<sup>368</sup> underlined the media’s role in framing public and political debate on the mass arrival of refugees and migrants and how they contribute significantly to shaping the public’s attitudes towards events.

Various academic and other studies have focused on the portrayal of refugees in the media and on how undue political influence, self-censorship in newsrooms and a prevailing lack of resources have hampered the preparation of in-depth, well-researched content. Two narratives on the migration story remain dominant: either highly emotional reporting of the plight of refugees and migrants as victims, focusing on tragic events and often underscored with dramatic images, or an emphasis on statistics and the potential threats that migrants can pose to the security, welfare and cultures of host communities. In both narratives, migrants and refugees emerge as a faceless mass of anonymous and unskilled outsiders, which contributes to perpetuating existing stereotypes and amplifying intolerant public and political discourse.

Increased training of journalists, promoting best practices on both sides of the Mediterranean and the use of glossaries to address the prevailing ignorance of the correct terminology to describe migrants, refugees, displaced persons and their rights, have all been proposed as possible solutions. While it is essential to properly equip and prepare journalists for the challenging task of evidence-based reporting on complex topics, it is equally vital to ensure that opportunities are provided to refugees and migrants themselves to express their views and communicate their concerns. Media as facilitators of public communication and discourse are widely viewed as key tools to managing the increasing diversity in society and promoting inclusion. This role cannot be fulfilled, however, when whole segments of the population are excluded from participating in media communication. This concerns a variety of marginalised groups, including recently arrived refugees and migrants, as well as, often, migrants with significant length of residence who still encounter important barriers in their media practices.

Thus far, media practices, communication needs and opportunities for participation and self-representation of recently arrived migrants and refugees remain insufficiently researched. A qualitative study commissioned by the Council of Europe in 2017 explores in more detail what role the media in general, and community media in particular, can play in response to the particular needs of refugees and migrants and with regard to their fundamental right to freedom of expression. The study comes to the conclusion that access to mainstream media for newcomers is difficult. Despite their significant share of the population in Europe, refugees and migrants are neither recognised as integral and relevant segments of the media audience with specific interests and needs, nor do they have adequate possibilities to develop an independent voice. Barriers are multiple, ranging from language skills to insufficient awareness of available media options, to the effects of an overall increasing fragmentation of public discourse.

Community media, with their long-lasting experience with multilingual and interactive formats, have since their inception in the 1980s become forums in which migrants have a highly active role. In recent years, many community media have developed proactive policies to involve newly arrived refugees and migrants in media production, and to strengthen their access to local networks of communication. Media makers and activists with a refugee or migrant background have played a key role in investigating and documenting alternative perspectives and providing important counter-narratives where mainstream media fail. In their efforts to promote media pluralism and diversity of content, Council of Europe member states should adequately support all sectors of the media: public, private and community-based. The latter can play a particularly important role in polarised societies in broadening access for all members of society to commonly shared communication spaces.

368. Georgiou M. and Zaborowski R. (2017), “Media coverage of the ‘refugee crisis’: a cross-European perspective”, Council of Europe report (DG1(2017)03) (<https://rm.coe.int/media-coverage-of-the-refugee-crisis-a-cross-european-perspective/16807338f7>).

# SOCIAL RIGHTS

## Chapter 5 – Inclusive societies

■ Sustained investment in the effective enjoyment of social rights remains essential today.

■ Continued high levels of unemployment, changes to the structure of salaried employment, the “Uberisation” of the economy, demographic changes and ageing populations, migration waves – all these significantly affect our institutionalised protection systems, including social protection provided by health insurance and old-age pensions.

■ These trends are compounded by the prolonged budget austerity in member states which causes reductions in the funding of public services. The ultimate consequence of all this is the absence or weakness of social institutions supposed to maintain the bonds between the individual and society. The breakdown of these bonds is feeding populism, which claims to offer a solution by “taking back control”.

■ Adjusting our social model in response to these trends and reinforcing social rights is thus more relevant today than ever before. Europe needs to change the narrative that sees a social model as an obstacle to competitiveness and economic growth. In order to do this, we need strong political commitment in our member states and support for the European normative framework.

■ The European Committee of Social Rights, the monitoring body of the European Social Charter, regularly highlights social rights violations and shortcomings through its conclusions and through its collective complaints mechanism. The effective implementation of the Charter and of the recommendations of the committee would help to ensure full respect of social rights, guaranteeing them in a reliable and sustainable way.

■ The “Turin process”, launched in October 2014 at a High-Level Conference on the European Social Charter, helped to reinforce the dialogue with the European Union on the judgments of the Court, the decisions of the European Committee of Social Rights and the European Union’s Social Rights Pillar.

### MEASUREMENT CRITERIA

- ▶ Domestic legislation prohibits discrimination in employment on any ground.
- ▶ Sufficient guarantees are enshrined in legislation and applied in practice to ensure equal rights between men and women, in particular as regards equal pay.
- ▶ Persons with disabilities are sufficiently integrated in mainstream education, the labour market and society in general.
- ▶ Domestic legislation provides an obligation of reasonable accommodation to ensure the access of persons with disabilities to education, the labour market and to an autonomous life.
- ▶ The ratification of the European Social Charter, the number of adopted key Charter provisions, the acceptance of the collective complaints procedure.
- ▶ The number of findings of non-conformity relating to the thematic group “employment, training and equal opportunities”.

### FINDINGS

■ In January 2018, the European Committee of Social Rights published its 2017 Conclusions<sup>369</sup> in respect of 33 State Parties<sup>370</sup> to the European Social Charter on the articles related to the thematic group “health, social security and social protection”.

369. European Committee of Social Rights, Annual conclusions for 2017 ([www.coe.int/en/web/portal/-/european-committee-of-social-rights-annual-conclusions-for-2017](http://www.coe.int/en/web/portal/-/european-committee-of-social-rights-annual-conclusions-for-2017)).

370. Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Republic of Moldova, Montenegro, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Spain, “the former Yugoslav Republic of Macedonia”, Turkey, Ukraine and the United Kingdom. The conclusions in respect of Greece, Iceland and Luxembourg will be issued later in 2018.

■ The 486 conclusions adopted in 2017 showed 175 situations of non-conformity and 228 situations of conformity with the provisions of the Charter. In 83 cases, the committee was unable to assess the situation due to a lack of sufficient information. Its conclusions are an indication that, in general, poverty levels in Europe are unacceptably high and that the measures taken by the member states are insufficient. Eight states (Belgium, Ireland, Italy, Latvia, Serbia, the Slovak Republic, Turkey and Ukraine) lack an adequate co-ordinated approach to combating poverty and social exclusion.

■ The committee found that a number of member states had failed to take necessary steps to address the high levels of infant and maternal mortality (Georgia, the Republic of Moldova, Romania, the Russian Federation and Turkey) and to reduce the high number of fatal accidents in the workplace (Bulgaria, Latvia, Lithuania, Malta, Portugal, Romania and Spain). The committee also found that certain categories of self-employed workers in Andorra, Germany, France, Hungary, the Republic of Moldova, Montenegro and Romania were not sufficiently covered by occupational health safety regulations.

■ The committee examined the measures taken by public authorities to address the demands on the competence and institutional capacity of labour inspection systems and found that in several member states (Belgium, Estonia, the Republic of Moldova, the Russian Federation and Turkey), the labour inspection system did not have sufficient resources to adequately monitor compliance with health and safety legislation.

■ As regards access to health care, the committee found that it was not sufficiently ensured owing to long waiting times (Poland, Albania), low public health-care expenditures (Albania, Azerbaijan, Latvia and Ukraine) and a high proportion of informal payments (Lithuania, Ukraine).

■ In many member states, the committee found that social security benefits, notably those related to unemployment and old age, remain below the poverty level, and that inadequate measures are taken against poverty and social exclusion in general. Unemployment benefits were of particular concern in terms of amounts, duration and conditions of payments.

■ The committee has examined 27 national situations with regard to the right to social and medical assistance and found that in 25 cases the requirements of the Charter had not been met (while the situation could not be assessed in two cases, due to a lack of sufficient information).

■ In a positive development, the committee found that a number of countries adopted measures and improved their legal framework to improve health and safety at work and to extend social security benefits related to health care and disability.

■ A number of countries (for example, Belgium, France, Poland, Spain, Turkey, Ukraine) introduced measures to combat poverty and exclusion, both through prevention and by accompanying people living in poverty and enhancing assistance to certain vulnerable categories.

■ In the framework of the collective complaints procedure, the committee, in the course of 2017, adopted several decisions relating, *inter alia*, to workers' rights affected by the austerity measures in Greece; the situation with respect to social housing standards in Ireland; access to mainstream education for children with intellectual and mental disabilities in Belgium; the situation in France with respect to reception, accommodation and care of foreign unaccompanied minors, and access for Roma children to education and vocational training in France. In most of these cases the respondent states have announced or are already taking measures to remedy the problems identified.

# EDUCATION AND CULTURE FOR DEMOCRACY

## Chapter 5 – Inclusive societies

All groups in society, including newly arrived persons, need to learn about, identify with and respect human rights, democracy and the rule of law. In this regard the development of competences for democratic culture, education for democratic citizenship and human rights education (EDC/HRE) and related awareness-raising activities are essential: not only do they make people aware of their rights and obligations and of the force and richness that diversity may bring, they also sensitise people to the discriminatory effects that their own actions can have, and help them to become aware of and put an end to patterns of unconscious and structural discrimination.

Enabling refugees to make use of the qualifications they already have, whether for work or further study, is important in reducing the pain of the refugee experience. Refugees who are given the opportunity to use and develop their competences can find motivation in spite of their very difficult situation. They will maintain and further develop their competences, which can benefit their host countries, as it will be of great importance to rebuilding their home countries if and when they are able to return home. The Council of Europe made efforts in this area in 2017, in cooperation with national and international partners.

- ▶ The adoption, in the framework of the Council of Europe/UNESCO Lisbon Recognition Convention (ETS No. 165), of a recommendation on recognition of qualifications held by refugees, displaced persons and persons in a refugee-like situation,<sup>371</sup> aiming to facilitate the recognition of qualifications that for good reason cannot be adequately documented.

- ▶ The development, together with the Hellenic Ministry of Education, Science and Religious Affairs and the national recognition centres (ENICs) of Greece, Italy, Norway and the United Kingdom, of a European Qualifications Passport for Refugees (EQPR).<sup>372</sup> The EQPR provides a tested methodology for assessing qualifications that cannot be fully documented, as well as a standard format to describe these qualifications in such a way that the assessment, once undertaken, can also be accepted in other countries if the refugee moves within Europe.

The education sector is not immune to the threat of corruption. This is why, along with targeted cooperation measures aiming at strengthening the legislative framework and the capacities of member states, the Council of Europe has set up ETINED, a network on Ethics, Transparency and Integrity in Education, aiming to help prevent corruption within the education sector. Its mandate is based on the assumption that issues regarding quality education and corruption can only be effectively addressed if all relevant sections of society commit fully to fundamental ethical principles for public and professional life, rather than relying only on top-down regulatory measures. ETINED is designed to exchange information and good practice on ethics, transparency and integrity in education, currently focusing on three main areas: combating education fraud, promoting integrity in higher education and supporting the effectiveness of ethical codes for the teaching profession.

371. Committee of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region, 14 November 2017 (<https://bit.ly/2uUW4cy>).

372. See [www.coe.int/en/web/education/recognition-of-refugees-qualifications](http://www.coe.int/en/web/education/recognition-of-refugees-qualifications).

## MEASUREMENT CRITERIA

- ▶ Strategies are put in place in member states for effective implementation of the Reference Framework of Competences for Democratic Culture.
- ▶ The Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education<sup>373</sup> is implemented; specific measures have been taken to increase the level of priority of education for democratic citizenship and human rights in education policies, with the appropriate status given at national level to ensure its place within the curriculum; a systematic, appropriate formal national assessment to measure the effective implementation of policies in the framework of education for democratic citizenship is introduced.
- ▶ There is a mandatory provision of education for democratic citizenship and human rights education, both online and offline, and reduced discrepancy in perceptions between government and civil society with respect to the effectiveness of this provision.
- ▶ Measures have been taken to ensure equal opportunities for access to education at all levels while paying particular attention to vulnerable groups, including migrants, refugees and people in refugee-like situations.
- ▶ Member states start using the European Qualifications Passport for Refugees and the toolkit promoting their linguistic integration.
- ▶ Skills for promoting social inclusion, valuing diversity and handling differences and conflict are part of initial teacher training, as well as of the ongoing teaching and learning process in schools.
- ▶ Appropriate infrastructure (museums, cinemas or live performance venues) and institutions are supported to encourage active cultural participation.
- ▶ Cultural policies promote participation in cultural life and in cultural activities (both online and offline) to enhance the sense of belonging, trust in society and its institutions and diversity in cultural institutions and industries.

## FINDINGS

— The Commissioner for Human Rights stressed the importance of inclusive education as a means to eradicate school segregation, a phenomenon which

373. Committee of Ministers Recommendation CM/Rec(2010)7 on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education (<https://bit.ly/2H7STTF>).

affects Roma children, children with disabilities, and children with a migrant background in particular.<sup>374</sup> He emphasised the need for inclusive education in multi-ethnic contexts,<sup>375</sup> called for measures to address ethnic segregation in public education, including the system of “two schools under one roof” and mono-ethnic schools,<sup>376</sup> and warned against the use, for instance, of a child’s religion as an admission criterion for state-funded schools.<sup>377</sup>

— The 2017 Report on the State of Citizenship and Human Rights Education in Europe<sup>378</sup> showed substantial differences in perceptions between governments and civil society organisations. In particular:

- ▶ only 17% of civil society respondents claimed that there was a shared definition of EDC/HRE in their countries, compared with 78% of government respondents;
- ▶ only 30% of civil society respondents are aware of any measures or activities planned to promote EDC/HRE in their countries, whereas 93% of government respondents report the existence of such measures;
- ▶ according to government respondents the priority given to EDC/HRE is generally high across different types and levels of engagement and support, but this perception was not shared by civil society respondents;<sup>379</sup>
- ▶ whereas government respondents considered that lack of support among education professionals, the media and the general public were the most important challenges to the promotion and development of EDC/HRE, civil society organisations pointed to the lack of priority among decision makers.

374. Commissioner for Human Rights (2017), “Fighting school segregation in Europe through inclusive education”, Position Paper.

375. See the Commissioner for Human Rights, Memorandum following the Commissioner’s mission to Kosovo\* from 5 to 9 February 2017 (CommDH(2017)9), 10 April 2017. All references to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo.

376. See, for instance, the Report of the Commissioner for Human Rights following his visit to Bosnia and Herzegovina (CommDH(2017)28), 7 November 2017 (<https://bit.ly/2zrzkBb>).

377. See, for instance, the Commissioner for Human Rights report following his visit to Ireland (CommDH(2017)8), 29 March 2017 (<https://bit.ly/2EgZfKZ>).

378. See <https://bit.ly/2qf05TE>.

379. In particular, respondents considered that priority is given to EDC/HRE to “a fair or to a large extent” as follows: at the national government level (96% for government respondents and 29% for civil society respondents), at education institution level (91% for government respondents and 33% for civil society respondents), to supporting training about EDC/HRE for teachers and school heads (88% for government respondents and 41% for civil society respondents).

■ According to analyses carried out by the Indicator Framework on Culture and Democracy (IFCD) in 2017,<sup>380</sup> where people are more involved in cultural life, especially by creating or performing art and participating in cultural activities, confidence in political institutions such as parliaments, government and the judiciary tends to be higher. Trust in the governing system goes along with individuals' feelings of security, which might free people to participate in cultural activities and create. Moreover, participation

in cultural life strengthens an individual's feeling of belonging to the system, and thus engenders greater trust in its institutions. Participation in cultural life thrives under conditions of what could be called "good governance". Analysis of the IFCD data in 2017 shows that levels of cultural participation are higher where judicial impartiality and independence, the quality of the legal system, transparency, and government checks and balances are stronger.

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380. Based on analysis of the data from the Indicator Framework for Culture and Democracy created by the Hertie School of Governance for the Council of Europe in 2017, see [www.coe.int/en/web/culture-and-heritage/indicators-culture-and-democracy](http://www.coe.int/en/web/culture-and-heritage/indicators-culture-and-democracy).



# ENGAGING YOUNG PEOPLE

## Chapter 5 – Inclusive societies

**Y**oung people struggle to access their rights and are often prevented from enjoying the autonomy required to participate in and fully contribute to society. Long-considered to be an essential building block for the health of democracies, youth participation must be protected from threats to participatory democracy in the form of laws, tax regulations and other measures that restrict, *inter alia*, youth organisations' activity and their right to freedom of assembly and association.

— The risks of youth disengagement are considerable. The sustainability of society relies on the creativity, dynamism, social commitment and competences of young people, as well as on their confidence in the future. Government policies must support young people in realising their full potential, enabling them to develop life plans and exercise their right to democratic citizenship.

— Youth policy that facilitates access to rights therefore remains at the heart of both national and Council of Europe efforts for and with young people, ensuring that the younger members of society know their rights, and that legal, political and social barriers to their full enjoyment are removed.

— The recommendations of the Committee of Ministers on youth issues (CM/Rec(2015)3 on access of young people from disadvantaged neighbourhoods to social rights, and CM/Rec(2016)7 on young people's access to rights) have enabled the Council of Europe to play a more active role in this field. In March 2017, a road map was adopted to facilitate the swift implementation of these standards by member states, in co-operation with youth organisations and the Council of Europe.

— Successful youth policies fully integrate young people, individually or through youth organisations and national youth councils, in the design, implementation and monitoring of policies and practices, and with their full participation in genuine decision

making. Independent national youth councils, in particular, can actively contribute to and add value to the development of public youth policy.<sup>381</sup> Their development – or their creation where they do not exist – should be facilitated.

— The adoption in 2017 of a Committee of Ministers recommendation on youth work<sup>382</sup> underlines the significance of youth work in helping young people understand and commit to human rights and democratic values, and in providing alternatives to nationalist populism and violent extremism. Quality youth work provision, as an integral part of youth policies, is needed to ensure “a lost generation of disillusioned and disengaged young people” (as the recommendation states) is not the price to pay for the challenges of our time, such as increasing unemployment, poverty, discrimination and social exclusion. A road map to support the implementation of this recommendation in member states was adopted in 2017. Flexible youth policy advice measures will help member states to adapt their policies and introduce new measures to help young people find their way in our complex and volatile environment. A youth policy self-assessment tool and other assistance to self-paced development are being offered to institutions.

— Young refugees and migrants – many of whom have fled from armed conflicts and other grave hardships – are particularly vulnerable, even more so when they lose the protection offered by the UN Convention on the Rights of the Child at the age of 18. A new Committee of Ministers recommendation is being drafted to help support these young people in their transition from childhood to adulthood.

381. See Committee of Ministers Recommendation Rec(2006)1 on the role of national youth councils in youth policy development.

382. See Committee of Ministers Recommendation CM/Rec(2017)4 on youth work.

Young people are at the forefront of many political and social movements and they are courted by both traditional and emerging political players. While opinion polls confirm their growing distrust and suspicion in political systems, some commentators argue that “as young people disengage from these ‘traditional’ forms of participation, they are finding ‘alternative’ or ‘innovative’ forms of participation to replace them”.<sup>383</sup>

## MEASUREMENT CRITERIA

- ▶ Youth policy aims to provide young people with equal opportunities and experience which enable them to develop knowledge, skills and competences to play a full part in all aspects of society (Agenda 2020).
- ▶ National youth policies implement quality outcomes consistent with Committee of Ministers Recommendations CM/Rec(2015)3 on access of young people from disadvantaged neighbourhoods to social rights, CM/Rec(2016)7 on young people’s access to rights, and CM/Rec(2017)4 on youth work.<sup>384</sup>
- ▶ Appropriate structures and mechanisms are established and supported at local, regional and national levels to enable the active participation of young people.
- ▶ The Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education is implemented in non-formal education with young people.
- ▶ Young human rights activists are trained to sustainably promote action against hate speech.
- ▶ Youth policy has a special focus on supporting the integration of excluded young people and supporting young people’s autonomy.

- ▶ The prevention and counteraction of all forms of racism and discrimination on any ground constitute a clear priority of youth policy.
- ▶ Practical measures and tools are established to enable as many young people as possible to have access to non-formal education and youth work, as a means of facilitating their autonomy and transition from childhood to adulthood and from education to employment.

## FINDINGS

The implementation of national youth policies or the enforcement of relevant legal instruments, including Council of Europe recommendations, is not overseen by monitoring mechanisms. However, evidence-based youth research is carried out on relevant subjects and projects implemented at national and local levels.

“New and innovative forms of youth participation in decision-making processes”,<sup>385</sup> a study commissioned by the Council of Europe suggests that both traditional (youth councils and forums) and more innovative forms of youth participation “are facing barriers in terms of young people’s views being taken into account by public bodies. Barriers include lack of funds and resources, lack of political support and lack of understanding by public authorities”. The study indicated that participatory spaces where people, including young people, can come together with decision makers are scarce, and stressed the need for public authorities at all levels to develop strategic approaches to promote and implement youth participation practice as a part of good governance.

Accompanying and supporting young people in their transition to adulthood requires qualified and competent youth and social workers. Anti-corruption education at all levels is also an effective preventive tool. However, less than half of the member states have quality assurance or competency frameworks in place.<sup>386</sup>

383. Crowley A. and Moxon D. (2017), “New and innovative forms of youth participation in decision-making processes”, Council of Europe Publishing, Strasbourg (<https://bit.ly/2xKKhcY>).

384. See Committee of Ministers Recommendation CM/Rec(2017)4, op. cit.

385. See Crowley and Moxon (2017), op. cit.

386. See Sousa M., Valcheva V., Cairns D. and O’Donovan J. (2017), “Mapping Educational Paths of Youth Workers and Gathering Knowledge on Youth Work”, preliminary study commissioned by the partnership between the European Union and the Council of Europe in the field of youth.

## Fighting corruption in sport

Despite major efforts undertaken by the sports movement (and the Olympic movement in particular) to promote good governance, sport remains vulnerable to corrupt practices. In recent years, the exposure of corruption in sport has reached historically high levels. Officials of international and national sports organisations have been in the spotlight of investigations into money laundering, collusion, bribery, vote-buying in bidding processes, tax evasion and financial malpractice. Coaches, referees and athletes have been charged for match fixing. Public officials, political figures and institutions appear linked to sport-related scandals. These breaches of the rule of law seriously undermine the confidence of society in sports organisations and tournaments. Moreover, the commercialisation of sports, the evolution of technologies and the resulting phenomenal growth of the betting market have outpaced the structural development capacity of sports organisations. The combination of sport and anti-corruption expertise is one of the main assets of Council of Europe action in this area.

One of the obstacles in the fight against corruption in sport is that private corruption is often not seen as a priority. Even where provisions on private corruption exist, they are sometimes focused on business activities, with the result that sports organisations, which are established as non-profit associations, do not always fall under the applicable law. GRECO has conducted a typology study<sup>387</sup> which highlighted shortcomings and contributes to filling these gaps.

With the adoption of the Council of Europe Convention on the Manipulation of Sports Competitions (CETS No. 215, Macolin Convention) in 2014, Europe made a quantum leap in the fight against corruption. The convention promotes a risk- and evidence-based approach and sets standards and principles in order to prevent, detect and sanction the manipulation of sports competitions. To achieve this, the convention requires the setting up of national co-ordination platforms involving public authorities, sports organisations and sports betting operators. The network of national platforms created by the Council of Europe in 2016 is already fundamental for the prevention and response to the manipulation of sports competitions, in spite of the fact that the convention has not yet entered into force (due to political and procedural controversies within EU bodies which currently prevents the ratification by EU member states).

A database of alleged cases of corruption in sport reported by the media was set up in 2016. Over 300 cases reported in 2016 and 2017 are being analysed by the Council of Europe to identify trends and risk factors that can help to shape policies. The objective is also to monitor the responses provided by the organisations and authorities concerned. A recommendation of the Committee of Ministers on the promotion of good governance in sport is in preparation and co-operation projects supporting countries and sports organisations involved in reforming sports governance are ongoing.

On the global stage, the Council of Europe, together with the United Kingdom Government, the Organisation for Economic Co-operation and Development (OECD) and the International Olympic Committee (IOC), is setting up an International Partnership against Corruption in Sport (IPACS), bringing together international sports organisations, governments and other intergovernmental organisations to deal with the problem and agree on common standards and requirements (for instance, mandate limits, financial transparency and conflicts of interest). GRECO will actively participate in the work of IPACS on mitigating risks and managing conflicts of interest in the selection of major sports events. GRECO may also be available to evaluate the integrity and governance frameworks of international sports organisations, if so requested. Within the UNESCO Kazan Action Plan, the Council of Europe is co-ordinating the development of guidelines on integrity in sport to tackle problems including doping, match fixing, sexual harassment and abuse, and spectator violence.

387. GRECO, "Summary analysis of selected private sector bribery cases", 20 September 2017 (Greco-Inf(2017)2 (<http://bit.ly/2K7j1Mw>)).

This is the fifth annual report of the Secretary General of the Council of Europe on the state of democracy, human rights and the rule of law in Europe. As with previous reports, the five chapters look at the key building blocks of democratic security: efficient, impartial and independent judiciaries; freedom of expression; freedom of assembly and freedom of association; democratic institutions; and inclusive societies.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.