

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

## Populism – How strong are Europe's checks and balances?

*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**  
127th Session of the  
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Nicosia, 19 May 2017

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## Populism – How strong are Europe's checks and balances?

*Report by the Secretary General  
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2017

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est-il suffisamment puissant en  
Europe ?*

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# FOREWORD

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**Thorbjørn Jagland**

Secretary General of the Council of Europe

**H**ow resilient are Europe's democracies? Each day millions of Europeans exercise their civil liberties, from participating in elections to practising free speech and enjoying the benefits of living in societies governed by the rule of law. Europe remains, in many parts of the world, a beacon of democratic progress.

■ Yet all is not well in our democracies. Our history obliges us to heed the illiberal swerve being witnessed in a range of states.

■ Since the Second World War, Europe's nations have worked to build constitutional, parliamentary systems which protect individuals and minorities from arbitrary power. We have come to understand that democracy is by definition pluralist and that giving citizens the right to be different and to criticise authority makes our countries more stable, not less. In this way, Europe has turned a page on its oppressive past.

■ Today, however, many of our societies appear less protective of their pluralism and more accepting of populism. By populist I mean those political forces which appeal to widespread public grievances while seeking to exclude other voices. We should be precise: populism is not a catch-all label for every person or movement which rocks the establishment; misusing the term will only render it meaningless. Rather, it describes those who invoke the proclaimed will of "the people" in order to stifle opposition and dismantle checks and balances which stand in their way.

■ Most concerning are the instances of governments openly challenging constitutional constraints and disregarding their international obligations to uphold human rights. Attempts are made to justify such actions on the basis that they serve the majority population. Those who oppose are discredited and undermined, including political opponents, journalists and judges.

■ In other states the populist tendency is less advanced, but they are heading down an extremely worrying path. In a growing number of countries, nationalist and xenophobic parties are making gains by challenging elites and exploiting public anxieties over migration. Fearful of losing ground, established politicians are responding by toughening up their stances on issues such as asylum and law and order.

■ The result is a race to the bottom in which the mainstream and the margins compete for support with increasingly hard-line policies and rhetoric. In their attempts to please the masses, these parties collude in stoking intolerance and damaging community relations, with Muslims suffering most. As they chase each other, they risk dragging their societies further away from a more consensual and inclusive political culture in which all sides respect democratic norms. Balanced discussion gives way to polarised, us-versus-them polemic, making it harder for members of a society to find common ground.

■ In all these cases we see international institutions denigrated in order to court nationalist sentiment. The central charge is that international organisations, courts and treaties rob "the people" of their sovereignty, including the European Convention on Human Rights. In reality, states freely elect to be part of these arrangements because co-operation and shared standards clearly advance national interests. Yet the compelling case for internationalism is obscured in many national debates.

■ When we take these trends together and see the febrile political climate they create, the risk becomes clear: yes, our democracies can go backwards. We must actively resist the drift towards a Europe where populism becomes tolerable and commonplace.

■ To this end, this report helps Europe's democracies measure their resilience and strengthen their defences against populist attack.

■ We cannot blame our populist problems exclusively on the most incendiary leaders or parties, nor simply on the rise of fake news. Their actions are deeply irresponsible and it is true that many exploit the internet to spread misinformation. But they thrive most easily where people have lost trust in their governments, parliaments and courts; where critical journalism and NGOs already struggle to be heard; where minorities have not been integrated into wider society; and where large numbers of citizens feel deprived of opportunities.

■ Such weaknesses can be found across Europe and, in some cases, have steadily worsened in recent years. It is time for Council of Europe member states to take a serious look in the mirror. Only our own governments can take the lead in building trusted institutions and inclusive societies able to withstand populist assaults.

■ The Council of Europe is determined to help its members grasp this challenge. This report sets out how we can support states to establish more efficient and independent judiciaries which are less vulnerable to political intrusion; strengthen national parliaments and constitutions as vital checks on the executive; enable media that are raucous and diverse and civil society that is vibrant and uninhibited; and manage migration and diversity in ways which foster respect, while guaranteeing social rights for all citizens.

■ Only when these democratic pillars stand firm can we feel more confident about Europe's ability to weather a populist storm. Responsible politicians will relish the challenge. They should also recommit to the European Convention on Human Rights.

■ The Convention was agreed, following the great conflicts of the mid-20th century, to protect Europe from a resurgence of dangerous populism. At that time it was clear that the only way to avert future upheaval was to safeguard fundamental freedoms and entrench the rule of law. The Convention's founding fathers understood that our best security policy is one which stops our societies from descending into xenophobia, aggressive nationalism and disregard for democratic institutions. Such unravelling invariably leads to tensions within and between nations and, in the worst cases, war.

■ Today's leaders should recall this wisdom, resisting the quick gains of populist politics and investing instead in a human rights-based security policy. The Convention remains the ultimate backstop for our democracies, preventing a slide towards a more antagonistic and chauvinistic Europe. Our shared standards are a means of resolving disputes and building bridges, whether between governments or communities. The present populist upsurge is serious but not unstoppable and the politics of reason and openness retain much appeal. Rather than accepting and attempting to benefit from rising tensions and confrontation, political leaders should seek common ground and co-operation. If they do, they will find that much more unites their people and nations than they could ever imagine.



**Thorbjørn Jagland**

Secretary General of the Council of Europe

# WHAT IS POPULISM?

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**P**opulism has become a fashionable term. It is increasingly used as a catch-all label for political forces and events which challenge the status quo, and as an insult to discredit a wide range of political actors.

■ This overuse is problematic: using populism too widely dilutes its meaning, making it difficult to identify the real populist threat facing our democracies. It is important to be precise about what does and does not constitute populism.

■ While it has many different forms, populist acts, individuals and movements display some common characteristics. They tend to be anti-establishment, respond to widespread public grievances and appeal to emotions.

■ So, however, do most politicians. Real populism goes one step further: invoking the will of “the people” in order to put itself above democratic institutions and overcome obstacles which stand in its way.

■ The people are presented as a single, monolithic entity with one coherent view. By claiming exclusive moral authority to act on their behalf, populism seeks to delegitimise all other opposition and courses of action.

All actions are justified on the basis of this exclusive moral authority.

■ Populism damages democracy by:

- ▶ limiting debate, delegitimising dissent and reducing political pluralism;
- ▶ dismantling democratic checks and balances, including the rule of law, parliamentary authority, free media and civil society;
- ▶ undermining individual human rights and minority protection;
- ▶ challenging international checks on unrestrained state power.

■ The resurgence of populist politics is a particularly worrying development in Europe, given the historical context. Since the middle of the 20th century it has become broadly accepted that constitutional and parliamentary democratic systems are necessary to restrain the notion of absolute sovereignty of the people. The consensus has been that pluralism, inclusive debate and the protection of minority interests against aggressive majoritarianism are essential for maintaining stable societies and democratic security.

# GUIDE TO THE REPORT

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**T**his is the fourth annual report of the Secretary General 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.

■ The report’s analysis of Council of Europe member states’ strengths and weaknesses in these areas can be used to assess their resilience to the challenges posed by populism.

■ Each chapter is broken down into parameters and measurement criteria. The methodology and the overall structure of the report remain unchanged from

last year. Some of the parameters have been updated and, 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.

■ 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.



# KEY FINDINGS

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## How efficient, impartial and independent are Europe's judiciaries?

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Despite the fact that most Council of Europe member states have adopted legislation to ensure judicial independence and impartiality, in compliance with Council of Europe standards, problems remain in the way these standards are applied, leaving national judiciaries open to political influence and fuelling public perceptions of interference in the judicial process and bias among individual judges. In most cases the challenge is one of implementation and mindset, with rules on independence not being sufficiently respected by the wider legal community and political actors.

Excessive length of proceedings continues to generate a large number of applications to the European Court of Human Rights, accounting for over 10% of found violations in 2016. It is important to note that there have been some positive developments. The efficiency of court proceedings has progressively improved in recent years in the member states, notably due to investments in staffing and infrastructure available to courts. There has also been improvement in the ability of national courts to process cases, with 38 member states now achieving a clearance rate of over 95% for criminal cases.

Legal certainty continues to be an issue in several member states. This is due either to retroactive application of legislation, in particular in the criminal field, or to the inconsistent or imprecise practice of domestic courts, posing a risk of arbitrariness or of individuals being unable to foresee the consequences of their actions.

## How robust is freedom of expression across member states?

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Recent years have seen a decline in protections for journalists. This trend continues. Twenty-eight member states do not sufficiently protect journalists against violence and threats. In 17 member states conditions which were previously considered satisfactory are now threatened by increasing reports of physical attacks and threats. In 2016, the Council of Europe's Platform to promote the protection of journalism and safety of journalists recorded 133 cases of alleged threats in 29 member states.

Some 36 member states still consider some form of defamation a criminal offence and in 29 member states it can be sanctioned by imprisonment. The arbitrary application of criminal law to limit freedom of expression remains problematic in over half of our member states. Most member states are experiencing a decline in editorial independence, hindering the watchdog role of the media and limiting plurality. The majority do not have sufficiently strong regulatory safeguards in place to ensure independence and media are often used by politicians, the government, commercial and private powers to reinforce particular political and economic agendas.

These trends are having a chilling effect on media freedom and undermining pluralism. There is evidence of increased self-censorship, exacerbated in some states by job insecurity, with parts of the media industry under significant financial pressure.

The rise of fake news is of major concern for Council of Europe member states, including the mass dissemination of deliberately misleading information online and its impact on the political process and community relations.

## How well protected are the rights to freedom of assembly and association?

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Opportunities for peaceful protest are limited where public assemblies are subject to undue restrictions, including in countries with long-standing democratic traditions. This problem has been exacerbated by measures taken in connection with the fight against terrorism. There are examples of NGOs, protesters and other

civil society groups being required to seek *de facto* authorisation for public gatherings. This is incompatible with Council of Europe standards.

■ In most member states, the rights to freedom of assembly and association necessary for a vibrant civil society as an essential check on power, are guaranteed by law, in compliance with Council of Europe standards. However, significant challenges persist in terms of the implementation of these laws.

■ In some countries, NGOs are effectively prevented from carrying out their work by legal and regulatory obstacles to their creation, activities and funding, including cumbersome and lengthy registration procedures, excessive administrative requirements and obstacles to accessing financial resources, particularly foreign funding.

■ In the last few years a few countries have seen a continuous deterioration in the environment in which NGOs operate, through stigmatisation, smear campaigns and judicial, administrative or fiscal harassment. The NGOs targeted are mostly those active in the field of human rights protection, promoting accountable governance or fighting corruption. Some national laws provide for the blanket de-registration of NGOs, their dissolution or their qualification as “undesirable”.

## How well are member states’ democratic institutions functioning?

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■ The 2016 political climate was characterised by increased populist rhetoric in political discourse accompanied, sometimes, by growing electoral support for political parties or movements expressing populist views.

■ In several member states, the primacy of international law over national law has been challenged, leading to *de facto* questioning of the application of judgments of the European Court of Human Rights in the domestic legal systems.

■ Surveillance of citizens by state security services poses growing problems for the protection of human rights. While some degree of surveillance is necessary to ensure security, notably in the fight against terrorism, it must be proportionate and subject to appropriate democratic oversight. The European Court of Human Rights is dealing with a growing number of cases in which national legislation is challenged for insufficient human rights safeguards.

■ Elections held in Europe in 2016 were broadly considered to have been conducted in line with formal democratic standards. In a few countries, there were reports on issues such as unequal access to media for electoral candidates, disrespect for campaign financial regulations, lack of effective sanctions for electoral violations and inaccuracy of voters’ lists.

■ Across Council of Europe member states the integrity of the electoral processes is facing new challenges, notably through the use of new information technologies. A growing number of member states have experienced or fear an increase in targeted misinformation on the internet during electoral periods and referendum campaigns, as well as cyberattacks and the hacking of their electoral systems.

■ Decentralisation reforms continued in 2016, notably in south-eastern, eastern and southern Europe, however the inadequacy of resources available to local authorities to exercise their powers remains a recurring problem in most member states.

## How inclusive are Europe’s societies?

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■ Comprehensive anti-discrimination laws are required to combat racism, discrimination and intolerance, yet significant legislative and institutional gaps remain in the majority of Council of Europe member states.

■ Several countries lack an independent complaints body capable of dealing with allegations of discrimination in both the private and public sectors. Where there is a specialised body to combat discrimination, it is often dysfunctional or lacks independence, authority or a clear mandate.

■ In 2016 the European Committee of Social Rights found 166 cases of non-conformity with the revised Social Charter – out of 516 cases examined in 34 member states. Its conclusions pointed to serious weaknesses in protection against discrimination on employment, insufficient integration of persons with disabilities into mainstream education and the labour market and weak guarantees of equal rights between men and women in particular with regard to equal pay. The number of collective complaints to the committee more than tripled to 21, compared to six complaints in 2015. Issues raised concerned the right to work, the gender pay gap, the right to equal opportunities and treatment in employment and occupation without gender discrimination.

■ Managing mass migration while respecting human rights obligations is proving to be a major challenge. In many instances, migrants, particularly irregularly present migrants, have had their basic rights denied or curtailed. Some member states have closed their borders with refugee-generating countries. The principle of *non-refoulement* is not always respected. Some member states have responded to the mass arrivals of refugees and migrants by resorting to the wide use of administrative detention.

■ Praiseworthy efforts have been made in Turkey, Italy, Greece, “the former Yugoslav Republic of Macedonia” and other member states to provide migrants amassed in border areas or cities with proper accommodation. However, living conditions in many official camps remain below standard, while refugees and migrants outside the formal accommodation system often receive very little care, if any at all.

■ There are grave concerns about the treatment of the high number of unaccompanied minors. Many refugee and migrant children receive no or inadequate education; many are at risk of trafficking, abuse and exploitation.

■ Hate speech has been identified as prevalent across many member states. Most member states now have legislation against incitement to hate speech in criminal law. However, such provisions are rarely invoked in practice, often because they are difficult to apply or because prosecutors and judges lack expertise.

■ Anti-Muslim hate speech on social networks has reached unprecedented levels. Individual Muslims are attacked and verbally abused. The vilification of Muslims and their religion has become a part of the mainstream public discourse in some countries.

# PROPOSALS FOR ACTION

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The Council of Europe, with the active support of its 47 member states, can play a constructive role in reversing negative trends in Europe's democracies in order to enhance their resilience to populism.

■ Collective action is needed on three fronts.

■ First, in these highly challenging times for Europe and the Convention system, member states should take an active stand in upholding the standards and values of the European Convention on Human Rights (hereafter "the Convention"), and in particular supporting the European Court of Human Rights (hereafter "the Court"). The Court's timely and efficient handling of priority cases is essential, as is the expeditious execution of judgments by member states.

■ Second, all previous reports from the Secretary General have included recommendations aimed at strengthening member states' democratic institutions and practices: independent judiciaries, free media, vibrant civil society, functioning democratic institutions and inclusive societies. In this report, particular attention has been paid to areas where worrying decline has been identified.

■ Important progress has been made. However, implementing these recommendations, many of which address the functioning of states' institutions, requires a continuous effort. As new and additional steps are taken it is therefore equally important that the application of the key recommendations included in the 2014, 2015 and 2016 reports is accelerated and consolidated, notably through:

- ▶ vigorous implementation of the Council of Europe Action Plan on the Independence and Impartiality of the Judiciary;
- ▶ a zero-tolerance approach to all forms of xenophobia and discrimination;
- ▶ sustained support for the Council of Europe Platform to promote the protection of journalism and safety of journalists, including with regard to following up alerts;
- ▶ protecting minority rights, including through the successful implementation of the Thematic Action Plan on the Inclusion of Roma and Travellers (2016-2019);
- ▶ safeguarding social rights as guaranteed by the European Social Charter, as well as in the conclusions and decisions of the European Committee on Social Rights (ECSR);
- ▶ strengthening the exercise of freedom of assembly and freedom of association in national legislation and practice.

■ Third, this report reveals a number of specific problems which should be expressly addressed in the 2018-2019 Programme and Budget, as well as through the following actions.

## Support integration and inclusive societies

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■ The Europe-wide project on democratic citizenship education should be implemented as a priority. Other initiatives outlined in the Council of Europe Action Plan on Building Inclusive Societies will also be actively implemented.

## Challenge the populist narrative

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■ The Parliamentary Assembly should initiate a broad political consultation at European level, including with the European Parliament, on how to respond to the populist challenge to democracy. National delegations should be encouraged to set the issue high on the agenda in their respective parliaments.

■ The Congress of Local and Regional Authorities will focus on the issue of populism during the European Local Democracy Week (16 to 20 October 2017) which involves events in over 120 municipalities in 30 member states.

■ The International Ombudsman Institute, in co-operation with local partners, will organise an event entitled “Populism, regression of rights and the role of the ombudsperson” in Barcelona in April 2017. Similar events should be organised throughout Europe in 2017 and 2018 at the initiative of national human rights institutions and in co-operation with the Council of Europe.

### **Protect freedom of expression and tackle misinformation**

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■ In 2017, at the initiative of the Secretary General, the Council of Europe will bring together the 10 partner organisations of the Platform to promote the protection of journalism and safety of journalists in an effort to identify possible solutions to the difficulties faced by journalism today and the fake news phenomenon. Major internet companies will also be included in the dialogue as far as fake news is concerned. The recommendations put forward in these discussions will be reflected in the Council of Europe’s activities.

### **Support the successful integration of migrants and refugees**

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■ Activities of the Secretary General’s Special Representative on Migration should be vigorously supported, in particular the new Action Plan on Migrant Children to be adopted at the Council of Europe ministerial meeting in Nicosia in May.

### **Combat hate speech, xenophobia and discrimination**

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■ Based on the judgments of the Court and the findings of the ECSR and the European Commission against Racism and Intolerance (ECRI), as well as the work of the Intercultural Cities Network, the Council of Europe will initiate new Europe-wide projects to help combat xenophobia and discrimination with a particular focus on Islamophobia, in co-operation with relevant non-governmental organisations, equality bodies and national human rights institutions.

■ Country-specific activities, based notably on the findings of ECRI and the No Hate Speech Movement, will be developed to tackle the most extreme forms of hate speech through criminal law and promote additional measures that are needed to eradicate hate speech, such as greater self-regulation by the media and the internet industry.



# CHAPTER 1

## EFFICIENT, IMPARTIAL AND INDEPENDENT JUDICIARIES





# INTRODUCTION

## Chapter 1 – Efficient, impartial and independent judiciaries

**E**fficient, impartial and independent judiciaries are the cornerstone of any functioning system of democratic checks and balances. They are the means by which powerful interests are restrained, according to the laws of the land. They guarantee that all individuals, irrespective of their backgrounds, are treated equally before those laws.

Such judiciaries are an obstruction to populism. This is as a result of their refusal to bow to political whims, as well as their willingness to assert the rule of law against political agendas which would otherwise trample it.

It should therefore come as no surprise that undermining the judiciary is on page one of the populist playbook. Many politicians may find themselves frustrated by judicial decisions. Often, when this occurs, they blame the law in question and seek legislative reform. The populist response, on the other hand, is to blame the courts themselves.

Either the system is declared defunct or individual judges are portrayed as out-of-touch, self-serving and even corrupt. Such criticisms pave the way for political acts which circumvent the established legal order and for reforms which weaken judicial authority and enable greater political influence.

The judicial systems that are best able to withstand populist attacks are those which exhibit high levels of independence and impartiality – at both the systemic and individual levels – and which command solid public trust.

Constitutional and legal guarantees of independence are essential, but alone they are not sufficient. It is equally important to foster a judicial culture in which autonomy and integrity are highly valued.

All those serving in the judicial arm of the state must be steadfast in their commitment to legality. Disputes must be handled efficiently. The law must be administered in ways which are proportionate and

predictable. Ultimately, no public authority or vested interest can operate above the law.

In this year's report judicial independence and impartiality are examined in greater depth. Where relevant, the report's measurement criteria have been updated to reflect developments in the Organisation's standards, for example in light of the new Venice Commission Rule of Law Checklist.<sup>1</sup>

The year 2016 saw the adoption by the Committee of Ministers of the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality.<sup>2</sup> This was one of the recommendations the Secretary General put forward in his second annual report. Through the action plan, the Council of Europe places judicial reform among its top priorities, working with member states to strengthen their judicial independence and impartiality.

The action plan identifies the characteristics of judicial systems which serve the needs of everyone and command the confidence of the public. It also sets out the reforms and improvements member states must pursue in order to meet these standards. Most of the international standards now considered to be benchmarks for independent, efficient and accountable judicial systems were developed by the Council of Europe. The action plan encapsulates these standards, focusing on safeguarding and strengthening the judiciary in its relations with the executive and legislature, protecting the independence of individual judges and ensuring their impartiality, and reinforcing the independence of the prosecution service.

Prior to the preparation of the action plan, a review was carried out by the Council of Europe of the follow-up action taken by member states

1. Venice Commission Rule of Law Checklist, CDL-AD(2016)007.  
2. Council of Europe [Plan of Action](#) on Strengthening Judicial Independence and Impartiality; CM(2016)36 final.

to Committee of Ministers Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities.<sup>3</sup> This too had its origin in the Secretary General's second annual report and was aimed at taking stock of the implementation of a recommendation that has become a reference point for the work and status of judges within European judicial systems, and at identifying the key challenges specifically in the areas of independence and impartiality. The Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE), representing the points of view of serving judges and prosecutors from all over Europe, also drew up a comprehensive review of challenges to judicial independence and impartiality.<sup>4</sup>

■ Their findings confirm that while the regulatory and institutional frameworks in member states mostly comply with the Council of Europe standards for judicial independence and impartiality, the real challenges lie in implementation. Formal legal guarantees are essential, but they do not in themselves guarantee that judicial independence and impartiality are enjoyed in practice. The Secretary General considers it a priority to examine this phenomenon more carefully so that the situation can improve in those countries where there is still a gap between the legal and constitutional framework and the situation in practice.

■ By addressing openly the functioning of the judicial system and proactively ensuring access to it for all those in need, including the most vulnerable, member states can foster public confidence in the functioning of the judiciary and in the state as a guarantor of human rights and the rule of law. Drastic measures to restore the integrity of the judiciary, such as the vetting of all judges, require utmost caution. Such systemic steps should only be considered as a last resort.

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3. Cf. CDCJ(2016)2. See also [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805afb78](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805afb78).

4. Information document "Challenges for independence and impartiality in the member states of the Council of Europe", 24 March 2016. See SG/Inf(2016)3rev.

# JUDICIAL INDEPENDENCE

## Chapter 1 – Efficient, impartial and independent judiciaries

**T**he experience of Council of Europe member states shows that the right laws and structures are key to judicial independence, but alone they are not sufficient. Proper checks and balances are needed to ensure a separation of powers between the judiciary and other branches of power, and, just as crucial is a culture of independence and impartiality. This becomes especially important when judges are called upon to adjudicate in cases involving the protection of individual human rights with regard to actions by the state.

Findings of the case law of the European Court of Human Rights, the exchanges the Council of Europe had with members of national judiciaries and testimonies from bodies responsible for managing the careers of judges in the member states, confirm that fostering and sustaining a culture of independence among judges remain real and concrete challenges.

Judges themselves must understand and accept that it is not just their privilege but their responsibility to deliver justice independently, making impartial decisions based solely on fact and law.

Other professional groups working with and within the judicial system must also contribute to this aim by respecting the authority of the courts and abstaining from any attempts to influence judges' decisions. Where they do not, effective sanctions should exist. The media can indirectly encourage judicial independence through unbiased, professional coverage of matters related to, or examined by, the judiciary.

The role of judges is to interpret the law and to reach a decision following a fair consideration of the issues.<sup>5</sup> This is a demanding task and judges must, in addition to legal knowledge, have the necessary training and professional experience, personal integrity and intellectual confidence to issue a just and fair decision in the cases brought before them.

The European Commission for the Efficiency of Justice (CEPEJ) has noted that the recruitment of judges in member states appears to be well anchored in national constitutional and legislative frameworks that integrate the applicable European standards.<sup>6</sup> This

is the case as regards the criteria determining access to the profession, the guarantees of independence concerning the recruitment authorities, the procedure, and the role of any high council for the judiciary or similar body.

The certainty that a judge will hold office until the age of retirement, except in cases of disciplinary incident or health problems, constitutes for them a guarantee of independence in line with European standards, and almost all member states safeguard this by law. However, it should be ensured that these provisions are effectively implemented and that a judge cannot be transferred in a discretionary manner without their consent.<sup>7</sup>

The institutional context of the prosecution service and particularly its relations with the executive vary among member states. However, the principle of functional independence of prosecutors is emerging as an essential guarantee, accompanied by a trend towards harmonisation of national law along this line.<sup>8</sup>

## 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 with sufficient funds to carry out its functions and it decides how these funds are allocated.
- ▶ More than half of the judicial council is composed of judges who are chosen by their peers.

5. Committee of Ministers Recommendation on judges: independence, efficiency and responsibilities, CM/Rec(2010)12 paragraph 31.

6. "European judicial systems – Efficiency and quality of justice", by the European Commission for the Efficiency of Justice (CEPEJ), Edition 2016 (2014 data).

7. Ibid.

8. Ibid.

## 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.

## FINDINGS

With the adoption of the Action Plan on Strengthening Judicial Independence and Impartiality, the Council of Europe committed itself to supporting its implementation by using all the Organisation's relevant tools and mechanisms. By way of example of such implementation, the Venice Commission has provided legal advice on the constitutional changes and accompanying legislation adopted in Albania in order to introduce a comprehensive reform of the judicial system and extraordinary measures to vet the suitability of serving judges and prosecutors, with a view to the full renewal of the system so as to ensure its integrity and professionalism.<sup>9</sup>

The constitutional issues addressed in two legislative proposals in Poland to amend the Act on the Constitutional Tribunal were examined by the Venice Commission, at the request of the Government of Poland and the Secretary General, respectively.<sup>10</sup>

The Venice Commission also adopted, in December 2016, at the request of the Parliamentary Assembly of the Council of Europe, an opinion on the overall conformity with European standards of the emergency decree laws introduced following the failed coup attempt on 15 July 2016 and the introduction of a state of emergency in Turkey.<sup>11</sup>

The CCJE for its part expressed its opinion following a request by the Association of European Administrative Judges as regards certain aspects of the legislation in Turkey concerning judges and

prosecutors,<sup>12</sup> while in respect of Poland, the CCJE published its opinion on matters related to the appointment of judges by the National Council for the Judiciary, following a request by the Polish judges' association.<sup>13</sup>

The aim of the renewal of the judiciary in Albania is to restructure the justice system to ensure that judges and prosecutors are independent from politics, and to root out corruption within the judiciary. The constitutional amendments, reviewed by the Venice Commission, allow the authorities to carry out a vetting of all sitting judges and prosecutors by verifying their income and property, their professional background and their connection to the criminal milieu. The Venice Commission has stressed that the appeal body of the vetting process should have the basic characteristics of a court and provide a fair trial for the dismissed judges and prosecutors, and that they should enjoy at least some access to the constitutional court to defend their fundamental rights and freedoms. In connection with ordinary disciplinary proceedings against judges, the Venice Commission has stressed that they should also correspond to certain basic principles: liability should follow a violation of a duty expressly defined by law; a fair trial with a full hearing of the parties and representation of the judge must be provided; the law should define the scale of sanctions; the imposition of the sanction should be subject to the principle of proportionality; and there should be a right to appeal to a higher judicial authority.<sup>14</sup>

The Court found a violation of Article 6.1 of the Convention in the case of *Baka v. Hungary*.<sup>15</sup> The term of office of the President of the Hungarian Supreme Court had been brought to an end before its normal date of expiry through the entry into force of the new constitution, which provided for the creation of the highest court in Hungary, the Kúria, to succeed and replace the Supreme Court. The Court found in particular that the president had not enjoyed the right of access to a court, since the termination of his term of office resulted from the transitional measures of new constitutional legislation that was not subject to any form of judicial review. The Court emphasised the importance of intervention by an authority which was independent of the executive and legislative powers in respect of every decision affecting the termination of a judge's office.

9. Final Opinion on the revised draft constitutional amendments on the Judiciary of Albania, adopted by the Venice Commission at its 106th Plenary Session, 11-12 March 2016, CDL-AD(2016)009.

10. Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session, 11-12 March 2016, CDL-AD(2016)001 and Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, 14-15 October 2016, CDL-AD(2016)026.

11. Opinion on emergency decree laws Nos. 667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016, CDL-AD(2016)037.

12. Comments by the CCJE Bureau, 5 July 2016, CCJE-BU(2016)3; see <https://goo.gl/SvnS8U>.

13. Comments by the CCJE Bureau, 26 October 2016, CCJE-BU(2016)9; see <https://goo.gl/3jmHSd>.

14. Final Opinion on the revised draft constitutional amendments on the Judiciary of Albania, adopted by the Venice Commission at its 106th Plenary Session, 11-12 March 2016, CDL-AD(2016)009.

15. *Baka v. Hungary*, (Application No. 20261/12), 23 June 2016.

■ In cases against “the former Yugoslav Republic of Macedonia”, the Court examined complaints brought by five judges who had been dismissed from office for professional misconduct.<sup>16</sup> The Court, observing that what was at stake was the confidence which the courts in a democratic society must inspire in the public, found that the bodies that had considered the cases, the Supreme Judicial Council or an appeal panel set up within the Supreme Court, had lacked the requisite independence and impartiality and it found a violation of Article 6.1.<sup>17</sup> In a 2016 judgment against Armenia,<sup>18</sup> the Court also reiterated that “it is of fundamental importance in a democratic society that the courts inspire confidence in the public”.

■ In Ukraine, amendments to the constitution in respect of the judiciary were adopted in June 2016. The changes, welcomed by the Council of Europe, included the removal of the power of the parliament to appoint judges, the abolition of probationary periods

for junior judges, the abolition of breach of oath as a ground for the dismissal of judges – an issue at the root of the finding by the Court of a violation of Article 6.1 in the 2013 judgment of *Oleksandr Volkov v. Ukraine*,<sup>19</sup> and the reform of the prosecution and of the participation of the parliament in the composition of the High Council for the Judiciary. With these constitutional amendments, the legal framework relating to the judiciary should be in compliance with Convention standards.

■ Ukraine has also taken steps to implement the Law on Fair Trial by initiating an assessment by the High Qualification Commission of Judges of Ukraine of all serving judges, an assessment involving the testing of the judges’ professional competences as well as a review of their assets and income. It is a commendable effort and a complex task to try to restore faith in the integrity of the Ukrainian judiciary, and the Council of Europe has supported this work.

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16. *Gerovska Popčevska v. “The former Yugoslav Republic of Macedonia”* (Application No. 48783/07), 7 January 2016, *Jakšovski and Trifunovski v. “The former Yugoslav Republic of Macedonia”* (Applications Nos. 56381/09 and 58738/09), 7 January 2016, and *Poposki and Duma v. “The former Yugoslav Republic of Macedonia”* (Applications Nos. 69916/10 and 36531/11), 7 January 2016.

17. *Gerovska Popčevska v. “The former Yugoslav Republic of Macedonia”* (Application No. 48783/07), 7 January 2016, *Jakšovski and Trifunovski v. “The former Yugoslav Republic of Macedonia”* (Applications Nos. 56381/09 and 58738/09), 7 January 2016, and *Poposki and Duma v. “The former Yugoslav Republic of Macedonia”* (Applications Nos. 69916/10 and 36531/11), 7 January 2016.

18. *Vardanyan and Nanushyan v. Armenia* (8001/07), 27 October 2016.

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19. *Oleksandr Volkov v. Ukraine* (Application No. 21722/11), 9 January 2013. The Court also found a violation of Article 6 paragraph 1 “as regards non-compliance with the principles of independence and impartiality” in cases brought by 18 Ukrainian judges who had been dismissed for breach of oath under the disciplinary regime in place before the 2016 constitutional changes, cf. judgment *Kulykov and others v. Ukraine* (Applications Nos. 5114/09 and 17 others), 19 January 2017.

# EFFICIENCY OF COURT PROCEEDINGS

## Chapter 1 – Efficient, impartial and independent judiciaries

**T**he speed with which cases are completed by national courts is a key indicator of efficiency of justice, but other factors play an important role too. 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 all impact on the efficiency of a judicial system.

■ A well-functioning judicial system requires continuous funding and investment. While significant expenditures will not guarantee efficiency, it is not attainable without adequate funding. The findings of the CEPEJ in its 2016 report “European judicial systems – Efficiency and quality of justice” based on verified 2014 data bear this out.<sup>20</sup>

■ Building and furnishing modern court houses is not in itself a guarantee of efficiency. The judicial system must be organised and implemented in a manner that enables it to comply with the fair trial guarantees enshrined in Article 6 of the Convention.

■ Article 6 of the Convention guarantees the right to a fair trial within a reasonable time. The Court’s case law has established criteria for assessing the reasonableness of the duration of the proceedings: 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>21</sup>

■ This aspect of Article 6 continues to generate large numbers of applications from individuals in member states and numerous findings of violations by the Court. In its 2016 report, the CEPEJ has noted as an overall positive trend the ability of European courts to cope with incoming cases, despite the increase observed in their number. This would appear

to suggest that the inflow of cases to the Court concerning excessive length of proceedings could be alleviated by focusing on reducing backlogs within national courts. It is important that member states continue to monitor court performance.

■ Access to justice can be facilitated in a number of ways. In the third annual report the Secretary General recommended action to encourage member states to actively develop e-justice solutions as a means of improving efficiency and broadening access to justice. To facilitate this, the CEPEJ has carried out a comprehensive assessment of the use of information technologies in courts in Europe.<sup>22</sup>

### MEASUREMENT CRITERIA

#### Legal criteria

- ▶ Hearings take place within a reasonable time-frame considering the circumstances of the case.

#### Institutional criteria

- ▶ The state allocates adequate 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.
- ▶ Regular monitoring activities are implemented to evaluate efficiency.
- ▶ Discretionary prosecution is encouraged where appropriate.

20. All figures and country information cited in this sub-chapter are from the report on “European judicial systems – Efficiency and quality of justice”, by CEPEJ, Edition 2016 (2014 data).

21. See for example *J.R. v. Belgium* (Application No. 56367/09), 24 January 2017, paragraph 59; *Sürmeli v. Germany* (Application No. 75529/01), 8 June 2006, paragraph 128.

22. Thematic report, “Use of information technology in European Courts”, CEPEJ, October 2016. Available at: <https://goo.gl/4vKDAX>.

- ▶ Offences that are inherently minor are not dealt with by court hearings.
- ▶ Simplified procedures are in place in respect of all 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 (IT) in court systems facilitates the full enjoyment of access to justice.

## FINDINGS

■ The CEPEJ findings show that situations vary greatly in Europe as regards budgets allocated to judicial systems.<sup>23</sup> The European average was €60 allocated per capita in 2014,<sup>24</sup> but half of member states spend less than €45 per capita, and the differences between the six states whose expenditure is lower than €20 (Albania, Azerbaijan, Georgia, Republic of Moldova, “the former Yugoslav Republic of Macedonia”, Ukraine) are considerable, as are the differences between the five states<sup>25</sup> where the expenditure is higher than €100 per inhabitant (Luxembourg, Netherlands, Sweden, Switzerland, United Kingdom (Northern Ireland)). Switzerland allocates €219 per capita.

■ A trend can be observed towards increasing the budget allocated to the judicial system in most states. The wealthier states are not necessarily the ones to make the greatest proportional budgetary effort with regard to the judicial system. Here the overall financial efforts of Azerbaijan, Latvia, Lithuania, Malta, the Republic of Moldova, Romania and the Russian Federation deserve to be highlighted. In

Ireland, Portugal, Spain and particularly in Greece, the judicial systems are still undergoing regular budgetary restrictions.

■ The CEPEJ has observed a trend in Europe towards a reduction in the number of courts and a consequent increase in the size of the remaining courts, including in terms of the number of judges per court, as well as a stronger specialisation of the judicial system.

■ The use of IT<sup>26</sup> is now widespread in European courts (see box “Trends and conclusions as regards the use of information technology in European courts”). Information technology have, in some respects, made it possible to improve the efficiency and quality of judicial systems.

■ However, the influence of computerisation itself remains moderate; the states which score highly in terms of IT equipment are not necessarily those with the greatest efficiency. Other external parameters, sometimes intrinsic to each state, can play a major role and must therefore be considered.

■ Consideration of other factors may help to explain the trends observed. When computerisation is not linked to a specific in-depth reflection about the organisation of the judicial work, it appears to be less efficient. Rather than being a mere tool for the operation of courts, the integration of IT within an organisational process of performance, coupled with a policy of change management involving all stakeholders, could be an important success factor. Work carried out by states themselves to measure and analyse the actual benefits resulting from information systems seems to contribute to decisions to invest in a better level of IT equipment.

23. Defined by the CEPEJ as covering court, legal aid and prosecution budgets.

24. The latest year for which verified data are available.

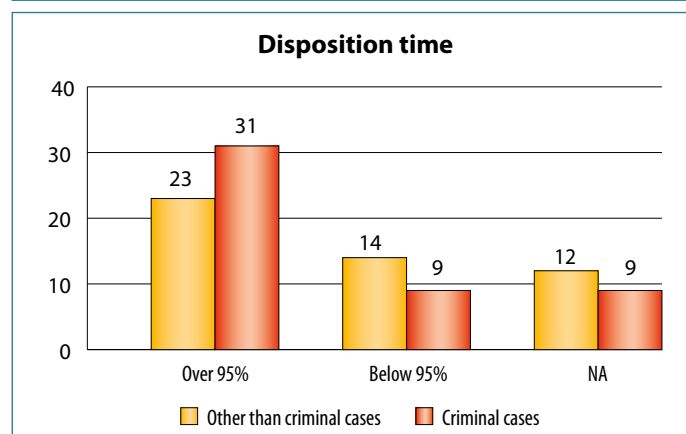
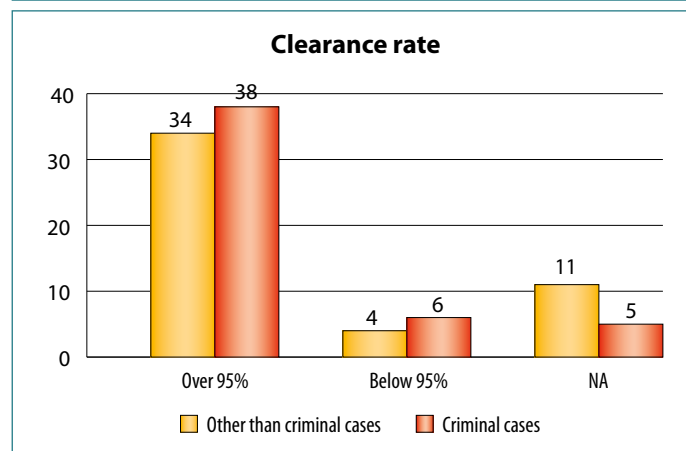
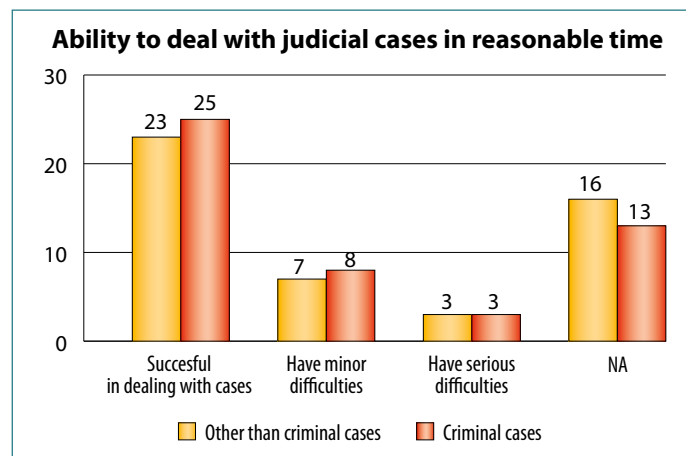
25. The results for the United Kingdom are presented separately for England and Wales, Scotland and Northern Ireland as the three judicial systems are organised differently and operate independently from each other.

26. All the findings presented here are based on CEPEJ Studies No. 24 “Use of Information Technology in European Courts”, October 2016.

## Clearance rate and disposition time of judicial cases<sup>27</sup>

The key indicators used by the CEPEJ are case clearance rates and case disposition times. Clearance rate shows a judicial system's case turnover ratio expressed as a percentage between resolved and incoming cases within one year. Disposition time indicates the number of days required for a system to solve a pending case with the existing rate of case processing. Combining these two indicators gives a complete picture of the ability of a state's judicial system to deal with court cases within a reasonable time, as shown in the chart which is based on data for 2014. It can be noted that a large majority of states are able to deal with incoming and pending cases in first instance courts without increasing their backlogs. These are states with a clearance rate over 95% and disposition time lower than the European average.

The situation has improved compared with the previous CEPEJ cycle especially for criminal cases.



27. The source of the data presented here is the report entitled "European judicial systems – Efficiency and quality of justice", by CEPEJ, Edition 2016.



## Trends and conclusions as regards the use of information technology in European courts

The use of IT is now widespread in European courts. Its positive impact on the efficiency and quality of justice has been assessed using several factors, not limited to the level of equipment.

IT has, in some respects, made it possible to improve the efficiency and quality of judicial systems. This finding is consistent with states' initiatives in this area.

However, there seems to be no obvious link between the level of IT equipment and good results as reflected in the efficiency indicators represented by clearance rate and disposition time (see above for definitions). Indeed, the influence of computerisation itself remains moderate; the states which score highly in terms of IT equipment are not necessarily those with the greatest efficiency. Other external parameters, sometimes intrinsic to each state, can play a major role and must therefore be considered.

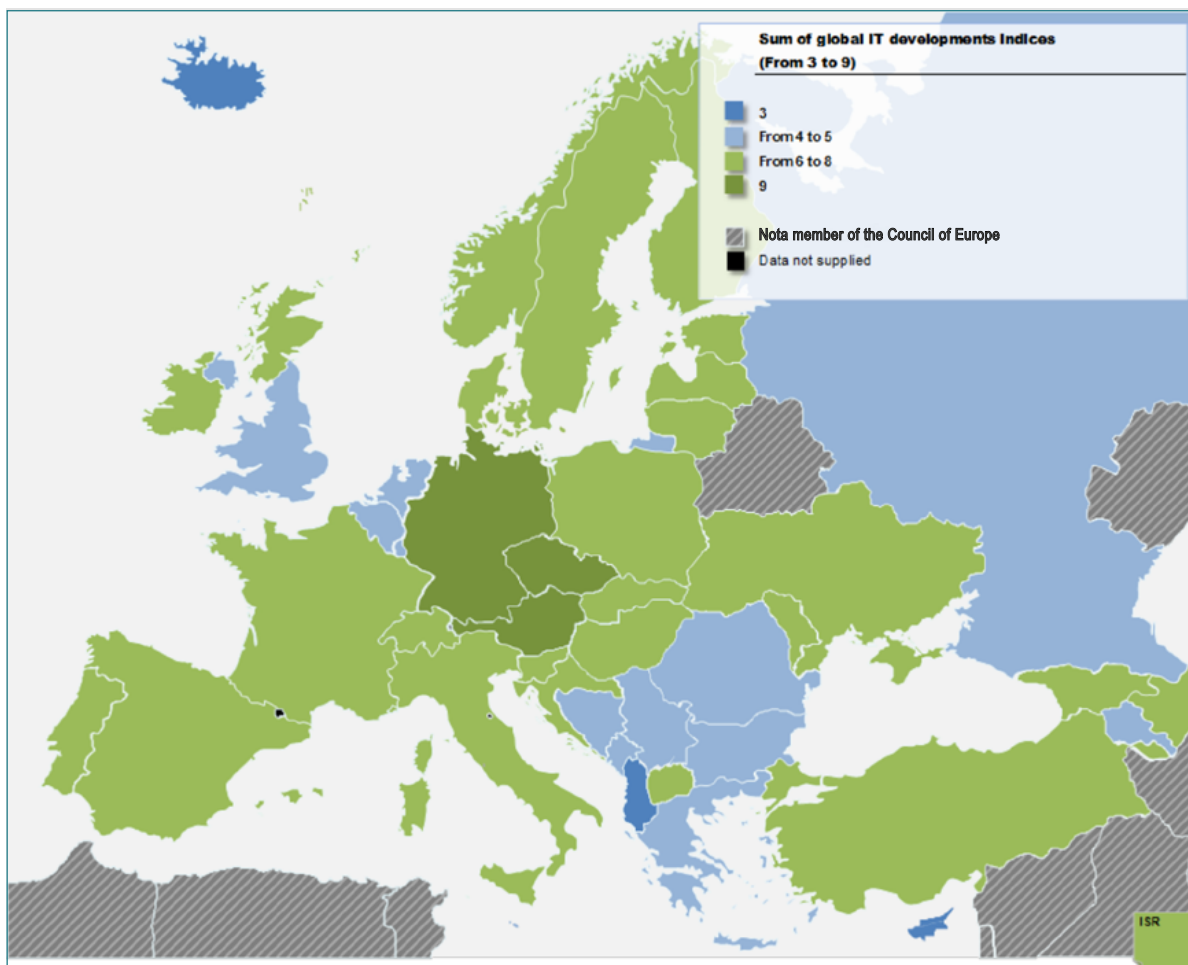
The CEPEJ findings, questions and assumptions in this important field will have to be updated in the coming years in order to confirm or repudiate the trends identified.

### The overall state of IT development in the member states of the Council of Europe

The overall index of IT development has been defined by the CEPEJ as ranging from 1 (initial development) to 3 (almost completed development) in three areas: equipment, legislative framework and governance. The sum of the results of these three areas ranges from 3 (lowest result) to 9 (highest result).

According to this methodology, Austria, the Czech Republic and Germany achieved the highest scores (9 out of 9). Albania, Cyprus and Iceland had the lowest results (3 out of 9).

In Austria, all areas (equipment, legislative framework and governance) appear to be developed in a homogeneous way. In the Czech Republic, the tools for direct assistance to professionals in court appear to be slightly less developed (in particular in the absence of a centralised registration of criminal convictions). In Germany, the level of equipment for court management tools and communication with users and professionals appears to be less pronounced, but this should be contextualised with regard to the decentralised organisation of the state, which leads the *Länder* to adopt different choices. The lack of online monitoring of cases and the low level of equipment with regard to communication with other professionals (lawyers, bailiffs, notaries, etc.) can be noted.



## Use of IT in European Courts

Source: CEPEJ Studies No. 24

The situation in Albania, Cyprus and Iceland is uniform in all the areas assessed: IT tools, the legislative framework and the governance vision to be implemented in order to capitalise investments in computerisation are at the early stages of development. The situation in Cyprus is the most critical in this respect, with a complete absence of development of business management tools in the courts.

### Improving the quality of the service provided to litigants and the interaction between courts and professionals

The CEPEJ has defined specific indices of measurement of the level of computer development within the fields of equipment, legislative framework and governance more precisely than for the global indices (see above). These specific indices range from 0 (complete absence of development) to 10 (development completed). States were assessed by the CEPEJ against this more precise scale.<sup>28</sup>

<sup>28</sup> Level of development of computer equipment with regard to communication between courts, users and professionals (2014).

# ENFORCEMENT OF COURT DECISIONS

## Chapter 1 – Efficient, impartial and independent judiciaries

**A** judicial decision that is not enforced, or the enforcement of which is delayed, makes a mockery of the right to a fair trial.<sup>29</sup> As the Court has pointed out, the right to a fair trial protected by Article 6 would be illusory if a contracting state's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. The execution of a judgment given by a court must therefore be regarded as an integral part of the trial for the purposes of Article 6. Moreover, the complexity of the domestic enforcement procedure or of the budgetary system cannot relieve the state of its obligation under the Convention to guarantee to everyone the right to have a binding and enforceable judicial decision enforced within a reasonable time. Nor is it open to a state authority to cite a lack of funds or other resources.<sup>30</sup>

Ensuring the effectiveness of domestic remedies in an expedient manner is most pressing in the case of structural problems bringing with them risks of a high number of repetitive violations. However, if the problems are indeed of a structural or systemic nature, a remedy, although important and required by Article 13, will not constitute a long-term solution and without speedy measures to address the root problems, it may even aggravate the situation as money which could have been spent on effective reforms are instead spent to compensate victims.<sup>31</sup>

The burden to ensure compliance with a judgment against the state lies primarily with the state authorities<sup>32</sup> and may entail different measures relating for example to budgetary procedures, state organisation or the creation of special funds. As regards

execution in general, the CEPEJ has issued a good practice guide on enforcement of judicial decisions outlining the concrete steps to be taken, including as regards ensuring the efficiency, quality and fairness of the enforcement procedure; the rules for exercising the profession of enforcement agent; and the scope of the functions of such agents.<sup>33</sup> The enforcement of in-kind obligations may pose special problems.<sup>34</sup>

### 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.

#### Institutional criteria

- ▶ Enforcement is generally fair, swift, effective and proportionate.
- ▶ Enforcement strikes a balance between the needs of the claimant and the rights of the defendant.

29. Venice Commission Rule of Law Checklist, CDL-AD(2016)007.  
30. *Burdov v. Russia* (No. 2), (Application No. 33509/04), 15 January 2009, paragraphs 65, 67 and 70.

31. Cf. Conclusions of the round table “Effective remedies against non-execution or delayed execution of domestic court decisions”, Strasbourg, 15-16 March 2010 (CM/Inf/DH(2010)15).

32. *Burdov v. Russia*, op. cit., paragraph 69.

33. CEPEJ, “Good practice guide on enforcement of judicial decisions”, adopted at the 26th CEPEJ Plenary Session 10-11 December 2015.

34. See for example *Hornsby v. Greece* (Application No. 18357/91), 19 March 1997; *Olaru v. Moldova* (Application No. 476/07), 28 July 2009, or *Gerasimov v. Russia* (Application No. 29920/05), 1 July 2014.

- ▶ Access to information on the enforcement process is available, and enforcement activities are carried out in a predictable manner and are transparent.
- ▶ Enforcement in individual cases 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.
- ▶ Authorities exist to supervise implementation and find solutions to problems observed, engaging their liability if efforts to find adequate solutions are not undertaken.

## FINDINGS

■ Non-enforcement of national court decisions is the second most frequently invoked ground in applications submitted to the Court, following excessive length of proceedings. Ensuring the existence of effective remedies, whether compensatory or acceleratory, in all member states, is thus a major concern. According to the CEPEJ, this dysfunction of the national judicial system is the object of a compensation mechanism

in 25 Council of Europe member states.<sup>35</sup> It is to be welcomed that legal aid is increasingly being extended to the enforcement of judicial decisions or judicial mediation. This is now the case in 32 member states.<sup>36</sup>

■ Many of the applications to the Court concern non-enforcement by the state and require additional attention to ensure that the state is organised (including as regards budgetary allocations) so that the enforcement of national judicial decisions can take place quickly. Where the obligation is of a non-pecuniary nature (for example, the provision of housing), the possibility of rapidly transforming the in-kind obligation into a monetary obligation should be considered.

■ If the problem of non-enforcement is due to a lack of funds, urgent measures are needed to ensure necessary financing. Many ingenious solutions have been developed by member states over the years on this issue and should provide good sources of inspiration, whether based on bond schemes as with the payment of pensions in Greece, combined cash and bond schemes as in the case of payment of war damages in Bosnia and Herzegovina (Republika Srpska), or recourse to the international financial institutions such as the Council of Europe Development Bank as in the case of prison construction in the Republic of Moldova.

35. "European judicial systems – Efficiency and quality of justice", by CEPEJ, Edition 2016 (2014 data).

36. Ibid.

# LEGALITY AND LEGAL CERTAINTY

Chapter 1 – Efficient, impartial and independent judiciaries

**A**rticle 7.1 of the Convention sets out the basic principle of legality – that there can be no punishment without law.<sup>37</sup> This right, intended to provide effective safeguards against arbitrary prosecution, conviction and punishment, is non-derogable even in time of war or public emergency.<sup>38</sup> That interference with human rights and fundamental freedoms must have a legal basis is also a constituent element of most other substantive articles of the Convention.<sup>39</sup>

Legal certainty presupposes respect for the principle of *res judicata*, that is the principle of the finality of judgments. According to the Court, this principle requires that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case.<sup>40</sup> Foreseeability is another key principle. Foreseeability means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects; it must, also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with the law.<sup>41</sup>

The Venice Commission has issued a Rule of Law Checklist in which it identifies, *inter alia* the benchmarks of the concepts of legality and legal certainty, as seen below.<sup>42</sup>

37. See Article 7 of the Convention: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

38. See Article 15, paragraph 2, of the Convention.

39. See Articles 2, 5, 6 and 8-12, of the Convention.

40. *Vardanyan and Nanushyan v. Armenia* (Application No. 8001/07), 27 October 2016 and *Brumărescu v. Romania* (Application No. 28342/95), 28 October 1999.

41. *The Sunday Times v. the United Kingdom* (No. 1) (Application No. 6538/74), 26 April 1979, paragraph 49.

42. Rule of Law Checklist, CDL-AD(2016)007 adopted by the Venice Commission at its 106th Plenary Session 11-12 March 2016.

## MEASUREMENT CRITERIA

### Legality

#### Legal criteria

- ▶ The supremacy of the law is recognised. The law is implementable in practice.
- ▶ The powers of public authorities are defined by law.
- ▶ The process for enacting law is transparent, accountable, inclusive and democratic.
- ▶ Any derogations are provided for by law and are proportionate, that is limited to the extent strictly required by the exigencies of the situation in duration, circumstance and scope.

#### Institutional criteria

- ▶ Effective remedies are available against non-implementation of legislation.
- ▶ Effective judicial review of the conformity of acts and decisions by the executive, or the absence of actions or decisions, is available.
- ▶ Public authorities act within the limits of the powers that have been conferred upon them by the law.
- ▶ Legislative assessment is practised *ex ante* and *ex post*.
- ▶ Parliamentary control and judicial review of the existence and duration of an emergency situation are in effect.

### Legal certainty

#### Legal criteria

- ▶ Retroactivity of criminal legislation is prohibited.
- ▶ The effects of laws are foreseeable, especially in criminal legislation.
- ▶ Legal safeguards exist against arbitrariness and abuse of power.
- ▶ Where officials exercise discretionary power, the limits of discretion should be laid down in

law, an obligation to provide reasons exist, and judicial review of the exercise of such power are available.

### Institutional criteria

- ▶ Laws and court decisions are accessible.
- ▶ Laws are stable and consistently applied.
- ▶ Judicial practice is coherent and respect of *res judicata* ensured, that is final judgments are respected.

## FINDINGS

Several Court cases highlighted problems of retroactive legislation, in particular in the criminal field.<sup>43</sup> Relevant state authorities should take care when preparing new legislation and devising transitional provisions to avoid violations of the Convention linked to the temporal application of the new norms. Courts should similarly pay close attention to these problems, in particular when changing their jurisprudence on sensitive issues. Risks of arbitrariness and of individuals being unable to foresee the consequences of their actions may also arise from national court practice that is inconsistent or lacks precision in a particular area.<sup>44</sup>

In the case of *Vardanyan and Nanushyan v. Armenia* concerning land and house ownership and the fairness of civil proceedings, the Court, finding a violation of Article 6.1, concluded that in the absence of any circumstances of a substantial and compelling character justifying the re-examination of a matter which had previously been determined in final and binding judicial decisions, the courts had infringed the principle of legal certainty.<sup>45</sup> The Court has also pointed out how undermining the principle of legal certainty can weaken public confidence in the judicial system.<sup>46</sup>

Some states are facing the risk to legal certainty which may arise from a very large turnover of office holders within the judiciary, resulting in the replacement of a significant portion of serving judges and prosecutors. Guarantees must be provided that this will not result in a disruption in the delivery of justice or affect the quality of the decisions rendered. This issue is relevant in respect of Albania and Ukraine where

all or a significant part of the judiciary has been, or is in the process of being, replaced.<sup>47</sup>

In Turkey, a state of emergency was introduced in July 2016 following the failed coup attempt and extended through March 2017. A number of emergency decree laws were issued by the Turkish Government regulating, *inter alia* criminal procedure matters, the dismissal of public officials including judges and prosecutors considered to have links with a terrorist organisation, and the closing of professional associations and of private media outlets. The prohibition by law of a particular behaviour must have been known at the time the impugned conduct took place.<sup>48</sup> Furthermore, as the Commissioner for Human Rights has pointed out, all measures taken under the state of emergency must derogate from the Convention only to the extent strictly required by the situation and must be proportionate to the aim pursued.<sup>49</sup>

The Venice Commission has reiterated, as regards the dismissal of judges based on the powers given in the relevant decree law to the High Council of Judges and prosecutors or to the highest courts, respectively, that every such decision must be individualised and reasoned; it must refer to verifiable evidence, and the procedures before the decision-making body must respect at least minimal standards of due process. The Venice Commission has also concluded more broadly, as regards the decision-making process leading to the dismissals of public servants in Turkey as a result of the state of emergency decree laws, that this process was deficient in the sense that the dismissals were not based on individualised reasoning, which made any meaningful subsequent judicial review of such decisions virtually impossible.<sup>50</sup>

In an encouraging development, it was announced on 23 January 2017 that dismissed judges and prosecutors would be able to seek redress before the Turkish Council of State, and that those affected by measures adopted under state of emergency decree laws could have their cases examined by a new national commission set up for this purpose, in line with the Council of Europe's recommendation and the principle of subsidiarity.

43. See for example *Žaja v. Croatia* (Application No. 37462/09), 4 January 2017; *Vasiliauskas v. Lithuania* (Application No. 35343/05) 4 October 2016; *Varvara v. Italy* (Application No. 17475/09) 29 October 2013; *OAO Neftyanaya kompaniya Yukos v. Russia* (Application No. 14902/04) 20 September 2011.

44. *Žaja v. Croatia* (Application No. 37462/09), 4 January 2017.

45. *Vardanyan and Nanushyan v. Armenia* (Application No. 8001/07), 27 October 2016.

46. *Lupeni Greek Catholic Parish and Others v. Romania* (Application No. 76943/11), 29 November 2016 concerning judgments delivered by the High Court of Cassation containing divergent interpretations.

47. Venice Commission, *inter alia* on Albania: Final Opinion of the revised draft constitutional amendments on the judiciary, 11-12 March 2016, CDL-AD(2016)009, paragraph 7 and paragraph 50 and following; on Ukraine, Opinion on the proposed amendments to the Constitution of Ukraine regarding the judiciary as approved by the Ukrainian Constitutional Commission on 4 September 2015, 23-24 October 2015, paragraph 34 onwards.

48. For example, Venice Commission, Opinion on emergency decree laws Nos. 667-676 adopted following the failed coup of 15 July 2016, 9-10 December 2016, CDL-AD(2016)037, paragraph 127.

49. See "Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey", Council of Europe Commissioner for Human Rights, CommDH(2016)35, 7 October 2016.

50. Venice Commission, Opinion on emergency decree laws Nos. 667-676 adopted following the failed coup of 15 July 2016, 9-10 December 2016, CDL-AD(2016)037, paragraphs 140 and 150.

# ACCESS TO LEGAL AID

## Chapter 1 – Efficient, impartial and independent judiciaries

**L**egal aid is the assistance provided by the state to persons who do not have sufficient financial means to defend themselves before a court, to initiate court proceedings or to seek legal advice.

■ The right to legal assistance when faced with a criminal charge is explicitly protected in Article 6.3.c of the Convention. According to the case law of the Court, in civil litigation Article 6 may compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to a court because legal representation is compulsory or by reason of the complexity of the procedure or of the case.<sup>51</sup>

■ Inevitably, the persons most in need of legal services may be those whose possibilities of accessing the justice system and securing legal advice or representation are the most limited. Whenever the aim is to improve the take-up of legal aid services by a particularly vulnerable group, or in respect of a particular class of legal dispute, this can be helped through targeted actions by the state, a common practice across Europe.

■ The risks of inequality and of discriminatory outcomes of a system requiring payment by the users are clear. The imposition of court users' fees or taxes should obviously not constitute a barrier to access to justice. It is therefore important, as the CEPEJ has been able to conclude, that in countries where court users are subject to substantial court taxes or fees, access to justice of persons with limited financial means is efficiently ensured through a general legal aid system. A concomitant risk also exists that a judicial system that is objectively in need of further funding yet does not rely on users' fees as a source of financing will face difficulties handling its workload due to underfunding.

■ In the Secretary General's previous report, member states were encouraged to review their legal aid schemes with a view to ensuring their continuing

effectiveness in giving access to justice for vulnerable groups. The European Committee on Legal Co-operation (CDCJ) is reviewing current issues facing legal aid provision and considering updating the Council of Europe standards on legal aid to take account of developments in national law and practice.

### MEASUREMENT CRITERIA

#### Legal criteria

- ▶ The right to legal aid is guaranteed by law (where the circumstances of the case and/or of the applicant so require).

#### Institutional criteria

- ▶ The state offers an appropriate system of legal aid to provide effective access to justice to everyone in its jurisdiction.
- ▶ Extra-judicial legal advice services are provided.
- ▶ Where appropriate, procedures are simplified for individuals to conduct cases themselves.
- ▶ An effective system is in place to reduce or waive court and other fees if they prevent access to justice.
- ▶ The legal aid system co-ordinates and includes organisations that wish to contribute to it.
- ▶ Legal aid is accessible, easy and timely for those who need it.
- ▶ Clear information is available on what types of legal aid and assistance are available and appropriate and on how to benefit from this right.
- ▶ Public expenditure on legal aid is adequate, varied and efficiently used.

<sup>51</sup> *Airey v. Ireland*, 6289/73, 9 October 1979, paragraph 26.

## FINDINGS

European states spend an average of €9 per capita on legal aid.<sup>52</sup> Significant variations exist behind this average, with half of member states spending less than €2 per capita and 13 states less than €1. Albania allocates €0.001 per capita. The largest budgets committed to legal aid per capita can be found in the common-law countries and in northern Europe. However, a comparison shows that, proportionally, Bosnia and Herzegovina and Portugal are making very significant financial efforts to facilitate access to justice through legal aid.

Another positive trend observed by the CEPEJ is that all Council of Europe member states have implemented a legal aid system in criminal matters, in compliance with the requirements of the Convention. As a general rule, this system encompasses legal representation before courts and legal advice. The regime of legal aid for mediation procedures is applied in 31 states. A private system of insurance for legal expenses is in place in 36 states. While welcome, this may not be affordable for those most in need.

The Council of Europe's efforts at intergovernmental level as regards the possible need to update the Organisation's standards in the legal aid field suggest that member states' positions are affected in particular by considerations of the potential cost resulting from the implementation of any schemes or measures that would follow such revised standards. Although financial constraints are real in member states, and all public services involve a degree of prioritisation, it is worth recalling that member states continue to be bound by the obligations arising out of Article 6 and the right to access to justice.

According to the most recent findings and analysis of the CEPEJ, the trend in Europe is that the users of the public service of justice are increasingly called upon to finance the judicial system, through taxes and judicial fees. These revenues represent more than 20% of the public budget allocated to the judicial system in more than a quarter of member states.<sup>53</sup> They represent more than 50% in Turkey and in Austria are actually higher than the budget allocated to the judicial system. Only France and Luxembourg do not charge any taxes or fees for starting proceedings in a court of general jurisdiction.

The Court has established that, although the actions and decisions of the defence are a matter between the defendant and their lawyer, be they legal aid appointed or private, in case of the manifest failure by a lawyer appointed under a legal aid scheme to provide effective representation, Article 6.3.c requires the national authorities to intervene.<sup>54</sup>

A co-operation project implemented with the Ministry of Justice of the Russian Federation has sought to strengthen the access of vulnerable people to free civil legal aid through an improved implementation of the Federal Law on Free Legal Aid throughout the country, by developing measures that will increase the supply of legal aid service providers and the take-up of these services by vulnerable people. In Ukraine, as part of the Council of Europe's support for comprehensive criminal justice reform, a project has been launched that focuses on strengthening the free legal aid system in criminal cases, with a view to ensuring access to quality legal assistance.

52. All figures and country information cited in this sub-chapter are from the report on "European judicial systems – Efficiency and quality of justice", by the European Commission for the Efficiency of Justice (CEPEJ), Edition 2016 (2014 data).

53. The results for the United Kingdom are presented separately for England and Wales, Scotland and Northern Ireland as the three judicial systems are organised differently and operate independently from each other.

54. See for example *Bogumil v. Portugal*, (Application No. 35228/03), 6 April 2009, paragraph 46.



# LAWYER PROFESSIONALISM

## Chapter 1 – Efficient, impartial and independent judiciaries

In any judicial system, the role of lawyers is crucial for ensuring effective access to justice and the full enjoyment of the principle of equality of arms as guaranteed by Article 6 of the Convention. Everyone should have access to a timely resolution and enforcement of their dispute, be it in court or outside. The legal profession should be characterised by consistency and transparency as regards accreditation, discipline and in the representation of the professional interests of lawyers. This is important in order to ensure the quality of the justice delivered. Moreover, the more restrictive the criteria of accreditation, the more robust the legal aid system needs to be. With only a small number of lawyers available, there would otherwise be a risk of jeopardising that access to justice; fees may be high and securing the service of a lawyer both more difficult and more costly.

### MEASUREMENT CRITERIA

#### Institutional criteria

- ▶ Lawyers can discharge their duties without improper interference.
- ▶ Entrants to the legal profession have appropriate education and training.
- ▶ The lawyer licensing body/professional association is self-governing and independent from state and public pressure.
- ▶ Decisions on entry into the profession are made transparently, are based on merit and objective criteria and are subject to review on request by an independent and impartial judicial authority.
- ▶ A code of conduct for lawyers exists. Disciplinary measures for violation of its provisions are proportional, respect the principles and rules of the Court and are subject to judicial review.

### FINDINGS

Some observations can be made based on the findings of the CEPEJ as regards the availability of legal services.<sup>55</sup> The quality of the legal services provided by lawyers becomes particularly important when lawyers enjoy a monopoly on legal representation. Such a situation would have a direct bearing on access to justice. A monopoly on representation exists in criminal matters in 33 Council of Europe member states<sup>56</sup> in respect of defendants, and in 22 member states in respect of victims.

With regard to civil proceedings, lawyers have a monopoly in 18 member states, while a monopoly exists in 14 member states as regards administrative proceedings.

The CEPEJ has observed that, with the exception of Albania and Ukraine which reported drops in the number of lawyers, almost every other member state reported a significant increase in the number of lawyers between 2010 and 2014. In Lithuania, Montenegro, Poland, Slovakia, Slovenia, Turkey and the United Kingdom (Scotland), the number of lawyers per 100 000 inhabitants increased by 20% or more, while in Armenia it increased by 42% from 2010 to 2014. Very significant variations are visible across the member states, with Azerbaijan at 10 lawyers per 100 000 inhabitants, followed by Bosnia and Herzegovina at 37, while Greece, Malta, Portugal and Spain report the highest concentration at just under or above 300 lawyers per 100 000 inhabitants.<sup>57</sup>

55. All figures and country information cited in this sub-chapter are from the report on "European judicial systems – Efficiency and quality of justice", by CEPEJ, Edition 2016 (2014 data).

56. The results for the United Kingdom are presented separately for England and Wales, Scotland and Northern Ireland as the three judicial systems are organised differently and operate independently from each other.

57. The figures are also high for Cyprus and the United Kingdom (England and Wales) but include legal advisers, and for Luxembourg which is an atypical example for other reasons.

■ The profession of lawyer is organised and regulated by national, regional and/or local bar associations in all member states. Nearly all member states require initial training and/or an examination to enter the profession. Mandatory in-service training is required in 65% of the member states.

■ Lawyers' fees are the result of negotiations in most of the member states, although the law and/or bar associations establish rules in this field in more than half of the member states; in only 15% of the member states are there no rules as regards lawyers' fees. Fees may be contested in 85% of the member states.

■ Quality standards are defined for lawyers in 80% of the member states, formulated by bar associations (70% of the member states), parliament (35% of the member states) or other bodies. In all member states, clients may initiate complaints about lawyers' activities, in most cases to the bar associations.

■ The CCJE for its part considers that a judge should be able to order legal representation if the case is very complex or if there is a major risk that the rights of

the defence would be infringed. In that event, such representation should be covered by legal aid.<sup>58</sup>

■ The Court had the opportunity to examine the principle of equality of arms in the case of *Vardanyan and Nanushyan v. Armenia*. While not dealing with lawyer professionalism as such, the judgment finds a violation of the principle of equality of arms because the applicant was absent and unable to be represented by his lawyer at a decisive appeal court hearing. This confirms the importance of professional representation as an aspect of the right to a fair trial and the protection provided by Article 6.<sup>59</sup>

■ A co-operation project implemented with the Bar Association of Georgia has focused on the exercise of the profession of lawyer in line with Committee of Ministers Recommendation No. R (2000) 21 on the freedom of exercise of the profession of lawyer, and on the development and dissemination of a code of ethics for lawyers. The bar association also sought, and used, the Council of Europe's input in respect of the framework for admission to the profession of lawyer and the self-administration of the profession. Similar work has been undertaken in the Republic of Moldova.

58. CCJE opinion No. 6 (2004) on fair trial within a reasonable time and judges' role in trials, paragraph 26.

59. *Vardanyan and Nanushyan v. Armenia* (Application No. 8001/07), 27 October 2016.

## CHAPTER 2

# FREEDOM OF EXPRESSION



# INTRODUCTION

## Chapter 2 – Freedom of expression

**F**reedom of expression, protected under Article 10 of the Convention, is a precondition for a healthy democracy.

Individuals of all backgrounds and beliefs have the right to express themselves, even when their opinions are offensive or shocking, providing that they do not incite violence or hatred. Open debate enables our societies to evolve and meet new challenges. Free speech, supported by a diverse and independent media, allows citizens to make informed decisions and helps ensure that powerful interests are held to account.

Populist movements benefit from their democratic right to express themselves freely, even when the views expressed are controversial and provocative. However, the populist approach to free speech is ungenerous and discriminatory. Critics of the populist cause and unsympathetic media are dismissed as inaccurate, biased and self-serving. In this way, populism eliminates dissent and erodes a fundamental principle in any democracy: our right to disagree.

While successful populism tends to rely on established media outlets lending their approval to its aims, the internet has also created unprecedented opportunities to build support. Social networks in particular allow populist narratives, fake news and “alternative facts” to spread with lightning speed, often unchallenged and uncorrected.

Such developments create serious challenges for democracies. When individuals or organisations spread hateful messages which break the law, such actions must be punished. This includes on the internet, ensuring that human rights are upheld online.

Robust safeguards are needed to protect the media from undue political influence. Council of Europe member states should guarantee a plural landscape in which opposing views are given space and where all political parties and agendas can be

subject to scrutiny. Democratic governments must ensure that media operating within their borders can do so independently of powerful interests. Formal restrictions on monopolies must be enforced and journalists must be able to conduct their work free from interference, including the threat of violence and intimidation.

Restrictions on information that can be published, for example when publication would threaten national security, must be legitimate, proportionate and based on a clear law. It is also vital that journalists and whistle-blowers are able to expose wrongdoing in the knowledge that politicians and state officials are subject to higher levels of scrutiny.

This year, the parameters of this chapter have been adjusted and measurement criteria refined, in order to better reflect the ongoing developments in member states. The main parameters are (1) legal guarantees for the freedom of expression; (2) protection of journalists and other media actors; (3) media independence; (4) media pluralism and diversity; and (5) protection of freedom of expression on the internet. Key findings are provided for the states for which data are available.

One of the most alarming findings concerns the safety of journalists and other media actors: member states fail to guarantee an enabling environment for them and journalists are exposed to threats and violence. Imprisonment of journalists has reached unprecedented numbers. The crackdown on journalists and media actors is paralleled by an increase in other restrictions of the freedom of expression, often justified by national security concerns and state of emergency situations.

In April 2016, the Committee of Ministers adopted a recommendation on the protection of journalism and safety of journalists and other media actors, requiring member states to put in place effective mechanisms that guarantee the physical and

moral integrity of journalists and ensure that all crimes committed against them are effectively investigated to prevent impunity.<sup>60</sup>

■ Media pluralism is another indicator that denotes how many member states are failing in their positive obligation to foster a variety of media and a plurality of information sources. Concentration of ownership remains a widespread feature of media markets and this hinders a diverse and independent media environment.

■ As regards freedom of expression on the internet, while the legal framework on blocking, filtering and removal of internet content is in the majority of member states in accordance with Article 10 of the Convention on freedom of expression and basic rule of law standards, some remarkable exceptions can be observed, in particular with regard to counter-terrorism measures and laws regulating hate speech.

■ An absence of quantifiable records on filtering and surveillance activities by member states does not necessarily imply that no such activities are taking place. On the contrary, technological evolution may lead to surveillance without the knowledge of the affected person or organisation.

■ Following up on the recommendations of the Secretary General's previous report, a new recommendation of the Committee of Ministers on internet intermediaries is currently being prepared by an Expert Committee of the Steering Group on Media and Information Society. Steps have also been taken to establish a partnership between the Council of Europe and internet companies which would serve as a platform for close consultation with intermediaries on issues related to the exercise and enjoyment of human rights, notably freedom of expression, online.

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60. Council of Europe, News about protection of journalism and safety of journalists, 13 April 2016. See [www.coe.int/en/web/media-freedom/-/council-of-europe-adopts-guidelines-to-protect-media-freedom-and-journalists](http://www.coe.int/en/web/media-freedom/-/council-of-europe-adopts-guidelines-to-protect-media-freedom-and-journalists).

# LEGAL GUARANTEES FOR FREEDOM OF EXPRESSION

## Chapter 2 – Freedom of expression

**F**reedom of expression, must be guaranteed in law and in practice and all restrictions must be limited to what is necessary in a democratic society in the interest, among others, of national security or public safety, or for the protection of the reputation or the rights of others. In line with the jurisprudence of the Court, these exceptions defined in Article 10.2 must be interpreted narrowly to ensure that the protection of freedom of expression is not eroded through laws, judicial proceedings or other restrictive measures that disproportionately place emphasis on, for instance, national security or the reputation of others. As regards politicians, members of governments and heads of states, the Court has taken the view that a higher level of criticism should be allowed due to the public office they hold. The Council of Europe Committee of Ministers has further recognised that whistle-blowing can be an important instrument to promote democratic accountability and transparency.<sup>61</sup> As whistle-blowing forms part of freedom of expression and freedom of conscience, whistle-blowers should be adequately protected.

■ The protection of the reputation of others is still used as one of the most common grounds for limiting freedom of expression. Both, the Committee of Ministers and the Parliamentary Assembly have urged member states to ensure that defamation laws include freedom of expression safeguards in conformity with European and international human rights standards and the principle of proportionality. The Commissioner for Human Rights has further underlined that freedom of expression must be guaranteed more effectively in criminal defamation proceedings and has spoken out against imprisonment as a sanction for defamation. Both imprisonment and the imposition of disproportionate damages can produce a significant chilling effect on journalists. While incitement to hatred and violence against a religious group is not protected under the Convention, blasphemy should not be deemed a criminal offence as the freedom of conscience forms part of freedom of expression.

■ The protection of national security, territorial integrity and public safety are other grounds for limiting freedom of expression regularly cited

by member states in 2016. In a number of member states, the implementation of public safety laws and anti-terrorism measures have restricted the rights of individuals to receive and impart information both offline and online.

### 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 other 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 of the Convention.
- ▶ A normative, institutional and judicial framework is in place to protect whistle-blowers.

### FINDINGS

■ The arbitrary application of criminal law to limit freedom of expression remains problematic in over half of our member states.

■ Some form of defamation is considered a criminal offence in 36 member states and imprisonment is a

61. Committee of Ministers Recommendation CM/Rec(2014)7 on the protection of whistleblowers, adopted on 30 April 2014; see <https://goo.gl/TgZxeb>.

possible sanction in 29. The mere fact that criminal sanctions related to defamation can be applied produces substantial undesirable effects on freedom of expression and information, as well as cases of opportunistic litigations.

Political or public officials in 30 member states enjoy higher levels of protection in defamation laws. This is not in line with the jurisprudence of the Court, which has ruled that the limits of acceptable criticism should be wider for politicians, given the need for transparency and scrutiny.<sup>62</sup> The criminal conviction and imposition of a fine on a journalist for mocking local government officials, for instance, was considered a violation of Article 10 of the Convention,<sup>63</sup> as was the conviction of a journalist for a satirical publication found to be insulting to a regional prosecutor.<sup>64</sup>

At the end of 2016 the Italian Parliament was debating a government bill aimed at abolishing detention for cases of defamation through the media. The Ministry of Justice of Germany announced the intention of the German Government to remove the provision prohibiting insult to foreign heads of state from criminal law. In many other cases, however, defamation laws are being misused to prevent contributions to public debate, thereby unduly limiting freedom of expression. The Committee of Ministers, in the context of the supervision of the execution of a judgment,<sup>65</sup> expressed concerns regarding the legislative amendments to the Criminal Code of Azerbaijan introducing new defamation offences.

Blasphemy remains an offence in 18 member states, although there is a tendency to decriminalise it. Malta, for instance, abolished its criminal provision related to the vilification of religion in 2016.

Although in most member states there is no established framework to protect whistle-blowers, some are adopting laws in that field to facilitate public interest reporting and disclosures as an effective tool to expose and fight crime and corruption. The House for Whistle-blowers Act was adopted in the Netherlands in March and entered into force in July 2016, establishing a new authoritative body to advise whistle-blowers. New protections were also included

in the Transparency, Fight against Corruption and Economic Modernisation Act, adopted by the French Parliament in November 2016, and a new law aiming to protect employees who sound the alarm about irregularities in the workplace entered into force in Sweden in January 2017.

In 2016, cases of imprisoned journalists were reported to the Council of Europe's Platform to promote the protection of journalism and safety of journalists with regard to Azerbaijan, Montenegro, the Russian Federation, "the former Yugoslav Republic of Macedonia" and Turkey.<sup>66</sup>

In Turkey, in the aftermath of the coup attempt, more than 150 media outlets were closed down by emergency decree laws,<sup>67</sup> 17 newspapers, 1 TV channel and 2 radio stations have been reopened by decree laws.<sup>68</sup> Prominent journalists were prosecuted on terrorism-related charges, including the editor-in-chief and other employees of the newspaper *Cumhuriyet*.<sup>69</sup> The Commissioner for Human Rights has expressed his concern at these sweeping measures that have been applied indiscriminately to sectors such as newspapers and other media outlets.<sup>70</sup> While not questioning in any way the decision of the Turkish authorities to declare a state of emergency, the Commissioner for Human Rights has underlined the urgent need for a nuanced approach that takes the specific circumstances of each individual case into account and establishes whether the freedom of expression has been guaranteed to the widest extent possible and that adequate safeguards are in place.

The Commissioner for Human Rights has also expressed his concern at the repression of those expressing dissent or criticism of the authorities, including journalists and bloggers in Azerbaijan.<sup>71</sup>

62. Venice Commission, Opinion on the law on the Protection of Privacy and on the law on the Protection of Whistle-blowers of "the former Yugoslav Republic of Macedonia", CDL-AD(2016)008.

63. *Ziemiński v. Poland* (No. 2) (Application No. 1977/07), 5 July 2016.

64. *Grebneva and Alisimchik v. Russia* (Application No. 8918/05), 22 November 2016.

65. See the Council of Europe Committee of Ministers in its 1273rd meeting (December 2016) regarding the supervision of the execution of the case H46-4 *Mahmudov and Agazade Group v. Azerbaijan* (Application No. 35877/04), noting that new defamation offences subject to imprisonment had been introduced through amendments to the Criminal Code in 2016. See <https://goo.gl/ab8mw1>.

66. See information provided on the Platform to promote the protection of journalism and safety of journalists ([www.coe.int/fom](http://www.coe.int/fom)) and the Report of the Committee on Culture, Science, Education and Media of the Council of Europe Parliamentary Assembly, available at <https://goo.gl/HG9um3>.

67. See the Statement of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe of 9 March 2016. Available at: <https://goo.gl/wYezl0>.

68. See Observations by Turkey on the Memorandum of Commissioner for Human Rights on freedom of expression and media freedom in Turkey. Available at <https://goo.gl/Vk8I9J>.

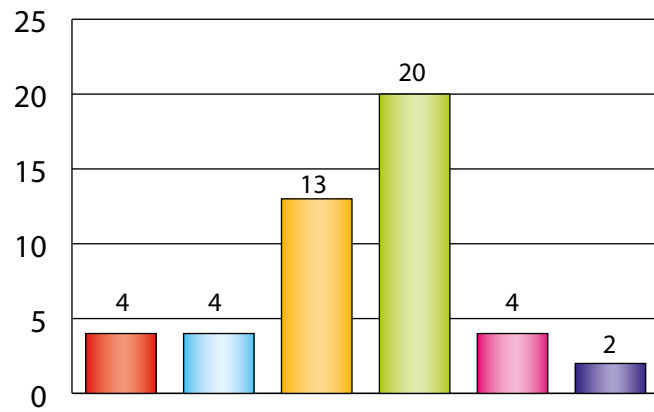
69. See Statement of the Council of Europe Secretary General of 31 October 2016.

70. Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, Council of Europe Commissioner for Human Rights, CommDH(2016)35, 7 October 2016.

71. See Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights, *Bagirov v. Azerbaijan*, 22 November 2016 (CommDH(2016)42).



### Legal guarantees for freedom of expression



No info

Satisfactory - deteriorating

Unsatisfactory - stable

Satisfactory

Unsatisfactory - improving

Unsatisfactory - deteriorating

## Positive obligations of the member states to protect journalists and the freedom of expression

Although the essential objective of Article 10 of the Convention is to protect the individual against arbitrary interference by public authorities, member states must, in addition, fulfil a range of positive obligations, as identified in the relevant judgments of the European Court of Human Rights and the other relevant instruments of the Council of Europe.<sup>72</sup>

Such obligations comprise legal, administrative and practical measures aiming to ensure the safety of journalists and to create an enabling environment for freedom of expression. They are to be fulfilled by all state authorities – executive, legislative and judicial – and at all levels – national, regional and local. The scope of these obligations will vary, having regard to the diversity of situations, and the choices made in terms of priorities and resources. Such obligations should not impose an impossible or disproportionate burden on the domestic authorities.

### A. Prevention

**Safety and physical integrity of journalists:** member states must guarantee the safety and physical integrity of journalists and this entails not only the obligation to refrain from the intentional and unlawful taking of life, but also the positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction.

This involves a primary obligation for the state to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against journalists.

This also extends, in appropriate circumstances, to a positive obligation on the authorities to take preventive measures to protect individuals whose lives are at risk. In particular, the authorities should pay attention to the vulnerable position of the journalists who cover politically sensitive topics, vis-à-vis those in power.<sup>73</sup>

**Legislative framework:** member states should put in place a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear.<sup>74</sup> It should:

- ▶ guarantee access to information, privacy and data protection, confidentiality and security of communications, and protection of journalistic sources and whistle-blowers;
- ▶ recognise the particular roles of journalists in a democratic society, by paying due attention to the importance of adequate labour and employment laws to protect them from arbitrary dismissal or reprisals, and from precarious working conditions that may expose them to undue pressures to depart from accepted journalistic ethics and standards.<sup>75</sup>
- ▶ be subject to independent, substantive review to ensure that safeguards for the exercise of the right to freedom of expression are robust and effective in practice.<sup>76</sup>

### B. Protection

States are under a positive obligation to protect journalists against intimidation, threats and violence irrespective of their source, whether governmental, religious, economic or criminal. Clear and adequate provisions should be made for effective injunctive and precautionary forms of interim protection for those who face threats of violence.

Adequate procedural guarantees must be afforded in all cases of deprivation of liberty of journalists or other media actors carried out by the police or other law-enforcement officials: the right to inform, or

72. See, in particular, Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors (adopted at the 1253rd meeting of the Ministers' Deputies).

73. *Dink v. Turkey*, 2668/07, 6102/08, 30079/08, judgment of 14 September 2010; *Gongadze v. Ukraine*, 34056/02, judgment of 8 November 2005; *Kiliç v. Turkey*, 22492/93, judgment of 28 March 2000.

74. Recommendation CM/Rec(2012)1 of the Committee of Ministers to member states on public service media governance (Adopted on 15 February 2012 at the 1134th meeting of the Ministers' Deputies); Parliamentary Assembly of the Council of Europe Resolutions 2035 (2015) "On the protection of the safety of journalists and of media freedom in Europe" and 1535 (2007): "on the threats to the lives and freedom of expression of journalists".

75. *Fuentes Bobo v. Spain*, 39293/98, 29 February 2000; *Palomo Sánchez and Others v. Spain* [GC], 28955/06, 28957/06, 28959/06 et al., 12 September 2011; *Frăsilă and Ciocirlan v. Romania*, 25329/03, 10 May 2012.

76. CM/Rec(2016)4 of the Committee of Ministers to member states, op. cit.

to have informed, a third party of their deprivation of liberty, their location and any transfers; the right of access to a lawyer; the right of access to a medical doctor; and the right to challenge the lawfulness of the detention before a court of law.

Journalists arrested or detained in relation to an offence must be brought promptly before a judge, and they have the right to a trial within a reasonable time or to be released pending trial.

Member states should also take the necessary measures to prevent the frivolous, vexatious or malicious use of the law and legal process to intimidate and silence journalists and should exercise similar vigilance to ensure that administrative measures such as registration, accreditation and taxation schemes are not used to harass journalists or to frustrate their ability to contribute effectively to public debate.<sup>77</sup>

### C. Prosecution

Member states must take all necessary steps to bring the perpetrators of crimes against journalists and other media actors to justice, whether they work for state media or not. Investigations into killings, attacks and ill-treatment of journalists must respect the essential requirements of adequacy, thoroughness, impartiality and independence, promptness and public scrutiny.<sup>78</sup>

They should be capable of leading to the establishment of the facts as well as the identification and, if appropriate, punishment of those responsible. Their conclusions must be based on thorough, objective and impartial analysis of all relevant elements, and the victim's next of kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. The persons responsible for carrying out such investigations, must be independent and impartial in law and in practice and any person or institution implicated in a case must be excluded from any role in investigating it.

Member states must ensure that effective remedies are available to victims and to their families, if necessary, including legal remedies, financial compensation, medical and psychological treatment, relocation and shelter. An ongoing or pending criminal prosecution should not preclude victims from seeking civil remedies.

77. Ibid.

78. See, *Rizvanov v. Azerbaijan*, 31805/06, 17 July 2012; *Najafli v. Azerbaijan* 2594/07, 2 October 2012; *Emin Huseynov v. Azerbaijan*, 59135/09, 7 August 2015.

## “Journalists under pressure”

The physical attack, harassment or imprisonment of journalists compromises their fundamental rights to freely express themselves and threatens the free flow of information. Likewise, it affects citizens’ access to information from various sources, their ability to engage in open public debate and, consequently, to participate as active citizens. Yet, amid a general perception of increased risks of unwarranted interference with the work of journalists across Europe, resulting in some states in an alarming rise in alerts to the Platform to promote the protection of journalism and safety of journalists, the true extent of the phenomenon and its consequences for the journalistic profession across the continent have so far not been systematically documented or researched.

A study commissioned by the Council of Europe’s Information Society Department, entitled *Journalists under pressure – Unwarranted interference, fear and self-censorship in Europe* explores in detail what types of unwarranted interferences are experienced by journalists today. It also documents the extent of journalists’ fear of such interference and its impact on self-censorship, thereby showing the limitations on the exercise of their role of public watchdog. The study gathers information submitted through the use of anonymous online questionnaires in five languages from 940 journalists from the 47 member states and Belarus. While using a convenience sample of journalists recruited mainly from members of five major journalists’ and freedom of expression organisations, the study attempts to contribute evidence-based data to the debate.

According to the findings over a three-year period, 31% of respondents (both male and female) had experienced physical assault, 46% had been threatened with force, 39% experienced robbery/confiscation/destruction of property or non-contact personal theft, all in connection with the exercise of their professional activities. Some 13% of respondents (mainly female) reported sexual harassment and/or violence, and a staggering 69% reported experiencing psychological violence, such as intimidation and humiliation, mainly at the hands of public authorities. Furthermore, 39% of respondents stated that they had been subjected to targeted surveillance, and 23% had experienced judicial intimidation. The experience of psychological violence and of targeted surveillance was high in all regions. Overall, over a third of journalists reported that there were no readily accessible mechanisms of redress available to them, and half of respondents feared that their ability to protect their sources was compromised. The fear of future unwarranted interference was high, especially with regards to psychological violence, cyberbullying and intimidation by individuals and interest groups. A third of respondents reported concern about their personal safety and the safety of those close to them. The perceived fear of future victimisation was closely correlated with having actually experienced unwarranted interference.

The results highlight the significant impact of the fear of interference experienced by journalists on their role as public watchdogs. A significant percentage of journalists reported having toned down or even abandoned sensitive or critical stories, having been selective about the items they reported on in an effort to minimise controversial narratives, and having withheld information or shaped stories in order to suit the company’s or editors’ interests. Some 36% of respondents, however, also stated that the experience made them more committed to not engaging in self-censorship. Those who reported experiences of physical assault, threats with force and psychological violence also reported that these experiences made them more likely to make certain compromises in their work compared to those who did not have such experiences.

# PROTECTION OF JOURNALISTS AND OTHER MEDIA ACTORS

## Chapter 2 – Freedom of expression

**F**reedom of expression and the free flow of information are the cornerstones of public debate and democracy. In their established role as public watchdogs, journalists ensure the right of the public to be informed on all matters of public interest, thereby contributing to the formation of an educated electorate that can hold democratic authority to account. However, journalists and other media actors can fulfil their important role only when they are able to work without interference and fear of violence, arbitrary detention and harassment.

■ The Court has repeatedly underlined the fundamental duty of member states to put in place effective systems for the protection of journalists and other media actors as part of their broader obligation to create a favourable environment for an active public debate where everyone is encouraged to express opinions and ideas without fear. In April 2016, the Committee of Ministers adopted a recommendation on the protection of journalism and the safety of journalists and other media actors, requiring member states to put in place comprehensive legislative frameworks that guarantee public access to information, privacy and data protection, confidentiality and security of communications, and protection of journalistic sources and whistle-blowers.<sup>79</sup> Moreover, member states should effectively protect the physical and moral integrity of the person by putting in place appropriate criminal law provisions to deter the commission of offences against journalists and by ensuring that all crimes against journalists are effectively investigated to prevent impunity.

■ As the gathering of information and evidence is an essential preparatory step in all journalistic

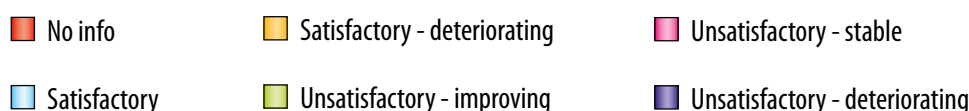
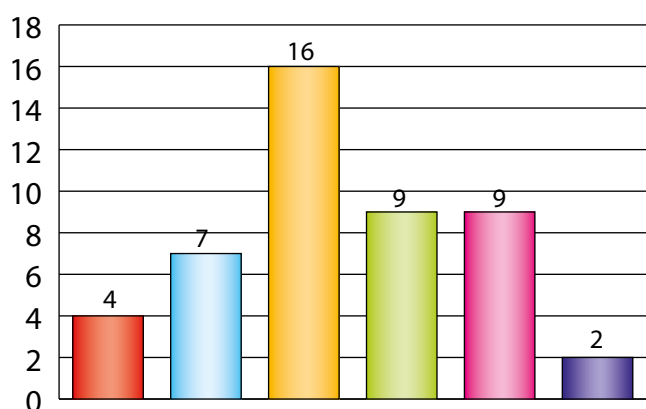
work and inherently protected by media freedom, the confidentiality of journalistic sources must be protected in law and in practice subject to clear and narrow exceptions. Moreover, journalists should not be subjected to surveillance as this can have a chilling effect on them and negatively impact their ability to scrutinise public power.

### 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 comments. There are no politically motivated prosecutions or sanctions administered against journalists and other media actors.
- ▶ Journalists are not subjected to verbal intimidation led or condoned by authorities, or to negative public rhetoric.
- ▶ 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. There are no delays in the administration of justice.
- ▶ Prosecutors and courts deal promptly and effectively with cases.
- ▶ Journalists are not subjected to surveillance by the state in the exercise of their profession.

<sup>79</sup> Committee of Ministers Recommendation CM/Rec(2016)4, 13 April 2016.

## Protection of journalists and other media actors



- ▶ 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 by the state before they can work. Foreign journalists are not refused entry or work visas because of their potentially critical reports.

## FINDINGS

■ The assessment confirms the negative trend in recent years. Journalists are not sufficiently protected against violence and threats in 28 member states, while in 17 member states previously satisfactory conditions are compromised by a rising number of reports of physical attacks and threats directed against journalists.

■ Since January 2015, 16 journalists have been killed in member states.<sup>80</sup> The situation was considered satisfactory with no reports regarding any

form of violence or threat against journalists in only 12 member states. In 2016 alone, the platform to promote the protection of journalism and safety of journalists recorded 133 cases of alleged threats in 29 member states.<sup>81</sup>

■ Journalists and other media actors face censorship, political and economic pressure, intimidation, job insecurity, misuse of defamation laws as well as physical attacks, as acknowledged by the Parliamentary Assembly of the Council of Europe in its recent resolution on attacks against journalists and media freedom in Europe.<sup>82</sup> Impunity for offences against journalists fuels recidivism and has a chilling effect on media freedom.<sup>83</sup> In Croatia, where 24 attacks against journalists have been reported since May 2014, the investigations of a number of cases of journalists who had been physically attacked or received death threats in 2014 and 2015 had not been effectively

80. Parliamentary Assembly Resolution 2141 (2017) "Attacks against journalists and media freedom in Europe", 24 January 2017. See <https://goo.gl/i1F4eC>.

81. Platform to promote the protection of journalism and safety of journalists. See [www.coe.int/en/web/media-freedom/home](http://www.coe.int/en/web/media-freedom/home).

82. Parliamentary Assembly Resolution 2141 (2017), op. cit.

83. See for example, the platform alerts "Continuing Impunity in the Killing of the Ukrainian Investigative Journalist Georgiy Gongadze" of 16 November 2016 and "Masterminds still not Brought to Justice, Ten Years after the Murder of Novaya Gazeta Journalist Anna Politkovskaya" of 7 October 2016.

completed in 2016 or had resulted in misdemeanour proceedings for disturbance of public order.<sup>84</sup>

■ There are no barriers for the exercise of the profession of journalist nor are there any restrictions to the work of foreign journalists in 25 member states. In six member states, foreign journalists were deported or were denied entry.

■ All but nine member states provide for a legal framework that recognises the confidentiality of journalists' sources, however, these frameworks do not always contain effective safeguards for preventing the disclosure of these sources. Only in 24 member states were there no cases reported of enforced disclosure of sources.

■ The effectiveness of measures to protect the confidentiality of journalistic sources has been challenged by surveillance laws, passed in some states under exceptional circumstances and often by resorting to extraordinary legal procedures. The Commissioner for Human Rights criticised the legislation on surveillance adopted in Poland as entailing a threat to the protection of journalistic sources.<sup>85</sup> In the United Kingdom,

the Investigatory Powers Bill was passed by the House of Lords in November 2016, allowing the police, tax inspectors and other public servants to access communications' traffic data without prior judicial review.<sup>86</sup> In his Memorandum of 17 May 2016,<sup>87</sup> the Commissioner for Human Rights had recommended that judicial warranting should be the default mechanism for the authorisation of most surveillance, with only a limited number of cases which would be subject to the certification of the Secretary of State.

■ A positive trend can be observed in favour of adopting laws that ensure access to documents and information held by public bodies as a tool for more transparency in public administration. Transparency of public authorities is a key feature of good governance and an indicator of whether a society is genuinely democratic and pluralist, as recognised by the Council of Europe Convention on Access to Official Documents (CETS No. 205, the Tromsø Convention).<sup>88</sup> Most member states have adopted freedom of information laws, with only eight remaining without such a legal framework.

84. See the Commissioner for Human Rights Report following his visit to Croatia from 25-29 April 2016 of 5 October 2016, CommDH(2016)31.

85. See the Commissioner for Human Rights Report following his visit to Poland from 9-12 February 2016 of 15 June 2015, CommDH(2016)23.

86. See alert on the Safety of Journalists platform "UK Draft Bill on Surveillance Threatens Protection of Journalists' Sources" of 16 November 2015 and update of 18 November 2016.

87. See Commissioner's Memorandum on surveillance and oversight mechanisms in the United Kingdom, 17 May 2016, CommDH(2016)20.

88. The Council of Europe Convention on Access to Office Documents (CETS 205) of 18 June 2009 has been signed by five and ratified by nine Council of Europe member states. It will enter into force upon the 10th ratification.

# MEDIA INDEPENDENCE

## Chapter 2 – Freedom of expression

**T**he editorial independence of the media, including online media, should be guaranteed in law, in policy and in practice and should not be subject to any form of censorship or pressure to follow a particular editorial direction. However, ensuring media independence remains one of the main challenges to freedom of expression in Europe. Licensing restrictions, arbitrary interference in the work of media professionals and different forms of censorship and self-censorship are examples of how the independence of the media, whether public or privately owned, is restricted and how undue influence is exerted on their editorial freedom.

■ The Council of Europe has developed detailed standards on media independence and has highlighted how these must be ensured by concurrent conditions and measures, including clear and fair rules regarding the licensing for broadcasting; protective measures against pressure and unwanted control by politicians, by advertisers and by other dominant private sector interests over editorial choices, including laws on conflict of interest restrictions on media ownership; independence of the regulators who are monitoring the media market; and a fair distribution of state subsidies to public media based on transparent criteria. The independence of public-service media is another fundamental standard that must be fulfilled: recently the Committee of Ministers urged member states to safeguard the independence of the media, including by ensuring the economic independence and sustainability of public-service media.<sup>89</sup> An international conference on Public Service Media and Democracy in Prague in November 2016 highlighted the role of parliaments in protecting the independence of the media and the impact of public-service media on societies.<sup>90</sup>

■ Media independence also depends on the professionalism of journalists. They should carry out their important functions in the interest of the public, by following ethical and deontological rules of their profession that are, among others, defined in self-regulatory mechanisms. Safeguards for the independence of the media also include decent economic working conditions for journalists and other media actors. Finally, local media also play an essential role in creating a favourable environment for freedom of expression through independent media.

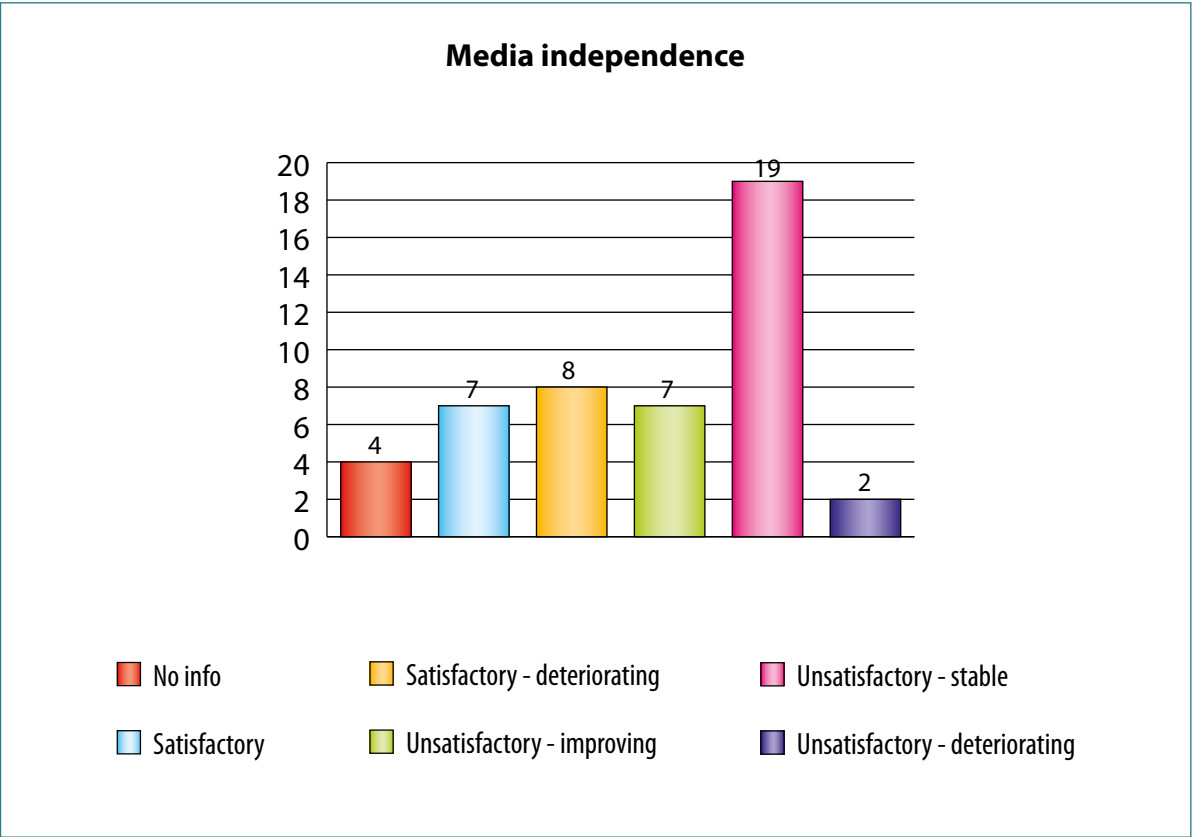
### MEASUREMENT CRITERIA

- ▶ Regulatory frameworks safeguard the editorial independence of media outlets from government, media owners' and political or commercial interests.
- ▶ The editorial independence of media outlets is respected in practice.
- ▶ Print, broadcast and internet-based media are not subject to 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, impartial, and decisions are public. The press and internet-based media are not required to hold a license which goes beyond mere business or tax registration.
- ▶ Broadcasters, the press and internet-based media are free from arbitrary interference in and sanctioning of their work.
- ▶ 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.

89. Recommendation CM/Rec(2016)4, op. cit.

90. See "Public Service Media and Democracy" conference in Prague on 10-11 November 2016. See <https://goo.gl/NAstZP>.





- ▶ There are effective self-regulatory measures which balance media rights and responsibilities.
- ▶ Journalists have adequate working contracts with sufficient social protection.

**FINDINGS**

The evaluation of media independence in this report shows that most member states do not have sufficiently strong regulatory safeguards in place and fail to take effective measures to guarantee the independence of the media. Media are often used by politicians, the government, commercial and private powers to steer the political and economic agenda: this hinders the watchdog role of the media and limits media plurality.

The results show a trend towards declining editorial independence of the media in most member states. Some sort of censorship – or of self-censorship – was identified as a consequence of the misuse of defamation laws against journalists, the poor working conditions of journalists and other media actors, and of political and economic pressures.

The working conditions of journalists are a major challenge in almost all member states. The journalistic profession is visibly becoming increasingly precarious and fewer journalists have a permanent job. This leads to increased self-censorship as journalists are less likely to publish material that go against the

interests of their employer or government in order to avoid losing their jobs.<sup>91</sup> Few member states provide journalists with mechanisms of social protection in case of changes of media ownership or editorial line.

Less than half of Council of Europe member states have established fully independent regulatory authorities. A lack of independence of the public-service media can further be observed in all cases where financial independence is at stake.<sup>92</sup> The year 2016 witnessed interference of governments in the appointment and dismissal procedures of members of public-service media boards.

The conclusions of the Prague Conference on Public Service Media and Democracy in November 2016 call on member states to abstain from political interference with the independence of public-service media and to ensure their sustainable funding to allow them to fulfil their mission.

In Croatia, the government requested the termination of the broadcast regulator’s mandate and

91. See the study “Journalists at Risk: Part of the Job?”, available at [www.coe.int/en/web/human-rights-rule-of-law/-/new-council-of-europe-study-on-journalists-at-risk-part-of-the-job-](http://www.coe.int/en/web/human-rights-rule-of-law/-/new-council-of-europe-study-on-journalists-at-risk-part-of-the-job-).

92. See Thomas Hammarberg et al. (2011), *Human rights and a changing media landscape*, Council of Europe Publications, Strasbourg ([www.coe.int/t/commissioner/source/prems/MediaLandscape2011.pdf](http://www.coe.int/t/commissioner/source/prems/MediaLandscape2011.pdf)).

the dismissal of its members.<sup>93</sup> The Director of the Croatian Radio and Television (HRT) was dismissed by parliament based on a negative report by the supervisory committee that directly appointed a new acting director. Over 70 other dismissals or replacements of managers, editors, journalists, engineers and legal experts within the public-service media followed the election of a new government.<sup>94</sup>

■ In Poland, the Small Media Act was adopted at the end of 2015, as a temporary legislative act until the end of June 2016. It modified the competences of the regulatory authority in the area of appointing boards and supervising the public-service media. The act introduced the appointment of the public-service media boards directly by the treasury.<sup>95</sup> On 7 July 2016, the new Act on the National Media Council entered into force, according to which two out of five members of the Council are designated by the opposition parties.

■ In October 2016, the Romanian Senate passed a draft law to eliminate the licence fee for public-service media and to introduce direct funding from the state budget.<sup>96</sup>

■ Editorial independence is challenged by the reduced viability of media markets. The recent case of the Hungarian newspaper *Népszabadság* may be representative in this regard: the newspaper, one of the most important opposition outlets in Hungary, was forced to close.<sup>97</sup>

■ State advertising and direct and indirect funding by governments, when not based on fair and non-discriminatory criteria, represents a threat to media independence as it creates a non-transparent system of selective state support. This practice is an increasingly common and easy method for governments to influence not only the editorial line of the media but to drive the media market itself.

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93. The Platform alert "Attacks on the Independence of Croatian Public Broadcaster and Broadcast Regulator" of 16 March 2016 and update of 13 May 2016.

94. See the Commissioner for Human Rights Report following his visit to Croatia from 25 to 29 April 2016 (5 October 2016).

95. See the Commissioner for Human Rights Report following his visit to Poland, 15 June 2016 (CommDH (2016)23).

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96. See Platform alert "Romania to Eliminate Public Broadcast Fee" of 21 October 2016.

97. See Platform alert "Largest Opposition Daily Suspended in Hungary" of 12 October 2016.

# MEDIA PLURALISM AND DIVERSITY

## Chapter 2 – Freedom of expression

**A**ccess to various sources of information allows an individual to form an educated opinion and thereby directly contributes to pluralistic political debates and informed electorates.

■ The Court has upheld the legitimacy of various forms of interference by public authorities if this is necessary to foster media pluralism.<sup>98</sup> The introduction of structural limits through a system of licensing or the introduction of thresholds and restrictions on media ownership can be seen as a measure to limit the natural tendency to oligopoly of the media markets, thereby allowing a reasonable number of diverse media outlets to operate in the member states without any dominant voice.

■ A regulatory framework to guarantee transparency of media ownership is fundamental for media pluralism as knowledge of the ultimate owner of a media company is essential when it comes to addressing media concentration and possible conflict of interests. Transparency is therefore instrumental for citizens and the public in general to address potential undue influence over the media. Access to comprehensive information on media ownership is also essential for regulatory authorities.

■ Public-service media and local media can make a crucial contribution to fostering public debate, political pluralism and awareness of diverse opinions, notably by providing different groups in society – including cultural, linguistic, ethnic, religious, or other minorities – with an opportunity to receive and impart information, to express themselves and to exchange ideas. According to Council of Europe standards, public-service media in particular should be a source of impartial information and comment, a forum for pluralistic public discussion, and a guarantee for diversified information to balance any potential bias of the media market and private media operators.

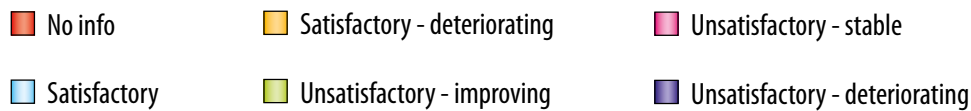
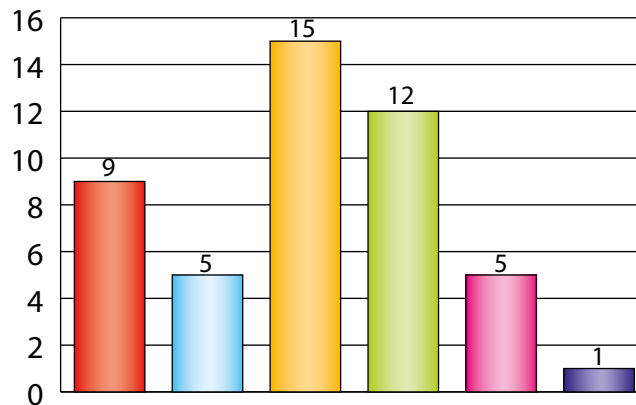
■ Member states should ensure that existing public-service media organisations occupy a visible place even in the new media landscape and play an active role in promoting social cohesion and integrating all communities, social groups and generations. In order to guarantee the fairness and independence of public-service media, measures for the promotion of a diversity of opinions in the media should be put in place, such as rules on the composition of management boards of public-service media to guarantee their independence and limit interference from the political and commercial sectors in the appointment of managers and personnel.

### MEASUREMENT CRITERIA

- ▶ The public has access to a sufficient variety of print, broadcast and internet-based 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.
- ▶ Information about media ownership and economic influence over media is easily accessible to the public.
- ▶ All types of media have fair and equal access to technical and commercial distribution channels and electronic communication networks.
- ▶ Media outlets represent diverse interests and groups within society, notably local communities and minorities. Media outlets actively promote representation of minorities and diversity in their internal organisation, including in media governing boards and self-regulatory mechanisms.

<sup>98</sup> See, among others, European Court of Human Rights, *Centro Europa 7 S.R.L. and Di Stefano v. Italy* (38433/09), 7 June 2012.

## Media pluralism and diversity



- ▶ Public-service media play an active role in promoting social cohesion and integration of society through proactive outreach to diverse social groups, minorities, persons with disabilities and all generations.
- ▶ Media, including public-service media, have fair and equal access to state advertising and state subsidies.
- ▶ Political parties and candidates have fair and equal access to the media. Coverage of elections by the broadcast media is balanced and impartial.

### FINDINGS

■ The findings from 2016 show that regulatory safeguards for media market plurality often fail to guarantee a diverse media landscape, either because they are insufficient to the aim or because they are not effectively implemented. In particular, there is a correlation between high levels of media concentration and low levels of media diversity. The lack of clear thresholds on media ownership generally has led to a downward trend in media pluralism and diversity.

■ In about half of the member states information about media ownership and economic influence over the media is in some form accessible to the public and/or to media authorities. Media ownership remains

opaque in many member states, which limits media accountability and effective pluralism, in particular where no transparency obligations requiring media companies to publish their ownership structures are foreseen in the law.

■ In a number of cases, public broadcasters rely on commercial funding, which results in their programme strategies being guided by the needs of advertisers and sponsors rather than their public-service obligations. In Hungary, the ban on paid political advertisement was considered by the Venice Commission to unjustly penalise the opposition and secure the media domination of the ruling majority, which can have a negative effect on the diversity of the media market.<sup>99</sup> The Parliamentary Assembly called on Hungary to revise certain parts of its media legislation in accordance with Opinion No. 798/2015 of the Venice Commission.<sup>100</sup>

■ An expert dialogue between the Polish Government and the Council of Europe regarding the draft big media law package relating to the Polish public-service media considered that the envisaged provisions limit media pluralism by disadvantaging

99. See Compilation of Venice Commission Opinions and Reports concerning Freedom of Expression and Media, at <https://goo.gl/4n0MJn>.

100. Parliamentary Assembly Resolution 2141 (2017) "Attacks against journalists and media freedom in Europe", available at <https://goo.gl/o0WyxK>.

minority voices.<sup>101</sup> In Georgia, despite the adoption of a law on broadcasting which encourages all responsible authorities to continue strengthening the independence and diversity of public and private media, concerns have been expressed about the past and continuing changes in media ownership, which have an impact on media pluralism and diversity. Efforts to change the ownership of the country's most popular TV station have caused continual concern among many international interlocutors and in civil society.<sup>102</sup>

■ As regards political pluralism and media pluralism during an electoral period, media laws in member states generally impose rules that aim at a fair representation of political viewpoints in news and informative programmes, at least on public-service media. Critical situations still occur in member states where, because of media concentration and parallelism of public-service media with the ruling parties, the

basic principle of fair space in the media for a plurality of political opinions is not respected in practice. Online media have played an important role in shaping public opinion during electoral periods. Discussions are ongoing on how relevant this influence can be and how to reduce the impact on media pluralism of the use of algorithms to create personalised newsfeeds, as well as potential disinformation campaigns and fake news (see box on the "fake news" phenomenon).

■ In a positive development, a law was passed in France in November 2016 introducing new guarantees for journalists and media actors with the aim to enforce media freedom, independence and pluralism. A media ownership bill was brought forward in early 2017 in Ireland to respond to growing concerns about media ownership concentration as a result of proposed media mergers and acquisitions.

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101. See the Expert Opinion of the Council of Europe on the three draft Acts regarding Polish public service media (DGI(2016)13) of 6 June 2016, at <https://goo.gl/D0BfjB>.

102. Parliamentary Assembly Resolution 2141 (2017), op. cit.

# FREEDOM OF EXPRESSION ON THE INTERNET

## Chapter 2 – Freedom of expression

**T**he internet creates new opportunities for the exercise and enjoyment of the freedom of expression as, unlike any other medium, it enables individuals to easily seek, receive and impart information across national borders.

Any interference with freedom of expression online must be prescribed by law, pursue a legitimate aim foreseen in Article 10.2 of the Convention, and must be necessary in a democratic society. All interference must also be based on a decision by a judicial or other independent authority.

While the online environment offers vast possibilities for freedom of expression and the media, it also poses new challenges. Internet intermediaries play a fundamental role in the distribution of content online. Legal frameworks for intermediaries should recognise this role and contain all necessary safeguards for freedom of expression and relevant privacy rights. Yet, they must also take into account and act against the use of the internet for illegal activities that are not covered by the Convention, such as the dissemination of hatred and incitement to violence. Furthermore, member states must put in place effective guarantees against the arbitrary monitoring and surveillance of internet users, which hinder the free flow of information and ideas on the internet.

The Council of Europe takes an active part in the ongoing dialogue with all stakeholders to ensure that the protection of the rights and freedoms enshrined in the Convention are at the forefront of all discussions regarding the internet. In April 2016, the Committee of Ministers adopted a recommendation to member states on internet freedom, which recommends that member states periodically evaluate the level of respect for and implementation of human rights and fundamental freedoms with regard to the internet, with a view to elaborating national reports.

The aim of the Council of Europe's internet governance strategy is to ensure that public policy relating

to the internet is people-centred and contributes to building democracy online, protecting internet users, and ensuring the protection and respect for human rights online. One aspect of its focus has also been to promote media and information literacy as the capacity to interpret autonomously and critically the flow, substance, value and consequence of media in all its many forms and to take advantage of the full range of opportunities offered by new communications technologies.

Following up on the recommendations set out in the Secretary General's previous annual report, a new draft recommendation of the Committee of Ministers to member states on internet intermediaries is being prepared by the committee of experts on internet intermediaries of the Steering Group on Media and Information Society with the aim of providing a rule of law framework to the relationship between state authorities and intermediaries and their respective human rights obligations and responsibilities.

Steps have also been taken to establish a platform on a partnership for human rights, democracy and the rule of law between the Council of Europe and internet companies with a view to creating a tool for closer consultation with intermediaries on issues related to the exercise and enjoyment of human rights, notably the freedom of expression, online.

### 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.

- ▶ The scope of any measure to block or filter internet content is any determined by a judicial authority or an independent body having due regard to their proportionality.
- ▶ The state does not block access to or usage of social media or other internet platforms permanently or during specific events.
- ▶ Internet intermediaries do not monitor their users, whether for commercial, political or any other purposes.
- ▶ Internet intermediaries are not held responsible for the information disseminated via the technology they supply except when they have knowledge of illegal content and activity and do not act expeditiously to remove it.
- ▶ Internet intermediaries do not censor content generated or transmitted by internet users.
- ▶ There is no surveillance of internet users' communication and activity on the internet except when this is strictly 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

■ The internet is generally available and accessible to most citizens in the member states. Data show a stable, positive situation for almost half of the member states, with most of the countries providing open access to the internet. Despite the growing penetration of broadband internet, lack of access to the internet remains critical in some member states. Moreover, there are substantial differences in the share of the population with a subscription to broadband internet even in member states with open access.

■ Restrictions on internet content are generally prescribed by law. In most of the member states, the rules that apply to offline media have been extended to online media. Few states have introduced specific rules to regulate illegal content distributed through the internet. In six member states, data show a deterioration in the situation as the restrictions on freedom of expression online are not clearly defined in law. Arbitrary limitations to freedom of expression may in particular occur when the grounds for restricting or filtering content online are vague and broad, such as through the use of terms like "humiliation of national honour", "extremism", "terrorist propaganda" or "condoning terrorism".

■ In the majority of member states, public authorities refrain from filtering or blocking online content

in an arbitrary manner and ensure that all content restrictions are based on decisions by a judicial authority or an independent body. Some member states have established new bodies that take a leading role in content restrictions or removals from the internet, based on special regulations specifically designed for the online environment. This may raise concerns with respect to the independence of these bodies and their impact on freedom of expression.

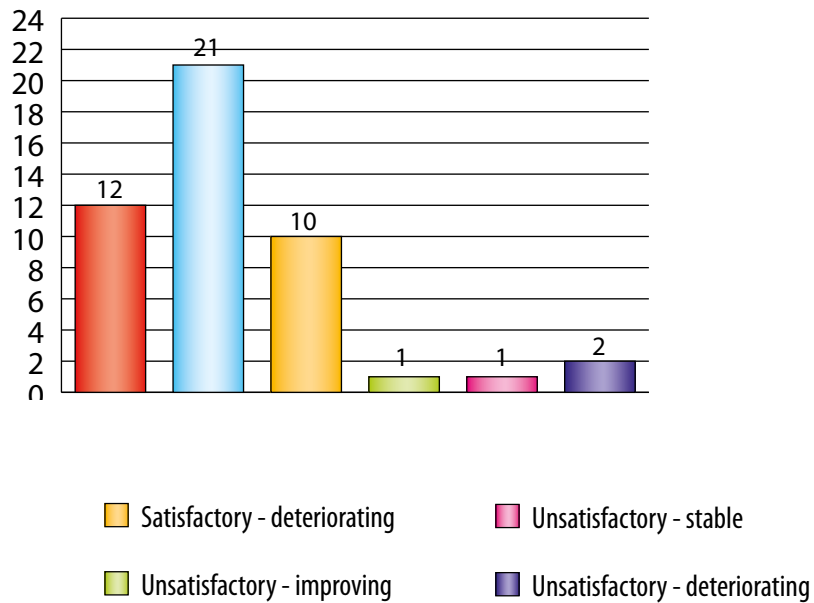
■ As regards the regulatory framework related to internet intermediaries and their liability for the dissemination of online content, member states generally use similar approaches: intermediaries are not held responsible for the information disseminated via the technology they supply unless they have knowledge of the illegality of the content and do not act expeditiously to remove it. However, the interpretation of this rule varies from state to state. Member states have, for instance, adopted different approaches to what qualifies as "knowledge" and/or "expeditious removal" and there are different procedures that may result in the removal of illegal online content. While the Court has generally held that member states have a wide margin of discretion in assessing what measures are "necessary" to pursue the legitimate aim that may justify restrictions on freedom of expression, the lack of a common approach leads to inconsistent levels of protection afforded to the freedom of expression across Europe.

■ Various legislative initiatives in member states have increased opportunities for surveillance over internet users' communications. While ostensibly the situation in most of the Council of Europe member states remains unchanged compared to 2015 with few records of surveillance activities, whether for commercial, political or other purposes, the mere fact that cutting-edge technologies are used for the massive monitoring of communications in order to pre-empt incidents may be problematic. The Court held in January 2016 that the legislation in question has to provide sufficiently precise, effective and comprehensive safeguards on the ordering, execution and potential redressing of such measures to avoid abuse. Most importantly, there has to be close judicial oversight at all stages of the process, from authorisation to application of the surveillance measures, even if extremely urgent situations may allow only for *ex post facto* judicial review.<sup>103</sup>

■ On 10 June 2016, the Russian state Duma approved amendments to the Law on Information, Information Technologies and Protection of Information. According to the amendments, "news aggregators" with more than 1 million daily users are required to check the truthfulness of "publicly important" information before dissemination. The

<sup>103</sup> Szabó and Vissy v Hungary (37138/14), 12 January 2016.

### Freedom of expression on the internet



law includes a number of broad terms that are open to abuse. It also confers liability for third-party content to intermediaries which may result in increased monitoring and removal of content.<sup>104</sup>

■ In the second half of 2016, a debate ensued in Europe and beyond regarding the use by social media platforms of algorithms for the creation of personalised newsfeeds, which may limit the plurality of sources, and regarding the truthfulness of information distributed by social media (see also the box on “fake news”, below). Some member states are discussing regulatory solutions that may be at odds with Article 10 of the Convention and could lead to censorship

operated by online intermediaries. More appropriate responses may be the creation of fact-checking websites and voluntary initiatives to facilitate the reporting and correction of inaccurate information.

■ Lastly, adequate policies to further media and information literacy and improve users’ skills, knowledge and critical understanding of content online remain of high importance in most member states. Finland and Sweden, have developed targeted and successful education programmes, including guidance on how to respond to hate messages on social media platforms.

104. See Platform alert “Law on News Aggregators Undermines Media Freedom Online” of 16 June 2016.



## The “fake news” phenomenon

During the second half of 2016, in particular surrounding the United Kingdom’s referendum on European Union membership and the presidential elections in the United States, public and political concern about mass dissemination of deliberately misleading and false information online has grown.

False information, rumours and propaganda have always existed and have always been particularly prevalent in politically charged times, such as before elections. However, today such information can be rapidly produced and disseminated on the internet, in particular via social media platforms, usually without prior verification of accuracy or correctness and without editorial control. Sources are often anonymous and distribution is automatic, including through social bots that are used to “like” and spread misinformation, while appearing to represent real people.

While there are good reasons to be concerned about the instant and massive spread of false information and lies, one must place these concerns in the broader context. The phenomenon is a symptom of citizen’s serious lack of trust in the media. There is a decline in independent, accurate and professional journalism as traditional media are losing funding and leverage, and social media are increasingly becoming the main distributors of news.

Yet, social media play an enabling role in the exercise of freedom of expression and information and in furthering democratic participation. Both traditional media and social media have reacted with a high degree of responsibility in the face of concerns expressed about false information. Several media organisations have strengthened their fact-checking capabilities while some social media have stepped up their engagement in designing and deploying tools that enable users to flag possible false stories which are then examined for their accuracy by third-party fact-checking organisations.

Any response to the challenge of false information must address the root causes of the problem rather than its symptoms, and must be carefully balanced to not affect the legitimate exercise of human rights and democratic participation. The Council of Europe is already addressing the particular role of social media by preparing a Committee of Ministers recommendation on internet intermediaries. The aim of this work is to provide a human rights and rule of law framework to the relationship between state authorities and intermediaries. The Committee of the Parties to the Convention on Cybercrime (ETS No. 185, Budapest Convention) is working to facilitate co-operation between multinational service providers and national law-enforcement authorities to obtain subscriber information for accounts and websites involved in criminal activities. The Council of Europe is also establishing a partnership framework with major internet companies in the context of which the spread of false and misleading information can be discussed.

Other activities contribute to our response through the development of counter narratives that challenge the accuracy of information and diversify the perspectives relayed by the media, including through the support of community media and the preparation and organisation of digital citizenship education programmes that emphasise media and information literacy and human rights education to help young people to develop the necessary critical thinking skills to navigate the digital space.



## CHAPTER 3

# FREEDOM OF ASSEMBLY AND FREEDOM OF ASSOCIATION



# INTRODUCTION

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

**F**reedom of assembly and association, protected under Article 11 of the Convention, is a fundamental expression of pluralism. The right of individuals and groups to meet and express their views, including unpopular ideas or minority interests, is a defining feature of healthy democracy. Civil society depends on this freedom to defend the public interest, expose human rights violations and challenge abuses of power.

Freedom of assembly and association is not an absolute right. Restrictions are possible where, for example, this right would be otherwise exercised in ways which threaten the interests of wider society. Authorities should, however, always ensure that any limits are proportionate and are imposed in the least intrusive way possible.

Populism does not recognise the universal nature of freedom of assembly and association. Groups and activities which promote the populist agenda are accepted on the basis that they advance the will of “the people”, while those that oppose it are deemed illegitimate. Populism thus advocates a partial approach to freedom of assembly and association: it is a right preserved for some, but not all.

Council of Europe member states must establish and maintain solid legal frameworks which allow peaceful assembly and association to be enjoyed by everyone, in practice and without discrimination. Overly restrictive laws or those which give broad, discretionary powers to public authorities must be avoided as they are too easily abused.

In addition to guaranteeing adequate legal protections, democratic governments have a responsibility to foster a permissive environment for peaceful gatherings. Even when they have not satisfied all official requirements, such as providing the authorities with prior notice, it is important that meetings which cause no obvious harm are not automatically dispersed, and that the groups involved can continue their work unimpeded.

Authorities should set an extremely high bar when deciding whether or not to restrict the work of NGOs, for example in response to fears over public safety. Any limits should be clearly necessary and kept to a strict minimum, in light of other concerns. Council of Europe member states should strive to create a culture in which NGOs feel confident that, regardless of their specific views, the state values their democratic contribution. Such groups must be free to solicit and receive funding, including from institutional or individual donors based in other states.

The recommendations in last year’s report related to the preparation of new guidelines “to ensure meaningful civil participation in political decision making”, give civil society a greater voice within the Organisation and revise the guidelines on the participatory status for INGOs.

Several steps have been taken to implement these recommendations. The guidelines have been included in the work and the terms of reference of the European Committee on Democracy and Governance. The review of existing practice and standards in the member states regarding civil participation in political decision making is underway.

The revised guidelines on the granting of participatory status for INGOs have been drafted and will be submitted to the Committee of Ministers this spring.

Last year’s report also included recommendations to bring member states’ legislation, regulations and practice in line with Council of Europe standards. Little progress has been achieved in terms of reforming problematic legislation.

The Council of Europe institutions have been signalling a growing number of cases where the freedoms of assembly and association have been violated. In some states, the exercise of freedom association has become more difficult. NGO’s have been targeted by legislative interventions and their activities

have been curtailed through excessive requirements, reporting obligations or arbitrary sanctions. A restrictive approach to NGOs, particularly those pursuing a public watchdog function, is incompatible with pluralist democracy. NGOs should be free to solicit and receive funding from a variety of sources, including from foreign sources or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange, money laundering and those on the funding of elections and political parties.

■ To reflect all these developments, the criteria to assess freedom of association have been revised, allowing more specific reporting on the quality of the legal framework and of its implementation in practice.

■ Last year's report also contained a recommendation to review the standards that apply to foreign funding of NGOs. This is a very complex and controversial topic, which the Venice Commission is now studying. A study on this topic should be released in 2017.

■ Reports in a number of countries have indicated excessive use of force by law-enforcement authorities during protests, including excessive force used

against journalists or medical personnel. The issue of the safety of journalists covering public demonstrations was specifically raised in last year's report: the Venice Commission and the Office for Democratic Institutions and Human Rights of the Organisation for Security and Co-operation in Europe (OSCE/ODIHR), in consultation with the Council of Europe Platform to promote the protection of journalism and safety of journalists, are now reflecting on it with a view to possibly covering it in their joint "Guidelines on freedom of peaceful assembly". It is a delicate matter, where the right balance should be found between the duty of the authorities to ensure the safety of journalists and their right to free and unimpeded coverage of demonstrations.

■ For all these reasons, this year's recommendations aim at eliciting the firm, public and unequivocal commitment of state authorities to the exercise of freedom of assembly and freedom of association. A more proactive role of the Council of Europe in stimulating both legal reforms, and above all concrete action to improve the implementation of the law and regulations is necessary.

# FREEDOM OF ASSEMBLY

## 1. Legal guarantees and favourable implementation of the law

■ The right to assemble peacefully, together with the freedoms of expression and of association, rests at the core of any functioning democratic system. Public demonstrations and rallies are to be seen as part of the routine that makes up a pluralistic democracy. 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. Therefore, the protection of the freedom to peacefully assemble is crucial to creating a tolerant and pluralistic society in which groups with different beliefs, practices or policies can exist peacefully together.

■ Freedom of assembly is not an absolute right. It may be subject to limitations which must, however, meet the requirements set out in Article 11 of the Convention and in most national constitutions. 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.

■ 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 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 in itself. The absence of prior authorisation and the ensuing “unlawfulness” of the action do not give the authorities carte blanche; they are still restricted by the proportionality requirement of Article 11 of the Convention. The authorities should always choose the least intrusive means of achieving the legitimate aims listed in Article 11. Content-based restrictions (visual

or audible content of any message) should only be permissible in extreme cases, for example, if there is an imminent threat of violence. Restrictions on time, place or manner of the assembly should not interfere with the message communicated, and the alternatives offered by the authorities should be reasonable and conform to the principle that the assembly should take place “within sight and sound” of the target audience.

■ Freedom of assembly laws which allow for disproportionate sanctions (both pecuniary and non-pecuniary) for administrative offences – in which there has been no use of violence – have a strong dissuasive effect on potential organisers and participants in peaceful public events.

### 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 legislation on freedom of assembly is guided by a presumption in favour of holding assemblies.
- ▶ 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.
- ▶ Effective judicial review mechanisms are available.
- ▶ There are no Court judgments – or very few – finding a violation of Article 11 of the Convention in respect of freedom of assembly.

## FINDINGS

In most Council of Europe member states, legislation regulating freedom of assembly is in compliance with the Convention standards. The main issues lie primarily with the implementation of laws and regulations on freedom of assembly. There is an inclination towards a “command-and-control” approach, and public assemblies are not always seen as a normal component of a pluralist democracy, including, as has been observed in recent years, in countries with long-standing democratic traditions. This trend was accentuated in recent years by legal and enforcement measures taken in connection with the fight against terrorism, which has an overall dissuasive effect on people exercising their freedoms, including the freedom of peaceful assembly.

The references made below to specific countries are given as examples of deficiencies that have been documented in various Council of Europe reports and may also be observed to some extent in other Council of Europe member states.

### Legal framework

In some states, freedom of assembly is still regulated in a way that often results in its *de facto* denial. The inclination towards a command-and-control approach is reflected in more regulations, more control and more bureaucratic hurdles.

In Ukraine, no specific law on the freedom of assembly has been adopted yet. This legislative vacuum has existed for more than two decades now.<sup>105</sup> In the Russian Federation, since 2012, the legal framework regulating freedom of assembly has gradually become more restrictive. A number of restrictive laws, placing limits on the rights to freedom of association, expression and assembly, have been enacted and have created an unfavourable climate for the expression of dissenting opinions or views assumed to be offending or shocking to the majority or the most conservative segments of the population. Concerns have also been raised with regard to Turkish anti-terrorism legislation,

105. In the case of *Vyrentsov group v. Ukraine*, No. 20372/11, the Court pointed out a structural problem: “legislative lacuna concerning freedom of assembly, which has remained in Ukraine since the end of the Soviet Union”. In September 2016, the Ukrainian Constitutional Court held the 1988 Decree on the freedom of assembly inapplicable because of its inconsistency with Article 39 of the Constitution. Until then, local courts and local authorities had opposing views as to the applicability of the Decree in question. Two draft laws have recently been submitted to the Venice Commission for an assessment of their compliance with the relevant international standards. The opinion adopted by the Venice Commission and the OSCE/ODIHR on 24 October 2016 concludes that both drafts, “large parts of which are in line with international standards, constitute a genuine attempt to fill the existing legislative lacuna in this area” (CDL-AD(2016)030).

which has resulted in an overall legal environment where undue limitations are placed on freedom of expression in general and freedom of peaceful assembly in particular.<sup>106</sup> Georgian legislation that prohibits “spontaneous” assemblies also raises concerns.<sup>107</sup> In Azerbaijan, shortcomings remain in the legal framework governing the exercise of freedom of assembly and its implementation,<sup>108</sup> and the Parliamentary Assembly called on public authorities to amend the legislation in question in accordance with the recommendations of the Venice Commission and to fully and promptly implement the judgments of the Court, in particular those finding violations of the freedoms of association, assembly and expression.<sup>109</sup>

### Notification versus authorisation procedures

Notification procedures foreseen by law are not being applied in accordance with Convention standards, resulting in a *de facto* authorisation requirement for the holding of public demonstrations. In the case of *Körtelyessy v. Hungary*,<sup>110</sup> the Court observed that “notification, and even authorisation procedures, for a public event do not normally encroach upon the essence of the right under Article 11 of the Convention as long as the purpose of the procedure is to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assembly, meeting or other gathering”. A ban on a demonstration based on traffic considerations alone, as in this case, failed to strike a fair balance between the rights of those wishing to exercise their freedom of assembly and those others whose freedom of movement may have been frustrated temporarily, if at all. The Court reiterated that “a demonstration in a public place may cause a certain level of disruption to ordinary life”. Furthermore, cumbersome administrative requirements imposed on organisers of assemblies may represent a hidden obstacle to freedom of peaceful assembly and as such be incompatible with Article 11 of the Convention.

In a report on his visit to Azerbaijan, the Commissioner for Human Rights stated that he remained “concerned by the way the Law on Freedom

106. Parliamentary Assembly, Monitoring Committee, “The functioning of democratic institutions in Turkey”, 6 June 2016 (Doc. 14078). Available at: <https://goo.gl/UZwTKC>.

107. Venice Commission, Final Opinion on the amendments to the law on assembly and manifestations of Georgia (CDL-AD(2011)029).

108. Parliamentary Assembly, Monitoring Committee, “The functioning of democratic institutions in Azerbaijan”, 5 June 2015 (Doc. 13801). Available at: <https://goo.gl/CVHUO9>.

109. Parliamentary Assembly Resolution 2096 (2016) “How can inappropriate restrictions on NGO activities in Europe be prevented?”, see <https://goo.gl/lerb4n>.

110. *Körtelyessy v. Hungary*, No. 7870/10, judgment of 5 April 2016.



of Assembly is ... being implemented in Azerbaijan" with regard to the notification procedure.<sup>111</sup>

## Exercise of freedom of peaceful assembly

Public authorities should show a certain degree of tolerance towards peaceful gatherings where demonstrators do not engage in acts of violence. Article 11 of the Convention would otherwise be deprived of its substance.<sup>112</sup> The unlawful character of a public gathering resulting from its non-compliance with notification procedures should not be viewed as entailing an obligation for public authorities to automatically intervene and disperse it. A presumption in favour of holding assemblies should prevail.

The Turkish law on Assembly and Marches does not require the authorities to take into consideration whether or not a demonstration is peaceful or represents a danger to public order. In August 2016, with regard to a demonstration which took place on 1 May 2008 in Istanbul and which was dispersed by the police using violence, the Court held that:

there had been no pressing social need capable of justifying the complete lack of tolerance which the authorities had shown towards the demonstrators by interfering – in violent fashion – with the exercise of their freedom of peaceful assembly.<sup>113</sup>

In March 2015, the Ministers' Deputies:

urged the Turkish authorities to intensify their efforts to amend the relevant legislation, in particular the "Meetings and Demonstrations Marches Act" (No. 2911), so that Turkish legislation requires an assessment of the necessity of interfering with the right to freedom of assembly, in particular in situations where demonstrations are held peacefully and do not represent a danger to the public order.<sup>114</sup>

Similar concerns have been voiced with regard to Azerbaijan. In February 2016, the Court noted in respect of a demonstration in May 2011 in Baku, which was dispersed shortly after it had begun, that:

the dispersal of the demonstration and the applicants' arrest and conviction could not but have the effect of discouraging them from participating in political rallies. Those measures had a serious potential also to deter other opposition supporters and the public at

large from attending demonstrations and, more generally, from participating in open political debate.<sup>115</sup>

## Location of assemblies

In some cases, the administrative authorities unreasonably impose changes in the location intended for the demonstration, offering alternative locations far from the city centre or not easily accessible. Such changes often prevent a demonstration from conveying the intended message to the target audience, and thus represent a disproportionate interference with the exercise of the right to peaceful assembly.

In its opinion on the June 2012 amendments to the 2004 Russian Law on Public Gatherings, the Venice Commission considered that:

the Russian Assembly Law confers too broad discretion on the executive authorities to restrict assemblies, for instance by giving them the power to alter the format of the public event for aims ... which go beyond the legitimate aims contained in Article 11 of the European Convention on Human Rights.

It found that "the provision ... of specially designated places as the venues to be used as a rule for all public events will hinder rather than facilitate the exercise of the right to freedom of assembly and is therefore incompatible with international standards."<sup>116</sup>

In his "Observations on the human rights situation in Azerbaijan", the Commissioner for Human Rights observed that:

the most frequent problems encountered include the banning of demonstrations in central and easily accessible locations and the use of force to disperse the demonstrations which still go ahead, leading to arrests and, in some cases, harsh sentences.

The Commissioner reiterated that "the authorities should seek to facilitate and protect public assemblies at the organisers' preferred location".<sup>117</sup>

## Content-based restrictions

In a few cases, content-based restrictions, including blanket prohibition of assemblies, are imposed on assemblies perceived by public authorities as promoting homosexuality. Gay Pride marches continue to be banned in some countries.<sup>118</sup>

111. Council of Europe Commissioner for Human Rights, Report following his visit to Azerbaijan, 6 August 2013, CommDH (2013)14.

112. *Oya Otaman v. Turkey*, No. 74552/01, judgment of 5 December 2006 (final on 5 March 2007); *Körtélyessy v. Hungary*, No. 7870/10, judgment of 5 April 2016.

113. *Süleyman Çelebi and Others v. Turkey*, No. 37273/10, 38958/10, 38963/10, 38968/10, 38973/10, 38980/10, 38991/10, 38997/10, 39004/10, 39030/10, 39032/10, 39034/10, 39037/10, 39038/10, 39042/10, 39049/10, 39052/10 and 45052/10, final judgment of 24 August 2016.

114. See Committee of Ministers' 1222nd meeting on 12 March 2015. The Deputies' decision relates to 46 cases concerning the excessive use of force to break up unlawful but peaceful demonstrations (available at <https://goo.gl/n8Odv4>).

115. *Ibrahimov and Others v. Azerbaijan*, 69234/11, 69252/11 and 69335/11, judgment of 11 February 2016 (final on 11 May 2016).

116. Venice Commission, Opinion No. 686/2012, CDL-AD(2013)003.

117. See Council of Europe Commissioner for Human Rights "Observations on the human rights situation in Azerbaijan", 23 April 2014, CommDH(2014)10.

118. See the Commissioner for Human Rights statement on ban of Istanbul Pride March (20 June 2016).

At their 1273rd meeting in December 2016, in connection with the execution of the judgment delivered by the Court in the case *Alekseyev v. Russia*, the Ministers' Deputies expressed serious concern that:

notwithstanding the measures presented, the situation does not attest to any improvement, as the number of public events allowed continues to be very limited: only one of all the requests to hold an assembly, deposited during the last period examined by the Committee (from 1 October 2015 to 30 June 2016), was allowed; and therefore, urged the authorities to adopt all further necessary measures to ensure that the practice of local authorities and the courts develops so as to ensure the respect of the rights to freedom of assembly and to be protected against discrimination, including by ensuring that the law on "propaganda of non-traditional sexual relations among minors does not pose any undue obstacle to the effective exercise of these rights".<sup>119</sup>

In respect of the execution of the *Identoba v. Georgia* case,<sup>120</sup> the Ministers' Deputies invited the authorities to provide further information on the practical impact of these measures and on possible additional measures envisaged, bearing in mind the conclusions of the latest report of ECRI on Georgia.<sup>121</sup>

In the Russian Federation, the recently adopted package of anti-extremism legislation (known as the Yarovaya Law) also contains restrictions on religious practices and bans most "missionary activities" including proselytising, preaching, praying, or disseminating religious materials outside of "specially designated places". In this respect Jehovah's Witnesses are currently being prosecuted for extremist activity for what seems to be merely attending religious services and practising their faith.<sup>122</sup>

119. The 1273rd meeting of the Committee of Ministers, CM/Del/Dec(2016)1273/H46-23. See also *Alekseyev v. Russia*, Nos. 4916/07, 25924/08 and 14599/09, 21 October 2010, where the Court found that the ban on events organised by LGBT groups "did not correspond to a pressing social need and was thus not necessary in a democratic society". See also the Venice Commission Opinion 707/2012 (CDL-AD(2013)22, 18 June 2013) on the issue of the prohibition of so-called "propaganda of homosexuality" in the light of recent legislation in some member states of the Council of Europe.

120. *Identoba and Others v. Georgia* (No. 73235/12, 12 May 2015) where the Court held that "the authorities had failed to ensure that the march of 17 May 2012 (International Day against Homophobia) ... could take place peacefully by sufficiently containing homophobic and violent counter-demonstrators", and therefore there had been a violation of Article 11.

121. ECRI report adopted on 8 December 2015, published on 1 March 2016.

122. Parliamentary Assembly of the Council of Europe, Monitoring Committee, AS/Mon(2016) 29, 11 October 2016, available at <https://goo.gl/GjDnCJ>.

## Preventive arrest or detention

The practice of preventing one or more participants from taking part in an assembly using various means, including arrest and detention, is not new in itself, but seems to be used more frequently lately. A refusal to allow an individual to travel for the purpose of attending a meeting amounts to an interference with that individual's freedom of assembly.<sup>123</sup> The Court has ruled that the arrest and detention of participants in order to prevent them from taking part in an assembly is to be considered unlawful within the meaning of Article 5 § 1 (c) and thus under Article 11 § 2. The Assembly called on Council of Europe member states to "refrain from placing people in administrative detention in order to prevent them from participating in peaceful protests".<sup>124</sup>

## Sanctions

In some countries, legislation provides for disproportionate pecuniary and non-pecuniary sanctions for non-compliance with the provisions of the law on freedom of assembly. Harsh sentences continue to be requested or imposed on peaceful demonstrators.

With regard to the legislation of the Russian Federation, the Venice Commission, in its Opinion No. 686/2012, recommends "to revise and lower drastically the penalties applicable in case of violation of the Assembly Act".<sup>125</sup>

In its Resolution 2116 (2016) "Urgent need to prevent human rights violations during peaceful protests" of May 2016, the Assembly noted with concern the recent legal restrictions placed on the right to freedom of assembly in the Russian Federation, referring in particular to an amendment to the Law on Public Gatherings which permits the detention of any person participating in an unauthorised public assembly. The 2014 amendments to the Law on Public Gatherings indeed permit such detention and place criminal responsibility on anyone found to have violated the law more than twice within 180 days. The amendments also introduce new administrative sanctions for violating the rules of assembly. The legal framework deteriorated with the adoption of a recently signed package of anti-extremism amendments which made encouraging people to take part in "mass disturbances" a crime punishable by five to 10 years in prison.

In the case of *Frumkin v. Russia*,<sup>126</sup> the Court considered that the arrest, the detention and the ensuing

123. See *Kasparov and Others v. Russia*, 21613/07, paragraph 84, 3 October 2013; *Kasparov v. Russia*, No. 53659/07, paragraph 66, 11 October 2016 (not final); and *Huseynli and Others v. Azerbaijan*, 67360/11, 67964/11 and 69379/11, paragraphs 84-97, 11 February 2016.

124. Parliamentary Assembly Resolution 2116 (2016) "Urgent need to prevent human rights violations during peaceful protests", paragraph 7.7 Available at: <https://goo.gl/E3g2eq>.

125. Venice Commission, Opinion No. 686/2012, CDL-AD(2013)003, op. cit.

126. *Frumkin v. Russia*, 74568/12, judgment of 5 January 2016.

administrative conviction of the applicant and the large number of arrests 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.<sup>127</sup>

■ The Commissioner for Human Rights, in his report following his visit to Azerbaijan, expressed concern about the “harshening of the fines and the use of administrative detention against those who organise or participate in ‘unauthorised’ public gatherings”.<sup>128</sup>

■ Following their visit to the Republic of Moldova on 27-29 June 2016, the Parliamentary Assembly monitoring co-rapporteurs expressed concern at the arrest of four demonstrators from the “Dignity and Truth” platform on 5 May 2016 on charges of “mass disorder” for participating in a large demonstration on 24 April.

■ In the case of *Gülcü v. Turkey*<sup>129</sup> relating to the conviction in Turkey of a minor for having participated in an illegal demonstration during which he had thrown stones at members of the security forces, the Court held that the arrest, detention or imprisonment of a child can be used only as a measure of last resort and for the shortest appropriate period of time.

## Remedies

■ There are a number of cases where judicial review mechanisms are not effective and fair trial standards are not respected. In the case of *Navalnyy and Yashin v. Russia*, the Court ruled that the administrative proceedings against the applicants, taken as a whole, were conducted in violation of their right to a fair hearing under Article 6.1 of the Convention.<sup>130</sup> In his report following his visit to Azerbaijan, the Commissioner for Human Rights expressed his concern regarding the “reported non-implementation of due process standards in proceedings brought against participants in ‘unauthorised’ demonstrations”.<sup>131</sup>

## 2. Proper conduct of authorities during public events

■ The policing of assemblies must be guided by the principles of legality, necessity, proportionality and non-discrimination. The state has a positive duty to take appropriate, timely and reasonable measures to ensure that peaceful assemblies may take place without participants fearing physical violence. Participants must be protected from any person or group that attempts to disrupt the assembly.

■ Managing and policing crowds at public events is a challenging exercise, which requires a firm commitment from the government to the rights of those attending in addition to professional conduct by law-enforcement officials. The latter should be trained in crowd management techniques in order to minimise the risks of physical harm during demonstrations, and they must also be made aware of their responsibilities to facilitate the exercise of freedom of assembly. Any use of force must be proportionate to the actual threats posed by the situation. Law-enforcement officials should dispose of a range of responses that enable a differentiated and proportionate use of force. Information on the legislation and the regulations guiding the actions of the police in relation to protests should be accessible to the public.<sup>132</sup>

■ As the Commissioner for Human Rights has stated, misconduct by law-enforcement officials poses a direct threat to the rule of law. If the force used is illegal or disproportionate, civil and/or criminal liability should ensue. Effective, independent and prompt investigation must be carried out when participants in a demonstration are physically injured or killed by law-enforcement officers. An identification system for law-enforcement officials, especially riot police, should be in place in order to make them accountable for their actions during assemblies.<sup>133</sup>

■ Arbitrary arrests of peaceful demonstrators are in breach of the requirements of Article 11 of the Convention. The imposition of arbitrary and unreasonably harsh sanctions effectively dissuades people from participating in public protests.

### MEASUREMENT CRITERIA

- ▶ The state ensures effective public security management at demonstrations.
- ▶ Excessive use of force is avoided.

127. See also *Yaroslav Belousov v. Russia*, No. 2653/13 and 60980/14, judgment of 4 October 2016 (Request for referral to the Grand Chamber, pending).

128. See Council of Europe Commissioner for Human Rights, Report following his visit to Azerbaijan, 6 August 2013, CommDH(2013)14, op. cit. See also C Council of Europe Commissioner for Human Rights, Observations on the human rights situation in Azerbaijan, 23 April 2014, (2014)10, op. cit., where the Commissioner for Human Rights expressed concerns over the fact that on 17 March 2014, eight of the 18 persons arrested in relation to protests which took place in January 2013, were sentenced to two and a half to eight years' imprisonment, while another eight persons received suspended sentences and were released from custody.

129. *Gülcü v. Turkey*, 17526/10, 19 January 2016.

130. *Navalnyy and Yashin v. Russia*, op. cit.

131. See Council of Europe Commissioner for Human Rights, Report following his visit to Azerbaijan, 6 August 2013, CommDH(2013)14.

132. See Council of Europe Commissioner for Human Rights' Human Rights Comment: “Police Abuse – a serious threat to the rule of law”, 25 February 2014.

133. Parliamentary Assembly of the Council of Europe Resolution 2116 (2016) “Urgent need to prevent human rights violations during peaceful protests”, 27 May 2016, paragraph 7.10. Available at: <https://goo.gl/rLFk4u>.

- ▶ Law-enforcement officials are held accountable for abuses.
- ▶ Media professionals are guaranteed access to assemblies.
- ▶ There are no or few judgments of the Court finding a violation of Article 11 of the Convention in respect to freedom of assembly.

## FINDINGS

Various Council of Europe sources confirm that excessive use of force and ill-treatment by law-enforcement officials and their impunity remain entrenched practices in some member states.

The references made below to specific countries are given as examples of deficiencies documented through various Council of Europe sources. These deficiencies can be described and classified as follows.

### Excessive force

Cases of the use of excessive force to disperse demonstrations and arrests of peaceful demonstrators continue to occur. In May 2016, the Assembly called on the member states to:

regulate the use of tear gas and other “less-lethal” weapons more strictly in order to include more adequate and effective safeguards to minimise the risk of death and injury resulting from their use and abuse and from avoidable accidents.<sup>134</sup>

The Commissioner for Human Rights noted:

that, in three judgments against Azerbaijan, the Court found violations of Article 3 of the Convention (prohibition of inhuman or degrading treatment) ... due to excessive use of force against the applicants by law enforcement officials during demonstrations.<sup>135</sup>

In March 2015, the Ministers’ Deputies requested the Turkish authorities “to consolidate the diverse legislation which regulates the conduct of law-enforcement officers and fixes the standards as regards the use of force during demonstrations” and “to ensure that the relevant legislation requires that any force used by law-enforcement officers during demonstrations is proportionate and includes provisions for an adequate *ex post facto* review of the necessity, proportionality and reasonableness of any such use of force”.<sup>136</sup>

In September 2015, the Monitoring Committee of the Parliamentary Assembly noted that protests in

Yerevan which took place in June 2015 were broken up by the police, allegedly with excessive use of force, and, while all persons detained were later released, the allegations of excessive use of force should be investigated by the authorities.<sup>137</sup> The Monitoring Committee also noted the co-operation between protesters and the police which led to a de-escalation of tensions during subsequent protest rallies. Following investigations, the government fired the Yerevan police chief and penalised a score of police officers for “failing to prevent attacks on protesters and journalists”.

In *Frumkin v. Russia*, the Court emphasised the communication of the police with the leaders of an assembly to be an essential aspect of the state’s positive obligation under Article 11 to ensure the peaceful conduct of the assembly, to prevent disorder and to secure the safety of all involved.<sup>138</sup>

In the report following his visit to Spain, the Commissioner pointed out that:

reports indicating excessive use of force by law enforcement authorities in the course of anti-austerity demonstrations in 2011 and 2012 brought to light a number of long-standing, serious human rights issues concerning the actions of Spanish law enforcement agencies.<sup>139</sup>

In October 2016, the Monitoring Committee expressed its concerns with regard to the Federal Law on Amending Individual Legislative Acts of the Russian Federation that provides the legal foundations for the federal security service’s (FSB) use of military equipment, weapons and “special means”. This law, which was signed into force by President Putin on 30 December 2015, would allow the FSB to open fire on crowds under certain specific circumstances and possibly without warning. The Russian Presidential Human Rights Council itself has appealed to the President not to enforce these provisions.<sup>140</sup>

Similar concerns have been voiced with regard to Greece.<sup>141</sup>

134. *Ibid.*, paragraph 7.3.

135. See Council of Europe Commissioner for Human Rights, “Report following his visit to Azerbaijan”, 6 August 2013, CommDH(2013)14.

136. 1222nd meeting of the Committee of Ministers, CM/Del/Dec(2015)1222/20. See also Parliamentary Assembly of the Council of Europe, Doc. 13864 on the implementation of judgments of the European Court of Human Rights. <https://goo.gl/cv6pRq>.

137. Parliamentary Assembly of the Council of Europe Monitoring Committee, Doc. 13868, 14 September 2015, paragraph 28. Available at: <https://goo.gl/nUQhsH>. See also the Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/32/36/Add.3, 16 June 2016, paragraphs 476, 477, 478 and 479.

138. *Frumkin v. Russia*, No. 74568/12, 5 January 2016.

139. See Council of Europe Commissioner for Human Rights, “Report following his visit to Spain”, 9 October 2013, (CommDH(2013)18).

140. Parliamentary Assembly of the Council of Europe, Monitoring Committee, AS/Mon(2016) 29, 11 October 2016.

141. Parliamentary Assembly of the Council of Europe, Doc. 13864, *op. cit.*, Appendix 1, Part II.6 on Greece. Reference was made to incidents at demonstrations in Athens in May and June 2011, as well as in April 2012 and November 2014.

## Excessive use of force against media professionals and medical personnel

■ The media exercises a public watchdog role in respect of assemblies. The Court pointed out in its *Pentikäinen v. Finland* judgment that:

the crucial role of the media in providing information on the authorities' handling of public demonstrations and the containment of disorder must be underlined. ... their presence is a guarantee that the authorities can be held to account for their conduct vis-à-vis the demonstrators and the public at large when it comes to the policing of large gatherings, including the methods used to control or disperse protesters or to preserve public order. Any attempt to remove journalists from the scene of demonstrations must therefore be subject to strict scrutiny.<sup>142</sup>

■ Journalists or medical personnel – the latter clearly identifiable by their clothing – have been victims of excessive force used against them during assignments in Armenia,<sup>143</sup> Azerbaijan,<sup>144</sup> Turkey and Ukraine.<sup>145</sup>

■ Citing a comparative law survey, the Court indicates that none of the 34 Council of Europe member states examined has granted journalists covering public events a special status regarding arrest, detention and conviction. In 12 member states, journalists are encouraged to identify themselves as such in order to be distinguished from participants so that their journalistic activity is enabled and facilitated, but they are not given any sort of immunity.<sup>146</sup>

■ In May 2016, the Parliamentary Assembly called on member states “to fully respect the right to freedom of expression of journalists covering the protests, and protect medical staff providing assistance to protesters.”<sup>147</sup>

■ Several countries have rules or guidelines on police interaction with the media, securing access of the press to demonstrations and seeking to protect journalists. In Greece, a ruling issued by the chief of police requires that the police “offer as much protection and security as possible to media representatives”. In Spain, the Ministry of Internal Affairs and the Spanish Journalist Professional Association signed a

co-operation agreement on the identification of journalists covering situations in which police intervention may be required. The Russian Federal Law on Mass Media secures the access of the press to demonstrations and provides for protected areas for the press. Luxembourg and Sweden have set up guidelines for the law-enforcement authorities, aimed at enhancing communication between the media and the police and the media's access to the scene of events. In the Republic of Moldova, the right of the media to have free access to public meetings is guaranteed by law; this right must be ensured both by the organisers of the meeting and by the authorities.

## Protecting demonstrators from violence

■ Some state authorities have not fulfilled their positive obligation to protect demonstrators from violence. In *Identoba and Others v. Georgia*<sup>148</sup> the Court found that the law-enforcement authorities had failed to provide adequate protection to the applicants from the attacks of private individuals during a march organised by an association promoting LGBT rights.

## Lack of effective remedy

■ In some member states, there is still no effective remedy for violations of the right to freedom of assembly by law-enforcement officials, and investigations into misconduct by law-enforcement personnel in the context of assemblies are not common practice or are ineffective.

■ In March 2015, the Ministers Deputies:

reiterated their call on the Turkish authorities to take the necessary measures to ensure that the authorities and courts act promptly and diligently in carrying out investigations into allegations of ill-treatment and in conducting criminal proceedings initiated against law-enforcement officers in compliance with Convention standards and in such a way as to ensure the accountability of all, including senior law-enforcement officers.<sup>149</sup>

■ Similar concerns have been voiced with regard to Georgia, Spain,<sup>150</sup> Poland, Azerbaijan<sup>151</sup> and Russia.<sup>152</sup>

142. *Pentikäinen v. Finland*, No. 11882/10, judgment [GC] of 20 October 2015, paragraph 89.

143. Parliamentary Assembly of the Council of Europe Monitoring Committee, Doc. 13868, 14 September 2015, paragraph 28, available at <https://goo.gl/4jBK96>.

144. Commissioner for Human Rights, “Report following his visit to Azerbaijan”, 6 August 2013, CommDH(2013)14, paragraph 14.

145. Commissioner for Human Rights, Comment: “Police Abuse – a serious threat to the rule of law”, “In both Ukraine and Turkey, police repeatedly targeted both journalists and medical personnel, who could be clearly identified by their clothing”.

146. *Ibid.*, paragraphs 57-59.

147. Parliamentary Assembly Resolution 2116 (2016) “Urgent need to prevent human rights violations during peaceful protests”, 27 May 2016, paragraph 7, 11.

148. Application No. 73235/12, judgment of 12 May 2015.

149. CM/Del/Dec(2015)1222/20, op. cit. See also Commissioner for Human Rights, “Report following his visit to Turkey”, 26 November 2013 (CommDH(2013)24), where he considered “that impunity of law enforcement officials committing human rights violations is an entrenched problem in Turkey, which seriously limits the country's capacity to tackle the root causes of such violations”. See also AS/Mon(2014)18rev, Post-monitoring dialogue with Turkey, Information note by the rapporteur on her fact-finding visit to Istanbul, Ankara and Eskişehir (26-29 May 2014).

150. Commissioner for Human Rights, “Report following his visit to Spain”, 9 October 2013 (CommDH(2013)18).

151. Commissioner for Human Rights, “Observations on the human rights situation in Azerbaijan”, 23 April 2014 (CommDH(2014)10).

152. See *Navalnyy and Yashin v. Russia*, op. cit., and *Nemtsov v. Russia*, No. 1774/11, judgment of 31 July 2014.

In *Identoba and Others v. Georgia*, the Court ruled that the domestic authorities had failed to launch a comprehensive and meaningful inquiry into the circumstances surrounding the incident with respect to all of the applicants. The Commissioner for Human Rights, in his report following his visit to Spain expressed concerns over the granting of pardons by the government, including in cases related to serious human rights violations and regretted that human rights violations – in particular, ill-treatment – in the context of incommunicado detention by the Guardia Civil continue

to occur, despite long-standing recommendations by several international human rights institutions.<sup>153</sup>

■ Also in his report on Greece, the Commissioner for Human Rights noted with concern that:

allegations of torture and other forms of ill-treatment by law enforcement officials do not seem to be thoroughly investigated by courts and that instances of such misconduct have as a rule remained unpunished or led to excessively mild penalties, both at administrative (disciplinary) and especially criminal law levels.<sup>154</sup>

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153. CommDH(2013)18, op. cit.

154. Commissioner for Human Rights, "Report following his visit to Greece", from 28 January to 1 February 2013 (CommDH(2013)6, paragraph 109); see also the Commissioner's letter addressed to the Greek Alternate Minister of Interior and to the Minister of Justice, 25 July 2016.

# FREEDOM OF ASSOCIATION

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

**F**reedom of association is a fundamental human right, crucial to the functioning of a democracy and 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 are essential for the protection of human rights.<sup>155</sup> Their functions go from lobbying for better health care, protection of the environment, and advancement of education for all, to delivering 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 in need of 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.

■ 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 produce a chilling effect on the exercise of rights and 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 for 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>156</sup>

■ 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 worldwide and at the European level.<sup>157</sup>

155. In its Recommendation CM/Rec(2007)14 on the legal status of non-governmental organisations in Europe of 10 October 2007, the Committee of Ministers stressed “the essential contribution made by non-governmental organisations (NGOs) to the development and realisation of democracy and human rights, in particular through the promotion of public awareness participation in public life and securing the transparency and accountability of public authorities, and ... the equally important contribution of NGOs to the cultural life and social well-being of democratic societies” (paragraph 2 of the preamble).

156. Ibid. See also the OSCE/ODIHR-Venice Commission *Guidelines on freedom of association*, Principle 7, available at <https://goo.gl/P5KIX4>.

157. The Declaration on Council of Europe 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)).

## 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 and 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.
- ▶ 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

Over the last few years, restrictive laws and regulations, have been subject to strong criticism by the Secretary General, the Venice Commission, the Council of Europe Commissioner for Human Rights and the Conference of International Non-Governmental Organisations. NGOs encounter various impediments

to their creation, activities and funding. Emphasis is placed on a control-and-command approach reflected in cumbersome and lengthy registration procedures, additional administrative requirements and obstacles to accessing financial resources, particularly foreign funding. More and more frequently this goes along with a deterioration of the environment in which NGOs operate, through stigmatisation, smear campaigns and judicial, administrative or fiscal harassment. The NGOs targeted are mostly those active in the field of human rights protection, promoting accountable governance or fighting corruption.

The main problem areas that can be identified lie primarily with the implementation of the legal framework governing the registration and functioning of NGOs, the implementation in practice of new laws or decrees allowing broader sanctions against NGOs, creation of a hostile or polarised environment via media or political rhetoric, and restrictive practices in relation to access to domestic or international funds. The references made below to specific countries are given as examples of deficiencies that have been documented in various Council of Europe reports and may also be observed, at least to some extent, in other Council of Europe member states.

### Legal basis

Legal provisions concerning associations are worded in general terms, giving rise to divergent interpretations by courts and law-enforcement bodies and affording unlimited discretionary power to public authorities.

In its Resolution 2096 (2016) "How can inappropriate restrictions on NGO activities in Europe be prevented?", the Parliamentary Assembly called on Azerbaijan to:

amend its legislation on NGOs in accordance with the recommendations of the Venice Commission (Opinions Nos. 636/2011 and 787/2014) and to fully and promptly implement judgments of the European Court of Human Rights, in particular those finding violations of the freedom of association, assembly and expression.<sup>158</sup>

Following a fact-finding visit of the Parliamentary Assembly Monitoring Committee in June 2016, the call for reform of the legislation was reiterated.<sup>159</sup>

In June 2016, the Venice Commission<sup>160</sup> recommended that the Federal Law of the Russian Federation No. 129-FZ on amending certain legislative acts

158. Parliamentary Assembly, Resolution 2096 (2016) "How can inappropriate restrictions on NGO activities in Europe be prevented?", 28 January 2016. See <https://goo.gl/EL9Z7j>.

159. Parliamentary Assembly, Monitoring Committee, AS/ Mon(2016) 26, Information note on a fact-finding visit to Baku (15-17 June 2016), 12 September 2016. See <https://goo.gl/3T0MiW>.

160. Opinion No. 814/2015, CDL-AD20(2016)020, 13 June 2016.



(Federal Law on Undesirable Activities or Foreign and International Non-Governmental Organisations) be amended. The vague formulation of key provisions allows for arbitrary implementation of the law. Most importantly, decisions to include NGOs on that list should be based on a court decision and should be subject to appeal.<sup>161</sup>

## Registration

■ NGOs are either denied registration on insufficient grounds – which represents a sanction that is disproportionate to the legitimate goals pursued – or encounter serious difficulties in registering.

■ In the case *House of Macedonian Civilisation and Others v. Greece*,<sup>162</sup> the Court held that there had been a violation of Article 11 of the Convention, considering that the refusal by the authorities to register an association was not proportionate to the legitimate goal pursued.

■ In the case *Association of Victims of Romanian Judges and Others v. Romania*,<sup>163</sup> the Court held that the reasons invoked by the Romanian authorities for refusing registration of the applicant association were not determined by any “pressing social need”, and that such a radical measure as the refusal of registration, taken even before the association started operating, was disproportionate to the aim pursued.

■ In the report following his visit to Azerbaijan, the Commissioner for Human Rights noted that:

national NGOs have also faced difficulties, especially with regard to the restrictive application of the regulations on registration, which can result in long delays or the absence of any formal decision on registration.

■ He called on the authorities:

to ensure full respect of the right to freedom of association, in particular by alleviating the registration requirements and making the whole process, as well as the functioning of NGOs, less bureaucratic.<sup>164</sup>

## Deregistration or dissolution

■ Some national legislations provide for the blanket deregistration of NGOs, their dissolution or their qualification as “undesirable” with justifications that are not admissible.<sup>165</sup>

■ The Assembly expressed its concern over the adoption in May 2015 of the law on “undesirable” organisations, the implementation of which may lead to the closure of major international and foreign NGOs working in the Russian Federation.<sup>166</sup>

■ The Commissioner for Human Rights expressed concern over the dissolution in Turkey of private entities “enumerated in long lists, in an entirely irrevocable fashion involving the takeover of their assets by the Treasury.”<sup>167</sup> Similarly, the Venice Commission raised concerns over the mass liquidation in Turkey of organisations “which belong to, connect to, or have contact with” the “FETÖ/PDY” through Article 2 of Decree Law No. 667 without any individualised decisions, without being based on verifiable evidence, and apparently without respect for due process requirements. Both the Commissioner and the Venice Commission urged the Turkish authorities to cease taking such measures and reverse or remedy unjustified measures already taken.<sup>168</sup>

■ Other states introduce overly restrictive administrative requirements with regard to the registration of NGOs as legal entities. In some cases, additional administrative requirements are imposed on a selected number of NGOs, solely based on their supposed or actual activity (Hungary<sup>169</sup> Azerbaijan and Turkey<sup>170</sup>).

161. See also Expert Council on NGO Law, Opinion on the draft federal law on introducing amendments to certain legislative acts of the Russian Federation #662902-6, OING Conf/Exp (2014) 3. This law came into force in June 2015.

162. No. 1295/10, 9 July 2015. See also Parliamentary Assembly of the Council of Europe, Doc. 13864 on the implementation of judgments of the European Court of Human Rights, paragraphs 168-173, concerning the Greek authorities’ refusal to register associations, and the dissolution of an association promoting the idea that a Turkish ethnic minority exists in Greece. Available at: <https://goo.gl/5JkMMc>.

163. No. 47732/06, 14 January 2014, paragraph 34.

164. See Commissioner for Human Rights, “Report following his visit to Azerbaijan”, 6 August 2013, CommDH(2013)14, op. cit.

165. OING Conf/Exp (2014) 3, op. cit. See also the Expert Council on NGO Law, Opinion on the Federal Law of 23 May 2015 #129-FZ “on introduction of amendments to certain legislative acts of the Russian Federation (Law on “undesirable” organisations), OING Conf/Exp (2015) 1, paragraph 231.

166. Parliamentary Assembly, Resolution 2096 (2016), 28 January 2016, paragraph 6.

167. Commissioner for Human Rights, Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, 7 October 2016, CommDH(2016)35.

168. Ibid. Venice Commission, Opinion on emergency decree laws Nos. 667-676 adopted following the failed coup of 15 July 2016, CDL-AD(2016)037.

169. See Letter of the Commissioner for Human Rights to János Lázár, Minister of the Prime Minister’s office, Hungary, 9 July 2014, CommDH(2014)16.

170. Parliamentary Assembly, Doc. 13940, “How can inappropriate restrictions on NGO activities in Europe be prevented?”, paragraphs 48-51. See <https://goo.gl/ljO7Zn>.

## Financial and reporting requirements

■ NGOs are subject to financial reporting obligations, limits on foreign funding and/or other requirements that impede the operation of NGOs (Hungary,<sup>171</sup> Russian Federation,<sup>172</sup> Turkey<sup>173</sup>). They are labelled in a negative manner merely on account of receiving foreign funds and subsequently face adverse consequences. In its opinion on several federal laws of the Russian Federation, the Venice Commission recommended that the controversial term of “foreign agent” be abandoned and considered that the legitimate aim of ensuring transparency of NGO funding from abroad could not justify measures hampering their activities. It noted that:

being labelled as a “foreign agent” signifies that a NCO [non-commercial organisation] would not be able to function properly, since other people and – in particular – representatives of the state institutions will very likely be reluctant to co-operate with them, in particular in discussions on possible changes to legislation or public policy.<sup>174</sup>

■ In the Russian Federation, on 1 September 2016, the official list of active “foreign agents” consisted of 104 organisations.<sup>175</sup> Many NGOs challenged the forced designation in courts but most of them lost their cases. Even the laureate of the Assembly’s Human Rights Prize, the Nizhny Novgorod Committee against Torture, was recently forced to close down for this reason.<sup>176</sup>

■ Furthermore, increasingly centralised procedures for distribution of domestic public funds or even of international funding (European Economic Area, European Union grants) can afford to public

authorities, or the intermediate bodies they establish for this purpose, wide scope for discrimination in the allocation of those funds. NGOs complain of politicisation of the grant allocation process both at national and regional levels.<sup>177</sup>

## Ban on joining NGOs for members of the military and the police

■ In several Council of Europe members states an absolute ban on joining an association is imposed on active police and military. In the case *Matelly v. France*, the Court held that an absolute prohibition may not be imposed on trade unions in the armed forces. Although restrictions may be placed on the exercise of freedom of association by military personnel, those restrictions must not deprive service personnel of the general right of association in defence of their occupational and non-pecuniary interests: these restrictions may concern the methods of action and expression used by an occupational association, but not the essence of the right itself, which includes the right to form and join such an association.<sup>178</sup> Some 19 out of 42 Council of Europe member states which possess armed forces do not guarantee the right of association for their military personnel, and 35 do not guarantee the right to collective bargaining.<sup>179</sup>

## Targeting NGOs pursuing “political activities”

■ An overly broad definition of “political activity” in legislation<sup>180</sup> limits the ability of NGOs to engage in activities aimed at voicing opinions, shaping policies or influencing policy-making processes. In an increasing number of countries, NGOs face difficulties in performing activities that are viewed as politically biased or politicised, and suffer stigmatisation by public authorities. The INGO Conference has repeatedly expressed worries over the stigmatisation or even criminalisation<sup>181</sup> of the kind of work that NGOs have always carried out in democratic societies. The INGO Conference has particularly highlighted the pressure and threats of legal action or criminal prosecution faced by humanitarian NGOs and individuals providing assistance to refugees and irregular migrants in some parts of Europe.<sup>182</sup>

171. Letter of the Council of Europe Commissioner for Human Rights to János Lázár, Minister of the Prime Minister’s office, Hungary, 9 July 2014 (CommDH(2014)16).

172. See the Venice Commission Opinions Nos. 716-717/2013 on Federal Law N. 121-FZ on non-commercial organisations (“Law on Foreign Agents”), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on making amendments to the criminal code (“Law on treason”) of the Russian Federation, CDL-AD(2014)025, of 27 June 2014. See also Parliamentary Assembly, Doc. 13940, op. cit., paragraph 10.

173. *Ibid.*, paragraphs 48-51.

174. Venice Commission, CDL-AD(2014)025, op. cit. See also Parliamentary Assembly, Doc. 13940, op. cit., paragraph 10. See also Expert Council on NGO Law, OING Conf/Exp (2015) 1, op. cit., and OING Conf/Exp (2014) 3, op. cit.

175. 145 organisations had been designated as “foreign agents”, and over 20 organisations have shut down in order to avoid such designation. The Ministry of Justice has removed the “foreign agent” label from 13 groups, acknowledging that they had stopped accepting foreign funding. Most of the designations were made through decisions taken by the Ministry of Justice. The procedure for removing the label “foreign agent” has raised concerns as being particularly complex. See Parliamentary Assembly Monitoring Committee, “Report on the Honouring of Obligations and Commitments by the Russian Federation”, AS/Mon(2016)29, 11 October 2016.

176. Resolution 2096 (2016), 28 January 2016, paragraph 6.

177. Report of the fact-finding visit to Poland, INGO Conference, available at: <https://goo.gl/FL82C4>.

178. *Matelly v. France*, 10609/10, 2 October 2014. See also *Adefdromil v. France*, 32191/09, 2 October 2014.

179. *Matelly v. France*, op. cit., paragraph 35.

180. Expert Council on NGO Law, “Regulating political activities of non-governmental organisations” (OING Conf/Exp (2014) 2).

181. Statement of the INGO Conference President on criminal charges brought against Valentina Cherevatenko, Chair of the Coordination Council of Women of the Don Union. See <https://goo.gl/LKGLc4>.

182. Conference INGO, 29 January 2016.

■ In June 2016, the Russian Federation adopted new amendments establishing an even broader definition of “political activities”, allowing for almost all activities carried out by NGOs to be labelled as “political”.<sup>183</sup> In addition to the list of organisations labelled as “foreign agents”, there is a registry of organisations labelled as “undesirable on the Russian territory” set up on the basis of legislation adopted in May 2015. This category applies to NGOs whose activities are considered to pose a threat to the Russian Federation’s constitutional order, defence or national security. While only foreign or international NGOs can be declared “undesirable”, domestic NGOs that have collaborated with them can face criminal and administrative charges.<sup>184</sup> In its June 2016 opinion, the Venice Commission recommended that the law in question be amended with a view to bringing it in line with Articles 7, 10, 11 and 13 of the Convention. In particular, its provisions need to be clarified, and criteria for inclusion of NGOs in the list of “undesirable organisations” should be set out in the law. The decision to include an NGO in the list should be subject to a prior judicial review, should be appealable and should be proportionate to the threat identified.<sup>185</sup>

■ In its Resolution 2078 (2015), the Parliamentary Assembly called on the Russian authorities:

to cease the harassment and prosecution of civil society organisations or their activists and journalists; to abrogate the law on undesirable foreign organisations; to bring the legal framework for non-governmental organisations into line with Council of Europe standards.<sup>186</sup>

■ Regarding Azerbaijan, in its Resolution 2062 (2015), the Parliamentary Assembly condemned:

the crackdown on human rights in Azerbaijan where working conditions for NGOs and human rights defenders have significantly deteriorated and some prominent and recognised human rights defenders, civil society activists and journalists are behind bars.

■ It also declared itself:

alarmed by reports by human rights defenders and international NGOs, confirmed by the Council of Europe Commissioner for Human Rights, concerning the increase in criminal prosecutions against NGO leaders, journalists, lawyers and others who express critical opinions.<sup>187</sup>

183. Parliamentary Assembly, Monitoring Committee, Information note on the functioning of democratic institutions in the Russian Federation, AS/Mon(2016)29, 11 October 2016, paragraph 18, <https://goo.gl/lq8HDQ>.

184. *Ibid.*, paragraph 19.

185. Opinion No. 814/2015, CDL-AD20(2016)020, 13 June 2016.

186. See also the Expert Council on NGO Law, OING Conf/Exp (2014) 3, *op. cit.*

187. CommDH(2014)10, *op. cit.*; CommDH(2013)14, *op. cit.*; ACFC/OP/II(2007)007, *op. cit.*, paragraphs 68 and 69; ACFC/OP/III(2012)005, *op. cit.*, paragraphs 66 and 67. See also *Ilgar Mammadov v. Azerbaijan*, 15172/13, judgment of 22 May 2014; the third party intervention by the Commissioner for Human Rights in *Hilal Mammadov v. Azerbaijan*, No. 81553/12; CommDH(2014)10, *op. cit.*; OING Conf/Exp (2014) 1, *op. cit.*; the Expert Council on NGO Law, OING Conf/Exp (2011) 2, *op. cit.*, paragraphs 140 and 141; and Parliamentary Assembly Doc. 13940, *op. cit.*



## CHAPTER 4

# DEMOCRATIC INSTITUTIONS



# INTRODUCTION

## Chapter 4 – Democratic institutions

**S**table democracies are those which contain strong institutional checks on power. This means free and fair elections which allow citizens to choose their representatives. Parliaments must be 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 arms 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. Since the horrors of the Second World War, European governments have sought to construct institutions which promote individual rights and freedoms, accommodate diversity and protect minority interests. It is a model of governance which reflects the many differences which exist within a modern, democratic state, while enabling its members to live alongside one another in peace.

■ This stands in stark contrast to the populist approach, which challenges institutional guarantees of pluralism on the basis that they obstruct the will of "the people". This can take many forms, from refuting the results of elections, to opposing constitutional constraints on executive authority, delegitimising opposition and eroding civil liberties. Perhaps most common of all is the populist attack on international norms and institutions, which are derided as a block on "the people's" absolute sovereignty.

■ Guarding against the unravelling of institutional safeguards thus requires responsible states to urgently address their own shortcomings. These vary from country to country, but no Council of Europe member state can claim a perfect system. Moreover, all have a duty to reaffirm their commitment to binding international norms.

■ Democratic security needs well-functioning democratic institutions, respectful of international principles and standards. The parameters used in this chapter this year look at the requirements in the areas of elections, the functioning of democratic institutions

decentralisation and good governance as the basic criteria for assessing the functioning of democracies.

■ Following on last year's recommendations, draft guidelines to ensure meaningful civil participation in political decision making were prepared in 2016 and are now with the European Committee for Democracy and Governance for adoption.

■ Lessons learned from electoral observation by the OSCE/ODIHR, the Parliamentary Assembly of the Council of Europe and domestic observation have been discussed with member states and specific recommendations including in the field of the electoral legal framework, media, transparency of campaign finance, the efficiency of election dispute resolution systems, greater participation of women and groups with specific needs as voters and candidates are being implemented in the framework of country-specific action plans.

■ In order to enhance the capacity of domestic election observation, two handbooks entitled *Using international election standards* and *Reporting on elections*<sup>188</sup> have been prepared and are being used to help citizen observers become more efficient and to produce more quality reports in line with Europe's electoral heritage, specifically focusing on the reporting of core team members.

■ A particular focus on women as candidates and voters has addressed, at regional level, stereotypical views and assumptions about the role of women in society as well as major barriers to women's political representation in all the countries examined. The study contains country-specific and general recommendations to political parties, governments and parliaments that will be implemented in the framework of the next biennium.

■ At the level of Council of Europe member states the new Recommendation of the Committee of Ministers on international standards on e-voting drafted in 2016 will replace Recommendation Rec(2004)11 on legal, operational and technical standards for e-voting.

188. Council of Europe handbook for civil society organisations. Available at: <https://goo.gl/5h9tbp>.

# FREE AND FAIR ELECTIONS

## Chapter 4 – Democratic institutions

**T**he right to free and fair elections is crucial to sustaining the foundations of an effective and meaningful democracy governed by the rule of law. The legitimacy of any government relies on elections that allow citizens to participate in the democratic debate and to express their choices in the ballot boxes.

Political parties remain the key actors of the electoral processes, even if they are no longer the only ones: civil society, the media and social networks have taken on an increasingly important role in elections. There is a renewed public interest in public affairs, which calls upon governments and policy makers to initiate substantive reflection on the evolution of electoral systems and practices.

### MEASUREMENT CRITERIA

Under Article 3 of the Protocol to the Convention, the citizens of the Council of Europe member states are guaranteed 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.

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 nationals 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, 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.
- ▶ **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.
- ▶ There is an effective remedy system.

### FINDINGS

The 2016 electoral observation mission reports of the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe, as well as other international observation missions confirm last year's conclusions that the elections held in Europe are broadly in line with democratic standards and have generally respected the principles defined in the Venice Commission's Code of Good Practice in Electoral Matters.

The holding of several referendums, national elections and primaries in Europe testify to the phenomenon of citizens returning to the polls and the results that are known in the United Kingdom, Italy or France to mention just three examples.

A number of issues, such as unequal access to the media of candidates, campaign financing, lack of effective sanctions for violations, accuracy of voters



lists as well as instances of pre-electoral violence have been reported by the electoral observation missions.

Moreover, with the increased importance of IT systems in the organisation of elections, a number of countries have expressed concerns related to the increase of targeted misinformation and cyberattacks on their electoral systems or on the political parties during the referendum campaigns or electoral periods. (see box “Protecting the integrity of democratic elections”).

The question of equitable access to the media for all candidates remains recurrent in a number of countries due to links between certain media and political parties, which leads to violations of the free will of voters and of the principle of equal opportunities.

There is still the question of transparency concerning the financing of electoral campaigns which leads to citizens’ reduced confidence in the electoral processes.

The lack of effective sanctions due to insufficient financial transparency of the campaign accounts and the financial situation of elected representatives before and after the elections was also noted in several countries. Moreover, the abuse of administrative resources is a hindrance to the principle of equal treatment of candidates.

Inequalities persist in the political representation of certain groups such as persons with disabilities, minorities, internally displaced persons and young people and between men and women (Armenia, Bosnia and Herzegovina and Georgia).

In its judgment of 9 June 2016 *Pilav v. Bosnia and Herzegovina*, the Court ruled unanimously that, based on the constitutional provisions, a decision to exclude a Bosniak politician living in the Republika Srpska from election to the Presidency of Bosnia and Herzegovina, was a violation of Article 1 of Protocol No. 12 (general prohibition of discrimination) to the Convention.

In several countries, electoral rolls should be updated regularly (Armenia, Bosnia and Herzegovina and the Republic of Moldova). States should refrain from using additional voters’ lists, voting on such a list should be limited to two conditions: to allow voters who have changed address or who have reached the legal voting age after the publication of the electors’ list to vote (Republic of Moldova). Cases of family voting, vote buying and “assisted voting” have been observed in several countries.

The International Observation Mission (IOM) to the 2016 Parliamentary elections in Georgia noted that “there is an increased trust and confidence in the accuracy of the voter lists amongst election stakeholders,

and election commissions gave voters ample opportunity to verify their information”<sup>189</sup>

The Parliamentary Assembly of the Council of Europe election observation mission for the presidential elections in the Republic of Moldova assessed elections as competitive and respecting fundamental freedoms, and stated that “people made their choice in a free manner and the voting day was very well organised”. However, there were issues such as increasingly polarised media coverage, harsh and intolerant rhetoric and continued instances of abuse of administrative resources.<sup>190</sup> The observers noted the incomplete legal framework, related to the application of campaign finance regulations, voter list updates, media coverage and the timely adjudication of complaints and appeals.

Overall, the work of national observers has been satisfactorily accomplished and their professionalism improved in countries where training programmes have been set up for them (Armenia, Georgia and the Republic of Moldova).

Among the countries which have benefited from electoral assistance from the Council of Europe, Armenia,<sup>191</sup> Bosnia and Herzegovina,<sup>192</sup> Georgia<sup>193</sup> and the Republic of Moldova<sup>194</sup> carried out elections that were observed by Council of Europe bodies.

Lastly, national elections and referendums were held in 25 Council of Europe member states for which participation rates were classified into three categories, as seen in the following chart.

189. The IOM stated that “Georgia elections were competitive and well-administered, although allegations and incidents of violence impacted [the] campaign”.

190. Parliamentary Assembly of the Council of Europe election observation mission: “Competitive Moldova Presidential run-off: fundamental freedoms respected, but polarized media campaign”.

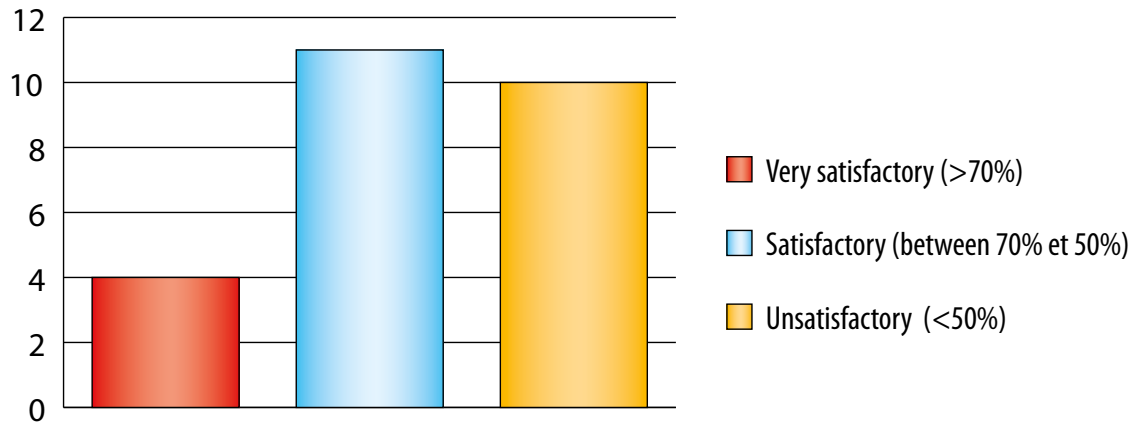
191. Congress of Local and Regional Authorities of the Council of Europe, Information report on the assessment of local by-elections in Armenia, CPL31(2016)02, 17 October 2016, available at <https://goo.gl/bvhTfz>.

192. Congress of Local and Regional Authorities of the Council of Europe, Congress mission presents preliminary conclusions further to the observation of local elections held in Bosnia and Herzegovina, CG024(2016), 3 October 2016, available at: <https://goo.gl/XfrfxT>. Congress of Local and Regional Authorities of the Council of Europe, “Speech by Stewart Dickson (United Kingdom, ILDG), Head of the Congress’ delegation to observe local elections in Bosnia and Herzegovina”, 3 October 2016, available at: <https://goo.gl/bKcK4k>.

193. Parliamentary Assembly of the Council of Europe, Observation of parliamentary elections in Georgia (8 and 30 October 2016), Doc. 14204, 24 November 2016, available at: <https://goo.gl/hPkDRd>.

194. Parliamentary Assembly of the Council of Europe, Observation of the presidential election in the Republic of Moldova (30 October and 13 November 2016), Doc. 14202, 24 November 2016, available at: <https://goo.gl/6o653J>.

### Voter turnout in elections and referendums in 2016



## Protecting the integrity of democratic elections

In the last 12 months, the Czech Republic, France, Germany, the Republic of Moldova, the Netherlands, Norway, Turkey, UK, Ukraine and others have expressed concerns related to the increase of targeted misinformation and cyberattacks on their electoral systems or on the political parties during the referendum campaigns or electoral periods.

The range of cyberattacks is wide – from hacking into systems or databases, to obtaining campaign emails, or databases, other documents and personal data, to installing spyware and malware, spamming accounts and hacking campaign websites. Other concerns relate to creating and propagating social media trends through fake social media accounts.

There is legitimate fear that cyberattacks are becoming increasingly sophisticated and better organised and with a number of Council of Europe member states holding national elections in 2017, they will probably intensify and lead to tampering with the votes and election results.

The internet provides a potent vehicle for the phenomenon of “cyber influencing” for political gain. Internet platforms and social media give different interest groups, the ability to influence public opinion by saturating cyberspace with targeted misinformation or accusations and to spread it swiftly across social networks and the mainstream media. Such practices may also easily be employed by political actors, thus subverting electoral communication and rendering the electorate more vulnerable to manipulation.

Some efforts are hastily being put in place, in different areas, responding to these challenges ahead of elections. Germany, following the 2015 cyberattack on the Bundestag and given the rising number of attacks ahead of its general elections, is significantly reinforcing its cyber defence units. The Czech Government has set up a communications centre to prevent false information from influencing the political debate ahead of the autumn elections. The Dutch Ministry of the Interior announced its intention to count manually the votes in the upcoming general elections, in order to thwart hacking. In France, Facebook has teamed with major news organisations, to curb false information during the French presidential elections.

However, the extent of the phenomenon has taken many European states largely unprepared. The inability of states to tackle cyber risks could undermine the integrity of the electoral process, influence the results and destabilise our democratic institutions.

It is thus vital that the Council of Europe, member states, institutions and political parties shore up their cyber defences against online threats from cybercriminals, intent on disrupting elections or on maliciously influencing election results.

The activities of the Council of Europe against cybercrime, notably the negotiations on the additional protocol to the Convention on Cybercrime (the Budapest Convention), aim to support these efforts and render access to electronic evidence in the cloud more effective.

# FUNCTIONING OF DEMOCRATIC INSTITUTIONS

## Chapter 4 – Democratic institutions

**T**he 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 separation of powers principle, due to the concentration of exceptional powers in the hands of the executive branch. This is why emergency legislation requires a 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.

Effective public participation and transparent decision making help improve the quality of police and legislative decisions, enhance the potential for their implementation and ultimately serve to increase public trust in state institutions. Some forms of participative democracy, such as popular referendums, might in some cases jeopardise the proper functioning of democratic institutions. As the Venice Commission pointed out, there is a strong risk that referendums might be turned into plebiscites on the leadership of the country.<sup>195</sup>

National parliaments are the institutions which embody society in the diversity of its composition and its opinions and which relay and channel this diversity in the political process. Their vocation is to regulate tensions and maintain equilibrium between competing claims, in order to enhance social cohesion and solidarity, hence the importance of political forces and individuals representing the opposition being able to participate in the work of the parliament.

195. Venice Commission (2001), Guidelines for constitutional referendums adopted at national level, adopted by the Venice Commission at its 47th Plenary Meeting (Venice, 6-7 July 2001), CDL-AD(2010)001, paragraphs 17 and 107, available at <https://goo.gl/v2728l>.

Parliamentary immunities are an integral part of the European constitutional tradition. These immunities are 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, the courts or political opponents.<sup>196</sup>

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

### 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

196. Venice Commission (2014), Report on the Scope and Lifting of Parliamentary Immunities, CDL-AD(2014)011, available at <https://goo.gl/OoeAZg>.

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 in practice. Such procedures are transparent and respect the principle of the presumption of innocence.
- ▶ Different forms of political participation are in place and are used.
- ▶ Derogations from certain international commitments are possible only in exceptional situations, where parliamentary control and judicial review are guaranteed.

## FINDINGS

■ The 2016 political climate was characterised by increased populist rhetoric in political discourse accompanied, sometimes, by growing electoral support for political parties or movements expressing populist views.

■ Insular tendencies have been taking ground leading some member states to question the nature of international law and of international multilateral and/or supranational arrangements – as set up after the Second World War – with the risk not only of diverging implementation but of crippling the integrity of the Council of Europe Convention system as a whole.

■ In several member states, the primacy of international law over national law has been challenged, leading to *de facto* questioning of the application of judgments of the Court in the internal legal system.

■ Open challenges to Council of Europe values have come from a number of countries that have taken unilateral actions – notably in response to the refugee crisis – that are at odds with international law. Such decisions have at times been justified by the strength of popular support or consultative referendums.

■ Three years have passed since the illegal annexation of Crimea, and the question of how the Council of Europe's monitoring structures can function there still remains open. This underlines the importance of identifying viable solutions to ensure that the 2.5 million people living in Crimea are effectively covered by our human rights mechanisms.

■ The trend, already noticed last year, towards a diversification of forms of political participation has witnessed a sharp increase this year. Popular referendums, primary-type consultations, online consultations and other forms of effective political participation have recorded high turnouts.

■ European citizens have eagerly taken up the opportunities to take part in electoral consultations.

From the Brexit referendum to the French centre-right primaries to the Italian constitutional referendum and the numerous online consultations translated into political decisions, when voters considered the stakes high, they turned out massively to make their voices heard.

■ In 2016, a state of emergency was in place in three member states, all of which applied a derogation from the Convention under its Article 15. On 21 July 2016, the Secretary General was informed by the Turkish authorities that Turkey would notify a derogation from the Convention under its Article 15.<sup>197</sup> On 24 November 2015, the French authorities informed him about state of emergency measures taken following the large scale terrorist attacks in Paris, which involved a derogation from certain rights guaranteed by the Convention.<sup>198</sup> On 5 June 2015, Ukraine notified him that given the emergency situation in the country, the authorities of Ukraine had decided to use Article 15 of the Convention to derogate from certain rights enshrined in the Convention.<sup>199</sup>

■ The exceptional circumstances invoked by France, Turkey and Ukraine are different, even if, in all three cases, there is no doubt that the state of emergency had been put in place for justified, legitimate reasons. However, for all the states concerned, the implementation of the state of emergency is a test of the good functioning of democratic institutions, especially as regards the preservation of a system of checks and balances, the democratic oversight of the government, judicial independence and the respect

197. See the Council of Europe (2016), "Secretary General receives notification from Turkey of its intention to temporarily suspend part of the European Convention on Human Rights", DC132(2016), press release published on 21 July 2016, available at: <https://goo.gl/t5dOae>; European Court of Human Rights (2017), "Derogation in time of emergency", under *Facts and figures*, Factsheet available at: [www.echr.coe.int/Documents/FS\\_Derogation\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf), on the Turkish Government's communication registered by the Secretariat General on 25 July 2016; and the Turkish Government's declarations JJ8239C Tr./005-199, 18 October 2016, and JJ8289C Tr./005-203, 6 January 2017, available at: <https://goo.gl/Cr9z0t> and <https://goo.gl/n4lODm>, respectively.

198. "France informs Secretary General of Article 15 Derogation of the European Convention on Human Rights" press release, 25 November 2015, available at: <https://goo.gl/F2qRxi>. See also the French Government's declarations related to the Convention JJ8085C Tr./005-188 (26 February 2016), JJ8149C Tr./005-189 (30 May 2016), JJ8191C Tr./005-193 (25 July 2016) and JJ8285C Tr./005-202 (22 December 2016), available at: <https://goo.gl/uzO799>, <https://goo.gl/pSelm9>, <https://goo.gl/rXCPzl>, and <https://goo.gl/aPkm2k>, respectively.

199. Council of Europe Secretary General (2015), "Ukraine derogation from European Convention on Human Rights", press release, 10 June 2015, available at: <https://goo.gl/CptN9K>. See also the Ukrainian Government's declarations related to the Convention, JJ8034C Tr./005-186 (4 November 2015) and JJ8172C Tr./005-190 (1 July 2016), available at: <https://goo.gl/tu0eol> and <https://goo.gl/83hQ28>, respectively.

for expression and freedom of the media. In this context, parliamentary scrutiny of acts by the authorities in connection with a state of emergency and the special procedures for such scrutiny is a particularly important guarantee of the rule of law and democracy.

Regarding the use of the state of emergency in France, the Council of Europe Commissioner for Human Rights expressed concerns regarding the expediency and proportionality of some of the measures taken by the authorities,<sup>200</sup> but noted that important checks and balances have been quickly put in place by both chambers of the French Parliament, the judiciary, the National Human Rights Institution and the Ombudsman, which are effectively monitoring the use of administrative powers and formulating criticisms and recommendations for improvement.

In Turkey, the Venice Commission acknowledged that vesting the government with emergency powers was justified after the failed coup of July 2016, but found some of the measures taken by the government in response as excessive, notably taking permanent measures, which went beyond a temporary state of emergency, related to the collective dismissal of civil servants, dissolution of structures and companies, confiscation of property and removal of certain safeguards that protect detainees from abuses.<sup>201</sup> In January 2017, acting upon Council of Europe recommendations the authorities amended certain provisions of emergency decree laws. The period during which a suspect can be held in police custody has been reduced from 30 days to 7 days, with a possible extension by the Public Prosecutor for a further 7 days in specific circumstances. The restriction for 5 days of the right of a suspect to have access to a lawyer has been lifted and a national commission entitled to examine measures adopted under state of emergency decree laws has been created. It is important that this becomes a functioning system of redress at the national level.

The Venice Commission reviewed the draft modifications to the Constitution of Azerbaijan, expressing its concern with the institutional reform proposed by the draft, notably the extension of the presidential mandate as well as the new powers of the president, making the executive less accountable to the parliament.<sup>202</sup> The Venice Commission invited the authorities of Azerbaijan to undertake a constitutional reform which would strengthen – and not weaken – the parliament.

200. See article of the Council of Europe Commissioner for Human rights, “Luttons contre le terrorisme dans le respect du droit”, *Le Monde*, 3 February 2016, available at: [www.coe.int/en/web/commissioner/-/luttons-contre-le-terrorisme-dans-le-respect-du-droit](http://www.coe.int/en/web/commissioner/-/luttons-contre-le-terrorisme-dans-le-respect-du-droit).

201. Venice Commission (2016), “Opinion on emergency decree laws Nos. 667-676 adopted following the failed coup of 15 July 2016”, CDL-AD(2016)037, 12 December 2016.

202. Venice Commission (2016), “Opinion on the draft modifications to the Constitution”, CDL-AD(2016)029, 18 October 2016.

The question of parliamentary immunity has been debated by parliaments of several member states and has sometimes led to amendments to national legislation or the constitution. It is a healthy approach to assess the relevance of rules on parliamentary immunity, especially as regards parliamentary inviolability, which should not extend beyond what is proportional and necessary in a democratic society, taking into account the situation in every country concerned. Following the amendments to the Constitution of Albania limiting the immunity of members of parliament and the related “Decriminalisation Law”, the National Assembly adopted, on 4 March 2016, the by-laws needed for this law. The suspension of parliamentary inviolability in Turkey through a constitutional amendment led to the subsequent detention of those opposition parliamentarians who had court cases pending against them. The lifting of immunity of a large number of members of parliament is a matter for serious concern.

In its opinion adopted in March 2016 on the amendments to the Act on the Constitutional Tribunal of Poland,<sup>203</sup> the Venice Commission recalled that making a constitutional court ineffective is inadmissible, as this removes a crucial mechanism which ensures that potential conflicts with European and international norms and standards can be resolved at the national level without the need to have recourse to European or other subsidiary courts, which are overburdened and not as close to the realities on the ground.

Co-operation among the major political forces in Armenia has led to the adoption of the new electoral code, which historically had been a source of contention between the ruling majority and the opposition. Similarly, in Albania, the parliament unanimously adopted a package of constitutional amendments facilitating wide-reaching judicial reforms in a moment of unity in July.

Several judgments of the Court underlined, in 2016, the pressing need for protection offered by rules on parliamentary immunity against misuse of legal systems. In a judgment of 12 January 2016, *Party for a Democratic Society (DTP) and Others v. Turkey*,<sup>204</sup> the Court found a violation of Article 3 of Protocol No. 1 to the Convention. Even supposing that the measure in question pursued one or more legitimate aims, namely the protection of public order and the rights and freedoms of others, the Court considered that it had not been proportionate. The applicants’ speeches had not been such as to justify the dissolution measure and their right to freedom of expression was protected insofar as their statements could not be interpreted

203. Venice Commission (2016), “Opinion on amendments to the act of 25 June 2015 on the constitutional tribunal of Poland”, CDL-AD(2016)001, 11 March 2016.

204. *Party for a Democratic Society (DTP) and Others v. Turkey*, 3840/10, 3870/10, 3878/10, 12 January 2016.

as expressing any form of direct or indirect support for the acts committed by the PKK, or any form of approval for them.

■ Parliamentary immunity should not extend beyond what is necessary in a democratic society. In the case *Uspaskich v. Lithuania*,<sup>205</sup> the Court held that, when prosecuting corruption offences, the states were encouraged to limit immunity to the degree necessary in a democratic society. This case stems from a complaint brought by a well-known Lithuanian former politician regarding his house arrest pending an investigation for political corruption in Lithuania. He complained in particular that his house arrest had prevented him from taking part on equal grounds with other candidates in the parliamentary elections. The Court examined thoroughly the question of the applicant's immunity from prosecution. It underlined that member states are required to provide appropriate measures to prevent legal entities from being used to shield corruption offences. In the present case, it transpired that the applicant's political party,

which itself avoided prosecution by formally changing its status, shielded the applicant from prosecution by systematically presenting him as a candidate in municipal, parliamentary and European Parliament elections, all of which meant that at least for a certain time the applicant could enjoy immunity from prosecution. Therefore, the Court did not find irregularities capable of thwarting the applicant's right to stand for election effectively.

■ The quality of the legal framework defining the powers of authorities engaged in secret surveillance is also a concern in numerous cases before the Court, as is the effectiveness of control mechanisms put in place to ensure respect for the framework set up.<sup>206</sup> Legislators and control bodies should regularly revisit existing systems and practices to ensure that they meet the requirements of the rule of law. This problem requires particular attention in the present context when such surveillance is a major tool in the fight against terrorism.

<sup>205.</sup> *Uspaskich v. Lithuania*, 14737/08, 20 December 2016.

<sup>206.</sup> *Szabo and Vissy v. Hungary*, 37138/14, 12 January 2016; *Santare and Laboaznikovs v. Latvia*, 34148/07, 31 March 2016; *Bucur and Toma v. Romania*, 40238/02, 8 January 2013; *Roman Zakharov v. Russia*, 47143/06, 4 December 2015 or *Cevat Özel v. Turkey*, 19602/06, 7 June 2016.

## Derogating from human rights in time of emergency: main legal obligations falling on Council of Europe member states

**Article 15 (derogation in time of emergency)** of the Convention affords to the governments of the states parties, in exceptional circumstances, the possibility of derogating, in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms, in order to protect their populations from future risks.

The use of this provision is governed by substantive and procedural conditions set by Article 15 and interpreted by the Court.

**Substantive requirements.** Member states may take measures derogating from their obligations under the Convention only in time of war or other public emergency threatening the life of the nation. Those measures cannot go beyond what is strictly required by the exigencies of the crisis and should not be inconsistent with the other obligations assumed by the member states under international law.<sup>207</sup>

“Public emergency threatening the life of the nation” refers to “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed”.<sup>208</sup> The crisis should be exceptional in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate.<sup>209</sup>

The situation in one particular region can also amount to an emergency threatening “the life of the nation”. According to the case law of the Court, terrorism in Northern Ireland met the standard of a public emergency, since for a number of years it represented a “particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties [of Northern Ireland] and the lives of the province’s inhabitants”.<sup>210</sup> So, too, did PKK terrorist activity in South-East Turkey<sup>211</sup> and the imminent threat of serious terrorist attacks in the United Kingdom after 11 September 2001.<sup>212</sup> On the contrary, in the “Greek case”,<sup>213</sup> brought against Greece in response to the in 1967 “colonels” coup d’état, the Commission found that, on the evidence presented, there was no public emergency which would have justified the derogation made.

The emergency should be actual or imminent. The requirement of imminence does not require a state to wait for disaster to strike before taking measures to deal with it.<sup>214</sup>

Member states should not go beyond the “extent strictly required by the exigencies” of the crisis.<sup>215</sup> This means essentially that ordinary laws would not have been sufficient to meet the danger caused by the public emergency;<sup>216</sup> that the derogatory measures are kept under review, are subject to safeguards<sup>217</sup> and do not involve any unjustifiable discrimination.<sup>218</sup> These factors will normally be assessed on the basis of the “conditions and circumstances reigning when the measures were originally taken and subsequently applied”.<sup>219</sup> Member states cannot rely on Article 15 of the Convention to justify measures taken outside the territory to which the derogation applies.<sup>220</sup>

207. *Lawless v. Ireland (No. 3)*, 1 July 1961, Series A No. 3, paragraph 28.

208. *Lawless* cited above, paragraph 28.

209. *Denmark, Norway, Sweden and the Netherlands v. Greece (the “Greek case”)*, 3321/67 and 3 others, Commission report of 5 November 1969, Yearbook 12, paragraph 159-165 and 207; *Hassan v. the United Kingdom* [GC], 29750/09, European Court of Human Rights 2014.

210. *Brannigan and McBride v. the United Kingdom*, 26 May 1993, Series A No. 258-B, paragraph 48; *Marshall v. the United Kingdom* (dec.), 41571/98, 10 July 2001.

211. *Aksoy v. Turkey*, 18 December 1996, Reports of Judgments and Decisions 1996-VI, paragraph 70.

212. *A. and Others v. the United Kingdom* [GC], 3455/05, European Court of Human Rights 2009, paragraph 181.

213. The “Greek case” cited above, paragraph 159-165 and 207.

214. *A. and Others v. the United Kingdom*, cited above, paragraph 177.

215. *Ireland v. the United Kingdom*, cited above, paragraph 207; *Brannigan and McBride* cited above, paragraph 43; *A. and Others v. the United Kingdom*, cited above, 173.

216. *Lawless v. Ireland (No. 3)*, op. cit., paragraph 36; *Ireland v. the United Kingdom*, cited above, paragraph 212.

217. *Lawless v. Ireland (No. 3)* op. cit., paragraph 37; *Aksoy v. Turkey* cited above, paragraphs 79-84.

218. *A. and Others v. the United Kingdom*, op. cit., paragraph 190.

219. *Ireland v. the United Kingdom*, op. cit., paragraph 214.

220. *Sadak v. Turkey*, 25142/94 and 27099/95, 8 April 2004, paragraph 56; *Sakik and Others v. Turkey*, 26 November 1997, Reports of Judgments and Decisions 1997-VII, paragraph 39.



**Procedural requirements.** Any member state availing itself of this right of derogation must keep the Secretary General of the Council of Europe fully informed without delay. According to the case law of the Court, a three-month period of time between the introduction of derogating measures and their notification was considered to be too long and could not be justified by administrative delays resulting from the alleged emergency.<sup>221</sup> The same was true for the notification of certain measures four months after they were taken.<sup>222</sup> On the contrary, the Court found that notification 12 days after the measures entered into force was sufficient.<sup>223</sup> Without an official and public notice of derogation, the measures taken by the respondent state are not covered by Article 15.<sup>224</sup> The emergency measures require permanent review.<sup>225</sup>

**Intangible rights.** Member states cannot make any derogation from certain rights and freedoms of the Convention: the right to life (Article 2), except in the context of lawful acts of war; the prohibition of torture and inhuman or degrading treatment or punishment (Article 3), the prohibition of slavery and servitude (Article 4) and the prohibition of punishment without law (Article 7). Similarly, there can be no derogation from Article 1 of Protocol No. 6 (abolishing the death penalty in peacetime), Article 1 of Protocol No. 13 (abolishing the death penalty in all circumstances) and Article 4 of Protocol No. 7 (the right not to be tried or punished twice).

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221. *Greece v. the United Kingdom*, 176/56, Commission report of 26 September 1958.

222. See the "Greek case" cited above, paragraph 81(3)).

223. *Lawless v. Ireland (No. 3)* cited above, paragraph 47.

224. *Cyprus v. Turkey*, 8007/77, Commission report of 6 October 1983, paragraphs 66-68.

225. *Brannigan and McBride v. the United Kingdom*, op. cit., paragraph 54.

## Respect for commitments to international law and human rights standards

States are free to choose the ways and means of implementing their international legal obligations, provided that the result is in conformity with those obligations. They have an obligation of result and not only an obligation of conduct.

Under Article 26 of the Vienna Convention on the Law on Treaties (*Pacta sunt servanda*), “every treaty in force is binding upon the parties to it and must be performed by them in good faith”; “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Therefore, no legal argument in national law, including constitutional law, can justify an act or omission which turns out to be in breach of international law.

States may not invoke the provisions of their internal law as justification for their failure to respect the obligations of a treaty or to ensure compliance with binding decisions of international courts. The execution of international obligations stemming from a treaty is incumbent upon the state as a whole.

As to the specific situation of the European Convention on Human Rights, domestic procedural law should not be an obstacle to the effective implementation of the final judgments of the Court. Article 1 of the Convention sets forth that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”. In order to ensure the observance of the engagements undertaken by the high contracting parties, the Court was set up, on a permanent basis (Article 19). It follows that the states parties accepted not only the obligations referring to the rights and freedoms listed in the Convention and its protocols, but also the creation of a mechanism having the competence to examine and decide on the way they ensure those rights and freedoms within their jurisdiction. The role of the Court is defined in Article 32, and covers all matters concerning not only the application, but also the interpretation of the Convention by the states parties.<sup>226</sup>

In other words, upon becoming a party to the Convention, the state parties expressly accept the competence of the Court to interpret, and not only apply, the Convention. By becoming a party to the Convention, the states parties assumed the obligations firstly to secure the individual human rights and fundamental freedoms listed in the Convention, and secondly, to have their conduct verified by an international tribunal on human rights having the competence to establish whether the respective conduct was in conformity with the provisions of the Convention, this verification being undertaken by interpreting and applying the Convention to the factual and legal circumstances of each specific case at the time of decision of the case.

Article 46.1 of the Convention contains a mandatory obligation on contracting states to comply with judgments of the Court: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.” This provision is an unequivocal legal obligation. Its centrality was reaffirmed by the Steering Committee for Human Rights (CDDH) report on the longer-term future of the Convention mechanism, which stressed that there could be no exceptions to the obligation in Article 46.<sup>227</sup>

The judgments of the Court therefore enjoy the authority of *res judicata*, both formally (they cannot be modified or contested beyond the ways permitted by the Convention – through referral before the Grand Chamber – or by the Rules of the Court – through requests for interpretation or revision) and substantively (their content and conclusions are final and obligatory for the parties concerned). State bodies (including constitutional court) have to comply with the legal situation under the Convention but also to remove all obstacles in their domestic legal system that might prevent an adequate redress of the applicant’s situation.

The obligation to abide by the judgment of the Court issued in a case against a state party implies the compliance with the findings of the Court in that judgment. This execution covers individual redress, but is not limited to it. The state may also be required, with the aim of putting its domestic legal system in conformity with the conventional provisions, as interpreted by the Court, to revise its legislation, and to reform its administrative or judicial practice.

226. “1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols...” See also the Brussels Declaration adopted in March 2015: the Conference stressed “that full, effective and prompt execution by the states parties of final judgments of the Court is essential”.

227. In its Grand Chamber judgment in the case of *Scozzari and Giunta v. Italy*, the Court elaborated on the meaning of Article 46: “a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court (see, *mutatis mutandis*, the *Papamichalopoulos and Others v. Greece* (Article 50) judgment of 31 October 1995, Series A No. 330-B, pp. 58–59, paragraph 34).

# DECENTRALISATION

## Chapter 4 – Democratic institutions

**A** balanced distribution of powers throughout all levels of government is one of the main pillars of any democratic state. It represents an essential component of the necessary checks and balances and is likely to engage more citizens in public life. Strong local and regional government brings democracy closer to the people, thereby enhancing democratic security.

### MEASUREMENT CRITERIA

— The European Charter on Local Self-Government is the principal international treaty in the field of local self-government. 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, as far as possible, in the constitution or at least in law.
- ▶ Local authorities regulate and manage a substantial part of public affairs; local authorities are elected directly.
- ▶ 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 the authorities concerned, if possible by referendum.
- ▶ Administrative supervision is only exercised according to law.
- ▶ Local authorities have adequate resources of their own – they can levy taxes – which they can dispose of freely; financial resources are commensurate with responsibilities and sufficiently

buoyant; they have resources of their own 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.

### FINDINGS

— The role and importance of local and regional self-government has undoubtedly developed in recent decades. Many countries have undertaken public administration reforms leading to increased decentralisation. This trend continued in 2016, in particular in south-eastern, eastern and southern Europe, as illustrated by Albania, Greece and Ukraine where the Council of Europe implements co-operation programmes.

— Several states have either implemented or are considering implementing territorial consolidation reforms of their second or third tiers of government. They may consist either in amalgamation into larger communities or, in the case of local authorities, in arrangements for intermunicipal co-operation with a view to ensuring efficiency and streamlining public administration. Implementation of such reforms continues in Albania, Armenia, Croatia and Ukraine. In Finland, the creation of a new tier of self-government at regional level has been considered in the framework of a wider reform.

— Calls for further regional devolution may serve as a catalyst for dialogue and reform and should be dealt with in line with the principles of good governance (see section on good governance below). Dialogue on the transfer of competences and resources to regional authorities can provide elements for a political solution to problems.

— The inadequacy of resources available to local and regional authorities to exercise their powers remains a recurring problem in most of the member states and has been exacerbated by the prolonged

effects of the weak economic situation and inadequate equalisation systems, for example in Croatia,<sup>228</sup> Cyprus,<sup>229</sup> France,<sup>230</sup> Greece<sup>231</sup> and Luxembourg.<sup>232</sup> Reflections on revisions of the equalisation process have been recently carried out in several countries for a more adequate financing system.

■ The imprecise allocation of responsibilities and powers or overlaps of competences between different tiers of government limit local autonomy in law and practice in several countries, notably Albania, Armenia, Croatia, Cyprus, Greece, Luxembourg, Moldova, Montenegro, “the former Yugoslav Republic of Macedonia” and Turkey. Local authorities regret a lack of formal consultation on government decisions that

concern them and of institutionalised co-ordination and consultation mechanisms based on the criteria provided by the charter (consultation in due time, in an appropriate manner and on all matters which concern them directly), for example in Croatia, Cyprus, France, Greece and the Slovak Republic.<sup>233</sup>

■ While the participation of individuals and organised civil society in decision-making processes is common practice in many countries, only 14 member states have ratified the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority and six have signed but not yet ratified it.

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228. Congress Recommendation 391 (2016) (available at: <https://goo.gl/RO1eDj>) and Report (available at <https://goo.gl/W33GvY>) on the local democracy in Croatia.

229. Congress Recommendation 389 (2016) (available at: <https://goo.gl/1imNfO>) and Report (available <https://goo.gl/l4m8lk>) at on the local democracy in Cyprus.

230. Congress Recommendation 384 (2016) (available at: <https://goo.gl/Nloiqe>) on the local and regional democracy in France.

231. Congress Recommendation 372 (2015) (available at: <https://goo.gl/vn8vTQ>) and Report (available at <https://goo.gl/V7NDjh>) on the local and regional democracy in Greece.

232. Congress Recommendation 380 (2015) (available at: <https://goo.gl/cDsJvl>) and Report (available at: <https://goo.gl/uAYstE>) on the local democracy in Luxembourg.

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233. Congress Recommendation 387 (2016) (available at: <https://goo.gl/UIODxL>) and Report (available at: <https://goo.gl/GjNPzw>) on the local and regional democracy in the Slovak Republic.

# GOOD GOVERNANCE

## Chapter 4 – Democratic institutions

**A** democratically secure society requires both effective democracy and good governance at all levels. More specifically, “effective democracy and good governance at all levels are essential for preventing conflicts, promoting stability, facilitating economic and social progress, and hence for creating sustainable communities where people want to live and work, now and in the future”, as underlined by the 2005 declaration by the heads of state and government of the member states of the Council of Europe at their 3rd Summit in Warsaw.

■ The Council of Europe has adopted a number of legal instruments to support democracy and good governance, including the 12 Principles of Good Democratic Governance<sup>234</sup> (on the basis of which the Hertie School of Governance prepared a “Council of Europe Good Governance Index”) and the 20 Guiding Principles for the Fight against Corruption. Their effective implementation is essential to ensure the proper functioning of democracy, to build trust between the citizens and the states, and to meet citizens’ legitimate needs and expectations through democratic governance and efficient and transparent service delivery.

### MEASUREMENT CRITERIA

- ▶ 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 the 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 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, and subject to scrutiny and remedies exist for maladministration or wrongful decisions.
- ▶ Ethical Conduct: 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.

■ The 20 Guiding Principles for the Fight against Corruption provide a framework for countries’ action to prevent and combat corruption. They, in particular, 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).

234. The 12 principles for good governance at local level, with tools for implementation. Available at [www.coe.int/t/dgap/localdemocracy/Strategy\\_Innovation/12principles\\_en.asp](http://www.coe.int/t/dgap/localdemocracy/Strategy_Innovation/12principles_en.asp).

## FINDINGS

Several Council of Europe member states launched wide-ranging reforms in order to enhance the efficiency and effectiveness of public administration. Armenia and Serbia adopted laws on public service and on the status of civil servants respectively. Albania is implementing civil service reform, *inter alia* through the creation of a central register of civil servants and an electronic platform for public administration with a view to streamlining human resource management.

Reform efforts in Greece are focusing on improving financial management through a clearer distribution of competences between the different levels of the state and a modernisation of the management of local budgets.

Spain aims at improving transparency through the adoption of legal frameworks, supplemented by capacity-building measures for enhancing public ethics.

Transparency also requires public access to information. While two more countries (Estonia and the Republic of Moldova) ratified the Council of Europe Convention on Access to Official Documents (CETS No. 205) in 2016, one more ratification is needed to reach the number of 10 ratifications necessary for its entry into force.

Innovation and change are promoted through the use of information and communication technologies (ICT). Albania made progress towards the digitisation of the civil service, including online provision of administrative services. Romania used ICT in combination with traditional means for participation and a targeted communication strategy to raise awareness of the possibilities for citizens to become involved. Such measures help to combat the feeling of disconnect felt by citizens and to reach a wider audience, including younger generations. Germany, for example, promoted the implementation of national e-government legislation with concrete guidelines for its implementation at local and regional level.

The Council of Europe Good Governance Index 2016 compares performance in the fields of ethics, transparency, accountability, efficiency, competence, responsiveness and innovativeness. It shows that efforts for enhancing governance, often in the context of Council of Europe programmes, have resulted in almost all countries scoring better over the past year than in previous years.

As in 2015, the divergence and relatively low average and median scores in the area of ethics, transparency and accountability remain of concern. However, looking at individual countries, much progress can be observed in a number of member states in the areas of ethics (with significant gains in Albania, Bulgaria,

Finland and Spain), transparency (Albania, Cyprus and Italy) and accountability (with the most important gains observed in the Netherlands and Switzerland).

An area where the Group of States against Corruption (GRECO) focused its evaluations in 2016 relates to the prevention of corruption in respect of members of parliament (MPs). MPs' transparency and accountability are key to strengthening the trust people have in the way public affairs are managed. In this regard, GRECO issued recommendations, among others, relating to:

**Codes of conduct:** GRECO has highlighted the need for parliamentarians to give consideration to the elaboration of a code of conduct as a public signal of their commitment to high integrity (Cyprus, Czech Republic, Moldova, Italy, Georgia, Austria, Switzerland). Although a code in itself does not guarantee ethical behaviour, it does help to foster a climate of integrity and to endorse the intention of the legislature to abide by a culture of ethics.

**Conflicts of interest:** Preventing, detecting and penalising conflicts of interests<sup>235</sup> among MPs has been one of the core areas of focus of GRECO's evaluations. Indeed, MPs' personal interests may "conflict" with the public interest when passing laws and scrutinising government policy. The situation in countries is diverse. In many cases, the provisions and regulations on this matter exist but require further development or clarification, for instance, with a clear and written definition of conflicts of interests, detailed guidelines, practical examples and specific requirements of ad hoc disclosure (see, for example, the cases of Cyprus, Italy, Austria, Georgia, Switzerland).

**Asset declarations:** asset declaration systems for MPs (and to some extent their close relatives) are instrumental to transparency and accountability. While striking a reasonable balance between the interests of public disclosure and privacy rights of the elected representatives, GRECO has recommended ensuring public access to MPs' financial declarations, for example through their timely publication (in the case of Cyprus). Progress is starting to be visible with asset declaration systems being gradually improved, the introduction of e-declaration systems, the widening of their scope and more in-depth monitoring (see the case of Georgia).

235. They are defined by the Council of Europe as "a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties".

## CHAPTER 5

# INCLUSIVE SOCIETIES





# INTRODUCTION

## Chapter 5 – Inclusive societies

Inclusive societies are those which guarantee equal rights and promote tolerance, thereby reducing tensions between communities. In Europe's increasingly diverse democracies, it is important that newcomers and minorities are protected from discrimination and benefit from policies which actively seek to integrate them into mainstream society. At the same time vulnerable groups within the majority population must benefit from state welfare policies and have access to quality education, decent health care, adequate housing and employment opportunities, helping to diffuse any sense of social injustice.

States which exhibit low levels of inclusion are particularly vulnerable to populism, which feeds on the discontent of citizens who feel forgotten by elites, and who fear that their communities are being transformed by outsiders. Populism, in turn, exacerbates these tensions by vilifying groups seen as threatening "the people" and weakening their rights.

Council of Europe member states must have robust anti-discrimination laws in place to protect minorities, which are properly implemented and complemented by policies to integrate marginalised groups. This includes members of ethnic and religious minorities, recently arrived migrants, asylum seekers, Roma, members of the LGBTI community and persons with disabilities. Politicians have a special duty to resist irresponsible rhetoric which stokes the fires of xenophobia and prejudice, instead of promoting mutual respect and inclusion.

State authorities must ensure social rights for all citizens, as enshrined in the revised European Social Charter (ETS No. 163, hereafter "the Charter"), not least in education, employment, housing and health care. Effective policies to ensure gender equality are also essential for the successful inclusion of women and girls.

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

Following last year's report, the Committee of Ministers authorised the establishment of the European Roma Institute for Arts and Culture (ERAC) and the German Government offered to locate the institute in Berlin. A new joint programme with the European Commission to improve access to justice for Roma and Traveller women was launched in September 2016.

Greece ratified the Charter on 18 March 2016 and it entered into force on 1 May 2016.

The No Hate Speech Movement has extended to 44 countries with Estonia, France, Germany, Luxembourg and the Flemish Community of Belgium joining in 2016. The renewed platform [www.nohatespeechmovement.org](http://www.nohatespeechmovement.org) provides improved features to signal hate speech online and insert counter narratives to hate through Hate Speech Watch.

The Conference of Ministers of Education of the States Parties to the European Cultural Convention endorsed the Framework of Reference of Competencies for Democratic Culture<sup>236</sup> model in April 2016. A pilot phase is under way and the results will be presented at a major education event held under Cyprus' Committee of Ministers chairmanship.

The Intercultural Cities programme increased in one year from 74 to 105 members and six national networks. The programme expanded in the fields of intercultural competence, social and economic innovation for refugees and interconvictional dialogue. Pilot projects were launched on the economic potential of workforce diversity, migrant entrepreneurship and diversity inclusion in digital media.

Following the recommendations in last year's report, the Ad hoc Committee for the Rights of the Child is developing standards to provide immediate care to refugee and asylum-seeking children, notably in the areas of guardianship and age determination. In two countries, HELP programmes on asylum seekers were launched in close co-operation with the national

236. Available at [www.coe.int/en/web/education/competences-for-democratic-culture](http://www.coe.int/en/web/education/competences-for-democratic-culture).

training institutions for judges and prosecutors. In Italy, the HELP/Office of the United Nations High Commissioner for Refugees (UNHCR) course on the European Convention on Human Rights and Asylum was launched for a pilot group of legal professionals. In “the former Yugoslav Republic of Macedonia”, the Council of Europe helped to develop in-service training manuals for police officers which will be used for cascade training sessions in 2017.

■ The Council of Europe strategies on the rights of persons with disabilities (2017-2023) and for children’s rights (2016-2021) aim at supporting member states in fighting inequality, reducing vulnerability and removing obstacles to the effective enjoyment of the rights of millions of people who are often left behind as a result of disability.

■ The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201, Lanzarote Convention) reached 42 ratifications (three in 2016). The Lanzarote Committee has launched an urgent monitoring round on Protecting children affected by the refugee crisis from sexual exploitation and sexual abuse. The resulting report should be adopted in the spring of 2017.

■ 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 22 member states (three in 2016). In 2016 GREVIO started the baseline evaluation procedure in respect of four states parties.

■ The number of states parties to the Convention on Action against Trafficking in Human Beings (CETS No. 197) has grown to 46 (two in 2016). The Group of Experts on Action against Trafficking in Human Beings (GRETA), which monitors the implementation of this convention, launched an urgent procedure in respect of Italy and carried out a visit in September 2016 to examine the specific situation of forced returns of victims of trafficking in human beings and the identification of victims of trafficking among asylum seekers and migrants. A first evaluation visit to Greece was organised by GRETA in October 2016, as well as a second evaluation visit to France in September 2016, both of which focused on issues related to prevention of trafficking among asylum seekers, unaccompanied minors and migrants, and the identification of victims of trafficking among these vulnerable groups.

# SOCIAL RIGHTS

## Chapter 5 – Inclusive societies

**R**espect for social rights enables our societies to remain united and overcome their problems, whether social or economic. Such respect restores and strengthens the public's trust in institutions and political leaders, both nationally and at European level. It is a means of combating social exclusion and poverty by enforcing the principle of the interdependence of human rights, which commands an international consensus; it plays a part in the social reintegration of the most vulnerable people in society and people who, for various reasons, have become marginalised.

Clearly, respect for social rights is even more necessary in times of crisis and economic hardship than in normal times. If growth were to benefit only a minority this would weaken social cohesion and democratic security on the continent. Whatever the substance of the economic policies implemented, governments must always consider the realisation of fundamental rights that meet citizens' everyday needs. Disregarding them means creating fertile ground for anti-social, anti-political, anti-European and racist movements, or movements based simply on political exploitation of social egoism.

Investing in the effective enjoyment of social rights like the right to housing, education, health, non-discrimination, employment, decent working conditions and legal, social and economic protection appears indispensable today. It is in this context that the Turin Process was launched in 2014 with the aim of placing the Charter at the centre of European political debate. The Turin Process promotes the idea that upholding social rights in Europe is an essential contribution to democratic stability. One of its objectives is the ratification of the Charter and acceptance of the additional protocol providing for a system of collective complaints by all Council of Europe member states. It further aims at co-ordinating European social rights systems, whether established within the Council of Europe or the European Union.

One of the achievements of the Turin Process is the ratification by Greece, on 18 March 2016, of the Charter, accepting 96 of its 98 paragraphs.

Two high-level meetings marked the Turin Process in 2016: the Interparliamentary Conference on the European Social Charter<sup>237</sup> and the Turin Forum on Social Rights in Europe.<sup>238</sup> These events, held in Turin on 17 and 18 March, were organised by the Council of Europe, in co-operation with the Italian Chamber of Deputies and the City of Turin. The discussion focused in particular on the way in which the full enjoyment of social rights could help resolve the economic crisis, ensure migrants' integration and promote societies in which radicalisation ceases to be an option for young people.

At the Turin Forum, the European Commission presented its initiative for a European Pillar on Social Rights, whereby the EU shall seek to make these rights central to its functioning, its institutions and its policies. In December 2016, the Secretary General submitted an opinion supporting this initiative, which aims to help to build a Europe that is better attuned to meeting people's everyday needs and therefore able to promote shared and sustainable growth. The Secretary General underlined that member states of the European Union are parties to the treaty system of the Charter; this treaty system provides extensive and comprehensive guarantees for social rights and these guarantees now form part of the European *acquis* in the field of human rights. As far as European Union law is concerned, in addition to the express reference to the Charter in the Treaty on European Union and the Treaty on the Functioning of the European Union, a number of the rights guaranteed by this Charter are reflected in the corresponding norms of the Charter of Fundamental Rights of the European Union and other instruments of secondary European Union legislation. Making the Charter central to the European Pillar of Social Rights will thus help initiate a virtuous circle of shared and sustainable growth, while preventing the vicious circle of social dumping. The outcome will indeed be a Europe that is not only more prosperous, but also more united and based on greater solidarity.

237. Available at: [www.coe.int/en/web/turin-european-social-charter/interparliamentary-conference](http://www.coe.int/en/web/turin-european-social-charter/interparliamentary-conference).

238. Ibid.

The Secretary General suggested that the provisions, of the revised Charter be formally incorporated into the European Pillar of Social Rights as a common benchmark and that the contribution to the effective social rights protection of the collective complaints procedure before the European Committee of Social Rights (ECSR) be expressly recognised.

■ In parallel, exchanges and training for judges and other legal professionals, social partners and civil society on the Charter and its interpretation by the ECSR were initiated in the framework of the Council of Europe's HELP Programme, targeting, as a first step the EU member states. The HELP course on labour rights aims at achieving a better understanding of the human rights' dimension of labour rights and covers key concepts such as the right to work, employment relationship and working time; termination of employment; discrimination and equal opportunities; collective labour rights; and health and safety at work.

■ The constructive dialogue between the ECSR and EU institutions culminated in October 2016 in the exchange of views with Koen Lenaerts, President of the Court of Justice of the European Union (CJEU), on recent developments in the case law of the two bodies. This exchange followed previous meetings between the committee and the CJEU and aims at achieving maximum convergence between the Charter and the EU legal order.

■ The European Cohesion Platform, established within the 2016-2017 Programme of Activities, began its work focusing on the following issues: follow-up to Recommendation CM/Rec(2015)3 on the access of young people from disadvantaged neighbourhoods to social rights; the protection and integration of migrants and refugees; and the impact of the economic crisis on health and social protection and on combating poverty and social exclusion.

## MEASUREMENT CRITERIA

- ▶ The ratification of the Charter, the number of adopted key provisions of the Charter, the acceptance of the collective complaints procedure.
- ▶ The number of findings of non-conformity relating to the thematic group "employment, training and equal opportunities".
- ▶ Measures adopted by states parties showing compliance with the requirements of the Charter.

## FINDINGS

■ Greece ratified the Charter on 18 March 2016. It entered into force on 1 May 2016. It accepted 96 out of its 98 paragraphs.

■ In 2016, the ECSR adopted conclusions in respect of 34 states on the articles of the Charter relating to employment, training and equal opportunities. The rights under review were:

- ▶ the right to work (Article 1);
- ▶ the right to vocational guidance (Article 9);
- ▶ the right to vocational training (Article 10);
- ▶ the right of people with disabilities to independence, social integration and participation in the life of the community (Article 15);
- ▶ the right to engage in a gainful occupation in the territory of other states parties (Article 18);
- ▶ the right of men and women to equal opportunities (Article 20);
- ▶ the right to protection in cases of termination of employment (Article 24);
- ▶ the right of workers to the protection of claims in the event of insolvency of the employer (Article 25).

■ The committee found 166 cases of non-conformity with the Charter and 262 situations of conformity out of 513 conclusions on the rights examined in 2016. There were 85 cases where the committee was unable to assess the situation due to lack of information. The problems encountered by a large number of states parties when applying the Charter relate to:

- ▶ insufficient protection against discrimination in employment on different grounds, such as gender and sexual orientation;
- ▶ insufficient integration of persons with disabilities in mainstream education, the labour market and society in general;
- ▶ insufficient guarantee of equal rights between men and women, in particular as regards equal pay;
- ▶ in some cases the efforts to combat unemployment and encourage job creation remain inadequate.

■ The committee welcomed several positive developments, such as the adoption of anti-discrimination legislation in the field of employment in many states parties (for example, in Georgia, Italy and the Republic of Moldova) or jurisprudential developments leading to increased protection against discrimination in labour relations (Andorra). It considered that legislative developments in Armenia, Austria, Greece, Italy, Malta, Montenegro, the Russian Federation, "the former Yugoslav Republic of Macedonia", Ukraine and the United Kingdom increase the protection of people with disabilities against discrimination. It further considered that the right of women and men to equal opportunities was adequately covered

in newly adopted legislation in Armenia, Belgium, France, Hungary, Serbia and Slovakia and welcomed institutional measures to protect equality in Romania.

■ The committee also considered that legislative and other measures adopted in the Russian Federation to promote employment policies and regulate private employment agencies are compliant with the right to work, as guaranteed by the Charter. It also welcomed measures adopted by Spain to promote youth employment, support job stability and maintain vocational training programmes for those who have exhausted their right to unemployment benefits. Legislative measures adopted and implemented in Lithuania concerning the calculation and allocation

of allowances complied with the right of workers to the protection of their claims.

■ The committee also noted that vocational guidance and training systems are well established in the majority of the states examined.

■ In 2016, the ECSR registered 21 collective complaints, as compared with only 6 in 2015. Most of the collective complaints registered in 2016 relate to Article 1 (right to work), Article 4.3 (right to a fair remuneration – non-discrimination between women and men with respect to remuneration) and Article 20 (right to equal opportunities and treatment in employment and occupation without discrimination on grounds of sex).

# NON-DISCRIMINATION AND INTEGRATION POLICIES

## Chapter 5 – Inclusive societies

**E**nsuring non-discrimination lies at the core of building inclusive societies, which override differences of sex, race, ethnic origin, religion, language, colour, citizenship, sexual orientation and gender identity. If people with a different ethnic, religious or linguistic background enjoy their human rights to a lesser degree, this can lead to segregation and the emergence of parallel societies, and contribute to radicalisation and extremism. Taking robust measures to eliminate discriminatory attitudes in practice is therefore of the utmost importance. To achieve this, states should adopt a wide range of measures and act proactively to counter negative stereotypes towards vulnerable groups, including women, migrants and national minorities which could hinder their enjoyment of human rights and increase hostility in society. In this regard, combating the use of hate speech, including on the internet and in social media, constitutes a particular priority, as defined in the ECRI General Policy Recommendation No. 15.<sup>239</sup>

■ The existence of a comprehensive anti-discrimination legal framework is a key requirement to combat racism, discrimination and intolerance. According to the case law of the Court, rights must be “practical and effective” rather than “theoretical and illusory”. In order to make any fundamental right a reality, the right needs to be equipped with an enforcement mechanism, notably through access to justice. National law should ensure the availability of easily accessible judicial or administrative proceedings that provide effective sanctions. Other monitoring mechanisms, such as independent specialised bodies, have also proved to be indispensable in effectively tackling discrimination.

239. ECRI General Policy Recommendation No. 15 on combating hate speech, adopted on 8 December 2015. Available at: [www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N15/REC-15-2016-015-ENG.pdf](http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N15/REC-15-2016-015-ENG.pdf).

■ Guaranteeing access to rights has become critical with the migrant crisis in Europe. In many instances, migrants, particularly irregularly present migrants, have had their basic rights denied or curtailed. It is, however, the obligation of states to protect the fundamental rights of all people within their jurisdiction, regardless of their status. In this respect, in March 2016, ECRI adopted General Policy Recommendation No. 16<sup>240</sup> on safeguarding irregularly present migrants from discrimination. This instrument recommends member states to secure for these people effective access to certain human rights, specifically as regards education, health care, housing, social security and assistance, labour protection and justice. This is the only way that these people living in member states would have an opportunity to live in dignity.

■ The Istanbul Convention is an effective response to the need to achieve gender equality and end gender-based violence. Protecting and promoting gender equality and the human rights of women, including the full implementation of existing legal and policy standards, is crucial to ensuring societies continue to make steady progress towards equality. As foreseen by the Gender Equality Strategy, the Council of Europe aims at mainstreaming the gender perspective in all its actions. National studies carried out in Armenia, Azerbaijan, Georgia, the Republic of Moldova and Ukraine<sup>241</sup> have mapped the obstacles to women’s access to justice in each of the countries and made recommendations to overcome them. A training manual on equal access of women to justice, addressed to judges and prosecutors and adapted to each national context, is under preparation.

240. ECRI General Policy Recommendation No. 16 on safeguarding irregularly present migrants from discrimination, adopted on 16 March 2016. Available at: [www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N16/REC-16-2016-016-ENG.pdf](http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N16/REC-16-2016-016-ENG.pdf).

241. “Barriers, remedies and good practices for women’s access to justice in five Eastern Partnership Countries”, Council of Europe (2016), study prepared in the framework of the project “Improving Women’s Access to Justice in Five Eastern Partnership Countries”. Available at: <https://goo.gl/NhB5VM>.

■ The evaluation of the implementation of the Council of Europe Disability Action Plan (2006-2015) highlighted achievements, in particular with regard to legislation, service delivery, the physical environment and attitudes towards people with disabilities. The evaluation also underlined that discrimination and barriers to participation persist, however, and that there are significant challenges in ensuring compliance with international standards to combat discrimination and to achieve the full respect of the human rights of people with disabilities. It pointed out that the implementation gap needs to be addressed as a matter of priority.

■ While increasingly polarised and populist political debates have led to a situation where issues around sexual orientation or gender identity have become highly controversial in many societies among the member states of the Council of Europe, we witness in parallel growing engagement and political commitment on the side of the member states to work with the Council of Europe to tackle discrimination on the grounds of sexual orientation or gender identity.

## MEASUREMENT CRITERIA

### Legal criteria

- ▶ Ratification of Protocol No. 12 to the Convention 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 Court.
- ▶ National criminal law punishes public incitement to violence, hatred or discrimination on the grounds of “race”, colour, language, citizenship, ethnic origin, sexual orientation and gender identity.
- ▶ Civil and administrative law prohibits direct and indirect racial and homophobic or transphobic discrimination, as well as segregation, harassment, discrimination by association, the announced intention to discriminate, and instructing, inciting and aiding another to discriminate; it provides for the sharing of the burden of proof in discrimination cases in all areas and all grounds.
- ▶ Ratification of the European Charter for Regional and Minority Languages (ECRML) and the Framework Convention of the protection of National Minorities (FCNM) by member states.
- ▶ Ratification of the Istanbul Convention.

### Institutional criteria

- ▶ National specialised bodies’ powers include: assistance to victims of discrimination; investigation powers; the right to initiate and participate in court proceedings; monitoring legislation and advice to legislative and executive authorities; and raising awareness.
- ▶ National specialised bodies are independent and have the freedom to appoint their own staff and to manage their resources.
- ▶ National integrated policies and co-ordinating bodies are established to prevent and combat violence against women.

## FINDINGS

■ ECRI has noted that gaps continue to exist in the anti-discrimination legislation of the majority of member states, in relation to its General Policy Recommendation No. 7.<sup>242</sup> In addition, problems remain regarding their institutional capacity, which has a crucial role in ensuring victims’ access to justice. A number of countries<sup>243</sup> continue to lack an independent body competent to deal with discrimination in both the private and public sectors. Moreover, where there is a specialised body to combat discrimination, it is often dysfunctional or lacks independence, authority, or even a clear mandate.<sup>244</sup> Limited resources and expertise also affects these bodies’ ability to fulfil their advisory role to legislative and executive authorities, as well as other stakeholders.<sup>245</sup>

■ FCNM reports have highlighted how access to rights for national minorities have been fostered by the adoption of anti-discrimination laws and measures specifically targeting national minorities as regards education, use of language,<sup>246</sup> media,<sup>247</sup> employment and social services. Further action remains nonetheless

242. ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, 13 December 2002. Available at: <https://goo.gl/7Fr0ko>.

243. See, for example, ECRI’s fourth report on Azerbaijan, published on 7 June 2016, paragraph 20.

244. See, for example, ECRI’s fifth report on Turkey, published on 4 October 2016, paragraph 27; ECRI’s fifth report on Italy, published on 7 June 2016, paragraph 29; ECRI’s fifth report on Estonia, published on 13 October 2015, paragraph 29-30.

245. See Commissioner for Human Rights, issue paper “Time for Europe to get migrant integration right”, chapter 6.

246. FCNM, Fourth Opinion on Finland, published on 6 October 2016, paragraph 3-4, on the achievements regarding the revival of Sami languages and the efforts needed to reverse the deteriorating situation of the Swedish language.

247. FCNM, Fourth Opinion on Georgia, published on 11 January 2016, paragraph 68; FCNM, Fourth Opinion on Hungary, published on 12 September 2016, paragraph 110.

necessary to ensure equal access to these rights,<sup>248</sup> as well as participation and consultation of national minorities.<sup>249</sup> ECRML reports have highlighted the need for further action by states to provide better access for national minorities notably to education but also social services, justice and media. They also noted positive developments, including the adoption of the new Law on the Minority Councils of National Minorities in Serbia and the establishment in Hungary of a public radio station receivable on the entire territory of the country exclusively devoted to minority language broadcasting, operating seven days a week, addressing all traditional national minorities of Hungary in their native language.<sup>250</sup>

■ Safeguarding irregularly present migrants from discrimination remains a challenge in many member states. Despite continuing efforts, these people still face difficulties in accessing their basic rights. ECRI has underlined the importance of providing adequate medical treatment to migrants irrespective of their residence status in cases of serious infectious diseases or other public conditions presenting health risks.<sup>251</sup> ECRI reports have also shown that the large influx of people fleeing war and persecution has led many states to take measures for their integration. For example, Turkey, which has become the country hosting the largest number of refugees in the world, has given refugees access to a considerable range of public services, including education and health care, and to employment.<sup>252</sup> Similarly, the authorities have opened an integration centre in Armenia.<sup>253</sup>

■ Most Council of Europe member states have adopted national strategies, programmes and action plans for Roma integration. Members of the Roma community continue to be marginalised in many areas of life.<sup>254</sup> As highlighted in the recent ECRI report on

“the former Yugoslav Republic of Macedonia”<sup>255</sup> the lack of personal identity documents creates significant difficulties in their access to basic rights, particularly regarding education and health care. ECRI and the FCNM continued to highlight the extent to which Roma are socially marginalised in employment, mostly due to poor educational attainment and lack of professional qualifications, as stated in ECRI’s fifth reports on Georgia<sup>256</sup> and the United Kingdom<sup>257</sup> and in the FCNM’s opinions on Hungary<sup>258</sup> and Finland.<sup>259</sup> Efforts to address the educational needs of Roma pupils have however continued and the FCNM observed that progress on Roma’s access to education has been achieved in Finland.<sup>260</sup> In Cyprus,<sup>261</sup> new measures have been put in place, including remedial classes in Greek during and after school hours, financial support for buying books, transport, uniforms and other school items, and breakfast and lunch free of charge for Roma pupils attending state primary schools. Regrettably, the practice of placing Roma children in segregated schools has continued in some states.<sup>262</sup> ECRI has also observed that the widespread negative stereotyping of Roma sometimes results in racist violence<sup>263</sup> and underlined the need to tackle the notorious under-reporting<sup>264</sup> and under-prosecution of these racist crimes. Another serious issue regarding Roma is their access to housing, for instance, as a result of clearance of illegal settlements, as seen in France<sup>265</sup> and in Lithuania, or the dire housing conditions in which

248. See, for example, the FCNM’s Fourth Opinion on the Republic of Moldova, published on 1 February 2017, paragraph 82-85, on instruction in and of minority languages.  
249. FCNM, Fourth Opinion on Croatia, paragraph 83-85; Fourth Opinion on Georgia, paragraph 112.  
250. See, for example, ECRML reports on Spain, Slovakia, Serbia, Bosnia and Herzegovina, Hungary, Switzerland and the Netherlands, published in 2016.  
251. See, for example, ECRI’s fifth report on Greece, published on 24 February 2015, paragraph 136.  
252. ECRI’s fifth report on Turkey, op. cit., paragraph 60-72.  
253. ECRI’s fourth report on Armenia, published on 4 October 2016, paragraph 68.  
254. The Council of Europe Human Rights Commissioner published a Human Rights Comment entitled “Travellers – Time to counter deep-rooted hostility” on 4 February 2016, in which he urged states to do more to counter discrimination against Travellers. During 2016 he also addressed letters to nine governments expressing concern about forced evictions and other measures targeting Roma, as well as anti-Roma public rhetoric.

255. ECRI’s fifth report on “the former Yugoslav Republic of Macedonia”, published on 7 June 2016, paragraph 75-76. Similar data are found in CAHROM “Thematic report on solving the legal status of Roma from Ex-Yugoslavia and their lack of personal identity documents”, 30 October 2014.  
256. ECRI’s fourth report on Georgia, published on 1 March 2016, paragraph 86.  
257. ECRI’s fifth report on the United Kingdom, published on 4 October 2016, paragraph 105.  
258. FCNM, Fourth Opinion on Hungary, published on 12 September 2016, paragraph 53-54.  
259. FCNM, Fourth Opinion on Finland, published on 24 February 2016, paragraph 77.  
260. Ibid, paragraph 77.  
261. ECRI’s fifth report on Cyprus, published on 7 June 2016, paragraph 53-54.  
262. FCNM, Fourth Opinion on the Czech Republic, published on 16 November 2015, paragraph 90-91, FCNM, Fourth Opinion on Hungary, op. cit., paragraph 138.  
263. See, for example, ECRI’s fifth report on Albania, published on 9 June 2015, paragraph 48; ECRI’s fifth report on Slovakia, published on 16 September 2014, paragraph 68.  
264. ECRI’s fifth report on “the former Yugoslav Republic of Macedonia”, op. cit., paragraph 39; ECRI’s fifth report on Turkey, op. cit., paragraph 41.  
265. ECRI’s fifth report on France, published on 1 March 2016, paragraph 80-83. Similar data are found in the letter of the Commissioner for Human Rights addressed to the Minister of Interior of France, 26 January 2016.



Roma live in illegal settlements.<sup>266</sup> However, ECRI has noted positive developments in this area, such as the recognition of the cultural needs of Roma to remain nomadic and facilitation of their accommodation accordingly.<sup>267</sup>

■ Hate speech has been identified as prevalent across member states.<sup>268</sup> Though the means of expression and target groups of this discourse vary, it negatively affects the perception of vulnerable groups in society. This also affects national minorities, who experience growing hate speech in social media and in the political arena.<sup>269</sup> Most member states now have legislation against incitement to hate speech in criminal law. However, such provisions are rarely invoked in practice, often because they are difficult to apply or prosecutors and judges lack expertise. Similarly, even where specific provisions exist, punishing racially-motivated violence, or where specific aggravating circumstances relating to racist motivation are in place, there is a tendency by prosecuting authorities to try perpetrators for lesser offences which do not require proof of motivation and which carry lower sanctions. In this way, the message that racist offences are unacceptable is lost.

■ While the use of hate speech must be criminalised in the most extreme circumstances, criminal sanctions

are not in themselves sufficient to eradicate its use. In many instances, the most effective approach to tackling hate speech can be self-regulation by public and private institutions, media and the internet industry, as well as encouraging counter speech by public figures demonstrating both the falsity of the foundations on which it is based and its unacceptability.

■ While the situation concerning discrimination against LGBT people varies considerably among member states,<sup>270</sup> some progress has been made. Austria,<sup>271</sup> France,<sup>272</sup> Cyprus<sup>273</sup> and Luxembourg<sup>274</sup> have adopted new legislation to grant additional rights to LGBT people, including providing for the possibility of registered same-sex partnerships or marriages. Tangible results of the engagement of member states with regard to addressing LGBT issues and based on Council of Europe expertise include the adoption and launch of the National Action Plan on LGBTI (Albania), work and activities around Legal Gender Recognition (Cyprus, France, Greece), and good practice and know-how on LGBTI inclusive local and regional policies (Montenegro). However, homo- and transphobic hatred continues to be spread on the internet. In several countries,<sup>275</sup> LGBT people and in particular LGBT rights activists and organisations have become the victims of violent attacks and these are not always sufficiently investigated.

266. ECRI's fifth report on Lithuania, published on 7 June 2016, paragraph 62-64; FCNM, Fourth Opinion on Croatia, published on 30 May 2016, paragraph 93; FCNM, Fourth Opinion on Italy, published on 12 July 2016, paragraph 40-41.

267. See, for example, ECRI's fifth report on the United Kingdom in relation to Wales, *op. cit.*, paragraph 97.

268. Annual Report on ECRI's Activities, covering the period from 1 January to 31 December 2015.

269. FCNM, Fourth Opinion on Finland, paragraph 49.

270. ECRI started examining discrimination and intolerance towards LGBT persons only in its fifth cycle of country monitoring.

271. ECRI's fifth report on Austria, published on 13 October 2015, paragraph 81.

272. ECRI's fifth report on France, paragraph 101, *op. cit.*

273. ECRI's fifth report on Cyprus, paragraph 110, *op. cit.*

274. ECRI's fifth report on Luxembourg, published on 28 February 2017, paragraph 87.

275. See, for example, ECRI's fifth report on Albania, *op. cit.*, paragraph 49; ECRI's fourth report on Georgia, paragraph 53-54, *op. cit.*; ECRI's fourth report on Armenia, paragraph 59, *op. cit.*

## Islamophobia and anti-Muslim hatred: threats to human rights and social cohesion in Europe

Islamophobia and anti-Muslim hatred, as a specific form of racism, refer to acts of violence and discrimination, as well as racist speech and negative stereotyping and lead to exclusion and dehumanisation of Muslims, and all those perceived as such. This manifests itself in multiple ways.

Individual Muslims are attacked and verbally abused. Mosques are desecrated and become targets of arson attacks. The frequency and intensity of anti-Muslim hate speech in social networks has grown to unprecedented levels. The vilification of Muslims and their religion has become a staple of public discourse in some countries.

Human rights violations, however, are only one manifestation of Islamophobia and anti-Muslim hatred. In many instances, Muslims are victims of various other forms of discrimination, for example in the labour market, but also with regard to education and health. Carrying a Muslim name or wearing a headscarf is often enough to see one's job application being turned down. There is also a strong gender dimension to Islamophobia and anti-Muslim hatred; women often suffer from double discrimination for being female and Muslim.

Muslims living in Council of Europe member states are increasingly stigmatised and held responsible for attacks committed by terrorists.

Islamophobia and anti-Muslim hatred are not only in sharp contrast to European values and human rights standards, they can also be the backdrop for radicalisation and are counter-productive to the successful integration of Muslim migrants and refugees in our European societies. This is threatening social cohesion in Europe and leading to a growing sense of marginalisation, especially, but not only, among young Muslims.

The fight against discrimination with regard to religious and other minorities and their protection against human rights violations is a centre-piece of the Council of Europe's mission. Many human rights programmes of the Council of Europe regularly monitor and report incidents of anti-Muslim hatred in member states. The Council of Europe conventions, resolutions and recommendations of the Parliamentary Assembly and the Committee of Ministers, as well as the General Policy Recommendations of the European Commission against Racism and Intolerance provide member states with guidance on how to confront human rights violations and discrimination against religious minorities.

The upsurge in Islamophobia and a growing number of multiple manifestations of anti-Muslim hatred, and instances of political exploitation of these sentiments, in Europe and beyond, demand a more resolute and systematic approach by the Council of Europe.

## Children's access to rights

### Recognising and treating children as holders of human rights

Historically, children have been treated as an extension of their families, and their rights as individuals have rarely been considered or put forward. The family and the state are indeed at the forefront of the protection of children's rights. Unfortunately, while there is an obligation to act and decide in the child's best interest, children's rights are often violated by those who have the responsibility to care for them. It is very difficult for children to claim their rights. They are rather expected to adapt, follow instructions and meet adults' expectations. The acceptance and social tolerance of corporal punishment are indicators of the lower status granted to children. The way children are portrayed in the media may both create and reflect negative stereotypes and assumptions. This is particularly true when it comes to children in conflict with the law, adolescents and socially excluded children. This negatively impacts the way in which many children are perceived and treated, increasing children's vulnerability to violence and manipulation and society's reluctance to invest in the protection of these children.

There are more than 150 million children across the Council of Europe member states. To better protect and promote their rights, the transversal Programme "Building a Europe for and with children" has consistently promoted work around the European Convention on Human Rights, the Lanzarote Convention, the Istanbul Convention, the Convention on Action against Trafficking in Human Beings and other legal standards, thus covering a wide range of rights and addressing the specific problems that children face.

Alongside the promotion of these standards is a consistent effort to challenge and address social norms and practices that condone, tolerate or perpetuate violence against children. This includes work in the fields of education, justice, information society, migration, social services and support to families.

### Addressing and decreasing children's vulnerability

All children are not exposed to the same kind of risk, nor are they equally protected against it. The vulnerability of children depends on many factors, including their age and their evolving capacities. Failure to address the specific rights and needs of children at each moment of their development puts children in a situation of vulnerability or exacerbates existing vulnerability. Poverty, social exclusion, discrimination and violence disproportionately affect children. Addressing the factors that create or increase the vulnerability of children is a key component of the Council of Europe strategy to safeguard children's rights.

### Promoting child-friendly services

For children to have real access to their rights, it is important to create a support system that takes into account their specific rights, needs and wishes.

Through its standards on child-friendly services in the fields of justice, social services and health care, the Council of Europe aims at removing the obstacles to children's access to their rights and improving the quality, efficiency and cost-effectiveness of the services provided to children.

The Council of Europe Strategy for the Rights of the Child 2016-2021 identifies five priority areas.

#### 1. A life free from violence

Violence is one of the most common violations of children's human rights. Some 15 member states have not yet introduced a ban of all corporal punishment of children, in spite of this being consistently declared a breach of the Charter. It is estimated that up to one in five children will become victims of some form of sexual violence before they reach the age of majority. Bolstered by its 42 ratifications, the Lanzarote Convention has broken the silence around sexual violence and important progress has been noticed in awareness on this issue, the legal protection of children and the setting up of child-friendly procedures and services for victims and potential victims. An urgent round of monitoring has been launched on the protection of children affected by the refugee crisis.

## **2. Equal opportunities for all children**

The obstacles that children face to accessing their rights sometimes seems insurmountable, in particular for socially excluded children. Many children face discrimination on grounds such as gender, disability, ethnic origin, sexual orientation or sexual identity. Through the Charter and its work on human dignity and non-discrimination, the Council of Europe guides member states in safeguarding children's right to enjoy equal opportunities and to grow up in tolerant and inclusive societies. Migrant children (in particular when unaccompanied) are at high risk of suffering numerous violations of their human rights. Standards are being developed to provide immediate care to refugees and asylum-seeking children and states are being supported to help to putting an end to the detention of migrant children.

## **3. Participation for all children**

The Council of Europe promotes the child's right to participate and seeks to embed the genuine involvement of children in decision making at Council of Europe, national and local levels, including through its Child Participation Assessment Tool, the Committee of Ministers Recommendation CM/Rec(2012)2 on the participation of children and young people under the age of 18, and through its work on democratic citizenship and human rights education.

## **4. Child-friendly justice**

Although children come into contact with the justice system in many ways, procedures remain ill-adapted to the needs of children – the experience can be unnecessarily intimidating, difficult to understand, and not in full acknowledgement of the child's interests. The detention of children, including of migrant children, poses serious challenges to the realisation of their rights. The Council of Europe Guidelines on child-friendly justice guide member states in the promotion of justice systems which are accessible, age appropriate, speedy, diligent and adapted to and focused on the needs and rights of the child. Support is provided to avoid the deprivation of liberty of children and to monitor places of deprivation of liberty for children.

## **5. The rights of children in the digital environment**

Increasingly, access to and literacy in the digital world is indispensable for children and adults alike in the enjoyment of their rights. Yet the digital world is rife with risks, unequal opportunities for access, and there is a lack of knowledge in how best to exploit its benefits. To further the rights of children in the digital world, policy guidelines for member states to empower, protect and support children's safe access to their rights on the internet are being developed. Furthermore, the Council of Europe has developed a fully revised edition of its internet literacy handbook. Given the particular challenges that children with disabilities face on the internet, the Council of Europe has also launched a project on these children's rights in the digital environment.

# ACCESS TO RIGHTS AND INTEGRATION OF REFUGEES AND MIGRANTS

## Chapter 5 – Inclusive societies

**T**he mass arrival in Europe of people fleeing war and persecution or simply misery at home has been a major test for our system, which guarantees their human rights, as long as they are within member states' jurisdiction. Many of those who have arrived in Europe in the past few years would qualify for protection under the 1951 Refugee Convention and its 1967 Protocol or equivalent rules. At a time when legal avenues for accessing such protection remain limited, the burden of safeguarding the right to seek asylum falls primarily on frontline states. Pushbacks and returns to countries where the right to life and freedom from ill-treatment are not guaranteed constitute breaches of the Convention as confirmed by judgments of the Court. Respect for such rights is also one of the conditions for the application of key international texts in the field of refugee protection and migration, such as those of the EU Dublin system, and are also reflected in the EU–Turkey deal.

■ One way in which the relevant obligations may be violated is by sending asylum seekers, refugees or other migrants to countries that cannot guarantee them basic, decent living conditions, whether in places of administrative detention, in open structures, or outside the official accommodation system. Of course, when the receiving country is a member state, its responsibility can be directly engaged. The enormous strain that the presence of great numbers of refugees puts on some emergency accommodation systems cannot be invoked as an excuse for not safeguarding human rights. Nor can member states resort to immigration detention, without a clear legal basis. To be able to propose realistic alternatives to such detention, member states have to review their legislation as well as their policy and practice.

■ In addition to covering refugees' and migrants' urgent needs, the authorities should also be able to provide them with accurate information about their legal and administrative situation, interpretation services and psycho-social support. Granting new

arrivals effective access to asylum procedures is, in many cases, the obvious first step for the authorities to take under Articles 3 and 13 of the Convention. Again the number of people concerned cannot justify the failure to register and process their claims. Moreover, the right to legal aid cannot be *de facto* denied (notwithstanding the wide financial implications of compliance with the relevant rules in cases of mass migration). Without such aid, the possibility of appealing against various migration-related decisions would often become illusory. Making the relevant remedies system less unwieldy and managing the courts' caseload efficiently would be part of the process of adapting administrative justice to the reality of what has been termed by many "Europe's migration crisis".

■ The high number of unaccompanied minors is one aspect of the crisis. Additional capacity for member states' guardianship systems, effective age-determination procedures and international cooperation are needed. The education of refugee and migrant children should also remain a priority. All of them, including those in unofficial camps or temporary state-provided accommodation, need a school routine (even when facing expulsion). Integration in the mainstream education system should be the principal objective. Special support is often needed for this purpose, as part of transitional measures and to ensure respect for these children's linguistic and cultural heritage. Moreover, member states must fight against all forms of migration-related abuse: human trafficking, violence against women, the sexual exploitation of children and the activities of smugglers taking advantage of human vulnerability. Disabled, LGBT and older refugees and migrants have special needs, which the authorities must address effectively, alongside those of women and children.

■ In many cases, relocation or resettlement is the only realistic way of ensuring access to basic rights for refugees amassed in frontline states. Many are

candidates for family reunification; and, quite often, the family will only be able to live together in the country that has granted asylum. In general, greater solidarity is required among member states of the Council of Europe, whose human rights system is based on the idea of collective responsibility.

Finally, member states need to integrate those who will remain on their territories. Relevant provisions of the Charter provide essential guidance. Learning the majority language and being given adequate work opportunities are central parts of any integration effort. The recognition of academic and professional qualifications, acquired prior to arriving in Europe, would facilitate the process. Member states' authorities should be able to measure the results of integration policies; statistical data is needed to this effect. And no such policy is likely ever to succeed if hate crime and discrimination are not effectively tackled. Sadly, mass migration has rekindled xenophobia, aggressive nationalism and populism. Responsible management of mass migration is vital in order to ensure social cohesion and the active promotion of tolerance and mutual respect is key to this.

## MEASUREMENT CRITERIA

- ▶ Compliance with relevant obligations under the Convention, as interpreted by the Court; the Charter, as interpreted by the ECSR; the Istanbul Convention; the Lanzarote Convention; and relevant standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (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.
- ▶ 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, available 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 ECRI.
- ▶ 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, hereafter "the Lisbon Recognition Convention").

## FINDINGS

Managing mass migration, while respecting human rights obligations, is a major challenge. Some member states have closed their borders with refugee-generating countries or countries that continue to have issues of compliance with the Court judgments concerning asylum determination procedures and living conditions for asylum seekers.<sup>276</sup> The principle of *non-refoulement* is not always respected. The Court has had to stop, under Rule 39 of the Rules of Court, returns to Syria pending its examination of a number of applications concerning serious human rights violations. It has also found a breach of Article 2, which guarantees the right to life, and/or Article 3, which guarantees freedom from ill-treatment, in cases concerning the threat of deportation to Iraq or Iran.<sup>277</sup> Human rights issues continue to have a serious impact on the functioning of the Dublin system,<sup>278</sup> while questions have also been raised concerning the correct application of the EU–Turkey deal.<sup>279</sup> To help member states' authorities comply with their relevant obligations, the Council of Europe has been offering training on the Convention to border guards, migration and asylum officials and judges.

Good practices are not lacking in the field. Italy, for example, has been making strenuous efforts to save lives, even outside its search and rescue zone, in

276. SRSG's reports of 22 July 2016 on Turkey and 8 April 2016 on Greece and "the former Yugoslav Republic of Macedonia".

277. *F.G. v. Sweden*, 23 March 2016; *J.K. and others v. Sweden*, 23 August 2016.

278. *M.S.S. v. Belgium and Greece*, 21 January 2011. The Court has also had to deal with a number of cases following its judgment in *Tarakhel v. Switzerland* of 4 November 2014. In 2016 it received a number of applications concerning returns to Hungary on the basis of the Dublin III regulation. See also the Council of Europe Commissioner for Human Rights Third Party Intervention under Article 36 of the Convention, Applications No. 44825/15 and No. 44944/15, *S.O. v. Austria* and *A.A. v. Austria*.

279. SRSG's report on Turkey, op. cit.

the Mediterranean.<sup>280</sup> The Council of Europe has also proposed its know-how on setting up proper mechanisms to investigate allegations concerning the use of force – including lethal force – against asylum seekers and other migrants by law-enforcement authorities and the army.<sup>281</sup>

■ Praiseworthy efforts have been made in Turkey, Italy, Greece, “the former Yugoslav Republic of Macedonia” and other member states to provide people amassed in border areas or capital cities with proper accommodation.<sup>282</sup> However, the living conditions in other official camps remain below standard, while refugees and migrants outside the formal accommodation system often receive very little care, if any at all.<sup>283</sup> There are issues of conformity with the Charter in this respect, although bold action has been taken following a collective complaint against the Netherlands obliging it to give adequate shelter to families who have been refused asylum, as long as they remain on that country’s territory.<sup>284</sup>

■ Member states have responded to the mass arrivals of refugees and migrants by resorting to the wide use of administrative detention. This raises serious issues in general and especially in the case of children.<sup>285</sup> The conditions of detention sometimes leave much to be desired and many facilities are overcrowded.<sup>286</sup> Legislative changes requiring a stricter review of the need for such detention can dramatically improve overcrowding, as has happened in Malta.<sup>287</sup> The legal basis for depriving asylum seekers, other migrants and even refugees of their liberty is, in any event, quite often a rather controversial issue: there have been questions about the “hotspots” in Greece and Italy and some kinds of migration detention in Turkey.<sup>288</sup> The CPT has responded to the wide use of migration detention by conducting ad hoc visits to frontline states.<sup>289</sup> In parallel, the Council of Europe

is developing new rules on alternatives to migrants’ administrative detention; it is also codifying existing standards for such detention.

■ Many member states are also confronted with difficulties in providing new arrivals with accurate information about their legal and administrative situation or the available interpretation services and psycho-social support. Often, because of the numbers involved, delivering these services is not possible without the co-operation of the civil society.<sup>290</sup> Some asylum seekers have problems accessing international protection, as a result of registration delays or, in the case of detainees, obstacles to communication with counsel and competent intergovernmental organisations (IGOs) and NGOs.<sup>291</sup> Some states have made sustained efforts to facilitate the submission and ensure the speedy examination of international-protection claims.<sup>292</sup> However, the asylum and court systems have not always been able to react appropriately to the challenges of the “migration crisis”. The Council of Europe has been providing some of them with tailored assistance on streamlining the relevant procedures and eliminating the backlog of cases. In order to address other issues, such as continuing to guarantee the right to legal aid (notwithstanding the wide financial implications of compliance with the relevant rules, in cases of mass migration), the Secretary General’s Special Representative on Migration and Refugees (SRSG) has called for partnerships between the Organisation and various international stakeholders. The CPT monitors respect for the procedural rights of those subject to return procedures, even when removal operations are co-ordinated by the European Border and Coast Guard.<sup>293</sup>

■ The number of unaccompanied minors has created a challenge for member states’ guardianship systems, which until now have had to deal with fewer and much younger children.<sup>294</sup> The Council of Europe has decided to work on improving the relevant standards and age-assessment procedures.<sup>295</sup> Many refugee and migrant children, who live in official or makeshift camps, receive no or inadequate education; some are obliged to work. The efforts made in some countries, including Turkey, to integrate these children into the mainstream education system are commendable. However, the need for special measures to support the transition and ensure respect for their

280. SRSG’s report on Italy. See [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016806f9d70](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806f9d70).

281. SRSG’s reports on Turkey and “the former Yugoslav Republic of Macedonia”, op. cit.; see also his report of 12 October 2016 on France; the report on Hungary of the CPT of 3 November 2016.

282. SRSG’s reports on France, Greece and “the former Yugoslav Republic of Macedonia”, Turkey and Italy, op. cit.

283. Ibid.

284. See follow-up to the ECSR’s decision on collective complaint No. 47/2008 *DCI v. the Netherlands* and follow-up to its decisions in collective complaints No. 90/2013 *CEC v. the Netherlands* and 86/2012 *FEANTSA v. the Netherlands*.

285. Cf. judgments of 12 July 2016 of the Court in applications Nos. 11593/12, 68264/14, 76491/14, 33201/11 and 24587/12 against France; see also the above-mentioned CPT report on Hungary.

286. See the reports on Hungary by the CPT and Greece, “the former Yugoslav Republic of Macedonia”, Italy and Turkey by the SRSG, op. cit.

287. CPT, report, 25 October 2016.

288. See SRSG’s reports on these countries.

289. CPT; visits to Greece on 13-18 April 2016 and 19-25 July 2016.

290. SRSG’s reports on France, Greece, Italy and Turkey, op. cit.

291. SRSG’s reports on France and Turkey, op. cit.

292. SRSG’s report on France, which however also points out the difficulties encountered in this connection by the authorities in Calais, op. cit.

293. CPT, reports of 15 December 2016 on return flights from Italy and Spain.

294. SRSG’s reports on France, Greece, Italy and Turkey, op. cit.

295. See decisions taken by the Committee of Ministers at its 126th session in Sofia on 18 May 2016.

linguistic and cultural heritage is often neglected.<sup>296</sup> All these issues will be addressed in an organisation-wide action plan, which the Secretary General intends to present in 2017.

■ In 2016 the Group of Experts on Action against Trafficking in Human Beings (GRETA) used an urgent procedure to carry out a visit to Italy. The Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Committee) launched an urgent monitoring exercise for the benefit of those affected by the refugee crisis. The SRSg has expressed concern about the effects of gender-based violence, early marriage practices and anti-LGBT intolerance on refugees and migrants.<sup>297</sup> He has also called for the sharing of know-how and increased co-operation in tackling people smuggling.<sup>298</sup>

■ The crisis has accelerated the shift in focus – observed since the beginning of the decade in several member states<sup>299</sup> – from integration to migration-control policies, in order to discourage migration.<sup>300</sup> The absence of proper integration policies<sup>301</sup> has had clear consequences, not only in the fields of accommodation and education, as observed above; refugees and migrants also experience difficulties accessing work and even health care.<sup>302</sup> Concrete examples of such difficulties can be found in the ECSR's 2016

conclusions on the application of Articles 10 and 18 of the Charter and relate to excessive work-permit fees and limited access to vocational training, among other things. On a more general level, refugees and migrants' integration is inhibited by their negative portrayal in the media and political discourse (direct or indirect incitement to xenophobia having become the preferred weapon of most populist parties).<sup>303</sup> However, there are good practices as well. Despite the difficult context, the ECSR has reported improvements in migrants' employment: one-stop shops have been set up, in some states, for work-permit applications.<sup>304</sup> The Council of Europe has also been developing, with member states, a pilot project to facilitate the recognition of refugees' and migrants' higher-education qualifications ("the qualifications passport").

■ The Secretary General and the SRSg have called for more solidarity among member states to alleviate the impact of the crisis on all those concerned.<sup>305</sup> So has the Parliamentary Assembly of the Council of Europe.<sup>306</sup> This is an area where substantial progress can be achieved by promoting solidarity among states and concerted action with other international stakeholders. It is also an area where the Council of Europe has a clear role to play given that any attempt at migration management inevitably has wide-ranging human rights implications.

296. See SRSg's reports on France, Greece, Italy and Turkey; on the latter country, see also ECRI's fifth report, paragraph 68 (published on 4 October 2016), *op. cit.*

297. See, especially, his report on Turkey, *op. cit.*

298. See his reports on France and Italy, *op. cit.*

299. ECRI's 2010 annual report.

300. See Commissioner for Human Rights' May 2016 issue paper *Time for Europe to get migrant integration right.*

301. Integration policies are one of the topics of ECRI's fifth cycle; in 2016 ECRI called for the further development of such policies for migrants in its reports on Azerbaijan (published on 7 June 2016, paragraph 51), Georgia (published on 1 March 2016, paragraph 90), Cyprus (published on 7 June 2016, paragraph 87) and Turkey (paragraph 65).

302. See the SRSg's report on Turkey; also ECRI's fifth report on Italy, published on 7 June 2016, paragraph 77, concerning migrants' undeclared work, *op. cit.*

303. See, for example, ECRI's fifth report on the United Kingdom, published on 4 October 2016, paragraph 34 and 40.

304. Greece and Turkey.

305. See SG's Nafplio speech on 27 May 2016; the SRSg's Athens statement on 9 March 2016 and his reports on France, Greece, Italy and Turkey, *op. cit.*

306. See Resolutions 2008, 2107, 2108, 2019 and 2118, all adopted in 2016.



## Media coverage of the “refugee crisis”

The media played an important role in framing the public debate on the mass arrival of refugees and migrants in the autumn of 2015 and during 2016. While social media disseminated information and provided a platform for the exchange of views, it was mainly the traditional media that acted as sources of information, thereby actively contributing to shaping the public perception of events.

A report<sup>307</sup> produced by the Council of Europe in co-operation with the London School of Economics, entitled “Media coverage of the ‘refugee crisis’: A cross-European perspective” examines the narratives developed by European quality print media, in particular during the peak of events as they unfolded in the second half of 2015. Over 1 200 articles in traditional print media in eight European countries (the Czech Republic, France, Germany, Greece, Hungary, Ireland, Serbia and the United Kingdom) and in two European Arabic-language newspapers were analysed for the purposes of the study, showing the significant contribution of the media as the public perception of the “crisis” shifted from careful tolerance over the summer of 2015, to an outpouring of solidarity in September 2015, to a securitisation of the debate and a narrative of fear in November 2015.

While there are significant regional variations in the press coverage, the narrative overall focused on the management of the “crisis”, paying only scattered attention to the individuals’ plight. Refugees and migrants generally emerged as an undistinguishable group of anonymous and unskilled outsiders, portrayed either as vulnerable and weak, or as dangerous and imposing. There were few opportunities for refugees and migrants to recount their stories, express their concerns or give their views on events, with the voices of refugee women remaining particularly concealed. The views of representatives of national governments or European officials were featured significantly more often than the voices of refugees and migrants.

According to the study, journalists and media professionals have been faced with similar challenges across Europe. They have had to cover fast-evolving stories about unfamiliar phenomena and people in the context of tragedy, loss of life and changing national and European policy responses. Yet, as a result of the desire for constant and speedy coverage by mainstream media and often under pressure from the vast flow of information delivered on online and social media, reporting at times lacked the necessary understanding of context and background.

Mainstream political narratives, sometimes promoting hostility and sometimes solidarity towards migrants, were reflected and amplified in the media, often without critical engagement and without questioning political decision making, a responsibility that is usually associated with independent journalism.

An outpouring of solidarity spread, in particular after the pictures of the three-year-old Aylan Kurdi, a young Syrian boy who had drowned off the Turkish coast, circulated in the media. The “welcome culture” that developed in several countries, involving central authorities, municipalities and many local volunteers, was amplified in the media, as was the subsequently growing scepticism regarding the ability of European societies – and in particular local communities – to cope with the situation. This, in turn, gave way to a rise in xenophobic, in particular Islamophobic, voices in the media and in political discourse.<sup>308</sup>

Media thus played a role in disseminating and amplifying intolerant public and political discourse that contributed to an increase in xenophobic sentiments against refugees and migrants, and fuelled and exacerbated anti-immigrant rhetoric with spill-over effects also on established European minorities.<sup>309</sup> The dissemination of biased or ill-founded information on refugees and migrants contributes to perpetuating stereotypes and creating an unfavourable environment not only for the reception of refugees but also for the longer-term perspectives of societal integration.

307. Report “Media coverage of the ‘refugee crisis’: A cross European perspective”, available at <https://goo.gl/Y8lTAH>.

308. See also ECRI Annual Report 2015, May 2016.

309. ACFC 10th Activity Report, May 2016.

# EDUCATION AND CULTURE FOR DEMOCRACY

## Chapter 5 – Inclusive societies

**T**here is increasing recognition that while education is essential in preparing people for the labour market, it is equally important in preparing them for life as active citizens in democratic societies, for their personal development and helping them to develop a broad, advanced knowledge base.<sup>310</sup> In April 2016, Ministers of Education of the States Parties to the European Cultural Convention agreed<sup>311</sup> on the importance of education in preparing young people to meet the challenges of today's and tomorrow's societies. Those challenges are wide-ranging including but not limited to the impact of austerity and long-term economic uncertainty, the rejection of traditional forms of democratic participation, the threat posed by violent extremism and radicalisation, and the responses required to support regular and irregular migrants.

Education therefore needs to be broad. There is growing demand within our member states for young people to have access to and benefit from an education that develops analytical and critical thinking skills, communication skills, co-operation skills, flexibility, respect for others, responsibility, and so on, to support their personal development and navigate a path through the digital world.

Member states continue to argue that education for democracy and human rights should be the central part of the Council of Europe's education activities, in light of persisting barriers to implementing the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education (EDC/HRE).<sup>312</sup> This responds to evidence that education strategies

can be used to counter prejudice and intolerance towards other national, ethnic and religious groups, and to reduce support for violent extremism.

Education for democracy and human rights is therefore a fundamental component of any measure taken to address discrimination, prejudice and intolerance, thus preventing and combating violent extremism and radicalisation in a sustainable and proactive way. It also makes an essential contribution to building inclusive societies, within the framework provided by democratic institutions and respect for human rights.

A related problem is the growing concern that educators are struggling to maintain schools and universities as places for open debate as part of building young people's analytical and critical thinking. The Secretary General's initiative to explore further the challenges associated with schools as "safe spaces" for such exchanges and associated learning, highlighted in his 2015 report, is ongoing, with research being conducted to examine the scale and scope of the problem. The Council of Europe will also consider how best to support relevant authorities, including by identifying and sharing best practice that builds on existing Council of Europe resources such as the widely-used *Signposts* manual for teaching about religious and non-religious world views.<sup>313</sup>

The Council of Europe's education activities in 2017 focus more clearly on narrowing the implementation gaps. This will be achieved through events such as the major international review conference on the Charter on EDC/HRE, the wider implementation through innovative projects of the Lisbon Recognition Convention,<sup>314</sup> and the evaluation conferences to be

310. Recommendation CM/Rec(2007)6 of the Committee of Ministers to member states on the public responsibility for higher education and research, 16 May 2007. See <https://goo.gl/m30YZS>.

311. Council of Europe Standing Conference of Ministers of Education on "Securing democracy through education", 12 April 2016. See <https://goo.gl/xxfkyu>.

312. Recommendation CM/Rec(2010)7 of the Committee of Ministers to member states on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education; See <https://goo.gl/0xhxoG>.

313. Robert Jackson (2014): *Signposts – Policy and practice for teaching about religions and non-religious world views in intercultural education* – Council of Europe Publishing, Strasbourg.

314. See [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/165](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/165).

organised in Cyprus and the Czech Republic on the progress of the Brussels final declaration of the 25th session of the Standing Conference of Ministers of Education “Securing Democracy through Education”.

## CULTURE

— In recent years a link has been observed between a strong, well-functioning democracy and an abundance of cultural opportunities for citizens and others living within a society. Moreover, culture remains an essential vehicle for freedom of expression, allowing people to affirm and recognise diversity and helping to reinforce cohesion in societies. Access to cultural rights and participation in cultural life are therefore key to the reinforcement of democratic security. Societies are expected to be more open, tolerant, well-functioning and economically successful where people have easy access to a wide range of cultural activities and participation rates in these activities are high. The new Indicator Framework on Culture and Democracy (IFCD) helps examine this multifaceted relationship.

## MEASUREMENT CRITERIA

- ▶ The Charter on EDC/HRE<sup>315</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 mandatory provision of education for democratic citizenship and human rights education, both offline and online.
- ▶ Curricula identify tacit elements related to democracy, human rights and respect for diversity, especially in the subjects of history and religion.
- ▶ Measures have been taken to ensure equal opportunities for access to education at all levels.
- ▶ Skills for promoting social inclusion, valuing diversity and handling differences and conflict are part of initial teachers’ training as well as of the ongoing teaching and learning process in schools.

315. Recommendation CM/Rec(2010)7 of the Committee of Ministers to member states on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education, 11 May 2010. See <https://goo.gl/pOR9jt>.

- ▶ Appropriate infrastructure (for example, museums, cinemas or live performance venues) and institutions are supported to encourage active cultural participation.
- ▶ Cultural policy promotes diversity in cultural institutions and industries.

## FINDINGS

— The Council of Europe 2016 survey on the state of citizenship and human rights education, with the participation of 40 member states, made following observations.<sup>316</sup>

- ▶ Substantial progress has been made in all countries and EDC/HRE is gaining more ground in education systems and in school communities around Europe. All the countries that took part in the survey reported that concrete measures were taken to promote citizenship and human rights education, in accordance with the objectives and principles of the Charter on EDC/HRE, compared to two thirds of respondents in 2012. There is an over 30% increase in the number of countries where action has been taken or is planned to evaluate strategies and policies in this area over the last four years.
- ▶ A majority of the respondents (35 out of 40 countries or 88%) indicated that EDC/HRE is promoted in schools and colleges through a cross-curricular approach, followed by EDC/HRE as an obligatory subject matter (78%), a whole school approach (73% of the respondents), and finally, EDC/HRE as an optional subject (45% of the respondents). The number of countries where EDC/HRE is not an obligatory subject at any age has remained unchanged in recent years.<sup>317</sup>
- ▶ Inconsistencies between policies and their implementation are reported by 66% of respondents in 2016 compared to 20% in 2012. The most salient implementation issues according to the respondents are related to the lack of resources, lack of a long-term approach, lack of evaluation tools and lack of awareness among key partners.
- ▶ Over a third of respondents stated there is almost no reference at all to EDC/HRE in laws, policies and strategic objectives, in vocational education

316. The replies from the country respondents are available at: [www.coe.int/en/web/edc/report-on-the-state-of-citizenship-and-human-rights-in-europe](http://www.coe.int/en/web/edc/report-on-the-state-of-citizenship-and-human-rights-in-europe).

317. Comparing the 2012 “Report on the Implementation of the Charter with countries’ responses in 2016, as well as considering Eurydice (2012)”. Citizenship education in Europe. Brussels: Education, Audiovisual and Culture Executive Agency (EACEA P9 Eurydice and Policy Support). See [http://eacea.ec.europa.eu/education/eurydice/documents/thematic\\_reports/139EN.pdf](http://eacea.ec.europa.eu/education/eurydice/documents/thematic_reports/139EN.pdf).

and training, and higher education (14 out of 40 respondents).

- ▶ In almost two thirds of the countries no criteria have been developed to evaluate the effectiveness of programmes in the area of citizenship and human rights education.
- ▶ The results show an increase in the number of countries that have either taken part in international co-operation activities or are planning to do so from 45% (in 2012) to 73% (in 2016), to a great extent through initiatives driven by the Council of Europe and the EU.
- ▶ The majority of the respondents felt that the review process provided encouragement/motivation for stronger action and higher quality, an opportunity to promote good practice, a support tool for dialogue with other countries and within the country, and access to expertise from other countries and from international institutions.

■ According to the final report of the monitoring of the implementation of the Joint Council of Europe-UNESCO Convention on the Recognition of Qualifications for Higher Education in the European Region<sup>318</sup> (Lisbon Recognition Convention),<sup>319</sup> that was carried out by the Convention Committee in 2015-2016 in 50 states parties:

- ▶ some 70% of the countries which responded say they have not implemented Article VII of the Lisbon Recognition Convention and so have no regulations at any level concerning the recognition of refugees' and displaced persons' qualifications;
- ▶ of the 15 countries which reported having national regulations, most only covered procedures relating to the submission of documents, or to recognition for admission to first degree (bachelor) level studies;
- ▶ of the countries which have introduced regulations, six stated that they issue formal decisions,

which carry greater weight and authority than an advisory statement or an explanatory report;

- ▶ six countries issue a "background paper" describing the content and function of, and the formal rights attached, to refugee qualifications. A "background paper" modelled on the Diploma Supplement is adopted as good practice both within the Revised Recommendation on Criteria and Procedures for the Assessment of Foreign Qualifications and in the European Area of Recognition manual (EAR manual), which was endorsed by the ministers of the European Higher Education Area<sup>320</sup> in 2012;
- ▶ some countries issue an advisory statement without having produced a background paper. This, nonetheless, is in full compliance with the obligations set out in Article VII on refugees' qualifications.

■ According to analyses carried out by the Indicator Framework on Culture and Democracy in 2016:<sup>321</sup>

- ▶ where cultural participation is high, tolerance is also high. Participation in cultural activities (for example, artistic expression, online creativity, passive participation) and genuine acceptance of different cultures, values and ways of life seem to go hand in hand;
- ▶ in societies where generalised interpersonal trust among the population is high, so is the level of the population's participation in various cultural activities, both active and passive, offline and online. Furthermore, there is a strong association between cultural participation and people's perception of the fairness of others, which can be taken as evidence of a high level of social cohesion;
- ▶ stronger cultural industries and – to the extent measured – a more solid cultural infrastructure coincide with higher levels of cultural participation and could therefore provide clues regarding where policies or initiatives might contribute indirectly to improving inclusion in society.

318. The monitoring report is available at [www.enic-naric.net/fileusers/Monitoring\\_the\\_Implementation\\_of\\_the\\_Lisbon\\_Recognition\\_Convention\\_2016.pdf](http://www.enic-naric.net/fileusers/Monitoring_the_Implementation_of_the_Lisbon_Recognition_Convention_2016.pdf).

319. The main aim of the convention is to facilitate the recognition of qualifications between the parties and, in so doing, support mobility and ensure the fair recognition of qualifications for all students. Each party is required to take all feasible and reasonable steps within the framework of its education system and in conformity with its constitutional, legal and regulatory provisions to develop procedures designed to assess fairly and expeditiously whether refugees, displaced persons and persons in a refugee-like situation fulfil the relevant requirements for access to higher education, further higher education programmes or employment activities, even in cases where the qualifications obtained in one of the parties cannot be proven through documentary evidence.

320. European Higher Education Area and Bologna Process. See [www.ehea.info/](http://www.ehea.info/).

321. 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 2016.

## Schools as engines of social inclusion – Roma and travellers

Roma and Traveller social inclusion tends to be regarded as an almost impossible goal. Extremely complex issues and a large variety of very difficult situations translate into a myriad of approaches that are impossible to synchronise and often lead to disappointment, destructive critique and fatigue of intergovernmental institutions, governments and local administrations.

Focusing on a pragmatic approach based on a life-cycle analysis of problems is the way the Council of Europe will address these issues. An example of this approach, focused on education, is explained here.

Millions of children in our member states should be in schools, but they are not. Roma and Traveller children are massively overrepresented in this group. At this moment, the overwhelming majority of the most vulnerable Roma are caught in a trap. Roma children cannot go to nursery schools due the fact that these facilities do not exist or their parents do not know about them or do not have legal papers that allow them to enrol their children. A similar situation exists for kindergartens: families of children that are not used to the discipline of preschools and kindergartens tend to be less supportive towards their children's school performance. Roma children therefore have extremely low rates of enrolment in nursery schools and kindergartens. Research shows that children who are not involved in preschool education have much higher school drop-out rates.

The majority of drop-outs happen between the fourth and eighth school years. However, in order to be entitled to enrol in technical schools, Roma children and young people generally need to finish primary school. Consequently, Roma children and young people are very negatively affected by this regulation and end up without the skills needed for meaningful, legal employment. Often this results in employment on the black market or no employment at all.

The "Schools as engines of social inclusion" project will help to overcome this vicious circle. Piloting the project is a way to motivate communities and local administrations where the Council of Europe is already present through the successful Council of Europe/EC joint programme ROMACT to solve the obstacles identified by a life-cycle analysis and be more involved in the educational process of the most disadvantaged, with a focus on Roma. The Council of Europe plans to develop a pilot programme that will address the above-mentioned problems through methods already tried and tested in some member states.

The Council of Europe will propose to modify existing legislation in such a way that it will permit children to obtain identity papers and youth that did not finish primary school to enrol at the same time in technical schools and in second chance programmes, which will allow them to recover in one year of courses two years of regular school. It will also work on introducing school curricula meant to address anti-Gypsyism from a very early age and to use schools as one-stop shops for integrated social services for the community, significantly reducing the costs of public interventions while at the same time increasing their impact. This approach brings benefits to all stakeholders and allows flexible interventions.

# ENGAGING YOUNG PEOPLE

## Chapter 5 – Inclusive societies

**Y**outh policy must support young people in accessing their rights, which are essential if they are to realise their full potential as autonomous members of society. It must respond to the obstacles facing young people in achieving the autonomy and independence necessary for a self-determined life. In seeking to combat marginalisation (and the associated risks ranging from mental health issues to radicalisation), youth policy should reach youth groups that are at risk or vulnerable because of armed conflict, their status as regular or irregular migrants, their membership of a minority group (for example, Roma), economic or other disempowerment, or other reasons.

Successful youth policies are only possible with the full integration of 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. National youth councils, in particular, can actively contribute and provide added value to the development of public youth policy.<sup>322</sup> Their development – or their creation where they do not exist – should be facilitated.

Making assumptions about young people's needs, desires, frustrations and opportunities is the direct route towards poor policy responses. Further research in this field remains important, alongside co-ordinated action at national and European levels to share best practice, in order to be able to base policies on methods that work.

The Council of Europe repeatedly hears from young people of the need to understand their own rights, and the roles that they should be playing in society. This points to reduced certainty, and greater confusion, about current and future opportunities in light of the new challenges facing society. Despite positive trends in education (attendance, levels of attainment, qualifications), young people consider themselves ill-equipped to take the opportunities

presented, or to overcome the barriers to the full enjoyment of their rights.

In September 2016, the Council of Europe adopted a new standard on young people's access to rights<sup>323</sup> which sets out measures that member states should take, at all levels, to remove these barriers. The year 2017 will see a specific focus, in the Council of Europe's youth sector, on monitoring the implementation of this recommendation and responding to any emerging gaps.

### MEASUREMENT CRITERIA

- ▶ Youth policy aims to provide young people with equal opportunities and experience which will 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 CM Recommendations 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.
- ▶ Appropriate structures and mechanisms are established and supported at local, regional and national levels to enable active participation of 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.
- ▶ Preventing and counteracting all forms of racism and discrimination on any ground constitute a clear priority for youth policy.
- ▶ Practical measures and tools are established in order to enable as many young people as

322. Recommendation Rec(2006)1 of the Committee of Ministers to member States on the role of national youth councils in youth policy development.

323. Recommendation CM/Rec(2016)7 of the Committee of Ministers to member States on young people's access to rights.

possible to have access to non-formal education and youth work, as a means of facilitating their autonomy and the transition from childhood to adulthood and from education to employment.

## FINDINGS

Demographic changes and the current economic situation have put young Europeans in a difficult position in which they are experiencing increasing challenges to the full enjoyment of human rights and to a smooth transition to an autonomous life. Unemployment, precariousness, discrimination and social exclusion are a reality for many young people in Europe. Even those with good qualifications experience a difficult transition from education to the labour market. Young people are among the most vulnerable groups of society and the dire socio-economic situation in many Council of Europe member states presents huge barriers to their autonomy, personal development and full participation in society.

Barriers to accessing social rights are one of the most common forms of discrimination faced by young people, which has a direct impact on young people's daily lives and sense of societal belonging.

The ENTER! project<sup>324</sup> was developed to identify and promote alternative approaches and practice around youth policy and youth work to promote access to social rights as a prerequisite for social inclusion. Starting by prioritising the active involvement of young people most affected, it relies on innovative youth work interventions and youth organisations to leverage youth policies at local and national levels. This has sustainable effects on the quality of life and well-being of young people experiencing exclusion, discrimination and violence in a variety of localities and regions around Europe. Co-operation with local authorities is crucial for the project's success, as local interventions have the most immediate impact on young people's lives. The Council of Europe member states recognised the importance of activity in this field by setting standards for the access of young people from disadvantaged neighbourhoods to social rights in Committee of Ministers Recommendation CM/Rec(2015)3 on the access of young people from disadvantaged neighbourhoods to social rights.<sup>325</sup> This recommendation makes clear the importance of the situation of young people in disadvantaged neighbourhoods or vulnerable situations as a barometer of integration and cohesion within communities and societies at large.

324. Council of Europe, Access to Social Rights for Young People. See [www.coe.int/en/web/enter/home](http://www.coe.int/en/web/enter/home).

325. Committee of Ministers Recommendation CM/Rec(2015)3, 21 January 2015. See <https://goo.gl/4s5Lzo>.







This is the fourth 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.

The report's analysis of Council of Europe member states' strengths and weaknesses in these areas can be used to assess their resilience to the challenges posed by populism.

[www.coe.int](http://www.coe.int)

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.