

# ***EU 2020: DEMANDING ON DEMOCRACY***

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



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## ***Executive summary***

Democracy and the rule of law have suffered a hit across a large number of European countries in the year of the COVID-19 pandemic, as shown in this new wide-ranging report by the Civil Liberties Union for Europe (Liberties).

The report, which covers 14 countries across the EU, has been jointly drafted by Liberties and its national member and partner organisations. It points to the most striking developments concerning the rule of law and democracy in the countries surveyed as viewed by Liberties' members.

Among the most alarming findings, the reports expose the increasing pressure put on media freedom and the space for civil society across many of the countries analysed. This is particularly disturbing in these times of crisis, as it is when our democracy becomes more fragile and our freedoms are limited that we most need free and strong watchdogs to hold the powerful to account.

This includes political pressure on the media, which has increased or is still at worrying levels in the Czech Republic, Hungary, Poland and Slovenia. Harassment and attacks targeting journalists have also become more commonplace. Slovenia is a particularly striking example, with journalists routinely threatened, women journalists labelled as 'presticides', and self-censorship being commonly used among journalists to protect themselves against such attacks. An increasingly hostile environment for media is also reported in

Bulgaria, Italy, Spain, Slovenia and Croatia, although Spain, Italy and the Czech Republic have seen improvements in the protection of whistleblowers.

Restrictions on freedom of association have not only persisted, but have worsened for example in Bulgaria, Germany, Hungary, Ireland and Slovenia, with Romania being the only country where some real progress in this area was reported. Disruptions of protests and arbitrary detentions of protesters are increasingly worrying trends in many countries, including France, Bulgaria, Croatia, Poland, Spain, and Slovenia. Abusive prosecutions and SLAPPs (strategic lawsuits against public participation) by corporations and politicians to harass activists and silence criticism is also a practice that is reported to be on the rise, particularly in Croatia, Poland, Slovenia and Spain. This practice had already become more common in several other countries, including France, Ireland and Italy.

The independence of the judicial system has further weakened in countries where serious deficiencies already existed, like Bulgaria, Hungary and Poland. But concerns about the integrity of the judiciary and the transparency of appointments also arise in other countries, such as Ireland and Spain. Heavy case backlogs still seriously affect the length of proceedings in many countries, hindering courts from delivering justice within a reasonable time. This is often due to the fact that governments do not provide the judiciary with

enough resources, as highlighted in particular in Bulgaria, Italy, Ireland, Poland, Romania and Slovakia. Other barriers have increased that hamper people getting fair and effective justice, exacerbated by the impact of the measures taken to address the pandemic on justice systems. These include high court fees in Bulgaria and the Czech Republic, the inadequacy of the legal aid system in Romania and Spain and the violation of fair trial rights in criminal proceedings, in particular for persons in pre-trial detention in Italy, Poland and Slovakia.

The report also exposes gaps in the anti-corruption framework in Bulgaria, France, Hungary, Ireland and Poland, as well as weak checks to balance executive powers in several countries. These go from poor quality law-making to serious deficiencies in the constitutional review of laws, as is the case in Hungary and Poland. There is also increasing concern over public watchdog human rights bodies not being sufficiently independent and effective in Bulgaria and the Czech Republic, or exposed to increasing pressure and threats, in particular in Croatia and Poland.

The COVID-19 pandemic has played an important part in weakening democracy across the continent. People's freedoms, including the right to protest, have been curtailed in a bid to stop the spread of the virus and law-making has often gone through fast-track procedures, which has limited oversight of the executive and restricted the possibility for civil society to get involved in the political process. These practices may have a long-term negative effect including in countries with strong traditions

of democratic participation, such as Germany, Ireland or Sweden.

But the worst changes happened in countries with longer-standing problems with democracy and the rule of law, such as Bulgaria and Romania, as well as countries ruled by governments with authoritarian tendencies, like Hungary, Poland and Slovenia, as part of their ongoing attempts to strengthen their hold on power and limit criticism of the government. Governments in those countries used the pandemic as an excuse to weaken democratic standards further, going far beyond what was necessary to limit the pandemic.

The fairness and independence of the justice system in countries like the Czech Republic, Romania and Slovakia could well improve with reforms already underway, or under discussion. The push for the digitalisation of justice is a positive trend that may help improve the situation in countries where the justice system has long been under strain, such as Italy and Spain. Another positive note is that some EU countries are actively trying to counter hate speech and disinformation through campaigns, such as the Czech Republic. However, some countries are going too far and limiting legitimate free speech, like Bulgaria, Germany, Hungary, Romania and Spain. The EU has a crucial role to play in protecting the rule of law and democracy across the EU. The European Commission has taken the important step of carrying out an audit of countries' democratic record in an annual exercise, which this report feeds into. Nevertheless, Liberties urges it to expand its scope, make sure it contains clear recommendations to individual

countries, applies sanctions to countries that are damaging the rule of law, and take them to court whenever necessary. The EU should also ensure human rights and democracy groups have sufficient funding to carry out their activities.

The rule of law is not only about our societies being governed by pre-determined laws or procedures. Or about defending individuals from abuse. It is the bedrock of democracy, closely interlinked with the shared European values of human dignity, freedom, equality and respect for human rights. These are important tools which make our societies free and full of opportunities to live fulfilling lives. Weaknesses affecting the ability to get justice from independent and efficient courts, threats to a free and plural media environment, the inability of watchdogs like rights and democracy groups to hold the powerful to account or reduced oversight over executive powers and impunity for human rights abuses in one or more EU countries are worrying signs for the health of democracy in the EU as a whole.

This report is as a wake-up call for governments and politicians in the EU because it shows that no EU country is immune to threats to democracy and more concrete efforts are badly needed to revert worrying trends. Our liberties are something we can never take for granted. Preserving and protecting the rule of law in all EU countries is one of the means through which we safeguard our freedoms against those who try to take them away from us.

## About this report

This report illustrates the challenges affecting the rule of law, democracy and justice in the European Union (EU) as viewed by the member and partner organisations to the Civil Liberties Union for Europe.

*The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation (NGO) promoting the civil liberties of everyone in the EU. Liberties is built on a network of national civil liberties NGOs from across the EU. Currently, we have member organisations in Belgium, Bulgaria, the Czech Republic, Croatia, Estonia, France, Hungary, Ireland, Italy, Lithuania, Poland, Romania, Spain, Slovakia, Slovenia and the Netherlands, and associated partners in Germany and Sweden – and we intend to keep expanding our membership to include NGOs from all 27 EU countries.*

Liberties, together with its members and partner organisations, has been carrying out advocacy, campaigning and public education

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

In particular, we assist our members to alert EU-decision makers to problems affecting the rule of law, democracy and justice at national level and conduct research, analysis and advocacy to help EU and national policy-makers address them. Among others, we contributed<sup>1</sup> to the European Commission's reflection process on how to better monitor and react to challenges to the rule of law in the EU.<sup>2</sup> In 2020, we also prepared, together with some of our members, a targeted joint submission<sup>3</sup> to feed the very first Annual Rule of Law Report by the European Commission.<sup>4</sup>

This report offers a comprehensive overview of the main challenges affecting the rule of law across the EU as viewed by civil liberties

1 Liberties, [A Response to the Commission Communication on further strengthening the rule of law within the Union](#) (June 2019).

2 European Commission, [Communication to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union - State of play and possible next steps](#), COM/2019/163 final (July 2019).

3 Liberties, [A response to the European Commission Consultation on Rule of Law in the EU](#) (May 2020).

4 European Commission, [2020 Rule of Law Report](#) (September 2020).

organisations. It covers the past year's most striking developments related to the rule of law in 14 EU countries, as reported by Liberties' member and partner organisations, and namely:

- Bulgarian Helsinki Committee – Bulgaria
- Centre for Peace Studies – Croatia
- League of Human Rights – Czech Republic
- Vox Public – France
- Society for Civil Rights – Germany
- Hungarian Civil Liberties Union – Hungary
- Irish Council for Civil Liberties – Ireland
- Associazione Antigone jointly with the Italian Coalition for Civil Liberties and Rights – Italy
- Helsinki Foundation for Human Rights – Poland
- Apador-CH – Romania
- Via Iuris – Slovakia
- Peace Institute – Slovenia
- Rights International Spain – Spain
- Civil Rights Defenders – Sweden

The report brings together all the country rule of law reports as developed by our contributing member and partner organisations. It also offers an overview of trends compiled by Liberties based on the country submissions received and includes a series of recommendations addressed to EU institutions on how to better address the issues identified.

The country reports were compiled by national member and partner organisations on the basis of a common structure developed by Liberties. Insofar as the report is also meant as

a contribution to the European Commission's public consultation to feed its 2021 Annual Rule of Law Report,<sup>5</sup> the common structure was developed by taking account of the priority areas and indicators identified by the European Commission for the purpose of its annual rule of law monitoring cycle.

The common reporting structure used for the purpose of this report revolves around these key areas:

- Functioning of the justice system
- Corruption
- Media environment and freedom of expression and of information
- Checks and balances
- Civil society space
- Impacts of measures taken to address COVID-19 on rule of law and human rights protection
- Other systemic issues affecting rule of law, democracy and human rights

In developing their country reports, each member and partner organisation was left free to report on what it deemed appropriate and more relevant to the national context, also having regard to the organisation's areas of work and expertise. The information provided, as well as the positions and opinions expressed in connection to the issues reported on, build on our members' and partners' autonomous monitoring and reporting work at national and international level.

<sup>5</sup> European Commission, [2021 Rule of Law Report](#).

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# ***What is the rule of law and why does it matter?***

Liberties promotes a broad understanding of the rule of law, as a principle which is closely interlinked with the values of respect for human dignity, freedom, democracy, equality and respect for human rights. These are important tools which guarantee people living in our societies freedom and an equal opportunity to live fulfilling lives.

The areas covered by this report reflect this holistic understanding of the rule of law. The rule of law is not only about our societies being governed by laws put in place by our elected representatives in accordance with pre-determined procedures. Or about defending individuals from abuse. Its purpose is to allow all members of society to develop to their full potential and participate actively in social, economic and democratic life.

This requires the existence of independent and efficient courts to ensure the law is respected and to offer redress where laws are violated. It presupposes that an efficient anti-corruption framework is in place, to prevent politicians from taking decisions that put their own friends and family above the citizens they serve. For the rule of law to function properly, there must also exist a free and plural media, where independent journalists can do their jobs and keep track of what people in power are doing. Executive powers need to be kept in check and balanced through oversight by parliamentary bodies and other independent

institutions. These checks on the way laws and decisions are created and implemented rely on the executive to be transparent. Watchdogs like rights and democracy groups are another essential component of the rule of law: they should be free to monitor what authorities do and to convey people's concerns. Finally, there is no rule of law if authorities can systematically infringe on people's rights and liberties without being made accountable for such violations.

Weaknesses affecting one or more of these essential components in a country indicate a problem with the health of its democracy as a whole.

While all these values and principles have been put at the core of the EU project, as reflected in Article 2 of the Treaty on the European Union, a variety of reports by NGOs as well as international and regional monitoring bodies show that EU countries are not immune to threats and attacks on the rule of law. And this not only concerns Hungary and Poland, where the authoritarian governments in power have progressively dismantled democracy and fundamental rights. It also refers to worrying and widespread concerns affecting countries across the EU, including countries with strong democratic traditions. Such negative developments were also exacerbated by the incapacity of a number of governments to address effectively the challenges posed by the COVID-19

pandemic outbreak while fully respecting the rule of law, democratic principles and people's liberties.

# ***The rule of law across the EU: overview of trends***

Recent reports by NGOs as well as international and regional monitoring bodies already pointed to a deterioration in the state of the rule of law in the EU.

The horizontal 2020 Rule of Law Report compiled by the European Commission,<sup>6</sup> in particular, pointed to a number of widespread challenges affecting justice systems, the fight against corruption, media freedom and independence, the space for civil society and checks and balances. It also raised preliminary concerns that the response to the COVID-19 pandemic was accompanied in many countries across the EU by a substantial weakening of democratic oversight, in part due the widespread use of emergency and accelerated law-making.

This resonates with the evidence compiled by independent rights and democracy groups. Similar findings are contained in Liberties' 2020 targeted submission to the European

Commission's first rule of law monitoring cycle,<sup>7</sup> and the more recent joint report from Liberties and Greenpeace's European Unit on the disproportionate restrictions imposed by EU governments during the COVID-19 pandemic.<sup>8</sup>

The evidence compiled by Liberties and its member and partner organisations over 2020 revealed four top concerns affecting the rule of law in the EU:

- Insufficient fairness and efficiency of justice, in part due to political influence over the courts and excessively long proceedings
- Inadequate efforts to fight against government corruption, in particular cases exposing high level public and political figures
- Serious obstacles hindering media freedom and independence in many EU countries, including political influence on the media, lack of pluralism in the media landscape

6 European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, [2020 Rule of Law Report - The rule of law situation in the European Union](#), COM/2020/580 final (September 2020).

7 Liberties, [A Response to the Commission Communication on further strengthening the rule of law within the Union](#), cited.

8 Liberties and Greenpeace European Unit, [Locking down critical voices - How governments' responses to the Covid-19 pandemic are unduly restricting civic space and freedoms across the EU](#) (September 2020).

and a surge in attacks and abusive lawsuits against journalists

- Increasing attempts by many EU governments to hamper people engaging in civic activism and public participation through, among others, restrictions on access to funding for civil society actors and smear campaigns against civil society activists and organisations

The information provided this year by Liberties' member and partner organisations, included in this report, show that little progress was made to address the identified concerns and further exposes a number of worrying trends in the areas surveyed.

### ***Delivering justice: one step forward, two steps back***

Information provided by Liberties' member and partner organisations reveals a mixed picture as regards the independence, fairness and functioning of justice systems across the EU.

Overall, it is clear that the **further deterioration** of the justice system continues in **Hungary** and **Poland**, where attempts to dismantle the independence of judiciary are part of a broader pattern to undermine democracy and rule of law.

In other countries where generalised deficiencies exist, a number of Liberties' member and partner organisations report **attempts to try to improve the justice system**, including

by strengthening independence and restoring confidence. For example, in **Slovakia**, the justice system is undergoing a major reform, while in the **Czech Republic** and in **Romania**, our member reports that positive developments on independence and transparency of the justice system may come from recently proposed reforms.

At the same time, **negative developments reportedly affected public perception of the justice system** in a number of EU countries. These include the President awarding an honour decoration to the President of the Constitutional Court of the **Czech Republic**, but then withdrawing it after the Court issued an unfavourable ruling on the electoral law; the so-called golf-gate scandal in **Ireland**, which, coupled with the lack of transparency in the appointment procedure, is casting doubts over the integrity of a Supreme Court judge; a recent prosecution sparking debate over intimidation of lawyers in the exercise of their profession in **Romania**; and the persistent refusal by the authorities in **Poland** to provide information about the way cases are allocated to courts.

### ***The judiciary under control***

Arbitrariness, lack of transparency and irregularities in the **way judges and prosecutors are appointed** seem to be common issues in several countries across the EU and has a serious impact on justice systems. The problematic appointment of judges by the National Council of Judiciary is a disturbing and longstanding practice that is part of the government's plans to take control of the judiciary in **Poland** – as

also exposed by a recent ruling of the Supreme Court. In **Bulgaria**, concerns persist over whether the appointment procedure of judges and prosecutors is sufficient to ensure their full independence, while the impartiality of existing specialised courts, such as the military court, is questioned. Our member in **Ireland** also points to mounting criticism in parliament over the lack of transparency of the process by which the judiciary is appointed, in particular at the level of the Supreme Court. The recent appointment of a new Supreme Court president is also criticised as opaque and arbitrary in the **Czech Republic**. The appointment of prosecutors remains problematic in **Slovakia**, although overall progress was made on the appointment of judges.

The **appointment and independence of judicial councils** continues to be seriously questioned by our members in **Bulgaria** and **Poland** (where irregularities in appointments were confirmed thanks to a recent disclosure of information request). While the ongoing reform has brought some improvements on the appointment of the judicial council in **Slovakia**, some issues remain. The appointment system of members of the General Council of Judiciary also remains problematic in **Spain**, while efforts to reform it have met with criticism from monitoring bodies.

Similarly, shared concerns relate to the **lack of independence of prosecutors**, which is raised by Liberties' member in **Bulgaria**, with reference to new rules to monitor and investigate the work of the prosecutors general; the **Czech Republic**, where problematic rules on dismissals are still in place; and in **Poland**,

where there seems to be generalised government control over sensitive investigations and arbitrary transfers are reportedly used as a tool to discipline prosecutors.

At the same time, some Liberties' member and partner organisations register **efforts to increase the accountability of judges**, at times in response to **corruption scandals**. This is the case in **Ireland**, where a new justice committee is taking over the process for disciplining the members of the judiciary after a Supreme Court judge refused to resign following the 'golf-gate' scandal. In **Slovakia**, as a major corruption scandal involving judges is being investigated, new rules were introduced to increase judges' accountability, including a new crime to sanction judges who unduly bend the law introduced in the criminal code. Corruption scandals were not met elsewhere with effective responses, as shown by the cases reported by our member in the **Czech Republic**.

Elsewhere, **rules on accountability and liability of judges raise serious concerns** instead. If **Romania** is one example where new problematic rules were recently introduced, the most emblematic case remains **Poland**, where the disciplinary regime set in place by the so-called muzzle law is already being used as a tool to intimidate judges who try to protect the rule of law and to subject them to government control. As reported by our Polish member, after its adoption earlier last year, the muzzle law was used to commence disciplinary proceedings against common court judges and to waive judges' immunity through the new Supreme Court Disciplinary Chamber. This

rendered dead letter a judgment of the EU Court of Justice which considered it unlawful. Other further problematic developments were also reported, including a Constitutional Court ruling striking down provisions that allow judges to be excluded from adjudicating in a case where the manner in which they were appointed raises concerns over their independence or impartiality.

### ***Struggling to get justice***

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Most contributions of Liberties' member and partner organisations expose barriers that hinder access to justice and fair trials across the EU.

**New rules on court fees** are reported to be particularly problematic in **Bulgaria**, where even higher court fees were imposed for action before the Supreme Administrative Court, as well as in the **Czech Republic**.

At the same time, the **legal aid system** is said to be still in need of urgent reform in certain countries such as **Romania** and **Spain**. On the contrary, some progress in this area is recorded in **Slovakia**, where Liberties' member reports efforts to make legal aid more accessible to people in marginalised areas, and in **Ireland**, where the Minister of Justice has proposed improvements to expand the civil legal aid system.

The **lack of respect for procedural rights**, coupled with the **widespread use of pre-trial detention**, is identified as a threat to fair trials in criminal proceedings and to the efficiency

of the criminal justice process by our members in **Italy, Poland** and **Slovakia**.

**Gaps in the protection and support of persons with disabilities within the justice system** are highlighted by Liberties' partner organisation in **Sweden**, and presumably concern many other EU countries.

The **poor implementation of judgments** is an issue that is regarded as particularly problematic in **Bulgaria**, also insofar as it can undermine judicial responses to corruption practices.

### ***Justice systems badly in need of resources***

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Systemic problems are also said to affect the efficiency of EU justice systems.

Heavy backlogs seriously affect the **length of proceedings**, hindering courts from delivering their judgments within a reasonable time, as highlighted by our member and partner organisations in **Bulgaria, Italy, Ireland, Poland** and **Romania**.

**Inadequate resources for the judiciary** and weak investments to improve the situation are factors that exacerbate the problem. Particular concerns are raised in this regard in relation to **Italy, Romania** and **Slovakia**. Our member in **Ireland** also points to very low spending by the government on the judiciary, although some improvements are reported on judicial pay and investment in training.

Meanwhile, in a number of countries, Liberties' member and partner organisations report **progress made to digitalise the justice systems**, which is seen as a way to improve efficiency. For example, in the **Czech Republic** a new Act on the Right to Digital Services, also introducing measures for the justice system, is coming into effect, while in **Ireland** the digitalisation process is supported by a new 2-year programme and a new online platform for remote court hearings, and some progress is also reported in **Slovakia**. In other countries, and in particular in **Italy** and **Spain**, Liberties' members note however that while COVID-19 was a push for the digitalisation of justice, the absence of an overall and long-term strategy to accompany and guide the process exposes **problems in the criminal justice process**.

### ***Too soft on corruption***

**Corruption levels remain concerning** in a number of countries. Recent reports referred to by our members reveal the problem is growing in countries like **Ireland** and **Hungary**, while there are concerns over the effectiveness of investigations, as reported for example by our member in **Poland**.

Certain practices by the authorities expose their **reluctance to ensure transparency and accountability**. For example, Liberties' members in **Bulgaria** and **France** deplore the increasing obstacles that prevent civil society organisations fighting against corruption and promoting reforms.

In contrast, our member and partner organisations in the **Czech Republic** and **Italy** report **efforts to strengthen the fight against corruption**, including through **whistle-blower protection**.

### ***Media pluralism, free speech and freedom of information under attack***

Across the EU, **toxic media landscapes** are threatening media pluralism as well as freedom and access to information.

Developments in **Slovenia** are particularly concerning: our member reports a **rapid deterioration of media pluralism**, characterized by a **lack of transparency on media ownership** and **political pressure** by the government on the national press agency, including through **smear campaigns, funding cuts and changes to the regulatory framework** that endanger the agency's independence.

Several other Liberties' member and partner organisations have pointed with concern to a **concentration of media ownership**. In **Italy**, for example, the companies RAI and Mediaset dominate most of the market share. In the **Czech Republic**, Prime Minister Andrej Babiš owns about 30% of the private media. Our member in **Poland** reports that the state-controlled oil company PKN Orlen plans to acquire one of the country's biggest publishing groups, Polska Press.

Alongside these worrying trends, our members in **Bulgaria, Croatia, Hungary, and Slovenia** report a deterioration of independent and effective **media regulatory bodies**. For example, in **Croatia**, our member points out that the government de facto **controls the process of electing** new appointees to the body.

The **funding framework** further threatens the sector, for example in **Italy**, where our member reports a **reduction in state subsidies for media**, which risks undermining journalistic work.

### ***An increasingly hostile environment for professional and citizen journalists***

Liberties' member and partner organisations report an **increasingly hostile environment for professional journalists and citizen journalists**. Our members in **Italy, Slovenia and Spain** highlight a **climate of violence** with **regular attacks and harassment** against journalists and media activists. In Slovenia our member notes a recent report by the Slovenian Association of Journalists, which found that journalists routinely experience violence and threats, efforts to discredit them, online harassment and systemic pressures. **Self-censorship** has become increasingly common among targeted journalists in Slovenia to protect their safety and mental health. **Women journalists** are the target of particularly disturbing harassment, with the term "presstitute" being commonly used to libel them after an expression used by the current Prime Minister when he was the opposition leader.

Among the other concerns raised, our members point to insufficient **protection mechanisms** and **arbitrary arrests** that are not investigated in **Bulgaria**, a lack of **protection of journalistic sources** in **Ireland** and a sharp increase in abusive lawsuits in **Croatia**, making it harder for journalists and media activists to carry out their work. In **Germany**, our member reports that the expansion of police and intelligence powers, and in particular the use of spyware, threatens journalists.

On a positive note, **Spain's** Constitutional Court annulled a controversial article in the so-called gag law, which prevented journalists from documenting police violence. Progress was also made around **whistleblower protection** in **Italy, the Czech Republic and Spain**.

### ***Speech is increasingly less free***

Our members and partners in **Croatia, France, Italy, Slovenia and Spain** report an alarming trend of **free speech restrictions** and the **abuse of legislation** to censor speech, including through **strategic lawsuits against public participation (SLAPPs)** brought against media outlets, journalists and activists. Attempts to introduce safeguards against SLAPPs in Italy have thus far failed. In **France**, a new bill was presented that included a controversial provision that would hamper the exposure of police violence. Fortunately, the government dropped this provision, but concerns remain over a new bill that was subsequently presented.

**Criminalisation of speech** is also particularly concerning. In **Spain**, our member has reported a series of incidents where activists and artists have been prosecuted and given prison sentences for various reasons, including publishing satirical cartoons, burning a flag, making provocative use of religious symbols during a protest, or shouting pro-abortion slogans during a religious ceremony. However, there seems to be increasing awareness that certain provisions, like the criminal provisions on glorification of terrorism, are not in line with international standards – which has reportedly resulted in a decrease in prosecutions over the past two years. On a positive note, the **prohibition on blasphemy** was officially removed from the **Irish Constitution** in January following a referendum in 2018. Our members in **Bulgaria** and **Hungary** have also highlighted the use of **criminal provisions on ‘fearmongering’** to censor criticism, including in relation to the COVID-19 pandemic. On a positive note, our member in **Croatia** notes that authorities have removed the offence of ‘serious shaming’ from the Criminal Code.

**Freedom of expression online** is also under increasing pressure. In **Spain**, a new bill is being prepared that would allow the government to remove content with limited judicial oversight. Similarly, our member in **Germany** has noted that the domestic intelligence services are relying on controversial rules regulating internet platforms for security purposes to keep a leftist internet platform under watch, drawing parallels to a similar incident whereby a website was subsequently banned. In **Ireland**, our member reports of a new bill that

threatens online platforms with hefty fines if they don’t remove harmful content.

### ***Disinformation on the rise, while access to information is restricted***

Our members in **Italy**, the **Czech Republic**, **Spain** and **Hungary** observe the **fast spread of disinformation**, especially related to COVID-19 measures or the side effects of vaccines. Governments are often too late to react, with ineffective fact-checking campaigns, as our member in the **Czech Republic** highlights.

At the same time, **restrictions on access to information** are an increasing concern in several EU countries. In **Poland**, our member reports that access to documents on completed criminal investigations are now dependent on the arbitrary decisions of the prosecutor, without even the possibility of challenging this decision through an administrative court. In **Italy**, our member reports some improvements in the legal framework on access to information, although many shortcomings remain. Our **Croatian** member notes that several far-right parties that receive taxpayers’ money do not publish their statutes on their website. In **Hungary**, our member highlights further worrying developments regarding freedom of information. Government data and information on the pandemic are either not publicly available or are made accessible only after significant delays.

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## **Weak checks to balance executive powers**

### **Poor quality law-making leads to bad laws**

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The quality and transparency of the process of enacting laws is criticised by our member and partner organisations in various countries, with existing shortcomings being exacerbated by additional challenges brought by the emergency situation linked to the COVID-19 pandemic outbreak. Problems range from a **poor quality of law-making** (as reported for example in relation to **Bulgaria**) to the **lack of effective consultations** (in **Croatia** and **Poland**).

### **Public watchdogs are not sufficiently independent and effective**

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In various EU countries, public watchdog bodies, particularly National Human Rights Institutions (NHRI), have difficulty exercising a genuine watchdog role in relation to the government.

For our members in **Bulgaria** and the **Czech Republic**, this is due to the **perceived lack of independence and effectiveness** of the NHRI, contrary to the international requirements applicable to such institutions. **Threats to independence and attempts to exercise political control** over the NHRI are reported in **Poland**, where the ruling majority is pushing for their candidate to be elected

as new Commissioner and budget cuts are being imposed on the Institution. The **lack of resources and government pressure** also is reported as a challenge to the functioning of the NHRI in **Croatia**. At the same time, our members in **Italy** and our partner organisation in **Sweden** complain that the government is yet to establish a NHRI at all.

### **Gaps in judicial oversight**

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Where there are many problems affecting the justice system, as illustrated above, these negatively affect the quality and effectiveness of judicial oversight of the executive. This is the case, in particular, in **Hungary** and **Poland**, where our members report that serious concerns persist over the **regime of constitutional review of laws** and regulations in view of the lack of independence of the Constitutional Courts.

### **Initiatives to foster a rule of law culture: “no information available”**

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None of our member and partner organisations were able to point to initiatives by public authorities to contribute to fostering a rule of law culture. This indicates that the governments surveyed are making no big efforts to actively raise awareness about, promote and build support for rule of law, democracy and human rights.

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## **Governments are squeezing the civic space**

### ***Making it difficult to work together in associations***

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Liberties' members reported restrictions on freedom of association in **Bulgaria, Germany, Ireland, Hungary and Slovenia**. Our member in **Bulgaria** report that discriminatory practices in the registration of civil society organisations (CSOs) persist, despite repeated condemnations by the European Court of Human Rights (ECtHR). In **Germany**, our member points with concern to the **vague and incomplete civil society legislation**, which continues to create **legal uncertainty** and threaten the advocacy role of civil society actors – leading many of them to refrain from public and political engagement. Our member in **Ireland** reports that no progress was made to reform problematic provisions of the Electoral Act, which restrict the advocacy role of CSOs, including by limiting access to funding. Our member in **Slovenia** reports administrative harassment, including an eviction case where the government terminated the lease of a building which served as offices for internationally renowned NGOs. Positive developments in this area are only reported by our member in **Romania**, which relates a series of measures to facilitate the freedom of association, mostly removing existing bureaucratic hurdles.

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## **Tracking down and silencing critical voices**

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The **right to freedom of peaceful assembly has taken a hit** this year. Our members and partners in **France, Bulgaria, Croatia, Poland, Slovenia and Spain** have all reported an increasing trend to silence critical voices and break up protests. In **Bulgaria**, police brutally beat and arrested protesters who were marching against the government and the Prosecutor General. Access to an attorney was denied and no investigations were launched into possible **police misconduct**. Our members in **Spain and Slovenia** also record **excessive police violence and arbitrary detention against protestors**. Our Spanish member further reports that government services have been using spyware to watch over Catalan independence campaigners. In **France**, our partner points with great concern to arbitrary detentions following protests against a law that would restrict the dissemination of images of police officers during police interventions.

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### ***Abusing the law to harass civil society activists***

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In a number of countries, CSOs are also harassed with prosecutions and lawsuits. In **Poland**, our member reports a case whereby two members of parliament submitted a request to prosecutors to investigate an LGBT activist running a photographic project. Our member in **Spain** reports a number of abusive defamation lawsuits against environmental activists and CSOs. In **Croatia and Italy**, our members raise concerns over the abuse

of criminalisation of humanitarian assistance provided to migrants and other practices to harass and hinder the work of CSOs' providing support to migrants.

### ***Access to funding becomes harder***

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In several countries, CSOs are increasingly **struggling to access funding**. In **Croatia**, our member criticizes the government's practices which hinder possibilities for CSOs to access EU funds, including by deliberately failing to comply with rules on tender procedures and placing unnecessary burdens on CSOs' applications. In **Germany**, the inadequate legal framework hampers access to funding. Our member in **Ireland** reports a similar bill that poses significant burden on CSOs working on issues as diverse as education and the environment. In **Poland**, our member raises concern over **discriminatory public funding** practices that favour conservative organisations expressing positions close to the government's rather than progressive ones. In **Slovenia**, government attempts to cut funding of CSOs failed due to considerable mobilization by civil society actors.

### ***Restrictions on civic participation***

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Contributions from Liberties' member and partner organisations expose a **marked decline in public participation** in decision-making processes. In **Croatia**, our member reports that CSOs have been excluded from the election process of the very committee that represents

civil society organizations. Our member in **Poland** points with concern to a steady deterioration regarding civic participation, with no public consultations on key pieces of legislation, no more structured cooperation and attempts by the Prime Minister to control the structured dialogue body. In **Slovenia** civil society participation continues to be characterized by a steady decrease in public consultations. A new bill that seeks to contain the COVID-19 pandemic excludes most CSOs from the right to have a say in environmental impact assessments.

A **good practice** of cooperation between public authorities and civil society is reported by our partner organization in **Sweden**, consisting in a new dialogue forum between CSOs and the Office of the Parliamentary Ombudsmen. The dialogue, which concerns the situation and rights of people deprived of their liberty, is seen as a good tool to enable CSOs to share their views and concerns, better monitor state actions and contribute to better compliance with human rights standards.

### ***Smears and mobilisation***

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Several members highlighted attempts by governments to **discredit, delegitimize** and **silence critical voices**.

**Smear campaigns against rights and democracy groups** are an increasingly worrying trend. In **Croatia**, human and minority rights organizations have been baselessly accused of not providing humanitarian assistance during the earthquakes that shook the country, while

discrediting CSOs working on migrant rights is common practice. In **Slovakia**, our member reports an **increasingly aggressive narrative** against civil society actors from members of parliament with opposing ideologies, in particular in the area of gender equality. Our member in **Slovenia** reports **virulent smear campaigns** targeting CSOs from various fields, such as the protection of the environment, culture and LGBTQI rights. **Critical voices are regularly insulted and delegitimized** by media close to the ruling coalition. A recent example was a questionnaire that was sent to Slovenian households that depicts CSOs as draining the country's budget, at the expense, for example, of the renovation of homes for the elderly. In **Poland**, our member reports smear campaigns targeted against the LGBTQI movement, including disturbing statements from the President.

In some countries, **CSOs continue to be depicted as foreign agents** acting against national interests. In **Hungary**, the judgement by the Court of Justice of the EU which declared the 2017 anti-NGO law as contrary to EU law and fundamental rights remained a dead letter. In **Poland**, the government presented a new draft law that similarly aims to **discredit CSOs that receive funding from abroad**.

Despite, or perhaps as a response to these attacks, civil society has shown **resilience**. This is best exemplified by the mobilization in **Poland** of over 1200 CSOs to present to Parliament their favored candidate for the vacant Ombudsman position – who was however not retained.

## ***Disregard for international human rights obligations***

Patterns of widespread human rights violations and impunity are a clear sign of a fragile rule of law. Contributions provided by Liberties' member and partner organisations show that EU countries are not immune to such patterns.

In certain cases, human rights violations are the result of **governments' authoritarian tendencies**. In **Hungary** and **Poland**, this is reflected in regressive steps threatening **women rights and LGBTQI equality**, made with the intention to counter progressive and inclusive visions of society and exacerbate divisions based on nationalist rhetoric.

In other cases, human rights violations seem due to the failure of governments to address effectively challenges facing society, and the failure of international bodies to make them accountable. This is the case, for example, of **structural racism, racial profiling and police brutality in Spain**; or of **documented pushbacks and violence against migrants in Croatia**.

**Impunity for past violations** is also common: in **Ireland**, a recent report confirms how the state allowed the pervasive violation of human rights of vulnerable women and children placed in church managed care facilities during the 20th century, and stresses how survivors continue to be denied justice and reparation. Lack of accountability is also reflected in the **poor implementation of judgments by supranational courts**, including the **European Court of Human Rights** (as reported in **Bulgaria**,

Italy, Ireland, Poland and Romania) and the Court of Justice of the EU (as reported in Hungary and Poland).

### **COVID-19: a stress test for rule of law and human rights protection**

The COVID-19 pandemic has turned into a severe test for rule of law and human rights protection. To protect public health, governments have adopted measures that restricted fundamental freedoms. To allow them to act promptly, many governments triggered states of emergency.

Certain temporary restrictions and a strict enforcement of precautionary measures can be necessary to save lives and protect at-risk groups. Accelerated law-making procedures can allow governments to take decisions easier and quicker when faced with the urgency of crisis situations. But many governments have adopted problematic measures in the name of protecting public health. Sometimes this was an unintended consequence of governments not properly evaluating how to respond to the pandemic. But in certain cases, it was a result of conscious attempts by governments with authoritarian tendencies to exploit the emergency to further erode individual freedoms and the democratic process.

### **Law-making in emergency mode: from poor quality to arbitrariness and authoritarianism**

The many problems posed by emergency law-making during the pandemic, illustrated in our member and partner organisations' contributions to this report, are a good example.

Governments in countries with authoritarian tendencies like **Poland** and **Slovenia** took advantage of this to **push the adoption of controversial laws**. The fact that **many restrictive measures adopted during the emergency regime were not revoked** once the state of emergency came to an end, as reported by our member in **Hungary**, is also a sign of instrumentalization by the government of COVID-19 to accelerate existing efforts to roll back on civic freedoms and democratic participation.

Elsewhere, the use of **expedited, accelerated and fast-track decision-making procedures**, with no or very little oversight on the executive, led to **poor quality regulations**. This was reported by our members in several countries, and particularly in **Bulgaria**, the **Czech Republic**, **Ireland**, **Italy**, **Ireland**, **Poland**, **Romania** and **Spain**. Our Polish member provides a telling example of how regulations intended to allow employers to decrease employees' working hours inadvertently resulted in an automatic decrease of social benefits, which could only be corrected several months later. Law-making in the emergency mode also **drastically reduced the space for participation and consultations** including in countries, such as **Sweden**, with a strong track

record of inclusiveness and transparency of the legislative process.

The widespread debate surrounding the adoption of **regulations introducing data tracing apps and other measures of data control** to monitor compliance with restrictions are a good example of poor quality law-making due, in part, to the **absence of proper impact assessments**. This resulted in such measures being criticised for lack of proportionality and limited effectiveness (as reported by our members in **Ireland** and **Spain**) or even struck down because unconstitutionality (as reported by our members in **Bulgaria** and **Croatia**).

Concerns over **corruption** also call into question the integrity of governments' responses, as stressed by our members in **Hungary, Poland** and **Spain**.

### ***Justice under strain***

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Measures taken to contain the spread of COVID-19 are having an enormous impact on justice systems across the EU.

**Suspension and delays of proceedings and hearings** as well as **limited access to case files** are impairing access to justice as reported by Liberties' members in **Bulgaria, the Czech Republic, Croatia, Italy, Poland, Romania, Slovakia, Spain** and **Sweden**.

Practices in **violation of fair trial standards in criminal proceedings**, including in connection with remote hearings, are of particular concern for our members in **Italy** and **Spain**.

### ***Little space for democratic debate***

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Instead of facilitating civic engagement to allow citizens and watchdogs to keep track of what is going on, help shape policy and make their voices heard many governments have imposed unnecessary and disproportionate limitations on civic freedoms and democratic debate. Restrictions have taken many forms, with bans on protests and demonstrations, censorship of free speech and denial of access to information reported among the most pressing concerns. These were already illustrated in a joint report by Liberties and Greenpeace published last year.<sup>9</sup> Contributions provided by our member and partner organisations for this report confirm these problematic trends.

**Arbitrary restrictions and disruptions of protests**, including violence and sanctions against participants of peaceful protests, have continued to be common across the EU, as shown by the striking examples reported by our members in **Germany, Ireland, Poland, Romania, Slovakia, Slovenia** and **Spain**. Slovenia, where anti-government protests have been held since the new government came into power in March last year, is emblematic in this respect. There, fines were imposed even when

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9 Liberties and Greenpeace European Unit, [Locking down critical voices - How governments' responses to the Covid-19 pandemic are unduly restricting civic space and freedoms across the EU](#), cited.

protesters respected physical distancing rules. For example, protesters faced fines for leaving their paper footprints with messages in front of the parliament.

Measures to fight against **disinformation and hate speech** turned in a number of cases into **arbitrary restrictions on free speech**, in particular online, as reported by our members in **Spain** and **Romania**. Attempts to use the fight against disinformation as a **tool to silence critics** were reported by our members in **Bulgaria** and **Hungary**. In contrast, **efforts were genuinely stepped up to counter disinformation** in the **Czech Republic**.

Great limitations were placed on **access to information and free media reporting** on the pandemic and the measures taken to address it. These included **delays, suspension and other restrictions on freedom of information requests**, as well as various forms of **obstruction of media reporting**, as recorded by Liberties' members in **Hungary, Italy, Poland, Romania, Slovenia** and **Spain**. In Spain, the State Secretary's practice of filtering journalists' questions in a context of restrictions on media participation during government press conferences was harshly criticized by media professionals and led the government to put in place a dedicated videoconference system.

### ***No adequate protection for those most at-risk***

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Governments have paid little attention to providing support to those most at risk from

the pandemic or to preventing the crisis from exacerbating inequalities and discrimination.

In several countries, Liberties' member and partner organisations point to the **situation of children, women, people living below the poverty line, migrants and people deprived of liberty** as particularly concerning (as variably reported in relation to **Croatia, the Czech Republic, Italy, Poland, Spain** and **Sweden**). Weak or no efforts were made to protect these groups even though they are disproportionately harmed by the consequences of the pandemic – except for the scrutiny exercised in certain countries by NHRIs, ombudspersons and the courts. On the contrary, our members report **discriminatory practices by the authorities**, such as **racial policing of Roma communities** in **Bulgaria** and **Slovakia**.

# ***Measures to improve our democracies: key recommendations to the EU***

The trends emerging from the submission of Liberties' contributing member and partner organisations show that serious concerns persist across the EU over the respect for the rule of law and democratic standards in all the areas covered by this report, and that too little efforts are being made to address them. This is due in many cases to the incapacity of governments to address identified shortcomings, or their unwillingness to change practices that serve their personal or political purposes. In other cases, it reveals a broader and systemic strategy to progressively erode freedoms, weaken oversight and silence critics to stay in power.

The EU has a crucial role to play to reverse these trends and nurture a stronger rule of law environment to improve the state of our democracies.

## ***Make the EU rule of law monitoring process more effective***

Liberties welcomed the decision by the European Commission to carry out, as from 2020, an annual audit of EU countries' democratic records. It was a ground-breaking step forward for the Commission which helps make more tangible the EU's stated commitment to uphold rule of law, democracy and fundamental rights – basic European values set out in

Article 2 of the EU Treaty. There is, however, scope to substantially improve and increase the impact of this monitoring exercise.

First, the scope of the Commission's audit remains too restrictive. Remarkably, it does not look into human rights abuses by public authorities and their failure to prevent such violations. Excessive surveillance, data breaches, police abuse, racial segregation and ill-treatment of migrants at the EU's external borders are some of the most striking examples of human rights breaches happening across the EU. Rule of law, democracy and human rights are interlinked and mutually reinforcing: a democracy based on the rule of law can only be realised where human rights are fully protected. If the Commission is serious about the rule of law, it should also reflect worrying patterns of human rights breaches in its assessment.

Secondly, it is imperative for the European Commission to integrate in its reports clear recommendations to EU governments on how to address identified shortcomings. Or, where dialogue is clearly not an option any longer, as with authoritarian regimes in Hungary and Poland, clear indications on the action the Commission intends to take. In a spirit of transparency and accountability, action taken by the concerned governments and/or by the Commission should be set out in the following year's report. This would also increase the

impact of the other EU institution's engagement in the process: indeed, the implementation of recommendations is a topic apt for discussion among EU governments in the Council's political dialogues and in inter-parliamentary debates and hearings organised by the European Parliament.

Thirdly, the process has to be made more transparent and inclusive. As regards the preparation of the reports, while the European Commission encourages stakeholders, including rights and democracy groups, to feed into its reports, the public consultations are very short and too limited in scope. Civil society actors are not given enough space to engage with the Commission on its country assessments. The Commission should ensure the systematic and regular involvement of NGOs and rights groups at all stages of the audit cycle, including in follow-up country visits. In order to allow NGOs and rights groups to effectively contribute to this process, the Commission should provide them with adequate financial support for this purpose.

Discussions on the Commission's rule of law reports with EU governments should also be transparent. The EU should make information on the outcomes of the debates organised at technical level by the European Commission, and the bi-annual peer review dialogues held by the Council of the EU, publicly available.

There should also be a public and transparent inter-institutional debate on the rule of law

reports, which should: lead to joint conclusions on findings, recommendations and EU follow-up action needed; allow for monitoring of Member States' implementation of recommendations and of EU follow-up action; and inform the preparation of next review cycles, including as regards the choice of focus areas.

### ***Make sure that when governments breach EU rules, they face real sanctions***

The annual audit set in place by the European Commission is seen as a way to increase awareness over existing challenges and open a debate with and among EU countries. But this will not stop populist authoritarians from deliberately undermining democracy. And it will not deter others determined to go down the same road. The Commission's policy of trying to find compromises has only helped authoritarianism gain strength inside the EU and will eventually undermine the EU as a group of democratic nations.

When governments attack democracy and freedoms, the EU must act and speak with one voice:

- Political sanctions must be applied using the procedure already foreseen in Article 7 of the EU Treaty. An interinstitutional agreement between the Council of the EU, the European Commission and the European

Parliament, as proposed by the latter,<sup>10</sup> can help to make this happen.

- The funding conditionality regulation<sup>11</sup> must be applied irrespective of the political declarations made by EU governments to delay its application.<sup>12</sup> When an EU government engages in serious breaches of the rule of law and democratic principles, the EU must use the possibility offered by the new rules to suspend, reduce or restrict access to EU funding, while making sure that end beneficiaries can benefit from alternative funding channels.
- The EU should ensure stricter adherence to Article 2 values by EU political parties and their national member parties, building on existing requirements for EU political parties' registration and funding.

### ***Make better use of EU law to prevent and address rule of law challenges***

The European Commission is the institution that has the responsibility to watch and act

when EU law is violated. It should take countries to the EU court more frequently when they break EU rules that help safeguard the rule of law and democracy. The Commission should identify those elements of EU law that can be used to protect the rule of law and enforce these strategically in relation to countries that systematically undermine Article 2 values. For example, more attention could be paid to the enforcement of EU rules on fair trial rights, competition rules on media concentration, internal market rules that allow associations to function freely, public procurement rules meant to prevent and stop corruption or whistleblower protection to prevent arbitrary restrictions on the right to information and free speech.

As the EU institution tasked with proposing new legislation, the European Commission should also use that power to come up with new EU rules that can help fill the gaps left by inadequate national laws and make governments accountable for their breaches or their failure to protect the rule of law, democracy and fundamental rights. For example, it should propose rules to oblige states to protect media

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10 European Parliament, [The establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights](#) (2020/2072(INI)) (October 2020).

11 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. For more information, see European Commission, [General regime of conditionality for the protection of the Union's budget](#) (December 2020).

12 European Council, [Conclusions of meeting of 10 and 11 December 2020](#). On the topic, see Liberties, [Three Reasons Governments Need To Turn Down Poland & Hungary's 'Interpretative Declaration' On Rule Of Law Conditionality](#) (December 2020).

actors and rights groups from abusive lawsuits (known as SLAPPs); set EU-wide detention standards, including as regards the use of pre-trial detention and alternatives to detention; or reinforce EU rules on legal aid.

The European Commission should also become more mindful of dangerous interpretations and applications of EU rules and obligations, such as in the area of terrorism financing or incitement to terrorism and hate speech, as illustrated in this report. The Commission should provide clear guidance to EU governments to avoid an implementation of EU rules which run counter to fundamental rights standards and take action when this occurs.

### ***Financial and political support to rights and democracy groups***

The EU should make sure that actors that help make democracy work properly have enough support and resources to carry out their work properly. The EU must invest more in rights and democracy groups that are in a position to protect, promote and grow grassroots support for the values protected by Article 2 of the EU Treaty.

This requires, first, providing adequate funding for rights and democracy groups within the framework of the new Citizens, Rights and Values Programme and of the new Justice Programme, making full use of the budget envelope allocated to these programmes for this as a priority. Support should include

both core funding as well as targeted support for specific activities, including fundamental rights litigation, awareness raising and public education activities. In disbursing funds, the Commission should ensure that funds can easily get to grassroots organisations active at local and national level.

Secondly, the Commission and the other EU institutions should prioritise, including within the rule of law annual audit as well as other horizontal exercises such as the annual reports on fundamental rights, the monitoring of civil society freedoms and civic space. Such monitoring should form the basis of targeted recommendations to EU governments on how to nurture a free and plural civil society and determine appropriate action at EU level (including legislative and enforcement action) to quickly and effectively address identified issues.

# ***COUNTRY REPORTS***

# Bulgaria // Bulgarian Helsinki Committee (BHC)



BULGARIAN  
HELSINKI  
COMMITTEE

## Key concerns

- New rules introduced to monitor and investigate the work of the prosecutors general in a way that may threaten their independence
- Higher court fees hinder access to justice, while courts struggle to deliver justice in reasonable time and judgments still fail to be enforced
- Frequent episodes of violence against journalists that are often not met with effective responses
- National Human Rights Institution regarded as not sufficiently independent and effective, and a systematic failure to implement judgments of the European Court of Human Rights
- Discriminatory practices in the registration of civil society organisations representing minority groups persist
- Criminal provisions on fearmongering being used to try and censor criticism in the context of the COVID-19 pandemic

## Justice system

### Judicial independence

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

Judges, prosecutors and investigators are appointed by the Supreme Judicial Council (SJC). In December 2015 the SJC was reorganised, following a constitutional amendment. In particular, two separate chambers within the SJC (one for judges and one for prosecutors) were created. Unfortunately, attempts to secure a majority of judges elected by judges in the Chamber of Judges (as a means of securing judges' independence) were rejected by the parliament.

*Independence and powers of the body tasked with safeguarding the independence of the judiciary*

Currently, under Article 130a (3) of the Constitution of Republic of Bulgaria, the Chamber of Judges consists of 14 members: 6 judges elected by judges, 6 judges elected by the parliament, and the chairs of the two supreme courts – the Supreme Court of Cassation (SCC) and the Supreme Administrative Court (SAC). The latter two are themselves not elected by other judges but by the plenary

of the SJC, i.e. with the participation of the members of the Prosecutorial Chamber.

The Prosecutorial Chamber consists of 11 members: 4 members elected by the prosecutors, 1 member elected by the investigators, 5 members elected by the parliament, and the Prosecutor General (PG).

The PG and the chairs of the SCC and SAC are elected by the SJC's plenary. Each of the chambers is responsible for appointments, promotions, dismissals, and secondment of the respective magistrates. They are also the competent bodies for attestations and in some cases of disciplinary proceedings. In practical terms, this means that the career development, the potential disciplinary proceedings, and other important decisions on the administration of the judicial system are either in the hands of the two chambers (where magistrates – and especially judges – elected by other magistrates are a minority); or they are in the hands of the SJC's plenary (where magistrates elected by magistrates do not form a majority and the decisive votes are in the hands of a 'big three' – the PG and the chairs of the supreme courts). This is contrary to recommendations from the Council of Europe (CoE)<sup>1</sup>, and has been criticised both by civil society organisations and by the European Commission for Democracy

through Law (the Venice Commission).<sup>2</sup> Nevertheless, no further legislative amendments were made or discussed on that matter.

In November the European Court of Human Rights (ECtHR) delivered its judgment in the case of *Mustafa v. Bulgaria* (no. 1230/17). The case concerns the conviction of the applicant, a civilian, at first and second instance by military courts, whereas the Supreme Court of Cassation, which considered the case at last instance in June 2016, did not have full jurisdiction. The Court held that the doubts raised by the applicant as to the independence and impartiality of the military courts could be regarded as objectively justified, in view of such factors as the submission of military judges to military discipline, their formal membership of the military corps, and the status of the military court's jurors, who are by definition officers of the army. The ECtHR found a violation of Article 6 § 1 of the Convention.

#### *Accountability of judges and prosecutors*

In response to the harsh criticism from CoE bodies<sup>3</sup>, by request of the government on 23 July 2020, the Constitutional Court delivered a judgment where it found that the Prosecutor General (PG) cannot exert their supervisory competencies over prosecutors and

1 See Recommendation CM/Rec(2010)12 of the committee of ministers of Council of Europe, § 27.

2 See the Venice Commission's opinion on Bulgaria of 9 October 2017, [CDL-AD\(2017\)018](#), § 14.

3 Interim Resolution CM/ResDH(2019)367 of the Council of Europe's Committee of Ministers in December 2019 and Venice Commission's opinion on Bulgaria of 9 December 2019, [CDL-AD\(2019\)031](#), §§ 18, 27.

investigators who are investigating the PG themselves.<sup>4</sup>

Furthermore, amendments to the Criminal Procedure Code introduced in December 2020<sup>5</sup> created the position of a special prosecutor tasked with monitoring and investigating the work of the PG. Following a presidential veto, a majority of parliament successfully passed the amendments on 17 February 2021. Proposals for the position of the special prosecutor can be filed by any 6 members of the SJC's plenary as well as by the candidates themselves. The special prosecutor will be appointed for 5 years with no possibility to be re-elected. However, the rules foresee that, after leaving office, the special prosecutor will be able to file a request to be reinstated in the previous position occupied within the Prosecutor's Office before assuming the position of special prosecutor. This raises concerns not only over the impartiality of this prosecutor at the time of assuming office, but also in terms of their independence and impartiality in relation to their future position in the Prosecutor's Office following their term as special prosecutor. According to the government's ruling party, an important guarantee in that regard will be that all acts of the special prosecutor will be

subject to judicial control, including refusals to open an investigation. This, however, cannot be regarded as a guarantee of impartiality but merely of independent review. It has no effect on who is appointed special prosecutor, what their stance will be on issues related to the PG, or whether they will execute all their duties in good faith. Also problematic is the special prosecutor position's conformity with the Constitution itself, since such a figure is not envisaged in the Constitution.

#### *Perception of the independence of the judiciary*

At the end of May 2020, former members of the SJC wrote an open letter expressing 'regret' over their choice for Mr. Lozan Panov as chair of the SCC. The reason for this was mainly due to the management of the building of the Palace of Justice by Mr. Panov, in view of an episode where he allowed the shooting of a music video for a pop song.<sup>6</sup> Commenting on the letter on the state television channel, the then acting Minister of Justice, Danail Kirilov, said that Mr. Panov should resign not only for this reason but – among other things – also because of an interpretative decision of the SCC from 2018 regarding the confiscation

4 [Judgment no. 11 in case 15/2019.](#)

5 See <https://www.parliament.bg/bg/bills/ID/163448>.

6 See <https://dariknews.bg/novini/bylgariia/magistrati-izbrali-lozan-panov-nachelo-na-vks-poiskaha-ostavkata-mu-2226460>.

of assets.<sup>7</sup> This statement was met with harsh criticism by the Bulgarian Judges Association, which stated that demanding accountability of the chair of a court for that court's judgment or decision is a clear infringement of the independence of the court.<sup>8</sup>

## Quality of justice

### *Accessibility of courts*

Despite objections by civil society organisations in 2019, the parliament voted for the introduction of a higher court fee for appeals on points of law before the Supreme Administrative Court. For natural persons, the fee is 70 BGN (nearly 11% of the minimum gross wage and nearly 19% of the poverty line for Bulgaria in 2021) and for legal persons, for- or not-for-profit, it is 370 BGN (which is 57% of the minimum gross wage and nearly 100% of the poverty line for Bulgaria in 2021). This effectively dissuades persons to pursue judicial review of unfavourable judgments of administrative courts of the first instance. This includes many civil society organisations and informal collectives operating on a voluntary basis. With the same legislative amendments, objections before higher courts

against injunctions that discontinue hearing a case due to points of the procedure have also been increased to 30 BGN for natural persons and 150 BGN for legal persons. These amendments are enforced to date.

Court fees and expenses are to be especially considered as regards cases for protection against discrimination under EU rules (in particular, the transposed Directives 2000/43/EC, 2000/78/EC, 2004/113/EC, and 2006/54/EC). In Bulgaria, the Protection against Discrimination Act stipulates that procedures both before the general courts and before the quasi-judicial equality body are exempt from all costs, both state fees and expenses (Articles 53 and 75(2)). In practice, however, this provision is not respected as the losing party is generally ordered to pay the winning party fees and expenses.<sup>9</sup>

### *Judicial reforms*

In June 2020 the then Minister of Justice, Danail Kirilov, dismissed the vote for electing members in the civic council of the Coordination and Cooperation Council ('post-monitoring council') that was proposed by the Bulgarian government as replacement of the Cooperation and Verification

7 For more information, see <https://bnt.bg/bg/a/ministr-danail-kirilov-ne-sme-obekt-na-monitoring>.

8 See the full statement at <https://judgesbg.org/wp-content/uploads/2020/06/deklarazia-SSB-june-2020.pdf>.

9 See European Commission, Directorate-General for Justice and Consumers, [A comparative analysis of non-discrimination law in Europe 2019](#), pp. 83 – 84.

Mechanism (CVM).<sup>10</sup> It is required that three civil society organisations be members of the civic council: an organisation experienced in issues of judicial reform, an organisation experienced in anti-corruption, and an employers' organisation. When selecting members by lot on 2 June 2020, the organisation with experience in judicial reform that was elected was the Bulgarian Institute for Legal Initiatives – a well-known organisation that is critical of the government.<sup>11</sup> After the lot drawing, the Ministry sent a press release stating that the minister 'rejects the results' because very few organisations participated in the lot.

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

### *Length of proceedings*

In October the ECtHR delivered its judgment in the case *Petrov and Others v. Bulgaria* (application no. 49817/14). The case concerns the excessive length of the criminal proceedings brought against the two applicants between 2001 and 2011 and the failure of the national courts to award them compensation. The Court found a violation of the right to

a fair trial enshrined in Article 6 § 1 of the European Convention on Human Rights.

### *Execution of judgments*

A stark example of issues with the implementation of court judgments in Bulgaria is the case of Rosangela Svierkosky – a Brazilian national and mother of two children with Bulgarian citizenship who, despite a court decision granting her the exercise of parental rights, are currently held by the father without the possibility to contact the mother. No bailiff or other institution has succeeded in securing her relation to her children and she has not had reasonable contact with them since 2015.

In a notorious case in 2020, authorities failed to secure the transfer of possession of the premises of an elevator factory. The case became widely publicised via covert videorecording of the procedure. The video shows how a private security company fails to carry out orders of the bailiff, who requested the possession to be transferred after a court order. The recording was broadcasted by one of the national television stations but was not covered by most of the others.<sup>12</sup> The case exposes serious corruption

10 See the 2019 Report from the European Commission to the European Parliament and the Council on Progress in Bulgaria under the Cooperation and Verification Mechanism, pp. 3 – 4, available at [https://ec.europa.eu/info/sites/info/files/progress-report-bulgaria-2019-com-2019-498\\_en.pdf](https://ec.europa.eu/info/sites/info/files/progress-report-bulgaria-2019-com-2019-498_en.pdf).

11 For more information, see <https://defakto.bg/?p=67691>.

12 See <https://btvnovinite.bg/predavanja/tazi-sutrin/sled-sadebno-reshenie-zashto-chsi-ne-beshe-dopusnat-da-va-vede-novite-sobstvenici-na-zavod-v-dupnica.html>.

potentially involving the Prosecutor's Office, as illustrated in a video documentary.<sup>13</sup>

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

### **Media authorities and bodies**

The main self-regulatory body for journalists is the National Council of Journalism Ethics – a not-for-profit organisation.<sup>14</sup> While this body seems independent, the effectiveness of its work is questionable. Decisions of the body are not bound to any actual sanctions even for those media that have signed the Council's Ethical Code.

### **Framework for the protection of journalists and other media activists**

Attacks and violence against journalists are a rising concern. The journalist Dimitar Kenarov was arrested on 2 September 2020 while covering an anti-government protest that turned violent. Despite identifying himself as a reporter multiple times, he was taken away by three police officers and was subjected

to violence while being handcuffed. The next morning a forensic doctor confirmed his injuries and bruises. According to the police report, Kenarov, who was handcuffed and escorted to a nearby police department where he spent a few hours without being given any explanation, was actually "visiting" the station upon the "invitation" of the officer on duty that night. At the end of January 2021 prosecutors refused to open a formal investigation, citing an internal probe, carried out by the same police department that was in charge of guarding the protests. In practice, the Sofia Directorate of Interior Affairs was tasked to investigate the incident itself.<sup>15</sup>

Another attack was also reported during the national conference of the Citizens for European Development of Bulgaria party (GERB). The journalist Polina Paunova of the Bulgarian service of Radio Free Europe/Radio Liberty was attacked by young men who attended the political rally while trying to interview them as she earlier saw them clashing with anti-government protesters. Paunova's cell phone, which she used for filming the event, was grabbed and thrown on the ground multiple times while she herself was pushed and hit. The ruling party's conference was held during protests demanding the resignation of Prime Minister Boyko Borissov and Prosecutor General Ivan Geshev, which at the

13 The video is accessible here: [https://youtube.com/playlist?list=PLlytu5IULkSIZ8n\\_7fEY52fYqi5KHRIUS](https://youtube.com/playlist?list=PLlytu5IULkSIZ8n_7fEY52fYqi5KHRIUS)

14 See <https://mediaethics-bg.org/>.

15 See <https://aej-bulgaria.org/en/justice-for-dimiter-kenarov/>.

time of the events had been going for 28 days. The men, who can be seen assaulting Paunova in the video of the incident, had been allowed to the designated area by the security of the event.<sup>16</sup> While Paunova and her colleagues were asking the security guards for help, another participant at the rally approached Paunova, insisting that the journalist show her press card, pushing and insulting her. The police did not intervene. However, due to the wide coverage of the events, one of the attackers was identified. After reaching an agreement with the Prosecution, he was sentenced to two years of probation.<sup>17</sup>

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

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In 2020 charges were pressed against the chair of the Bulgarian Pharmacists Union, prof. Asena Serbezova, over an expert opinion she expressed in an interview for the Bulgarian National Radio. The charges against Prof. Serbezova are in connection with her warning of an approaching crisis in the supply of some medicines, which the Prosecutor's Office says caused undue concern. They were pressed under Article 326 of the Criminal Code (CC),

which provides that “a person who transmits over the radio, by telephone or in some other way false calls or misleading signals for help, accident or alarm, shall be punished by imprisonment for up to two years.” The actions of the Prosecutor's Office were widely criticized and were seen as an attempt at a broader application of the provision whose main function is to penalize the authors of fake bomb alerts and people who abuse police, fire brigade, and ambulance workers by calling 112 without needing their assistance. The Association of European Journalists – Bulgaria (AEJ) made several statements, condemning the practices of bringing charges against experts for opinions they have expressed as a “form of obscurantism that goes directly against Bulgaria's European Union (EU) membership because it clearly shows a lack of understanding of the fact that democracy can only work in the presence of free and independent media”.<sup>18</sup>

There has also been an attempt to use the above-mentioned article against two doctors from Plovdiv who were summoned to explain themselves in relation to a statement they had made in the media that the hospital they work at was not prepared to treat patients diagnosed with COVID-19. However, following a strong

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16 See <https://www.svobodnaevropa.bg/a/30767484.html>.

17 See <https://aej-bulgaria.org/en/aej-bulgaria-condemns-attack-on-journalist/and> <https://prb.bg/bg/news/aktualno/48543-dve-godini-%E2%80%9Eprobatsiya%E2%80%9C-poluchi-podsadim%C2%A0-izvarshil-huliganski-deystviya-spyam>.

18 See <https://aej-bulgaria.org/en/statement-on-the-charges-against-the-chairwoman-of-the-bulgarian-pharmaceutical-union/>; as well as <https://www.svobodnaevropa.bg/a/30920941.html>.

public response, the Prosecutor's Office did not press charges against them.

Charges under the same article were pressed against the chair of the NGO "Boets", Mr. Georgi Georgiev. He was accused of causing panic with his statements that the authorities in Vidin refused to test people who were in contact with others who have COVID. Yet he was found not guilty by the Court.<sup>19</sup>

## **Other issues related to checks and balances**

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

The National Assembly of Bulgaria recently adopted some questionable legislative practices, leading to a significant deterioration in the quality of amended legal acts. These practices include the following:

- The drafting of legal acts without public consultations.
- In accordance with the Bulgarian Constitution, the bills shall be read and voted in two readings in the Parliament, during different sessions, but many amendments are initiated for the first time just before the second vote.
- The National Assembly often amends, supplements, and repeals the laws via

transitional and concluding provisions of other laws governing completely different legal issues. Those transitional and concluding provisions usually are lacking motivation.

- Amendments, especially concerning criminal law including the length of deprivation of liberty as a specific punishment, are often adopted with only formal reasons after widely publicised criminal cases.
- Formal character and poor quality of the motives, the report and the ex-ante impact assessment, including the reasoning on why amendments are required and the objectives of the act; the financial and other means necessary for the adoption or change of regulation; the expected results from its application, including the financial ones, analysis regarding the compatibility with the European Union law.
- The lack of legal experts involved in the legislative process: in early 2019, the chairman of the Legislative Council, including a number of prominent law experts, insisted on closing the body due to the inactivity of this body. The functioning of the Council has been suspended de facto since late 2017.

At the beginning of February 2021, the president of the Republic of Bulgaria turned to the Constitutional court with questions regarding the legislative procedure. He requested that the Constitutional judges analyse certain practices of the National Assembly of Bulgaria related to amending, supplementing and repealing laws voted by the Assembly before their

19 For more information, see <https://www.svobodnaevropa.bg/a/30832112.html>.

promulgation in the State Gazette. The matter is still pending before the Constitutional court.<sup>20</sup>

### *Independent authorities*

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The national quasi-judicial equality body – the Commission for Protection against Discrimination – does not seem to demonstrate sufficient independence, capacity, and powers.

In terms of independence, it should be noted that the body consists of 9 members – 5 elected by the parliament and 4 by the president. Only the parliament has a procedure for public hearing of the nominees for members of the Commission, but there is no transparency as regards the selection process. Nominations are a matter of internal decision within the parliamentary groups. Only parliamentary represented parties can nominate members, with no guarantees that the minimal standards of the competencies of the nominees will be respected. Civil society organisations may send questions for the hearing which are read by the parliamentary commission but have no other influence on the election procedure. The president has no transparent procedure on the matter whatsoever. Furthermore, during the current term of office of the members of the commission no case of sanctions against

a high-profile politician – if any exists – has been published. This comes in the context of a rise of political hate speech in Bulgaria in the past few years.<sup>21</sup>

In terms of capacity, the Commission seems to be lacking human resources and capacity for strategic planning for the existing resources. For example, during the current term of office of the members of the commission its public hearing room was renovated while no financial resources have been invested into securing publication of the Commission's decisions, more accessible website, and e-administration. Moreover, length of proceedings before the Commission are substantial although the body is meant as an administrative body with a simplified and a faster course of proceedings. Furthermore, no procedure for independent control over the length of proceedings before the Commission exists.

In terms of powers, the Commission seems to be lacking any tools for tackling online hate speech where the author of that speech can only be identified through obtaining data from foreign hosting or service provider companies like social media platforms. This calls into attention, among other things, the outdated system of the EU's anti-discrimination directives which lag behind similar regulations for other administrative bodies, such as the ones contained in Regulation (EU) 2017/2394

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20 Constitutional case No. 3/2021, see <http://www.constcourt.bg/bg/Blog/Display?id=920&type=1>.

21 See for example <https://www.coe.int/en/web/commissioner/-/bulgaria-should-counter-harmful-narratives-endangering-human-rights-and-step-up-efforts-to-fight-hate-speech-and-domestic-violence>.

or the General Data Protection Regulation, where Mutual Assistance Mechanisms exist.

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

Amendments to the Administrative Procedure Code came into force in 2019, and the amount of fees in cassation proceedings was increased. Currently, the fee for filing a cassation appeal in the Supreme Administrative Court was BGN 5 for natural persons and for non-governmental organizations and BGN 25 for companies. After the amendments in 2019, this fee increased to BGN 70 for natural persons and BGN 370 for non-governmental organizations and companies. The lawfulness of the amendments was challenged before the Constitutional Court and in its opinion the Plenum of the Supreme Administrative Court argued that the amount of the citizens' fee was not excessive because it «corresponds in proportion» to the minimum monthly salary (BGN 560 for 2019) and therefore it was not contrary to the European Convention on Human Rights. However, with increasing the court fees in administrative cases, the state virtually deprived citizens of their ability to file such complaints, because only a few have the financial opportunity to pay high court fees.

There has also been an alarming trend in the practice of the Bulgarian courts concerning the conviction of claimants and complainants in proceedings for protection against discrimination with fees and costs. In accordance with the provision of Art. 75 (2) of the

Protection against Discrimination Act “for proceedings before a court under this law no state fees are collected, but the costs are at the expense of the court’s budget”. According to this provision, the parties shall be exempted unconditionally from the payment of fees and expenses in discrimination cases. “Expenses” within the meaning of Art. 75 includes all expenses, without exception. The phrase “for proceedings” applies as much to the costs of state fees, witnesses and expertise as to litigation, because it pursues the same purpose - to ensure that persons affected by discrimination are able to make their claims regardless of their financial situation because undoubtedly burdening them with the costs of these cases would have a deterrent effect. This would lead to an ineffective prosecution of discrimination in public life, contrary to the legal goal. However, in many anti-discrimination cases, the parties are ordered to pay the costs according to the outcome of the case.

In April the ECtHR delivered its judgment in the case *Chorbadzhiyski and Krasteva v. Bulgaria* (no. 54991/10). It concerns the disproportionate restriction on the applicants' right of access to a court as a result of the excessive amount of court fees they were ordered to pay in a successful claim for damages against the State (violation of Article 6 § 1 found). The court fees ordered were more than half of the total amount granted to the applicants (around 55%). The proceedings in issue took place between 2003 and 2011.

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## **Enabling framework for civil society**

### ***Freedom of association***

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A large group of ECtHR judgments that remain not implemented is related to the unjustified refusals of the courts, in 1998 – 1999, 2002 – 2004, 2010 – 2013 and 2014 – 2015, to register an association with the aim of achieving “the recognition of the Macedonian minority in Bulgaria”. In October and November 2019, the Bulgarian authorities provided information on the registration by the Registration Agency of “Civil Association for the Protection of Fundamental Individual Rights” which aims at “protecting the human rights of the Macedonians and other ethnic minorities in Bulgaria”, as well as of another association - “Ancient Macedonians”. This is a persisting issue as in May 2020 the ECtHR delivered two judgements on similar cases, holding that there has been a violation of Art. 11 of ECHR due to the refusal of the Bulgarian Courts to register two associations – Society of the Repressed Macedonians in Bulgaria Victims of the Communist Terror and Macedonian Club for Ethnic Tolerance in Bulgaria. The ECtHR found that such

restrictions and actions cannot be seen as necessary in a democratic society.<sup>22</sup>

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

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In July 2020 protests against the government and the Prosecutor General took place in Sofia. On the 56th day of the protests, tensions escalated, resulting in the arrest of 126 people and police brutality. Many complained that following their arrests, they were not only beaten by the police officers but were also denied access to an attorney. However, all of the arrested but one were released by the court several days later. No policemen were indicted and no information on investigations of police brutality was released.<sup>23</sup>

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22 SEctHR (2020) Macedonian Club for Ethnic Tolerance in Bulgaria and Radonov v. Bulgaria, case no. 67197/13, Judgment of 28.05.2020; Vasilev and Society of the Repressed Macedonians in Bulgaria Victims of the Communist Terror v. Bulgaria, case no. 23702/15, Judgment of 28.05.2020.

23 See <https://civicspacewatch.eu/bulgaria-protests-continue-peacefully-after-tension-escalated-in-sofia-on-the-second-of-september/>.

## **Other systemic issues affecting rule of law and human rights protection**

### **Implementation of judgments of the European Court of Human Rights**

Bulgaria's record on implementation of judgments of the ECtHR did not improve in 2020. According to the European Implementation Network, the country has 77 leading cases pending for an average of 6 years and 9 months.<sup>24</sup>

In 2021 amendments were made in the Bulgarian Criminal Procedure Code (CPC) in relation to the execution of the ECtHR judgement on the case *Kolevi v. Bulgaria*. These amendments aim to address the lack of guarantees of an independent and effective criminal investigation of the Prosecutor General identified by the Court. With the adopted amendments, the investigation in cases of crimes committed by the Prosecutor General or their deputy shall be conducted by the “prosecutor of the investigation against the Prosecutor General or their deputy.” In case of a refusal by the prosecutor of the investigation against the PG to initiate pre-trial proceedings, the refusal may be appealed before the Specialised Criminal Court and the Specialised Criminal Court of Appeal. The

procedure for the election of a prosecutor of the investigation against the Prosecutor General or their deputy shall be carried out by the plenary of the Supreme Judicial Council and the candidates can be nominated by the Members of the Plenary of the Supreme Judicial Council. Self-nominations are also allowed. The election decision shall be by a majority, not less than fifteen votes, by open vote. The term of office shall be five years without the right to a second term.

These amendments were quickly adopted by the National Assembly, disregarding public concerns expressed on the matter. The President Rumen Radev vetoed the bill on grounds that the amendment does not offer a fair and sustainable solution to the problem of the lack of effective investigation of a sitting prosecutor general and is in violation of a number of constitutional principles, among them the independence of the court of the prosecution. The National Assembly, however, overturned the veto.<sup>25</sup>

## **Impact of COVID-19**

### **Emergency regime**

On 13 March 2020, the Parliament announced that Bulgaria is in a state of emergency due

24 See <https://www.einnetwork.org/bulgaria-echr>.

25 See <http://www.bta.bg/en/c/DF/id/2363702>.

to the Covid-19 pandemic. The state of emergency lasted two months. However, in May 2020, legislative amendments were passed by the Parliament in the Health Act which allowed the establishment of an ‘emergency epidemic situation’ (EES). The Act provides for the power of the Council of Ministers to declare an epidemic emergency situation in the territory of the country, in case of immediate danger to the life and health of the public due to the spread of a contagious disease. The Act also provides for the conditions which should be met in order for such an emergency to be declared. The Act governs the implementation of temporary anti-epidemic measures which include (i) the suspension or limitation of various activities and services provided to the public, (ii) the restriction on movements within the country and (iii) a ban on entry of foreign nationals in the country, with the exception of individuals who have been issued a permanent, long-term or continuous residence certificates and their family members.

The measures may be implemented by virtue of an order of the Minister of Health or of another competent authority.

On 14 March 2020, the President challenged the provisions of the Health Act and the declaration of an emergency epidemic situation before the Constitutional Court. The head of state contests the power of the Council of Ministers to declare the measures, as well as the lack of a deadline for the measures and the

criteria for assessing the danger to human life and health, and the disproportionate restriction of their rights.

However, on 23 July 2020 the Constitutional Court, despite many statements of NGOs, legal practitioners and university professors in support of the President’s request that certain provisions of the Act must be found unconstitutional, rejected the application and found the amendments in line with the Constitution and the possible restriction of citizens’ rights proportionate.<sup>26</sup>

### *Impact on the justice system*

In Bulgaria, the special law on the measures during the state of emergency temporarily suspended the procedural deadlines in all judicial, arbitration and enforcement proceedings with the exception of criminal proceedings, European Arrest Warrant proceedings and proceedings related to coercive measures. The amendments to the law, adopted in April 2020, defined more precisely these exceptions by adding a separate annex containing an exhaustive list of all judicial proceedings for which the suspension did not apply. The amendments also authorised the courts to hold distance hearings, including in criminal proceedings, provided that the direct virtual participation of all parties is duly ensured. In practice, many courts started using Skype for holding open hearings on cases that were

26 Decision 10/2020 from 23 July 2020 on Constitutional case No. 7/2020. See: <http://www.constcourt.bg/bg/Acts/GetHtmlContent/b2ff2778-7f70-41c6-a319-963776aa073>

not suspended and could not be postponed. The practice was first introduced for hearing criminal cases but was gradually utilised in civil cases as well. In Bulgaria, the operation of the courts during the state of emergency was organised according to a decision of the Supreme Judicial Council adopted on 15 March 2020. The decision suspended all court cases with the exception of those specifically listed in it, introduced mandatory submission of documentation by post or electronic means of communication, instructed the courts to provide information on pending cases only by phone or electronically, restricted the access to court buildings and obliged the courts to send subpoenas and other cases related documentation only by phone or electronically. On 14 April 2020, following the amendments to the law on the measures during the state of emergency, the list of cases exempted from suspension was revised to correspond to the list of exceptions included in the newly adopted annex to law. On 28 April 2020 the obligation of courts to send subpoenas and other case-related documentation only by phone or electronically was revised and conventional handling was permitted for cases, in which the party had not provided a phone number or an electronic address.<sup>27</sup> In May 2020 the Supreme Judicial Council adopted Guidelines and Measures regarding the operation of Courts during the pandemic. The guidelines were amended several times.<sup>28</sup>

### *Inequalities and discrimination*

At the beginning of the pandemic, neither the Ministry of the Interior (MoI) nor the Commission for Protection against Discrimination (CPD) reported about incidents of xenophobic speech, acts of harassment, or violent attacks against persons of, or perceived as being of, Asian origin, or coming from a country identified as at high risk. Incidents involving Italians and other EU nationals from the Member States where the virus is reported/perceived to be widespread were not reported either. The media reported about occasional cases of services being denied to persons coming from countries where the virus is reported to be widespread (a hotel cancelled the booking of four Italian opera singers, an airline company which disembarked British tourists, allegedly in response to protests by other passengers). None of the cases was referred to the police or the national equality body.

The media reported that cities with large Roma populations were restricting the access to and from segregated Roma neighbourhoods by organising temporary checkpoints and checking the identification papers of everyone entering or leaving the neighbourhood. The measures were implemented independently by the local authorities after consulting the National Operational Headquarters. On 19 March 2020, the Sofia Regional Prosecutor's

27 See [https://fra.europa.eu/sites/default/files/fra\\_uploads/bg\\_report\\_on\\_coronavirus\\_pandemic\\_-\\_may\\_2020.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/bg_report_on_coronavirus_pandemic_-_may_2020.pdf).

28 See <http://www.vss.justice.bg/page/view/105223>.

Office instructed the local mayors in Sofia to assess the situation and organise checkpoints to control the movement from and to Roma neighbourhoods. The instruction was issued “in relation to the information, published in the media, about gathering and movement of groups of people (more than two adults) in neighbourhoods in the city of Sofia inhabited by persons of different ethnic background, clearly demonstrating their unwillingness to comply with the restrictions imposed.” In the city of Kazanlak, some of the access points to the Roma neighbourhood were sealed with concrete to make the neighbourhood accessible only through the checkpoints. The NGO Amalipe Center for Interethnic Dialogue and Tolerance commented that authorities must be careful when implementing such measures to avoid the causing of tension, which can escalate into ethnic tension, and that “measures must apply equally to everyone.” Other civil society organisations and Roma rights activists also expressed concerns that the measures are discriminating against the Roma populations in these cities. Neither the Ombudsman nor the equality body commented publicly on these measures. The Ministry of the Interior noted that the restrictive measures were applied by the competent authorities equally to all Bulgarian citizens and without discrimination on any ground. The checkpoints were progressively removed.

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

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Bulgaria’s Constitutional Court on 17 November 2020 declared unconstitutional a provision in the Electronic Communications

Act, which allowed law enforcement to access traffic data kept by telecom operators on the grounds of checking whether a person is complying with quarantine orders. The amendments were part of the State of Emergency Act, passed by Parliament earlier in the year to fight the Covid-19 pandemic, but were challenged by opposition members of parliament, who argued that the scope of the amendments was too broad because it was not limited only to coronavirus quarantine cases and would not expire once the current epidemiological state of emergency was over.

The Constitutional Court agreed, ruling that the provision was disproportional because “the right to privacy is not a privilege solely for periods when times are relatively calm, but also in times of crisis, where any interference should be, as a constitutional imperative, proportional and strictly necessary.”

# Croatia // Centre for Peace Studies (CMS) & Croatian Platform for International Citizen Solidarity (CROSOL)



- Human rights violations against refugees and asylum seekers persist. Particularly worrying are push-backs at the border to Bosnia Herzegovina. Criticism by international monitoring bodies is ignored.

## Key concerns

- Media regulatory body lacks independence, as government controls the process of electing new appointees to the body
- Public trust in media is low and lawsuits against journalists are on the rise.
- The government regularly proposes laws without prior democratic consultations.
- The Ombudswoman's Office lacks resources and capacity and is harassed by the government
- Frequent lawsuits and smear campaigns against civil society actors working on the protection of the rights of refugees and migrants.

## Media environment and freedom of expression and of information

### Media authorities and bodies

#### Independence of media regulatory bodies

The media regulator in Croatia is the Agency for Electronic Media.<sup>1</sup> It was established in accordance with the provisions of the Electronic Media Act (EMA) and performs administrative, professional and technical tasks for the Electronic Media Council<sup>2</sup>, the governing body of the Agency and regulatory body in the field of electronic media.

1 See <https://www.aem.hr/about-the-agency/>

2 See <https://www.aem.hr/en/vijece/>

The Government controls the composition of the Council. It proposes candidates to the Parliament via a public call. So, in principle, it is not fully subject to discretionary decision by the Government. Some of the appointments to the regulatory body are concerning. For example, in the past several years, like in 2019, some appointments came from the same media circles that had previously been doing little to promote non-discriminatory informing and reporting. On the contrary, some members were warned<sup>3</sup> by the same regulatory body for not distancing themselves from discriminatory statements made in the central TV news outlet, which the elected councillor was editing and hosting. This was criticized by the Croatian Journalists' Association (CJA).<sup>4</sup>

In February 2020, the Ministry of Culture proposed a new Draft EMA. Although the CJA was involved in the EMA's working group, the CJA left the group as the Ministry of Culture did not include any of the CJA's proposals in the Draft EMA. These included proposals on election processes of candidates for the Electronic Media Council and other

comments concerning the institution's independence. Other comments and open issues in the Draft EMA regard Article 93, which covers the responsibility of the publisher for the comment section below articles. The report<sup>5</sup> on public consultations<sup>6</sup> concerning the proposed EMA was published beginning of March 2020 but due to the COVID-19 pandemic the Draft EMA was discussed in Parliament only in December 2020. Most of the comments on the Draft EMA were merely "duly noted" and only a small percentage was accepted. Further discussion and adoption is awaited.<sup>7</sup>

#### *Existence and functions of media councils or other self-regulatory bodies*

The CJA Ethical Council is the only self-regulatory body operating within the CJA since its founding in 1910. The council has 11 members elected by the CJA assembly among its members. During the election, special attention is paid to the experience of candidates and the representation of different media and communities. Code of honour, work regulations,

3 See <https://www.aem.hr/en/vijece/>

4 See <https://www.jutarnji.hr/vijesti/hrvatska/hnd-protiv-imenovanja-katje-kusec-clanicom-vijeca-za-elektronicke-medije-8996345>

5 See <https://esavjetovanja.gov.hr/ECon/EconReport?entityId=13393>

6 See <https://esavjetovanja.gov.hr/ECon/EconReport?entityId=13393>

7 See <https://esavjetovanja.gov.hr/Econ/MainScreen?EntityId=13393>

report procedures and report conclusions are available on the CJA web page.<sup>8</sup>

In the case of minor offences, the CJA Ethical Council can issue a warning to journalists who are members of the CJA, reminding them of their obligations and duties to adhere to ethical and professional standards. In more serious cases, the Council may issue a severe warning of a serious violation of ethical and professional standards. For the most serious offenses that compromise the profession's dignity, the Council may decide to exclude a journalist from the CJA.

### ***Transparency of media ownership and government interference***

The Agency for Electronic Media maintains a register of electronic publications providers<sup>9</sup>, in accordance with Article 80 of the EMA. Natural and legal persons wishing to broadcast electronic media are required to register. This obligation extends to radio program providers, audiovisual service providers and providers of electronic publications, both for- and non-profit.

According to the EMA's legal definition, electronic publications are "editorially designed websites and / or portals that contain electronic

versions of the press and / or information from the media in a way that is available to the general public regardless of their scope." Prior to the first publication, a natural or legal person must request entry in the register. In 2021, there were 392 electronic publications in the register, but this number does not reflect the real number of electronic publications in circulation. In 2019, the Croatian NGO Center for Peace Studies (CPS) conducted an analysis of internet portals in the context of hate speech, concluding that out of 18 portals only 6 were registered.<sup>10</sup> When publishers are not represented in the register, it is difficult to determine their name and legal form. Also, the regulation and self-regulation of these portals is not possible, because they are not subject to regulations and rules arising from the status of the media or the electronic publication as defined in the EMA.

In terms of media ownership, there is a lack of transparency in data collection and regulation. In accordance with media legislation, media publishers have the obligation to publish information on ownership but there is no clearly defined body that supervises this obligation.

8 See <https://www.hnd.hr/novinarsko-vijece-casti1?seo=novinarsko-vijece-casti1>

9 See <https://www.aem.hr/en/elektronicke-publikacije/>

10 See [https://www.cms.hr/system/publication/pdf/127/Analiza\\_mre\\_nih\\_stranica\\_Protiv\\_mr\\_nje.pdf](https://www.cms.hr/system/publication/pdf/127/Analiza_mre_nih_stranica_Protiv_mr_nje.pdf)

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## **Public trust in media**

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The level of trust in media in Croatia is low. This was demonstrated by a recent quantitative research published by the Friedrich Ebert Stiftung.<sup>11</sup> The study was implemented in August and September 2020 through computer-assisted web interviewing (CAWI) on a nationally representative probabilistic sample of Croatian citizens aged 18 - 74. On the scale from 0 to 10, where 0 means no trust and 10 means absolute trust, the average level of trust in media is 3.39.

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## **Framework for the protection of journalists and other media activists**

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In 2019, the offense of serious shaming was deleted from the Criminal Code, and the offense of insult was further defined in a way that it does not apply to journalists, which represents a positive development. The amendments to the Criminal Code did not decriminalize all crimes against honour and reputation. The following provisions were not amended: Article 149 “Defamation”, Article 349 “Violation of the reputation of the Republic of Croatia” and Article 356 “Violation of the

reputation of a foreign state and international organization”.

The trend of lawsuits against journalists continued in 2020. In October 2020, the CJA warned the public about a new wave of lawsuits against journalists and the media.<sup>12</sup> According to a survey conducted by the CJA, 905 lawsuits were filed as of May 2020.

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

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As the Rabat Plan<sup>13</sup> suggests, human rights are indivisible and interrelated. This is particularly evident in the discussion on freedom of expression in connection to other human rights, such as protection from discrimination, hostility or violence based on ethnicity, religion or other grounds. Proper balancing of freedom of expression and the prohibition of incitement to hatred is no simple task. This is reflected in the documents of some of the political parties in Croatia that are financed from the state budget or, in other words, by taxpayer’s money.

Neither the Anti-Discrimination Act<sup>14</sup> nor other legislation provide for an obligation to

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11 See [https://www.fes-croatia.org/fileadmin/user\\_upload/Prezivjeti\\_ili\\_zivjeti.pdf](https://www.fes-croatia.org/fileadmin/user_upload/Prezivjeti_ili_zivjeti.pdf)

12 See <https://hnd.hr/hnd-upozorava-na-novi-val-tuzbi-protiv-novinara-i-medija>

13 See [https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf)

14 See [https://narodne-novine.nn.hr/clanci/sluzbeni/2008\\_07\\_85\\_2728.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2008_07_85_2728.html)

suppress public financing of organisations or political parties which promote racism or in any other way incite to hatred. Some political parties on the far-right political spectrum do not even publicise their statutes. For example, Autochthonous Croatian Party of Rights<sup>15</sup> (in Croatian: Autohtona - Hrvatska stranka prava, abbreviation: A-HSP) in their 2020 state directly discriminatory goals. For example: “Persons working against national interests will be expelled from Croatia and will lose their citizenship,” “Various LGBT and other associations that work to destroy Croatian families and peoples will be defunded.” Over the last several years, A-HSP has organized numerous demonstrations against the Serb National Council as the representative institution of the Serb national minority in Croatia. Most of these were explicitly tied with demonstrative burnings of the left-leaning weekly paper Novosti (‘News’), which is published by the Serb National Council, for alleged defamation of Croatia. These public actions are without exception designed to intimidate and draw attention. A-HSP receives 1000

Croatian kuna (HRK) from the local regional self-government units according to the publicly available 2020.

Another far-right party, the Croatian Pure Party of Rights<sup>16</sup> (in Croatian: Hrvatska čista stranka prava, abbreviation: HČSP) also does not publish their statute, but their program is available online.<sup>17</sup> It consists of eleven points with problematic content, for instance towards minorities. They advocate for abolition of the quota of eight members of the Croatian Parliament for minorities. HČSP receives 24000 HRK from the local regional self-government units according to the publicly available financial plan for 2020.<sup>18</sup> In 2019, they received 23150 HRK according to the rebalancing plan for 2019.<sup>19</sup>

Generation of renewal<sup>20</sup> (in Croatian: Generacija obnove, abbreviation: GO) is a relative newcomer to the scene of far-right political parties and is publicly represented by young people. Although not highly visible, the

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15 See <https://www.hrvatskipravasi.hr/>

16 See <http://hcsp.hr/>

17 See <http://hcsp.hr/program/>

18 See <http://hcsp.hr/wp-content/uploads/2020/02/GODISNJI-PROGRAM-RADA-I-FINANCIJSKI-PLAN-ZA-2020..pdf>

19 See <http://hcsp.hr/wp-content/uploads/2020/02/REBALANS-FINANCIJSKOG-PLANA-ZA-2019.pdf>

20 See <https://generacijaobnove.hr/>

party has manifested its ties with anti-immigrant politics in Europe.<sup>21</sup>

## **Other issues related to checks and balances**

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

#### *Quality and transparency of legislative process and public consultations*

Legislative procedure in Croatia is characterized by the weak role of the Parliament and dominance of the executive branch which usually submits the laws and other legislative acts, while the ruling majority adopts them regardless of the debate, its arguments and conclusions. Although laws can be proposed by either the government, individual MPs or groups of MPs, deputy clubs and working bodies, a large majority is proposed by the government. Impact assessments and policy analyses are seldom used in a meaningful way and often untransparent and/or unavailable to the public. Public consultations are predominantly held *pro forma*, with relevant government bodies and institutions acknowledging the comments made by the public, but rarely incorporating them in the bills. Consultations are often announced late in the legislative

process or during periods of holidays with short deadlines, so the public has little time to react.

Parliamentary elections were held on 5 June 2020, so the year encompasses two terms of the Parliament. The final part of the 9th term of the Croatian Parliament (from 2016 until mid-2020) finished with the 16th plenary session (15 January - 18 May 2020). During this 5-month period, a total of 193 proposals were voted on, including legislative acts and various technical and procedural decisions, as well as reports. **123 of those 193 (64%)** acts were sponsored by the government. During the second half of the year, the 10th term of the Croatian Parliament was inaugurated. From its beginning on 22 June 2020 until the end of the year, a total of **160 proposals were voted on, and 115 (72%)** of those were sponsored by the government.<sup>22</sup>

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

Use of fast-track and urgent procedures is widespread and practically standardized practice in the Croatian Parliament despite them being nominally preferred only in extraordinary circumstances (“laws may be enacted under urgent procedure when this is required on particularly justified grounds, in particular pertaining to issues of defence and other important justified state issues, or when this is required to prevent or remedy major

21 See <https://generacijaobnove.hr/1/temeljna-nacela/>

22 See <https://www.sabor.hr/hr/sjednice/pregled-dnevnih-redova>

disturbances in the economy”). During the 16th plenary session of the 9th term of the Croatian Parliament, a total of 144 legislative bills were voted on. **70 of 144 (49%) bills were discussed under urgent procedure.** During the Parliament’s 10th term, (22 June 2020 - ongoing), **90 bills were voted on and 19 of them (21%) were discussed under urgent procedure.**

### *Independent authorities*

Independent authorities, especially Ombud’s institutions, sometimes lack sufficient capacity and powers and there are attempts of pressures on their work by the government’s executive branch.

Regarding the work of the Ombudswoman’s Office, it is important to highlight that the Ombudswoman has been facing serious issues in her work related to migration. In 2020, the Ministry of the Interior continued to deny her access to data during National Preventive Mechanism (NPM) visits, crippling her investigations, even though unannounced visits of detention institutions and free access to data of persons deprived of liberty are key tools at the NPM disposal, according to the national

and international legal duty accepted by the Republic of Croatia.

The Commission for the Prevention of Conflicts of Interest in Croatia has been undermined by the ruling party Croatian Democratic Union (*Hrvatska demokratska zajednica* or HDZ) for years, as well as by some MPs from other/opposition parties. After Commission President Nataša Novaković began questioning the role of Prime Minister Andrej Plenković in the Agrokor affair<sup>23</sup> and investigating a trip from HDZ party officials to Helsinki<sup>24</sup>, the Prime Minister began to publicly criticize her work and refused to send the requested documentation to the Commission. Following that incident, he accused her of conflict of interest in another case and asked for her resignation. Plenković requested that it should be reviewed whether the Commission had any authority to decide on the violation of the general principles of action in the exercise of public office, which is exactly the subject of the recent ruling.

In March 2020, after the start of the COVID-19 induced lockdown, the Administrative Court in Zagreb postponed all hearings, except the Prime Minister’s appeals against the Commission’s decisions. The Administrative Court in Zagreb annulled the decisions of

23 See <https://www.gong.hr/en/good-governance/anti-corruption-policy/letter-to-greco-plenkovic-undermines-the-fight-aga/>

24 <https://hr.n1info.com/english/news/a444407-conflict-of-interest-commission-to-seek-help-from-international-institutions/>

the Commission in two of his cases<sup>25</sup> (first instance): the disputed appointment of the Prime Minister's godfather as an ambassador and the refusal to submit requested documentation on the HDZ's trip to Helsinki. In both cases, the Court concluded that officials could not be sanctioned for violating the principle of operation.

## **Enabling framework for civil society**

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

Most of the issues connected to the exercise of freedom of assembly were connected to the various measures designed to contain the COVID-19 pandemic. The restrictions and limitations of the freedom of assembly had a legitimate aim and were largely proportionate to the threat posed by the pandemic, but implementation of certain measures was inconsistent. In addition, some provisions

lacked clear explanations and justification, such as in the decision<sup>26</sup> that bans spending time in public spaces where “more people” may gather. Throughout the year, various measures that restricted public gatherings changed over 20 times, and, according to the Ombudsman<sup>27</sup>, frequent amendments and vague measures and recommendations have led to growing dissatisfaction and fear and undermined trust in institutions, particularly in the Civil Protection Headquarters. At the same time there were exceptions from those restrictions that allowed for certain gatherings to take place. For example, a Civil Protection Headquarters' decision from April 2020<sup>28</sup> restricted the number of participants at all public events to five, but religious gatherings were allowed from 2 May onwards. In addition, the decision on gatherings was changed<sup>29</sup> in order to allow the commemoration of the Remembrance Day in November. The consistency of the Civil Protection Headquarters was called into question. By allowing certain events to take place, other forms of gatherings were put at a disadvantage, although the right to public assembly should be available to

25 See <https://www.telegram.hr/politika-kriminal/upravni-sud-opet-presudio-u-korist-premijera-srusena-je-odlu-ka-povjerenstva-za-sukob-interesa/>

26 See [https://narodne-novine.nn.hr/clanci/sluzbeni/2020\\_03\\_34\\_734.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2020_03_34_734.html)

27 See <https://www.ombudsman.hr/hr/download/izvjesce-pucke-pravobraniteljice-za-2020-godinu/?wpdm-dl=10845&refresh=6038a8291f2261614325801>

28 See [https://narodne-novine.nn.hr/clanci/sluzbeni/2020\\_04\\_51\\_1035.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2020_04_51_1035.html)

29 See [https://narodne-novine.nn.hr/clanci/sluzbeni/2020\\_11\\_122\\_2375.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2020_11_122_2375.html)

everyone under equal conditions, regardless of the assembly's purpose.

### ***Lawsuits and convictions against civil society actors***

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Over the past years, there were cases of lawsuits and convictions against civil society actors and volunteers working on protection of the rights of refugees and migrants. This continued in 2020. The civil society organization Are You Syrious (AYS) had to fight against allegations of illegal conduct. In the case of one of their volunteers, the Ministry of Interior pressed charges<sup>30</sup> for “facilitating illegal migration”, whereby in April 2018 they recommended the highest prescribed penalty, including imprisonment, an 43,000 EUR fine, and the ban of AYS's work. In September 2019, the court found the volunteer guilty<sup>31</sup> on the grounds of “unconscious/inadvertent negligence”, but rejected the recommended penalties, issuing a smaller 8,000 EUR fine. An AYS volunteer approached a police control in March 2018 near the Croatian border to alert police about a family of asylum seekers huddled in a field near Strošinci. At this time, the family, including several small children, had already been on Croatian soil. Part of AYS's activities is to observe such incidents be present until the

refugees meet the police because of the threat of imminent push-backs. The AYS volunteer was accused of giving signals to the family to assist their crossing from Serbia into Croatia. These allegations were proven false by the organisation during the court hearing. AYS has challenged the decision and is awaiting the outcome of the appeal.

In 2020, the Centre for Peace Studies was contacted by several individuals who were charged for “facilitating illegal migration” after giving a lift to refugees and other migrants within the Croatian territory. The court found them guilty on the same grounds as for AYS's volunteer, namely unconscious negligence. It argued that the individuals should have presumed that the person in their car is not residing legally in Croatia and will attempt to cross the border irregularly. In one of the decisions, the judge noted that the defendant should have presumed that the person is an “illegal migrant” based on the person's looks.

### ***Smear campaigns against civil society organisations***

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After the earthquakes that hit Zagreb region in March 2020 and Sisak-Moslavina county in December 2020, there were numerous false

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30 See <https://areyousyrious.medium.com/ays-daily-digest-25-09-18-statement-on-a-unjust-verdict-against-ays-volunteer-b91baab377ba>

31 See <https://www.portalnovosti.com/dragan-umicevic-kazna-meni-je-poruka-drugima>

allegations<sup>32</sup> against human and minority rights organisations and other civil society organisations (CSOs). They were accused of not actively providing humanitarian assistance and relief to the victims. Some media<sup>33</sup> accused CSOs of not helping in the Bania region, without proper research on what the CSOs have been doing in the crisis or asking the accused organisations on their activities.

## Surveillance

There have been recent cases of intimidation of human rights defenders, especially those criticizing the Government's migration policy and those policing migration. On 11 May 2020, a program coordinator's partner working for the AYS received a decision<sup>34</sup> of the Ministry of the Interior revoking the decision granting him asylum in the Republic of Croatia and giving him a deadline of 30 days to leave the EEA. The Ministry of Interior issued this decision arbitrarily to put pressure on her and her partner who was also volunteering for AYS and to circumscribe her work as a human rights defender, primarily for the rights of refugees and other migrants. Croatian police

have harassed AYS programme's partner on multiple occasions. As Front Line Defenders said in their statement<sup>35</sup> in October 2020, "on 9 October 2019, he received a phone call summoning him to the police station at Petrinjska Street No. 30 for an interview allegedly concerning 'the register of persons who have entered the Republic of Croatia'. On 10 October 2019, he arrived at the police station where he was questioned, among other things, about his relationship with Tajana Tadić, people who he met in the Centre for Asylum Seekers, as well as some people he is not acquainted with. In addition, content on his mobile phone was checked by a police officer, without a warrant. During the interview, he was asked by a police officer to meet informally at a cafe and was told that he should help police by providing them with information about other refugees. When he refused, the police officer reportedly started to threaten him with revocation of his refugee status and deportation to Iraq. Following the interrogation, the police officer confiscated his residence permit even though such an action was illegal and returned it only after Tajana Tadić's intervention."

32 See <https://www.portalnovosti.com/pandemija-mrznje>

33 See <https://www.glasistre.hr/kolumna/gdje-su-sada-udruge-koje-inace-ne-prestaju-govoriti-o-solidarnosti-ljubavi-i-dobrosvosti-691123>

34 See [https://www.frontlinedefenders.org/sites/default/files/croatia\\_-\\_ua\\_-\\_tajana\\_tadic\\_-\\_30\\_oct\\_2020.pdf](https://www.frontlinedefenders.org/sites/default/files/croatia_-_ua_-_tajana_tadic_-_30_oct_2020.pdf)

35 See [https://www.frontlinedefenders.org/sites/default/files/croatia\\_-\\_ua\\_-\\_tajana\\_tadic\\_-\\_30\\_oct\\_2020.pdf](https://www.frontlinedefenders.org/sites/default/files/croatia_-_ua_-_tajana_tadic_-_30_oct_2020.pdf)

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

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Negative trends connected to participation in decision-making processes have continued in 2020. The 7th assembly of the Council for Civil Society Development<sup>36</sup>, an advisory body to the Government which aims to improve cooperation between the Government and CSOs, was constituted in 2020. In the new convocation of the Council from May 2020, CSO representatives in the Council have limited influence on the decisions brought by the Council because most of its members come from various state institutions.

For example, during the election process for members of the European Economic and Social Committee (EESC) representing civil society (Group III), crude violations of the principle of civil society's self-representation and autonomy were committed by the Government's Office for Cooperation with NGOs which coordinated the process. The voting was held by the Council for the Development of Civil Society, which in itself is violating the principle of civil society self-representation due to its membership which consists of 20 representatives of public authorities (state, regional and local government institutions, agencies and their associations) and 17 representatives of civil society and social partners. EESC Group III representatives were appointed by the election process by means of electronic voting

towards the end of the workday on Friday 29 May 2020, with a tight deadline (Tuesday, 2 June at noon), not allowing for candidate presentations or discussions by the Council. These violations of civil society's autonomy took place despite the fact that the Council members from CSOs had submitted a written proposal for a transparent two-stage electronic election procedure (first round of voting by 17 Council CSO members, followed by confirmation vote of all 37 Council members). This proposal was ignored at the constituting meeting of the Council, held on 20 May 2020 while the head of the NGO Government Office initiated the election procedure that envisioned only one round of vote by all Council members, which is in collision with self-representation principles guiding democratic relations between government and civil society.

Also, since 20 May, the Council did not have valid sessions, as the Government has not yet appointed the new representatives of the public authorities to the Council<sup>37</sup> after the parliamentary elections, despite the requests by CSO representatives to the Council. This has repercussions to participation of CSOs in decision-making processes, as the Council is the body that appoints civil society representatives in various bodies and working groups. For example, it is not possible to carry out the selection of representatives of CSOs in the working groups for the design of programming documents for the EU funds financial

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36 See <https://udruga.gov.hr/highlights/the-council-for-the-civil-society-development/163>

37 See <https://www.gong.hr/hr/aktivni-gradani/civilno-drustvo/imenujte-predstavnik-tijela-javne-vlasti-u-savjet/>

period 2021-2027 that are currently holding their sessions without representatives of civil society.

### **Access to funding**

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Regarding the availability of funds, within the scope of the EU Multi-Annual Financial Framework 2014-20, funding was planned for CSOs in Croatia. Due to a lack of a coherent system, it is difficult to expect compliance with the procedures as well as the opening long-announced tenders.

The Ministry of Foreign and European Affairs' public call for applications for the Program of Cooperation with Civil Society Organizations Dealing with Development Cooperation and Humanitarian Activity Abroad<sup>38</sup> exemplifies the government's failure to comply with tender procedures. After the application procedure finished, the tender was annulled<sup>39</sup> due to "epidemiological circumstances that prevented the implementation of the projects"<sup>40</sup>. The explanation states that "the tender will be opened again when epidemiological conditions allow it" and to encourage organizations "to re-apply with their projects". This means that the working days spent on design, elaboration and

contacting partners are wasted and it will be necessary to re-apply (which also means collecting fresh administrative evidence of the functionality of the applicant organization).

An example of tenders being unforeseeable is the public call within the European Social Fund on combating discrimination announced in November 2019, titled "Combatting Discrimination – a precondition for social inclusion of the most vulnerable groups – Phase 1", with a budget of 22.800.000,00 HRK. It was supposed to be operated by the Ministry of Demography, Family and Social Policy. In the Annual Plan for the Publication of Calls for Proposals of the Operational Programme Effective Human Resources 2014-20<sup>41</sup>, published on 25 February 2020, this operation was placed on the reserve list where it remained after the changes visible from May 2020. This call is only one of the calls that was announced in the plans, but then withdrawn, which puts CSOs in uncertainty, as they cannot plan possibilities for funding.

Also, it is important to note that the institutions operating EU and other funds in Croatia put large, illogical and unnecessary burdens on CSOs in Croatia, which results in serious

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38 <http://www.mvep.hr/files/file/2020/1.-Tekst-Javnog-poziva.pdf>

39 See <http://www.mvep.hr/files/file/2020/2011282001-odluka.pdf>

40 See <http://www.mvep.hr/files/file/2020/2011300950-obrazlozenje.pdf>

41 See <http://www.esf.hr/europski-socijalni-fond/razdoblje-2014-2020/godisnji-plan-objave-operacijaprojekata-esf/>

limitations of their work, as the Croatian NGO Gong described in its analysis in June 2020<sup>42</sup>.

## **Other**

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The Government Office for Cooperation with NGOs of the Government of the Republic of Croatia denied<sup>43</sup> the possibility to journalists to attend the first constitutive session of the Council for Civil Society Development, with the explanation that this is due to epidemiological measures, although the session was held in the Great Hall of the National University Library. Also, there was no possibility of broadcasting the session live via video link, which was standard practice from other locations until then. Since the venue for the session was the hall where the activities related to the EU 2020 Presidency of the Council of the European Union took place in the same period, it is difficult to believe that the broadcasting was impossible.

There has also been no progress regarding the National Plan for Creating an Enabling Environment for Civil society Development. The foreseen duration of the previous Draft Strategy<sup>44</sup> that was jointly drafted in a

participatory process by representatives of institutions and civil society in 2016 was the period 2017-2021.

## **Other systemic issues affecting rule of law and human rights protection**

### **Widespread human rights violations**

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In 2020, reports from different institutions, including Croatian Ombudsperson, national and international NGOs, as well as photographs, videos and medical documentation and testimonies of thousands of victims collected by activists, continue to point to the same direction: systematic, severe violations of refugees and migrants' human rights at Croatian borders and within Croatian territory. This is a serious rule of law issue, as there are no effective investigations or protection mechanisms in place.

Figures for 2020 are deeply worrying. Border Violence Monitoring Network alone reported that 1656 persons have been pushed back

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42 See [https://www.gong.hr/media/uploads/government\\_attacks\\_on\\_civil\\_society\\_in\\_croatia\\_eng.pdf](https://www.gong.hr/media/uploads/government_attacks_on_civil_society_in_croatia_eng.pdf)

43 See <https://faktograf.hr/2020/05/21/savjet-za-razvoj-civilnog-drustva-uveo-socijalno-distanciranje-od-novinarar/>

44 See <https://udruge.gov.hr/istaknute-teme/nacionalna-strategija-stvaranja-poticajnog-okruzenja-za-razvoj-civilnoga-drustva/nacionalna-strategija-stvaranja-poticajnog-okruzenja-za-razvoj-civilnoga-drustva-od-2017-do-2021-godine/3676>

(illegally expelled) from Croatia in 2020.<sup>45</sup> The Danish Refugee Council recorded 16425 illegal expulsions from Croatia to Bosnia and Herzegovina in 2020.<sup>46</sup> CPS filed four criminal complaints against unknown police officers in 2020 who conducted such pushback.<sup>47</sup> Three of these complaints requested an investigation into cooperation between the Croatian police officers and armed men in black who most probably are members of the special unit or the so-called Ministry of Interior's operational action „Corridor“, described in the testimony of an anonymous police officer in 2019.<sup>48</sup>

In July 2020, the Slovenian Administrative Court issued a judgement proving that the national police force carried out an illegal collective expulsion of a man who was chain refouled from Slovenia through Croatia to Bosnia-Herzegovina. The Court found that the Republic of Slovenia violated the applicant's right to asylum, the prohibition of collective expulsions and the principle of non-refoulement by readmitting him to Croatia, from where he was pushed back to Bosnia-Herzegovina.<sup>49</sup>

Despite overwhelming evidence, Croatian State Attorney's Office continues to reject criminal complaints against Croatian authorities, and the Ministry of Interior continuously states that they did not find any misconduct or breaching of the law, without giving any argumentation or showing that an unbiased investigation was conducted. The investigations remain internal (the Ministry investigates itself) and aren't independent. The results of the conducted investigations remain unknown to the public and to the Ombudswoman. Low number of investigations shows unpreparedness of the Government to stop the violence and assure the rule of law, while the lack of independent investigations is further worrying and further undermines the rule of law and functioning of the legal state.

Furthermore, the European Commission awarded the Emergency Assistance grant scheme (EMAS) under the Asylum, Migration and Integration Fund (AMIF) and Internal Security Fund (ISF) to Croatia in 2018, with a requirement to set up an independent monitoring mechanism in order to guarantee

45 See <https://www.borderviolence.eu/launch-event-the-black-book-of-pushbacks/#more-16565>

46 See <https://drc.ngo/our-work/where-we-work/europe/bosnia-and-herzegovina/>

47 See <https://www.cms.hr/en/azil-i-integracijske-politike>

48 See <https://net.hr/danas/hrvatska/zastrasujuca-devijacija-akcije-koridor-policija-sve-dogovara-na-whatsappu-a-poseban-zadatak-u-hvatanju-migranata-imaju-taksisti/>

49 See <https://www.borderviolence.eu/press-release-court-find-slovenian-state-guilty-of-chain-pushback-to-bosnia-herzegovina/>

Croatia's compliance with fundamental rights in its border surveillance activities.<sup>50</sup> The Croatian Government's failure to establish such a mechanism and subsequent cover-up have additionally amplified the need for truly independent border monitoring to be put in place and rule of law to be assured.<sup>51</sup>

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

On 19 June 2020, the United Nations' Special Rapporteur on the human rights of migrants and Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment called Croatia to immediately investigate reports of excessive use of force by law enforcement personnel against migrants, including acts amounting to torture and ill-treatment, and sanction those responsible.<sup>52</sup> They said physical violence and degrading treatment against migrants have been reported in more than 60 percent of all recorded push-back cases from Croatia between January and May 2020. The UN Special Rapporteurs were also concerned that Croatian police officers

reportedly ignored requests from migrants to seek asylum or other protection under international human rights and refugee law.

In August 2020, the Council of Europe's Committee for the Prevention of Torture (CPT) visited Croatia to examine the treatment of persons attempting to enter the country and apprehended by the police.<sup>53</sup> In the course of the visit, the delegation held consultations with Ms Terezija Gras, State Secretary of the Ministry of Interior and Mr Zoran Ničeno, Head of the Border Police Directorate. The delegation also met with representatives of the National Preventive Mechanism (NPM) and non-governmental organizations active in areas of concern to the CPT. The delegation also visited several temporary reception centres and informal migrant settlements in north-west Bosnia and Herzegovina where it interviewed and medically examined migrants who claimed they had very recently been apprehended by Croatian law enforcement officials within the territory of Croatia and forcibly returned to Bosnia and Herzegovina.

On 21 October 2020, the Council of Europe Commissioner for Human Rights, Dunja

50 See [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_6884](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6884)

51 See <https://www.theguardian.com/global-development/2020/jun/15/eu-covered-up-croatias-failure-to-protect-migrants-from-border-brutality>

52 See <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25976>

53 <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-carries-out-rapid-reaction-visit-to-croatia-to-examine-treatment-of-migrants>

Mijatović, published a statement in connection with the latest allegations of collective expulsions of migrants, denial of access to asylum, and the use of extreme violence by Croatian law enforcement officers.<sup>54</sup> In the statement, she reiterated her call on the Croatian authorities to stop pushbacks and border violence and eradicate impunity for serious human rights violations committed against migrants by law enforcement officers. She stressed that they should ensure full cooperation with independent monitoring mechanisms, especially the office of the Croatian Ombudswoman. The Commissioner also called on the Croatian authorities to publish, as soon as possible after it is adopted, the report of the CPT on their rapid reaction visit to the country.

The Croatian Government still hasn't published the Committee's report, contrary to previous practice.

### **Poor crisis coordination**

At the end of 2017, the then-Croatian government passed the Act on The System Of Homeland Security which constitutes the basis for coordination in crisis situations. However, with the outbreak of the pandemic and the Zagreb earthquake that occurred in March 2020, the Coordination for the System of Homeland Security which held its constitutional session in October 2020, had

no significant impact nor role in handling both crisis situations. Instead, measures for containing the epidemic and those related to handling the aftermath of the earthquake have been declared by the national Civil Protection Headquarters. The absence of a coordinated crisis response became even clearer after the catastrophic earthquake on 29 December 2020 in Petrinja, as no fast nor coordinated response to the third crisis occurred. This resulted in a chaotic situation as many citizens rushed to the Sisačko Moslovačka County, which was hit the most by the earthquake, as well as to Zagrebačka and Karlovačka County. One week later, the government managed to establish a second Civil Protection Headquarters to Address the Consequences of the Earthquake Disaster. During this week, emergency services and volunteers overlapped or lacked on the field due to missing coordination and communication. Despite the existence of a law governing the crisis response in disaster situations, Croatia failed to react adequately to three large catastrophe situations, thus risking and endangering human rights and antidiscrimination legislation as well as exacerbating inequalities.

54 See [https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/newsletter-october-2020/-/asset\\_publisher/cVKOAAoroBOtI/content/croatian-authorities-must-stop-pushbacks-and-border-violence-and-end-impunity?](https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/newsletter-october-2020/-/asset_publisher/cVKOAAoroBOtI/content/croatian-authorities-must-stop-pushbacks-and-border-violence-and-end-impunity?_lang=en)

## Impact of COVID-19

### Emergency regime

Croatia did not declare a state of emergency, but on 11 March 2020, the Law on the Protection of the Population from Infectious Diseases entered into force. The Civil Protection Headquarters, governed by the Law on Civil Protection System, was established by the Croatian Government on 20 February. Various legal experts criticized the amendments to the Law on Civil Protection System proposed in March 2020 because the new Article 22a matches the definition of disaster that already existed in the Law. But the Government and the governing majority in the Parliament deliberately avoided applying constitutional norms, in order to pass the laws by simple and not by two-third majority, which is needed if the state declared state of emergency or if extraordinary circumstances occurred (Art. 17). The legality of the measures brought by the Civil Protection Headquarters was publicly debated because they were brought based on the new Art. 22a of the Law on the Civil Protection System. As a result, several claims for constitutional review were brought to the Constitutional Court.<sup>55</sup> In its decision

in September, the Constitutional Court stated that the decision whether certain freedoms and/or rights will be limited through Art. 16 or 17 of the Constitution is the authority of the Parliament.<sup>56</sup> Therefore, the disputed measures and laws are not unconstitutional because they were not in accordance with Art.17. Also, the Court decided to reject the proposals to initiate procedures for constitutional review of disputed articles of the Law on Civil Protection System and the Law on Amendments to the Law on the Protection of Population from Infectious Diseases, by a majority of 10 constitutional judges. 3 constitutional judges published separate opinions expressing their disagreement with the decision and elaborating their views on the constitutional issues in question.

The Rules of Procedure (RoP) of the Parliament were amended in April in a way that new Art. 293.a was added.<sup>57</sup> It introduced changes such as the possibility of shortening time for discussion and for breaks, limiting the number of MPs present at the session and suspending the right to reply. 35 MPs from the opposition requested the assessment of the constitutionality of the RoP claiming that its amendments limited their right to discussion granted by the Constitution. The Constitutional Court

55 See [https://sljeme.usud.hr/usud/praksaw.nsf/C12570D30061CE54C12585E7002A7E7C/\\$FILE/SA%c5%bdETAK%20-%20COVID-19.pdf](https://sljeme.usud.hr/usud/praksaw.nsf/C12570D30061CE54C12585E7002A7E7C/$FILE/SA%c5%bdETAK%20-%20COVID-19.pdf)

56 See [https://sljeme.usud.hr/usud/praksaw.nsf/C12570D30061CE54C12585E7002A7E7C/\\$FILE/U-I-1372-2020%20i%20dr.pdf](https://sljeme.usud.hr/usud/praksaw.nsf/C12570D30061CE54C12585E7002A7E7C/$FILE/U-I-1372-2020%20i%20dr.pdf)

57 See [https://narodne-novine.nn.hr/clanci/sluzbeni/2020\\_04\\_53\\_1061.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2020_04_53_1061.html)

assessed that the newly introduced measures had a legitimate cause, but, inter alia, it noted that there are possibilities for a different way of organizing the work of the Parliament, which does not limit the rights and duties of the members of the Parliament.<sup>58</sup> The Court concluded that any restriction on the exercise of the rights and duties of the representatives must be objectively and reasonably justified. As this was not the case it decided to repeal the newly added Art. 293.a of the RoP.

### ***Lack of access to the courts and impact on the justice system***

At the end of March 2020, most of the court hearings were postponed for indefinite time and parties were not allowed to enter the court premises. Only lawyers, court appraisers, bankruptcy administrators and legal entities that have become involved in e-Communication were able to communicate electronically with the courts. At the end of April, the Croatian Ombudswoman expressed concern about the consequences of the pandemic, highlighting the situation of parties who, due to the pandemic, cannot use suspensive remedies such as appeals in a timely manner, or who will miss deadlines for private lawsuits.<sup>59</sup> She also underlined the importance of legal aid during the pandemic, as a precondition for

exercising the rights to equal access to justice, fair trial and an effective remedy. In July, after relaxation of the measures regarding the first COVID-19 wave (the second one started in September), no strategies aimed to deal with case backlog or increased litigation due to COVID-19 measures had been adopted. Steps to lift restrictions previously imposed on court proceedings were determined by each court individually. There have been no general instructions or recommendations from the president of the Supreme Court of the Republic of Croatia or the Ministry of Justice which would apply to all courts.

### ***Measures affecting human rights that are not legitimate nor proportionate***

In March 2020, the Government proposed amendments to the Electronic Communications Act which would have provided them with the capacity to monitor the location of every mobile phone in Croatia. The action was supposedly taken for the purpose of limiting the impact of the pandemic, but it revealed a possible flagrant violation of the right to privacy and revealed a strategy to shrink civic space, using the health crisis as an excuse. In an open letter to the public, 44 CSOs reminded of the necessity that all

58 See [https://sljeme.usud.hr/usud/praksaw.nsf/C12570D30061CE54C12586080035A65C/\\$FILE/U-I-4208-2020.pdf](https://sljeme.usud.hr/usud/praksaw.nsf/C12570D30061CE54C12586080035A65C/$FILE/U-I-4208-2020.pdf)

59 See <https://www.ombudsman.hr/hr/omoguciti-ucinkovito-funkcioniranje-pravosuda-i-u-izvanrednim-okolnostima/>

measures adopted by the Government must be effective, but also proportionate, i.e. we cannot allow the damage from the measures to be greater than their benefits.<sup>60</sup> After the pressure of CSOs and numerous other actors, mostly legal experts, the Government dropped the proposal.

### *Shrinking civic space*

The Government of the Republic of Croatia passed a series of measures to preserve employment following the outbreak of the pandemic, inter alia financial compensation for workers paid to their employers. However, Croatian CSOs who employ over 18,000 workers were not included in these measures as these were designed only for for-profit employers.

In December 2020, CSOs active in various fields sent an open letter to the Minister of Labour, Pension System, Family and Social Policy, the Head of the Government Office for Cooperation with NGOs and the Director of the National Foundation for Civil Society Development requesting a change in the date of opening the application for the call for proposals “Strengthening CSOs capacity to respond to the needs of the local community” and to change the problematic method of administering this call.<sup>61</sup> The call was

announced in April as a method of mitigating the consequences of COVID-19 pandemic on CSOs but was published only in December. The most problematic aspect of the call is that it is administered through the “fastest finger” procedure, which means that applications are collected with the opening day until sufficient applications are received to spend the budget, after which the call is closed. This procedure is problematic because the conditions are unfair and do not contribute to the highest quality applications, but to receiving it from those who are the fastest and who score minimum points. Regularity of procedures during which tenders are closed and filled in an incredibly short time is also put into question. Other than the problematic procedure of the fastest finger, the time to prepare the projects was under 30 days and it included the Christmas and New Year holidays. At the end, the competent institutions changed the dates of opening the call, but not its procedure.

Thus, the annulment of long-announced public tenders in combination with insufficient or inadequate public measures for preserving employment in CSOs and mitigating social consequences of the pandemic and earthquakes caused financial shortages in the civil society sector. These shortages can have severe effects on the work of CSOs as many are forced to cut

60 See <https://www.cms.hr/hr/izjave-za-javnost/reakcija-44-udruge-pracenje-svakog-mobitela-u-zemlji-nije-mjera-zastite-od-koronavirusa-nego-nepotrebno-krsenje-ljudskih-prava>

61 See <https://www.cms.hr/hr/novosti/otvoreno-pismo-organizacija-civilnog-drustva-natjecaji-vrijedni-100-milijuna-kuna-koje-udruge-iscekuju-devet-mjeseci-izlaze-s-rokom-za-prijavu-od-10-dana-po-metodi-najbrzi-prst>

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costs, which will likely result in job losses and a drop in offered services.

### ***Inequality and discrimination***

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During the distant schooling established after the outbreak of the pandemic, the GOOD initiative, the Serb National Council, the Roma Youth Organization of Croatia and Are You Syrious? warned the government to not leave vulnerable pupils and pupils belonging to ethnic or national minorities behind.<sup>62</sup> Namely, due to the necessity of having the digital equipment and the technical preconditions for following distance schooling. Thus, the initiative warned, socially and economically marginalized pupils were not always in the position to participate in the distance education as the Ministry of Science and Education did not adequately react to the needs of marginalized children as regards their participation in online schooling. Furthermore, pupils attend minority education or those who are not Croatian native speakers were also left behind, since the online and distance learning was not adopted to non-Croatian speaking children. Even though the pandemic made it necessary for the Ministry of Science and Education to react swiftly and digitalise primary and secondary education, it failed to consider the needs of marginalized pupils thus putting them in an unequal position and leaving them and their right to education behind.

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62 See <http://goo.hr/zasto-su-neka-djeca-ostavljena-na-pristojnoj-udaljenosti/>

# Czech Republic // League of Human Rights (LIGA)



LIGA LIDSKÝCH PRÁV

## Key concerns

- The controversial appointment of a new president of the Supreme Court by the president of the Czech Republic renews concerns on judicial independence.
- A lack of media independence and support for investigative journalism remain important issues.
- Lack of clarity and transparency around new COVID-19 restrictions, some of which are passed without proper justification.

## Justice system

### Judicial independence

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

The Czech Republic's Chamber of Deputies (the lower house) discussed the amendment

to the Act on Courts and Judges, which is now going to the Senate. It aims to improve the transparency process when selecting new judges and court presidents, using objective uniform criteria. Currently the law does not regulate the selection of new judges. From now on there should be five phases, namely (1) the experience of the judge's assistant, (2) a judicial examination, (3) a selection procedure for a judicial candidate, (4) the experience of a judicial candidate (other legal professions may apply as well, e. g. lawyers) and (5) an open audition for a judge. A five-member commission consisting of two members of the executive branch and three members of the judiciary should be established to select the presidents of high, regional and district courts. Specific members of the commission will be appointed depending on the position for which they will select a suitable candidate. The amendment also extends the exclusivity of the judicial office. In addition to the current restrictions, it will now be prohibited to combine the function of a judge with the function of a statutory, managing or controlling body of a legal entity, a trustee, etc. A judge will also not be able to be a member of a political party or movement. This is about strengthening the independence of the judiciary and a clearer separation of powers. The amendment also enshrines the obligation of the judge to notify the president of the court of what other paid activities he/she had in previous year, by 30 June of the following calendar year. This measure will contribute

to greater transparency and independence of the judiciary.

In the spring of 2020, the President of the Czech Republic, Miloš Zeman, appointed a new president of the Supreme Court. He did not follow the recommendation of the Minister of Justice and decided arbitrarily, in a non-transparent manner and without proper justification.

Since 2016, the Council of Europe's Group of States against Corruption (GRECO) has been recommending that the Czech Republic adopt an amendment to the Public Prosecutor's Office Act. However, several parliamentary proposals for this amendment have been in the Chamber of Deputies for a year and a half, and the Minister of Justice has not yet submitted its proposal. Currently, the government can remove the Supreme Public Prosecutor at any time without having to provide a reason. According to the government's draft proposal, the Supreme Public Prosecutors could only be removed by a decision within the disciplinary proceedings, i.e. with proper justification. In the current legislation, there is no fixed term of mandate of the Supreme Public Prosecutor. The term of the office should now be seven years, and the Supreme Public Prosecutor should be elected by a five-member commission composed of members appointed by the Ministry of Justice, the Supreme Public Prosecutor and the Chief Prosecutor.

#### *Accountability of judges*

Since the end of 2019, the Chamber of Deputies has had a bill on proceedings in matters of

judges, public prosecutors and bailiffs, within which the disciplinary proceedings of these officials are to be changed. A two-stage system of disciplinary proceedings should be introduced, in which the high courts would be the first instance and it would be possible to appeal to the Supreme Court and the Supreme Administrative Court. In 2020, a significant decision was made by the disciplinary senate of the Supreme Administrative Court concerning judge Alexander Sotolář. In the Opencard case (a chip card required for using the public transport in Prague), the judge manipulated the transcripts of the hearings, as they did not match the sound recordings. Sotolář was found guilty, and the disciplinary senate removed him from the position of Chairman of the Senate of the Municipal Court in Prague. However, he was not removed from the judiciary, so he continues to pursue his work as a judge. This has provoked criticism, for example, from former President of the Supreme Administrative Court Josef Baxa and the Minister of Justice.

#### *Other*

On 28 October 2020, the traditional presentation of state decorations by the President of the Czech Republic was to take place. However, due to the COVID-19 pandemic, the Prague Castle only published the names of the awarded personalities on its website, and the medals will not be taken over until autumn 2021. Among the winners is the President of the Constitutional Court, Pavel Rychetský, to whom the President wanted to grant the Order of T. G. Masaryk. However, at the beginning of February 2021, the Constitutional Court issued a ruling repealing

part of the electoral law, according to which elections to the Chamber of Deputies are to take place in autumn 2021. The President considers this decision to be damaging to the Czech Republic, and therefore decided not to award Rychetský the decoration. It is not clear at this time whether the President has already signed the diplomas to award or bestow honours or not. If so, it is not *de jure* about not awarding the award, but about withdrawing it. However, a state decoration can only be lost by the death of the decorated person or by a final conviction in criminal proceedings and the imposition of a penalty of loss of honorary titles and decorations. In this case, the President would act in violation of the law and would *de facto* arbitrarily punish one of the country's top judicial officials. It could thus upset the principle of checks and balances between executive and judicial power, without any support in law.

## **Quality of justice**

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### *Accessibility of courts*

In summer 2020 the government submitted a new draft law regarding court fees. The amount of the fee was supposed to increase, since the standard of living has increased in the past 10 years. In consequence, the government wanted to create more pressure for people to use the alternative methods of resolving disputes such as mediation. By increasing court fees, access to justice would get more difficult for people who have lower income and those facing poverty. The draft law was supposed to lower this effect by exempting people with lower incomes

more regularly from court fees. However, it is not certain that courts would become more benevolent. It is also important that they consider equality before the law. The court must be consistent in its ruling and not act discriminatorily. Court fee exemptions would have to reflect those requirements. After the first reading in January of 2021 the new draft law was rejected by Parliament.

In 2020 a new draft amendment of judicial administrative order law was discussed. The amendment was passed at the beginning of 2021 and will come into force in spring 2021. The administrative courts adjudicate proceeding has only one instance, so an ordinary appeal is not possible. One may only file an extraordinary appeal in the form of an appeal in cassation. The Supreme Administrative Court decides this appeal and reviews both substantive and procedural flaws in the proceeding. Until now the court has found appeals in cassation in matters of international protection inadmissible if the affair does not have implications well beyond the personal interests of the applicant. The amendment shall aim at decreasing the high strain the court has had to bear and at fastening the judicial review of the decisions of the regional courts. Now the appeals in cassation in cases where a specialized judge has decided in the first instance and the case does not highly exceed the interests of the applicant will be found inadmissible. That includes simpler cases, such as offences charged with fines of up to 100 000 Czech crowns (approximately 3845 EUR), some foreign matters, permit to stay, etc. Ordinary people will lose the opportunity for their decision to be subjected to further revision. Their

access to justice might become more difficult. People might reach out more frequently to the Constitutional Court (not taking into consideration the admissibility of the constitutional complaint).

### *Digitalisation of the justice system*

In the Czech Republic a program called eGovernment has been operating for several years now. The program serves to administer public matters through various electronic devices. According to the Digital Economy and Society Index (DESI), which monitors the digital competitiveness of EU Member States, the Czech Republic is performing below average in electronic administration matters, even though digitalization is on the government's agenda. Progress has been very slow. At the beginning of 2020 came into effect the Act on the Right to Digital Services, which guarantees, amongst others, the right to the provision of digital services by public authorities. However, in connection with the digitalization of the judiciary system, there is a conflict between theory and reality. For example, to strengthen the right to information and transparency in the functioning of the courts, all decisions of the civil judiciary courts are supposed to be gradually published. Since almost no decisions were published, the Department of Justice issued guidance for the courts to publish at least the "important" decisions. Currently, it is mostly the highest court instances who publish their decisions: the Supreme court, the Supreme Administrative Court and the Constitutional Court. Because the instructions from the Department of Justice were not sufficient to ensure compliance with

the obligation to publish all judicial decisions, the Parliament debated a modification of the law governing the judicial system, which was passed after several amendments in January 2021. The law may strengthen the transparency of the judiciary system and the principle of legal certainty. A decree will determine which decisions must be published. Courts will have the obligation to publish their decisions from the second half of 2022. The draft law will now be deliberated on by the Senate.

### *Other*

According to the annual statistical report prepared by the Department of Justice on the state of the Czech judiciary system during 2019, there is a lack of 453 custodial court judges in full-time employment for 2020. The calculation results from the number of cases which were assigned to the custodial courts in the past 3 years. By 1 January 2020 the number of full-time employments was 367, which means that the need was covered by only 81 %. According to the Department of Justice, 14 national courts (approximately 16 %) reached or exceeded the calculated need and 31 national courts (approximately 36 %) narrowly missed the required level, by approximately one full-time employment. Most of the remaining courts missed the target by 1 to 3 full-time employments. The calculated need for custodial court judges says nothing about the quality and speed of individual judges and their ruling. At the moment the Department of Justice is communicating with each national and regional court and is trying to resolve how to improve the situation of missing custodial judges. They are also working on securing a

more personal and less formal attitude to minors in court proceedings (special interrogation rooms, methods and the attitude of judges).

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

### *Length of proceedings*

The Department of Justice publishes an annual report on the length of the judicial proceedings. The 2020 report is not completed yet but according to the 2019 annual report there has been a slight improvement in the length of individual court proceedings. For courts of first instance, the Czech Republic features at 7th place compared to other EU Member States regarding the length of the proceedings in civil and business matters. According to the last annual statistical report the average length of civil court proceedings has decreased by 13 days in comparison to 2018. The situation of the busiest courts got better as well, mostly those in North Bohemia and South Moravia. Vice versa, when regional courts decide matters in first instance, the average length of court proceedings has increased from 922 to 1046 days. In the first instance criminal agenda, court proceedings have prolonged from 526 to 571 days. The number of solved cases in administrative judicial proceedings have for the first time surpassed the number of new cases delivered, although the average length of 486 days for administrative proceedings by regional courts remains high. The Department of Justice wants to reflect this situation in the selection procedure of new judges. It also

wants to strengthen the administrative sectors of selected courts.

### *Execution of judgments*

During spring 2020 a new act came into effect regarding measures to contain the spread of COVID-19 (Lex COVID). The measures were passed in fast-track procedures under the state of emergency. The law aimed to improve the situation of people who suffered from the coronavirus. Many people lost their jobs or have lower incomes. The effect of this law on execution of the judicial rulings consists of a possibility of relief from the effects of the expiry of the period in the proceedings of execution of the judicial rulings and executional proceeding. The law also established a protected period from the moment of coming into effect until 30 June 2020. During this time the courts were not executing the judicial rulings or execution by sale of movable and immovable property.

### *Corruption of the judiciary*

The judge of the High Court in Prague, Zdeněk Sovák, is accused of having actively demanded bribes in exchange for a favourable decision of the party that would enrich him. The case is still under investigation.

## **Corruption**

### **General transparency of public decision-making**

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The Chamber of Deputies decided to adopt a law on the registration of beneficial owners, thanks to which some companies will no longer be able to hide their unclear ownership structure. The law was approved in early 2021. It defines, inter alia, who is referred to as the “beneficial owner”, namely the person who is the ultimate beneficiary or the person with ultimate influence over the company. The law further defines what information companies are required to disclose. This will help to ensure that anonymous companies do not receive subsidies or public procurement. If companies do not comply with the law and, for example, do not provide accurate data, they will face a fine of up to half a million Czech crowns.

### **Whistleblower protection**

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At the instigation of the new EU Whistleblower Protection Directive, the government prepared a draft law on the protection of whistleblowers, which was approved at the beginning of 2021 and submitted to the Chamber of Deputies. The law is drafted in a fundamentally positive direction and has the potential to ensure effective legal protection for both notifiers and people affected by the notification. However, there is no independent authority to which whistleblowers can turn. They will therefore have to contact the Ministry of Justice, which will forward the

notification to other competent authorities (e. g. inspections), which in practice may jeopardize the application of the law. On the positive side, notifications will not be archived in paper form for 10 years but will be archived digitally for 5 years.

### **Other measures to prevent corruption**

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At the end of 2020, the government approved an Action Plan to Fight Corruption for 2021 and 2022. The plan contains various measures and divides them into four areas - executive and independent executive, transparency and open access to information, efficient management of state property and civil society development. The plan also stipulates the individual government departments’ responsibilities for fulfilling specific tasks. Among the most important measures was the enforcement of the draft law on the protection of whistleblowers, which has already been adopted (see above) or the draft law on lobbying (which is now in the Chamber of Deputies).

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

### **Transparency of media ownership and government interference**

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A report by the European Federation of Journalists (EFJ) warns about the issue of ownership of private media in the hands of Czech

Prime Minister, Andrej Babiš. In an open letter from 17 November 2020, the president of the EFJ, Mogens Blicher Bjerregård, called for the need to protect democracy with a special focus on freedom, plurality and the independence of media that have been in danger for the past couple of years. According to the president, civil society relies on the freedom of press particularly during the COVID-19 pandemic since the media can be an easy source of new and reliable information. International experts stress the need to pay attention primarily to the funding of the media.

Prime Minister, Babiš owns up to 30% of the private media which has potential for conflict of interest. The media group Mafra is the public's main concern, due to its direct links to Andrej Babiš through his trust funds in the company Agrofert, which owns Mafra. The main media associated with Mafra are big newspapers such as Lidové noviny, Mladá fronta Dnes, news portal [iDNES.cz](https://www.idnes.cz) and [Lidovky.cz](https://www.lidovky.cz), radio stations Impuls and Rockzone and other magazines. The EFJ has highlighted the issue of media portraying Prime Minister Babiš only in a positive light with little critique. Simultaneously, the EFJ with support of the public demand the complete independence and freedom of media.

According to the international organization Reporters Without Borders, the Czech Republic has fallen from 13th to 40th place in the last 5 years (data available for 18/10/2019) when it comes to media independence. The EFJ and other independent international supervisory institutions that have investigated the situation in the Czech Republic have

concluded that the situation is worsening. To improve the situation in the future, there must be an increase of support for investigative journalism.

## ***Other issues related to checks and balances***

### ***Independent authorities***

At the beginning of 2020, the Chamber of Deputies elected a new Ombudsman, Stanislav Křeček, as former Ombudsman, Anna Šabatová, finished her mandate. However, immediately after his election, he began to express himself very controversially about public affairs, and in some cases, he publicly presented his own views, which were in conflict with the recognized (human) legal doctrine. More than 300 lawyers responded to his statements by signing an open letter, urging the Ombudsman to be aware of his role and responsibilities. The letter reacted, inter alia, to the Ombudsman's statements to ban the presence of fathers at childbirth under the emergency state present at the time (Křeček said it was not a human right, but only a fashion issue and would not address people's complaints). The letter also addressed the Ombudsman's approach to the interpretation and application of human rights. Signatories included influential personalities of the professional legal community, such as former Vice-President of the Constitutional Court Eliška Wagnerová, Senate Vice-President Petr Pithart, Constitutional Lawyer Jan Kysela

and Deans of three law faculties in the Czech Republic - Jan Kuklík, Martin Škop and Václav Stehlík. The Ombudsman responded to the letter on his website stating that he was surprised by the letter, as the attitude of his signatories was based on distorted and untrue messages spread by some media. However, in view of the several interviews given by the Ombudsman including on the points mentioned above, it is clear that his statement was false. Unfortunately, problems with the new ombudsman continue. Given that it is an independent function, it cannot be dismissed unless, for example, it engages in other gainful activities prohibited by the Ombudsman Act.

In 2020, a bill on the children's ombudsman was drafted. It was supposed to be on the agenda of the Chamber of Deputies in autumn, but due to the deteriorating epidemiological situation, its discussion was postponed. In the context of this law, there has been a wide-ranging debate on whether a children's ombudsman should be part of the current ombudsman's mandate, i.e. that his remit should be extended, as the Ombudsman's Office already acts as a supervisory body for the Convention on the Rights of the Child and its employees have the necessary know-how and experience, or whether to create an independent institution. In the end, it was decided that a separate institution should be set up, which would work closely with the current Ombudsman in order to build on existing good practices. Some activities will also be linked, for example, in the area of complaints.

## ***Other systemic issues affecting rule of law and human rights protection***

### ***Widespread human rights violations***

The Body of Social and Legal Protection of Children (ASLPC) is not acting in accordance with one of its core principles - to act in the best interest of a child according to Article 3 of The Convention on the Rights of the Child. In certain situations, ASLPC examines insufficiently what the best interest of the child is. Consequently, courts are ruling on the basis of ASLPC's statement, rather than considering the child's opinion or an opinion of its lawful supervisor. In these cases, the role of independent and impartial court is not present. This kind of court is often not trying to get to know the complex situation and is not deciding in the best interest of the child. Of course, there are courts and ASLPCs that work well together. However, it is necessary to pay attention to cases where the application of law is not delivered perfectly, especially regarding the cases of state institutions.

In one of the cases that the League of Human Rights (LLP) represented, the mother of a mentally ill daughter wanted a special assistant not only during her daughter's classes but also during her daughter's time in afterschool and on school trips. However, the school was not able to meet these conditions and contacted instead ASLPC. Straight after, ASLPC filed a motion to court to impose proper measures (in reality this means a removal of a child of

one's care) due to bad communication of the mother with the school. ASLPC took the highest possible measure that is available to resolve the situation without consulting it with LLP's client, which is directly against the law. For 2 years, the mother had to go through numerous proceedings and was under constant fear that her child would be taken away from her. The mother had to pay over 35 000 Czech crowns in legal services. In the end, the courts confirmed the ASLPC's mistake but ruled that the mother should get only 20 000 Czech crowns as compensation, much less than her expenses. The mother took the case to the higher courts but neither the Highest Court nor the Constitutional Court have decided in her favour.

In February 2020, the organization European Roma Rights Centre (ERRC) filed a complaint to the European Committee for Social Rights warning about persistent discrimination against Roma citizens. The ERRC stated that the Czech Republic failed to implement effective policies and laws and did not collect data, such as unemployment rates, of the Roma minority. The ERRC also highlighted that there is an excessive amount of Roma children in the state care and that the state did not carry out sufficient preventive measures that would lower the rate.

Currently a novelization of a law considering health institutes is being negotiated - it includes abolishing children's homes for children up to the age of three.

## ***Impact of COVID-19***

### ***Emergency regime***

The first state of emergency was declared on 12 March 2020 and ended on 17 May 2020. Right at the beginning of the first wave of the pandemic, there was a big problem with the lack of supplies of face-masks and other protective equipment, which the government gradually bought, but not transparently. It continued to do so for a month after the declaration of a state of emergency. Contracts with suppliers were not published in the contract register. The government issued crisis measures in the form of government resolutions on the basis of crisis law. Even before the declaration of the state of emergency, the Ministry of Health began issuing comprehensive anti-epidemiological measures based on the Public Health Protection Act. However, with some measures, the Ministry of Health exceeded its legal competences, which was criticized, for example, by the Municipal Court in Prague. The government stated that it was not liable for any damages beyond the flat-rate compensatory measures it had taken. Although the compensatory measure partially covers the incurred expenses of persons, it is not a complete compensation of damage. In addition, some of the measures taken were illegal. For example, in violation of the Constitution, the government postponed the Senate elections in Teplice, cancelled the meetings of municipal and regional councils and banned citizens from traveling outside the Czech Republic. The government did not properly justify its measures, did not examine whether they were

proportionate, and did not provide the public with appropriate information that would justify its decisions. The explanation was simply that this was a new, sudden and complex situation, which is very serious - but that is just a vague statement that cannot be used for a whole year. Following criticism from the courts and civil society, the government and the Ministry of Health have improved the rationale for individual measures, but still not in sufficient quality. Over the summer, measures to contain the virus became more relaxed. Unfortunately, in September, the number of infected people increased rapidly again, and a new state of emergency was introduced on 5 October. The government extended it several times. It lasted until 14 February 2021. The Chamber of Deputies did not approve its further extension. However, immediately after the government negotiated with the governors of all state regions, who later uniformly declared a new state of emergency, without passing it by the Chamber of Deputies. Thus, as of 15 February 2021, the government imposed a new state of emergency, which some experts, including Senate President Miloš Vystrčil, describe as unconstitutional.

### ***How courts responded to COVID-19 measures***

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Although the courts are rather critical of individual measures and have annulled some of them for illegality or insufficient reasoning, their decisions are often late due to the dynamic of the situation. Unfortunately, before a court decides that a particular measure is against the law and needs to be revoked,

a new one will come into effect. In one case, the Municipal Court in Prague annulled a measure concerning the obligation to wear face-masks, due to insufficient reasoning, but the decision was not effective until a few days after its announcement. The Court wanted to give the Ministry of Health time to create a better explanation for the measure. In the meantime, the Ministry of Health managed to repeal the measure and adopted a completely new one, which was not covered by the court decision. However, the reasoning remained the same - including a badly copied date from the previous measure.

### ***Measures affecting human rights that are not proportionate or legitimate***

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A student of the 6th year of elementary school defended himself against the obligation to wear a mask at school at all times. The boy has both medical and mental problems that make it impossible for him to wear a mask. However, the school insisted the boy wear a mask, as ordered by the Ministry of Health. The school threatened the mother with the Authority of child protection. When issuing the measure, the Ministry of Health did not respect earlier court instruction to find a solution for the negative health effects of wearing masks. The measure was (or still is, because even though the Ministry of Health issued a new one, the content is still the same) disproportionate and did not take into account the needs of people who cannot wear masks for various reasons. Also, the Ministry of Health did not deal with the best interests of the child under the

Convention on the Rights of the Child. The court has not yet ruled on the matter.

From 18 March 2020 to 15 April 2020, a measure of the Ministry of Health prohibited visits to medical facilities, including the presence of fathers at childbirth. The measure affected thousands of families who had a child during this period. One lawyer from Prague, in cooperation with the League of Human Rights, filed a motion to repeal this measure as disproportionate and illegal. Unfortunately, the Municipal Court in Prague rejected this proposal because the measure changed in a matter of days and the Ministry of Health was still issuing new ones (although the content was the same). A petition and an open letter to the Minister of Health were issued, but the situation did not change until mid-April. To this day, no court has ruled an interference with the fundamental rights of the families affected by the measure. In the second wave, however, a similar ban was not issued again.

### **Other**

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On 22 February 2021, the Constitutional Court issued a ruling (the complaint was submitted by a group of 63 senators), which partly annulled a government resolution on retail sales and the provision of services. Although the finding relates to measures adopted on 28 January 2021, the senators lodged their complaint as early as November 2020. Since then, the individual bans have changed, but the substance of the matter has remained the same. The court accused the government of issuing a blanket ban on retail sales and the provision

of services, but at the same time provided for almost 40 exceptions. Also, the government is not able to properly justify its decisions, to clarify why they are necessary, why there are no milder options and what the meaning of introducing so many exceptions is. The reason why arms, ammunition and flower shops are open, but clothing stores are not, remains unclear.

### ***Government's efforts to counter disinformation***

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Firstly, the Ministry of Health has started (from the second half of 2020) a clearly structured portal on their official websites as a way of fighting the spread of disinformation. The website offers a verified source with information related to the new restrictions at place as well as information about the epidemiologic development of the pandemic in the country. The Ministry of Foreign Affairs chose a very similar way to inform Czech citizens in case of their departure from and to the Czech Republic, where quarantine measures or required PCR testing may apply.

Secondly, the Centre of Fight against Terrorism and Hybrid Threats (CTHH) conducted an analysis of the ten most common disinformation narratives that appeared between March 2020 and May 2020 on quasi-media websites and social media. The findings have been published on the official websites of the Ministry of Internal Affairs where any citizen can see the disinformation statements and factual explanations backed up by official sources that show why these statements are wrong.

Notwithstanding the good intentions of the project, its real impact on civil society has been minimal. According to MEP Markéta Gregorová, who specializes in disinformation, at least 60 % of Czechs encountered disinformation from which 25% continued to believe the information even after they have been confronted with the truth.

Thirdly, the Ministry of Health launched a campaign (after almost a whole year of the pandemic) that is focused on exposing disinformation, lies, hoaxes and alternative facts regarding the vaccination against COVID-19. One part of the campaign is a video conducted by two social influencers who explain together with main epidemiological experts and doctors, some basic disinformation and how it is false by presenting a true scientifically established claim. A few marketing experts gave opinion on the campaign on the internet portal [Seznam.cz](https://www.seznam.cz) especially due to the odd character of the target group on which the government's campaign focuses when it published the project on the platform TikTok.

Overall, the effort produced by state institutions is very reactive, considering the circumstances of the spread of disinformation. There is an evident lack of preventive measures. This resulted in the mistrust of society towards officials and its institutions. The most alarming fact is that there is an apparent legislative vacuum in disinformation matters which impedes any further progress in fighting the spread of disinformation. It is vital to create a law that would stop disinformation harming society. Non-governmental and volunteering organizations stepped in to debunk COVID-19

myths and present facts in order to educate members of society.

## France // Vox Public



### Key concerns

- Security bills threaten free speech and the operations of civil society organisations
- Protests are met with violent disruptions and arbitrary detentions
- A weaker role for civil society organisations in the fight against corruption

### Corruption

#### Anti-corruption framework

France has a financial prosecutor's office which investigates cases of corruption and tax evasion.

A High Authority for the Transparency of Public Sphere was established in 2013 in the law. Ministers, parliamentarians, heads of public agencies and independent authorities must make a full declaration of interest and of assets failing which they can be sanctioned.

Associations which are fighting against corruption gained, by means of the 2013 law,

the possibility of requesting state approval to be able to become a civil party in lawsuits even if they are not directly victims of corruption. Three associations – Transparency International, Anticor and Sherpa – were granted this accreditation in 2015 and 2018.

The French law appears strong enough to prevent and fight corruption, but recent developments indicate how reluctant the government is to accept the critical role civil society organizations can play in the prevention of corruption.

Recently, the 3-year agreement granted to the association Anticor, which allowed it to be civil party in legal cases, was not renewed before its expiry date. Anticor sent its request for renewal of this agreement in October last year. But after four months, the government had not taken any decision. Instead of renewing the agreement, the government required Anticor to answer many questions, most of them without any link with the official criteria governing the granting of the « anticorruption » agreement. For the association Sherpa, the new agreement was also granted only very late in November 2019.

No specific measures were taken to our knowledge to address corruption risks in the context of the COVID-19 pandemic.

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## **General transparency of public decision-making**

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Initially, in 2014 the National Assembly set up its own register of interest representatives. Law n ° 2016-1691 of 9 December 2016 relating to transparency, the fight against corruption and the modernization of economic life entrusted the High Authority for the transparency of public life (HATVP) with the creation in July, 2016 of a digital directory of lobbies. The register of the Assembly therefore disappeared and was replaced by this directory. As a result, the lobbyists have since then been required to register themselves in a digital directory in which they must provide information on their organization, their lobbying actions and the resources devoted to them.

If they fail to respect the reporting obligations, the maximum penalties they can incur in are imprisonment for one year and a 15,000 EUR fine. Article 18-9 of the law sanctions the lack of spontaneous transmission, or of transmission at the request of the HATVP, of information provided by article 18-3 of the law. Article 18-10 covers the reiteration of ignoring reporting obligations. After the first violation of reporting obligations, HATVP addresses the lobby a formal notice. In case of subsequent violations occurring over the following three years, the lobby incurs the aforementioned sanctions.<sup>1</sup>

This directory aims to provide information to citizens on the relations between lobbyists and politicians. It permits to better understand the impact of lobbyists on the law and normative process.

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## **Whistleblowers protection**

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Law No. 2016-1690 of 9 December 2016 relating to the competence of the French Ombudsman for the guidance and protection of whistleblowers provides that the latter is responsible for “directing to the competent authorities any person reporting an alert under the conditions set by law, to ensure the rights and freedoms of this person”.

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

The bill called “Global Security Law” presented in the past fall, and in particular its article 24, represented a concerning development. The provision would have penalized any “malicious” dissemination of images of members of the security forces. This would have prevented journalists and others from filming the police in their interventions and may hamper the exposure of police violence. Following strenuous opposition and protests, the government dropped this provision as a way to “save” the law.

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1 Le courrier des maires et des élus locaux, Le nouveau cadre juridique de la représentation d'intérêt, numéro 320, page 11 (February 2018).

Article 18 of the draft “Anti-separatism law” (officially “Bill to strengthen, the respect of republican principles”), on which discussions are ongoing at the Parliament level, would have a very similar effect to article 24 insofar as it represses “the fact of revealing, disseminating or transmitting, by any means whatsoever, information relating to the private, family or professional life of a person allowing him to be identified or located, with the aim of exposing one or the members of one family to an immediate risk of injury to life, physical or mental integrity, or property”. The provision provides for a penalty of “5 years in prison and a fine of 75,000 EUR when the victim is a public official”. This provision constitutes in essence a new version of the abovementioned article 24 of the Global Security Law, which provided for restricting the dissemination of images of police officers in intervention - more precisely, it punishes the fact of broadcasting such images.

Civil society organisations are also worried about Article 8 of the draft “Anti-Separatism law”, which broadens the conditions for pronouncing the dissolution of an association. Previously, this was possible as a sanction to the holding of “armed demonstrations in the street”. From now on, dissolution will be imposed for “violent acts against people and property”. Many organizations such as Attac and Greenpeace do engage in spectacular public actions to raise awareness and attract attention of the public opinion. Against this background, the law is an obvious attack on freedom of speech and the actions of some civil society organisations.

Another article of this draft “Anti-Separatism law” considers that the content of certain comments on social networks, even when published by simple followers, and not by members of the association, could justify the dissolution of the latter. If the Parliament votes this bill (the vote is expected to take place in the 1st semester of 2021), and if the Constitutional Council does not censor it, this provision would become a serious threat to freedom of expression in France.

## ***Other issues related to checks and balances***

### ***Independent authorities***

The French independent authorities – French Ombudsman (“Rights Defender”), Consultative commission for human rights (CNCDH) and the General Controller of Places of Deprivation of Liberty – are genuinely independent institutions.

The CNCDH is a consultative for the Prime minister. It is composed of representatives of human rights organizations, academics and experts. The government may consult its members every time it needs an advice on decisions which may impact human rights and the rule of law. However, in reality, the government requests very rarely the opinion of this Commission.

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## ***Enabling framework for civil society***

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In October, a Coalition of French associations released the first report “Repressed citizenship”<sup>2</sup> to denounce more than 100 cases of attacks against associations (financial sanctions, judicial proceedings, administrative sanctions...). The Coalition for Association Freedoms issued a list of 12 recommendations in order to enlarge and protect the civic space CSOs need to implement their activities.

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## ***Freedom of association***

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So far, the right to create an association in France remains secured. The problem is how the State or local authorities try to limit the critical activities of civil society organisations.

In December 2020, the government approved the above-mentioned draft “Anti-separatism law”. This law, if it is voted by the Parliament (1st semester 2021) will have harsh consequences on freedom of association, opinion, expression and demonstration. The bill includes also several articles introducing new types of control over civil society organizations, with the risk to reinforce administrative and political arbitrariness. This bill will weaken sustainably the entire French associative fabric.

Unilaterally substituting the long-time negotiated “reciprocal engagement contract” (agreed between the State, the local authorities and associations in 2014) by a “Republican Engagement Contract” (CER), written by the executive power, with antagonistic interpretations, breaks with the spirit of a respectful and trusting dialogue with the associative sector. Each association benefiting of public subsidies or of an agreement with a specific Ministry, will be required to sign the CER. If this contract was not honoured, the grants would be withdrawn from them, and they would have to repay the money received previously. This economic sanction can have the effect of muzzling associations which are particularly critical towards the authorities.

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## ***Freedom of assembly***

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An investigation published on 8 February 2021 by the NGO Amnesty International<sup>3</sup> shows that “arrests” by the police of demonstrators who marched in Paris on 12 December 2020 to protest against the draft “Global security law” constituted “arbitrary detentions”.

In its report, Amnesty International affirms that “dozens of demonstrators were victims of arbitrary detentions” during this demonstration, which constitutes “a violation of the

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2 Vox Public, « A Repressed Citizenship », an inventory of the barriers against associative actions in France (October 2020).

3 Amnesty International, Climate of total insecurity: arbitrary arrests of peaceful demonstrators on 12 December 2020 in Paris (February 2021).

right to liberty and security of the person”. Some people victims of “arbitrary detentions” have decided to take legal action against the Paris police chief Didier Lallement, who is now subject of 40 complaints against him.<sup>4</sup>

The Minister of Interior, Gérald Darmanin, commented on the arrests on social networks. He suggested that the 142 people arrested were among the hundreds of “thugs” present in this demonstration. This position is at odds with the impartiality the highest level of the hierarchy of law enforcement is expected to maintain. Such behavior is likely to encourage the repetition of arbitrary arrests and detentions of demonstrators, rather than ensuring respect for the right to freedom of peaceful assembly. This is problematic as nearly 80% of these arrests did not ultimately lead to any prosecution and were therefore unfounded. These practices violate the right to freedom of peaceful assembly: they prevent those arrested from participating in protests. This also constitutes violations of the right to liberty and security of persons. The French authorities must stop intimidating protesters and change all laws that undermine the right to peaceful assembly.

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4 France Info, Sécurité globale : Amnesty International dénonce des « arrestations arbitraires » lors d’une manifestation à Paris (February 2021).

# Germany // Society for Civil Rights (GFF)



## Key concerns

- Following a ban of a leftist internet platform in 2017, the domestic intelligence service is laying eyes on a similar online medium, raising media freedom concerns.
- The expansion of police and intelligence powers pose a threat to journalists, in particular the use of spyware by security agencies.
- The civil society legislation is vague and incomplete, creating legal uncertainty and threatening the very existence of certain civil society organizations.
- Measures to contain the COVID-19 pandemic have severely restricted the right to freedom of assembly.

## Media environment and freedom of expression and of information

### Government interference

Self-regulation and supervision by the independent state regulatory authorities (Medienanstalten) are in danger of being undermined by recourse to security law. In January 2020, the Federal Administrative Court dismissed a lawsuit that was directed against the ban of the Internet platform “link-sunten.indymedia”.<sup>1</sup> The ban issued in 2017 by the Federal Ministry of the Interior was based on the Law on Associations, bypassing the strict provisions of the Interstate Treaty on Broadcasting and Telemedia.<sup>2</sup> The Federal Administrative Court did not examine the legality of the ban because the media activists did not admit to having operated the portal, probably for fear of prosecution. In July 2020, it became known that a similar online medium, the portal “de.indymedia” was listed by the domestic intelligence service (Federal Office for the Protection of the Constitution)

1 <https://www.bverwg.de/290120U6A1.19.0>

2 See the amicus curiae brief submitted by the Gesellschaft für Freiheitsrechte <https://freiheitsrechte.org/linksunten-indymedia-english/>

as a suspect case of extremist activities.<sup>3</sup> The medium is being discredited by the official report and the media activists concerned are at risk of surveillance.

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

The expansion of police and intelligence powers poses a threat to journalists. Journalists are at risk of becoming the target of surveillance measures, for example when they for professional purposes maintain contacts with criminals or suspects. Particularly problematic is the use of spyware by security agencies, which has been successively expanded in recent years and threatens the confidentiality of journalistic investigation.<sup>4</sup> Most recently, the Free Hanseatic City of Hamburg even authorized the domestic intelligence service (State Office for the Protection of the Constitution) to use spyware.<sup>5</sup> On a positive note, the Federal Constitutional Court issued a ruling concerning the powers of the foreign intelligence

service (Federal Intelligence Service). Following a complaint by various foreign journalists, the court declared that the Federal Intelligence Service's practice of worldwide mass surveillance is unconstitutional.<sup>6</sup>

### ***Enabling framework for civil society***

In Germany, many civil society organizations (CSOs) are facing increasing restrictions on their work. The reason for this is that German legislation determining which CSOs are benefitting from tax benefits is vague and incomplete. To qualify for tax benefits, CSOs must engage in certain activities, which are listed in Section 52 of the Fiscal Code (Abgabenordnung). However, the list does not include activities related to, for example, the promotion of peace, social justice, or comprehensive equality. CSOs working on these issues therefore have difficulty classifying their work under a recognized activity,

3 See the amicus curiae brief submitted by the Gesellschaft für Freiheitsrechte <https://freiheitsrechte.org/linksunt-en-indymedia-english/>

4 See <https://freiheitsrechte.org/home/wp-content/uploads/2019/11/2019-11-11-Aktualisierte-Uebersicht-neue-Polizeigesetze.pdf>

5 Sec. 8 para 12 Hamburgisches Verfassungsschutzgesetz. See the constitutional complaint filed by the Gesellschaft für Freiheitsrechte, <https://freiheitsrechte.org/verfassungsbeschwerde-polizei-verfassungsschutzgesetz-hh/>

6 See [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200519\\_1b-vr283517.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200519_1b-vr283517.html)

leading to practical challenges and serious consequences. For many CSOs, their financial existence depends on these tax benefits. The legal uncertainties increased since the decision of the Federal Fiscal Court that became known as the attac-ruling.<sup>7</sup> According to this ruling, a civil society organization must not engage in political matters more generally, but is only allowed to do so if strictly necessary to pursue one of the activities listed in the Fiscal Code. Political engagement is referred to as “influencing the formation of political opinion”. However, CSO are allowed to inform the public in a neutral way. Since it remains unclear as what is considered to be neutral in a democratic society, this ruling lead to enormous legal uncertainty for CSOs.

In addition, the BFH has confirmed its decision of 2019 in a new decision.<sup>8</sup> The new decision also added, albeit unnecessary for the decision at stake, that influencing public opinion must remain “in the background” even if such activity is necessary to pursue an aim recognized under Article 52 of the Fiscal Code. This massively restricts the scope of political activity for CSOs. If CSOs are found to have crossed the line by the fiscal authorities, they will lose their status as an organization that enjoys tax privileges also retrospectively.

As this constitutes a severe consequence for CSOs, many CSOs decided to refrain from public and political engagement. This denies citizens their right to collectively participate in their democracies through non-partisan associations. Moreover, the unclear legal situation increases the risk that political opponents will try to disrupt the work of CSOs by abusing this unclear legal situation. They have been many incidents in which a political party threatened to sue CSOs for their public engagement on illegitimate grounds.<sup>9</sup>

### ***Impact of COVID-19***

The COVID-19 pandemic poses particular challenges to the freedom of assembly, protected under Article 8 of the Basic Law. To contain the spread of the virus, since March 2020 the executive branch has been taking far-reaching measures that are virtually shutting down public life. In the so-called first lockdown in early March 2020, administrative court case law on freedom of assembly was still extremely restrictive. In this context, the courts mainly gave priority to health protection over freedom of assembly, in some cases without examining the concrete facts, i.e.

7 <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BFH&Datum=10.01.2019&Aktenzeichen=V%20R%2060%2F17>

8 See <https://www.bundesfinanzhof.de/de/entscheidung/entscheidungen-online/detail/STRE202110007/>

9 See for instance [https://www.deutschlandfunk.de/parlamentarische-anfragen-afd-will-demokratie-vereinen.862.de.html?dram:article\\_id=408111](https://www.deutschlandfunk.de/parlamentarische-anfragen-afd-will-demokratie-vereinen.862.de.html?dram:article_id=408111)

whether the planned demonstration would in fact lead to an increase of infections and pose a real risk to the right to health. Thereby they granted the executive branch wide-ranging and unchecked discretionary powers.<sup>10</sup> In several other instances, the police cracked down on demonstrations although they were fully complying with the general regulations on the prevention of COVID-19 such as keeping the distance of several meters between people or wearing protective masks.<sup>11</sup>

This line of case law only significantly changed after two decisions by the Federal Constitutional Court<sup>12</sup> declared blanket bans on the freedom of assembly unconstitutional. Competent authorities and courts must always evaluate each case and examine whether restrictions on the right to protest or bans are proportionate in the specific case. While doing so, they must take into account the special significance of Article 8 of the Basic Law as an indispensable functional element of a democratic polity.<sup>13</sup> The Federal Constitutional Court explained that the authorities also cannot rely on general and blanket consideration

that can be held against any assembly.<sup>14</sup> For instance, authorities cannot prohibit an assembly based on a general risk that an assembly may attract more people resulting increased risk of infection. Instead, they must take into account the specific circumstances of the individual case and whether the organizers of the assembly put sufficient safety measures in place such as wearing protective masks or refraining from sending out public invitations. A ban can only be the last resort. At the same time the Court clarified the duty of the state to cooperate which means that the state must assist in developing safety concepts and to ensure that the protest can happen as planned.

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10 See Cf. VG Neustadt, decision of 02.04.2020, ref. 4 L 333/20.NW; VG Hannover, decision of 27 March 2020 - 15 B 1968/20; VG Dresden, decision of 30 March 2020 - 6 L 212/20

11 For more details and specific cases, see <https://freiheitsrechte.org/corona-und-zivilgesellschaft/#versammlungs-freiheit-kurzstudie>

12 See BVerfG, decision of April 15, 2020 - 1 BvR 828/20; decision of April 17, 2020 - 1 BvQ 37/20

13 See BVerfG, decision of May 15 1985 - 1 BvR 233/81, 1 BvR 341/81 69, 315 - Brokdorf

14 See BVerfG, decision of April 17, 2020 - 1 BvQ 37/20, fn. 23

# Hungary // Hungarian Civil Liberties Union (HCLU)



## Key concerns

- Concerns about the independence of the judiciary persist
- Corruption still widespread, even more concerning during pandemic
- Toxic media environment: no independent media authority and greatly reduced access to information
- Civil society space: the 2017 NGO law is still in force
- Government taking advantage of the emergency regime to further weaken rule of law and civil liberties

This contribution is meant to briefly highlight some of the most relevant concerns as regards the state of the rule of Law in Hungary. HCLU has contributed to a full report on the situation in Hungary jointly drafted by a coalition of national civil society organisations, which is being submitted to the European Commission and published as a standalone report.

## Justice system

Serious concerns about the independence of the judiciary are still valid. The most important new development in this field deepened the distrust among judges: the new president of the Kúria (the supreme court) was appointed despite the objection of the National Judicial Council. The new chief judge, which is very close to the government's ruling party, does not have a proven record of experience in the judiciary. Before his appointment, two acts of parliament were amended in order to allow for him to be elected. The laws were tailored to his personal parameters. Last year, the rule of law report of the European Commission mentioned these amendments as possible threats to judicial independence; the fact that Varga was elected to be the new chief judge is a piece of evidence that such concerns were well-founded.

## Corruption

Hiding the misuse of public funds became easier in 2020 as an (intentional) outcome of an amendment to the Fundamental Law.

Over the past years, the government has outsourced national assets to foundations where the level of possible control over the use of these funds are much lower. Recent amendment to

the Fundamental Law cemented this practice: they made it nearly impossible for future governments to change or reverse this since this will need a two-thirds majority in Parliament.

The same amendments to the Fundamental Law narrowed the notion of “public funds”, further restricting the transparency of the use of public funds: the funds lose their public nature if they are going through non-governmental entities (companies, foundations). This amendment was already ruled upon in a judgment as preventing the transparency of certain transactions. Now the Fundamental Law itself enables those who want to hide corruption to do so.

During the first state of emergency (March–June 2020), a government decree defined a number of projects as especially important for the national economy and removed administrative restrictions for their implementation, while an act of parliament put some state properties into the hands of pro-government oligarchs. In another questionable step, the cabinet classified the details of a huge infrastructural project, the 5.4 billion USD Chinese-financed railway line. According to a report of the Corruption Research Center Budapest (CRCB), business circles close to PM Orbán won more public money during the epidemic without competition on an extremely high percentage.<sup>1</sup>

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

A recent research report carried out by HCLU examining the relationship between independent media and public authorities during the coronavirus pandemic in Hungary<sup>2</sup> shows that:

- Public information on the coronavirus pandemic has been centralized and restricted. Restrictions are most detrimental to independent media that provide daily news.
- Other sources of information have also been narrowed. Potential information providers are intimidated. Retaliation threatens those who leak information to the independent press.
- The amendment of the legal provisions of scaremongering as a criminal offence affects the majority of journalists.
- Discrediting independent media has been intensified and become organized. There is a regular smear campaign carried out in the public service media against critical voices, in particular against the independent media outlets, which immediately sweeps through the propaganda media machine.

Some further developments regarding freedom of information can be reported since the above-mentioned research: data on the pandemic are not available to the public; the national strategy on vaccination is equally

1 The report is accessible here: <http://www.crcb.eu/?p=2464>

2 See [https://tasz.hu/a/files/coronavirus\\_press\\_research.pdf](https://tasz.hu/a/files/coronavirus_press_research.pdf)

not available to the public. The deadline for providing public information related to the pandemic was extended from 15 (+15) days to 45 (+45) days, and the authorities are taking advantage of this new opportunity for not providing timely information.

Additional developments regarding media freedom concern the politically imbalanced media authority's decision-making, which has become obvious when it selectively enforced laws against different media outlets: the very same facts and laws let them prolong the concession for using a radio frequency of a radio station while this was not the case for another radio station critical to the government. This is a piece of evidence that an authority meant to be impartial makes arbitrary decisions if the law enables them to do so.

### ***Enabling framework for civil society***

Hungary failed to comply with the judgment of the court of Justice of the EU (CJEU) no. C-78/18 (Transparency of associations). On the contrary, in 2020 it started to enforce the disputed law through a public foundation distributing EU funds, TEMPUS foundation. The foundation decided not to require compliance with this disputed law anymore, after the European Commission started infringement proceedings against Hungary for its failure to implement the CJEU judgment.

### ***Impact of COVID-19***

The main concerns regarding COVID-19 are related to the withholding of information, mentioned above. This led to the public's mistrust towards the government's handling of the pandemic, including the vaccination campaign, with detrimental consequences including for the fight against the virus. As a recent example, Hungarian authorities licensed Synopharm vaccine (originated from China), by-passing the European authorization process, without available documentation of the vaccine for the medical professionals, and just after the prime minister proclaimed the political expectation towards this authority to grant the licence to it. When a Member State of the EU declared that they will allow travellers to enter the country only if they are vaccinated with a vaccine that has a European licence, Hungary changed its regulation on the "vaccination clearance": it will not contain the name of the vaccine the traveller got.

Between 11 March and 18 June 2020 and since 3 November 2020 a state of emergency has been declared. The parliament is working but the Government rules by decree. It means that the Executive Branch is entitled to issue government decrees which may suspend the application of certain Acts of Parliament, derogate from the provisions of Acts of Parliament, and that the exercise of fundamental rights can be suspended or can be restricted even beyond a proportional limit. Government decrees affected several fundamental rights (e.g., a general ban of demonstrations is in place, transparency of data of public interest is more limited, health care

professionals are not allowed to quit their job), and sometimes these decrees are not clearly serving the fight against the virus. The government exploited the opportunities created by the special legal order and the political environment to the fullest extent. And when the state of emergency was lifted in the summer, several elements introduced during the special state remained in place (including, e.g., alterations to public law that further weakened constitutional and parliamentary control over the government). The government has created a new type of special legal order under which there is much less oversight over their activity; measures strengthening the influence of government-friendly economic actors and thus the ruling party's economic power also remained in place; steps aimed at severely restricting the financial space for manoeuvre of opposition-led local municipalities were not revoked; and similarly the decisions serving the purpose of silencing critical voices.

# Ireland // Irish Council for Civil Liberties (ICCL)



- The passage of COVID-19 measures lacked transparency and have restricted freedom of assembly.

## Key concerns

- Controversial appointment of new Supreme Court Judge has undermined trust in the judiciary
- Access to justice, length of proceedings and low resources of the judiciary remain important issues
- The Electoral Act restricts the work of civil society organizations, in particular access to funding

## Justice system

### Judicial independence

#### Appointment of judges

The Judicial Appointments Commission Bill of 2017<sup>1</sup> lapsed following the Irish General Election on 8 February 2020.<sup>2</sup> A General Scheme for a new Judicial Appointments Commission Bill 2020<sup>3</sup> has been published but has not yet been progressed through the Dáil (Parliament). Initially, the Minister for Justice,

1 See <https://www.oireachtas.ie/en/bills/bill/2017/71/>

2 See [https://data.oireachtas.ie/ie/oireachtas/electoralProcess/electionResults/dail/2020/2020-05-01\\_33rd-dail-general-election-results\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/electoralProcess/electionResults/dail/2020/2020-05-01_33rd-dail-general-election-results_en.pdf)

3 See [http://www.justice.ie/en/JELR/Pages/General\\_Scheme\\_of\\_the\\_Judicial\\_Appointments\\_Commission\\_Bill\\_2020](http://www.justice.ie/en/JELR/Pages/General_Scheme_of_the_Judicial_Appointments_Commission_Bill_2020)

Helen McEntee proposed that there should be no pre-legislative scrutiny of the Bill but this proposal was rejected by the Oireachtas Justice Committee.<sup>4</sup> This Bill is a priority for the Department of Justice.

The process by which the judiciary are appointed came under scrutiny in November 2020<sup>5</sup> when McEntee was required to answer questions before Parliament in relation to the appointment to the Supreme Court of Mr Justice Seamus Woulfe.<sup>6</sup> The current process involves consideration of (i) candidates which come through the Judicial Appointments Advisory Board, (ii) expressions of interest by current judges and (iii) other qualified judges who have not expressed an interest. The Minister for Justice then chooses one individual, discusses this with party leaders within Government and brings this name before Cabinet for approval. This process has

been criticised in Parliament for its lack of transparency.

*Bodies tasked with safeguarding the independence of the judiciary*

A Judicial Council was formally established on 17 December 2019 made up of the entire Irish judiciary. The first meeting of the Council took place on 7 February 2020 where several committees were established, including committees for a judicial training, conduct, sentencing guidelines and personal injury awards guidelines<sup>7</sup> and non-judicial members were appointed to the committees.<sup>8</sup>

The Judicial Council have met twice in February to agree on new personal injury guidelines drawn up by the Personal Injury Committee. Both meetings were postponed due to the Council's lack of agreement. Memos and letters were circulated from members of

4 See for instance <https://www.independent.ie/irish-news/politics/tds-block-helen-mcentees-request-to-bypass-scrutiny-of-controversial-bill-to-reform-appointment-of-judges-39988374.html>

5 See <https://www.oireachtas.ie/en/debates/debate/dail/2020-11-19/17/?highlight%5B0%5D=woulfe&highlight%5B1%5D=s%C3%83%C2%A9amus&highlight%5B2%5D=woulfe&highlight%5B3%5D=s%C3%83%C2%A9amus&highlight%5B4%5D=woulfe>

6 See <https://www.oireachtas.ie/en/debates/debate/dail/2020-11-26/32/?highlight%5B0%5D=s%C3%83%C2%A9amus&highlight%5B1%5D=woulfe>

7 See <https://judicialcouncil.ie/about-the-judicial-council/>

8 See <https://www.lawsociety.ie/gazette/top-stories/lay-members-of-key-judicial-council-committees-named/>

the judiciary in strong opposition to the guidelines. The guidelines are expected to pass but they appear to have caused division within the Council.<sup>9</sup>

#### *Accountability of judges and prosecutors*

Under the current regime, there is no formal process for disciplining members of the judiciary. The Judicial Council seek to remedy this through their Judicial Conduct Committee, which will be established in 2021.

In August 2020, Supreme Court Judge Seamus Woulfe attended a dinner at the Oireachtas Golf Society with more than 80 guests, including high-profile politicians, in apparent breach of public health guidelines. Several individuals resigned from their positions in government as a result of this incident. But Mr Woulfe did not. The Chief Justice, Frank Clarke, wrote to former Chief Justice and retired Judge, Susan Denham, to conduct an informal review of the incident and the behaviour of Mr Woulfe. This process, which had no statutory basis, was consented to by Mr Woulfe. The “Denham Report” was published on 29 September 2020.<sup>10</sup> It found that Mr Woulfe had failed to consider whether, as a Supreme Court Judge,

his attendance at the dinner might amount to an impropriety, or might create the appearance of an impropriety, to reasonable members of the public. However, the report found that it would be unjust and disproportionate to seek Mr Woulfe’s resignation.

In subsequent correspondence between the Chief Justice and Mr Woulfe, the Chief Justice expressed the view that Mr Woulfe should resign. Judge Woulfe refused but offered not to sit on the Court until February and to sit on the High Court in the interim to assist with the case load there. It was suggested by media reports that an informal resolution was reached in which Judge Woulfe would not sit on the Court for three months.<sup>11</sup> It is unclear to what the pair eventually agreed, but Judge Woulfe did not sit on the Supreme Court until February 2021 and has only sat to hear leave to appeal matters as opposed to substantive hearings. Judge Woulfe has sat on the Court of Appeal since February 2021. It is unclear when he will resume normal duties.<sup>12</sup>

An attempt to impeach Judge Woulfe was unsuccessfully pursued by opposition parties in government however, as the standard, set out in Article 35.4 of the Irish Constitution

9 See <https://www.irishlegal.com/article/judges-dissent-from-proposed-personal-injury-guidelines>

10 See <https://judicialcouncil.ie/assets/uploads/documents/report-1-10-20.pdf>

11 See <https://www.rte.ie/news/2021/0204/1195010-justice-seamus-woulfe-supreme-court/>

12 See <https://www.irishtimes.com/news/crime-and-law/s%C3%A9amus-woulfe-sits-for-first-time-as-supreme-court-judge-today-1.4475403>

which states that a Judge can only be removed “for stated misbehaviour or incapacity”, was viewed as too high for a case of this nature. There is currently no formal disciplinary process for members of the judiciary except for impeachment.<sup>13</sup>

#### *Remuneration for judges and prosecutors*

Judicial pay was increased by Parliament by 2% on 8 December 2020, restoring it to the same level as it was prior to the financial crisis in 2008. Judicial pensions were also restored to previous levels. Parliament were legally obliged to make the increases on account of the Public Service Stability Agreement.<sup>14</sup>

#### *Public perception on the judiciary*

There has been intense public debate surrounding both the appointment of Seamus Woulfe to the Supreme Court, and his attendance at the Oireachtas Golf Society dinner in August 2020 (see above). The media coverage of both the event, the subsequent fallout between

the members of the Supreme Court and Mr Justice Woulfe, and the attempted impeachment by opposition parties<sup>15</sup> are likely to affect the public’s perception on the independence of the judiciary.

*In November 2020, further media attention focused on the appointment of Mr Justice Woulfe. Members of Parliament criticised the lack of transparency and some claimed that judiciary appointments are entirely political and lack independence.<sup>16</sup> This incident may further harm the reputation of the judiciary’s independence.*

### **Quality of justice**

#### *Accessibility of courts*

The current civil legal aid system in Ireland is very restrictive and requires that the applicant have a disposable income of less than 18,000 EUR per year. There are limited exceptions to these strict means requirements, such as cases

13 See <https://www.irishtimes.com/news/politics/motion-seeking-to-impeach-woulfe-to-be-moved-in-d%C3%A1il-this-week-1.4416238>

14 See <https://www.forsa.ie/other-benefits/pay-and-conditions/national-agreements/>

15 See <https://www.rte.ie/news/politics/2020/1201/1181699-politics-dail/>

16 See <https://www.oireachtas.ie/en/debates/debate/dail/2020-11-19/17/?highlight%5B0%5D=woulfe&highlight%5B1%5D=s%C3%83%C2%A9amus&highlight%5B2%5D=woulfe&highlight%5B3%5D=s%C3%83%C2%A9amus&highlight%5B4%5D=woulfe>, <https://www.oireachtas.ie/en/debates/debate/dail/2020-11-24/3/?highlight%5B0%5D=s%C3%83%C2%A9amus&highlight%5B1%5D=woulfe>

which involve child protection and family law.<sup>17</sup> This system has been criticised for being prohibitive and a barrier to access to justice by a number of bodies such as the Public Interest Law Alliance (PILA) and Free Legal Advice Centres (FLAC), as well as being subject to criticism by Chief Justice Frank Clarke.

In the Justice Plan 2021<sup>18</sup> recently published by the Department of Justice, the Minister for Justice has proposed to expand the civil legal aid system to improve access to justice.

#### *Resources of the judiciary*

In 2020, the European Commission for the Efficiency of Justice published its annual report on the efficiency of the legal systems in each Member State. According to the report, Ireland spent just 0.1% of GDP on its judicial system in 2018, the lowest of the 46 jurisdictions reviewed in the report. The report also showed that Ireland still has one of the lowest number of judges per capita, with only 3.3 judges per 100,000 people compared to an average of 21.<sup>19</sup>

In October 2020, the Government announced it was allocating a substantial budget to the Department of Justice resulting in a total budget of just over 3 billion EUR, a marked increase from previous years. These funds have been allocated across the various sectors, including the Courts Service, the Prison Service and the Gardaí (the national police service). Minister for Justice, Helen McEntee, has stated that the increased budget will allow for the modernisation and reform of the legal system.<sup>20</sup>

#### *Training of justice professionals*

At present, there is no formalised training provided to judges when they are appointed to the bench. Instead, the education of members of the judiciary has been carried out by the Association of Judges of Ireland Committee for Judicial Studies. Due to a lack of funding, this Committee organises only one annual training day for the judges of each Court and an additional judicial conference day which all judges attend once a year. Judges are also

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17 See <https://www.legalaidboard.ie/en/our-services/legal-aid-services/how-do-i-apply-for-civil-legal-aid/>

18 See [http://www.justice.ie/en/JELR/Department\\_of\\_Justice\\_Action\\_Plan\\_2021.pdf/Files/Department\\_of\\_Justice\\_Action\\_Plan\\_2021.pdf](http://www.justice.ie/en/JELR/Department_of_Justice_Action_Plan_2021.pdf/Files/Department_of_Justice_Action_Plan_2021.pdf)

19 See <https://rm.coe.int/evaluation-report-part-2-english/16809fc059>

20 See <http://www.justice.ie/en/JELR/Pages/PR20000237>

selected to attend conferences and international training events relevant to their area of work.<sup>21</sup>

The Judicial Studies Committee will be taken over by the Judicial Council on foot of the Judicial Council Act 2019. The purpose of the committee is to ensure a more consistent and high-quality educational programme for members of the judiciary.

#### *Digitalisation of the justice system*

The digitalisation of the Courts system in Ireland has become a priority of the Courts Service and the Department of Justice since the beginning of 2020. Prior to the pandemic, the Courts Service announced the launch of the “Modernisation Programme”, a 2-year programme which seeks to improve the use of technology within the Courts and to reduce the time and cost of accessing legal services.<sup>22</sup> The Courts Service IT system was allocated 5 million EUR in the Department of Justice budgetary plan.<sup>23</sup>

The pandemic has expedited the use of technology in the Courts, with the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 making provision for the use of videolink in lieu of live hearings. In civil matters,

the judiciary facilitate hearings and motions online via a platform called “Pexip”, except for jury trials and non-urgent personal injury matters. In criminal matters, accused persons can be arraigned over videolink and, if in custody, can attend any hearings and applications via Pexip.

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

#### *Length of proceedings*

In April 2020, the European Court of Human Rights (ECtHR) delivered its decision in the case of *Keaney v Ireland*. In that case, the Applicant claimed that the delay of over 11 years between the date of initiation of proceedings to the date of judgment of final appeal in the Supreme Court was excessive. The ECHR found that this delay was excessive and a violation of Article 6 of the European Convention on Human Rights. The Court further found that there was no effective remedy for delay of this nature in the Irish courts. The Court noted that Ireland has persistently not met its obligations in this regard and that lengthy delays in litigation were systemic. Although the concurring opinion of Judge O’Leary noted that some progress had been made with

21 See <https://aji.ie/supports/judicial-education/>

22 See <https://www.courts.ie/acc/alfresco/8b21c2bf-4d7f-453f-8703-80a91aa063d2/CourtsServiceNewsDec20.pdf/pdf>

23 See <http://www.justice.ie/en/JELR/Pages/PR20000237>

the introduction of case management and the expansion of the Court of Appeal, Judge O’Leary was still of the view that Ireland is not doing enough to meet its obligations under Article 6.<sup>24</sup>

## **Corruption**

### ***Measures to prevent corruption***

The Public Sector Standards Bill 2015,<sup>25</sup> which intended to provide a consolidated ethics standard for all public officials, lapsed on 14 January 2020 after the dissolution of the Dáil. The Council of Europe’s Group of States against Corruption (GRECO) published an Evaluation Report for Ireland in 2014 in which it recommended the establishment of a new consolidated legal/ethical framework for Ireland.<sup>26</sup> In the annual report of the Standards in Public Office Commission (SIPO) – an independent body that oversees ethics, electoral, state finance and lobbying legislation – published in June 2020, the Commission

referred to GRECO giving Ireland a rating of “globally unsatisfactory” partly as a result of the delay in enacting the Bill. The Commission have called for the immediate establishment of an ethical framework akin to that set out in the 2015 Bill as a matter of urgency.<sup>27</sup>

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

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

The Future of Media Commission was set up by the Government in September 2020 to examine the future of the media in Ireland, including Ireland’s public service broadcasters, commercial broadcasters, print and online media platforms. The Irish Council for Civil Liberties (ICCL) has made a submission to the Future of Media Commission.<sup>28</sup>

In this submission they highlighted:

24 See [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-202411%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-202411%22]})

25 See <https://www.oireachtas.ie/en/bills/bill/2015/132/>

26 See [http://www.justice.ie/en/JELR/Greco%20Eval%20IV%20Rep%20\\_2014\\_%203E%20Final%20Ireland.pdf/Files/Greco%20Eval%20IV%20Rep%20\\_2014\\_%203E%20Final%20Ireland.pdf](http://www.justice.ie/en/JELR/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf/Files/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf)

27 See <https://www.sipo.ie/reports-and-publications/annual-reports/2019-SIPOC-AR-English.pdf>

28 See <https://futureofmediacommission.ie/wp-content/uploads/286.-ICCL-Submission.pdf>

- The importance of a free flow of accurate and timely information from government to the public service media to engender trust in the reliability of news from public service outlets. ICCL argued that the participation from all sectors of the community in public service programming, with a focus on including traditionally marginalised groups, is vital to ensure inclusion, diversity and equality. ICCL highlighted the importance of S.42 of the Irish Human Rights and Equality Commission Act 2014 which imposes a statutory obligation on public bodies to perform their functions in guiding considerations of equality, non-discrimination and human rights.
- The economic benefit to public broadcasters that comes from strong data protection. ICCL and the Dutch national broadcaster NOP, found new economic evidence that strong data protection creates a level playing field on which publishers can finally compete with Google and Facebook and protect their businesses from other digital media market hazards. Strong data rights enforcement also removes conditions for disinformation.
- Urgent law reforms that are needed to protect the freedom of all media, including the public service media, from undue interference. This includes reforming the Defamation Act 2009; properly legislating for hate speech in a way that protects

freedom of expression; and regulating social media content in a manner that protects but doesn't disproportionately interfere with the rights to free expression and information.

ICCL considers that the Defamation Act 2009 has a number of flaws that together constitute an ongoing disproportionate impact on the right to freedom of expression and have a chilling effect on expression, public debate and the right to participate in public life, including for the media.<sup>29</sup>

### ***Framework for the protection of journalists and other media activists***

The protection of journalistic sources was recently considered by the High Court of Ireland in the case of *Corcoran v An Garda Síochána & Ors*.<sup>30</sup> In that case the plaintiff, a journalist, attended an event in which a gang of masked individuals assaulted several individuals who had been securing a dwelling house from which the occupants had earlier been evicted following a court order. The plaintiff took videos on his phone of the incident and posted them online. The Gardaí wished to analyse the phone of the plaintiff for the purposes of the investigation, but the plaintiff refused to hand the phone over to

29 For a full exposition of ICCL's concerns see submission to the Department of Justice on reform of the Defamation Act, <https://www.iccl.ie/wp-content/uploads/2021/01/ICCL-Defamation-Act-Submission-3.4.20.pdf>

30 See [https://www.courts.ie/acc/alfresco/f2600e9b-f6b2-4a68-a580-3d6fae359a81/2020\\_IEHC\\_382.pdf/pdf](https://www.courts.ie/acc/alfresco/f2600e9b-f6b2-4a68-a580-3d6fae359a81/2020_IEHC_382.pdf/pdf)

the Gardaí for fear that it would reveal his journalistic sources. The Gardaí obtained a search warrant for the home of the plaintiff; the only item seized during the search was the plaintiff's phone. The plaintiff initiated proceedings, arguing that there was no formal legislative structure in place for an individual to challenge a warrant based on journalistic privilege.

The High Court held that the phone could lawfully be retained and searched by the Gardaí pursuant to the warrant. However, it limited the search to strict terms. The Court also stated: “the public interest in the protection of journalistic sources is outweighed by the countervailing public interest in ensuring that all relevant evidence is available in the pending criminal proceedings, and the related public interest in the proper investigation of criminal offences.”

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

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### *Abuse of criminalisation of speech*

Ireland, in a referendum in 2018, voted with 64.85% in favour of removing the prohibition on blasphemy from the Constitution.<sup>31</sup> The offence was officially abolished in January

2020 after the enactment of the Blasphemy (Abolition of Offences and Related Matters) Act 2019.<sup>32</sup>

### *Censorship and self-censorship*

The General Scheme of the Online Safety and Media Regulation Bill was published in January 2020.<sup>33</sup> The Bill is a substantial overhaul of the regulation of online content and platforms. The Bill establishes a Media Commission, including an Online Safety Commissioner who will have extensive powers to oversee the enforcement of the new regulations and to impose financial sanctions on a variety of online platforms who do not regulate their content in accordance with the new provisions.

## ***Other issues related to checks and balances***

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

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#### *Transparency of the legislative process*

Transparency of the legislative process with regards to the passage of new COVID-19

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31 See <https://www.rte.ie/news/2018/1027/1007130-blasphemy-referendum/>

32 See <https://data.oireachtas.ie/ie/oireachtas/act/2019/43/eng/enacted/a4319.pdf>

33 See <https://www.gov.ie/en/publication/d8e4c-online-safety-and-media-regulation-bill/>

pandemic restrictions has been a serious issue in Ireland. Once passed, the contents of legislation and regulations are not communicated in a clear and transparent way, including the intentional “marketing” of certain legal requirements to “obfuscate what was a legal requirement and what was not to ensure greater compliance with the wider public health guidelines”.<sup>34</sup>

A report released by the Irish Human Rights and Equality Commission (IHREC) in February 2021 finds that the Irish Government has persistently blurred the lines between legal requirements and public health guidance during its response to the pandemic.<sup>35</sup> The report finds that human rights and equality scrutiny has been all but side-lined in the government’s response to the pandemic.<sup>36</sup> There has been a significant dearth of sufficient legislative scrutiny surrounding COVID response measures, with legislation being steamrolled through the legislature on a regular basis.

#### *Rules and use of fast-track procedures*

The formulation, communication and enforcement of emergency legislation, regulations, and policing powers due to the COVID-19 pandemic have been a particular concern

during the reporting period. There has been a significant delegation of power to the Minister for Health, who has made 67 sets of regulations since the start of the pandemic. ICCL has repeatedly highlighted the need for emergency powers and procedures to be time-bound, necessary, and proportionate. Ireland’s emergency legislation had an initial sunset clause of 9 May 2020, which could be extended “in the public interest” by the Minister for Health – an incredibly broad threshold for extension.

Since the advent of the emergency legislation and the transfer of power to the Minister for Health, various regulations (such as limits on travel within the state) have been applied retrospectively and not published for several days after they were made.

In many cases the government has sought the quasi-legal enforcement of public health advice, which is oftentimes indistinguishable from actual legal regulations. This has the potential to erode the principle of legality in Ireland.

34 See page 17 <https://www.iccl.ie/wp-content/uploads/2020/09/ICCL-Submission-to-Covid-Committee-7-Sept-2020-.pdf>

35 See <https://www.ihrec.ie/documents/irelands-emergency-powers-during-the-covid-19-pandemic/>

36 See <https://www.ihrec.ie/app/uploads/2021/02/Irelands-Emergency-Powers-During-the-Covid-19-Pandemic-25022021.pdf>

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

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In December 2020, the Minister for Justice welcomed the submission of a report by a Review Group set up to review and make recommendations to reform the administration of civil justice in the state. The Review Group made over 90 recommendations in order to make the civil justice system more efficient and easier for people to access.

## ***Enabling framework for civil society***

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

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The emergency COVID-19 legislation (provided for by amendments to the Health Act 1947), and the regulations introduced under the Act have significantly restricted the rights to freedom of assembly and freedom of association in Ireland. Several regulations restricting movement within the state have been introduced since April 2020. Under the Irish Constitution and the ECHR, all individuals have the right to gather in public. Limitations to these rights must be proportionate, even in times of public emergency. This requires that not only must these powers be time bound but each time they are used a proportionality assessment must be conducted. The fact that

these restrictions must be necessary and proportionate is not explicit within the legislation. There is a lack of strong safeguards within the legislation to prevent a future government from retaining these restrictive powers.<sup>37</sup>

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### ***Access to funding***

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The Electoral Act in Ireland poses significant restrictive regulatory burden for civil society. The wording in the Electoral Act used to define ‘political purposes’ (which determines what groups, including community groups, are subject to strict spending rules) is so broad and vague that they can be applied to almost every community group in the country. As a result, any community group (from a large charity to a local Tidy Towns group or community garden) which calls on the local or national government to improve conditions for Irish people, could be found in breach of the Electoral Act if someone were to donate more than 100 EUR to them. A wide range of civil society organisations working on issues as diverse as education and environmental rights have been directly impacted.

The human rights issues presented by the Electoral Act and the implementation of the Act by the Standards in Public Office Commission were highlighted by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association and the UN Special Rapporteur on the situation of

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37 See page 4, <https://www.iccl.ie/wp-content/uploads/2020/03/ICCL-analysis-emergency-COVID19-legislation.pdf>

human rights defenders in a communication to Ireland in December 2020.<sup>38</sup>

## **Other systemic issues affecting rule of law and human rights protection**

### **Failure to protect**

The December 2020 publication of the final report from the Commission of Investigation into Mother and Baby Homes highlighted the widespread human rights violations committed by the church and state during the 20th century, including forced labour and adoption, neglect, and more. The state failed to protect vulnerable women and children placed in its care throughout the 20th century and it continues to fail in adequately protecting them now. Survivors of the Mother and Baby Homes continue to face ongoing human rights violations, including their right to identity and access to personal information.

## **Implementation of judgments by the European Court of Human Rights**

Ireland has still not fully implemented the decision of the European Court of Human Rights (ECtHR) in the case of O’Keeffe v Ireland, a case concerning the liability of the state for serious child abuse that occurred with the national school system. State redress schemes for the victims of child abuse have consistently proven to be inadequate. The state’s most recent Action Plan on implementation of the judgment was issued on 7 December 2020.<sup>39</sup>

## **Impact of COVID-19**

### **Measures affecting human rights that are not legitimate or proportionate**

The COVID Tracker App was launched in Ireland in July 2020 to much fanfare. The Irish government launched a national communications campaign and more than 862,000 people downloaded the voluntary Bluetooth-based app within the first day. By mid-January 2021 the app had about 1.3 million active users and sent close contact alerts to more than 20,000 people.

38 See <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25665>

39 See <https://www.education.ie/en/Learners/Information/Former-Residents-of-Industrial-Schools/ECHR-OKeeffe-v-Ireland/>

On 6 November 2020, the ICCL asked the Irish health authorities a list of questions about the app's efficacy and about the Department of Health's measurement of its efficacy. As of 25 February, these questions remain unanswered.

In June 2020, the ICCL and Digital Rights Ireland wrote, in a submission to the Special Committee on COVID-19 Response, that the app would have to be effective and that evidence, continuously reviewed, would have to be established to show how effective it is in the state's efforts to curb the transmission of COVID-19.

They highlighted that the necessity and proportionality of the app would be contingent on this effectiveness and that any deployment of an ineffective app would erode public trust and undermine future efforts to implement solutions.

Although we are living with a pandemic, human rights laws still apply and any interference with privacy must be lawful, necessary and proportionate. As ICCL awaits evidence to illustrate the effectiveness of this app, the necessity and proportionality of the measure is left wanting.

# Italy // Associazione Antigone & Italian Coalition for Civil Liberties and Rights (CILD)



## Key concerns

- Inadequate resources for the judiciary still affect length of proceedings, although efforts are made to reduce the backlog
- Progress is made on digitalisation of the justice system, but criticalities arise especially in the criminal justice process
- Journalists suffer frequent intimidation, including through SLAPPs and online threats
- Increase in disinformation, especially linked to COVID-19, is not met with effective fact-checking and quality reporting, while access to information is restricted during the state of emergency
- COVID-19 exacerbates inequality and discrimination against certain groups including women and migrants

## Justice system

### Quality of justice

#### Resources of the judiciary

There is a significant difference between the justice system personnel in Italy compared to the rest of Europe. According to the 2018 data of the Council of Europe European commission for the evaluation of justice (CEPEJ)<sup>1</sup>, in 2018, in Italy there were 11.6 judges per 100,000 inhabitants (compared to 17 European median), 3.7 prosecutors (compared to 11.2 European median) and 37.1 non-judicial staff (compared to 59.7 European median). The two areas that do not seem to be affected by the lack of personnel are non-prosecutorial staff (14.1 in Italy compared to an European median of 14.9) and lawyers (388.3 compared to 120.4 European median).

The Ministry of Justice is currently investing to hire new human resources in order to tackle the issue of case backlogs, as a means to reduce the length of trials (see the section “length of proceedings”). Article 255 of the Decree-law

1 Available here: [https://public.tableau.com/profile/cepej#!/vizhome/CEPEJ-Overviewv20201\\_0EN/Overview](https://public.tableau.com/profile/cepej#!/vizhome/CEPEJ-Overviewv20201_0EN/Overview)

n. 34 of 19 May 2020<sup>2</sup> converted into Law n. 77 of 17 July 2020 (so called Decreto Rilancio) in order to address the issue of the length and digitalization of proceedings allowed hiring 1,000 members of personnel to work in the “Ufficio per il processo” (UPP).<sup>3</sup> The UPP is an office present in all Tribunals and Courts of Appeal in order to carry out research on doctrine and jurisprudence, drafting of reports, maximisation of judgments, direct collaboration with the magistrate for the preparation of the hearing, collection of statistical data flows. The competition was carried out and with a Decree of 11 February 2021 950 people were hired.<sup>4</sup>

Also, the annual Report on the administration of justice<sup>5</sup> (pp. 2-3) reports that in the Italian draft of the Recovery and Resilience Plan, 2.3 billions will be used in order to hire new human resources with temporary contracts for the UPP. The new human resources will be hired to reduce the case backlog: 16,000 people will be hired for 2.5 years (2 slots of 8,000 people) by the UPP and they will support judges in the study of the case, jurisprudence and doctrine and in the civil trial will cooperate in the collection of proofs. Also, 2,000

honorary judges will be hired (2 slots of 1,000 people) to cooperate with judges in civil cases in tribunals that have very heavy backlogs by writing draft sentences. 4,200 other people will be hired by the registries in order to speed up the registries’ work in the tribunals where higher case backlog is being cleared. If the draft Recovery and Resilience Plan will be approved, the Ministry of Justice foresees that already in 2021 it will be possible to hire new resources. The aim is to clear the case backlog by 2026 so to diminish the length of trials.

#### *Digitalisation of the justice system*

Regarding the digitalization of the criminal justice system, it is possible to observe a two-faced problem: the telematic criminal trial (“processo penale telematico”) and remote hearings. Regarding the problems posed by remote hearings during the Covid-19 pandemic, please refer to section “Lack of access to the courts/impact on the justice system” under the section “Impact of Covid-19”.

Before the pandemic, there were already several problems with the state of telematic justice. In its 2019 report on the state of telematic

2 Text available here: <https://www.gazzettaufficiale.it/eli/id/2020/05/19/20G00052/sg>

3 See [https://www.giustizia.it/giustizia/it/mg\\_2\\_9\\_2.page](https://www.giustizia.it/giustizia/it/mg_2_9_2.page)

4 See [https://www.giustizia.it/giustizia/it/mg\\_1\\_8\\_1.page?contentId=SDC320922&previousPage=mg\\_1\\_6\\_1](https://www.giustizia.it/giustizia/it/mg_1_8_1.page?contentId=SDC320922&previousPage=mg_1_6_1)

5 Available here: [https://www.giustizia.it/cmsresources/cms/documents/anno\\_giudiziario\\_2021\\_relazione.pdf](https://www.giustizia.it/cmsresources/cms/documents/anno_giudiziario_2021_relazione.pdf)

justice<sup>6</sup>, the self-government body of Italian magistrature (CSM) had pointed out several technical and organizational issues along with the lack of training on the use of the IT systems.

It is no doubt that the pandemic has given a strong push to the digitalisation of the criminal justice system and its effects will last even after the end of this crisis. For instance, the Portale dei Servizi Telematici<sup>7</sup> was strengthened and thanks to a function called Portale dei Depositi Penali (PDP) lawyers can now officially deposit some specific documents via the portal for which it is necessary to have a certified email and a digital signature. At first it was possible to use the PDP exclusively for the deposit of: the appointment of the lawyer, documents (memorie), and submissions/requests (istanze) addressed to the prosecution. Later on, a Decree of the Ministry of Justice dated 13 January 2021<sup>8</sup> extended the use of the PDP to other acts that now can **only** be submitted via the PDP: opposition to the acquittal, the denunciation, the appointment of a lawyer, the change of lawyer, the renunciation of an appointment) and other documents. It is now possible to submit other

acts via certified email and for this reason, the Ministry of Justice activated more than 1,000 certified emails. This last measure is currently allowed because of the pandemic and it is not clear if it will remain active after the end of the emergency.

The president of the Camere Penali (criminal lawyers's union) recently wrote to the Ministry of Justice pointing out many of the criticalities encountered on the portal (e.g. crashing, malfunctioning, tardiness in the authorisation to lawyer to consult the case file in some cases) and pointing out that in many cases each Prosecution Office allows (or does not allow) the use of the portal in a different way. Therefore, he asked the Ministry that until such criticalities be solved, that the portal be not used as the **only** means to deposit legal acts as it is today.<sup>9</sup>

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6 Consiglio Superiore della Magistratura, [Relazione sullo stato della giustizia penale telematica 2018](#) (January 2019).

7 <https://www.altalex.com/documents/news/2021/02/10/penalista-telematico-vademecum-breve>

8 Text available here: <https://www.gazzettaufficiale.it/eli/id/2021/01/21/21A00327/sg>

9 See [https://www.camerepenali.it/cat/10795/portale\\_telematico\\_ed\\_esercizio\\_del\\_diritto\\_di\\_difesa\\_lunione\\_scrive\\_al\\_capo\\_dipartimento\\_dottssa\\_fabbrini.html](https://www.camerepenali.it/cat/10795/portale_telematico_ed_esercizio_del_diritto_di_difesa_lunione_scrive_al_capo_dipartimento_dottssa_fabbrini.html)

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

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### *Length of proceedings*

As it was pointed out in the submission on Italy included in the 2020 Liberties' report on rule of law<sup>10</sup> and the 2020 Rule of Law report by the European Commission<sup>11</sup>, as well as by the Council of Europe European commission for the evaluation of justice (CEPEJ)<sup>12</sup>, length of proceedings and case backlog are two major problems of the Italian justice system, both in civil and penal proceedings.

Data from the annual Report on the administration of justice (pp. 157-158) of the Ministry of Justice<sup>13</sup> and the Statistics on civil justice<sup>14</sup> show that, because of a lower amount of incoming cases (-18%), despite the partial closing of courts in 2020 (that led to a lower number of concluded cases, -20%) because of the Covid-19 pandemic, the amount of cases on 31 December 2020 is slightly lower than it was on 31 December 2019 (-1,742, -0.05%). The breakdown of the number of cases by

instance at the end of 2020 is indicated as “stable” compared to 2019 for the first instance, -4.8% for the second instance and +2.9% at the Court of Cassation. The Report indicates a clearance rate of 101% for 2020. However, the positive trend of the last few years of the reduction of cases at risk of breaching the time limits of the reasonable length of trial (at risk of Pinto compensation) was interrupted. At first instance, there are now +3.1% cases that have breached the three-year duration, at second instance +1.1% cases that have breached the two-year duration and at Court of Cassation +12.2% of cases that have breached the year duration.

Data from the Statistics on criminal justice<sup>15</sup> on the website of the Ministry of Justice show that case backlog in the criminal justice system has worsened in 2020 because of the courts' shutdown during the first lockdown between March and May and despite the lower number of crimes committed in the same period. Numbers, updated on 30 September 2020, show +3.44% at first instance (1,193,329 cases), +4% at second instance (274,308 cases) and

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10 Liberties, [A response to the European Commission Consultation on Rule of Law in the EU](#), cited, pp. 42-52.

11 European Commission, [2020 Rule of Law Report - The rule of law situation in the European Union](#), cited.

12 See [https://public.tableau.com/profile/cepej#!/vizhome/CEPEJ-Overviewv20201\\_0EN/Overview](https://public.tableau.com/profile/cepej#!/vizhome/CEPEJ-Overviewv20201_0EN/Overview)

13 [https://www.giustizia.it/cmsresources/cms/documents/anno\\_giudiziario\\_2021\\_relazione.pdf](https://www.giustizia.it/cmsresources/cms/documents/anno_giudiziario_2021_relazione.pdf)

14 See [https://www.giustizia.it/giustizia/it/mg\\_1\\_14\\_1.page?contentId=SST1287132&previousPage=mg\\_2\\_9\\_13](https://www.giustizia.it/giustizia/it/mg_1_14_1.page?contentId=SST1287132&previousPage=mg_2_9_13)

15 See [https://www.giustizia.it/giustizia/it/mg\\_1\\_14\\_1.page?contentId=SST1288006&previousPage=mg\\_2\\_9\\_13](https://www.giustizia.it/giustizia/it/mg_1_14_1.page?contentId=SST1288006&previousPage=mg_2_9_13)

+19% at the Court of Cassation (29,166 cases). Unfortunately the statistics do not report how many cases are “at risk of Pinto compensation” for the criminal justice system.

Over the years, because of the diminishing number of cases that could fall under the Pinto law (that since 2001 allows compensations in cases where the reasonable length of proceedings is breached), less and less monetary resources have been allocated to the reparations to be granted pursuant to the Pinto law despite the fact that resources were deemed insufficient also in past years and that Pinto cases were equally taking an excessive time to be resolved. Indeed, in 2018 the budget for Pinto proceedings was 212,4 millions, in 2020 180 millions and in 2021 140 millions. At the beginning of 2020, the Ministry of Justice has renewed the agreement with the Banca d'Italia in order to expedite payments ex Pinto law.

Regarding the new human resources that the State is employing or that plans to employ, please refer to the section “resources of the judiciary”.

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

According to the Annual Penal Statistics (SPACE)<sup>16</sup>, in 2019 the average number of detainees without a final sentence in CoE member States was 25.9% while in Italy it was 32.8%. At the end of January 2021<sup>17</sup>, such percentage was 31.4% (16,766 people): around half of them were pre-trial detainees and the other half was made of detainees without a final sentence.

In Italy, when people are subjected to unjust detention, they have the right to receive a reparation to compensate for the days spent in prison or in other pre-trial measures. It is possible to apply to receive compensation for unjust detention (*ingiusta detenzione*) in two cases<sup>18</sup>:

Unjust pre-trial detention (pursuant to articles 314 and 315 Code of Criminal Procedure - c.p.p.)

Judicial error (pursuant to article 643 c.p.p.)

The first one concerns two different instances. Art. 314 par.1 c.p.p. concerns people who were subjected to pre-trial detention but that have been acquitted with a final sentence because

16 See [https://wp.unil.ch/space/files/2021/02/200405\\_FinalReport\\_SPACE\\_I\\_2019.pdf](https://wp.unil.ch/space/files/2021/02/200405_FinalReport_SPACE_I_2019.pdf), pp. 47-48.

17 [https://www.giustizia.it/giustizia/it/mg\\_1\\_14\\_1.page?facetNode\\_1=0\\_2&contentId=SST320013&previousPage=mg\\_1\\_14](https://www.giustizia.it/giustizia/it/mg_1_14_1.page?facetNode_1=0_2&contentId=SST320013&previousPage=mg_1_14)

18 [https://www.dag.mef.gov.it/aree-tematiche/indennizzi/ingiusta\\_detenzione/index.html](https://www.dag.mef.gov.it/aree-tematiche/indennizzi/ingiusta_detenzione/index.html)

the fact was not committed, because they did not commit the act, because the act does not constitute an offence or is not provided for by law as an offence. Par. 2 of the same article provides compensation to people (irrespective of the final verdict) who were in remand detention without the formal requisites for pre-trial detention as set out by artt. 273 and 280 c.p.p.. The judicial error, on the other hand, concerns cases in which a person, after serving a sentence resulting from a guilty verdict, is found innocent after a revision trial, an extraordinary measure for the revision of trials.

The maximum amount that can be received for an unjust pre-trial detention is € 516,456.90 and it is possible to file a request for compensation within 24 months from the final sentence. The amount is calculated by the judge on a case by case basis taking into account also the detention conditions to which the pre-trial detainee was subjected.

Art. 15 of law n. 47 of 16 April 2015 prescribes to the Ministry of Justice the yearly publication of data on pre-trial measures and on all compensations for unjust pre-trial detention (not on judicial errors). Data on 2019 (pp. 23-27)<sup>19</sup> is not complete (five jurisdictions are missing Courts of Appeal of Brescia, Lecce, Naples, Perugia and Salerno) but the available data shows that 1,026 compensations requests were approved. Among the compensation requests

that were approved, around half of them are irrevocable. 75% of these (350 out of 465) were granted for the violation of art. 314 par. 1 c.p.p. and the others for the violation of art. 314 par. 2. Around 70% of the compensations in both types of violation were granted by Tribunals of first instance while the others by the following instances.

In 2019, compensations were made to 1,000 applicants for a total of € 43,486,630. The highest numbers of measures were granted in three jurisdictions (Rome, Naples and Reggio Calabria) and that the largest payment was issued by the jurisdiction of Reggio Calabria.

## **Corruption**

### ***Framework for the fight against corruption***

Over the past few years, Italy considerably strengthened its fight against corruption, introducing the Freedom of Information Access (FOIA), regulations for the protection of whistleblowers, party funding rules and more severe sanctions in case of corruption. The health emergency, however, “revealed corruption as an obstacle to recovery, starting with the pandemic response, including the

19 Senato, [Relazione sull'applicazione delle misure cautelari personali e sui provvedimenti di riconoscimento del diritto alla riparazione per ingiusta detenzione](#) (Aprile 2020).

procurement of medical devices and health-care services”.<sup>20</sup>

According to Transparency International’s 2020 Corruption Perception Index (CPI), Italy ranks 52 out of 180 countries.<sup>21</sup> Democracy Reporting International<sup>22</sup> indicated that following the state of emergency the Italian government implemented significant human rights restrictions:

- Border restrictions;
- Restrictions on freedom of assembly;
- Limited access to education services;
- Restrictions on freedom of businesses;
- Restrictions on the access to information (FOIA’s temporary suspension<sup>23</sup>);
- Suspension of court hearings (hence increasing the risk of the backlog in the already-burdened justice system).

The main authority in charge of the prevention, detection and prosecution of corruption in Italy is ANAC - Autorità nazionale anticorruzione.<sup>24</sup>

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## *Access to information*

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In 2016 Italy approved a Freedom of Information Act (FOIA) (i.e. Legislative Decree no. 97/2016), recognizing the right to access data and documents from public administrations (PAs), which has proven to be a particularly relevant instrument for journalists’ enquiries.

While Italy considerably improved its right to information rating with the implementation of this measure, the law still has several shortcomings: e.g. the lack of sanctions for public bodies that illegitimately refuse to disclose documents; the absence, in many Italian regions, of an ombudsman that can safeguard the right to access to information; the limited duties on proactive transparency for PAs. In addition, although the Italian National Anti-Corruption Authority has adopted guidelines for public bodies handling access to information requests, these seem to be disregarded or unknown by civil servants.

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20 SIR, [Corruption](#). Transparency International: “Italy ranked 52nd. All countries suffered the impact of the COVID-19 emergency” (January 2021).

21 Transparency International, [Corruption Perception Index 2020](#) (February 2021).

22 Democracy Reporting International, [Phase two of COVID19 responses across the EU – the rule of law stress test continued](#) (July 2020).

23 For more information see [https://www.infodata.ilsole24ore.com/2020/04/01/43750/?refresh\\_ce=1](https://www.infodata.ilsole24ore.com/2020/04/01/43750/?refresh_ce=1)

24 <https://www.anticorruzione.it/portal/public/classic/>

The Italian FOIA still falls far behind international standards, as it forces applicants to go through the infamously-slow Italian court system in order to challenge decisions of non-disclosure of information, making it difficult to hold public officials accountable and nearly impossible for citizens to participate in decision making processes. On top of this, although almost all Italian regions have equipped themselves with an Access Register, they present significant differences in reporting, information-gathering and publication methods, thus leading to frequent gaps in yearly collections.

The actual implementation of the FOIA also appears to be unsatisfactory. Monitoring activities in 2017 and 2018 showed that around 75% of the requests were not answered at all by public bodies (no more recent data could be retrieved). One third of the denial by PAs to disclose information was illegitimate and, in most cases, the responses received from PAs could be considered totally inappropriate or deprived of any sound legal basis.

On top of this, the Decree-Law of 17 March 2020 suspended FOIA requests that were not “immediate and urgent” (with no precise indication of what kind of information can be considered such) until 31 May 2020. A second Decree issued on 27 March 2020 suspended all non-urgent administrative proceedings, including FOIA requests, until 15 April 2020.

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## ***Rules on preventing conflict of interests in the public sector***

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Constitutional references on the matter are scarce, generic and only implicitly addressed in Articles 97 and 98 of the Constitution. There are, however, several other sources applicable, among which Anti-corruption Law no. 190/2012, which foresees provisions for the prevention and repression of corruption and illegality in the public administration.

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## ***Whistleblower protection***

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Law no. 179/2017 - “*Provisions for the protection of whistleblowers who report offences or irregularities which have come to their attention in the context of a public or private employment relationship*” - stipulates that public and private sector employees must be protected if they report illegal practices within their company or organisations. Before its entry into force, whistleblowing was only regulated with reference to the public sector (article 54-bis of Legislative Decree no. 165/2001 as amended by Law no. 190/2012), banking and finance sector (Legislative Decree no. 72/2015) and for listed companies (Article 7 of the Corporate Governance Code). Additionally, this law sets forth protective measures also for workers belonging to the private sector who report offences or irregularities which have come to their attention in the context of the employment relationship. Workers are protected by the law and the applicable collective bargaining agreement. It is automatically unfair to dismiss or victimise an employee because he/

she made a disclosure if in doing so he/she did not breach the law or the contract.

There is no statutory requirement that employers put in place a whistleblowing policy or arrangements. There is, however, an increasing awareness that doing so means that concerns can be dealt with efficiently and transparently. There is also the added benefit that having an internal policy in place means that concerns can be raised and managed internally, not externally mitigating the risk of reputational damage/repercussions.

### ***Sectors with high-risks of corruption***

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The sectors with higher risks of corruption in Italy are:

- Healthcare
- Assistance
- Public utilities

### ***Measures taken to address corruption risks in the context of the COVID-19 pandemic***

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Mr Giuseppe Busia, President of the ANAC (National Anti-Corruption Authority), affirmed that several regulatory interventions

and anti-corruption coalitions have been launched to address corruption risks in the context of the COVID-19 pandemic. These include upgrading the national database of public procurement and “ensuring the transparency of Next Generation EU funds, allowing institutions and all citizens to accurately verify how these funds will be used, avoiding that they are diverted from society at large and squandered instead of being spent for the benefit of future generations”.<sup>25</sup> Particular attention has also been directed towards digitalisation, a key instrument to reduce the risk of corruption, increase transparency and market competitiveness, as well as an essential investment process of the Recovery Fund.

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

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

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Information about the mentioned aspects must be reported to the Communications Regulatory Authority (Autorità per le Garanzie nelle Comunicazioni, AGCOM)<sup>26</sup> and is held in the Register of the Communications (ROC). The AGCOM is charged with ensuring equitable conditions for fair market competition and protecting fundamental rights of all to

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25 SIR, *Corruption*. Transparency International: “Italy ranked 52nd. All countries suffered the impact of the COVID-19 emergency”, cited.

26 <https://www.agcom.it/>

media pluralism. Law No. 249/1997 entrusts AGCOM with tasks that range from identifying and monitoring the relevant media markets to issuing sanctions and approving regulations, to advising the Government and Parliament on matters concerning communications.

### ***Transparency of media ownership and government interference***

The Italian media market is characterized by considerable market concentration, in which the two main industry competitors, public broadcaster RAI and private media firm Mediaset, dominate market share and generate most of the revenues from FTA Audiovisual Media Services<sup>27</sup>. In terms of print press audience, the main media companies in Italy are GEDI Gruppo Editoriale, RCS Mediagroup, and Editoriale Nazionale (Monrif/Poligrafici Editoriale)<sup>28</sup> and in terms of revenues the dominant Italian media companies are RCS Mediagroup, GEDI Gruppo Editoriale and Il Sole 24 Ore.<sup>29</sup>

In most cases significant media owners have other relevant industrial and financial interests,

as well as political interests putting at risk media pluralism. According to the Centre for Media Pluralism and Media Freedom at the European University Institute, political and editorial independence within private media scores at a level of “medium risk” in Italy.<sup>30</sup> This is due to historical and structural features, where only one of the main owners is a “pure” publisher, while the others often manage additional businesses.

Being listed companies, most media companies are legally obligated to disclose in detail their ownership and governance structures on their websites and respect additional publishing regulations. They are not required to provide information on:

- Political, religious or other affiliations of shareholder or owner;
- Interests by owners in other media organisations;
- Interests by owners in non-media businesses;
- Interests in the media organisation by individuals (e.g. family members or organisations) affiliated to the owner.

27 See Centre for Media Pluralism and Media Freedom, [Media Pluralism Monitor 2016 Monitoring Risks for Media Pluralism in the EU and Beyond Country report: Italy](#).

28 See [http://www.adsnotizie.it/\\_dati\\_DMS.asp](http://www.adsnotizie.it/_dati_DMS.asp)

29 [https://www.mbres.it/sites/default/files/resources/rs\\_Focus-Editoria-2018.pdf](https://www.mbres.it/sites/default/files/resources/rs_Focus-Editoria-2018.pdf)

30 See Centre for Media Pluralism and Media Freedom, [Media Pluralism Monitor 2016 Monitoring Risks for Media Pluralism in the EU and Beyond Country report: Italy](#), cited.

Media organisations and/or their owners are specifically required to disclose ownership details directly to the public according to Article 2, Press Law No. 48 of 8 February 1947 (“the Press Law”). Relevant legislation covers both online and written “editorial products”. According to Article 1 of Law No. 62 of 7 March 2001, an “editorial product” is “produced on paper, including in a book, or through the computer, destined for publication or, however, for the dissemination of information to the public by any means, including electronic means, or via television or radio-broadcasting, with the exclusion of musical recordings or cinematic products.” This definition does not include broadcast media, which are therefore excluded from the application of this law.

Article 2 of the Press Law requires the following details to be published:

- Executive Director or Deputy Executive Director;
- Publisher (or publishing company) and related legal address;
- Printer (or printing company) and related legal address.

The information must be made available on every copy and in every edition, in the same format. The information must be disclosed in

the publication itself, although the exact position is not specified.

The information that media organisations are required to publish is limited and does not include details on the ownership structure, the beneficial ownership, the size of their shareholding, any companies with indirect control and/or connected companies. In addition, they are not required to publish information on the sources of media revenue.

### ***Funding landscape***

Recent governmental decisions concerning a reduction in state subsidies for the media risk of undermining journalistic work.

### ***Disinformation***

The Italian media environment faces the increasing challenge of addressing disinformation through quality reporting. However, according to the Report of the independent High level Group on fake news and online disinformation of the European Commission, media companies are associated with quality and trusted content rather than disinformation.<sup>31</sup> While disinformation increases<sup>32</sup>, Italy has no record of systematic fact-checking

31 European Commission, [Final report of the High Level Expert Group on Fake News and Online Disinformation](#) (March 2018).

32 See <https://www.agcom.it/documents/10179/3744102/Allegato+22-11-2018/3aff8790-8039-4456-8f9adae2497289a4>

initiatives carried out by media companies or any other independent outlet.

According to an April 2020 AGCOM report, the pandemic has been marked by an influx of disinformation; at its peak on March 11, almost three weeks after the outbreak began, nearly half of all disinformation on websites and social media was related to the pandemic. Information that was circulated included claims that the virus was created by Chinese spies in a Canadian lab, that the virus was patented by a group financed by US software developer and philanthropist Bill Gates, that it was connected to 5G technology, and that remedies like garlic could cure the disease. The independent watchdog NewsGuard highlighted the existence of at least 10 Facebook pages that played a significant role in disseminating disinformation about the virus. The pages, which ostensibly focused on topics like fashion and cooking, together accounted for over five million followers and repeatedly shared disinformation content produced by two websites, [ViralMagazine.it](https://www.viralmagazine.it) and [FanMagazine.it](https://www.fanmagazine.it). At least nine of the pages had been shut down as of May 6.

## **Framework for the protection of journalists and other media activists**

### *Threats and intimidation*

The impunity rate for abuses against journalists remains high due in part to the fact that it is often difficult to investigate violations committed online and find the perpetrators, as they generally use fake accounts or have tools at their disposal that make them anonymous and difficult to track online. While Italian politicians are now less virulent towards journalists, violence (disparagement and intimidation) against reporters keeps on growing, especially in Lazio and in the South.<sup>33</sup>

As for the frequency of the attacks, Ossigeno per l'informazione indicates as follows:

- January - March<sup>34</sup>: 123 intimidations and threats in Italy against journalists, bloggers and other information operators. For 77 of these 123 episodes, the Observatory rigorously verified and certified the facts. For the other 46 episodes, the Observatory had to stop at the stage of preliminary examination, from which it appears “probable” that each of them constitutes a similar serious violation. Therefore, these 46 names have been publicly reported, separately from the others, with the invitation to verify and

33 Reporters Without Borders, [Italy](#).

34 <https://www.ossigeno.info/italia-il-rapporto-trimestrale-di-ossigeno-sulle-piu-gravi-violazioni-gennaio-marzo-2020/>

ascertain their validity and provide due assistance.

- April - June (most recent report available)<sup>35</sup>: 73 intimidations and threats directed against 127 journalists, bloggers and other information operators. For 27 of these 73 episodes, the Observatory rigorously verified and certified the facts. For the other 46 episodes, it had to stop at the stage of preliminary examination, from which it appears “probable” that each of them constitutes a similar serious violation. Therefore, 83 names have been publicly reported separately from the others.

On top of this, about 20 Italian journalists are still under 24/7 police protection because of serious threats or murder attempts by the mafia.

#### *Strategic litigation against public participation (SLAPP)*

Defamation suits against journalists, including those operating online, remain common. Drawn-out legal proceedings, whatever their result, can entail serious financial costs for defendants. Ossigeno per l’Informazione has reported hundreds of “frivolous defamation suits” against the media since 2011, including cases against online media.

A draft law regulating defamation<sup>36</sup> is being currently discussed in Parliament. It brings forward an increase of the sanctions for defamation that would replace prison sentences. If a judge dismisses a civil action for defamation as unfounded, the same judge may require the person who brought the suit to compensate the journalist with an amount not less than half of what is required of the journalist as damages.

The only provisions that can be relied upon to prosecute perpetrators of hate speech and other verbal abuses are the same ones used against journalists (e.g. defamation). Decriminalising these provisions, hence, would hence mean that there would be no other viable instrument to combat hate speech and forms of libel.

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

#### *Access to information*

Legislative Decree no. 97/2016, known as Freedom of Information Act (FOIA), been particularly relevant for journalists’ enquiries. Its suspension during the COVID-19 pandemic strongly impeded journalists’ access to data about the spread of the pandemic on the local and regional level.

35 <https://www.ossigeno.info/italia-2-rapporto-trimestrale-ossigeno-aprile-giugno-2020/>

36 Text available at: [http://www.senato.it/japp/bgt/showdoc/18/DDLPRES/0/1078704/index.html?part=ddl-pres\\_ddlpres1-articolato\\_articolato1](http://www.senato.it/japp/bgt/showdoc/18/DDLPRES/0/1078704/index.html?part=ddl-pres_ddlpres1-articolato_articolato1)

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### *Freedom of expression online*

According to Comparitech (which conducted a research in 150 countries on the relationship between restrictions, censorship and Internet)<sup>37</sup> Italians enjoy a high degree of freedom of expression online even compared to neighbouring countries: Italy does not typically block or filter content of a political, social, or religious nature; all major websites and communication platforms are freely available; Italians do not face special economic or regulatory obstacles to publishing content online. Italy's Declaration of Internet Rights expresses the country's commitment to the net neutrality principle. However, the declaration is nonbinding, and net neutrality is not enshrined in national law, though a 2015 EU-level regulation empowers AGCOM to supervise and enforce the principle.

As for self-censorship, Freedom House<sup>38</sup> reports that content creators and online writers do exercise caution to avoid controversies with powerful entities or individuals and libel suits by public officials, whose litigation - even when unsuccessful - can take a significant financial toll. Individuals writing about the activities of organised crime in some parts of the country may be especially at risk of extra-legal reprisals.

Also, authorities sometimes request the

removal of specific content. According to Facebook, from July to December 2019, 579 pieces of content were removed from the main platform and 18 from Instagram. The report noted that 42 of these removals occurred "in response to valid court orders," while four items were reported by the National Office against Racial Discrimination (UNAR). The remaining items were removed following "user reports related to Holocaust denial" and "private reports of defamation." Twitter's transparency report for 2019 lists seven requests for content removal, including one court order, between January and June, but no content was ultimately withheld. According to Google's transparency report, the government sent 121 content removal requests between January and June 2019, including 64 for defamatory content, 42 for privacy and security reasons, and eight for hate speech.<sup>39</sup>

### ***Other issues related to checks and balances***

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

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The need to act quickly to counter the effects of Covid-19 has led the government to declare

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37 See <https://www.comparitech.com/blog/vpn-privacy/internet-censorship-map/>

38 Freedom House, [Italy](#).

39 See again Freedom House, [Italy](#), cited.

a state of emergency and to centralize most of the decisions. The majority of the acts adopted were in fact issued directly by the Central Government through Presidential decrees or by structures that refer to it, as the Civil Protection Department or the extraordinary Commissioner for the emergency.

In addition, many measures of fundamental importance for the lives of citizens (e.g. lockdown, support to the economy, fund allocation) have been taken through the various decree-laws issued by the government. Decree-laws are a fast-track instrument that the government uses to legislate; once published it has immediate effect but must be converted into law by Parliament within 60 days.

According to Openpolis<sup>40</sup>, as of November 2020, 24 decree-laws were issued to deal with the COVID emergency. These needed 297 implementing decrees required, of which 198 (66%) have yet to be adopted. The publication of these regulations involves 20 ministries plus the Presidency of the Council of Ministers.

### ***Independent authorities***

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Italy still lacks a National Human Rights Institution (NHRI). Equality bodies, such as UNAR (the Anti-Discrimination National Office), often lack independence from the government and thus have limited capacity.

Nonetheless, during a 2020 OSCE/ODIHR-led event on the situation of human rights defenders in Italy, both governmental representatives and civil society organisations stressed the need to establish an independent and fully funded NHRI, with its own staff and a specific funding plan that should link in a network all entities working in the promotion of human rights at regional, national and international levels. They reported that a draft law on the establishment of an NHRI is currently being reviewed by Parliament. According to participants, the establishment of an NHRI remains a key priority because it would be a significant step forward in protecting and promoting human rights in Italy, as well as in addressing the difficulties faced by defenders.

### ***Other systemic issues affecting rule of law and human rights protection***

#### ***Implementation of judgments of the European Court of Human Rights***

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As of 26 February 2021, Italy is still far from ensuring the full implementation of the judgements issued by the European Court of Human Rights<sup>41</sup>, as shown by recent data:

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40 See <https://www.openpolis.it/decreti-attuativi-a-rilento-il-66-ancora-da-approvare/>

41 See <https://www.cinnetwork.org/italy-echr>

- Number of leading cases pending: 56
- Average time leading judgments have been pending: 5 years, 9 months
- Proportion of leading cases pending from the last ten years: 60%

The lack of follow up on the recommendations of the Committee of Ministers is particularly worrying for the judgements *Khlaifia et al. v. Italy*<sup>42</sup>, concerning the holding of foreigner individuals in a reception centre on the island of Lampedusa then on ships in Palermo harbour (Sicily), and the cases *Ricci v. Italy*<sup>43</sup> and *Belpietro v. Italy*<sup>44</sup> concerning media pluralism.

While civil society organisations (including CILD) have been trying to push for the implementation of the above mentioned judgements by submitting Communications ex Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments, the Italian government has not responded adequately to these calls so far.

## **Impact of COVID-19**

### **Impact on the justice system**

As reported above, the health emergency led to the suspension of many court hearings and non-urgent administrative proceedings, hence increasing the risk of the backlog in the already-burdened justice system.

It is also important to point out the problems caused by the sudden need to digitalise the penal justice system during the lockdown that took place between March and May.

The research *Justice under Lockdown*<sup>45</sup> carried out by Antigone and Fair Trials Europe found opposing positions on the management of remote justice. In some cases, the good practice of certified emails was implemented in order to send and receive complete case files and Court documents that were made immediately available. However, not all Tribunals were ready for this sudden change and cases of “total confusion” have been reported, up to the point of using unconventional means like WhatsApp to send Court documents.

42 <http://hudoc.exec.coe.int/eng?i=004-45851>

43 <http://hudoc.exec.coe.int/eng?i=004-28242>

44 <http://hudoc.exec.coe.int/eng?i=004-28294>

45 Fair Trials Europe, [Justice under lockdown in Europe - A survey on the impact of COVID-19 on defence rights in Europe](#) (September 2020).

The impossibility for external personnel (e.g. lawyers) to physically access Tribunals and Court offices caused also many difficulties in the communication with magistrates and registries. As it is highlighted in one contribution to the journal *DisCrimen*<sup>46</sup>, websites of the different offices often show wrong phone numbers and inactive email addresses (also in the case of certified emails) making it very difficult for defense lawyers to contact such offices, hence creating difficulties for the effectiveness of the defence.

The *Justice under Lockdown* report also points out the difficulties that lawyers encountered when they had clients in police custody. Since they could not meet in person with their clients because of Covid-19 restrictions, lawyers claim that the impossibility of meeting their clients undermined the quality of legal assistance. In particular, the construction of a trust relationship is difficult via technological means or phone, especially with new clients. Another issue that was pointed out regarded the lack of confidentiality of the consultation between lawyer and client that was severely restricted by the use of remote consultation tools in police stations.

About legal defense rights in remote hearings, the vast majority of interviewees expressed concerns regarding the possible impacts. In

particular, they render it difficult to establish a relationship between the defendant and lawyer and make it more difficult for the judge to evaluate the person. Also, the technical tools did not guarantee the possibility of a clear conversation with the magistrate and the accused and there was a limited possibility to present, exhibit and view documents. There have also been cases in which lawyers were not able to participate in hearings because they were not given access to the remote hearing despite their availability.<sup>47</sup> The criminal lawyers' union president, pointed out other problems such as the lack of technical assistance for the parties that need to intervene in the hearing, the possibility of network failures, privacy and safety related issues.<sup>48</sup>

### ***Shrinking civic space***

Humanitarian ships arriving on Italian coasts have to undergo a 14-day obligatory quarantine period starting from the date of disembarkation. These measures apply despite the crew's pre-departure isolation and swab tests, their negative COVID-19 tests upon arrival, the strict health protocols (Ffp2 masks, visors and biocontainment suits) on board and the exemptions provided for in Article 7, point 8 of the Prime Ministerial Decree of 14 January 2021. The latter stipulates that "crew and

46 See <https://discrimen.it/wp-content/uploads/disCrimen-3-2020.pdf>, pp. 343-345.

47 See <https://www.strali.org/ilcasoprocessotelematico>

48 See <https://www.ildubbio.news/2020/04/18/la-denuncia-di-caiazza-e-un-processo-o-un-videogame/>

travelling personnel” must only take a test upon arrival and not undergo a 14-day quarantine. Not only is this applied to airlines’ staff, it is also applied to the crew of commercial ships, Coast Guard and Financial Police that provide assistance to migrants at sea. On 26 February 2020, Il Manifesto reported that, while the Open Arms was blocked by a two-week quarantine (on 16 February 2020 it arrived in Italy with 146 people), the Asso30 was allowed to depart 24 hours after its arrival (on 22 February, it disembarked 232 people).<sup>49</sup>

The COVID-19 pandemic has also hindered the monitoring of human rights and fundamental freedoms, especially freedom of expression and living conditions in places of detention.

### ***Inequality and discrimination***

From a socio-economic perspective, women have been the most affected category by the health emergency. The Fondazione Studi Consulenti del Lavoro<sup>50</sup> reports that, in Italy, female employment fell by two percent, compared to the 1.7 percent of male employment. Of the 841 thousand jobs lost in the second quarter of 2020 compared to the same period in 2019, 55.9 percent belonged to women. This means that 470 thousand female positions were lost, with a growth of inactive women touching 707 thousand. 74% of women workers in

Italy continue to work. Among them, three million women have had to find a balance with childcare. As a result, the stress level is very high - and increased - resulting in the risk of job abandonment.

The Civil Protection Department measure of 12 April 2020 provided for the possibility of holding migrants, who had been rescued or who had arrived on foreign-flagged vessels, on ships identified by the Ministry of Infrastructure and Transport off Italian coasts during their medical isolation period. In addition to those who arrived by sea on both Italian and non-Italian vessels, in October 2020, these ships started hosting also Covid-positive migrants who held a regular Italian residence permit. Quarantine ships went from being an exceptional reception measure to floating immigration holding facilities. In response to the reports and complaints of the civil society, the Minister of the Interior Lamorgese affirmed that, due a lack of on-land facilities, the measure was deemed necessary to ensure the isolation of virus-affected migrants and, hence, to protect the other hosts of the centres and their staff. “Once Covid-free”, she stated “migrants will be transferred to their provinces once again”. The Minister finally accepted the civil society’s request to stop the illegitimate holding of regular migrants on quarantine ships. She reassured that transfers from reception centres to quarantine ships will no longer be carried out and that the ships will

49 <https://ilmanifesto.it/covid-quarantene-mirate-per-femare-le-navi-delle-ong/>

50 See <http://www.consulentidellavoro.it/home/storico-articoli/13330-ripartire-dalle-donne>

be employed only for those migrants arriving by sea during their medical isolation period.

During the height of the epidemic in Trieste, in the Friuli Venezia Giulia region, regional authorities proposed to moor a “ship” in the port of the city to host old people affected by Covid-19. Although protests and opposition followed swiftly, the plan of a “lazareth-ship” remained solid for more than one month; the “Gnv Allegra ship” (one of the ships currently hosting migrants) was identified and commissioned for the job. Finally, however, regional authorities decided not to proceed and the agreement fell through. The health emergency should not be used as an excuse to discriminate.

## **Poverty**

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Italian agriculture lobby Coldiretti <sup>51</sup>estimates that the virus has created 300,000 newly poor people, based on surveys of the dozens of charity groups operating in the region. Nationally, one-third of all people seeking help from Caritas during the pandemic are first-time recipients, and in a reversal of usual trends, most are Italians and not foreign residents. Food security emerged as a key issue.

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51 See <https://apnews.com/article/pandemics-italy-coronavirus-pandemic-financial-markets-milan-821336fb6b-1fe6892fd178433de0fc70>

# Poland // Polish Helsinki Foundation for Human Rights (HFHR)



HELSINKI FOUNDATION  
FOR HUMAN RIGHTS

## Key concerns

- Dismantling of judicial independence continues, including new rules on disciplinary liability, with increasing impact on the ability of the justice system to deliver justice and hold authorities accountable – despite rulings of the EU Court of Justice
- Government continues its plan to take control over media
- Decision making is disturbingly opaque and the constitutional review of laws is seriously flawed
- Civil society is under continued attacks, with prosecutions and SLAPPs brought against activists, smear campaigns, reduced funding and crackdown on protests
- COVID-19 exacerbates problematic issues affecting justice, freedom of assembly and access to information

## Justice system

### Judicial independence

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

In 2020, one of the key issues concerning the appointment of judges was related to the position of judges appointed by the National Council of Judiciary in its current composition. The NCJ is composed of among others 15 judges who were elected by the Parliament in the procedure that raised numerous legal concerns (see the following point). The NCJ is a constitutional authority responsible for appointing and promoting judges. Given the legal concerns regarding the status of the NCJ in its current composition, there are also legal doubts regarding the validity of its decisions, including decisions on appointing judges of the Supreme Court and common courts. As the participation of these judges may influence the validity of the proceedings pending before the courts composed of these judges, the Supreme Court decided to rule on this case.

On 23 January 2020, the Supreme Court adopted a resolution concerning the impact that judges appointed by the new National Council of the Judiciary have on the legality of court proceedings. The Supreme Court referred to two provisions of criminal and the

civil procedure which provide for the grounds for challenging court decisions.

The Supreme Court interpreted these provisions in relation to both judges appointed to the Supreme Court and the common courts. In the relation to the judges of the Supreme Court appointed by the new NCJ, the Supreme Court stated that their participation in adjudicating results in invalidity of the proceedings before the Supreme Court.

In reference to judges of a common court appointed by the NCJ, the Supreme Court decided that their participation in the process of issuing the judgement gave grounds to challenge such a decision. However, this should be assessed on a case-by-case basis and the court should also take into consideration the process in which the judge was appointed by the NCJ and whether any irregularities in the appointment process led to a violation of this judge's independence and impartiality in particular case.

In the light of the resolution, judges appointed by the NCJ retain their status. The Supreme Court also ruled that the decision issued so far by the judges appointed by the new NCJ should remain in force.

The Supreme Court resolution was highly contested by the governing majority. Both the Speaker of Sejm and the Prime Minister challenged the resolution in the proceedings before the Constitutional Tribunal. In two verdicts of 20 and 21 April 2020, the Constitutional Tribunal ruled that by adopting the resolution

the Supreme Court violated certain provisions of the Constitution.

#### *Irremovability of judges*

In 2020, the media reported on several cases of transfers of prosecutors. According to the Act on prosecution, the National Prosecutor has a right to transfer a prosecutor from one unit to another for 12 months without the prosecutor's consent. However, in recent years this competence was used as a tool of disciplining prosecutors. For example, in December 2020, the media reported on a case of prosecutor Wojciech Pełeszok who was transferred from the Circuit Prosecutor Office to a District Office. Earlier that year, prosecutor Pełeszok participated in a court proceeding concerning application of pre-trial detention against a person participating in a protest against the Constitutional Tribunal decision on abortion law. In this proceeding, against the instructions of his supervisors, prosecutor Pełeszok did not support the motion for application of a pre-trial detention. Furthermore, in 2020, the media reported on a case of a prosecutor Mariusz Krasoń. In 2019, Mariusz Krasoń was transferred from the prosecutor office in Kraków to a prosecutor office in Wrocław. This decision was criticized for its lack of rational justification and was perceived as a form of disciplining the prosecutor for his engagement in the discussion on rule of law. In January 2020, when the term of delegating prosecutor Krasoń to Wrocław expired, he was yet again transferred to another office in Cracow.

In 2020, the Voivodeship Administrative Court in Warsaw ruled that the Ministry of

Justice should reveal the reports from the random allocation of cases system works.

In 2017, the System of Random Allocation of Cases was introduced to the Polish courts. The system, operated at the central level, assigns the new cases to the judges in common courts. For three years, the civil society organizations, including e-Państwo Foundation, applied for access to public information concerning the system algorithm and reports from its operation. In 2018, the Voivodeship Administrative Court dismissed the organizations complaint and decided that the system algorithm is not a piece of public information (the case is still pending before the National Administrative Court). Still, in 2020, the court decided that the Ministry should reveal the reports from the system daily operations.

#### *National Council for the Judiciary*

In 2020, the Speaker of Sejm published the lists of judges endorsing candidates to the National Council of Judiciary. The Law on the National Council of the Judiciary was amended in 2017 and changed the way in which 15 judges-members of the NCJ (out of 25) are appointed. Until that time the judges-members of the Council were elected by their peers.

The lists remained confidential for almost two years as the Speaker of the Sejm refused to publish them claiming that the lists are not public information. Finally, in February 2020

in a result of court proceedings, the Speaker of Sejm presented the lists.

The publication of the lists confirmed the on-going concerns regarding their legality as in one case the candidate, Judge Maciej Nawacki, did not collect a required number of endorsement. Four out of 28 of judges on his list withdrew their support before it was submitted to the Parliament. Despite that, the list was accepted by the Speaker of the Sejm and the Sejm appointed the entire group of 15 judges-members of the Council en bloc. The irregularity in submitting the required documents for one candidate influences the entire process of appointing the members of the NCJ and undermines the legal grounds for its further operation.

The further analysis of the lists indicates that out of 360 judges who took part in the whole procedure (ca. 3,5% of judges) 49 of them were seconded to the Ministry of Justice, 56 were appointed by the Minister of Justice for the position of courts' presidents or vice-presidents and 60 were promoted for the higher position in the courts by the very NCJ.<sup>1</sup>

#### *Disciplinary liability of judges*

On 23 January 2020, the Parliament adopted the muzzle law that provided among others a stricter disciplinary liability for judges. The law introduced new provisions on disciplinary offences such as e. g. questioning the status of a judge appointed by the National Council of

1 For more information, see: <https://ruleoflaw.pl/wp-content/uploads/2020/02/krs-zestawienie.pdf>

Judiciary. This provision was a response to the landmark judgements of the Court of Justice of the European Union (CJEU) of 19 November 2019 and the Supreme Court of 5 December 2019. In its ruling, the CJEU outlined the assessment criteria of the independence of the NCJ. In its judgment of 5 December 2019, the Supreme Court confirmed the NCJ, due to its composition and the way it operates, does not provide sufficient guarantees of independence from executive and the legislature. Having relied on these judgments, some ordinary courts judges started to question judicial appointments made by the President. In the opinion of the governing majority, such decisions might “lead to a legal anarchy”, hence the judges “attacking the legal order of Poland” should be held liable in disciplinary proceedings.

In 2020, the disciplinary commissioner of common courts judges continued their work initiating disciplinary proceedings against judges engaged in the defense of rule of law in Poland. In 2020, the commissioner launched proceedings in cases concerning among others judicial decisions, their public statements in defence of rule of law or their membership in judges cooperation groups.

At the same time, there are significant legal concerns regarding the Disciplinary Chamber of the Supreme Court. The Chamber was established in 2018 and is composed of judges nominated entirely by the National Council of the Judiciary (in its current composition). In its resolution of 23 January 2020, three chambers of the Supreme Court found that its disciplinary counterpart did not meet the criteria

for an independent court. Furthermore, on 8 April 2020, the Court of Justice of European Union ordered Poland to suspend the applications of the legal provisions regulating the competences of Disciplinary Chamber in disciplinary cases against judges.

Despite these decisions, members of the Disciplinary Chamber continue to adjudicate. Although the Chamber has not ruled in a disciplinary case against judge since April 2020, still the nature of the decisions made by the Chamber has a pseudo disciplinary character. In this case, the most controversial aspect of Chamber’s work concerns decisions on waiving immunities of judges known of defending rule of law. For example, in November 2020 the Disciplinary Chamber decided to waive the immunity of judge Igor Tuleya. The prosecution intends to bring charges against judge Igor Tuleya in reference to a judicial decision he made in 2017. The Disciplinary Chamber made a similar decision in October 2020 when it decided on waiving the immunity of Judge Beata Morawiec, a president of Judges Association THEMIS.

According to the Act on common courts, the Disciplinary Chamber while deciding on suspending the judge in their duties should also rule on lowering their salaries.

In February 2020, the Disciplinary Chamber decided to suspend judge Paweł Juszczyszyn – a judge from Regional Court in Olsztyn who, in one of the proceedings pending before his court, ordered the Chancellery of Sejm to reveal the lists of supporters for the candidates to NCJ. While suspending Judge Juszczyszyn,

the Chamber also decided to lower his salary for 40%. In November 2020, while deciding on lifting the immunity of Judge Igor Tuleya the Chamber also decided to suspend him in his duties and lower his salary for 25%. Finally, the Chamber made a similar decision in the case of Judge Beata Morawiec and lowered her salary for 50%, yet in the appeal proceeding in this case is still pending.

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

In 2020, the media reported on several cases in which the decisions made by the prosecutors were overturned by their supervisors. In the light of the Act on Prosecutor General and prosecution office the supervising prosecutor has a wide control over the decisions being made by the prosecutors.

In April 2020, prosecutor Ewa Wrzosek launched an investigation in case of organizing the correspondence voting for the President of Poland that was organized within the strict pandemic regime. The decision of Ewa Wrzosek was overturned by her supervisors and the proceeding was discontinued. Furthermore, Ewa Wrzosek heard disciplinary charges related to her decision. The disciplinary proceedings were also on-going in the cases of prosecutors who speak up publicly in defence of rule law e.g. the case of the

prosecutor Krzysztof Parchimowicz who faces disciplinary charges in relation to his public statements.

In the light of the Muzzle law that came into force in 2020, the prosecutors are obliged to declare their membership in all kinds of associations and organizations – this information is then published in the Public Information Bulletin.

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

#### *Length of proceedings*

The Ministry of Justice did not publish the data on the average length of judicial proceedings in Poland in 2020.

According to the report of the Supreme Audit Office (PL - Najwyższa Izba Kontroli),<sup>2</sup> between 2015 – 2019 the average overall length of judicial proceedings increased from 4,7 months to 5,8 months. The increase in the length of proceedings was also observed in the case of judicial proceedings concerning entrepreneurs (from 2,3 months in 2015 to 3,8 months in 2019).

Moreover, in 2020, HFHR conducted a study aimed at assessing the implementation of

2 Supreme Audit Office, Realizacja projektów informatycznych mających na celu usprawnienie wymiaru sprawiedliwości, available in PL: <https://www.nik.gov.pl/kontrola/P/19/038/> (24.02.2021).

ECHR's judgment in the case *Rutkowski and Others v. Poland*,<sup>3</sup> in which ECHR recognized the excessive length of judicial proceedings as a systemic problem of Poland. The HFHR study<sup>4</sup> revealed that 95,8% of 500 surveyed lawyers identified excessive length of proceedings as a burning problem. Furthermore, only 11,6% of the respondents recognized the specific complaint in that matter (PL - skarga na prawo strony do rozpoznania jej sprawy bez nieuzasadnionej zwłoki) as an effective remedy for the parties of judicial proceedings.

The respondents also identified main reasons for the excessive length of the proceedings, including inter alia: excessive intervals between hearings (75% of respondents), long waiting time for the first hearing of the case (73,9%), delays in performing expert opinion or obtaining next opinions (70%), inactivity of the court in making procedural decisions (63,2%), bad organization of court's work (59,1%), inefficient number of judges (52,7%), the excessive formalism of the proceedings (50%).

On the other hand, the statistical report of the Supreme Administrative Court<sup>5</sup> revealed a decrease in the average length of proceedings before administrative courts. In more than

80% of cases, the provincial administrative courts (PL – wojewódzkie sądy administracyjne) were able to deliver a judgment in less than 6 months. However, this data does not concern the jurisprudence of the Supreme Administrative Court, where the average length of the proceedings increased.

In recent years the ECHR issued several rulings concerning lengthy proceedings in civil, criminal, and administrative cases, including the case of *Rutkowski and others v. Poland* (application no. 72287/10), *Kaminska and others v. Poland* (4006/17), *Beller v. Poland* (51837/99). According to the Council of Europe's Committee of Ministers, those cases are still pending implementation.

#### *Execution of judgments*

On 23 January the Supreme Court issued a resolution concerning the status of judges appointed to their position by the new National Council of Judiciary. The resolution was implementing CJEU ruling of 19 November 2019.

Before the Supreme Court ruling, the government of Poland made an attempt to deter the Supreme Court from issuing a ruling in that

3 ECHR judgment in the case *Rutkowski and Others v. Poland*, application no. 72287/10, 13927/11 and 46187/11.

4 Helsinki Foundation for Human Rights, *W poszukiwaniu rozsądnego czasu... postępowań sądowych. Badanie nt. przewlekłości postępowań w Polsce*, available in PL: <https://www.hfhr.pl/wp-content/uploads/2020/07/Raport-przewlek%C5%82o%C5%9B%C4%87-1.pdf> (24.02.2021).

5 Supreme Administrative Court, *Informacja statystyczna o działalności sądów administracyjnych za 2019 r.*, available: <http://www.nsa.gov.pl/download.php?plik=2392> (24.02.2021).

case. In order to do it, the Speaker of Sejm created a fictitious competence dispute regarding the powers of the President of Poland and the Supreme Court, arguing that it suspends all activities of the Supreme Court in that case. The Supreme Court ignored that issue underlying that its actions do not interfere with the competencies of the President of Poland. After the resolution, the state authorities undertook actions aimed at depreciating the SC resolution and questioning its legal force. For this purpose, the Prime Minister applied to the Constitutional Tribunal to examine the constitutionality of the Supreme Court's resolution. The Constitutional Tribunal, in a very rapid way, just after a month since the Prime Minister's motion, found the Supreme Court ruling in the case BSA I-4110-1/20 to be unconstitutional. The CT judgment not only eliminated the SC ruling from the legal system, but also deprived individuals of protection resulting from it.

On 22 October 2020 the Constitutional Tribunal delivered a judgment declaring one of the three legal grounds for abortion unconstitutional. By eliminating the possibility to conduct abortion because of foetal abnormalities, due to which the overwhelming majority of legal abortions had been carried out in Poland, the Constitutional Tribunal's decision has led to an almost complete ban on the procedure. The judgement ignited the biggest street protests in Poland since 1989 (according to some, the biggest in the country's history). Despite the constitutional duty to immediately publish

the judgment in the promulgation journal, the Prime Minister delayed the promulgation for nearly three months, which was perceived as an attempt to postpone inflaming the already tense situation.

#### *Rules on withdrawal and recusal of judges and their application in practice*

The Constitutional Tribunal in its ruling of 4 March 2020 found the specific provision of Code of Criminal Proceedings and Code of Civil Proceedings unconstitutional to the extent to which they allowed to exclude judges from adjudicating due to the manner in which they are appointed. As a result, individuals do not have the possibility to request the exclusion of a judge due to the method of their appointment or challenge it in an appellate procedure. This violates their right to the tribunal established by law in the meaning of ECHR judgment in the case *Astradsson v. Iceland*.

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

On 4th June 2020, the Parliament adopted an amendment to the Code of Criminal Proceedings, enabling the courts to conduct remote hearings in the case of pre-trial detention. As a result of this amendment, the cases concerning pre-trial detention do not have to be recognized in a physical presence of a suspect. This, according to the HFHR, might be a violation of art. 5 of ECHR, which requires the suspect to be physically present during

the hearing concerning pre-trial detention<sup>6</sup>. Moreover, the amendment to the CCP worsened the standard of right to defence, as it did not guarantee that the suspects will have the possibility to consult their lawyers every time they need it. According to the new provisions of CCP, the defendant's lawyer might be present both in the courthouse or in the place where the defendant is held. In the first case, the court is able to grant the defendant a break in the hearing and enable a phone call between the lawyer and his client, unless the interruption of the hearing violates the proper conduct of proceedings and create a risk of not deliver the judgment in the required time.

### *Corruption*

In 2016 the government merged the positions of the Minister of Justice and the Prosecutor General. The new body has gained the competence to amend every decision of prosecutors conducting criminal proceedings or to give binding orders to the prosecutors. All supervising prosecutors received similar powers enabling them to interfere in all criminal proceedings.

In addition, the 2001 Freedom of Information Act guarantees every person access to the documents stored in the case files of preparatory proceedings that have been completed. It

enables the citizens to control the activities of the prosecution.

At the beginning of 2021, the group of ruling majority MPs brought to Parliament an amendment to the Code of Criminal Procedure (CCP). The amendment modifies the rules on third persons' access to case files of completed criminal proceedings, in which the prosecution brought an indictment to the court or decided to discontinue the proceedings. Pursuant to the new meaning of CCP, access to such cases will be dependent on the arbitrary decision of the prosecutor, without even the possibility to challenge it by an administrative court.

According to the HFHR, this violates ECHR provisions guaranteeing freedom of speech<sup>7</sup> and will have a negative impact on media representatives, NGOs, and other watchdogs.

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

### ***Transparency of media ownership and government interference***

On 7 December 2020, PKN Orlen, Polish state-controlled oil company, announced its intention to extend its activity in the media

6 ECHR judgment of 29 March 2010 in the case *Medvedev and Others v. France*, application no. 3394/03, § 118.

7 See ECHR Grand Chamber judgment in the case *Magyar Helsinki Bizottság*, application no. 18030/11.

sector through acquiring of one of the biggest publishing groups in Poland, Polska Press.<sup>8</sup> Polska Press, during its 26-year activity, has created one of the largest media and publishing groups in Poland. The most crucial part of its portfolio are local press titles, including 20 daily newspapers (at least one per each of the 15, out of total 16, administrative regions' capital cities. in Poland), and almost 150 local weekly magazines.<sup>9</sup> The group also runs numerous popular on-line services, the biggest of which is a local news platform [Naszemiasto.pl](https://naszemiasto.pl), as well as dedicated websites of its press titles. According to a November 2020 survey, Polska Press' Internet outlets have an amount of almost 17.5 million monthly real users.<sup>10</sup>

The upcoming acquisition of Polska Press and its media outlets by the major state-owned company raise several questions from the point of view of the possible impact on media freedom and pluralism in Poland. First, the Helsinki Foundation for Human Rights fears that the takeover will result in the politicisation of local press titles, putting an end to independent media at the regional level in Poland. A resemblance can be seen between the acquisition of Polska Press and the situation in Hungary, where independent media

outlets were purchased by the state, or business entities affiliated with the government, so as to gain political influence over them. Moreover, with control over local media outlets and politicised coverage, it would be much easier for the governing majority to attack local opposition politicians. With less than 3 years until the next local elections, in which city mayors and members of local legislative assemblies are chosen, harnessing local media to conduct smear campaigns against local politicians might be a calculated move on the part of the governing majority.

### ***Other issues related to checks and balances***

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

In 2020 HFHR observed that the lack of public consultations on proposed legislation is a recurrent issue. The problem was particularly visible (but not only) during the COVID-19 pandemic, where the majority of government legislation concerning epidemic restriction

8 PKN Orlen, PKN Orlen to take over Polska Press (press release), 7 December 2020, available at: <https://www.orklen.pl/EN/PressOffice/Pages/PKN-ORLEN-to-take-over-Polska-Press.aspx>

9 M. Burlikowski, "The Economist": Orlen mógłby przejąć Polska Press, [MMPonline.pl](https://mmponline.pl), 10 October 2020. <https://mmponline.pl/artykuly/242072,the-economist-orklen-moglby-przejac-polska-press>

10 Gemius Polska, Results of the Mediapanel survey for November 2020, 4 December 2020. <http://www.gemius.pl/wszystkie-artykuly-aktualnosci/wyniki-badania-mediapanel-za-listopad-2020.html>

was not consulted with stakeholders, NGOs, or other actors.

Moreover, the restrictions were usually announced by the Prime Minister or Minister of Health a day or two before its entrance into force. In a large number of cases, the announcement of the restrictions was not connected with the publication of the draft of the regulation. As a result, it happened that promulgated restrictions did not fully correspond with the ones that were announced during press conferences. The late disclosure of the new law drafts resulted in a situation where individuals were surprised with the meaning of the new restrictions. It also led to several mistakes forcing the government to quickly amend its regulations.

Furthermore, the pandemic forced the government to adopt a number of statutes aimed at counteracting the pandemic and its economic consequences. The majority of them amended the Act of 2 March 2020 on preventing, counteracting and combating COVID-19 pandemic.<sup>11</sup> The adopted legislative technique resulted in a situation where large numbers of provisions were related to art. 15 of that act. As a result, this specific statute includes dozens of provisions named after art. 15 and subsequent letters of the alphabet, e.g. art. 15zzzzl. This made the whole regulation and its consequences difficult to understand.

In addition, the acts on counteracting the COVID-19 epidemic were sometimes used as a method to introduce measures not even indirectly related to the counteracting of the pandemic.

As in previous years, the government continued its practice of by-passing public consultations by submitting governmental draft Acts by its MPs. In such a situation, the parliament was not obliged to conduct public consultations.

Generally, the parliament adopted the statutes in a rush. The whole legislative process concerning the Act on Presidential Elections during COVID-19 took only 2 hours and 43 minutes, depriving MP and stakeholders the possibility to comment or amend the proposed draft.

Lack of public consultation and rush in adopting the new law led to several mistakes. Some of them had a great impact on the situation of individuals. For example, the measures adopted in one of the statutes allowed entrepreneurs to temporarily reduce the working time of their employees. However, the reduction resulted in an unforeseen, automatic decrease of social benefits connected with sick leaves and maternity leaves. It took Parliament six months to correct these mistakes.

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11 Act of March 2, 2020 on special solutions related to the preventing, counteracting and combating of COVID-19, other infectious diseases and the crisis situations caused by them (Journal of Laws, item 1842, as amended).

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## ***Constitutional review of laws***

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The ongoing constitutional crisis questioned the ability of the Constitutional Tribunal (CT) to conduct an independent review of constitutionality of law. Specific problems in that field concern the composition of the Tribunal (and in particular the fact that its 3 members were elected to already taken seats) and the legality of the appointment of the President of the Tribunal. Moreover, J. Wyrembak, a member of CT elected on already taken seat, has publicly criticized the President of the Tribunal for interfering with the composition of the court or delaying its judgment due to political reasons.

Furthermore, the Constitutional Tribunal has been used to rubber-stamp the most controversial elements of the so-called reform of the judiciary and as a convenient ally to the ruling majority whenever there was a need to put the certain discussion on hold and reduce political tensions in the ruling majority or social protests. This happened inter alia in the case of the Istanbul Convention, where the Prime Minister decided to suspend public discussion on the termination of this convention by asking the CT to review the convention's constitutionality.

Moreover, the Constitutional Tribunal was used to limit the effects of the Supreme Court (SC) Chambers resolution of 23 January 2020. Before the SC judgment, the CT issued a judgment identifying an alleged competence dispute between the Speaker of the Sejm, President of Poland, and the Supreme Court. It aimed at preventing the Supreme Court from

issuing the resolution. After the SC resolution in just a month, the Constitutional Tribunal found the Supreme Court's ruling to be unconstitutional despite a lack of competence to assess the constitutionality of judgments.

Finally, the Prime Minister asked the Constitutional Court to assess the constitutionality of art. 417 of the Civil Code, allowing individuals to seek compensation for damages that occurred by the adoption of a law, e.g. governmental regulations introducing COVID restrictions. The future CT judgment founding this provision to be violating the Constitution will prevent common courts from assessing the constitutionality of regulations adopted by the government and ordering compensation to all persons who were victimized by COVID-19 restrictions.

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## ***Independent authorities***

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In September 2020, the five-year term of office of Commissioner for Human Rights ended. However, according to the provision of the Act on Commissioner for Human Rights, the acting Commissioner fulfils its duties until the election of the new Commissioner.

In August 2020, the coalition of more than 1200 non-governmental organizations proposed Ms. Zuzanna Rudzińska-Bluszcz, an attorney and employee of the Commissioner for Human Rights Office, as a candidate for the position of the new Human Rights Commissioner. Despite that, the lower house of the Parliament denied supporting her candidacy three times. At the same time, the Law

and Justice proposed Mr. Piotr Wawrzyk, a ruling majority MP and deputy minister of foreign affairs as a candidate for that position. On 21 January 2020, Mr. Wawrzyk was elected to the position of new Commissioner for Human Rights, but his election was not accepted by Senate, the higher house of the Polish Parliament.

Before that, the representatives of the ruling majority questioned the constitutionality of the Act on Commissioner for Human Rights in the context of provisions enabling current CfHR to hold office until the election of new Commissioner. According to their motion the current regime violates the rule of law principle, the principle of public trust to the state, as well as the provisions of the Constitution that limits the term of office of CfHR to only 5 years.

At the end of 2020, the Sejm decided to decrease the proposed budget of the Commissioner for Human Rights Office by 15%. According to the Commissioner, it means that office day-to-day expenses were set at the level observed in 2013 and 2014. Therefore, the CfHR Office might face problems to cover all salaries of already employed employees.

## **Enabling framework for civil society**

### **Lawsuits and prosecutions against civil society actors**

As a part of the protest against anti-LGBT resolutions adopted by local governments, Bart Staszewski, an LGBT activist, runs a photographic project within which he travels to places where such resolutions were adopted and hangs a sign “LGBT-free zone” along roads leading into them. He then takes photographs of LGBT people who live in those places, before taking down the sign. In response to this project, Bart Staszewski faced numerous legal actions. For example, in 2020 two MPs from the ruling coalition have submitted a request to prosecutors for him to be investigated.<sup>12</sup> Furthermore, the conservative think tank Ordo Iuris submitted a request to the police to start an investigation on the basis of the provisions of the Code of Petty Crimes against Bart Staszewski, however, the police refused to launch the investigation.<sup>13</sup>

In 2020, one of the LGBT civil society organisations, Campaign Against Homophobia (Polish *Kampania przeciwko homofobii*), won

12 Notes from Poland, Activist signposts Polish towns as “LGBT-free zones” in protest against anti-LGBT resolutions, available at: <https://notesfrompoland.com/2020/01/25/activist-signposts-polish-towns-as-lgbt-free-zone-in-protest-against-anti-lgbt-resolutions/>

13 Ordo Iuris, Kolejna krzywdząca akcja Bartosza Staszewskiego. Ordo Iuris w obronie prorodzinnych samorządów, available at: <https://ordoiuris.pl/rodzina-i-malzenstwo/kolejna-krzywdzaca-akcja-bartosza-staszewskiego-or-do-iuris-w-obronie>

a civil lawsuit against the public media. In the civil proceedings, the organisation sought remedies for the violation of its good reputation by one of the materials prepared by the public television. The material (entitled “Invasion”) presented homophobic statements and included allegations regarding the transparency of financing and organising LGBT pride marches in Poland. In June 2020, a court in Warsaw ordered public television to remove the material from its YouTube channel.<sup>14</sup>

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

In 2020, the anti-LGBTI campaign escalated. During the presidential campaign, the representatives of the governing majority, including incumbent President Andrzej Duda, made numerous anti-LGBT statements describing LGBT persons as “a foreign ideology” and seeking “the ban on the LGBT ideology”.<sup>15</sup> The attacks on the LGBT community constituted a peak of an over 2-year campaign, in which both public media and state authorities (including the representatives of the

local governmental institutions adopting the so-called anti-LGBT ideology resolution) participated.

In August 2020, the Minister of Justice together with the Minister of Environment presented a draft law on transparency of NGO financing. According to the draft legislation, each NGO that receives more than 30% of its annual budget from foreign funding will have to register in an official registry of foreign funded NGOs. Additionally, such an NGO should inform about the foreign funding in all of its prepared and published materials (including the printed materials but also on organization’s website etc., regardless of their form). In the light of the proposal, if an NGO fails to register, then it could be subject to financial penalties ranging from 3 up to 50 thousand PLN (7.5 up to 12.5 thousand EUR). If an NGO receives less than 30% of its funding from foreign sources, then it would be obliged only to inform about it in its materials. The draft law was strongly criticized by the civil society organizations who claim that adoption of this law would significantly limit the scope of work of the CSOs. Furthermore, the deputy prime minister who is responsible for supervising the Public Benefit Committee announced that the government does not plan to implement such a

14 Kampania Przeciw Homofobii, Sąd nakazał TVP usunięcie „Inwazji” z Youtube’a. To sukces KPH, które uruchamia zbórkę na kolejne sprawy przeciw Telewizji, available at: <https://kph.org.pl/sad-nakazal-tvp-usuniecie-inwazji-z-youtubea-to-sukces-kph-ktore-uruchamia-zbiorke-na-kolejne-sprawy-przeciw-telewizji/>

15 The Guardian, Polish president issues campaign pledge to fight ‘LGBT ideology’, available at: <https://www.theguardian.com/world/2020/jun/12/polish-president-issues-campaign-pledge-to-fight-lgbt-ideology>

law. Since the day the draft law was presented, there have been no further legislative works in this regard.<sup>16</sup>

### ***Access to funding***

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In 2020, the media also reported on the works of the National Institute of Freedom – the Centre of Civil Society Development. The Institute was established in 2017 as a governmental agency responsible for distributing some part of the public financing for civil society organizations. According to the media reports, the vast majority of the organization that receives financing from the National Institute of Freedom are the catholic, conservative or even in some cases nationalistic organizations. The media reports also documented examples of cases that remain loyal to the governing majority or have some personal ties with the representatives of the government administration. Furthermore, the media report revealed information on granting substantial financing to organizations that were registered only a week before announcing the call for proposals.<sup>17</sup>

On the other hand, in 2020, the Active Citizens Fund – National program, funded by the EEA and Norway Grants, was launched. The 30 million EUR budget program is dedicated to supporting civil society organizations working “towards greater civic participation in public life, protection of human rights and equality, environmental protection, preventing climate change, and empowering vulnerable groups”. The program provides financing, including grants, to improve awareness of civic, equality, and discrimination issues. The financing offered within the program is dedicated to both thematic projects as well as projects aiming at strengthening the condition of the civil society sector in Poland.<sup>18</sup>

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

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Since 2015, the civil society’s access to public consultations and participation in decision-making process has been gradually limited. According to the latest information analysing the legislative process, in years 2015–2019 the average time of social consultations was 12 days, and the government directed to

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16 Poland, Ministry of Justice, Nowe prawo wzmacni przejrzystość finansowania organizacji pozarządowych, available at: <https://www.gov.pl/web/srodowisko/nowe-prawo-wzmocni--przejrzystosc-finansowania-organizacji-pozarzadowych>

17 Baczyński M., Miliony dla swoich. Tak PiS wspiera swoje organizacje, cz. 1., available at: <https://wiadomosci.onet.pl/tylko-w-onecie/pis-i-organizacje-pozarzadowe-partia-rzadzaca-przelewa-miliony-zl-dla-swoich/51d421f>

18 Active Citizens Fund, Official launch of Active Citizens Fund – National programme, available at: <https://aktywniobywatele.org.pl/en/official-launch-of-active-citizens-fund-national-programme/>

social consultations less than 2/3 of the prepared draft legislation.<sup>19</sup> In recent years, the requirement of public consultations was also bypassed by presenting the draft legislation by the members of the Parliament and not by the government. This practice continued in 2020 when certain key pieces of draft legislation, particularly relevant from the perspective of civic engagement, such as e. g. the changes to the Electoral Code, were presented by the members of the parliament without proper consultations and adopted at an accelerated pace.

In March 2020, the Parliament amended the provisions of the Act on the Social Dialogue Council.<sup>20</sup> The Council is a platform of cooperation between the representatives of the employers, employees, and the government. The Council prepares among others opinion on draft legislation concerning e. g. labor market and state's financial strategies. In the light of the changes, the Prime Minister gained the competence to dismiss any member of the Council in a case of "loss of trust in a relation to an information concerning member's work performance". This provision was strongly criticized as an attempt to widen the

governmental control over the works of the Council. This provision was eventually abolished in December 2020.

Furthermore, according to the Act on public benefit and voluntary activities, each Ministry should prepare a program of cooperation with civil society organizations. In recent years, the practice of adopting such programs has, however, deteriorated. According to the information presented by the Polish Federation of Civil Society Organizations, in 2020, eight ministries (out of 16 Ministries in 2020) did not publish such a program.<sup>21</sup>

### ***Civil society mobilisation and resilience***

Despite the shrinking of space for civil society engagement in the decision-making process, civil society remains mobilised and seeks new forms of advocacy work. One of the examples of civil society's innovative work was the campaign for support for the candidate for the position of Ombudsman. In 2020, the term of office of the Ombudsman, professor Adam Bodnar, expired. According to the

19 Poland, Fundacja Batorego, XIII raport Obywatelskiego Forum Legislacji przy Fundacji Batorego, available at: [https://www.batory.org.pl/informacje\\_prasowe/xiii-raport-obywatelskiego-forum-legislacji-przy-fundacji-batorego/](https://www.batory.org.pl/informacje_prasowe/xiii-raport-obywatelskiego-forum-legislacji-przy-fundacji-batorego/)

20 Poland, Act on the Social Dialogue Council (Ustawa z dnia z dnia 24 lipca 2015 r. o Radzie Dialogu Społecznego i innych instytucjach dialogu społecznego) 24 July 2015

21 Ogólnopolska Federacja Organizacji Pozarządowych, Problemy z programami współpracy, available at: <https://repozytorium.ofop.eu/problemy-z-programami-wspolpracy/>

Constitution, the candidates for the position of the Ombudsman are presented by the group of MPs. In July and August, civil society organisations mobilised to present to the MPs their own candidate. Zuzanna Rudzińska-Bluszcz, a former director of strategic litigation in the Ombudsman's office, was supported by over 1200 civil society organisations. Her candidacy was presented by two political groups, yet she was not appointed for the position by the governing majority.<sup>22</sup>

### **Other systemic issues affecting rule of law and human rights protection**

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

On 22 October 2020, the Constitutional Tribunal delivered a judgment concerning the access of abortion in case of severe or fatal impairment of the foetus. The CT found the specific provision of the Act on planning family to be unconstitutional. It resulted in a

situation in which vast majority (96%) of abortions have become illegal in Poland.<sup>23</sup>

Moreover, the CT did not decide to postpone judgment entry into force. It directly violated the rights of women who were already pregnant and had legal grounds to terminate their pregnancy. As a result of CT judgment, they were forced to give birth to children with severe or fatal impairment, which violates human rights standards.

In addition, Poland still did not take general measures to implement ECHR judgments in the cases *Tysiąc v. Poland* and *R.R. v. Poland* concerning access to legal abortion and prenatal genetic testing. Moreover, the ECHR already communicated to the Polish authorities the case of *B.B. v. Poland* concerning lack of access to abortion in case of severe foetus impairment.<sup>24</sup> The applicant in that case raised a complaint on violation of her rights protected under Art. 3 of the European Convention on Human Rights, forbidding torture, inhuman or degrading treatment.

22 [Rp.pl](https://www.rp.pl/Urzednicy/301219865-Sejm-wybral-Piotra-Wawrzyka-na-Rzecznika-Praw-Obywatelskich), Sejm wybrał Piotra Wawrzyka na Rzecznika Praw Obywatelskich, available at: [https://www.rp.pl/Urzednicy/301219865-Sejm-wybral-Piotra-Wawrzyka-na-Rzecznika-Praw-Obywatelskich.html](https://www.rp.pl/Urzednicy/301219865-Sejm-wybral-Piotra-Wawrzyka-na-Rzecznika-Praw-Obywatelskich)

23 [Rp.pl](https://www.rp.pl/Spoleczenstwo/200819353-Raport-1116-legalnych-aborcji-w-2019-roku), 1116 legalnych aborcji w Polsce, available: [https://www.rp.pl/Spoleczenstwo/200819353-Raport-1116-legalnych-aborcji-w-2019-roku.html](https://www.rp.pl/Spoleczenstwo/200819353-Raport-1116-legalnych-aborcji-w-2019-roku)

24 Case no. 671717/17

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

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In 2020 the European Committee for the Prevention of Torture, Inhuman or Degrading Treatment and Punishment (CPT) delivered a report from its ad-hoc visit to Poland concerning the treatment of persons in police custody. According to the findings of the CPT report, persons taken into police custody in Poland are particularly exposed to the risk of being ill-treated, in particular at the time of apprehension. Therefore, the CPT urged Polish authorities to step up their efforts in this area and rigorously combat ill-treatment by the police.

Moreover, for more than 20 years the CPT and UN Committee Against Tortures have been urging Polish authorities to reduce occupancy rates in all penitentiary establishments, and offer a minimum of 4 m<sup>2</sup> of living space per inmate in multiple occupancy cells. Despite numerous appeals on that topic, Poland is still not willing to improve this legal standard of space ratio per inmate. As a result, Poland is raking among the worst in this area among all Council of Europe countries.

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

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On 19 November 2019, the CJEU delivered its judgment concerning the status of the Disciplinary Chamber of Supreme Court and the status of the National Council of Judiciary. The judgment provided Polish courts with

the possibility to assess the status of judges appointed by the new NCJ in the context of their independence. Poland not only have not implemented the judgment of CJEU but also took actions aimed at creating chilling effect among judges and discouraging them from using EU law to guarantee the independence of the court recognizing particular case. The so-called muzzle law adopted at the end of 2019 tightened the rules of disciplinary liability of judges and recognized any actions aimed at questioning the status of other judges as a disciplinary offense. Moreover, the Disciplinary Chamber of the Supreme Court was found as the only body competent to recognize cases concerning such offenses.

On the CJEU issued a ruling suspending the actions of the Disciplinary Chamber of the Supreme Court. CJEU decided to suspend the application of the provisions of the Supreme Court Act establishing the Disciplinary Chamber as well as to refrain from referring the cases pending before the Chamber for consideration by the panel not meeting the requirements of independence, laid down, inter alia, in the CJEU judgment of 19 November 2019.

Despite the CJEU ruling, the Disciplinary Chamber of Supreme Court gave on 9 June 2020 consent to prosecute Justice Tuleya, for his decision to admit journalists to an announcement of a ruling which was important to the public. On 12 October 2020, the Disciplinary Chamber lifted the immune of other Judge – Beata Morawiec, a President of the Judicial Association Themis, which is deeply involved in the protection of the independence of the

judiciary. However, this judgment has still not become final.

Last but not least, according to the European Implementation Network, Poland have not implemented 32 leading ECHR judgments. The average implementation pending exceeds 6 years. Finally, in recent 10 years, more than 40% of Polish cases that ended with ECHR ruling have not been successfully implemented. This includes cases concerning access to abortion, the right to have their case recognized in a reasonable time, inadequate detention conditions, lack of adequate and effective investigation, excessive length of detention of remand, delays in the enforcement proceedings.<sup>25</sup>

## **Impact of COVID-19**

### **Impact on the justice system**

A study prepared by the HFHR has identified several problems related to the impact of COVID pandemic on the functioning of the justice system.<sup>26</sup>

First, there have been numerous cancelled court hearings and sessions, which will result in an extension of duration of the proceedings in the future. In some courts, during the

quarantine, all of the scheduled hearings were cancelled, whereas in the other the number of hearings was smaller by half (compared to 2019).

Second, the applicable rules of filing the pleadings were an issue, as a result of different solutions adopted by particular courts in this regard (e.g. filing them in person, sending them by post or electronically). To make the matters worse, some courts have not informed the parties clearly on how to do so, which exacerbated the confusion.

Third, the possibility for third persons to participate in court proceedings as audience has been limited (as the study revealed, almost all of 369 Polish courts adopted some regulations in this regard; in 24 courts, the participation of audience has been completely excluded).

Fourth, when it comes to administrative courts, a disturbing trend of directing cases to sessions held *in camera* (without the participation of parties) has been observed. The courts argued that they lacked technical possibilities to conduct a hearing via means of distance communication.

Fifth, difficulties in the access to case files during the pandemic are visible. They take diverse forms, such the duty to order case files far in advance, the limited working hours of court

25 <https://www.einnetwork.org/poland-echr>

26 HFHR, Prawa człowieka w dobie pandemii, January 2021, <https://www.hfhr.pl/wp-content/uploads/2021/01/Prawa-czlowieka-w-dobie-pandemii.pdf>

reading rooms, as well as the limited time for familiarising with the case files (in some cases, reportedly, severely curtailed to 15 minutes).

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

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From among all civil rights and liberties, the freedom of assemblies has been affected most significantly by the COVID-related restrictions introduced in 2020 by the Polish government. The freedom of assemblies was limited for the first time in the regulation of 13 March 2020, which introduced a limit of 50 participants applicable both to ordinary assemblies (i.e. such that are organized on the basis of notifying a certain local government entity) and spontaneous assemblies (occurring as a reaction to some unpredicted events in public sphere). The absolute ban on assemblies was introduced soon on 31 March 2020, only to be softened in the end of May 2020, when assemblies of 150 persons were allowed again. This number was gradually limited by the subsequent regulations, and reached the limit of 5 persons, which is applicable up to this day, on 24 October 2020. A correlation can be noticed with massive protests that started two days earlier after the Constitutional Tribunal

delivered its decision on a nearly absolute ban of abortion in Poland.<sup>27</sup>

There are serious concerns that the adopted regulations are unconstitutional.<sup>28</sup> First, the government decided not to introduce any of the extraordinary measures allowing for derogation of certain civil liberties. Second, the Constitution requires that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute (act), and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Moreover, such limitations cannot violate the essence of freedoms and rights. Freedom of assembly has been restricted in a series of regulations (legal acts hierarchically lower than statutes) issued by the government, and probably beyond the scope of statutory authorization: the act that gives power for the government to issue such regulations contains a catalogue of possible orders or prohibitions that can be introduced, and a ban on assemblies is not among them.<sup>29</sup> Lastly, the introduced limitations on the number of participants violate the very essence of the right to assembly.

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27 <https://www.theguardian.com/world/2020/oct/24/thousands-join-poland-protests-against-strict-abortion-laws>

28 See M. Małecki, “Poland’s coronavirus restrictions are unconstitutional and risk years of legal chaos”, Notes from Poland, 18 April 2020. <https://notesfrompoland.com/2020/04/18/polands-coronavirus-restrictions-are-unconstitutional-unlawful-and-risk-years-of-legal-chaos/>

29 See Poland, Act on preventing and combating infections and infectious diseases (Ustawa o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi), 5 December 2008, Articles 46-46b.

Regardless of the restrictions, and the criminal or administrative penalties likely to be imposed in case of their breach (the latter even up to approx. EUR 6.5 thousand), there were numerous massive demonstrations in Poland in 2020. The most prominent example are protests organised by Polish Women on Strike (arguably the largest in history) with relation to the Constitutional Tribunal's decision on abortion law of 22 October 2020

There is a growing number of decisions in which Polish courts review the legality of introduced limitations on the freedom of assembly. In the majority of cases, the assessment is unequivocally negative.<sup>30</sup> For instance, the Appellate Court in Warsaw, when hearing an appeal from a banned assembly's organizer, observed that such a ban „raises significant concerns from the point of view of the constitutional freedom of assembly”, in particular when it comes to possible limitations of civil rights and the principle of proportionality.<sup>31</sup> Other courts emphasized, among others, the possible chilling effect that restriction of

freedom of assembly can cause, or were critical of the practice of imposing both criminal and administrative penalties for the same act.

### *Inequality and discrimination*

As HFHR report indicates,<sup>32</sup> there were three groups mostly affected by the pandemic: women, homeless people and foreigners. With regard to women, the laws adopted with relation to COVID-19 allowed for limiting the working time, therefore lowering the salaries, which serve as a basis for determining the amount of maternity allowance. As a result, the constitutional principles of equal treatment, social justice and the protection of maternity could have been violated. These changes in law were alleviated after the intervention from the Ombudsman.<sup>33</sup>

Second, homeless persons are by definition particularly exposed to risks connected with the pandemic. HFHR indicated that, among others, financial resources allocated by the

30 See further M. Kalisz, M. Szuleka and M. Wolny, „2020. Pandemia, kryzys praworządności, wyzwania dla praw człowieka”, HFHR, 2020. <https://www.hfhr.pl/wp-content/uploads/2021/02/2020.Pandemia-kryzys-praworzadnosci-wyzwania-dla-praw-czlowieka-01-02.pdf>; Obywatele RP, „Uczestniczenie w zgromadzeniu w czasie pandemii nie jest wykroczeniem”, 21 November 2020. <https://obywatelerp.org/uczestniczenie-w-zgromadzeniu-w-czasie-epidemii-nie-jest-wykroczeniem/>

31 Appellate Court in Warsaw, Judgement of 15 May 2020, case no. VI ACz 339/20.

32 HFHR, Prawa człowieka w czasie pandemii, January 2021. <https://www.hfhr.pl/wp-content/uploads/2021/01/Prawa-czlowieka-w-dobie-pandemii.pdf>

33 <https://www.rpo.gov.pl/pl/content/tarcza-antykryzysowa-zasilek-macierzynskiego-rpo-do-MRPiPS>

government in 2020 did not satisfy the needs of facilities providing support for the homeless, nor did they guarantee access to healthcare and COVID testing.

Third, when it comes to foreigners, the study has also revealed that the pandemic limited the Border Guard's and Office for Foreigners' capacity for handling e.g. the incoming applications for international protection. According to the report, in 2020 only 1620 applications were accepted, which makes it the smallest number since 1999. Persons applying for such protection have also been deprived of needed medical and social support and no changes in law have been adopted so far. Moreover, so far no measures have been adopted in order to guarantee foreigners legally employed in Poland social security benefits in case they are made redundant.

### ***Access to information***

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In March 2020 a change in law suspended the possibility for citizens to challenge the authorities' inaction with regard to requests for public information. Such amendment, in HFHR's opinion, should be assessed negatively as violating the right to access public information and completely unjustified. Although the law was applicable only for three months, during this period it deprived the citizens the expectation to obtain answer for their FOI request within the ordinary two-week time.

### ***Anti-corruption framework***

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At the beginning of the COVID-19 pandemic, the Parliament adopted an amendment to the Act on counteracting the COVID-19 pandemic.<sup>34</sup> Its Article 10c states that whoever violates official duties or regulations while purchasing goods or services necessary to combat COVID-19 does not commit criminal offenses specified in Articles 231 and 296 of Criminal Code, provided that they act in the public interest and without committing these violations it would not be possible to acquire those goods or services. Art. 231 of CC punishes failure to fulfil obligations or exceeding powers by a public officer, while art. 296 of CC criminalizes inflicting substantial material damage to an entity.

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34 Act of March 2, 2020 on special solutions related to the preventing, counteracting and combating of COVID-19, other infectious diseases and the crisis situations caused by them (Journal of Laws, item 1842, as amended).

# **Romania // Association for the Defense of Human Rights in Romania – the Helsinki Committee (APADOR-CH)**



## **Key concerns**

- Positive developments on judicial independence may come from ongoing reform, although new rules on accountability and liability of judges raises some concerns
- Lack of resources in the judiciary continues to impact on length of proceedings
- Concerns persist over the inadequacy of the legal aid system
- Government lags behind on the implementation of judgments of the European Court of Human Rights
- COVID-19 exacerbates existing issues as regards the quality and transparency of law-making, access to information and justice
- Measures of online censorship taken to allegedly fight disinformation during the

COVID-19 pandemic

## **Justice system**

### **Judicial independence**

Starting with 30 September 2020, the Ministry of Justice put up for public debate, until 31 March 2021, 3 draft laws that can be grouped under the title of “justice laws”, respectively: the draft Law on the statute of judges and prosecutors in Romania; the draft Law on judicial organization; the draft Law on the Superior Council of Magistracy. It should be mentioned that the proposed new laws replace (they do not modify) the current “justice laws”, which are to be repealed: Law no. 303/2004, Law no. 304/2004 and Law no. 317/2004.

As a general assessment, the draft laws return, in many respects, to the regulations prior to those introduced in 2018 and transpose decisions of the Constitutional Court, judgments of the European Court of Human Rights (ECtHR) and recommendations of several international bodies. They contain positive developments such as:

-redefining the principle of impartiality, by including the obligation for judges and prosecutors to ensure, in addition to impartiality,

the appearance of impartiality (art. 4 para. 3 of the draft law on the status of magistrates);

- the removal from the draft Law on the statute of judges and prosecutors of the obligation provided for magistrates in the current regulation (art. 9 para. 3 of Law 303/2004), according to which one must refrain from defamation against other state authorities, by any means it can be expressed. This obligation can restrict the freedom of expression of magistrates and can be a source of pressure on them. The removal of this provision corresponds to a recommendation in the 2018 MCV Report.

-Article 91 of the draft Law on the Superior Council of Magistracy establishes the principle of non-permanent activity of SCM members, who, between SCM sessions, will carry out their current professional activity in courts and prosecutor's offices, except for the SCM president and vice president, who have permanent activity within the SCM.

#### *Accountability of judges and prosecutors*

A draft law on the statute of judges and prosecutors (no. 303/2004) is part of the "justice laws" opened for consultation at the end of September 2020 by the Ministry of Justice. The public consultation will last until 31 March 2021.

The new regime regulating the patrimonial liability of magistrates (art. 270 of the draft law) poses some concerns.

On a positive note, the draft law establishes that the plenum of the Superior Council of

Magistracy (SCM) will be the decision-making body regarding the recourse action against magistrates. In other words, a professional body, SCM, will decide on the quality of the magistrates' activity. It will no longer be the Ministry of Finance, part of the executive branch with no special abilities in evaluating complex legal issues.

However, the draft law also has certain deficiencies which can make the mechanism inefficient.

1. The draft law does not provide for a deadline for the Ministry of Finance to notify the SCM plenum in case the state is obliged to pay compensation for a judicial error. By contrast, the current legislation does provide for a 2 months' term. The absence of a deadline can lead to a very long delay in initiating the verification procedure that precedes the formulation of the recourse action and there is a risk that the recourse action will be formulated late.

2. The draft law does not provide for the possibility of initiating recourse action against magistrates who, in civil cases, acted in bad faith or gross negligence leading to ECHR judgments obliging the state to pay compensation. For criminal cases such a regulation exists and it is provided in the Code of Criminal Procedure.

3. The draft law provides for a 6-month period (from the payment of compensations) for the state to exercise the recourse action against the magistrate who acted in bad faith or gross negligence. This period is too short and should be increased to at least 1 year from the payment of compensation.

The solution offered in the draft law- that of indirect increase of the term of 6 months by another 6 months through the possibility given to the state to postpone by 6 months the payment of due compensation- is not reasonable. A victim of a judicial error must receive compensation as soon as possible, a delay of 6 months from the moment when the state is able to pay is not justified. Moreover, even the Civil Code stipulates that the derogations made by parties from the general limitation period (which is 3 years) cannot lead to the establishment of limitation periods of less than 1 year, precisely in order for the holder of the action to have a reasonable time to act. So, the reasonable term estimated by the Civil Code for exercising an action is at least 1 year (not 6 months) from the date of birth of the right to act.

In addition, Article 156 of the draft law on judicial organization (also part of the package of laws subject to public debate until 31 March 2021) provides for the abolition of the Special Section for the investigation of offences committed by magistrates (SIIJ) within the Prosecutor's Office attached to the High Court of Cassation and Justice.

Some of the arguments brought by the Ministry of Justice for the abolition of the SIIJ are: unanimous criticisms made in international reports; lack of correlation between the law on the organization of the Special Section, as a structure without legal personality within the Prosecutor's Office attached to the High Court of Cassation and Justice, and the concrete attributions of the head of the Special Section which seem rather similar to

the specialized prosecutorial structures with legal personality (DNA, DIICOT); violation of the principle of career separation (Article 1 (2) of Law no. 303/2004 on the statute of judges and prosecutors); the existence of de facto immunity from criminal jurisdiction of SIIJ prosecutors, in some cases; the regulation and functioning of SIIJ -having in view the definition of the notion of a hierarchically superior prosecutor- trigger discussions from the perspective of the constitutional principle of hierarchical control but also from that of efficient judicial control; the material and territorial competence assigned to this section, from a functional point of view, create difficulties and does not ensure the use of specialized prosecutors in situations where it would be necessary (fight against corruption, organized crime and terrorism), etc.

In addition to this draft law amending Law no. 304/2004, which contains in articles 156-158 provisions regarding the abolition of SIIJ, there is also a draft law aimed exclusively at the abolition of the SIIJ, which was initiated by the Ministry of Justice in February 2020. The amended form of this draft law was sent back to the Superior Council of Magistracy (SCM) for an opinion. In essence, the December 2020 version of the draft law contains provisions similar to those in articles 156-158 of the draft law for amending law no. 304/2004.

During the meeting of 11 February 2021, the SCM plenum gave a negative opinion (11 votes out of 19) on the draft law on the abolition of the Section (the December 2020 version). The negative opinion was justified by the fact that *„the proposed normative solution is*

*not accompanied by guarantees meant to give efficiency to the principle of independence of the judiciary, by ensuring adequate protection of judges and prosecutors against possible pressures on them.”*

After receiving the negative opinion from the SCM (an advisory opinion only), the Minister of Justice stated publicly that he will nonetheless send the draft law to the Parliament, for adoption.

APADOR-CH considers that a greater importance should be given to the SCM’s opinion as an institution representing the constitutional guarantor of the independence of justice. The fact that the negative opinion was adopted with a narrow majority vote indicates that this matter is subject to debate among magistrates and any solution adopted should try to reconcile the requirements of the SCM opinion with the initiative of abolishing the SIIJ.

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

A draft law on judicial organization (no. 304/2004)<sup>1</sup> is part of the “justice laws” opened for consultation at the end of September 2020 by the Ministry of Justice. The public consultation will last until 31 March 2021.

Article 68 (3) of the draft law on judicial organization provides for the possibility of the hierarchically superior prosecutor to overturn

a prosecutors’ decision only for reasons of illegality: “the decisions adopted by the prosecutor may be refuted, with a motivation, by the hierarchically superior prosecutor, when they are considered illegal.” This change in the draft law followed a recommendation from the GRECO Report of July 9, 2019 and returned to the regulation prior to 2018, eliminating the possibility of overturning the prosecutors’ solutions for reasons that they are unfounded. Currently, until the adoption of the new law on judicial organization, the current law on judicial organization provides in article 64 (3) the possibility of refuting the prosecutors’ solutions on grounds that they are unfounded.

#### *Public perception of the independence of the judiciary*

The Robert Rosu case polarized the Romanian justice society and stirred unparalleled controversy, as well as protests expressed by attorneys. A Romanian attorney, Robert Rosu is partner at one of the most renowned law firms in Romania, Tuca, Zbarcea&Associates (“TZA”).

In 2005, TZA through Mr. Rosu represented a buyer of litigation rights before Romanian authorities for the completion of the procedures for the restitution of several land plots. In 2015, the prosecutors of the Romanian National Anticorruption Directorate (DNA) began an investigation and accused him of

1 Full text available at: <http://www.just.ro/in-temeiul-dispozitiilor-art-7-din-legea-nr-52-2003-privind-transparenta-decizionala-in-administratia-publica-republicata-ministerul-justitiei-supune-dezbaterii-publice-urmatoarele-proiecte-de-leg/>

organizing a crime group with the beneficiaries of the restitution, based on his activities as an attorney.

The first court acquitted Robert Rosu, motivating that his activities were professional ones, specific to an attorney. This decision was appealed by the DNA. On 18.12.2020, the High Court of Cassation and Justice condemned him to 5 years of prison.

The legal issues deriving from this final decision are related to the huge discrepancy between the initial acquittal solution and the condemnation of the second court, for the same activities qualified by the first court as activities specific to the lawyer's profession. Several voices raised awareness on the fact that during the NAD's investigation, judges were heard and retracted within their testimony the decisions made through their final civil ruling, under pressure.

The case led to a wave of protests from attorneys within all Romanian bars arguing for the need to defend the lawyer's profession independence from undue associations between the lawyer's defence and the activities of the client. Other actors also reacted: the Superior Council of Magistracy publicly condemned the protests and the Prosecutors' association supported the DNA's point of view.

The fact that the Supreme Court solution was diametrically opposed to the first instance court one (went from acquittal to prison sentence) has created in a part of the public opinion a perception which may affect the appearance of impartiality of justice. The ruling against Mr.

Rosu is perceived as an example of a prison sentence being imposed as an act of intimidation against a lawyer. This perception has been also fed by the fact that although the common 30-day motivation term lapsed, the Court did not yet deliver its motivation. According to the law, where good reasons exist, this term can be extended by 30 days, for a maximum of two times. Currently, Mr. Rosu is executing his sentence in prison and cannot file any extraordinary means of recourse. This case has led to public discussions regarding the necessity for the motivation to be delivered in the same time as the court ruling.

It is worth emphasizing that the appearance of impartiality is of similar importance to impartiality itself. Not only is this particular case but in all cases, the motivation of the solution should be very clear and convincing, based on arguments beyond any doubt and, if it cannot be communicated together with the solution itself, it must be drafted as soon as possible, shortly after pronouncing the solution.

## **Quality of justice**

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### *Legal aid system*

The issue regarding the low value of legal aid fees for legal aid lawyers remains an unsolved one and continues to affect the quality of legal assistance and subsequently, the accessibility to effective legal representation by the lawyer.

A Protocol between the Ministry of Justice, the Public Ministry and the National Association of the Romanian Bar establishing the legal

aid fees has been adopted in February 2019. Although the adoption of this instrument was a welcome step, in practice the matter of the low value of the fees is yet to be resolved, since in some cases, the courts do not even take into consideration the fees mentioned in the Protocol, lowering them even further. Procedural laws allow judges to modify these fees, without having to observe the minimal thresholds set out through the Protocol, since such Protocol is not binding and opposable to magistrates as a law would be. In addition, in practice, it is also common for prosecutors to challenge the amount of the legal fee requested by the legal aid lawyers.

Another matter related to the legal aid fees is the fact that they are usually paid with a certain delay which can also lead to disruptions in the quality of the legal representation. One solution would be to enforce mandatory legal provisions establishing minimum legal aid fees which are paid within 30 days from the date when the legal services were performed.

#### *Resources of the judiciary*

Considering the concerns of judges and prosecutors with respect to the potential abrogation of their service pensions<sup>2</sup>, a large number of magistrates filed requests for early retirement.

In the near future, this circumstance will lead to a reduced number of magistrates per court, while the number of cases will remain the same, thus leading to an overload of cases per magistrate.

In December 2019, the Romanian Parliament voted for the anticipated retirement to be postponed until January 2022, in order to prevent the judicial system being overwhelmed due to the lack of magistrates. This measure alone, however, will not suffice. Competitions to fill in positions as judges and prosecutors should be organised urgently so that human resources at the courts' level are ensured once the magistrates are allowed to enter early retirement. Moreover, 2020 was the first year in which the Superior Council of Magistracy did not organize any type of competitions for the positions of judges or prosecutors, which increases the need for new resources to fill open positions within the judicial system and share magistrates' caseload.

#### *Digitalisation of the justice system*

In September 2020, the Ministry of Justice announced a draft law regarding remote justice during the pandemic that will provide for the possibility to hold video-conference hearings.<sup>3</sup> The draft law provides the possibility for

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2 See the country submission on Romania in last year's report from Liberties, [A response to the European Commission Consultation on Rule of Law in the EU](#), cited.

3 See <http://www.just.ro/proiect-de-lege-privind-unele-masuri-in-domeniul-justitiei-in-contextul-pandemiei-de-covid-19>

persons deprived of liberty (pre-trial detention, serving a custodial sentence or an educational measure of deprivation of liberty) to be heard by videoconference at the place of detention without their consent if the court considers that this means is without prejudice to the proper conduct of the proceedings or to the rights and interests of the parties. The draft law is currently still in the legislative process.

The draft law also provides for the possibility for persons, other than those deprived of their liberty, to be heard by videoconference, but only with their consent, which will be brought to their attention either at the first hearing or by a notice communicated by telephone, e-mail or other such means, the person concerned being asked whether he agrees.

Although the majority of courts were provided with video systems for hearings, their usage is extremely limited during the state of alert, since judges prefer to organize in person sessions, while implementing other social distancing methods such as scheduling case files at different hours, allowing only a limited number of people in the court room, providing limited access to physical files and others similar.

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

### *Length of proceedings*

Through the adoption of the New Romanian Civil Procedure Code in February 2013 and through the adoption of the New Romanian

Criminal Procedural Code in February 2014, the length of proceedings has been substantially reduced and should be, at least in theory, somewhat predictable. However, in practice, the length of proceedings in certain types of trials remains more than excessive. For example, in April 2020 the High Court of Cassation and Justice established a first hearing in a recourse against a public administrations' decision in March 2022, approximately 2 years after the date of submission of the recourse. The extensive length of these proceedings is explained by magistrates as being caused by insufficient personal, a high burden of cases per magistrate and scarce court resources, such as rooms for trials and for hearings. Therefore, a solution for limiting the situations when the length of proceedings is excessive is to increase the number of judges and to allocate proper locative resource to courts, including ICT equipment for long distance hearings.

Due to the measures implemented for the prevention of Covid-19, the length of the trial proceedings has suffered an increase. As of May 15th, 2020 courts are scheduling hearings per hour, as opposed to previous times, when all hearings were scheduled at the same time (e.g. if the court hearing commenced at 09.00 am, all participants to the trials were summoned at 09.00 am). This circumstance, coupled with the absence of sufficient court spaces where the hearings may take place, is leading to an increase of the time between the hearings, which in turn, leads to a significant increase in the entire trial duration. This situation also stems from the fact that starting from May 15th 2020 when the State of alert

was adopted, courts turned back the possibility to hold remote hearings almost unanimously.

### *Execution of judgments*

The extensive time for motivating courts' decisions is a problem which affects a great number of cases in practice. The delay in motivating and communicating the ruling impacts the enforcement of judgements, since a ruling can only be enforced once its motivation is drafted and duly communicated to the trial parties.

A solution would be increasing the number of judges and/or reducing the load of cases for each judge. However, in practice, this solution is difficult to implement. An alternative solution would be to introduce elements for the standardization of the judgements form. This would help to have more concise motivations that would lead to shorter times and diminished efforts. The standardization could be achieved by introducing a standard form for the motivation, depending on the specifics of certain categories of cases, starting with those in civil or criminal matters that raise the most frequent problems regarding motivation time. The forms could be prepared by the Superior Council of Magistracy and could also contain limitations on the number of pages.

One of the models that could be considered is the current complaint form used by the European Court of Human Rights (ECtHR), which, through the mandatory fields and limitations, obliges the parties to be concise, to describe exactly and objectively the situation, its classification and the arguments on which the violation of rights relies on.

## **Other issues related to checks and balances**

### ***Fostering a rule of law culture***

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Considering the limited possibilities of organizing physical discussions with stakeholders related to the rule of law, the necessity of ensuring the proper implementation of the frequently-changing COVID-19 legal framework in 2020 took the limelight. Therefore, apart from isolated initiatives of NGOs, no high-level initiatives related to fostering the rule of law were carried out.

## **Enabling framework for civil society**

### ***Freedom of association***

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In 2020, government ordinance 26/2000 2020 was amended by Law no. 276/2020 and entered into force on 5 December 2020. The law includes a series of beneficial measures, all meant to facilitate the right of association and to make the life of NGOs less bureaucratic. These changes are also a consequence of civil society pressure and advocacy. Some of the changes worth mentioning are:

-the registration request of an association in the Register of Associations and Foundations will be accompanied by fewer documents; the associations' by-law will no longer need to be authenticated (which implies the notary), it will

have to be submitted in a single copy certified for conformity with the original by the person empowered by the associates to carry out the procedure of acquiring legal personality;

-when applying for registration in the Register of Associations and Foundations, in the case of associations/ foundations set up/run only by natural persons, it is no longer mandatory to submit an affidavit when the only real beneficiaries are natural persons whose identification data are included in the file's documents, in which case the completion of the central register will be done based on them and according to the rules provided in art. 4 of Law no. 129/2019 for preventing and combating money laundering and terrorist financing;

- the General Assembly and Board member meetings may also take place remotely by electronic means and its decisions can be signed by the members with an extended electronic signature also;

-for the registration of the by-law changes in the Register of Associations and Foundations, the decisions of the General Assembly or those of the Board are submitted in a certified copy, for conformity with the original, by the person/ persons empowered by decision of the GA or the Board. Therefore, it is no longer necessary for them to be authenticated by a notary or attested by a lawyer.

-the declaration regarding the real beneficiary may be a document under private signature or

in an electronic form and may be communicated without any other formality, by electronic means, by electronic signature or by postal and shipping services; therefore, the authenticated form of this declaration is no longer required.

-the obligation to submit a declaration regarding the real beneficiaries of the association/ foundation to the Ministry of Justice (by 15th of January each year) was eliminated and has been replaced with the obligation to announce any change regarding the real beneficiaries within 30 days of change.

### ***Other systemic issues affecting rule of law and human rights protection***

#### ***Implementation of judgments of the European Court of Human Rights***

Of the “leading” ECtHR judgments handed down against EU states over the last 10 years – i.e. those that identify serious or structural problems - 38% remain pending implementation. For a number of EU states, this figure is almost 50%. This has also been the case of Romania for the last 10 years.<sup>4</sup> In 2020, there were 346 pending cases (out of which 85 leading cases) under the supervision of the Department for the execution of judgments of the Committee of Ministers, while only

4 See <https://www.cinnetwork.org/romania-echr>

10 cases (out of which no leading case) were closed by final resolution.<sup>5</sup>

While the ECtHR is not an EU body, countries have to accept the ECtHR's jurisdiction in order to become members of the European Union. However, countries can refuse to implement ECtHR judgments, and face no negative consequences at the EU level – the issue being not even mentioned, for example, in the European Commission's report on rule of law in the EU. Against this background, it would be important for the EU's rule of law review mechanisms to take into consideration widespread non-implementation of ECtHR judgments and the reasons for non-implementation. This would strengthen both the EU's rule of law mechanisms and the Council of Europe's process for implementing judgments of the ECtHR.

## **Impact of COVID-19**

### **Emergency regime**

#### *Law-making during the emergency regime*

In 2020, there was a certain inconsistency of the authorities in some matters of principle regarding the rule of law. For example, the government chose at least twice to violate the national Referendum on Justice, validated in 2019, which it had intensely promoted in the

previous year. The referendum established that no emergency ordinance can be adopted “in the field of crime, punishment and judicial organization”. A regulation adopted in violation of a referendum can be declared unconstitutional. However, the government decided, at various intervals during 2020, to issue emergency ordinances in relation to areas on which the national referendum had established that they could not be regulated by emergency ordinances:

1. Emergency Ordinance no. 28/2020 for amending and supplementing the Criminal Code, which introduced new crimes in the Criminal Code, in connection with the measures for combating the COVID-19 epidemic (adopted in March 2020);
2. Emergency Ordinance no. 215/2020 on the adoption of measures regarding the composition of the judicial panels in appeal (adopted in December 2020);

The opportunity to introduce such regulations was reasonably motivated by the government, but the adoption procedure contradicted the prohibitions established by the 2019 Referendum, which has to be respected in a state governed by the rule of law.

Another example of legislative inconsistency in the context of the pandemic is the legislation regarding the contraventions during the state of emergency, which created confusion and inequity among people. More precisely,

5 See <https://rm.coe.int/168070975f>

following the Ombudsman's notification, the Constitutional Court decided in May 2020 that the provisions related to fines during the state of emergency were unconstitutional due to the lack of predictability and clarity of the law and therefore all the fines imposed during the state of emergency had no constitutional basis. However, people still had to challenge the fines in court in order to cancel them and to take their money back. This situation created a great inequity between the persons that were fined. Some of them could challenge the fine, others maybe didn't have the possibility and they had to pay a fine that was imposed on the basis of an unconstitutional provision. For this reason and in order to avoid the burdening of courts with almost 300.000 files, whose result was predictable, APADOR-CH asked the government to immediately adopt fiscal amnesty. Unfortunately, it was not the case, the situation wasn't improved.

#### *Lack of transparency and consultation*

One of the most problematic aspects of the state of emergency period has been the expedited manner in which laws have been adopted. This had impact on their quality, creating a legislative chaos. Later, many of them have been declared unconstitutional by the Constitutional Court.

Art. I, point 5 of the Government Ordinance no. 34/2020 contains a modification, meaning that during a state of siege or emergency, the provisions concerning the decisional transparency and the social dialogue don't apply to draft normative acts which establish the measures taken during a state of siege or during a

state of emergency or which are a consequence thereof. Broadly put, for any passed legal acts "the transparency of the decision making process" means that any draft legislation is subjected to public debates 30 days before it is passed (according to Law no. 52/2003). And "social dialogue" means that draft legislation is submitted for consultation and approval to the Economic and Social Council (tripartite organism, composed of the representatives of the civil society, the trades unions and employer's organizations), within ten days before it is passed, according to Law no. 248/2013.

The justification of this exception to the rules concerning transparency and dialogue is that during a state of siege or the state of emergency, immediate measures are needed, which must be implemented without any delay; otherwise, the desired effects may be cancelled, negative or even generate the opposite consequences. With a few notable exceptions, during the state of emergency civil society impact on law and policy has been limited.

These exceptions applied only during the state of emergency. For the state of alert, the law doesn't establish any other derogations from the transparency of the decision-making process or from the social dialogue.

During the state of emergency, all 13 military ordinances issued by the Ministry of Internal Affairs were passed without public consultation (they were later published in the Official Gazette). The state of alert was also instituted and prolonged though 8 normative acts which were also adopted without public consultation (government decisions).

### *Restrictions to civil liberties and role of the ombudsman*

Given the 2020 context, the Ombudsman has been very active in monitoring rights and freedoms restrictions in relation to the pandemic measures taken by the authorities. Its initiatives have generated controversy in the public space and among politicians who have requested its revocation. This reaction can be considered as an attempt to put pressure on the Ombudsman in connection with the exercise of its legal attributions since this happened especially due to the notifications addressed to the Constitutional Court regarding the pandemic measures. As detailed below, the notifications were admitted, which means that the Ombudsman acted accordingly to the law.

In 2020, the Ombudsman notified the Constitutional Court with 18 exceptions and objections of unconstitutionality, 26 legal opinions and conducted 76 visits regarding the torture prevention mechanism. One of the most important initiatives was challenging the legislation adopted during the state of emergency and during the following states of alert.

During the lockdown, the Ombudsman challenged the Emergency Ordinance on the establishment of the state of emergency that restricted many fundamental rights and freedoms. Although the Constitutional Court decided that the state of emergency was established in accordance with the Constitution, it also noted that the concrete measures taken exceeded the limit provided by law in which the president could act. Parliament could have sanctioned the president's overstepping of legal

powers, but it did not. At the same time, the provisions related to fines during the state of emergency were declared unconstitutional due to the lack of predictability and clarity of the law and therefore all the fines imposed during the state of emergency had no constitutional basis.

Moreover, the Ombudsman challenged the legislation on quarantine and forced hospitalization of infected persons which was also declared unconstitutional and the Parliament was forced to adopt a law that guarantees human rights. As part of its watchdog role, APADOR-CH issued recommendations regarding the law on quarantine and isolation and participated in the public consultation organized by the Chamber of Deputies. Most of the recommendations were taken into consideration but the adopted law still lacked many of the criteria imposed by the Constitutional Court Decision. As a result, on 7 August 2020 the Ombudsman challenged again the law for constitutional reasons, without any success this time.

Beside these initiatives, considering the legislative inconsistency that affected human rights in the healthcare field, the Ombudsman issued many recommendations and requests for legislative clarifications during the year. For example, there has been a great dissatisfaction coming from patients with serious chronic diseases that didn't have access to health services due to the pandemic measures. The situation gradually improved after the state of emergency has been lifted.

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## ***Freedom of assembly***

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Article 3 of the military ordinance no. 2/21.03.2020 banned the movement of groups larger than 3 outside the residence - thus participation to any public assembly, which obviously means more than three people, was essentially no longer possible. Starting with the 15th of May 2020, Romanian authorities declared subsequent states of alert. The restrictions regarding the freedom of assembly were gradually relaxed. Starting with September 2020, up to 100 people are allowed to participate in demonstrations, whilst wearing masks and respecting social-distancing.

The restrictions on the number of people who may assemble were justified by the fact that the disease spreads when the physical distance between two persons is less than 2 meters, and thus any public assembly where the participants couldn't keep a minimum distance of two meters between one another was essentially impossible to hold. This medical argument had no convincing counterarguments.

Similar to other actors, civil society organisations have been negatively affected by the total prohibition on the right to freedom of assembly and association. At the same time, the few protests which took place during the state of emergency and state of alert took place in peaceful conditions and the participants were not disproportionately sanctioned.

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## ***Freedom of expression and censorship***

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Legislation adopted during the state of emergency expressly set out the measure of taking down websites which shared fake news. The measure was implemented by the National Authority for Management and Regulation in Communications (ANCOM). Since the provision didn't state any means of appeal, the decision regarding this could be appealed at the administrative court, according to the procedures of the ordinary law, which are very slow, and which might take 1-2 years. Another problem was that the notion of "fake news" was not clearly defined, thus the classification of a piece of news as fake was quite arbitrary.

During March 15th-May 15th, ANCOM blocked 15 news websites and the access to these websites were restored after the nationwide state of emergency was lifted. Meanwhile, most of these websites were still accessible, since all the content was moved to other domains, according to information provided by the media. There are some accusations that some blocked websites didn't show any fake content and that the blocking thereof was used as a method to censor those with a critical view. Some civil society and media voices accused that the blocking of websites was decided and implemented by a group whose members were not known (the Group for Strategic Communication) and that these decisions can't be appealed effectively. During the first half of the year, ANCOM received 360 complaints regarding fake news.

Unofficially, many journalists complained about the obstruction of the right to information, with authorities employing different mechanisms or covert threats. But officially, no journalist has filed a complaint, and there is no information that any coercive measures have been taken against a journalist. Examples of harassment have included the removal by the Focsani County Hospital of the publication *Ziarul de Vrancea* from their media communications WhatsApp Group, after the paper published articles which criticized the hospital spokesperson who is also the spouse of the hospital director. The coordinator of all publications belonging to the Ringier Group was threatened with a criminal investigation after publishing in the newspaper *Libertatea* a working document concerning the declaration of the state of emergency prepared by the National Committee for Emergency Situations.

There have also been some cases of limitations of freedom of expression but they were a consequence of poor implementation of the law (not the law itself). Such was the case of a student who was fined by the local police for having criticized in a civilized manner the town mayor, who failed to adopt the necessary measures during the crisis.<sup>6</sup> The fine was totally disproportionate and unfounded and the student had to challenge it in court. The court annulled the fine. During the same period,

there was also a case of a whistleblower police officer who was disproportionately sanctioned for speaking to the press about abuses in the police.<sup>7</sup> The sanctions were withdrawn.

### ***Access to information***

According to art. 56 of Annex I to Decree 165/2020, during the state of emergency, the legal deadlines established for answering FOIA requests were doubled (to a maximum of 60 days). This doubling of the term, although justified by the pandemic context, was problematic from the point of view of transparency and access to timely relevant data about the states' ability to manage the pandemic. Some institutions have gone as far as interpreting this change in the law in the sense that it was totally suspended and refused to answer questions coming from journalists. After the 15th of May, during the current state of alert, the "normal" provisions and legal deadlines of the law on access to information of public interest (in force prior to the state of emergency) are applicable.

The Strategic Communication Group is one of the entities responsible with the pandemic management. According to the Government, it is formed of communication specialists from all ministries and public services with responsibilities in combating the pandemic.

6 For more information, see <https://www.apador.org/cerem-ministrului-de-interne-o-ancheta-in-cazul-amen-zii-pentru-o-postare-critica-facebook/>

7 See <https://www.apador.org/ce-se-intampla-cand-un-politist-spune-ca-politia-greseste/>

However, almost one year since its establishment and despite demands from civil society and journalists, neither the exact component of this group nor its concrete attributions are known to the public. In November 2020, a Romanian MP requested the nominal list of its members from the Ministry of Internal Affairs (MAI) and received it on the basis of the Governments' constitutional obligation to answer the questions of the Parliament. However, the document remains a secret, MAI invoking protection of personal data reasons. As a consequence, APADOR-CH drafted and sent a concrete proposal to amend Law 544/2001 on access to public information in order to oblige the institutions to publish such information. The law that protects personal data cannot limit the right of citizens to access information of public interest under the pretext of the "right to anonymity" of some people, especially when those people hold public positions and they take decisions that influence the citizens lives. Unfortunately, the problem currently persists, one year after the pandemic started.

### ***Impact on the justice system***

Romania was under a State of Emergency between 16 March – 14 May 2020. Starting with 15 May, the country is under a State of alert regime.

During the State of Emergency, only urgent cases were judged. The list of such cases was determined by the Leadership Collective of each Court, as per the guidelines set out by the Supreme Magistracy Council. For extreme

emergency case, the courts set shorter deadlines. Most courts used videoconference and communicated the procedural documents through telefax, electronic mail or other means, which excluded the transfer of written documents. The statute of limitation and other time limits were suspended throughout the period of the state of emergency. New time limits of similar duration started to run as of May 15th.

Among the barriers encountered by criminal justice lawyers during this period we can mention the lack of confidentiality of remote hearings, logistic matters, violation of the right of defence due to the impossibility to physically study the file and the delays incurred due to the manner in which hearings were scheduled, corroborated with the absence of enough court spaces.

Considering the significant reduction of the lawyers' activity during the State of emergency, The National Union of the Bar Association ("NUBA") and county Bars awarded postponements of the payment of the lawyers' monthly taxes, as a support measure.

The activity of the courts was resumed starting with 15 May and is currently characterized by transition measures, which involve the return of the in person court hearings, as well as a reassessment of the concept of scheduling the hearings.

In May 2020, the Superior Council of Magistracy (SCM) established a series of guidelines and general recommendations, applicable to all courts in the country. Some

of the measures taken by the courts are related to access in the buildings, conducting court hearings, transmission of documents to courts, the working schedule etc. For example, all the participants must wear protection equipment, each person that enters the building should present a statement regarding their health status, the presence of persons in the courtrooms will be restricted in order to ensure the social distancing, the hearings will be under very strict schedule and others similar.

In relation to these measures, the National Union of the Bar Associations manifested its dissatisfaction with the fact that SCM established the administrative measures that involve lawyers without a proper and prior consultation with the Union.

Due to the reorganisation of court schedules as part of Covid-19 protective measures, many delays are registered as regards the terms for publishing the motivation of court rulings.

# Slovakia // *Via Iuris*



## Key concerns

- Recent reform reflects efforts to improve the justice system, strengthen independence and restore confidence in the judiciary, although some concerns remain also against the background of COVID-19
- New rules introduced to enhance judges' accountability, as prominent corruption cases are being investigated
- While progress is registered as regards the regulatory framework, civil society organisations are confronted with smear campaigns, access to funding issues and limited opportunities of participation in decision-making

## Justice system

### Reform of the justice system

At the end of 2020, a large amendment to the Constitution was adopted (Constitutional Act No. 422/2020 Coll.). This amendment concerns the Constitutional Court, the Judicial

Council, rules regulating general issues concerning judges and the justice system and the establishment of the new Supreme Administrative Court. It was issued as the first phase of the judiciary reform (see below) launched by the new Minister of Justice, who has been in office since 21 March 2020.

As part of this reform, changes to the composition of the Constitutional Court of the Slovak Republic were approved, which include:

- re-formulated conditions for the appointment of a judge of the Constitutional Court (integrity, moral credit, legal practice),
- an increase in the quorum for the election of a candidate for a judge of the Constitutional Court, (a 3/5 majority of all deputies will be required for election. If this majority does not elect the required number of candidates, an absolute majority of all members will suffice)
- public voting on candidates for judges of the Constitutional Court.

The law also regulates the possible passivity of the parliament in the non-election of candidates for constitutional judges. The President will be able to appoint new judges of the Constitutional Court even in a situation where the deputies do not elect the necessary number, i.e. twice the number of candidates for the position of judge of the Constitutional Court, within the specified time limits. If Parliament does not elect the required number of candidates within two months of the end of the term

of office of a judge of the Constitutional Court or within six months of the term of office of a judge of the Constitutional Court for another reason (eg dismissal, resignation, death, etc.), the President will be able to choose and appoint judges of the Constitutional Court candidates who have already been elected by the required majority in parliament and have therefore been nominated by the eligible petitioners and at the same time heard by the Constitutional and Legal Affairs Committee in Parliament.<sup>1</sup>

To ensure the continuous replacement of judges and to prevent one governmental party or coalition from being able to nominate a majority of judges in this court as its nominees for judges of the Constitutional Court, different lengths of terms of judges of the Constitutional Court have been appointed.

The possibility of the so-called procedural rejection of the motion to initiate proceedings before the Constitutional Court of the Slovak Republic, i.e. the possibility of “agreeing to disagree” to prevent cases of denial of justice, has been introduced. It will always be the duty of the Constitutional Court of the Slovak Republic in plenary to find an agreement and a quorum for a positive or negative decision on a given proposal.

Another major development concerns the creation of the Supreme Administrative Court of the Slovak Republic. Included in the system of

courts, the Supreme Administrative Court will have an equivalent position in the hierarchy of general courts with the Supreme Court of the Slovak Republic. The Court shall serve as an appellate administrative court (as a court of cassation) which shall review the first instance administrative judgements, which was up to now exercised by the administrative college of the Supreme Court. In addition to the general jurisdiction of the Supreme Administrative Court in the area of administrative justice, the Supreme Administrative Court is also to act as a disciplinary court for judges, prosecutors and, to the extent provided by law, for other legal professions. It will also review certain general election results. Competences from the Constitutional Court in deciding on the unconstitutionality and illegality of elections to local self-government bodies should also be transferred to it. A person who is not a judge may also apply for the position of the President of the Supreme Administrative Court; non-judges with relevant experience may also become judges of this court. The Supreme Administrative Court will start its activities at the earliest in August 2021.

Furthermore, in 2020, a proposal for a new court map was presented. One of the basic goals of the new court map is the specialization of judges. The specialization of judges is presumed for criminal, civil, family and commercial agenda in general courts and administrative agenda in a separate administrative

1 <https://www.justice.gov.sk/Stranky/aktualitadetail.aspx?announcementID=3060>

judiciary. Currently, the draft court map is in the inter-ministerial comment procedure, where comments on its content are evaluated. As early as 2020, it was clear that opinions on the court map differed, with judges in particular refusing to accept it (see also below).

During the year 2020, there were also many personnel changes in leading judiciary positions. These positions included the President of the Judicial Council (plus six new members, out of whom three were appointed by the new government and three were elected by the Parliament), the Public Prosecutor General (elected by the Parliament and appointed by the President of the Slovak Republic), the President of the Supreme Court (elected by the Judicial Council and appointed by the President). Since there were general elections in the end of February 2020, a new Minister of Justice was appointed.

## ***Judicial independence***

### *Appointment and selection of judges and prosecutors*

As part of the above mentioned reforms, new legislation was adopted that changed the preconditions (requirements) for the appointment as a judge. The preconditions of the original legislation, which are the moral standard and integrity of judges for the proper and responsible performance of their function, have been retained. A new addition to the preconditions was that the judge may not have business, property or financial relations with persons connected to organized crime.

Regarding the selection procedure of prosecutors and prosecutor trainees in 2020, a working group that proposed changes for a more transparent and better selection of prosecutor trainees and prosecutors to the system of Prosecution was set up. The members of this expert group were representatives of the executive, the judiciary, the prosecutor's office and the third sector, who worked together to amend the Act on Prosecution. The government refused to deal further with the conclusions of the working group as regards possible changes in the process of selection procedures of prosecutor trainees and prosecutors to the system of Prosecution. There were therefore no legislative changes proposed in this area.

### *Transfers, dismissals and retirement regime for judges*

In September 2020, the Judicial Council of the Slovak Republic adopted Resolution No. 252/2020 to discuss personnel issues of judges according to § 18 par. 2 b) of Act No 385/2000 Coll. on Judges and Lay Judges. According to this provision, as amended by the Act on Judges and Associates at these time, the President could, on the proposal of the Judicial Council of the Slovak Republic, dismiss a judge if he reached the age of 65.

Therefore, in September 2020, the Judicial Council of the Slovak Republic filed a motion to dismiss eighty-two judges who have reached the age of 65 to the President of the Slovak Republic.

The President of the Slovak Republic, Zuzana Čaputová, decided to dismiss 63 judges based

on this proposal of the Judicial Council of the Slovak Republic and assessed other proposals individually. As a result of this decision, staffing problems have deepened in the judiciary. Many courts have long been understaffed.

In 2020, an amendment to the Constitution of the Slovak Republic was adopted, which also affected the termination of the position of judge. According to Art. 146, para. 2 of the Constitution of the Slovak Republic, a function of judge expires on the last day of the month in which the judge has reached the age of 67. For judges of the Constitutional Court, this limit is set at 72 years.<sup>2</sup> According to the legislation previously in force, the President of the Slovak republic could, on the proposal of the Judicial Council of the Slovak Republic, dismiss a judge if he reached the age of 65 – i.e., the position of the judge did not expire directly upon reaching the set age threshold. In addition, there was no age limit for the termination of the position of judges of the Constitutional Court.

There was also a change in the possibility of transferring judges to another court. Under the previous legislation, a judge could be transferred to another court only with his consent or based on a decision of the Disciplinary Board. According to Art. 148, para. 1 of the Constitution of the Slovak Republic does not require the judge's consent to the transfer

when changing the system of courts if this is necessary to ensure the proper performance of the judiciary.

#### *Reform of the Judicial Council*

Art 141a, para. 1 of the Constitution of the Slovak Republic in Art. 141a, para. 1, establishes the Judicial Council of the Slovak Republic (hereinafter referred to as the Judicial Council) as a constitutional body of judicial legitimacy.

The members of the Judicial Council elect not only the President of the Judicial Council but also the vice-President of the Judicial Council. The performance of the functions of President and vice-President of the Judicial Council is not compatible with the performance of the function of judge.

Members of the Judicial Council who are elected and appointed by the President of the Slovak Republic, the Government of the Slovak Republic and the Parliament (a total of nine members out of all eighteen members of Judicial Council), may include persons who are not judges.<sup>3</sup> This new rule ensures a balance between judges and non-judges in the Judicial Council.

A rule has been introduced that the President, vice-President and a member of the Judicial

2 Constitution of the Slovak Republic <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/20210101>

3 Art 141a, para. 3 of the Constitution of the Slovak Republic <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/20210101.html>

Council may be recalled at any time before the expiry of their term of office.<sup>4</sup>

The competence of the Judicial Council has also changed. The Council was given competence to supervise and act on matters concerning the patrimonial situation of a judge.

On the contrary, the Judicial Council was deprived of its competence of electing and recalling members and chairs of disciplinary senates (the disciplinary judiciary is transferred to the newly established Supreme Administrative Court of the Slovak Republic).

According to the amendment to Act No 185/2002 Coll. on the Judicial Council of the Slovak Republic the Judicial Council may decide to express disagreement with the criminal prosecution of a judge for the new crime of „Bending the law“, according to Section 326a of the Criminal Code (see also below).<sup>5</sup>

A monthly remuneration (in the amount of 1.5 multiple of the average nominal monthly wage of an employee in the national economy of the Slovak Republic for the previous calendar year) was introduced for a member of the Judicial Council who is not a judge, except for the President and vice-President of the Judicial Council. A member of the Judicial Council

who is a judge has an adjusted workload of the judge.

As part of the reform of the composition of the Judicial Council, a regional principle has been introduced in the election of its members as judges to increase its representativeness. One member of the Judicial Council is elected by the judges of the Supreme Court and the Supreme Administrative Court from among themselves, and the other eight members of the Judicial Council are elected by judges of other general courts in three constituencies with a comparable number of judges.

#### *Accountability, liability and disciplinary regime of judges*

As mentioned above, the Supreme Administrative Court of the Slovak Republic has been included in the general system of courts. The Supreme Administrative Court has an equal position in the hierarchy of general courts as the Supreme Court of the Slovak Republic. In addition to the general jurisdiction of the Supreme Administrative Court in the area of administrative justice, the Supreme Administrative Court is also to act as a disciplinary court for judges, prosecutors and, to the extent provided by law, for other professions.

4 Art 141a, para. 5 of the Constitution of the Slovak Republic <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/20210101.html>

5 § 4 par. 1 Act No 185/2002 Coll. on the Judicial Council of the Slovak Republic <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/185/20210101>

The Supreme Administrative Court is due to start operations in August 2021.

The decision-making immunity of judges has been adjusted. The decision-making immunity of a judge will only concern the legal opinion expressed in the application of a case, provided that the judge formulates his conclusion based on due consideration of the arguments and explains it properly. This principle is intended to protect society from arbitrary decisions by judges. According to Art. 148, para. 4 of the Constitution of the Slovak Republic, judges may not be prosecuted for their decision-making, even after the termination of their tenure, except in cases where a criminal offence would be committed; the disciplinary liability of the judge is not affected. The previous legislation precluded any prosecution of judges for decision-making.

A new crime, Bending the Law, was introduced into the Criminal Code. According to § 326a Criminal Code:

„(1) Whoever, as a judge, lay judge or arbitrator of the arbitral tribunal, arbitrarily exercises the law in his/her decision and thereby harms or favours another person, shall be punished by imprisonment for one to five years.

(2) The offender shall be punished by imprisonment for three or up to eight years if he/she commits the crime referred to in paragraph 1

a) against a protected person, or

b) for a special motive.

A possibility for the Judicial Council to decide on the temporary suspension of the post of a judge was introduced by the new rules. A judge who is being prosecuted for an intentional criminal offence or against whom disciplinary proceedings are being conducted for an act for which he may be dismissed as a judge may be temporarily suspended until the lawful termination of the prosecution, disciplinary proceedings or decision of the President to dismiss from the position of judge. A judge who has reasonable grounds for doubting that he or she qualifies as a judge may also be temporarily suspended if the credibility of the judiciary or the reputation of the judiciary may be seriously jeopardized. In this case, the temporary suspension of the post of a judge is decided by the Judicial Council on the proposal of the President of the Judicial Council or the Minister of Justice, in the case of judges of the Supreme Court on the proposal of the President of the Supreme Court and the case of judges of the Supreme Administrative Court on the proposal of the President of the Supreme Administrative Court. The judge has the right to comment on the motion to temporarily suspend the judge at the meeting of the Judicial Council, to which he will be invited by the President of the Judicial Council.

The consent of the Constitutional Court of the Slovak Republic to the detention of judges and the General Prosecutor of the Slovak Republic has been cancelled. The detention of a judge or General prosecutor is thus decided by the court that has jurisdiction to act and decide in the preparatory proceedings, i. district court or specialized criminal court.

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

The legislative definition of the prosecutor's office as an institution in the legal system has not changed.

In July 2020, the Parliament approved a ground-breaking amendment of the laws concerning the election and dismissal of the General Prosecutor and the Special Prosecutor. The amendment introduced several positive measures to increase transparency and accountability of the two highest prosecutor's offices and to improve the performance of their functions.

The circle of petitioners for candidates for General Prosecutor and Special Prosecutor has significantly expanded and the selection process has fundamentally changed. Rules governing the appointment of the highest prosecutors are now stricter on the requires moral qualities and integrity, and the application process is now much more demanding (eg, they must submit a letter of motivation, the General Prosecutor even a vision of prosecutor's management and development, and candidates must attend a public hearing in the Constitutional and Legal Affairs Committee of Parliament, where, in addition to deputies, a representative of the President may also attend and participate).

A non-prosecutor, i.e. a judge, lawyer or lawyer with relevant experience, who meets other

requirements can also run for the position of General Prosecutor and Special Prosecutor. A general requirement has been set for the candidate's experience as Prosecutor General or Special Prosecutor (15 years of legal experience, at least part of which where the candidate acted as a prosecutor, judge or lawyer).

The last election of the new Attorney General in 2020 took place according to the new legislative rules.

### *Independence of the bar*

In connection with the newly established Supreme Administrative Court, it was originally considered to transfer the disciplinary judiciary of lawyers to this court. These efforts have been interrupted for the time being. The Slovak Bar Association objected to the disciplinary proceedings of lawyers being dealt with by the Supreme Administrative Court. According to the Slovak Bar Association, "the essential support for the independence of a lawyer is the self-regulation of the profession in the form of a bar association, the key feature of which is to be independence. The Slovak Bar Association has a functionally and efficiently set up system of disciplinary proceedings."<sup>6</sup> Both the Slovak Bar Association and the Minister of Justice plan to turn to the Venice Commission for an opinion on this matter.

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6 See [https://www.sak.sk/web/sk/cms/news/form/list/form/row/380565/\\_event](https://www.sak.sk/web/sk/cms/news/form/list/form/row/380565/_event)

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### *Public perception of the independence of the judiciary*

In 2020, there were cases of prosecution of judges due to their corrupt behaviour, or their connection to a person from a criminal environment. Many high-ranking judges are now being prosecuted. Some of them cooperate with the police. These cases are under investigation, and no accusation has been brought in these cases.

In 2020, a new President of the Supreme Court of the Slovak Republic, a new President of the Judicial Council of the Slovak Republic, and a new General Prosecutor were elected, and an election for a new Special Prosecutor was being prepared for early 2021. The public also had the opportunity to watch all these elections live online.

In 2020, the new Minister of Justice of the Slovak Republic, Mária Kolíková, enforced a reform of the judiciary and also presented a proposal for a new court map. This is a clear signal to the public that the current government cares about this area and the restoration of confidence in the judiciary, although this process is only at its beginning.

## **Quality of justice**

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### *Legal aid*

The Slovak Centre for Legal Aid, which offers free legal aid to people in need, launched eight new consultancy offices in order to make its

services more accessible to people in smaller and remote towns.

### *Training of justice professionals*

No new or exceptional initiatives have been noticed, which might have been caused also by the COVID-19 pandemic outbreak.

### *Digitalisation of the justice system*

This field has faced tremendous changes caused by the COVID-19 pandemic outbreak since most of the planned meetings, trainings, workshops or conferences had to be held only in online format. This includes the meetings of the Judicial Council, which have been streamed online; audio recordings of them are available on its website. This change of practice was undertaken in May 2020 by the Act No. 106/2020 Coll, which amended the Judicial Council Act.

Where the general public was excluded from the court hearings due to the COVID-19 pandemic, audio recording had to be made and anyone could request it (Act No. 62/2020 Coll).

Some of the court hearings of great public attention were streamed for journalists who were seated in a separate room in the courthouse. This includes the well-known trials involving Kuciak and Kusnirova murder suspects, and the trial of Marián Kotleba - the leader of the Slovak ultra-right political party.

### *Use of assessment tools and standards*

We are not aware of any such specific initiative, which would have a significant impact.

### *“Judicial map”: geographical distribution and number of courts and their specialisation*

The first phase of the judiciary reform launched by the Minister of Justice was adopted in the Parliament and signed by the President at the end of the year 2020. This concerns amendment to the Slovak Constitution by the Constitution Act no. 422/2020 Coll. and amendment to several other laws in the field of justice and judiciary by the Act no. 423/2020 Coll. Among significant changes there is establishment of a new court - the Supreme Administrative Court, which shall consist of 30 judges.

The second phase of the reform entitled as “the new judicial map” was presented by the Minister of Justice and consultations with legal professionals were launched in 2020. The aim of the new judicial map is to completely redesign geographical distribution of general courts in Slovakia. The first draft of the reform which was presented to the public in 2020 has seen creation of new district courts (in the end there should be less of them compared to the recent state) and new courts of appeal (again less in overall number) and specialised courts of first instance for commercial and administrative agenda. According to the Ministry of Justice, it should bring deeper specialisation of judges, faster proceedings, higher efficiency of judges and more transparency of judicial proceedings. This reform is subject to wide debate

among legal professionals with very critical feedback, therefore it might be modified in 2021.

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

The major development in the field is the new judicial reform, which has been presented only as a draft (with the exception of Acts no. 422 and 423/2020 Coll, which have been described above).

Also, new criteria for State Prosecutor General were adopted that have opened the position also for other lawyers, non-prosecutors.

### *Resources of the judiciary*

In October 2020, the President of the Slovak Republic, Zuzana Čaputová, decided, based on a proposal of the Judicial Council of the Slovak Republic, to dismiss 63 judges who had reached the age of 65. As a result of this decision, staffing problems have deepened in the judiciary. Many courts have been understaffed for a long time. This step also weakened the evaluation commissions, which carry out evaluations of judges, as they were also staffed by judges over the age of 65 to a relevant extent. In practice, this was reflected that for a time no selection procedures for judges or their promotion to a higher court were carried out. Legislatively, the possibility of participation of judges emeritus in evaluation commissions had to be regulated. The Judicial Council of the Slovak Republic is gradually creating these new commissions.

In 2020, an unsuccessful mass selection of candidates to fill judges' positions had been carried out. In March 2020, the Judicial Council of the Slovak Republic announced a "mass selection" procedure for an undefined number of vacancies for district court judges and visiting judges. A total of 145 candidates for the position of the judge were to be selected, but only 15 applicants were successful.

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

During 2020, repeated police actions took place, revealing serious criminal activities that also included judges and other legal professionals. Many of them have been detained in custody, which has sparked criticism for abusing the institution of detention.

Moreover, at the very end of 2020 the former Police President, Milan Lučanský, committed suicide. This act raised even more questions concerning abuse of pre-trial detention and the living conditions in detention.

#### *Rules on withdrawal and recusal of judges and their application in practice*

The first phase of judicial reform also brought changes to the rules of removal of judges. When a judge reaches the age of 67 (72 years in case of the Constitutional Court judges), his/her term in the office expires. The main reason is to set up clear and predictable rules for the retirement of judges. However, the age

census concerning the constitutional judges is disputed among judiciary professionals.

#### *Corruption of the judiciary*

There were repeated police actions detecting corruption and other serious crimes during 2020. Many judges and other legal professionals were accused and taken to pre-trial custody. None of them was sentenced yet, but a few of them (including judges) are cooperating with the investigators and confirming some of the allegations. These investigations reveal the corruption schemes that the public suspected.

The first phase of the judiciary reform also introduced new rules regarding the property declarations of judges. They are supposed to be reviewed by the Judicial Council.

## **Enabling framework for civil society**

### ***Freedom of association***

The Slovak Constitution and laws provide for freedoms of associations<sup>7</sup> and the legal framework for civil society organisations (CSOs) remains generally favourable. CSOs may choose to register as civic associations, non-investment funds, non-profit organizations providing public benefit services, or foundations. Each legal form has its own registration

7 <https://www.legislationline.org/legislation/section/legislation/country/4/topic/1>

process. The laws regulating registration are generally enabling, and the process of registration is relatively simple.

In 2020, CSOs did not face any restrictive legislative proposal which might have negatively affected the freedom of association. Despite the pandemic and the state of emergency redeclared in October 2020, CSOs and their representatives are free to operate in compliance with the laws. While CSOs may openly express criticism, taking part in public protests has been restricted due to the state of emergency. Additionally, CSOs have the same legal right as other entities to challenge government decisions. The Slovak government may dissolve or restrict CSOs only for specific reasons stated in the law.<sup>8</sup>

In December, the new Register of Non-Governmental Non-profit Organizations was finally put into operation. The register was established by Act No. 346/2018 on the Register of Non-Governmental Non-profit Organizations,<sup>9</sup> which came into force as of January 2019, and represents a single reliable, up-to-date public register of all CSOs operating in Slovakia. The act extends the information that CSOs must provide at the

time of registration and requires previously registered CSOs to update their information in the register. Those CSOs which do not provide full information (e.g. about a statutory body) are not eligible for public funding. The rule is expected to improve transparency as it encourages CSOs to submit full registration data.

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

Following the last parliamentary elections in February, Slovakia has perhaps the most conservative parliament in the country's modern history, and consequently, liberals do not have adequate representation in the Parliament. This political environment was perceivable during the first wave of the pandemic when some of the ruling government members criticized human rights organizations and activists for their assessment of the government's measures for the lockdown of several Roma settlements.<sup>10</sup> This issue was noticeable also in relation to several drafts of legislation of a stricter abortion law proposed by a group of

8 See The 2019 CSO Sustainability Index for Slovakia, pp.207: <https://www.fhi360.org/sites/default/files/media/documents/resource-csosi-2019-report-europe-eurasia.pdf>

9 <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2018/346/20210101>

10 <https://spectator.sme.sk/c/22384400/ngos-criticise-government-for-steps-taken-in-roma-settlements.html>

opposition MPs and the strongest ruling party's MPs.<sup>11</sup>

Although attacks on COSs occurred in public discourse also during 2020, they were less virulent, especially in conspiracy media. CSOs, however, faced persistent attacks from extremists and anti-system activists. As indicated above, public authorities took over the rhetoric used by conspirators and extremists, and much often verbally attacked activists and CSOs, especially those from the opposite ideological spectrum. This negatively affected public opinion on CSOs and activists. At the same time, on a positive note, in June 2020, the President expressed significant support to CSOs actively engaged in fighting the spread of COVID-19 in the Presidential state of the republic.<sup>12</sup>

Besides that, CSOs and activists faced the negative attitude of the current government towards gender equality, which also limits the financial and personal capacity of feminist CSOs and negatively affects their work. The Minister of Labour, Social Affairs and Family responsible for the gender equality area particularly rejects the concept of gender equality in general. Consequently, the funding

scheme by the Ministry supposed to support CSOs working in the field of gender equality has been used to support conservative pro-life organisations, which do not generally focus on gender equality issues. As a result, no feminist CSO has received any support. At the same time, project proposals of pro-life organisation were not rated as the best ones. This implies that the committee did not take into account the expert assessment of the project proposals in any way, raising suspicion that the Ministry intentionally favoured the pro-life organizations.<sup>13</sup>

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

The legal framework, which enables CSOs to participate in the legislative process, remains unchanged. Similarly to the public, CSOs are eligible to enter the legislative process during the Interdepartmental Comments Procedure to submit their comments on proposed materials. The CSOs may also participate in expert working groups established by ministries or other public authorities to propose draft bills. Besides that, the participation of the CSOs in public policies is supported by the

11 See the list of recent legal proposals to restrict abortions on pp. 16-17 of the report of Policy Department for Citizens' Rights and Constitutional Affairs for the European Parliament: [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/659922/IPOL\\_IDA\(2020\)659922\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/659922/IPOL_IDA(2020)659922_EN.pdf)

12 <https://www.prezident.sk/article/sprava-prezidentky-o-stave-republiky/>

13 <https://domov.sme.sk/c/22573564/dotacie-na-rodovu-rovnost-ziskali-organizacie-ktore-v-bodovom-hodnote-ni-vyrazne-zaostavali.html>

institutional framework, which includes the Governmental Council for Non-profit Non-governmental Organizations and the Office of the Governmental Plenipotentiary for the Development of Civil Society.

The Government declared, in its political manifesto,<sup>14</sup> its will to maintain and further develop its partnership with civil society, and to simplify public participation. Despite the existing mechanism of umbrellas gathering CSOs across the sector and enabling cross-sectoral cooperation, there are multiple issues and barriers in practice. According to a recent research on the current state of civil society in Slovakia,<sup>15</sup> both the state administration and local governments still have not considered the CSO experts to be ‘partners for discussion’ in terms of preparing and implementing public policies, strategic documents and action plans. It is a result of the weak understanding and awareness of the function of CSOs and their contribution to policy-making. This implies a low interest of state administration to cooperate with CSOs. At the same time, CSOs often struggle with a lack of personal and financial capacities to further professionalize both their internal organization and activities.

In September 2020, the Ministry of Finance (MF) proposed a draft bill amending the tax

legislative act,<sup>16</sup> which included modification of the tax designation mechanism (see in the next section). It was proposed without broader discussion in the presence of respective stakeholders of the civic sector or above mentioned advisory bodies. Such an absence of proper participation was strongly criticized by several CSOs. Compared to previous practice, that is a negative shift, since CSOs used to be consulted when proposing any legislative proposal addressing the CSOs.

As regards positive developments, CSOs were involved in the preparation and consultation on the Partnership Agreement 2021-2027 (PA) extensively. That was a qualitative shift compared to the previous programming period. The process was ensured and coordinated by the central coordination body of the Ministry of Investment, Regional Development and Informatization (MIRRI) in close cooperation with the Office of the Governmental Plenipotentiary. From a procedural perspective, the consultation of the PA was very well organized, with high levels of participation. Subsequently, during November and in the first half of December 2020, even the public was involved in this process through online consultation, for the first time.

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14 Political Manifesto, pp. 16- 17: <https://www.teraz.sk/download/135/programove-vyhlasenie-vlady.pdf>

15 [https://www.minv.sk/swift\\_data/source/rozvoj\\_obcianskej\\_spolocnosti/vyskum\\_neziskoveho\\_sektora\\_a\\_obcianskej\\_spolocnosti/2020/ANALYZA\\_NP%20VYSKUM\\_17.12.2020\\_FINAL.pdf](https://www.minv.sk/swift_data/source/rozvoj_obcianskej_spolocnosti/vyskum_neziskoveho_sektora_a_obcianskej_spolocnosti/2020/ANALYZA_NP%20VYSKUM_17.12.2020_FINAL.pdf)

16 <https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=7896>

On the contrary, the process of preparation of the National Recovery and Resilience Plan (NRRP) has struggled with low transparency and poor participation of CSOs and their experts from the very outset. Although the Prime minister promised broad policy dialogue through an open discussion with the citizens and experts of any background, any proper participatory process did not take place. The Government did not respond adequately to the European Commission's appeal to involve civil society in preparations of national recovery and resilience plans (NRRP) and ensure a proper participatory process while using existing mechanisms.<sup>17</sup> The MF responsible for the NRRP, however, chose a strategy to prepare the draft 'behind closed doors' and engaged a limited number of experts selected beforehand. The exception was an online discussion in December 2020, during which the main objectives of the NRRP were presented. Last but not least, the Ministry sent the first draft to the European Commission at the end of the year without publishing its full version.

#### Access to funding

The Government, in its political manifesto,<sup>18</sup> announced that it intends to create a system for the financing of CSOs and support organisations dealing with the protection and promotion of human rights, building democratic citizenship, eliminating all forms of discrimination and detecting corruption, among

others. However, the Government has not introduced any measure to specifically reinforce the access of CSOs to financial opportunities so far. CSOs were not either explicitly mentioned in immediate response measures, introduced in April 2020 (also known as a 'first-aid' package of economic measures). These measures covered only businesses, the self-employed and employees affected by the coronavirus pandemics.

The economic decline will most likely negatively affect private contributions to the sector and a final amount of tax designation in 2021, which is an important source of finance for several of CSOs. Several CSOs also experienced being cut off from local subsidies (initially awarded to CSOs), as several local governments transferred these resources to fight the spread of COVID-19.

The state subsidies for CSOs have not been cut. Due to unfavourable conditions, however, CSOs called for amending administrative rules to allow these subsidies to be repurposed or extended. The extension of ongoing projects was allowed just within the grants supported by the European Structural and Investment Funds.

Until August 2020, CSOs were left out of any financial support or first aid mechanism addressing the impact of the pandemic.

17 See also the official answer on the EC on parliamentary question: [https://www.europarl.europa.eu/doceo/document/E-9-2020-005831-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-005831-ASW_EN.html)

18 Political Manifesto, pp. 16- 17: <https://www.teraz.sk/download/135/programove-vyhlasenie-vlady.pdf>

Finally, In August 2020, a measure was introduced to specifically support CSOs, through a 1.1 million EUR scheme launched by the MIRRI,<sup>19</sup> addressing particular CSOs.<sup>20</sup> According to this scheme, corresponding CSOs could refinance their costs related to activities addressing the pandemic situation. Despite the effort of the MIRRI, this funding scheme was not as effective as was expected. First, the scheme was limited to support CSOs since it was announced under the ‘Act on supporting regional development’.<sup>21</sup> Consequently, only specific legal forms of CSOs were eligible beneficiaries within the proposed call, while foundations or civic associations were excluded. Secondly, the grants were too big for small regional organizations.<sup>22</sup>

In October 2020, the Ministry of Culture announced financial support for individuals working in the culture and creative business. The Ministry declared that such financial resources will be eligible also for CSOs operating in the creative business, but in the second round after individuals.

In the last quarter of 2020, as mentioned above (see the fifth part of this section), the Ministry of labour, social affairs and family was strongly criticised with regard to the non-transparent process of granting.

In August 2020, The Ministry of Finance proposed an amendment of the tax legislative act<sup>23</sup> which included modification of the tax designation mechanism and which might have caused the drop-out of income coming from the tax designation for several CSOs. In a nutshell, under such amendment legal persons would be allowed to donate the 2 % of their income tax also in the non-financial form. Since no broader discussion took place with neither CSOs nor the government advisory bodies for civil society, there is no data about how it would have affected CSOs specifically. On the contrary, the Ministry proclaimed that they intend to support the civic sector by the amendment. Afterwards, this amendment was pulled down before the second reading in the National Council of the Slovak Republic.

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19 <https://www.mirri.gov.sk/wp-content/uploads/2019/05/P-V%C3%BDzva-2020-II-mvo.pdf?fbclid=IwAR3TTGtB02aQKKHshpHqj2mtQxL0-TbmDeCxxQ-Pdkafsptu1NAwYpdFcBQ>

20 Such as regional development, tourism, preserving and development of social services, creative business or culture.

21 <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2008/539/>

22 The minimum amount for the submitted project was 10 000 €.

23 <https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=7896>

In terms of positive developments, the MIRRI has proposed a new architecture of management and programming European Structural and Investment Funds to improve management of structural funds and simplify access to funding (also for CSOs) and eliminate the space for corruption. According to the proposed amendment, there will be just one central body responsible for the management and programming of structural funds, and only one operational programme established compared to the previous programming period.

## **Impact of COVID-19**

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

Following the coronavirus pandemic outbreak, the Slovak government restricted the exercise of the right to peaceful assembly, except for people living in a common household, between

6th April and 14th June.<sup>24</sup> Consequently, from 13th October, a prohibition of assembly of more than six people was applied in Slovakia, with exception for people living in the same household<sup>25</sup>. These restrictions, imposed due to the worsening of the epidemiologic situation in the country, were adopted during the “state of emergency” proclaimed by the government. During a state of emergency, the government may, in accordance with the law<sup>26</sup>, restrict fundamental rights and freedoms to the extent and time necessary. The state of emergency can last for 90 days but can be prolonged by a maximum of 40 days. Despite the state of emergency and the prohibition of assembly, in November 2020, thousands of people took to the streets in several Slovak cities to protest against the government and the measures taken in the wake of the coronavirus pandemics<sup>27</sup>. The person who does not respect the assembly restrictions can be fined up to 1.659 euros<sup>28</sup>.

24 Resolution of the Government of the Slovak Republic no. 207/2020 (<https://rokovania.gov.sk/RVL/Resolution/18345/1>)

25 Resolution of the Government of the Slovak Republic no. 645/2020 (<https://rokovania.gov.sk/RVL/Resolution/18788/1>)

26 Constitutional Act No. 227/2002 Coll. on State Security at the Time of War, State of War, State of Emergency, and State of Crisis

27 <https://www.teraz.sk/slovensko/sledujeme-protesty-na-slovensku/508408-clanok.html>

28 The Act of the National Council of the Slovak Republic No 42/1994 Coll. on Civil Protection of the Population, as worded in later amendments

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## *Impact on the justice system*

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Court deadlines were postponed in the spring until 30 April 2020 (during the first wave of the COVID-19 pandemic) by the Act no. 62/2020 Coll.

New less tight rules regarding the postponement of execution of the judgement (during the first wave of the COVID-19 pandemic) were introduced by Act no. 62/2020 Coll. Anyone was entitled to request a postponement if due to the pandemic his or her income has decreased so much that possible execution could have particularly adverse consequences for such a person or his/her family.

In addition, as part of economic measures to combat the pandemic situation, the government abolished the remuneration of judges and prosecutors and also abolished income compensations for temporary incapacity for work and supplementary sickness insurance. According to the Minister of Justice, these are professions in the exercise of public power, where thirteenth and fourteenth salaries are guaranteed and in the case of the above-mentioned remunerations and supplements it was a “regime of above-standard social security”. The judges considered the government’s move to be unmethodical, discriminatory and assessed it as a disproportionate interference with the material guarantees of the independence of the judiciary.

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## **Key concerns**

- Media environment is increasingly hostile, characterised by increasing threats to independence of regulatory authority, lack of transparency of media ownership and government pressure on the national press agency
- Journalists and media activists are subject to ongoing attacks, harassment and intimidation, including SLAPPs
- Intimidation of rights groups and activists by authorities and pro-government media is mounting, including through virulent smear campaigns, increasing restrictions on participation in decision-making, attempts to cut funding and administrative harassment
- Freedom of assembly was restricted and many protesters tracked down and fined over the past year, even where they were complying with physical distancing rules imposed to contain the spread of COVID-19

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

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

The main media regulatory authority in Slovenia, the Agency for Communication Networks and Services (AKOS), serves as an independent regulatory body for several sectors, including telecommunications, postal services, railway traffic as well as radio and television. It is a body functionally separate from the government. For years, one of the main threats for independence of the regulator has been connected to the appointment of the Director as the highest (individual) decision-making body in the Agency, being directly under control of the government. The collective body introduced in the form of the Agency's Council is also appointed by the government as a body supervising the work of the Agency in terms of annual plans and reports, and it can propose dismissal of the Director. One of the main instruments of independence of the regulator is connected to its financing pattern which is based on collection of spectrum fees, license fees etc.

The draft version of the amended Audiovisual Media Services Act expecting to transpose the revised Audiovisual Media Services Directive

contains specific provisions on independence of the media regulatory authority, as requested by the Directive, but the document is, in February 2021, still in the procedure of consultations within the government.<sup>1</sup>

However, the governing structure of the Agency is regulated by another act – the Electronic Communication Act – and the risks for independence of the regulator arising from the procedure of appointment of the Director of the Agency will remain until the governing structure of the Agency and the appointment procedure for Director as individual decision-making body is changed in a way to take from the government the power of appointment.

Additional risks for independence of the media regulatory authority arose in 2020, from the initiative of the Government to merge eight regulatory agencies in two super-agencies, which was presented as a way to streamline public administration. One of the two super-agencies is envisaged as an agency for market and consumers which would absorb several existing agencies, including AKOS. The new super-agency would regulate the following markets: energy, telecommunications, postal services, media and audiovisual services, and all forms of transport, while also supervising mergers and takeovers and competition and consumer protection. Major Slovenian regulators have

voiced opposition to plans to merge eight independent agencies into two super-agencies. As reported by the national press agency, STA, the Agency for Communication Networks and Services (AKOS) said the merger did not ensure regulatory independence. “The proposal is incompatible with multiple EU directives, in particular in the sense of ensuring the independence of the regulatory authority, a demand of directives in all areas covered by the agency,” AKOS director Tanja Muha told the press.<sup>2</sup>

The enforcement powers of the agency include warnings and fines, but the AKOS role as regulatory authority in the field of radio and television remains highly invisible and passive in terms of using the existing regulation and powers to challenge the controversial practices not only related to the market, but also in terms of content regulation such as hate speech, or to play more active role in the field of promotion of media literacy. This can be partly assigned to lack of sufficient capacities in terms of staff in the departments related to implementation of media regulation. But, even more, lack of ambition to build strong capacities, take stronger position, challenge the controversial practices and gain public reputation in this field seems to be connected with the internal policy of the Agency leadership to keep low profile in the politically sensitive field of media regulation.

1 See <https://e-uprava.gov.si/drzava-in-druzba/e-demokracija/predlogi-predpisov/predlog-predpisa.html?id=11475>

2 See <https://www.total-slovenia-news.com/politics/7084-main-regulators-oppose-govt-merger-plans-say-will-reduce-independence-competition>

In addition to AKOS, there is a “media inspector” in the system of regulation of media in Slovenia, being part of the Inspectorate for Culture and Media, a body under the responsibility of the Ministry of Culture, which handle the complaints related to certain provisions in the media regulation in compliance with the Inspections Act, the Minor Offences Act and the General Administrative Procedure Act.

There is a self-regulatory body on national level with long tradition and good reputation, operating within the Slovenian Association of Journalists, called “Journalists’ Court of Honour”<sup>3</sup>. It includes representatives of journalists and the public, handing complaints and taking decisions based on the Code of Ethics and publicly announced on regular basis. The self-regulatory body is co-founded by the Association and Union of Journalists, and appointed by their representative bodies. In addition, an Ombudsman of public media RTV Slovenia<sup>4</sup> exists, which is very operational and reputable. It handles more than 2,500 complaints in 2020, based on Professional Standards and other self-regulatory documents of RTV Slovenia. It is appointed by the governing body of RTV Slovenia – Programming Council – for a mandate of five years, and its independence is guaranteed by internal rules.

### ***Transparency of media ownership and government interference***

There are no specific obligations of the state bodies or media to report on allocation of state advertising in order to provide transparency and safeguards against political interference.

An online database (“Erar”<sup>5</sup>) serves as an instrument of general transparency of transactions from state budget. It is updated regularly with data on all transactions from the state budget, and it allows for searched based on state bodies and recipients. It also allows to obtain certain data on transactions between state bodies and media, but if it is the advertising agencies that are recipients of the funds from state bodies, the media as a final beneficiary of the advertisements are not listed in the online tool in relation to such transactions from the state budget.

For a long period, there have been indications that various governments in Slovenia have influenced distribution of advertisements from state bodies and public companies to the media engaging as an intermediary particular advertising agencies owned by businessmen close to the political grouping in power in order to channel the funds for advertisements

3 See <https://razsodisce.org/>

4 See <https://www.rtvlo.si/varuh>

5 See <https://erar.si/>

in the media close to that political grouping.<sup>6</sup> The recent circumstances in Slovenia are particularly raising the issue of potential political instrumentalisation of the state advertising, since the ruling party, SDS, co-owns a number of media, where advertisements of the government bodies and publicly owned companies are disseminated. The observers raise the issue particularly because the same media affiliated to the ruling party and carrying the advertisements of the state bodies and public companies, are accused for spreading hate speech and smear campaigns against individuals and organisations critical to the government or the ruling party.<sup>7</sup>

There are provisions in the Mass Media Act obliging the media outlets to report media ownership above 5 percent in the Media Register administered by the Ministry of Culture, and also to annually publish the data on ownership and updates on the ownership changes in the Official Gazette.

However, the beneficiary owners are often hidden and are subject of journalistic investigations.<sup>8</sup>

Municipality owned media lack transparency and are often used for promotion of political interests of mayors.<sup>9</sup>

At the same time the ruling political party, SDS, is involved in ownership of a media group, co-owned by the Hungarian businessmen close to the Hungarian ruling party and Prime Minister Orbán. This model of ownership and financing of the media group, involving directly or indirectly ruling parties of Slovenia and Hungary, has been investigated by journalists<sup>10</sup> but also by law enforcement authorities<sup>11</sup> and has also been discussed by a parliamentary body<sup>12</sup> in light of concerns of lack of transparency and possible irregularities.

The situation of the Slovenian Press Agency (STA) is another issue of concern. It is, in a

6 See [http://mediawatch.mirovni-institut.si/eng/you\\_call\\_this\\_a\\_media\\_market.pdf](http://mediawatch.mirovni-institut.si/eng/you_call_this_a_media_market.pdf)

7 See <https://www.dsavic.net/2020/05/18/slovenska-vojska-v-sluzbi-madzarskega-sovrastva/>

8 See <https://podcrto.si/oznaka/medijsko-lastnistvo/>

9 See <https://podcrto.si/povzetek-preiskave-kako-zupani-zlorablajo-obcinska-glasila/>

10 See <https://podcrto.si/povzetek-preiskave-medijski-sistem-sds/>

11 See <https://www.delo.si/novice/slovenija/npu-preiskuje-financiranje-medijev-blizu-sds/>

12 See <https://www.dz-rs.si/wps/portal/Home/deloDZ/seje/evidenca?mandat=VIII&type=dt&cuid=77CE9697A6A0A609C125851300368F92>

substantive part, funded from the state budget. The current government has been cutting funds to the press agency to exert pressure on its management and newsroom, and is gradually threatening to starve and dismantle the agency.<sup>13</sup> In addition to that, in 2020, the Government drafted the media regulation according to which the appointment of the members of the governing body (responsible for appointment of the agency's director) would be changed in a way to give the appointment power to the government instead of the parliament. The attempt to launch a quick change of the regulation, including such provision, failed. It is not clear when the new version of the media regulation changes will be released by the Ministry of Culture. Meanwhile, the Government proposed a measure according to which the national state agency STA would be among the public companies folding into the emerging National Demographic Fund, a new overarching state fund designed to pool all state assets. The regulation foresees the fund replacing the state as the founder and sole shareholder of the STA, a solution which raises concern of the STA staff, asking if it is "another manoeuvre to undermine the agency's independence or at least put it into uncertainty".

Public service media RTV Slovenia is under threat of diminishing its funding since the government drafted the media regulation changes, in 2020, intending to use significant part of RTV Slovenia's income (from the license

fee paid on monthly basis by households) for channelling it to other media, including competing private broadcasters. The 2020 government attempt to quickly close the public consultation on draft regulation and proceed with the adoption of the amendments did not succeed. The new version of the amendments to the media regulation has not been published yet. Meanwhile the ruling party and Prime Minister are conducting a campaign against the public media RTV Slovenia, including a leaflet sent by the party to households across Slovenia, in February 2021, where it is suggested that the funds spent for RTV Slovenia operations could be rather used for other purposes.

### *Public trust in media*

There is significant level of trust in the media in Slovenia, particularly traditional media, such as television and radio. Still, there is also an increasing level of distrust that raises concern.

Public service media enjoy high level of trust in comparison to other institutions. There was a public opinion research conducted by Valicon agency, in April 2020, as a part of longitudinal research. RTV Slovenia, a public service media, was reported among 9 institutions and sectors in Slovenia which gained trust (more answers of trust than distrust), the other trusted institutions and sectors included the

13 See <https://www.euronews.com/2020/12/02/slovenia-criticised-for-cutting-funding-to-national-press-agency>

health system, health workers, police, institute of public health, etc.<sup>14</sup>

Another public opinion research was conducted in April 2020 by Mediana agency measuring the trust in the media during the COVID-19 epidemic. The findings are presented according to media types and television enjoys the highest level of trust, but it is approx. 50% of the respondents expressing trust into television, 48% in radio, 40% in newspapers, 25% in online news media and 18% in social networks.<sup>15</sup>

### ***Framework for the protection of journalists and other media activists***

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In regulations and in the case law, there are provisions and decisions setting standards which allow journalists to protect their sources, and avoid prosecution for publishing confident information of public interest.

### ***Attacks, harassment and intimidation against journalists and media activists***

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The work environment for journalists in Slovenia has become increasingly hostile. The Slovenian Association of Journalists recently released a monitoring report on attacks on journalists “From physical violence and threats, to defamations, online harassment and systemic pressures”, highlighting also the common practice of police to underestimate verbal and online attacks and discourage journalists from reporting the attacks to the police.<sup>16</sup> The hostility towards journalists critically reporting about the government, particularly towards the journalists of public media RTV Slovenia, is increasingly connected to the rhetoric and campaigns of the ruling party and Prime Minister. Online harassment is often used against critical journalists and media, but there is also misuse of legal provisions to frighten journalists such as numerous charges against the same critical media or journalists by the same plaintiff, so called SLAPP (Strategic Lawsuits Against Public Participation): one recent example are the 39 lawsuits by Rok Snežič against three journalists of Nenczurirano.<sup>17</sup>

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14 See <https://www.rtv slo.si/slovenija/anketa-velik-porast-zaupanja-v-zdravstveni-sistem-in-rtv-slovenija/521138>

15 See <http://mm-arhiv.si/novice/mmediji/17967/mediana-zaupanje-slovencev-v-klasicne-medije-je-visoko>

16 See [https://novinar.com/wp-content/uploads/2021/01/Zakljucno-porocilo\\_Spremljanje\\_napadov2.pdf](https://novinar.com/wp-content/uploads/2021/01/Zakljucno-porocilo_Spremljanje_napadov2.pdf)

17 See <https://www.mappingmediafreedom.org/country-profiles/slovenia/>

In 2020, there was a physical attack on photo-journalist during the anti-government protest, resulting in hospitalisation of the reporter. The police investigation led to identification and prosecution of the attacker.<sup>18</sup>

Self-censorship is an increasing practice among journalists under attack, particularly at local level, as emphasized in the monitoring report on attacks on journalists “From physical violence and threats, to defamations, online harassment and systemic pressures” published recently by the Slovenian Association of Journalists. Journalists exposed to online attacks and harassment react also by closing their social media accounts and retreating from online communication to protect own safety and mental health.

Female journalists are particularly harassed, with the term “prostitute” being commonly used in social media and comment sections to libel female journalists<sup>19</sup> particularly since the today’s Prime Minister used a label “washed-up prostitutes” for two journalists of public television, in 2016, when being the opposition leader. In 2020, the Supreme Court decided to quash a ruling that ordered today’s Prime Minister to pay damages for that. The Court ruled that his tweet falls under the category of “highly protected political expression” and that freedom of political expression prevails.

The Slovenian Association of Journalists condemned such Supreme Court ruling, saying it has a fear-provoking effect on journalists. They asked “to whom journalists to turn for protection of their basic human and professional rights” after such a decision of Supreme Court.<sup>20</sup>

### *Freedom of expression*

Freedom of expression is under threat mainly in the context of right to assembly and association i.e. right to protest. Since April 2020, the regular peaceful protests have been organised mostly in the form of cycling protests to request resign of the government for claims of corruption and for curbing democratic standards in the country. The protestors have been on weekly basis exposed to the intimidation and sanctions by the police for expressing views, holding papers with messages against the government, performing street performances etc. The police is justifying the restrictive measures referring to the government orders and laws adopted with purpose to counter the epidemic, but there is disproportion in the way how other kind of gatherings of people are treated favourably in comparison with gatherings or individuals cycling or walking if the person expresses views by holding certain message or sign. The Legal Network for Democracy

18 See <https://siol.net/novice/slovenija/26-letni-osumljeni-napadalec-s-protestov-stari-znanec-policije-542051>

19 See [https://novinar.com/wp-content/uploads/2021/01/Zakljucno-porocilo\\_Spremljanje\\_napadov2.pdf](https://novinar.com/wp-content/uploads/2021/01/Zakljucno-porocilo_Spremljanje_napadov2.pdf)

20 See <https://www.delo.si/novice/slovenija/sodba-vrhovnega-sodisca-ima-na-novinarje-zastrasevalni-ucinek/>

Protection has been established recently by a group of non-governmental organisations and lawyers to provide legal support to hundreds of protestors experiencing intimidation and sanctions, and to enter into legal cases against police for violating freedom of peaceful assembly and freedom of speech, and for using disproportional measures.<sup>21</sup>

### ***Right to information***

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Access to public interest information (freedom of information) is provided for by law, with the Information Commissioner playing the role of an appeal body, and often being a last resort for journalists to provide public-interest information. There are negative developments in this field arising from the new practices of the judiciary (prosecutors and courts) to withhold information claiming that they can be accessed based on legal interest only, referring to the decision of the 2020 Supreme Court in a precedential case, and ignoring the provisions of the Access to Public Information Act.

## ***Checks and balances***

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

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In Slovenia, the National Assembly of the Republic of Slovenia adopted in 2009 the Resolution on Legislative Regulation.<sup>22</sup> The document was adopted with the aim of improving the standards when drafting laws and regulations. Among other things, the resolution in question provides for minimum standards as regards public consultations, with a minimum period of 30 to 60 days budgeted for consultation with the public. The Rules of Procedure of the Government of the Republic of Slovenia<sup>23</sup> were later also amended to include the provision related to the minimum period for public consultations. The Centre for Information Service, Co-operation and Development of NGOs established a violation meter, a mechanism to monitor the frequency of violations of provisions related to public consultations. This mechanism captures regulations for which the resolution stipulates a minimum time for public consultations. It also captures other acts for which such consultations are provided for in the government rules of procedure. After taking office on 13 March 2020 until 15 February 2021, the current government did not respect provisions

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21 See <https://pravna-mreza.si/>

22 Full text available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5516>

23 Available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=POSL32>

concerning public consultations in 67% of the cases. The former government, in office from 13 September 2018 until 13 March 2020, did not respect the relevant provisions in 60% of the cases.<sup>24</sup>

## **Enabling framework for civil society**

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

Since April 2020, informal Friday anti-government protests (particularly the so-called bicycle protests in Ljubljana), including against its handling of the purchase of the protective equipment and its role in downturn of environmental and democratic standards during the epidemic, have been a regular feature of public life in Slovenia. On several occasions, concerns were raised over the excessive use of police powers physical force. Amnesty International Slovenia, for example, called on police authorities to inspect the matter.<sup>25</sup> On 19 June, for example, the police stopped random people who were supposedly going to join a protest and completely blocked access to the

Republic Square in Ljubljana – an historical precedent, as this site carries high symbolic value in Slovenia.

The national Human Rights Ombudsman has dealt with police procedures for establishing the identity of individuals during the protest in question, involving 69 cases. The body established that the question remained whether the measures of establishing identity in these cases were actually carried out in a lawful manner and did not represent an encroachment on the rights to privacy and personality rights.<sup>26</sup>

In the course of these 2020 protests, the most common tool to restrict the right of the people to assembly seemed to be the imposition of fines on the basis of various government orders to curb the spread of the coronavirus and to provide for physical distancing, but also some other regulations. Since March 2020, for example, depending on the epidemiological situation, variably restrictive measures relating to assembly of people in public places and public surfaces were imposed (e.g. in certain periods gatherings were fully banned, while in periods of more favourable situation gatherings of up to 500 people were allowed). As noted, fines were often imposed despite peaceful

24 For more information, see the related webpage of the NGO in question on <https://www.cnvos.si/stevec-krsitev/> (accessed on 22 February 2021).

25 See <https://www.amnesty.si/navedbe-o-prekoracitvi-policijskih-pooblastil-je-treba-preiskati.html>; <https://www.amnesty.si/odziv-na-ravnanje-oblasti-protesti>

26 See <https://www.varuh-rs.si/sporocila-za-javnost/novica/policijski-postopki-ugotavljanja-identitete-ob-protestu-19-6-2020-v-ljubljani/>

protests and protesters respecting physical distancing. For instance, in the period of stricter measures, individual protesters or family members left their paper footprints with messages in front of the parliament, and some of them faced fines for violating ordinance on the prohibition of gatherings. When more people were allowed to assemble, some participants in protests received fines for writing protest slogans on the streets with chalk. Later in the year, for example, when the epidemiological situation deteriorated, car protests were held and fines were issued for protest honking in front of the parliament on the basis of the law governing road traffic.<sup>27</sup>

At the time of writing, namely from 12 February 2021, gatherings of up to 10 people are allowed, but public assemblies, namely organised assemblies of persons for the purpose of expressing opinions and standpoints on questions of public or common importance in open or enclosed places where access is open to anyone, as defined in the law governing public assemblies<sup>28</sup>, are still fully banned. Groups of people can thus come together for certain reasons, but these do not include voicing their opinions on public matters.

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

Individuals, NGOs and other informal groups critical of the political situation in the country are often subject to smear campaigns. These target for example NGOs working in the fields of environment protection, culture, human rights and non-discrimination, and LGBTI rights. Prominent individuals among protesters as well as other prominent individuals critical of the government are equally targeted. Such campaigns include depicting NGOs as parasites, spreading misinformation about their operations and financing, including deliberately creating misconceptions about the organisations' functioning and strength; publishing hostile and insulting articles about organisations, their founders and staff in attempts to compromise their public image and legitimacy. Serial publication of offensive, false, manipulative and hostile content about critics of the government, including among protesters, is also becoming common practice. Such campaigns are often carried out through media and other communication channels close to the major party in the current government coalition.<sup>29</sup>

27 Available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5793>

28 Available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1455>

29 For more information, see [https://www.mirovni-institut.si/wp-content/uploads/2021/01/Znacilnosti\\_napadov\\_na\\_civilno\\_druzbo\\_-\\_porocilo.pdf](https://www.mirovni-institut.si/wp-content/uploads/2021/01/Znacilnosti_napadov_na_civilno_druzbo_-_porocilo.pdf)

A recent example of a smear campaign is the alleged 2021 consultation with voters by the major government party in February 2021. A questionnaire was sent to Slovenian households. It is also available on the party's website. One among the ten questions reads as follows: "From 2009 to 2019 inclusive, 31,841,020 EUR were allocated from the budget of the Republic of Slovenia for the renovation of homes for the elderly, and we did not build any new ones. At that time, only 35,672,609 EUR were earmarked for the maintenance and construction of student dormitories. At the same time, the 20 best-funded so-called non-governmental organisations, mostly from Metelkova 6 in Ljubljana, received as much as 70,481,020 EUR from the budget. This order of funding seems to me to be: a) fully appropriate, "non-governmentals" are the most important; b) inappropriate, the essential needs of students and pensioners must be given priority; c) scandalous, because they are pointlessly spending our money."<sup>30</sup>

### ***Administrative harassment***

On 19 October 2020, the premises manager at the Ministry of Culture issued a proposal for an amicable termination of the lease to the non-governmental organisations operating at Metelkova Street No. 6 in Ljubljana. The ministry has threatened to take the case to the

court and to enforce the eviction if the NGOs fail to vacate the building by 31 January 2021. In a public release, the ministry later stated, among other things, that the building was dangerous for occupants due to its dilapidation, and the ministry, as the owner, was obliged to renovate it. According to the ministry, it would be converted into a Natural History Museum. The ministry further stated that the funds for the renovation have been secured, and the renovation and conversion into a museum were already planned by the previous ministers.<sup>31</sup> In their response, the occupants noted that the building had been for decades home to internationally renowned NGOs working in the field of independent cultural and artistic production, as well as involved in research and advocacy on behalf of marginalised groups. They stressed that the termination of the leases was issued on the day the COVID-19 epidemic and curfew were declared in Slovenia, and that no dialogue between the ministry and the NGOs took place before the termination document was issued. Similarly, no replacement premises were on offer. The organisations strongly protested the action of the ministry. It is seen as an attack on the civil society and independent culture intended to silence critical voices. According to the NGOs, the government in office and particularly its largest party have never hidden such intentions. The NGOs concerned stated that they did not intend to leave the building but

30 For more information, see <https://www.sds.si/posvet2021>

31 For more information, see the ministry's webpage on <https://www.gov.si/novice/2020-11-06-odziv-ministrstva-v-zvezi-s-stavbo-na-metelkovi-ulici-6/>

intended to resist the attack on civil society, independent culture, and democracy. Various NGO associations, academic institutions and trade unions expressed their support to the occupants.<sup>32</sup>

### ***Right to participation***

In April 2020, the Slovenian parliament adopted the Intervention Measures to Contain COVID-19 Epidemic and to Mitigate its Consequences for Citizens and Economy Act,<sup>33</sup> the second piece of legislation in the series of the so-called anti-corona stimulus packages adopted in the year in question. Among others, it amended provisions regulating the issuance of building permits under the Building Act.<sup>34</sup> The amendment was adopted to allegedly improve the issuance of these permits and to boost the economy during the COVID-19 pandemic. The package also included new provisions relating to the involvement of NGOs with the authorised status of organisations in the public interest in the field of environment protection in the building permits issuance procedures. It set out a new the new threshold as regards their access to these proceedings. Taking into account their legal

status, these NGOs must meet the relevant requirements for the year when the relevant procedures start as well as for the preceding two years (e.g. associations shall have 50 active members with paid membership fees in the mentioned period, institutes must employ at least three full-time staff achieving level 7 of the Slovenian qualification framework, while foundations shall have at least 10,000 EUR in assets every year in the period in question). Following submission of the draft law to the parliament, more than 50 NGOs protested the amendments. They noted that the amendment had the retroactive effect, that is – to be involved in current proceedings, the NGOs needed to meet the set conditions including in the two preceding years when such criteria were not in place. They also stressed the fact that the threshold set by the law is too high for practically all Slovenian NGOs with the authorised status of organisations in the public interest in the field of environment protection, effectively excluding them from the relevant proceedings and thus violating provisions of the Aarhus Convention.<sup>35</sup> In spite of the protests, the parliament eventually adopted the amendment. As provisions of the second anti-corona stimulus package were valid until the end of May 2020, the parliament

32 For more information, see the dedicated webpage on <https://www.mirovni-institut.si/metelkova6/>

33 Available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO8190>

34 Available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7108>

35 For more information on the concerns raised, see e.g. <https://www.cnvos.si/novice/2509/izjava-nevladnih-organizacij-glede-42-clena-novega-proti-koronskega-zakona/>

extended the measure by the end of 2021 in the so-called third anti-corona stimulus package.<sup>36</sup> Three NGOs have submitted a request for constitutional review of the amendment, and the Constitutional Court of the Republic of Slovenia suspended its application until it decides on the matter. The court is yet to rule on the issue.<sup>37</sup>

### ***Access to funding***

Historically, in terms of the percentage of GDP, Slovenian NGOs have access to fewer funds compared to many of their international counterparts. According to the data published by the Centre for Information Service, Co-operation and Development of NGOs, in 2019, for example, Slovenia allocated only 0.77% (0.73% in 2018) of its GDP to non-governmental organisations, while in 2013 the global average was 1.38%, and the EU countries allocated an average of 2.20 % of GDP to their non-governmental organizations in 2013.<sup>38</sup>

In December 2020, in the course of drafting the so-called seventh anti-corona stimulus package, the government moved to effectively abolish the Fund for the development of non-governmental organisations. Since 2007, personal income taxpayers may give 0.5% of their personal income tax for publicly beneficial purposes. By 2018, however, if taxpayers failed to make donation, the relevant percentage of their taxes was not allocated and remained in the state budget. To counter this, the Act on Non-governmental Organisations<sup>39</sup> was passed in 2018. According to the act in question, if taxpayers failed to make donations, the relevant percentage of their taxes shall now go to the fund. This fund shall provide resources for projects and programmes providing the support environment and promoting the development of non-governmental organisations, amongst others. In the draft submitted to the parliament in December, the government proposed an increase in donations a personal income taxpayer can give for publicly beneficial purposes, from 0.5 to 1 % of their income tax. At the same time, however, the money of those taxpayers who failed to make donations shall not go to the fund, as the fund

36 Available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO8206>

37 For more information on the case, see the court's webpage on <https://www.us-rs.si/zadrzanje/zadrzanje-izvrsevanja-2-clena-zakona-o-interventnih-ukrepih-za-omilitev-in-odpravo-posledic-epidemije-covid-19-v-zvezi-s-centrim-odstavkom-100-d-clena-100-e-in-100-f-clenom-ter-drugim-odstavkom-100/>

38 For more information, see the webpage of the Centre for Information Service, Co-operation and Development of NGOs on <https://www.cnvos.si/nvo-sektor-dejstva-stevilke/javno-financiranje-zbirni-podatki/>

39 Available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7129>

was to only be financed from the state budget or other donors. In spite of the increase in the size of possible donations by taxpayers, which was welcomed, the motion was seen as another attack on NGOs by the biggest party in the current government coalition, as the fund represent the only systemic source of funding for non-governmental organisations. It was further stressed that taxpayers' donations, if any, tend to be dispersed and mostly function as an instrument of support for local NGOs (e.g. in 2019, 5,394 organisations received an average 913 EUR, with almost 800 organisations receiving less than 5 EUR), while the fund provided rather generous financing of individual projects.<sup>40</sup> Following considerable mobilisation by civil society<sup>41</sup>, the fund stood, as the parliament did not back the government proposal effectively abolishing the NGO fund.

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40 For more information, see <https://www.cnvos.si/novice/2687/sds-ov-pogrom-nad-nvo-v-pkp7-ukinitev-sklada-za-nvo/>

41 See e.g. [https://www.facebook.com/cnvos/posts/2911384182428213?\\_\\_tn\\_\\_=-R](https://www.facebook.com/cnvos/posts/2911384182428213?__tn__=-R)

# Spain // Rights International Spain (RIS)



defendiendo los derechos y libertades civiles

## Key concerns

- Longstanding issues continue to affect the justice system, including as regards the appointment of judges and the legal aid framework
- The abuse of criminalisation of speech and SLAPPs against journalists, activists and artists are common, while awareness is growing that existing provisions are not in line with international standards
- While rules preventing journalists from documenting police brutality are declared unconstitutional, attacks and harassment on journalists and media activists continue to be reported alongside episodes of police violence, including when policing assemblies
- Newly proposed rules may restrict freedom of expression and information online

- Racism and racial profiling expose structural failure to provide adequate protection against discriminatory practices
- COVID-19 exacerbates existing issues including as regards poor quality law making, the situation of vulnerable groups, the respect of fair trial rights in criminal proceedings, corruption and challenges to the exercise of freedom of expression and the right to information

## Justice system

### Judicial independence

#### Appointment of judges

The acting Judiciary Council (Consejo General del Poder Judicial) has continued appointing judges to the highest levels of the judiciary system (see below).<sup>1</sup>

1 See for example: Público. El CGPJ en funciones pacta los nombramientos del Supremo, en contra de la opinión del Gobierno. (30 September 2020). Available here: <https://www.publico.es/politica/cgpj-funciones-pacta-nombramientos-supremo-opinion-gobierno.html> and; El Mundo. El CGPJ efectúa siete nuevos nombramientos discrecionales por amplísima mayoría de 18 votos. Available here: <https://www.elmundo.es/espana/2021/01/28/6012a47efdddfab7a8b4636.html>

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### *Independence and powers of the Council of the Judiciary*

The Spanish Council of the Judiciary expired its mandate in 2018. The renewal of this body requires a qualified majority of 3/5 in both Congress and Senate, which implies the need for dialogue and to reach agreements between political parties. It has never been easy to reach agreements in this regard and extensions in the mandates of the Council have not been uncommon in the past. However, the current situation is exceptional.

The Spanish right-wing Popular Party has been blocking the renewal of the General Council of the Judiciary since 2018 when its mandate expired. One of the critical problems is that this acting Council – with a majority of members appointed by the Popular Party – has continued making appointments to the highest Spanish courts, particularly in the Supreme Court and more precisely to its Criminal Chamber. It is the Criminal Chamber of the Supreme Court that has jurisdiction to try any

offence committed (for example, corruption cases) by the members of the Government, as well as deputies and senators, among others. And it is also the last appeals tribunal.

During the term of the acting Council, the highest positions in the Spanish judiciary have been decided by a majority of magistrates who are labelled by the media as conservative. This conservative majority in the Council also explains why the Popular Party is reluctant to renew the body. Considering the corruption cases that affect the political parties in Spain, the capacity to appoint the key judges of the Spanish judiciary is undoubtedly a very effective tool, that could have an impact in these corruption proceedings.<sup>2</sup>

In October 2020, the Spanish Government presented a draft bill to reform the system of appointment of the Judiciary Council with one main objective: to reduce the parliamentary majorities currently required to appoint the members of the General Council of the Judiciary<sup>3</sup>. Its purpose is to overcome the

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2 Senator Ignacio Cosidó, member of the Popular Party, sent a whatsapp to his colleagues in the parliamentary group in November 2018 that was leaked to the press. In this whatsapp he talked of ending up “controlling the Second Chamber from behind” – the Criminal Chamber of the Supreme Court –, and added: “[W]e were risking the future renewals of 2/3 of the Supreme Court and hundreds of appointments in the judiciary, vital for the Popular Party and for the future of Spain.”. See for example: El Español. “Controlando la Sala Segunda desde detrás”: el ‘whatsapp’ de Cosidó justificando el pacto con el PSOE en el CGPJ (15 November 2018). Available here: [https://www.elespanol.com/espana/politica/20181119/controlaremos-sala-segunda-cosido-justificando-psoe-cgpj/354214577\\_0.html](https://www.elespanol.com/espana/politica/20181119/controlaremos-sala-segunda-cosido-justificando-psoe-cgpj/354214577_0.html)

3 See for example: El Independiente. PSOE y Podemos quieren rebajar la mayoría parlamentaria para elegir a los vocales del CGPJ. (13 October 2020). Available here: <https://www.elindependiente.com/espana/2020/10/13/psoe-y-podemos-quieren-rebajar-la-mayoria-parlamentaria-para-elegir-a-los-vocales-del-cgpj/>

political blockage in the renewal of its members, which has already lasted two years.

The Group of States against Corruption (GRECO) of the Council of Europe (CoE) sent a letter to the Spanish government regarding the reform draft bill. According to GRECO, replacing the qualified vote of 3/5 in Congress by a simple majority would go against the Council of Europe standards relating to the composition and appointment of members of judicial councils. GRECO reminded the government that judicial councils must be independent to safeguard judicial independence, as well as independence of individual judges, which is an indispensable condition in the fight against corruption. According to CoE standards, at least half of the members of judicial councils must be appointed by judges, without interference or the intervention of political authorities. According to the 2020 report of the Legal Aid Observatory, the number of free legal aid cases increased by 5,6% with respect to the previous year. 63% of all free legal aid cases refer to assistance provided by court appointed lawyers (*turno de oficio*), a figure by 5,4% higher than the previous year;

while 34% of cases related to legal assistance provided to persons in custody.<sup>4</sup>

The General Council of Bar Associations in Spain published a manifesto in July 2020, highlighting, among other issues, the need to dignify the role of court appointed lawyers (*turno de oficio*), who defend the most disadvantaged persons in society, and demand a decent remuneration, paid without delays. According to the General Council manifesto it is urgent to reform the regulatory framework concerning Court appointed lawyers and Free Legal Assistance (*asistencia jurídica gratuita*) to consolidate the quality and improve the efficiency of the services provided.<sup>5</sup>

In fact, the Council of Europe European Commission for the efficiency of Justice (CEPEJ) 2020 evaluation report of judicial systems refers to the fact that Spain is among those countries having a higher number of legal aid cases but with a lower amount allocated per case.<sup>6</sup>

The General Council also recalled the importance of updating the criteria regulating citizen access to free legal aid. They said that

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4 Abogacía Española. XIV Informe del Observatorio de Justicia Gratuita. (2020). Available here: <https://www.abogacia.es/wp-content/uploads/2020/07/XIV-Informe-del-Observatorio-de-Justicia-Gratuita-def.pdf>

5 Abogacía Española. 12-J Manifiesto En Defensa De La Justicia Gratuita Y Del Turno De Oficio 2020. (July 2020). Available here: <https://www.abogacia.es/actualidad/noticias/12-j-manifiesto-en-defensa-de-la-justicia-gratuita-y-del-turno-de-oficio-2020/>

6 Council of Europe. European judicial systems CEPEJ Evaluation Report (2020 Evaluation cycle). (2020). P.41. Available here: <https://rm.coe.int/rapport-evaluation-partie-1-francais/16809fc058>

the increase in the interprofessional minimum wage without modifying the parameters established in Law 1/1996 on Free Legal Assistance has limited access to free legal aid for a growing number of families who, based on their precarious income, should be able to access it.

With respect to access to interpretation, the Fair Trials report “*Justice Under Lockdown in Europe. A survey on the impact of Covid-19 on defence rights in Europe*” highlighted the impact of remote justice on vulnerable persons and persons in need of interpretation<sup>7</sup>: “The use of masks coupled with video conferencing has made the statement [of detainees by video-conference] difficult. Even more so for foreign people speaking Spanish. In these cases, if they had a lot of accent or strange grammatical twists, communication was difficult.” In addition, “Simultaneous interpretation [on top of direct speech] makes it difficult to grasp what is being said for an accused who does not speak the official language. If each sentence is interpreted consecutively, it makes the process significantly longer and the court does not accept that.”

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

The state of Alarm and the strict lockdown measures put in place in Spain from March to June 2020 to fight the Covid-19 crisis has had an important effect on the efficiency of the justice system. Courts were paralysed during the lockdown and only urgent matters were addressed<sup>8</sup>. In fact, the Covid-19 crisis tested the limits of a judicial system with urgent needs of modernization and adaptation to new technologies. The result has been an increase in the delay of many proceedings, although not all justice areas have been equally affected by the pandemic. Labour Courts are severely overloaded due to the economic crisis that resulted from lockdown measures<sup>9</sup>: cases of unlawful lay-off have increased, wrongful application of temporary lay-off measures (ERTE), etc. Civil and Commercial Courts have also experienced an important increase in the number of proceedings and, to a smaller extent, Family Courts.

The Government enacted a set of procedural and organizational measures to face the

7 Fair Trials International. *Justice Under Lockdown in Europe. A survey on the impact of Covid-19 on defence rights in Europe*. (2020). P.12.

8 See for example: [elDiario.es](https://www.eldiario.es/politica/justicia-asoma-colapso-precedentes-abandono_1_5916877.html). La pandemia empuja a la Justicia a un colapso sin precedentes tras años de abandono sin inversiones ni consensos. (25 April 2020). Available here: [https://www.eldiario.es/politica/justicia-asoma-colapso-precedentes-abandono\\_1\\_5916877.html](https://www.eldiario.es/politica/justicia-asoma-colapso-precedentes-abandono_1_5916877.html)

9 See for example the measures taken in Madrid to face this unprecedented situation. Available here: <https://www.comunidad.madrid/noticias/2020/09/04/reforzamos-juzgados-lo-social-enfrentar-mayor-litigiosidad-derivada-covid-19>

situation during the lockdown period<sup>10</sup> and new technologies are getting more common in judicial daily activities; enabling remote access to proceedings, more fluid email communication between parties and a wider range of consultations enabled by digital means, prior appointment system, remote declarations in proceedings (through videoconference), or online court deliberations. However, the introduction/use of these digital tools in the justice administration in the current context and without a progressive transition and adaptation has generated several problems. The modernisation of the judicial administration cannot be the result of an improvised exercise. Second, the introduction of remote hearings (*juicios telemáticos*) in the mentioned context can have pervasive effects on fundamental rights, especially on the judicial guarantees of the defendants<sup>11</sup>.

In this regard, the above-mentioned report *Justice Under Lockdown in Europe. A survey on the impact of Covid-19 on defence rights in*

*Europe* expressed concern over the poor quality or unreliability of the available technology, affecting participation in trial: according to a respondent “[The suspect] is isolated, in a room with policemen, who refuse to remove his handcuffs for security reasons, and everything is through a video conference that he does not know how to use. The situation of helplessness is very great. Greater if he belongs to a vulnerable group.” Concerns were also raised as “Remote hearings could in some cases generate a certain insecurity for the accused persons, as they do not have the lawyer physically next to them and they are held in an environment that may be unfamiliar to them. Therefore, the accused persons or their lawyer should have the right to request, if they consider it necessary for their defence, the physical presence of the lawyer next to the accused, unless there is some risk of contagion.”<sup>12</sup>

Difficulties to challenge evidence in Spain were also reported, for instance, one lawyer noted that “they were unable to correctly witness

10 Real Decreto-ley 16/2020, de 28 de abril, de medidas procesales y organizativas para hacer frente al COVID-19 en el ámbito de la Administración de Justicia. Available here: [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2020-4705](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-4705)

11 See For example: Jimeno Bulnes, M. Emergencia judicial ante la crisis sanitaria originada por el Covid-19. (2020). Available here: <http://www.rightsinternationalspain.org/en/blog/165/emergencia-judicial-ante-la-cri-sis-sanitaria-originada-por-el-covid-19>; and Jimeno Bulnes, M. Commentary: iProcess – Judicial emergency in Spain during the COVID-19 crisis. (2020). Available here: <https://www.fairtrials.org/news/commentary-iprocess-%E2%80%93-judicial-emergency-spain-during-covid-19-crisis>

12 Fair Trials International. *Justice Under Lockdown in Europe. A survey on the impact of Covid-19 on defence rights in Europe*. (2020), p. 11.

the evidence through video-conference.”<sup>13</sup>. According to some respondents the quality of legal assistance at the very early stages of the proceedings can also be undermined: “Telephone assistance speeds up the process but undoubtedly reduces guarantees”<sup>14</sup>.

## Corruption

### General transparency of public decision-making

The coalition government of *PSOE* and *Unidas Podemos (UP)* has increased the number of advisors placed in the ministries. On 30 June 2020, the government lead by Pedro Sánchez counted with 777 advisors. The precedent cabinet lead by Sánchez had 100 less advisors (673) and that of Mariano Rajoy 566. It must be noted that this increase in figures does not

have any apparent correlation with the Covid-19 crisis, as the Ministry of Health has not registered any addition to its existing team<sup>15</sup>.

The lack of transparency concerning this topic is persistent with the coalition government of *PSOE* and *UP*. In 2019, only 5 out of the 17 ministries has provided information. The Transparency Council (*Consejo de Transparencia*) has also changed its criterion regarding this matter increasing the levels of opacity<sup>16</sup>.

### Whistleblowers protection

The Spanish Ministry of Justice announced in June the creation of a working group to transpose the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law<sup>17</sup>.

13 Ibid. pp. 12-13.

14 Ibid. P. 6

15 See: CIVIO. El Gobierno de coalición cuenta con 100 asesores más que el anterior de Sánchez y 200 que Rajoy en la misma época (2020) Available here: <https://civio.es/quien-manda/2020/07/22/el-gobierno-de-coalicion-cuenta-con-100-asesores-mas-que-en-el-anterior-de-sanchez-y-200-que-rajoy-en-la-misma-epoca/>

16 See: CIVIO. Solo cinco de los 17 ministerios de Pedro Sánchez identifican a todos sus asesores. (2019). Available here: <https://civio.es/quien-manda/2019/03/21/solo-cinco-de-los-17-ministerios-Pedro-Sanchez-identifican-a-todos-sus-asesores/>

17 See: <https://www.mjusticia.gob.es/gl/ministerio/gabinete-comunicacion/noticias-ministerio/justicia-avanza-trasposicion>

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

### **Framework for the protection of journalists and other media activists**

As mentioned above, the Spanish Ministry of Justice announced in June 2020 the creation of a working group to transpose the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law<sup>18</sup>.

## **Attacks and harassment of journalists and other media activists**

In 2019, far-right political party *Vox* prevented certain journalists from covering the Spanish general elections from attending their rallies during the campaign<sup>19</sup>. This authoritarian drift and trend has continued during 2020, with continuous attacks to journalists from different media outlets<sup>20</sup>. During a demonstration convened by *Vox* in May to protest against the government's management of the Covid-19 crisis, journalists from two national media outlets (*El País* and *La Razón*) suffered harassment and aggressions while carrying the coverage of the event<sup>21</sup>.

During 2020 cameramen and photojournalists were denied access to hospitals, morgues and retirement homes to cover the Covid-19 crisis.

18 Ministry of Justice. Official Press Release (6 June 2020). Available here: <https://www.mjusticia.gob.es/gl/ministerio/gabinete-comunicacion/noticias-ministerio/justicia-avanza-trasposicion>

19 See for example: *El País*. *Vox impide el acceso de los periodistas de PRISA a pesar de la resolución de la Junta Electoral*.

(10 November 2019). Available here: [https://elpais.com/politica/2019/11/10/actualidad/1573407921\\_913145.html](https://elpais.com/politica/2019/11/10/actualidad/1573407921_913145.html); [https://www.elplural.com/politica/espana/vox-veta-a-un-periodista-de-el-pais-son-activistas-comunistas\\_216130102](https://www.elplural.com/politica/espana/vox-veta-a-un-periodista-de-el-pais-son-activistas-comunistas_216130102)

20 See for example: *El Plural*. *Vox veta a un periodista de 'El País': "Son activistas comunistas"*. (10 May 2019). Available here: [https://www.elplural.com/politica/espana/vox-veta-a-un-periodista-de-el-pais-son-activistas-comunistas\\_216130102](https://www.elplural.com/politica/espana/vox-veta-a-un-periodista-de-el-pais-son-activistas-comunistas_216130102)

21 See for example: *Público*. *RTVE y 'La Razón' denuncian ataques a sus periodistas cuando cubrían la protesta de Vox en Madrid*. (24 May 2020). Available here: <https://www.publico.es/politica/tve-y-razon-denuncian-ataques-periodistas-cubrian-protesta-vox-madrid.html>

In the cases where they were allowed access as the field hospital in *Ifema*, journalists claimed there was too much control as for example guideline of the spots and angles from where to shoot photos<sup>22</sup>.

The Canary Islands have seen an increase of migrants arriving by boat, more than 2000 people than in 2019. The Ministry of Interior is struggling to manage the flux, leaving migrants in precarious camps near the harbour<sup>23</sup>. The government does not allow the moving of people to mainland Spain, arguing that migrants' relocation to other countries is impossible due to limits imposed on international border crossing to prevent the spreading of Covid-19. In this context, journalists were

also denied information and access by the authorities to key locations in the coverage of the arrival of migrants to the Canary Islands in August<sup>24</sup>. The photo-journalist Javier Bauluz was even sanctioned<sup>25</sup>.

Police forces have also impeded journalists from carrying out their work while covering protests. In the case of a journalist from *Noticias Navarra*, Mikel Urbaien, who was covering the protests against the Monarchy last summer when the *Guardia Civil* took away his cellphone and stopped the recording<sup>26</sup>. Another journalist covering a house forced eviction, Mireia Comas, was arrested while covering the event and faces charges

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22 See for example: Vozpópuli. España pone un veto a la tragedia y restringe el acceso de los fotoperiodistas a morgues y hospitales. (4 April 2020). Available here: [https://www.vozpopuli.com/espana/Espana-restringe-fotoperiodistas-hospitales-morgues-coronavirus\\_0\\_1342666982.html](https://www.vozpopuli.com/espana/Espana-restringe-fotoperiodistas-hospitales-morgues-coronavirus_0_1342666982.html)

23 See for example: RTVE. La llegada de migrantes a Canarias por mar crece un 1.019% en lo que va de año y supera al resto de España. (17 November 2020). Available here: <https://www.rtve.es/noticias/20201117/crisis-migratoria-canarias-datos/2056893.shtml>

24 See for example: RSF. Reporteros Sin Fronteras exige que los periodistas gráficos puedan cubrir la llegada de migrantes y pide al Gobierno máxima transparencia. (3 September 2020). Available here: <https://www.rsf-es.org/espana-reporteros-sin-fronteras-exige-que-los-periodistas-graficos-puedan-cubrir-la-llegada-de-migrantes-y-pide-al-gobierno-maxima-transparencia/>

25 See for example: Huffington Post. El fotógrafo Javier Bauluz denuncia en Twitter las trabas policiales para retratar la migración. (3 December 2020). Available here: [https://www.huffingtonpost.es/entry/el-fotografo-javier-bauluz-denuncia-en-twitter-el-trato-de-la-policia-al-cubrir-la-migracion-en-canarias\\_es\\_5fc8db4bc5b61bea2b15ae19](https://www.huffingtonpost.es/entry/el-fotografo-javier-bauluz-denuncia-en-twitter-el-trato-de-la-policia-al-cubrir-la-migracion-en-canarias_es_5fc8db4bc5b61bea2b15ae19)

26 See for example: Diario de Navarra. Cuando se intenta silenciar el periodismo. (28 September 2020). Available here: <https://www.noticiasdenavarra.com/actualidad/politica/2020/07/28/silenciar-periodismo/1066157.html>

for assaulting police officers (*atentado contra la autoridad*)<sup>27</sup>.

In a context of strong police and military presence in the streets under the state of alarm (March-June 2020), there have been numerous complaints and statements made by different organisations for arbitrary actions and excessive use of force.<sup>28</sup> The complaints generally are based on footage and recordings taken by citizens, which contained images of slaps, shoves, blows and kicks by police agents. A number of individuals have been fined for recording and disseminating these types of videos of police brutality, whereas the recording of police action should be covered by the right to freedom of information and expression. The Spanish Constitutional Court reviewed in December 2020 Organic Law 4/2015, of 30 March, of the protection of public security. The Court considered that

the sanction provided in article 36.23 that prohibited precisely “the unauthorized use of images or data of authorities or members of the Security Forces of the State” was in breach of article 20.2 of the Spanish Constitution (freedom of expression and information)<sup>29</sup>. This would allow the recording of police activity as described above.

In November 2020, a case of police brutality against an African American citizen was filed with several UN special procedures<sup>30</sup>. The applicant was in his house (June 2020) and recorded from the balcony an inappropriate police action involving four agents and a black man. One of the agents looked up and realized someone was recording them. Hours later, the same agents stopped and searched the young African American, for no reason, when he was leaving the house. They asked for his ID and

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27 See for example: El Periódico. Juzgan la fotoperiodista Mireia Comas por presunta agresión a una agente de los Mossos en un desahucio en Terrassa. (3 December 2020). Available here: <https://www.elperiodico.com/es/terrassa/20201203/juzgan-fotoperiodista-mireia-comas-presunta-10101382>

28 Equipo de Implementación del Decenio Afrodescendiente en España and Rights International Spain. Crisis sanitaria COVID-19: Racismo y Xenofobia durante el Estado de Alarma en España. (2020). p. 26, Available here <http://www.rightsinternationalspain.org/uploads/publicacion/d0b782ac0452e9052241b17a646df19ad4ed-f12c.pdf>

29 Decision available here: <https://www.boe.es/boe/dias/2020/12/22/pdfs/BOE-A-2020-16819.pdf>

30 The case was filled before the UN Committee Against Torture, UN Special Rapporteur on Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Special Rapporteur on the Human Rights of Migrants and the Working Group of Experts on People of African Descent.

went up to the house with him to get it. It was then that the police violence took place.<sup>31</sup>

The Spanish Constitutional Court reviewed in 2020 Organic Law 4/2015, of 30 March, of the protection of public security by virtue of an unconstitutional challenge filed by more than 50 MPs from different progressive parliamentary groups: *Socialista*, *La Izquierda Plural*, *Unión Progreso y Democracia* and *Mixto* against the law. The Constitutional Court considered that Law 4/2015 complied with all the constitutional standards with only one exception: the sanction provided in article 36.23 that prohibited “the unauthorized use of images or data of authorities or members of the Security Forces of the State”, which was considered in breach of article 20.2 of the Spanish Constitution (freedom of expression and information)<sup>32</sup>. This would allow journalists to use graphic material recorded, for example, during demonstrations or forced evictions involving excessive use of police force.

### ***Abusive lawsuits (including SLAPPs) and prosecutions against journalists, activists and artists***

Abusive proceedings (SLAPPs) for slander and defamation have been brought against media outlets and journalists. The majority are dismissed. Examples of relevant cases can be found in the Media Law Database of the International Press Institute<sup>33</sup>. In many cases, criminal charges and civil claims are filed at the same time, exposing SLAPP targets to particularly lengthy proceedings. This has a clear chilling effect on press freedom, in an environment where journalists are reportedly subject to increasing pressure.

The digital media *Contexto* was convicted in 2020 for attacking the honor of a Spanish actor. The sentence recognizes the veracity of the information contained in the original article published in 2016 by the digital media outlet -and that was subsequently rectified after the actor object of the press article expressed his disconformity with the wording-, but considers the writing insidious and thus, discrediting the plaintiff<sup>34</sup>. The sentence

31 See: RIS. Press Release. (10 December 2020). Available here: <http://rightsinternationalspain.org/uploads/prensa/c446eb54edc59ecc154b38f284e5d01bc07056d0.pdf>

32 Decision available here: <https://www.boe.es/boe/dias/2020/12/22/pdfs/BOE-A-2020-16819.pdf>

33 International Press Institute: <http://legaldb.freemedia.at/legal-database/spain/?target=criminal-defamation>

34 See for example, Contexto, Una jueza condena a CTXT por vulnerar el honor del famoso actor XXXXXXXX XXXXXXXX, (13 January 2021), Available here: <https://ctxt.es/es/20210101/Politica/34704/sentencia-actor-censura-libertad-de-informacion-ana-mercedes-merino-melara.htm>

concludes forbidding the publication of any further articles or information on the topic which, according to the *Plataforma en Defensa de la Libertad de Información* (PDLI), constitutes a form of previous censorship regarding this subject matter<sup>35</sup>.

On the other hand, in January 2021 the Investigative Court nº 29 (*Juzgado de Instrucción*) of Madrid has stayed the criminal case against the director and the chief editor of the digital media [elDiario.es](http://eldiario.es)<sup>36</sup> for publishing an exclusive on a corruption case involving the former President of Madrid region Cristina Cifuentes<sup>37</sup>. The journalists were accused of obtaining academic and personal documents illegally, an accusation that was not confirmed by the investigating judge.

Several criminal proceedings were also brought against activists and artists.

In early 2020, the adult cartoon drawer Toni Galmes was accused of defamation by four National Police unions for the publication of his book “*On és l’Estel.la?*”, on the incidents of the 1-O referendum in Catalunya<sup>38</sup>.

In June, the Supreme Court confirmed the sentence convicting the twelve members of the rap group *La Insurgencia* to 6 months of prison for an offence of glorification of terrorism (*enaltecimiento del terrorismo*)<sup>39</sup>.

In November, the Constitutional Court denied the existence of ground for the revision of the sentence of Pablo Frago, a unionist

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35 PDLI. La PDLI considera un peligro para la libertad de información la sentencia contra ‘CTXT’. (2021). Available here: <http://libertadinformacion.cc/la-pdli-considera-un-peligro-para-la-libertad-de-informacion-la-sentencia-contr-ctxt/>

36 See for example: [elDiario.es](http://eldiario.es). La Justicia archiva la querrela de Cifuentes contra Ignacio Escolar y Raquel Ejerique por el caso Máster. (21 January 2021). Available here: [https://www.eldiario.es/politica/justicia-archiva-querrela-cifuentes-ignacio-escolar-raquel-ejerique-caso-master\\_1\\_6979690.html](https://www.eldiario.es/politica/justicia-archiva-querrela-cifuentes-ignacio-escolar-raquel-ejerique-caso-master_1_6979690.html)

37 See for example: [elDiario.es](http://eldiario.es). Cifuentes pide hasta cinco años de cárcel para Raquel Ejerique e Ignacio Escolar. (28 June 2018). Available here: [https://www.eldiario.es/politica/cifuentes-falsificada-rey-juan-carlos\\_1\\_2048581.html](https://www.eldiario.es/politica/cifuentes-falsificada-rey-juan-carlos_1_2048581.html)

38 See for example: El Diario de Mallorca. Imputan al dibujante Galmés por calumnias a la Policía. (15 January 2020). Available here: <https://www.diariodemallorca.es/mallorca/2020/01/15/imputan-dibujante-galmes-calumnias-policia-2813112.html>

39 See for example: Público. El Supremo confirma la condena de seis meses de cárcel para los raperos de ‘La Insurgencia’. (24 June 2020). Available here: <https://www.publico.es/sociedad/supremo-confirma-condena-seis-meses-carcel-raperos-insurgencia.html>

convicted for an offence of institutional insult (*ultraje a la nación*) for burning a Spanish flag during labor protest<sup>40</sup>.

The Constitutional Court also announced the inadmissibility of the appeal in the case of the rap singer Pablo Hasel, convicted for glorification of terrorism (*enaltecimiento del terrorismo*), insulting the Crown and insulting state institutions (*injurias y calumnias a la Monarquía y a las Fuerzas y Cuerpos de Seguridad del Estado*)<sup>41</sup>. Hasel was arrested by the police on February 16, 2021 to begin his prison term<sup>42</sup>. Recently, the government has announced a possible reform of the Criminal Code in this sense<sup>43</sup>.

A woman was also convicted for an offence against religious feelings (*delito contra los sentimiento religiosos*) for participating in a protest called “Great procession of the sacred rebel pussy” (*Gran Procesión del Santo Chumino Rebelde*). The sentencing judge considered that protest was not protected under freedom of expression as it profoundly offended Christian religious feelings<sup>44</sup>.

On 3 November 2020, twelve Galician independentists belonging to the organisations *Causa Galicia* and *Ceivar* faced trial at the National Court (*Audiencia Nacional*) for “belonging to a criminal organization for the commission of crimes of glorifying a terrorist

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40 See for example: Público. El Constitucional considera delito de ultraje a la nación quemar la bandera de España. (19 November 2020). Available here: <https://www.publico.es/politica/bandera-espana-constitucional-considera-delito-ultraje-acto-sindicalista-incitar-quemar-bandera-espana.html>

41 See for example: Público. Pablo Hásel: “Esto no es una democracia porque no se respeta la libertad de expresión”. (25 June 2020). Available here: <https://www.publico.es/entrevistas/pablo-hasel-esto-no-democracia-no-respetata-libertad-expresion.html>

42 See for example: El País. El rapero Pablo Hasél ingresa en prisión tras ser detenido por los Mossos en la Universidad de Lleida. (16 February 2021). Available here: <https://elpais.com/espana/2021-02-16/los-mossos-entran-en-la-universidad-de-lleida-para-detener-a-pablo-hasel-que-no-se-presento-en-prision-pasado-el-plazo.html>

43 See: [elDiario.es](https://www.eldiario.es). El Gobierno eliminará las penas de cárcel en los delitos de expresión. (8 February 2021). Available here: [https://www.eldiario.es/politica/gobierno-eliminara-penas-carcel-delitos-expresion\\_1\\_7203896.html](https://www.eldiario.es/politica/gobierno-eliminara-penas-carcel-delitos-expresion_1_7203896.html)

44 See for example: RTVE. Condenada por la procesión del ‘santo chumino rebelde’ por un delito contra los sentimientos religiosos. (23 November 2020). Available here: <https://www.rtve.es/noticias/20201123/condenan-mujer-juzgada-procesion-del-santo-chumino-rebelde-delito-contra-sentimientos-religiosos/2058286.shtml>

organization and its members”<sup>45</sup>. In December, the National Court acquitted the defendants and concluded that the organizations’ values were the promotion of cultural activities and the support of convicted persons and denied any links with the glorification of terrorism.<sup>46</sup>

In December, the Supreme Court confirmed the sentence against the satirical magazine *Mongolia* for the publication of a photomontage of the ex-bull fighter Ortega Cano<sup>47</sup>.

On 17 December 2020, the Spanish Constitutional Court convicted a man who,

in 2017, disrupted a religious ceremony and shouted pro-abortion slogans- to six months in prison<sup>48</sup>. The Court ruled the aforementioned action was not protected by freedom of expression.

There was also some good news in 2020 for freedom of expression. The Constitutional Court annulled the sentence against the rapper and front man of the rap-metal group *Def con Dos*, César Strawberry<sup>49</sup>. The actor Willy Toledo was also absolved from the charges for his Facebook publication where he used the expression “I shit on God” (“*me cago en Dios*”)<sup>50</sup>.

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45 See for example: El Salto Diario. Radiografía de un despropósito judicial: las inconsistencias de la Operación Jaro. (6 November 2020). Available here: <https://www.elsaltodiario.com/operacion-jaro/radiografia-desproposito-judicial-inconsistencias>

46 See for example: La Voz de Galicia. Absueltos los 12 encausados de Causa Galiza y Ceivar juzgados por la Audiencia Nacional. (22 December 2020). Available here: <https://www.lavozdeg Galicia.es/noticia/galicia/2020/12/22/absueltos-12-encausados-causa-galiza-ceivar-juzgados-audiencia-nacional/00031608637386931863453.htm>

47 See for example: [elDiario.es](http://eldiario.es). El Supremo confirma la condena a la revista Mongolia por un fotomontaje sobre el extorero Ortega Cano. (22 December 2020). Available here: [https://www.eldiario.es/politica/supremo-confirma-condena-revista-mongolia-fotomontaje-extorero-ortega-cano\\_1\\_6540149.html](https://www.eldiario.es/politica/supremo-confirma-condena-revista-mongolia-fotomontaje-extorero-ortega-cano_1_6540149.html)

48 See for example: [elDiario.es](http://eldiario.es). El Constitucional decide que la libertad de expresión no ampara las protestas que perturben una ceremonia religiosa. (17 December 2020). Available here: [https://www.eldiario.es/catalunya/tc-dice-perturbar-ceremonia-religiosa-no-libertad-expresion\\_1\\_6513137.html](https://www.eldiario.es/catalunya/tc-dice-perturbar-ceremonia-religiosa-no-libertad-expresion_1_6513137.html)

49 See for example: Público. El Tribunal Constitucional anula la condena que el Supremo impuso a César Strawberry. (25 February 2020). Available here: <https://www.publico.es/politica/tribunal-constitucional-anula-condena-supremo-impuso-cesar-strawberry.html>

50 See for example: Público. Willy Toledo, absuelto del delito contra los sentimientos religiosos por cagarse en Dios y en la Virgen. (29 February 2020). Available here: <https://www.publico.es/sociedad/willy-toledo-absuelto>

There has been a decrease in the period 2019-2020 in prosecutions for glorification of terrorism, compared to previous years. This is due, in part, because of raising awareness that the provision in the Criminal Code (Article 578, which was amended in 2015 to encompass online “glorification or justification” of terrorism), is not in line with international legal standards (it makes no mention of intent or causation of any danger of violence)<sup>51</sup>. A recently published report which analysis jurisprudence of Spanish courts concerning the offence of glorification, from a human rights perspective, finds that an important number of Spanish court decisions are inconsistent with international human rights law governing the right to free expression<sup>52</sup>. The decisions analyzed vary widely in the interpretation of the elements of the offence of glorification. This is not surprising given the overly broad and vague language and nature of Article 578. Spanish courts, contrary to standards set by the European Court of Human Rights (ECtHR),

which are based on the consideration of a real, concrete and imminent danger, opt for the application of an “abstract” risk concept that disturbingly exacerbates criminalization of speech. This seriously affects, as seen in some cases such as those mentioned above, the right to freedom of expression.

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

The reform of the Telecommunications Law (*Ley General de Telecomunicaciones*)<sup>53</sup> that started in 2019 and continued during 2020 could have some important effects on the right to freedom of expression and information if its current wording is finally approved. Namely, it would allow the government to suspend, under public order criteria, access to the web or to some parts of the web (websites, applications, protocols, etc.); and would provide for the intervention

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- 51 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. Article 5.
- 52 Rights International Spain. Legal Standards on Glorification. Case law analysis of the offence of glorification of terrorism in Spain (2021). Available here: <http://www.rightsinternationalspain.org/uploads/publicacion/6b06a5a8ad6c2f7c9b408091b87d0b3c7dff219.pdf>
- 53 Anteproyecto de la Ley General de Telecomunicaciones. Available here: [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&ccd=&ved=2ahUKEwis2peXsP3uAhVIUBUIHe7NBI8QFjAAegQIAxA-D&url=https%3A%2F%2Favancedigital.gob.es%2F\\_layouts%2F15%2FHttphandlerParticipacionPublicaAnexos.ashx%3Fk%3D16842&usg=AOvVaw0yVbt-xjPb8\\_HdDSR6a-64](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&ccd=&ved=2ahUKEwis2peXsP3uAhVIUBUIHe7NBI8QFjAAegQIAxA-D&url=https%3A%2F%2Favancedigital.gob.es%2F_layouts%2F15%2FHttphandlerParticipacionPublicaAnexos.ashx%3Fk%3D16842&usg=AOvVaw0yVbt-xjPb8_HdDSR6a-64)

of the Internet and communications without judicial oversight<sup>54</sup>.

## **Enabling framework for civil society**

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

Feminist and ecologist movements were in the spotlight during 2019. During the protests held during the climate summit in Madrid or during March 8th marches a great number of incidents with the police were registered: numerous fines, stop and searches, police violence and arbitrary detentions<sup>55</sup>. Protests against evictions and regarding basic housing rights also registered a great number of incidents. Incidents during anti-fascists protests

against the far right-party *Vox* also increased during 2019<sup>56</sup>.

Protests and reactions to Supreme Court sentence convicting Catalan political leaders for the 1-O events were also especially targeted by the police. *Som Defensores* identified 122 cases of excessive use of force by the police, especially in the metropolitan area of Barcelona. 60% of them were related to actions carried out by the *Mossos d'Esquadra* and 40% by the National Police<sup>57</sup>.

Journalists covering demonstrations and other forms of protest have also faced similar incidents with the police (see above).

During great part of 2020 due to restrictions relate to the Covid-19 crisis, freedom of assembly was severely restricted (see below).

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54 See for example: El País. El Gobierno podrá intervenir redes y servicios de telecomunicación por motivos de orden público. (6 November 2019). Available here: [https://elpais.com/politica/2019/11/05/actualidad/1572978141\\_937893.html](https://elpais.com/politica/2019/11/05/actualidad/1572978141_937893.html)

55 Red Malla. Informe 2019. (2020). Available here: [http://defenderaquiendefiende.org/wp-content/uploads/2021/01/INFORME2019\\_v3.pdf](http://defenderaquiendefiende.org/wp-content/uploads/2021/01/INFORME2019_v3.pdf)

56 Idem.

57 See for example: La Vanguardia. 'Som Defensores' investiga 122 casos de "violencia policial" en protestas por la sentencia. (23 October 2019). Available here: <https://www.lavanguardia.com/local/barcelona/20191023/471158626812/catalunya-som-defensores-investiga-122-casos-de-violencia-policial-en-protetas-por-la-sentencia.html>

In February 2021, a case of police brutality has gathered special attention as real fire was opened<sup>58</sup> against the people participating in the protest against the brutal aggression of a man and his daughter (underaged) by two off-duty police officers<sup>59</sup>.

In 2020, numerous protests around Spain turned violent after rapper Pablo Hassel was imprisoned to serve a 9-month prison sentence for glorification of terrorism (*enaltecimiento del terrorismo*), insulting the Crown and insulting state institutions (*injurias y calumnias a la Monarquía y a las Fuerzas y Cuerpos de Seguridad del Estado*)<sup>60</sup> (see above as regards freedom of expression).

### ***Abusive lawsuits (including SLAPPs) and prosecutions against civil society activists***

A number of abusive defamation lawsuits targeting environmental activists and civil society organisations have been reported in Spain. Among recent prominent cases, the 1 million euro criminal defamation claim brought against environmental activist Manuel García by intensive livestock business *Coren*<sup>61</sup> and the lawsuit filed against Greenpeace Spain inhouse lawyer Lorena Ruiz-Huerta.<sup>62</sup>

The anti-eviction movement in Spain also faces a similar situation. Protest actions at the headquarters of property investment funds or real-state agencies have resulted in lawsuits for coercion (*coacción*) and disobedience to

58 See for example: Público. Denuncian que la Policía usó “fuego real” contra los ciudadanos en las protestas de Linares. (15 February 2021). Available here: <https://www.publico.es/sociedad/denuncian-policia-fuego-real-ciudadanos.html>

59 See for example: El País. Detenidos dos policías nacionales en Linares por la agresión a una niña de 14 años y a su padre. (13 February 2021). Available here: <https://elpais.com/espana/2021-02-13/detenidos-dos-policias-nacionales-en-linares-por-la-agresion-a-una-nina-de-14-anos-y-su-padre.html>

60 See for example: New York Times. ‘You Are Not Alone’: Spanish Rapper’s Arrest Sparks Free Speech Protests. (18 February 2021). Available here: <https://www.nytimes.com/2021/02/18/world/europe/pablo-hassel-protest-spain.html>

61 See: Greenpeace Spain. Coren contra Manuel - Un caso de SLAPP en la campaña gallega. (2020). Available here: <https://es.greenpeace.org/es/sala-de-prensa/informes/coren-contra-manuel/>

62 See: European Democratic Lawyers. Criminalization of jurists for their public denunciation of torture and mistreatment (2020). Available here: <http://www.aeud.org/2020/02/criminalization-of-jurists-for-their-public-condemnation-of-torture-and-mistreatment/>

authority (*desobediencia a la autoridad*). A recent prominent case is that of Jaime Palomera, spokesperson of the *Sindicat de Llogateres de Catalunya*, and two more activists, who are accused of coercion by property owner<sup>63</sup>.

One of the last cases recorded has been the lawsuit against the historian Fernando Mikelarena in an attempt to stop the investigations on White Terror (franquist repression)<sup>64</sup>.

## Surveillance

Catalan independence campaigners are suspected to have been targeted by government services using spyware, which is allegedly only sold to governments to monitor criminals and terrorists<sup>65</sup>.

It is believed that in the spring of 2019, a total of 1,400 users were targeted on WhatsApp by a surveillance software called “Pegasus”, sold by the Israeli NSO Group Technologies to government agencies. The messaging app suspects that over 100 individuals associated with the civil sector have been affected. WhatsApp has launched a lawsuit against NSO Group in the US, whose clients have included the governments of Saudi Arabia and Mexico. However, it was only discovered recently that the spyware was also used by a European state.

At least five members of the Catalan independence movement, including the speaker of the Catalan regional parliament, Roger Torrent, were targeted by what is a “possible case of domestic political espionage”<sup>66</sup>.

63 See for example: elDiario.es. Una jueza imputa a dos inquilinos y al portavoz de su sindicato en Barcelona por coacciones a una propietaria. (2 December 2019). Available here: [https://www.eldiario.es/catalunya/sociedad/sindicato-inquilinos-barcelona-coacciones-propietaria\\_1\\_1208467.html](https://www.eldiario.es/catalunya/sociedad/sindicato-inquilinos-barcelona-coacciones-propietaria_1_1208467.html)

64 See for example: elDiario.es. La guerra contra la memoria: demandas contra investigadores e impunidad para crímenes franquistas. (20 February 2021). Available here: [https://www.eldiario.es/sociedad/guerra-memoria-demandas-investigadores-e-impunidad-crimenes-franquistas\\_1\\_7233036.html](https://www.eldiario.es/sociedad/guerra-memoria-demandas-investigadores-e-impunidad-crimenes-franquistas_1_7233036.html)

65 The Guardian. Phone of top Catalan politician ‘targeted by government-grade spyware’. (13 July 2020). Available here: <https://www.theguardian.com/world/2020/jul/13/phone-of-top-catalan-politician-targeted-by-government-grade-spyware>

66 See for example: El País. El ataque a los móviles de Torrent y Maragall con un programa espía israelí desata una tormenta política. (15 July 2020) Available here: <https://elpais.com/espana/2020-07-14/el-ataque-a-los-moviles-de-torrent-y-maragall-con-un-programa-espia-israeli-desata-una-tormenta-politica.html>

The Spanish government has denied all allegations of spying on its citizens<sup>67</sup>. Nevertheless, there have been calls for a parliamentary investigation, as well as two of the alleged victims announcing that they will be taking legal action against Félix Sanz Roldán, the Director of Spain's National Intelligence Centre (CNI) at the time of the assumed hackings<sup>68</sup>.

### **Other systemic issues affecting rule of law and human rights protection**

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

In a context of strong police presence due to the Covid-19 crisis, there have been numerous complaints about the use of racial profiling. Data collected by civil society in the report

*“Covid-19: Racism and xenophobia during the state of alarm in Spain”* shows numerous examples of police racially profiling people who were on their way to buy basic goods<sup>69</sup>. This control provoked fear amongst those affected, leading them to self-isolate further, and preventing them from going out to provide themselves with basic goods. About 70% of the respondents of the online survey carried out by *RIS* and the *Implementation Team of the IDPAD* in Spain reported racial profiling before being subject of police brutality<sup>70</sup>.

In November 2020, the United Nations Working Group of Experts on People of African Descent released the report *“Covid-19, systemic racism and global protests”*. The document includes the findings of UN experts on police violence during the pandemic and reveals, among other things, the lack of official data disaggregated by race and ethnicity, and the “inhumane” detention conditions migrants and asylum seekers are subjected to. The Group concludes that “neglecting race

67 See for example: The Guardian. Spanish government denies spying on Catalan leaders. (19 July 2020). Available here: <https://www.theguardian.com/world/2020/jul/19/spanish-government-denies-spying-on-catalan-leaders>

68 See for example: The Guardian. Two Catalan politicians to take legal action over targeting by spyware. (16 July 2020). Available here: <https://www.theguardian.com/world/2020/jul/16/two-catalan-politicians-to-take-legal-action-targeting-spyware>

69 Equipo de Implementación del Decenio Afrodescendiente en España and Rights International Spain. Crisis sanitaria COVID-19: Racismo y Xenofobia durante el Estado de Alarma en España. (2020). Available here <http://www.rightsinternationalspain.org/uploads/publicacion/d0b782ac0452e9052241b17a646df19ad4edf12c.pdf>

70 Idem.

has led to critical failures” in the response to Covid-19.<sup>71</sup> Spain is among the most cited countries by the United Nations for violence against people of African descent, behind only the United States.

The Council for the Elimination of Ethnic and Racial Discrimination under the Ministry of Equality launched a campaign in December 2020 to raise awareness and denounce ethnic profiling. The poster shared through social media featured a young person of African descent saying, “I have been identified due to the color of my skin or other physical traits without a reasonable suspicion”. We advise you on how to report this, providing a free number. Several police unions published a counter poster saying “Outrage against the national police” stamped over the picture of the youth and the text of the tweet reading:

that the Ministry of Equality headed by Irene Montero wants to discredit the work of the police with posters that suggest that the law enforcement forces use stop and search powers in a discriminatory manner is outrageous. The trade unions will ensure the honor of the police force.<sup>72</sup>

In a public statement, a number of police unions requested the withdrawal of the campaign as they considered it incited to hatred towards the police force.<sup>73</sup>

Beyond profiling and racial policing, during January and February 2021 three cases of police brutality during protest have been reported in national media outlets. The first case was regarding an aggression of two off-duty police officers against a man and his daughter (14-year-old minor) in Linares<sup>74</sup>. This incident

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71 See: UN Human Rights Council. Covid-19, systemic racism and global protests. (2020). Available here: <https://undocs.org/en/A/HRC/45/44>

72 See tweets here: [https://twitter.com/Sup\\_Policia/status/1340643444390309891](https://twitter.com/Sup_Policia/status/1340643444390309891) ; <https://twitter.com/JupolNacional/status/1340623763851898882?s=20>

73 See for example: Europa Press. JUPOL y JUCIL piden la dimisión de Irene Montero y retirar la campaña sobre identificaciones por criterios raciales. (22 diciembre 2020). Available here: <https://www.europapress.es/nacional/noticia-jupol-jucil-piden-dimision-irene-montero-retirar-campana-identificaciones-criterios-raciales-20201222121158.html>

74 See for example: elDiario.es. Un roce en la puerta del bar: la chispa que desató la brutal agresión de dos policías en un polvorín llamado Linares. (14 February 2021). Available here: [https://www.eldiario.es/andalucia/roce-puerta-bar-chispa-desato-brutal-paliza-policias-polvorin-llamado-linares\\_1\\_7219111.html](https://www.eldiario.es/andalucia/roce-puerta-bar-chispa-desato-brutal-paliza-policias-polvorin-llamado-linares_1_7219111.html)

led to important protests that were repressed by police forces with real fire<sup>75</sup>. The last major incident registered was the use of foam balls in Barcelona to repress the protests against the imprisonment of Pablo Hasel who caused the loss of an eye of one of the protesters<sup>76</sup>.

The widespread use of sanctions and fines by police forces in Spain is also a persistent and periodically reported issue. In 2020, during the first 75 days of lockdown, the Interior Ministry issued nearly 1.1 million sanctions, up 42% from the amount handed down between 2015 and 2018<sup>77</sup>. Out of the nearly 1.1 million proposed sanctions, over half were made by the National Police and the *Guardia Civil*, followed by regional and local law enforcement. Andalusia and Madrid account for the highest number. In Catalonia and the Basque Country, the majority of sanctions were issued by the regional police forces, the *Mossos d'Esquadra* and the *Ertzaintza* respectively<sup>78</sup>.

States have a positive obligation under Article 3 of the Convention to put safeguards in place to protect people from torture and ill-treatment. The Court has said that this “requires by implication” that there should be an effective investigation, capable of leading to the identification and, if appropriate, the punishment of those responsible. In Spain, there is a systematic failure to carry out thorough, adequate and efficient investigations into allegations of torture and ill-treatment. The latest ECHR judgment on this matter was issued in January 2021 in the case of *Gonzalez Etayo*: violation of article 3 in its procedural limb, due to the lack of an effective and exhaustive investigation of the plaintiff’s allegations of ill-treatment during *incommunicado* detention.

If States are required to carry out official effective investigations, this implies a correlative obligation to ensure law enforcement officials are clearly and visibly identified in all circumstances when performing their duties. Obstacles to effective investigations, such as

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75 See for example: Público. Denuncian que la Policía usó “fuego real” contra los ciudadanos en las protestas de Linares. (18 February 2021). Available here: <https://www.publico.es/sociedad/denuncian-policia-fuego-real-ciudadanos.html>

76 See for example: El Salto. Pierde el ojo la mujer que recibió el impacto de una bala de foam durante la protesta por Hasél en Barcelona. (17 February 2021). Available here: <https://www.elsaltodiario.com/cataluna/pierde-ojo-mujer-bala-foam-durante-protesta-pablo-hasel-barcelona>

77 See for example: El País. Spain resorted to ‘gag law’ more than ever before during coronavirus lockdown. (30 June 2020). Available here: <https://english.elpais.com/politics/2020-06-30/spain-resorted-to-gag-law-more-than-ever-during-coronavirus-lockdown.html?rel=lom>

78 *Idem*.

inadequate or deficient identification systems of members of law enforcement agencies, “have the same practical effect as formal legal obstacles”. They “create a situation of impunity” and are therefore impermissible under Article 3. The identification of law enforcement agents is an essential safeguard to adequately prevent torture and ill-treatment and a culture of impunity. Hence, it is a fundamental element of the procedural protection afforded by Article 3. This requirement is linked to the principles of transparency and accountability of police forces before the law for their actions or omissions.

In Spain, impossibility to identify police officers continues to be a problem<sup>79</sup>.

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

In 2018, the UN’s Working Group of Experts on People of African Descent issued a public statement following its official visit to Spain<sup>80</sup> and the European Commission against Racism and Intolerance (ECRI) published its fifth periodic report on Spain<sup>81</sup>. Both reports express concern over the use of racial profiling by police forces (i.e. identity checks in a discriminatory and arbitrary manner, based on people’s skin color or ethnic origin instead of on objective criteria related to a reasonable suspicion of involvement in a crime). In 2019, the Special Rapporteur on Minority Issues issued a public statement following his official visit to Spain and also voiced concern regarding the lack of progress in combating racial discrimination in Spain<sup>82</sup>.

79 See for example: Público. La ONU insta a España a informar sobre la “adecuada identificación” de la Policía. (14 February 2020). Available here: <https://www.publico.es/politica/represion-policial-onu-insta-espana-informar-adecuada-identificacion-policia.html>

80 See: Statement to the media by the United Nations Working Group of Experts on People of African Descent, on the conclusion of its official visit to Spain, 19-26 February 2018. (2018). Available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22705&LangID=E>

81 See: ECRI. Spain: Council of Europe’s anti-racism commission regrets little progress in implementing priority recommendations. (2021). Available here: <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/-/spain-council-of-europe-s-anti-racism-commission-regrets-little-progress-in-implementing-priority-recommendatio-1>

82 See: Statement of the United Nations Special Rapporteur on minority issues, Fernand de Varennes, on the conclusion of his official visit to Spain, 14-25 January 2019. (2019). Available here: <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=24112&LangID=S>

In mid-April 2020, the United Nations published the results of the third Universal Periodic Review (UPR) of Spain before the January 2020 Human Rights Council. A total of 275 recommendations were issued. The final report of the Working Group on the Universal Periodic Review included at least 82 recommendations on the need to adopt measures to combat racism, racial discrimination, xenophobia and related intolerance, with special attention to minority groups (migrants, refugees, Roma and people of African descent, among others); with a special attention on ending ethnic profiling<sup>83</sup>.

During his visit to Spain in February 2020, the UN Special Rapporteur on Extreme Poverty and Human Rights concluded that Spain is failing to address inequality. He described a “deep, widespread poverty and high unemployment, a housing crisis of stunning proportions, a completely inadequate social-protection system that leaves large numbers of people in poverty a segregated and increasingly anachronistic education system, a fiscal system that provides far more benefits to the wealthy than the poor, and an entrenched bureaucratic mentality in many parts of the

government that values formalistic procedures over the well-being of people.”

### ***Implementation of decisions by the Court of Justice of the EU and the European Court of Human Rights***

During 2020 the European Court of Human Rights found Spain in breach of the Convention in nine occasions. The majority of cases concerned article 6 of the Convention (right to a fair trial)<sup>84</sup>. A recurring problem refers to the failure to ensure individuals are informed of foreclosure proceedings against them and thus are not given an opportunity to be heard in court despite the fact that they have not waived the right to a fair trial.

One case involved the disproportionate use of force by the police to dissolve a spontaneous protest, thus amounting to a violation of the right to freedom of assembly (art. 11 ECHR)

The Court of Justice of the European Union has also taken important decisions regarding

83 Report of the Working Group on the Universal Periodic Review to Spain (UN Doc. A/HRC/44/7). Available here: <https://undocs.org/en/A/HRC/44/7>

84 Six decisions referred to article 6 ECHR: Gil Sanjuan. (Case 48297/15). 26 May 2020. (art. 6.1 CEDH); Pardo Campoy y Lozano Rodríguez. (Case 53421/15, 53427/15). 14 January 2020. (art. 6.1 CEDH); Romero García (Case 31615/16). 8 de September 2018. (art. 6 CEDH); Gracia González. (Case 65 107/16). 6 October 2020. (art. 6.1 CEDH); Martínez Ahedo. (Cases 39434/17, 41066/17, 43600/17, 4752/18). 20 October 2020 (art. 6.1 CEDH); Karesvaara y Njie. (Case 60750/15). 15 December 2020 (art. 6.1 CEDH).

Spain in 2020, especially regarding unfair terms in mortgages<sup>85</sup>.

Regarding the implementation of decisions, the case of Arnaldo Otegi and others<sup>86</sup> before the ECtHR; the European court in its decision of 2018 concluded that the trial of Otegi and four other defendants did not comply with Article 6 ECHR standards. In order to implement the ECtHR judgement, the Supreme Court in July 2020 annulled the ruling<sup>87</sup> and then in December took the decision to repeat the trial<sup>88</sup>. Otegi and the other applicants had already served their sentence: between 6 and 6 and a half years of prison and a special disqualification, that Otegi was still serving until the Supreme Court decided to annul the ruling.

## **Impact of COVID-19**

### ***Emergency regime***

The first state of alarm<sup>89</sup> declared in Spain during the Covid-19 outbreak from March to June 2020 (through the Royal Decree (RD) 463/2020, of 14 March 2020) allowed for the limitation (not suspension) of certain fundamental rights: freedom of movement, temporary requisition of goods and properties as industries, workshops or venues with the exception of private residences, limit or ration first need goods or services, or make all necessary arrangements to guarantee market supply (during the state of alarm, Spain did not issue any declaration of derogation of rights)<sup>90</sup>.

85 Decisions of the European Court of Justice: Case Gómez del Moral Guasch/Bankia (C-125/18), 3 March 2020; Case XZ e Ibercaja Banco, S.A (C-452/18), 9 July 2020; Case Caixabank, SA y LG, PK/BBVA, SA (C-224/19 y C-259/19), 16 July 2020

86 Otegi Mondragon and Others (Cases 4184/15 and four others). 6 November 2018

87 See for example: Infolibre. El Supremo anula la sentencia a Otegi por pertenencia a organización terrorista en el 'caso Bateragune' (31 July 2020). Available here: [https://www.infolibre.es/noticias/politica/2020/07/31/el\\_supremo\\_anula\\_sentencia\\_otegi\\_por\\_pertenencia\\_organizacion\\_terrorista\\_caso\\_bateragune\\_109549\\_1012.html](https://www.infolibre.es/noticias/politica/2020/07/31/el_supremo_anula_sentencia_otegi_por_pertenencia_organizacion_terrorista_caso_bateragune_109549_1012.html)

88 See for example: elDiario.es. El Supremo ordena repetir el juicio a Otegi por intentar refundar Batasuna. (14 December 2020). Available here: [https://www.eldiario.es/politica/supremo-insta-audiencia-nacional-repetir-juicio-otegi-refundar-batasuna\\_1\\_6502766.html](https://www.eldiario.es/politica/supremo-insta-audiencia-nacional-repetir-juicio-otegi-refundar-batasuna_1_6502766.html)

89 The legal figure of the State of Alarm is regulated by article 11 of Organic Law 4/1981.

90 Some concerns were raised regarding the “necessity” and “proportionality” of the measure. See for example: Lopez Garrido. Un estado de excepción sería inconstitucional. elDiario.es (opinión). (11 April 2020). Available here: [https://www.eldiario.es/opinion/tribuna-abierta/excepcion-inconstitucional\\_129\\_2262738.html](https://www.eldiario.es/opinion/tribuna-abierta/excepcion-inconstitucional_129_2262738.html)

Furthermore, from the 31 March to 9 April, the confinement became stricter and all economic non-essential activity was suspended. Confinement measures were particularly restrictive in Spain.

During what the Government called “de-escalation phases” (0 to 3), that took place from the beginning of May until late June 2020 (when the state of alarm was put to an end), restrictions were softened<sup>91</sup> although there continued to be restrictions of freedoms of assembly and movement. Sanitary ministerial decrees were issued to detail the measures adopted:

- Movement was authorized from phase 0 although restricted to time slots divided by age to minimize contact (phase 0 and 1).
- Implementation of rules on physical distancing (1,5-2 meters) and mandatory use of masks<sup>92</sup>

- Restrictions on meetings (phase 0: max. 10 persons, phase 1: max 15 persons, phase 2: max 20 persons)
- Travel between territories was banned until phase 3.
- Borders remained closed to tourists (until the end of the state of alarm).

Some experts have argued that this was not a suitable legal instrument to achieve the aim as they regulated aspects that should be determined by norms of higher hierarchical level<sup>93</sup>.

A second nationwide state of alarm was declared on October 25 and will remain in place until May 9, 2021<sup>94</sup>. Its aim is to give Spain’s regional governments the legal framework they need to limit mobility – in particular nighttime socializing – in a bid to combat the second -and subsequent- wave(s) of the coronavirus.

91 Measures for Phase: 0 SND/386/2020, of 3 May 2020 <https://www.boe.es/boe/dias/2020/05/03/pdfs/BOE-A-2020-4791.pdf>; Phase 1: SND/399/2020, of 9 May 2020: <https://www.boe.es/boe/dias/2020/05/09/pdfs/BOE-A-2020-4911.pdf>; Phase 2 SND/414/2020, of 16 May: <https://www.boe.es/buscar/pdf/2020/BOE-A-2020-5088-consolidado.pdf>; Phase 3: SND/458/2020, of 30 May 2020: <https://boe.es/buscar/act.php?id=BOE-A-2020-5469>

92 Orden SND/422/2020, of 19 May 2020: <https://boe.es/buscar/pdf/2020/BOE-A-2020-5142-consolidado.pdf>; RD-Ley 21/2020, of 9 June 2020: <https://www.boe.es/boe/dias/2020/06/10/pdfs/BOE-A-2020-5895.pdf>

93 See: El País. El Estado de Alarma: Un bosque de 209 normas excepcionales. (17 May 2020). Available here: <https://elpais.com/espana/2020-05-16/el-estado-de-alarma-un-bosque-de-209-normas-excepcionales.html>

94 Real Decreto 926/2020, of 25 October: 2020 <https://www.boe.es/buscar/act.php?id=BOE-A-2020-12898> ; Real Decreto 956/2020, of 3 November 2020: <https://www.boe.es/buscar/act.php?id=BOE-A-2020-13494>

Within this legal framework the government is introducing an obligatory curfew for the entire country from 11pm to 6am, although regional governments have a margin of one hour to bring forward or anticipate the curfew times. Regions also have the possibility of restricting the entrance to and exit from their territories unless this is for essential reasons, such as going to work or to the doctor. This allows regions to close their borders if they have a neighboring territory that is particularly hard hit by the virus. The text also limits social meetings between citizens to six people for the entire country. The decree does not provide for the closure of Spain's borders, as was the case during the first state of alarm.

Governmental regulatory activity – from the State and regional governments – has spiked in such a way that some jurists are talking about a situation of legal liquidity, in which the legal order has been diluted in a series of technical legal prescriptions many times complex and inaccessible to the public<sup>95</sup>. Constitutional experts alert of the possible legal insecurity derived from open ended and vague wording as well as the risk of normative overlapping<sup>96</sup>. In fact, 337 regulations have been passed since the beginning of the Covid-19 crisis, including

executive orders (*Decretos-Ley*), orders, resolutions and executive agreements<sup>97</sup>.

### ***Impact on the justice system***

The above-mentioned report *Justice Under Lockdown in Europe. A survey on the impact of Covid-19 on defence rights in Europe* points to the following issues concerning the impact of the pandemic and of the measures taken to address it on the right to a fair trial in criminal proceedings in Spain:

- Lack of health and safety measures: Spanish respondents explained that many lawyers requested remote assistance due to the complete lack of protective measures in police stations, including masks and gloves. A Spanish lawyer noted that lawyers would provide assistance over the phone if their client wished to exercise their right to remain silent, but in other instances, they would go in-person to the police to attend the client and ensure effective legal assistance, despite the health risks involved.
- Disregard for confidentiality: A respondent expressed that when calls were facilitated by police officers these last remained present and could therefore overhear the

95 Jiménez Segado, C. Excepción normalizada en derecho penal y Covid19. *Jueces para la Democracia*. (December 2020). Pp. 79 -

96 See: <https://elpais.com/espana/2020-05-16/el-estado-de-alarma-un-bosque-de-209-normas-excepcionales.html>

97 BOE, Derecho Europeo, Estatal y Autonómico (Last update 11 February 2021), [https://www.boe.es/biblioteca\\_juridica/codigos/codigo.php?id=355](https://www.boe.es/biblioteca_juridica/codigos/codigo.php?id=355)

conversation between a suspect and their lawyer. Respondents in Spain noted that remote communication with detained clients was recorded and police agents were attending the call next to the detained person – one lawyer concluded that such interviews were therefore useless: “[Lawyer-client conversations in police stations] are not conducted in private. Both due to the fact that they are recorded and because the officer usually stands with the detainee with the loudspeaker on.”<sup>98</sup>

- Restriction on access to paper files: Respondents noted that, “court closures and limited access to police stations caused delays in gaining access to case files, where kept on paper – notably in (...) and Spain”.<sup>99</sup>

## Corruption

Several political leaders breached the vaccination protocols in Spain to get the Covid-19 vaccine before their turn. They made use of their privileged position to access the vaccines before other citizens in worse or similar health conditions<sup>100</sup>.

Spain has also witnessed an increase in irregular contracts during the pandemic crisis, especially handpicked adjudications of sanitary services<sup>101</sup>.

Access Info Europe, ePaństwo Foundation, Funky Citizens, K-Monitor and the Spanish organization Civio, under the EU-funded “*RECORD, Reducing Corruption Risks with Data project*”, in collaboration with the Open Contracting Partnership, stressed the benefits of transparency in emergency contexts. They

98 Ibid., p.8

99 Ibid., p.9

100 See for example: El Mundo. Transparencia Internacional advierte de que la vacunación de políticos incumpliendo los protocolos es corrupción. (28 January 2021). Available here: <https://www.elmundo.es/espana/2021/01/28/60129e9c21efa084328b45b0.html>

101 See for example: El País. La pandemia multiplica los contratos a dedo: 4.200 solo en Madrid. Available here: <https://elpais.com/espana/madrid/2021-02-02/la-pandemia-tumba-los-controles-4200-contratos-a-dedo-solo-en-madrid.html>; El Mundo. Los contratos por la Covid-19 cuestionan la gestión de Iñigo Urkullu en la campaña electoral. (26 May 2020). Available here: <https://www.elmundo.es/pais-vasco/2020/05/26/5ecc111521efa0db3a8b45cf.html>

issued a list of recommendations for Ensuring Transparency in Emergency Procurement<sup>102</sup>:

- The use of emergency procurement must be justified, recorded, and made public.
- Emergency procurement is the exception, not the rule, and should be judged on a case-by-case basis.
- Emergency procurement data should be centralised on national e-procurement portals.
- Full publication to maintain trust.
- Open Data on emergency procurement. E-procurement portals should be updated in the shortest possible time.
- Transparency to prevent price gouging.
- Open data to strengthen due diligence on suppliers and prevent fraud.
- Publicise sanctions for fraudulent activity and bid cartels.

- Cooperation with civil society, investigative journalists and whistleblowers.

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

Several judicial resolutions on freedom of assembly regarding May 1st demonstrations showed different forms of interpreting the limitation of this right under the state of alarm.<sup>103</sup> While a “caravan-demonstration” took place in Zaragoza<sup>104</sup>, a similar demonstration was forbidden in Vigo<sup>105</sup>.

The matter was brought before the Constitutional Court (CC) who argued that the right to life is above freedom of assembly<sup>106</sup>. The court argued that although the state of alarm does not allow the complete suspension of any fundamental right it permits limitations

102 See: CIVIO. Ten Recommendations on Transparency in Covid-19 Emergency Procurement (2020). Available here: <https://civio.app.box.com/s/nzootungmqog929km5ouk1tl7hxjn1wy>

103 It is important to bear in mind that in Spain demonstrations only require a prior notice to the authorities, however this administrative requirement allows the competent authority to propose substantial modifications of the demonstration, such as its schedule or route, or even forbid it. The fact that authorities can impose fines on organizers of protests who have not complied with the previous notice requirement has somehow turned this administrative proceeding in a de facto authorisation proceeding in some cases.

104 The demonstration was authorised with severe restrictions: only 60 citizens, in covered vehicles, with only one passenger per car. For more information see: <https://www.publico.es/sociedad/1-mayo-manifestacion-coches-unica-protesta-calle-mayo.html>

105 See: <https://www.lavozdegalicia.es/noticia/vigo/vigo/2020/04/28/tribunal-superior-deniega-manifestacion-coches-primero-mayo-vigo/00031588088262488995956.htm>

106 See: [https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP\\_2020\\_047/2020-2056ATC.pdf](https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2020_047/2020-2056ATC.pdf)

and restrictions. The CC's case law determines the possibility of restricting the right of freedom of assembly to guarantee physical integrity (art. 15 Spanish Constitution) or the fundamental right to health (art. 43) when objective data demonstrating the possible pervasive effects of the right to assembly in each case is provided.

On the same issue, a statement of the Prosecutor General's Office (PGO)<sup>107</sup> considered that the Decree establishing the state of alarm in Spain or any of its subsequent extensions have restricted or limited the fundamental right to assembly embodied in article 21 of the Spanish Constitution. Thus, the PGO argues that the state of alarm does not constitute in itself a sufficient legal justification to prohibit or modify an assembly or demonstration. However, the PGO clarifies that this does not mean that the current sanitary situation, that

precisely prompted the declaration of the state of alarm, can be ignored.

Overall, a lack of uniformity regarding the jurisdictional position on the possible limitations to freedom of assembly was evident during the lockdown under the first state of alarm<sup>108</sup>.

In July 2020, the Catalan government granted the "Grade 3" prison regime to several jailed Catalonia's pro-independence leaders<sup>109</sup>. It is a less strict regime which allows prisoners to leave prison for several hours *per* day and spend weekends at home. However, such a decision was revoked by the Spanish Supreme Court in December 2020<sup>110</sup>. On 14 January 2021, the Catalan prisons of Lledoners, Puig de les Basses and Wad-Ras, put forward a proposal to grant back the "Grade 3" prison regime to the jailed pro-independence leaders<sup>111</sup>. However,

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107 See: <https://www.europapress.es/nacional/noticia-fiscalia-dice-alarma-no-basta-prohibir-manifestaciones-pandemia-insta-ponderar-cada-caso-20200521115600.html>

108 Greenpeace and Civil Liberties Union for Europe. Locking down critical voices. (2020). Available here: <http://www.rightsinternationalspain.org/uploads/publicacion/648dc0722c17b64486dcada16b3570eed60eae62.pdf>

109 See for example: ElNacional.cat. Open prison regime approved for the Catalan pro-independence prisoners. (2 July 2020) Available here: [https://www.elnacional.cat/en/politics/catalan-political-prisoners-open-prison-regime\\_519318\\_102.html](https://www.elnacional.cat/en/politics/catalan-political-prisoners-open-prison-regime_519318_102.html)

110 See for example: El País. Supreme Court revokes open prison regime granted to jailed Catalan separatist leaders. (4 December 2020). Available here: [https://english.elpais.com/spanish\\_news/2020-12-04/supreme-court-revokes-open-prison-regime-granted-to-jailed-catalan-separatist-leaders.html](https://english.elpais.com/spanish_news/2020-12-04/supreme-court-revokes-open-prison-regime-granted-to-jailed-catalan-separatist-leaders.html)

111 See for example: ABC. Las cárceles catalanas desafían al Supremo y vuelven a proponer la semilibertad de los presos. (14 January 2021). <https://www.abc.es/espana/catalunya/politica/abci-carceles-catalanas-pro->

for this proposal to be effective, the Catalan Government's Justice Department must ratify it within a period of two months.

On 12 January 2021, 4.000 people protested in La Palma (the largest city of the Balearic Islands) against the Covid-19 restrictions<sup>112</sup>. The large majority of the demonstrators were workers from the hospitality and food service sectors, who have been strongly impacted by the measures adopted to curb the pandemic. Although there have been no reports of detentions or police brutality against the protesters, the assembly's organizers will be fined for breaching the rules, since the demonstration had been prohibited by the Government of the Balearic Islands due to public health concerns<sup>113</sup>.

### ***Inequality, discrimination and impact on vulnerable groups***

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Manifestations of racial discrimination and xenophobia by police forces were reported by national human rights organisations. RIS and the Implementation Team of the IDPAD in Spain compiled in a report from cases of ethnic profiling, harassment or threats of deportation, to police brutality against racialised groups, homeless and people with mental disorders<sup>114</sup>.

The economic impact of the pandemic has also increased inequality among minority groups.

Restrictions were imposed to aliens interned in detention centers for migrants (*centros de internamiento de extranjeros*). Different organisations reported unhealthy conditions of the centers and situations of overcrowding, lack of access to basic needs, proper phyco-social

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[ponen-otra-semilibertad-presos-pese-veto-supremo-202101141145\\_noticia.html](https://www.abc.es/sociedad/abci-millar-restauradores-piden-dimision-armengol-calles-palma-protesta-no-autorizada-202101121501_noticia.html)

112 See for example: El Mundo. Revolución de los bares contra el Govern de Francina Armengol al grito de “la presidenta es una borracha” (12 January 2021). Available here: <https://www.elmundo.es/baleares/2021/01/12/5ffd897bfc6c836f2f8b4617.html>

113 See for example: ABC. Unas 4.000 personas piden la dimisión de Armengol por las calles de Palma en una protesta no autorizada. (13 January 2021). Available here: [https://www.abc.es/sociedad/abci-millar-restauradores-piden-dimision-armengol-calles-palma-protesta-no-autorizada-202101121501\\_noticia.html](https://www.abc.es/sociedad/abci-millar-restauradores-piden-dimision-armengol-calles-palma-protesta-no-autorizada-202101121501_noticia.html)

114 Equipo de Implementación del Decenio Afrodescendiente en España and Rights International Spain. (2020). Crisis sanitaria COVID-19: Racismo y Xenofobia durante el Estado de Alarma en España, p. 26, available online: <http://www.rightsinternationalspain.org/uploads/publicacion/d0b782ac0452e9052241b17a646df19ad4ed-f12c.pdf>

assistance, legal advice or access to an interpreter.<sup>115</sup>

The impact in access to the economic and social rights of migrants in an irregular administrative situation has become evident with the closure of the administrations that register their stay in the districts where they reside during the lockdown period. The closure of town halls prevented undocumented migrants from registering in the municipal residency census and, therefore, lacking access to the public health system except for emergencies. They also could not access the exceptional social aids to mitigate the effects of the confinement since they were not registered or did not have a bank account. Some autonomous communities like the Balearic Islands and the Canary Islands extended exceptionally the access to a social subsidy consisting of minimum income (*Renta*

*Social Garantizada*) to persons in an irregular administrative situation.

Roma population whose first occupation is at flea or street markets<sup>116</sup> has seen their incomes drastically reduced due to the strict measures applied during the first state of alarm. This only hardens the hardship endured by this minority group whose poverty index rises to 91.9%, according to the AROPE indicator<sup>117</sup>. 90% of participants in a study carried out by the Universidad de Alicante claimed that none of the people living in their household were able to adapt their work activity to telework format<sup>118</sup>.

During the lockdown, the *Asociación Pro Derechos Humanos de Andalucía* (APDHA) underlined the impossibility of the groups that reside in slum dwellings and makeshift camps- where women and children also live- to

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115 Equipo de Implementación del Decenio Afrodescendiente en España and Rights International Spain. (2020). Crisis sanitaria COVID-19: Racismo y Xenofobia durante el Estado de Alarma en España, p. 26, available online: <http://www.rightsinternationalspain.org/uploads/publicacion/d0b782ac0452e9052241b17a646df19ad4ed-f12c.pdf>

116 A comparative study by the Fundación del Secretariado Gitano concluded that one in three Roma people work in street markets. See: Fundación Secretariado Gitano (2016) Estudio-mapa sobre vivienda y población gitana - 2015, Madrid: Ministry of Health, Social Services and Equality, Available online, [http://www.mscbs.gob.es/ssi/familiasInfancia/PoblacionGitana/docs/INFORMECompleto\\_STUDIO-MAPA-VIVIE-Y\\_P\\_G.pdf](http://www.mscbs.gob.es/ssi/familiasInfancia/PoblacionGitana/docs/INFORMECompleto_STUDIO-MAPA-VIVIE-Y_P_G.pdf)

117 compared with 29.3% of the general population. See: <https://ctxt.es/es/20200401/Politica/31848/gitanos-pobreza-confinamiento-coronavirus-meritxell-rigol.htm>;

118 Universidad de Alicante (2020). Encuesta de Impacto COVID-19 Población Gitana: [https://www.mscbs.gob.es/profesionales/saludPublica/prevPromocion/promocion/desigualdadSalud/docs/COVID-19\\_Impacto\\_PoblacionGitana.pdf](https://www.mscbs.gob.es/profesionales/saludPublica/prevPromocion/promocion/desigualdadSalud/docs/COVID-19_Impacto_PoblacionGitana.pdf)

comply with the sanitary measures imposed by the Health Ministry. These measures include the reinforcement of sanitation and/or maintenance of social distancing (since they cannot access hygienic or cleaning products), waste collection, adequate housing to quarantine themselves in the case of contagion and getting medical assistance<sup>119</sup>. Without control and oversight measures for the compliance of labour rights, these people work in inhuman conditions and without protection measures to prevent infections. *Caritas* Spain also expressed concern over the government's urgent measures in the field of agricultural employment<sup>120</sup>, as they considered them insufficient and not responding to the needs or social reality of immigrant agricultural seasonal workers who live in settlements<sup>121</sup>.

The crisis prompted an increase in the demand for shelters that are already overcrowded or reducing their capacities to apply distance

rules. The Ombudsperson reported numerous complaints about insufficient safe spaces and scarcity of means of protection for homeless people<sup>122</sup>.

The measures taken to address the pandemic particularly impacted on certain groups.

With regard to strict confinement measures in Spain, the Spanish Ombudsperson expressed concern about the physical and mental health of children who could not leave their homes. It recommended to allow children to leave the house in accordance with physical distancing rules<sup>123</sup>. Following this recommendation, the government amended legislation to permit children under 14 years to go outside from 26 April, after 43 days of confinement.

The Active Domestic Service (*Servicio Doméstico Activo* or SEDOAC) reported the lack of specific actions to support and protect

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119 See: APDHA. Press Release. (17 April 2020). Available here: <https://www.apdha.org/apdha-huelva-construccion-viviendas-ayudas-junta-acabar-asentamientos/>

120 Royal Decree 13/202

121 FRA. (2020). Coronavirus pandemic in the EU - fundamental rights implications: with a focus on contact-tracing apps. Available here: [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-may\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-may_en.pdf)

122 See: Defensor del Pueblo. Press Release. (3 April 2020). Available here: <https://www.defensordelpueblo.es/noticias/mas-millar-quejas-covid-19/>

123 Defensor del Pueblo (17 Abril 2020) El Defensor Plantea la posibilidad de que niños y niñas puedan salir a la calle de manera limitada y tomando las debidas precauciones; <https://www.defensordelpueblo.es/noticias/defensor-crisis-covid/>

women domestic and care workers, who in their majority, work in the informal economy and could not provide the evidence required by police controls to demonstrate the need to travel to their workplace during the state of alarm. Without a contract or a working permit, nearly 30% of these women are unable to prove the need to go to and from the workplace, thus exposing themselves to a potential fine<sup>124</sup>.

A survey carried out by Malen Etxea (an organization based in Basque Country) to map the situation of women domestic workers found that out of the total women who responded, 56.4% were in an irregular administrative situation. Regarding their employment status, after the declaration of the state of alarm, 46.9% were unemployed. Those who continued to work when the state of alarm was declared (35.6%) were requested by their employers to stay at home without payment, 21.3% were fired, 18.1% were not allowed to take breaks from work, 16.3% suffered a reduction in their working hours and 8% remained at home with their salary intact<sup>125</sup>.

In addition to the measures adopted at the end of April 2020, the government approved the Royal Decree 11/2020 (*Real Decreto-ley 11/2020*), of 31st of March, to adopt additional urgent social and economic measures (*Ingreso Mínimo Vital*)<sup>126</sup>. In Article 30, it establishes an exceptional unemployment benefit for all individuals included in the Special System for Domestic Workers of the General Regime of Social Security. In that sense, various organisations claim that the benefits ignore undocumented migrant women (approximately 30% of the collective) and their technological barriers to submit online applications. Furthermore, the collaboration of the employer is essential to access the benefits. However, some employers do not facilitate the required declaration of total or partial interruption of the service nor the dismissal letter.

The Government Delegation for Gender Violence, a unit under the Secretariat of State for Equality, approved on the 17th of March 2020 a Contingency Plan to combat gender violence during the lockdown. The Plan was later extended to women victims of trafficking for sexual exploitation and other women

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124 See for example: El País. ¿Quién cuida a las que cuidan? (20 March 2020). Available here: [https://elpais.com/elpais/2020/03/19/3500\\_millones/1584610961\\_994547.html](https://elpais.com/elpais/2020/03/19/3500_millones/1584610961_994547.html); El País. Un tercio del colectivo de las trabajadoras del hogar no podrá recibir el subsidio del Gobierno. (10 April 2020). Available here: <https://elpais.com/espana/madrid/2020-03-30/un-tercio-del-colectivo-de-las-trabajadoras-del-hogar-no-podra-recibir-el-subsidio-del-gobierno.html>

125 See: Malen Etxea. Press Release. Available here: <https://malenetxea.org/la-pandemia-estaba-antes-del-covid-19>

126 Real Decreto-ley 11/2020, de 31 de marzo, por el que se adoptan medidas urgentes complementarias en el ámbito social y económico para hacer frente al COVID-19.

in the context of sex work. According to the Plan, accredited NGOs are responsible for identifying and selecting potential victims of trafficking, to receive comprehensive support that includes temporary housing and/or a basic subsidy for persons in a situation of severe poverty (*Ingreso Mínimo Vital*).

The measures of the Plan included the strengthening of the dissemination of the 24-hour telephone lines and the email addresses of specialized entities, National Police and Guardia Civil. However, collectives of sex workers are warned about the fear of many victims or potential victims of trafficking to contact public institutions. In the case, for example, of women of African descent because they often remove the children out of the custody of mothers<sup>127</sup>.

Human rights organizations have pointed out to the fact that the economic and social

measures adopted by the government to face the Covid-19 pandemic have lacked a gender and racial perspective and thus have discriminated against already vulnerable groups.<sup>128</sup>

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

The contact-tracing *Radar Covid* app developed in Spain raised concerns about the possibility to geolocate the user and collect personal data such as mobile phone numbers<sup>129</sup>, although the National Data Protection Authority underlined that the Covid-19 crisis should not lead to the suspension of data protection rights. There have been a number of complaints involving the *Radar Covid* app and its compatibility with EU data protection laws; in particular, the lack of data protection impact assessment carried out and published prior to the launch of the app.<sup>130</sup>

127 See: Report of the Working Group of Experts on People of African Descent on its mission to Spain (2018), UN Doc A/HRC/39/69/Add.2, para.48, <https://undocs.org/en/A/HRC/39/69/Add.2>

128 See: Equipo de Implementación del Decenio Afrodescendiente en España and Rights International Spain. (2020). Crisis sanitaria COVID-19: Racismo y Xenofobia durante el Estado de Alarma en España, p. 28. Available here: <http://www.rightsinternationalspain.org/uploads/publicacion/d0b782ac0452e9052241b17a646d-f19ad4edf12c.pdf>

129 Order SND/297/2020, of 27 March: <https://www.boe.es/boe/dias/2020/03/28/pdfs/BOE-A-2020-4162.pdf> ; See: FRA. (2020). Coronavirus pandemic in the EU - fundamental rights implications: with a focus on contact-tracing apps, pp. 52 y ss. Available online: [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-may\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-may_en.pdf)

130 Reclamadatos association filed a complaint before the Spanish DPA (Agencia Española de Protección de Datos), see: <https://www.diariojuridico.com/denuncian-a-la-secretaria-general-de-administracion-digital-an>

## Freedom of expression and of information

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### Restrictions on access to information

Twenty-seven organizations united in the coalition *Pro Acceso* asked the central government to guarantee the right of access to information after the suspension of administrative deadlines due to the declaration of the state of alarm, including the mechanisms to request public information<sup>131</sup>. Some regional governments took the same position as the central government and paralyzed all the requests as, Andalucía, Canarias or Murcia. On the other hand, the regional governments of Castilla y León, Asturias, Castilla-La Mancha or La Rioja have continued to process all the request during the state of alarm. Madrid, Cataluña and Valencia have only processed and resolved the requests for information partially<sup>132</sup>.

### Restrictions on media reporting

Restrictions on media participation during government's press conferences were imposed during the lockdown (March-June 2020), consisting in the prohibition of physical presence of journalists during press conferences. The effects of these measures were not mitigated like in other countries where journalists were allowed to make their questions during live broadcast through videoconference systems or via WhatsApp. In Spain, questions were filtered by the State Secretary for Communication as journalists had to send their questions to a WhatsApp group with more than 220 participants and the State Secretary read the selected questions out loud at the end of the press conference. This aspect was much criticized by media professionals who argued that the government's system could conflict with freedom of expression.

These practices were amended by the government on 6th April 2020, allowing journalists

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[te-la-agencia-espanola-de-proteccion-de-datos-por-la-aplicacion-radar-covid/](https://www.liberties.eu/en/news/liberties-campaign-foi-request-covid19-tracking-apps/19396). Rights International Spain has sent freedom of information requests to the DPA as well as the Ministry of Digital Affairs involving the data protection impact assessment, see <https://www.liberties.eu/en/news/liberties-campaign-foi-request-covid19-tracking-apps/19396>

131 See: CIVIO. Desde la Coalición Pro Acceso pedimos al Gobierno que garantice el derecho de acceso a la información durante la crisis del Covid-19. (27 April 2020). Available here: <https://civio.es/novedades/2020/04/27/desde-la-coalicion-pro-acceso-pedimos-al-gobierno-que-garantice-el-derecho-de-acceso-a-la-informacion-durante-la-tesis-del-covid-19/>

132 See: CIVIO. ¿Qué comunidades responden las preguntas de los ciudadanos pese al estado de alarma y cuáles no? (2020). Available here: <https://civio.es/tu-derecho-a-saber/2020/05/07/que-comunidades-responden-las-preguntas-de-los-ciudadanos-pese-al-estado-de-alarma-y-cuales-no/>

to question Spanish government officials directly and without having to go through intermediaries<sup>133</sup>. The new system proposed consisted in a videoconference format with self-management of turns among participating journalists. It allowed the presence of media who traditionally covers governmental press conferences (79 media outlets according to the Secretary of State of Communications).

Cameramen and photojournalists were denied access to hospitals, morgues and retirement homes. They claimed this was a paternalistic attempt to control information from the government and other regional administrations<sup>134</sup>. In fact, during the first months of

the pandemic the lack of graphic information generated doubts among the Spanish population on the severity of the situation affecting on how to behave socially and prompted the spread of fake news<sup>135</sup>.

In the cases where they were allowed access as the field hospital in *Ifema*, journalists claimed there was too much control as for example guideline of the spots and angles from where to shoot photos<sup>136</sup>.

The lack of clear numbers of victims from regional and governmental health authorities has also been reported by journalists as a

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133 See: Coronavirus: Spanish government yields to the pressure of journalists and agrees to live press conferences <https://rsf.org/en/news/coronavirus-spanish-government-yields-pressure-journalists-and-agrees-live-press-conferences-0>

134 See for example: Infolibre. RSF denuncia que durante la pandemia los fotoperiodistas “tenían más dificultades para hacer fotos en España que en zonas de conflictos”. (14 December 2020). Available here: [https://www.infolibre.es/noticias/politica/2020/12/14/el\\_presidente\\_rsf\\_denuncia\\_que\\_espana\\_no\\_hay\\_cifras\\_oficiales\\_fidedignas\\_muertes\\_causadas\\_por\\_covid\\_19\\_114455\\_1012.html](https://www.infolibre.es/noticias/politica/2020/12/14/el_presidente_rsf_denuncia_que_espana_no_hay_cifras_oficiales_fidedignas_muertes_causadas_por_covid_19_114455_1012.html)

135 See for example: Maldita. Este vídeo con bolsas negras de cadáveres es de Guayaquil (Ecuador) no de Nueva York o Madrid. (9 April 2020). Available here: <https://maldita.es/malditobulo/20200409/video-cadaveres-guayaquil-hospital-ecuador-madrid-nueva-york/>; Maldita. Por qué no debes fiarte de los vídeos que muestran zonas de hospitales vacíos y afirman que la COVID-19 es mentira. (1 February 2021). Available here: <https://maldita.es/malditobulo/20210201/videos-hospitales-vacios-coronavirus/>

136 See for example: Vozpopuli. España pone un veto a la tragedia y restringe el acceso de los fotoperiodistas a morgues y hospitales (4 April 2020). Available here: [https://www.vozpopuli.com/espana/Espana-restringe-fotoperiodistas-hospitales-morgues-coronavirus\\_0\\_1342666982.html](https://www.vozpopuli.com/espana/Espana-restringe-fotoperiodistas-hospitales-morgues-coronavirus_0_1342666982.html)

serious problem of lack of transparency from the authorities<sup>137</sup>.

*Hate speech, disinformation and freedom of expression*

942 fake news have been recorded by *Maldita.es* (a web based on fact-checking to expose fake news) regarding Covid-19: fake methods to prevent infection, wrong figures, fake videos and images, misinformation on the vaccines, etc.<sup>138</sup>

Racist fake news and hate speech towards persons of Asian origin have been reported in Spain since the start of the epidemic. Also, numerous anti-Roma hate messages have been disseminated through social media and WhatsApp during the state of alarm. Fake news and campaigns asking citizens, among other things, not to go to the markets where Roma families do their itinerant trade, started

before the state of alarm but were maintained several days after the adoption of the exceptional measures.

The Platform in defense of freedom of expression (PDLI) alerted in April of the risks of encouraging practices as the intense monitoring of social networks and the internet by the police (*Guardia Civil*) in order to identify fake news and hoaxes with the potential to generate social stress and “disaffection against government institutions”<sup>139</sup>.

In fact, this has resulted in a disproportionate use of force by the police. An example is the case of a man who was arrested after he posted a joke on twitter threatening to travel to Torrevieja (city in the coast) to spread the virus; or the case of another man who was also arrested after posting a message on social media claiming he was infected and was strolling through the beach in Gandia (another

137 See for example: Newtral. Ministerio de Sanidad, MoMo, INE... los distintos datos sobre fallecimientos por COVID-19: Preguntas y respuestas. (6 June 2020). Available here: <https://www.newtral.es/datos-sanidad-ine-momo-coronavirus/20200606/>

138 See for example: Maldita.es. La COVID-19 y sus bulos: 957 mentiras, alertas falsas y desinformaciones sobre el coronavirus. (24 February 2021). Available here: <https://maldita.es/malditobulo/20210205/coronavirus-bulos-pandemia-prevenir-virus-covid-19/>

139 See for example: PDLI. La PDLI denuncia que la vigilancia selectiva de Internet para detectar “bulos” que puedan provocar “desafección a instituciones del Gobierno” vulnera la libertad de expresión. (21 April 2020). Available here: <http://libertadinformacion.cc/la-pdli-denuncia-que-la-vigilancia-selectiva-de-internet-para-detectar-bulos-que-puedan-provocar-desafeccion-a-instituciones-del-gobierno-vulnera-la-libertad-de-exp/>

coast/touristic destination)<sup>140</sup>. Both men were arrested under the premise of a possible public offence disorder and were later on released free of charges.

Social media tracking by police forces is not new in Spain. In fact, human rights bodies have repeatedly alerted on the pervasive effects of these type of practices, resulting in a criminalization of freedom of expression (through offences against religion, glorification/incitement of terrorism, insults to the crown or hate crimes) and the imposition on citizens of self-censorship attitudes regarding their use of social media<sup>141</sup>.

The PDLI also alerted in April of the risks of including in the Social Barometer (CIS) a question on the prohibition of fake news as it was seen as a strategy from the government to take advantage of the current social climate of fear to generate opinion in the population prone to regulations against fake news that in turn could reduce freedom of expression<sup>142</sup>.

Some days after the data from the barometer was released, the Attorney General announced that they were considering prosecuting fake news as they could incur in at least different criminal offences<sup>143</sup>. Eventually, the Prosecutor's Office from the Audiencia Nacional decided to set aside the case against

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140 See for example: Última Hora. Publica un vídeo diciendo que ha viajado a Torrevieja para contagiar el virus y acaba detenido. Available here: <https://www.ultimahora.es/sucesos/ultimas/2020/04/09/1156017/coronavirus-espana-detenido-por-decir-viajado-torrevieja-contagiar-virus.html>

141 See: Commissioner for Human Rights. (4th december 2018). Misuse of anti-terror legislation threatens freedom of expression. Available online: <https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression> ; RIS. (2019). Lagunas en la protección de derechos civiles y políticos en España: aportaciones para la lista de cuestiones previas a la presentación del VII Informe Periódico al Comité de Derechos Humanos. Available online: <http://www.rightsinternationalspain.org/uploads/publicacion/70975000875e37fe0a76ab5b77e91fa260f7d27a.pdf>

142 See: PDLI. La PDLI denuncia que la vigilancia selectiva de Internet para detectar “bulos” que puedan provocar “desafección a instituciones del Gobierno” vulnera la libertad de expression. (21 April 2020). Available here: <http://libertadinformacion.cc/la-pdli-denuncia-que-la-vigilancia-selectiva-de-internet-para-detectar-bulos-que-puedan-provocar-desafeccion-a-instituciones-del-gobierno-vulnera-la-libertad-de-exp/>

143 See for example: El Confidencial. La Fiscalía considera que difundir bulos puede incurrir en una decena de delitos (17 April 2020). Available here: [https://www.elconfidencial.com/espana/2020-04-17/fiscalia-considera-difundir-bulos-incurrir-decena-delitos\\_2552591/?utm\\_source=twitter&utm\\_medium=social&utm\\_campaign=BotoneraWeb](https://www.elconfidencial.com/espana/2020-04-17/fiscalia-considera-difundir-bulos-incurrir-decena-delitos_2552591/?utm_source=twitter&utm_medium=social&utm_campaign=BotoneraWeb)

fake news during the Covid-19 crisis as they form part of freedom of speech<sup>144</sup>.

In late October 2020, the government approved an action procedure to monitor fake news. The government order is merely of organizational nature and according to the PDLI it is impossible to know which actions will be taken and the concrete extension of the measures adopted fearing the standardization of censorship techniques<sup>145</sup>.

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144 See for example: elDiario.es. La Fiscalía considera “libertad de expresión” los bulos contra el Gobierno por la Covid-19 y archiva la denuncia de Unidas Podemos. (3 September 2020). Available here: [https://www.eldiario.es/politica/fiscalia-considera-libertad-expresion-bulos-gobierno-covid-19-archiva-denuncia-unidas\\_1\\_6199695.html](https://www.eldiario.es/politica/fiscalia-considera-libertad-expresion-bulos-gobierno-covid-19-archiva-denuncia-unidas_1_6199695.html)

145 See for example: Público. El Gobierno aprueba el procedimiento de actuación contra la desinformación. (5 November 2020). Available here: <https://www.publico.es/politica/bulos-gobierno-aprueba-procedimiento-actuacion-fake-news.html>

# Sweden // Civil Rights Defenders (CRD)



## Key concerns

- Gaps persist in the protection and support of persons with disabilities within the justice system
- Law-making is not immune from shortcomings, including the lack of impact assessments as regards respect of international human rights obligations and disproportionate limitations on public consultations during the COVID-19 pandemic
- The system to guarantee state authorities' accountability for crime needs improvement
- The national human rights institution still to be set up
- COVID-19 exacerbates existing problems as regards the situation of persons in detention facilities

This contribution is meant to briefly highlight some of the most relevant concerns as regards selected rule of law issues in Sweden, concerning in particular the justice system, checks and

balances and the impact of COVID-19 and the measures taken to address it on rule of law and human rights protection. CRD has contributed to a full report on the situation in Sweden jointly drafted with the Swedish section of the International Commission of Jurists, which is being submitted to the European Commission as a separate country report.

## Justice system

Gaps in the protection and support of persons with disabilities are one issue affecting the justice system in Sweden, which CRD has drawn attention to in recent years.<sup>1</sup>

The UN Convention on the rights of persons with disabilities (CRPD) has not been incorporated into Swedish law, but authorities and courts have a duty to interpret and apply national laws in conformity with the Convention.

In 2018, CRD conducted a study to investigate to what extent administrative courts perform an independent assessment of a patient's need for further compulsory psychiatric care and for the transfer from a closed to an open compulsory care centre. The study was conducted on 501 verdicts from three administrative courts

<sup>1</sup> See <https://crd.org/wp-content/uploads/2018/08/Civil-Rights-Defenders-submission-pre-session-Sweden.pdf>

spread over the country over a three-month period. The results of the study showed that the courts are very reluctant to rule against the assessment made by the chief medical officer. In only 2 out of 220 cases concerning compulsory forensic psychiatric care, did the chief medical officer and the court's medical expert express different opinions. The same pattern is shown in the study made on non-forensic compulsory psychiatric care. In only 5 out of 281 cases did the chief medical officer and the medical expert present different opinions. In every instance, the Court ruled following the assessment made by the chief medical officer expect rather than the medical expert. Furthermore, the study showed that all three courts would regularly use standard formulations in their decision. The formulations would often refer to the assessment made by the chief medical officer or to the medical material presented to the court by the chief medical officer, without further reasoning in relation to the circumstances of the case and thus casting doubts as to the grounds on which the courts made their decision.

Another area of improvement in this respect is the reasonable accommodation of the specific needs of persons with mental or physical special conditions or disabilities in criminal proceedings. While this is an issue already raised by international monitoring bodies<sup>2</sup>, no real progress has been made to date. Establishing a way to assess whether a person is unable to understand and to effectively participate in

criminal proceedings due to their mental or physical condition or disabilities, or otherwise needs special support, would improve the standards of respect for the right to a fair trial.

## ***Other issues related to checks and balances***

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

Even though Sweden has a well-established democratic process in terms of the way legislation is prepared and enacted, there have been cases where no adequate consideration was given to Sweden's obligations under international human rights instruments. As recently as 2021, the parliament has for instance proposed that no further time limit will be introduced as regards pre-trial detention, which is inconsistent with international human rights standards. All new legislative proposals should undergo an impact assessment to ensure compliance with international human rights standards.

### ***Independent authorities***

Although the government announced that an Independent Institution for Human Rights is to be set up in 2021, a bill on the establishment

2 Council of Europe, Committee for the Prevention of Torture (CPT), Report to the Swedish Government on the visit to Sweden carried out from 18 to 28 May 2015, page 5.

of such an authority has just been presented and the authority will only be set up in 2022.

### ***State authorities' accountability***

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The “Special Investigation Department” (SU), which consists of three investigative divisions placed in Stockholm, Gothenburg and Malmö, is an independent department within the Swedish Police Authority with the task of conducting criminal investigations and intelligence work in cases concerning holders of certain offices, including police officers. The Department was set up in connection with the reorganisation of the Swedish Police Authority on 1 January 2015. There are concerns that the SU is not impartial and independent enough to ensure State authorities' accountability in line with international human rights standards and to carry out preventive and investigation activities on the basis of a clearer human rights based approach.

### ***Enabling framework for civil society***

A good practice of cooperation between public authorities and civil society is the new dialogue forum between civil society organisations and the Office of the Parliamentary Ombudsmen, in particular the unit that since 2011 functions as the National Preventive Mechanism (NPM), in accordance with the Optional

Protocol to the UN Convention against Torture (OPCAT).<sup>3</sup> The dialogue, which concerns the situation and rights of people deprived of their liberty, enables civil society organisations to share their views and concerns, enable greater control of state's actions and contributes to better compliance with human rights standards. This is a vital exchange of knowledge for both the Office of the Parliamentary Ombudsmen and the organisations. It provides the Office of the Parliamentary Ombudsmen with new perspectives in order for them to carry out their mandate as the national preventive mechanism under OPCAT in the most optimal way possible, and it allows the organisations to have greater insight into the institutions

### ***Impact of COVID-19***

#### ***Accelerated law-making***

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An area of concern is accelerated law-making during the pandemic. Before the government takes a position on a legislative proposal, it is normally sent for consultation to the relevant authorities, organizations, municipalities and other stakeholders. The public also has the right to comment on the proposals. However, during the ongoing pandemic, the government has worryingly resorted to accelerated law-making procedures. In some cases, the consultation procedure has been as short as

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3 Parliamentary Ombudsman, Information about the Opcat unit: <https://www.jo.se/sv/Opcat/Om-Opcat-enheten/>

1 day, which in all circumstances must be regarded as unreasonably short.<sup>4</sup>

### ***Impact on the justice system***

Statistics show that Swedish courts have not suffered serious case-backlog in general, with the exception of some Administrative Courts and Migrations Courts. Additional funds have been granted to the Migration Courts to avoid unreasonable delays in proceedings.

Statistics show that the General Courts have improved their efficiency due to use of remote technologies, to which they significantly resorted in 2020 compared to earlier years<sup>5</sup>. Concerns however have been raised regarding the respect of fair trial standards and the right to access to justice, as also highlighted by a survey conducted by the Swedish Bar Association.

### ***Situation in detention facilities***

Restrictions imposed to face the COVID-19 outbreak in closed facilities have in many ways affected the situation for inmates.<sup>6</sup> Criticism expressed by the Parliamentary Ombudsmen has shown that the authorities managing closed facilities were unprepared to manage the COVID-19 outbreak.<sup>7</sup> Overcrowding in detention facilities<sup>8</sup>, an issue for which Sweden has already been criticized by monitoring bodies in the past<sup>9</sup>, exposes inmates to high infection rates. Against this background, the Swedish Prison and Probation Service is struggling to guarantee the respect of health protocols and precautionary measures such as social distancing, while safeguarding inmates' rights such as the right to release from insulation and the right to respect for family life as regards visits in prisons. Should the length of pre-trial detention increase, this also risks deteriorating an already strained situation.

4 See for instance: <https://www.regeringen.se/remisser/2020/06/remisser-s202005402sf-och-s202005401sf/>; <https://www.dagensarena.se/innehall/coronalagen-kritik-mot-rekordkort-remissrunda/>

5 <https://www.domstol.se/globalassets/filer/gemensamt-innehall/styrning-och-riktlinjer/statistik/2020/201207-diagram-veckovis-videokonferenssamtal-salar-vecko-1-49.pdf>, Accessed: 2020-12-14.

6 Protests occurred at least in three Swedish detention facilities since the introduction of the new anti-infection measures: see <https://www.svd.se/fangar-strejkade-mot-coronaatgarder>

7 See <https://www.jo.se/PageFiles/15549/O%2012-2020.pdf>, accessed on 14 October 2020.

8 See <https://sverigesradio.se/artikel/7558967>

9 See <https://rm.coe.int/1680697f60>

Similar concerns are to be raised with respect to the situation of migrants detained in close facilities pending deportation. Sweden has continued to detain persons facing deportation who end up waiting for several months for enforcement of deportation decisions given that certain countries, such as Afghanistan, do not currently accept deported persons from Sweden due to COVID-19.<sup>10</sup> Against this background, it can be questioned whether decisions on detention can be seen as a necessary and proportionate measure considering the uncertainty of when deportation can be carried out in the light of the current situation and existing COVID-19 restrictions. In April it was reported that detainees in several detention centres initiated a hunger strike to protest against their indefinite detention.<sup>11</sup>

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10 <https://www.svt.se/nyheter/inrikes/coronapandemin-forsvarar-utvisningar-mustafa-har-varit-inlast-i-fem-mader>, accessed on 15 October 2020.

11 <https://www.fplus.se/corona-hindrar-utvisningar-hungerstrejk-mot-vantan-i-forvar/a/g7nGmq>, accessed on 15 October 2020.