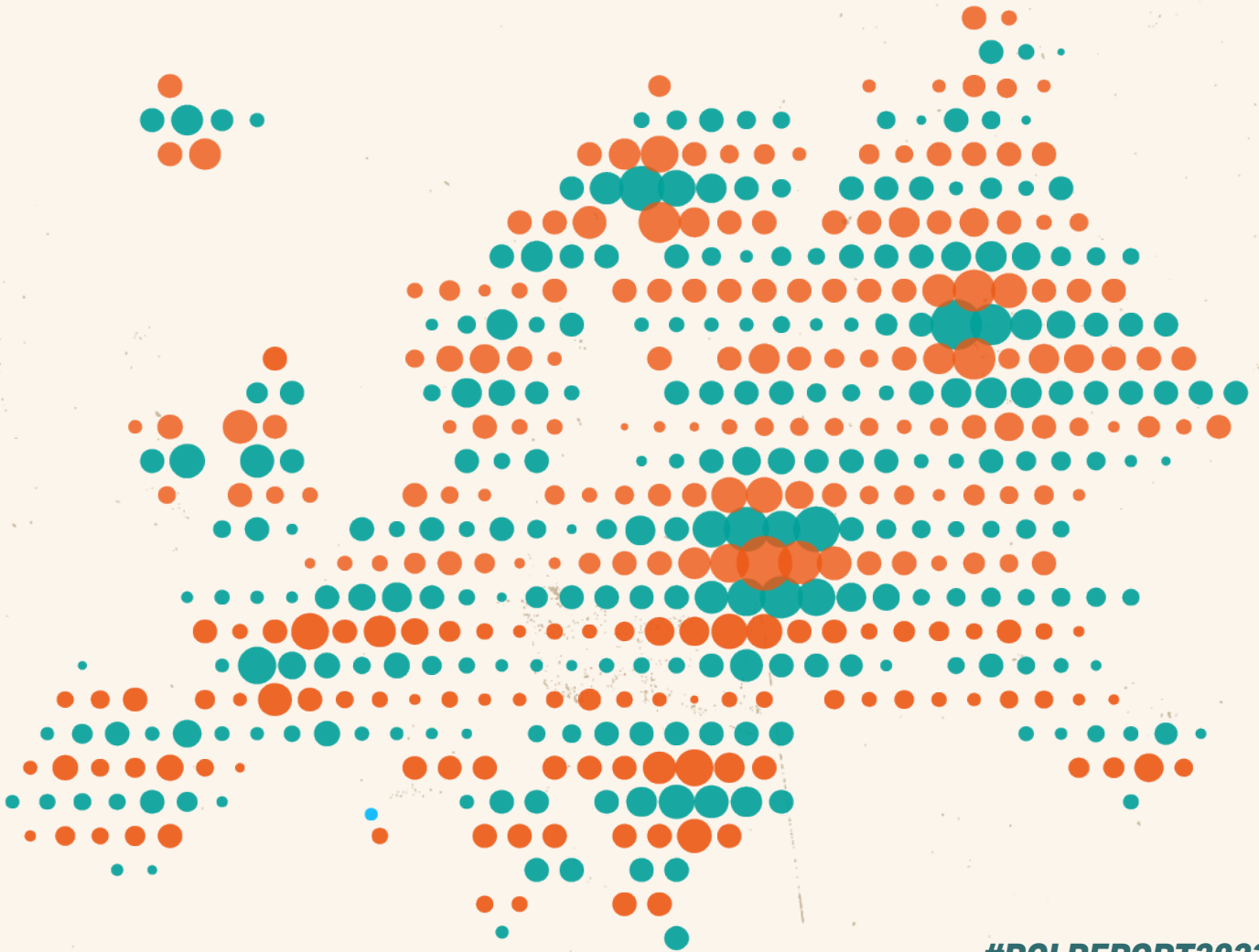


**LIBERTIES**

**RULE OF LAW REPORT**

**2023**



**#ROLREPORT2023**



**CIVIL  
LIBERTIES  
UNION FOR  
EUROPE**



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# ***Executive summary***

The Liberties Rule of Law Report 2023 is the fourth annual report on the state of the rule of law in the European Union (EU) published by the Civil Liberties Union for Europe (Liberties) – the most in-depth reporting exercise to date on the rule of law in the EU by an NGO network. The report, jointly drafted by Liberties and its national member and partner organisations, is a ‘shadow report’ to the European Commission’s annual audit of the rule of law, aimed at providing the Commission with reliable information and analysis from the groups to use in its annual audit, besides offering an independent analysis of the state of the rule of law in its own right.

The report lays out the most striking developments concerning the rule of law, democracy and related aspects of fundamental rights in 2022 in 18 countries across the EU. Forty-five civil society organisations from across the EU contributed to the research, which looked into a wide range of areas including the functioning of justice systems, the anti-corruption framework, media freedom, pluralism and safety of journalists, checks and balances, civic space and human rights defenders and systemic human rights violations affecting the rule of law.

Besides pulling together all the individual country reports drafted by member and partner organisations, the report includes an overview of general trends on the rule of law in the EU compiled by Liberties. It also formulates detailed recommendations addressed to both

national governments and the EU institutions on how to address the shortcomings identified in each of the areas covered, and suggests how the European Commission could improve the impact of its monitoring exercise.

Not all contributing organisations collected information on all the areas covered by the report. This means that our account of trends in the EU does not constitute an exhaustive overview. We believe, however, that the information is sufficiently representative to give an accurate indication of the direction of travel for the rule of law and democracy inside the EU.

## ***Authoritarians maintain their grip, but the damage is reversible***

As we reported in previous years, Hungary and Poland remain the worst offenders. Although, in an unprecedented step, the EU has triggered its newly created conditionality mechanism to withhold funds from Hungary, this has yet to produce genuine improvements on the ground. And similarly, the reforms being negotiated with Poland in exchange for release of EU COVID recovery funds would lead to only modest improvements that don’t free judges from political control. These governments continue to implement a series of measures designed to centralise power, silence their opponents, control public opinion, and make it very difficult to lose future elections.

Although it's too soon to tell, early signs from the new governments formed in Italy and Sweden in 2022 point to the risk that, if checks and balances do not stay strong, ruling coalitions may turn towards authoritarianism. For example, we have already seen a sharp increase in rhetorical attacks against NGOs and the media by both of these new governments.

In contrast, developments in Slovenia since the replacement of the far-right government show that countries can rehabilitate their democracies. For example, we recorded efforts to restore independence to institutions like the public broadcaster and to revoke and reimburse fines that were illegally issued under the previous far-right government to citizens for attending protests.

More generally, like last year, we find few efforts by EU countries to resolve problems that were already documented in previous reports. Most allowed existing shortcomings to go unaddressed, or made things worse.

## **Key findings**

### ***Free, democratic media***

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Citizens rely on journalists who are free to report the truth so we can understand what's happening in the world and make informed choices about whether we're happy with what our leaders are doing.

But in many countries, it became harder for journalists to do their job. The governments of Poland and Hungary continued to use their

public broadcasters to disseminate propaganda, and we found that in Slovakia and Sweden their independence from government was at risk. In many countries a small number of owners continue to own most private media outlets, allowing them to influence what the public hears, for example in Italy, the Netherlands, the Czech Republic, France and Slovenia. Journalists trying to report on things like corruption found themselves harassed by bogus lawsuits, for example in Bulgaria, Croatia, Hungary, Italy, the Netherlands and Poland. And reporters were also verbally and physically attacked across the EU by the public or by the state, for example in Bulgaria, Croatia, the Czech Republic, Estonia, France, Hungary, Germany, Ireland, Italy, the Netherlands, Poland, Romania, Sweden and Spain.

In one stand-out positive development, the new government of Slovenia has begun a series of reforms to depoliticise the public service media and restore it to independence after it was taken over by the previous far-right government.

### ***A voice for citizens***

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Leaders are supposed to make it easy for citizens to give their opinions and share their concerns. We tell our governments what we want from them by working together, whether that's by joining or supporting associations that fight for things we care about, or going out to protest.

But in 2022, many governments made it harder for associations to survive and do their jobs. A number of countries maintained, introduced

or proposed new laws which either gave the government greater powers to dissolve NGOs or were deliberately vague over what activities could lead to closure or loss of their public benefit status, making NGOs less likely to speak up on topics that politicians would rather not discuss – for example, the Czech Republic, France, Germany, the Netherlands and Spain. We also saw smear campaigns and legal harassment of NGOs in Croatia, France, Germany, Ireland, Italy, Slovenia and Sweden. These were particularly pronounced for organisations working to protect people who migrate and to combat climate change.

Several countries also used their powers to restrict the right to protest, especially in relation to people calling for action on climate change, for example in Belgium, Estonia, France, Germany, Italy, the Netherlands and Sweden. In some cases, the authorities were acting on powers created to deal with the pandemic that are still in place.

Among the few positive developments, we found that the government of the Czech Republic became more willing to include NGOs in shaping policy, and the new government in Slovenia is planning to revoke and reimburse fines found to be illegally issued to protestors under the previous far-right government.

### ***A government that listens***

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When governments create new laws and policies, they can give citizens the chance to have their say by publicising what they plan to do and by holding consultations.

But many governments do not share their plans with the public and leave little or no time for consultation or do not take public contributions seriously. In several countries this is a hang-over from the pandemic when governments sped up the process of creating new laws and policies so they could react quickly to protect public health. But, as in the past, governments are now continuing to abuse fast-track procedures and are not sharing information with the public. This often seems like a deliberate attempt to stop citizens from having their say. We found these problems in Croatia, the Czech Republic, France, Germany, Ireland, Hungary, Romania and Slovakia.

Most countries have institutions in place to make sure that governments follow the correct rules when legislating, for example, to make sure that new laws are compatible with human rights. In 2022 we found that a lot of countries haven't given these institutions the independence, resources or powers they need to do their jobs, for example in Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Hungary and Ireland. Elsewhere, like in Italy, governments seem incapable or unwilling to create an independent institution tasked to promote and protect human rights.

### ***Safeguards for public resources from corruption***

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To make sure that our governments use our resources to fund the things citizens rely on, it's important to have rules that prevent corruption and independent mechanisms that make sure the rules are followed. Otherwise it becomes easy for corrupt politicians and

their business allies to take public funds for themselves.

But in 2022 we found that the rules and mechanisms created by many governments were too weak to stop corruption. We found deep corruption in Hungary, though the government did make some superficial improvements in order to secure COVID recovery and structural funds. But many countries face problems. For example, in the Czech Republic and the Netherlands it's very difficult for the public to find out which businesses the government decides to give contracts to, and in France and Croatia the government has awarded contracts to business allies, while in Belgium and Ireland, the mechanisms created to combat corruption haven't been given the resources they need to do their job. Many countries have also failed to give whistleblowers the level of protection that the new EU directive requires, such as the Netherlands and Croatia, or have still not adopted national legislation, such as Bulgaria, the Czech Republic, Estonia, Italy, Slovakia and Spain.

A small number of positive developments were reported. For example, Italy adopted a new anti-corruption plan and the Czech Republic announced plans to create a new register of lobbyists to keep track of influence over law-making.

### ***Independent courts***

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We rely on judges who are independent of politicians to make sure that our leaders play by the rules. Whether those are rules to protect our freedoms, our resources, or the equal

worth of all people regardless of things like gender or race.

But in 2022, we saw many examples of courts not being able to do their job. For example, in Bulgaria, the Czech Republic, Germany, Hungary, Poland, Slovakia and Spain, we found politicians having a say over picking, promoting and disciplining judges. Political pressure on judges remained severe in Hungary and Poland, and in 2022 they also faced renewed smear campaigns.

We also found that countries are doing little to make it easier for people to use the courts. For example, governments don't give enough resources to the court systems in Belgium, Croatia, Estonia, France, Germany, Italy, Ireland and Poland. This means that it takes an unreasonably long time to get a decision because, for example, there isn't funding to hire enough judges.

There were some isolated cases of governments making improvements to their court systems. For example, Ireland plans to improve the way it selects judges to make sure they are independent and the Netherlands has increased the amount of funding for its courts.

When national courts aren't able to protect our rights, people in the EU still have a back-up: they can take their case to international courts and bodies to decide. Sadly, we've seen that many governments are refusing to implement the decisions made by these bodies when they lose a case. These include Belgium, Bulgaria, Croatia, the Czech Republic, Germany, Ireland and Slovakia.

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## ***Respect for human rights***

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Human rights set out minimum standards of treatment that ensure all of us are treated with dignity and respect and have the same opportunities to do well in life and contribute to our communities. Human rights make democracy work properly because they make sure everyone matters and we all have a say in how we are governed.

But some governments attack certain groups in society. Often this is a tool to distract the public from their own failure to solve the problems we face, by blaming hard times on anyone but the politicians with decision-making power. This year we have seen continued rhetorical attacks and often restrictive and punitive measures against people who migrate (in Croatia, Estonia, France, Germany, Hungary, Italy, Ireland, Lithuania, Slovenia and Spain), people from ethnic minorities (Bulgaria, France, Sweden) and LGBTQI+ persons (Czech Republic, Hungary, Ireland and Slovakia).

## ***Weakening democracy is short-sighted***

The less control citizens have over their leaders, the less likely they are to solve the problems that people care about, or pick the solution that serves our best interests. When democracy stops delivering for people, support for authoritarian leaders grows, which can lead to democracy itself being dismantled. European leaders who say they support democracy

should nurture the system that allows them to be in power.

## ***Nurturing our democracies***

This is why in our report we propose a range of recommendations to the EU as to how it can support and protect the rule of law, democracy and fundamental rights in its member states. In a nutshell, we urge the EU to:

- Activate the conditionality mechanism in relation to Poland and set the amount of suspended funds for Hungary and Poland at a sufficiently high level to secure genuine reforms
- Improve the way it reports on the rule of law by broadening the scope of the report to include contextual factors that have an impact on or indicate the health of the rule of law, such the existence of systemic human rights issues
- Improve the way it monitors progress or regression by using the Commission's annual report as the basis for structured dialogue between the institutions and national governments, to which national parliaments and civil society can contribute
- Use all available powers to support or pressure governments to promote and enforce rule of law standards, including suspending funds to a government under the conditionality mechanism, giving funding to support journalism and civil



society, infringement procedures, the Article 7 procedure, and issuing guidance

- Ensure that initiatives that could have an impact on the rule of law are used to promote the latter to its full potential, such as policies and legislation on digitalisation of justice, disinformation, media freedom and SLAPPs
- Address major challenges to the EU's legitimacy and credibility, such as the Qatargate scandal

## About this report

As in its previous editions, this report offers a comprehensive overview of the past year's most striking developments related to the rule of law as viewed by civil liberties organisations in 18 countries across the European Union (EU).

The Civil Liberties Union for Europe (Liberties) is a Berlin-based non-governmental organisation (NGO) promoting human and digital rights across the EU. As an umbrella organisation, Liberties coordinates campaigns through its expanding network of national civil liberties NGOs. Currently, we have member organisations in 18 EU Member States including Belgium, Bulgaria, Croatia, the Czech Republic, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain and Sweden. As an EU watchdog, Liberties closely follows the development of the EU Rule of Law Report, the Media Freedom Act, the Digital Services Act, the Proposal on Political Advertising & Transparency, the CSAM, the anti-SLAPP Proposal, the AI Act and frequently publishes reports on issues about privacy or surveillance and more.

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.

This is the fourth edition of Liberties' coordinated report on the state of rule of law in the EU. It brings together all the country rule of law reports as developed by our contributing 45 member and partner organisations in 18 EU countries, namely:

- BELGIUM
- BULGARIA
- CROATIA
- CZECH REPUBLIC
- ESTONIA
- FRANCE
- GERMANY
- HUNGARY
- IRELAND
- ITALY
- LITHUANIA
- NETHERLANDS
- POLAND
- ROMANIA
- SLOVAKIA
- SLOVENIA
- SPAIN
- SWEDEN

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 2023 Annual Rule of Law Report, 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.

Each country report reflects the information collected, and the findings compiled by contributing organisations. In developing their country report, contributing organisations were free to choose the areas and issues to report on, which they felt relevant to the national context and to their work.

Based on all the country submissions received, Liberties also compiled an overview of trends giving account of common challenges facing democracies across the EU. While this account of trends does not constitute an exhaustive overview, as country reports differ in scope and in the extent to which the different issues have been addressed, we believe that the information is sufficiently representative to give an accurate indication of the direction of travel for the rule of law and democracy inside the EU. The report further includes a series of recommendations addressed to both national and EU policymakers on how to better address the issues identified.

# ***Rule of law monitoring: why it matters***

## ***A tool to make sure powers and resources are used for the public good***

As an independent organisation committed to safeguarding the rights of everyone in the EU, regularly monitoring and reporting on the health of the rule of law in the EU is one of Liberties' priorities.

The 'rule of law' can be defined<sup>1</sup> as a set of rules and principles that ensure the authorities use their powers and public resources for the good of citizens. This means that the public should be able to follow and participate in decisions taken by their elected representatives, by being able to receive accurate and balanced information from a free and plural media and be free to voice their opinions by, among other things, working through civil society organisations and using their right to protest. It also means that governments should facilitate input from citizens, for example, through transparent law-making procedures and meaningful public consultations. The rule of law also requires safeguards against corruption to ensure that the authorities use public resources legally, and to ensure that

laws adopted by governments respect human rights. To ensure these standards are followed, the rule of law requires independent and impartial institutions which citizens can access easily and which have sufficient powers and resources to enforce the rules. While this primarily relates to a country's judiciary, it also includes other bodies such as ombudspersons and national human rights institutions. When a government respects the rule of law, those who have power in society use it for the good of their citizens, and all individuals are able to enjoy equal rights, freedoms and opportunities, participate actively and freely in social, economic and democratic life.

When a government erodes the rule of law, it is free to abuse its powers and serve the private interests of the ruling party at the expense of the public good. At its most serious, governments attack the rule of law to facilitate corruption and enrich themselves and their business allies, to remove rights and freedoms so citizens cannot hold their representatives to account, and to attack equality for marginalised groups as a way of mobilising their base. For example, judges who are not independent of politicians or businesses may be unwilling to hold powerful corporations to account for breaking laws that protect people or the environment. If a government creates laws that

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<sup>1</sup> See <https://www.liberties.eu/en/stories/rule-of-law/4427>

allow for exceptions or preferential treatment for their allies, corruption may become rampant and politicians may freely pocket our resources for themselves instead of funding the things our communities rely on, like schools and hospitals. If laws are adopted without transparent discussions that do not allow the public or those with expertise to contribute, the government may use the legislative process to arbitrarily take away from some people the opportunity to find work, to get healthcare, to join associations, or to receive an education. Without a free and open public debate, and when the right to be informed and to engage in critical thinking and expression is hampered by surveillance, censorship or retaliation in the form of, for example, administrative or legal harassment, citizens cannot speak up and shape the society we live in.

People are, therefore, the ultimate beneficiaries of governments' obligation to abide by the rule of law. It is important to monitor the state of the rule of law so that economic, political and legal tools to protect and restore the rule of law can be mobilised and directed appropriately by the EU and other entities that promote human rights and democracy.

## ***Compliance with democratic standards should never be taken for granted***

While member states in the EU are generally recognised as having very high standards when it comes to rule of law, democracy and human rights, this should never be taken for granted. Developments we witnessed over the past years are a stark reminder.

Past editions of this report noted emerging concerns over the resilience of democracy and the rule of law in countries across the EU. In some countries, namely Hungary and Poland, threats to the rule of law have been systematic and deliberate. Steady efforts by the governments in power to progressively dismantle democracy to be able to hold on to power became even more blatant during the COVID-19 emergency, where ruling parties abused the pandemic to further erode democratic standards. We also found that Slovenia was at risk of following Hungary and Poland down a similar authoritarian path. This year, we are happy to report that Slovenia's new government has begun to reverse the damage caused by its predecessor.

In general, however, traditionally strong democracies have continued to disappoint. In successive years, Liberties' reports have pointed to worrying and widespread concerns including in countries with strong democratic traditions, in all the areas covered by the rule of law monitoring exercise.

This year we report again that the situation for the media and civil society, in particular, continues to become more worrisome. Sadly, good developments and practices aimed at improving long-standing problems affecting justice and anti-corruption systems stood out again as exceptions. At the same time, systemic human rights violations have continued unaddressed, as illustrated by the documentation of widespread national practices of illegal pushbacks, or the involvement of some member states in large-scale privacy and surveillance scandals, such as the Pegasus spyware scandal. The normalisation in a number of EU countries of accelerated lawmaking and the failure to anticipate and address the impact of the COVID-19 pandemic on vulnerable groups is also a sign of governments' inability – and sometimes deliberate refusal – to fully respect the rule of law, democratic principles and people's liberties when addressing current challenges.

These trends underline how in the EU, as in other parts of the world, democratic standards should be never taken for granted and promoting and upholding the rule of law, democracy and human rights requires continued vigilance and constant improvement.

## ***Feeding efforts to protect our democracies***

As reflected in the Treaties, which constitute the foundation of the Union, political leaders in the EU have long committed to safeguard these principles and rules as a shared responsibility of all EU institutions and governments.

This commitment has in recent years materialised in a number of tools with which the EU has progressively equipped itself to detect potential threats to the rule of law and hold governments to account in case of deliberate attacks and systemic failures. The 'rule of law toolbox'<sup>2</sup> put together by the European Commission includes a yearly audit on the state of the rule of law across the EU. The findings of this exercise are summarised in annual rule of law reports that have, since last year, been accompanied by country-specific recommendations.

Each of the EU institutions should use these reports as the basis for a dialogue with governments on how to solve shortcomings in their country.<sup>3</sup> And such dialogues should include national parliaments, civil society and other stakeholders capable of playing a role in exposing problems and developing and implementing solutions. When dialogue fails, the EU institutions should move on to enforcement – including infringement proceedings, suspension of EU funds under the budget conditionality regulation<sup>4</sup>

2 For more information, check [https://ec.europa.eu/info/sites/default/files/rule\\_of\\_law\\_factsheet.pdf](https://ec.europa.eu/info/sites/default/files/rule_of_law_factsheet.pdf)

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

4 [https://ec.europa.eu/info/strategy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation\\_en](https://ec.europa.eu/info/strategy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en)

and special political sanctions under Article 7 of the EU Treaty.

Civil society, including NGOs such as Liberties and its member and partner organisations, has actively engaged to feed efforts by the EU to monitor and protect the rule of law. This has included substantive contributions to inform the Commission's annual rule of law audit as well as recommendations on how to make sure monitoring translates into enforcement and tangible improvements that benefit citizens. Our contributions can be found in past editions of Liberties' rule of law report, including the 2022 report,<sup>5</sup> as well as joint civil society statements.<sup>6</sup>

This year, we found that the European Commission has made good progress towards making its annual rule of law reports more meaningful. For example, by, after many years of encouragement, including country-specific recommendations. But there is still room for improvement in the Commission's annual report. As Liberties recently set out,<sup>7</sup> we urge the Commission to:

- embrace a more critical analysis of rule of law developments, going beyond merely reporting of quantitative and qualitative trends over time, but also giving an account of the context in which such trends develop and what they point to, both at national and

EU level. For example, the Commission illustrates yearly developments concerning the legal framework for civil society organisations. But it does not put this in the broader context of a shrinking civic space which has affected EU countries over the last ten years. This means its report cannot convey a clear picture of how such developments are weakening the rule of law;

- fill the monitoring gaps, in particular as regards the failure to ensure compliance with human rights standards. In many member states, governments have, for example, long failed to guarantee the right to seek international protection, offer dignified detention conditions, keep law enforcement accountable for violence and abuse, and engaged in racist practices and segregation. However, these serious problems are not accounted for within the narrow rule of law monitoring conducted by the European Commission, which only looks at limited aspects concerning justice, corruption, media freedom, checks on the executive and the environment in which civil society operates. As a result, some countries may be judged as having improved their rule of law framework because of steps taken to strengthen the efficiency of their courts, or to better prevent corruption, while still engaging in such systemic human rights violations,

5 Check key findings and download the report here <https://www.liberties.eu/en/stories/liberties-rule-of-law-report-2022/43972>

6 See for example the joint statement coordinated by the European Partnership for Democracy: <https://epd.eu/wp-content/uploads/2021/10/joint-statement-on-rule-of-law-reports-22-09-21-epd.pdf>

7 <https://www.liberties.eu/en/stories/eu-commission-third-rule-of-law-report-progress-but-more-action-needed/44372>

which are a clear sign of an overall flawed rule of law environment;

- formulate recommendations in a clear, concrete and measurable way, with a set timeline for implementation and a transparent monitoring and follow-up mechanism. The process should better allow, facilitate and value input by independent bodies and watchdogs, including when it comes to country-specific rule of law dialogues, be it among member states in the Council or at national level. It should also be better connected to the preparation and triggering of enforcement actions such as infringement proceedings and the conditionality regulation.

As it improves the way it monitors, reports on and reacts to threats to the rule of law in its member states, the EU should also address upfront any major challenge to its legitimacy and credibility. The steps taken by the EU to rein in the continued and deliberate attacks to democracy by Hungary and Poland, in particular by pursuing infringement proceedings to enforce the Union's founding values of democracy, fundamental rights and the rule of law, and making use of EU funds' conditionality, have been unprecedented. However, the EU has had mixed success in exerting a positive influence. Against the background of Russia's war against Ukraine,

the EU decided to take firmer action against Hungary (which isolated itself politically by supporting Russia) than Poland (which has gone to lengths to support Ukraine),<sup>8</sup> though even then, the Council weakened the Commission's proposal under the conditionality mechanism in exchange for Hungary lifting its veto on aid to Ukraine.<sup>9</sup> At the same time, the EU's own reaction to emerging threats to democracy have raised concern. For example, the EU's bans on Russia Today and Sputnik as a way of combating Russian state-sponsored disinformation alarmed some commentators for setting a dangerous precedent.<sup>10</sup> And the shocking revelations of the Qatargate corruption scandal rocking the European Parliament, are likely to have damaged the credibility and moral standing of the EU, which it will need to win public support for protecting the rule of law, especially when this involves measures that authoritarians can spin to their advantage, such as cuts in EU funds.

Against this background, Liberties will continue to support its member and partner organisations as they work to monitor and advance rule of law, democracy and human rights in their countries; but also to act as an independent watchdog over the EU, so that its actions and initiatives are coherent with the integrity and moral high ground that it takes to effectively protect our democracies.<sup>11</sup>

8 For an analysis, see <https://verfassungsblog.de/unexpected-complications-the-impact-of-the-russian-invasion-of-ukraine-on-the-rule-of-law-crisis-in-the-eu/>

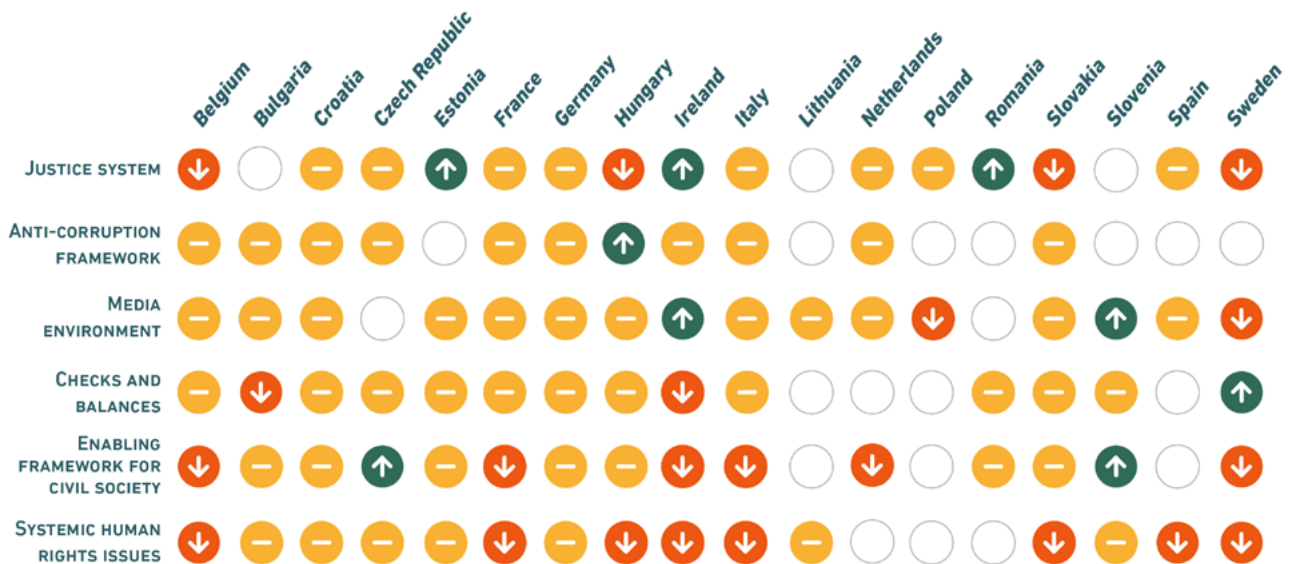
9 <https://www.euronews.com/my-europe/2022/12/13/hungary-lifts-vetoes-on-ukraine-aid-and-corporate-tax-to-lower-frozen-eu-funds>

10 Check for example <https://verfassungsblog.de/the-risk-of-tunnel-vision-in-targeting-russian-disinformation/>

11 For an overview of Liberties' work and achievements, see <https://www.liberties.eu/en/stories/year-end-thank-you/44595>



# Common challenges facing our democracies: overview of trends and key recommendations to policy makers



## Legend

- ↓ Regression
- No progress
- ↑ Progress

## ***Delivering justice: old problems remain, as reforms disappoint***

### **Key findings**

- In Hungary and Poland, where systemic attacks on the judiciary have been part of the deliberate rule of law backsliding pursued by the ruling parties over the past decade, the pressure exerted by the EU triggered some positive developments in a number of areas. However, these often appear to be just cosmetic fixes aimed at achieving an agreement on the release of EU funds, rather than genuine efforts to repair and restore the independence of the courts.
- In countries where promising reforms were initiated last year, their implementation failed to show results, while in others it remains to be seen whether they can live up to their expectations.
- In several member states, the independence of judges and courts remains threatened because of obscure appointment procedures, opaque allocation of cases, corruption or government control over judicial oversight bodies. The independence of the criminal justice system also encounters serious challenges, with numerous reports of judges and prosecutors abusing their power or not being held accountable for their actions.
- A lack of financial and human resources continues to affect the quality of the justice system in most of the covered member states, although some countries have taken measures to improve the situation.
- In a number of countries, access to justice remains difficult due to inadequate legal aid systems, high litigation costs, as well as the failure to cater for the needs of vulnerable groups.
- The transparency of court decisions remains an issue in several countries, while in others, reforms and digitalisation have led to some progress.
- The fairness and efficiency of the justice system still suffers from lengthy procedures in most of the countries covered, with little or no progress over the huge backlogs and delays in court proceedings.
- Alongside overcrowded prisons, the excessive use of pre-trial detention, where international human rights standards are not always respected and where discrimination is prevalent, continues to affect the criminal justice system.

Last year, Liberties' rule of law report showed **large discrepancies between the proper functioning of justice systems across EU member states**. While some progress was reported in those countries where reforms were underway or planned, our research also found that governments failed to address important issues, and in some cases, deliberately weakened the judiciary to dismantle the rule of law. **Common problems** included pressure on the independence of courts, poor efforts to improve the quality of justice, and insufficient efficiency, transparency and compliance with fair trial standards.

This year's report finds that the implementation of **wide-ranging reforms**, in particular in the Czech Republic, Romania and Slovakia, have **not lived up to expectations**. While there have been **new efforts** to increase the quality and efficiency of the justice system, for example in Estonia, Ireland and Italy, the **common problems** reported on last year, in particular affecting the **independence of courts**, have largely gone **unaddressed** in the majority of the countries. In **Poland**, the government has taken steps to remedy systemic deficiencies regarding the independence of the justice system, but many concerns remain, especially regarding the disciplinary regime for judges, the independence of the National Council for the Judiciary and the independence of prosecutors. In **Hungary**, things have gotten worse: the political pressure on judges, smears, obstacles to the work of the Judicial Council, and reports of corruption and abuse of power involving judicial leaders have led to a deterioration of the justice system in 2022.

## *Independent courts*

Serious concerns persist regarding the **independence of judges and courts**. The country reports have identified several issues related to the **appointment of judges and prosecutors**. A new regulation on the **selection of judges** is in effect in the **Czech Republic**, but there are concerns about its practicality. In **Slovakia** and **Romania**, the **criteria to appoint a judge** are not clear enough and, in some cases, not based on competence. This is in contrast with **Ireland**, which responded to critics concerned over a politicised appointment system by proposing a new bill that includes a new merit-based process. In **Hungary**, judicial appointments lack transparency and there are concerns over **nepotism**, as unqualified friends and family of well-connected politicians have taken senior posts in the court system. In **Germany**, the promotion of judges and prosecutors is too dependent on political connections. Judges in **Poland** and **Hungary** also face **political pressure**, as those who oppose the government's views are suspended or transferred or face threats and smears.

Flawed appointment systems also impact the **independence and functioning of constitutional and supreme courts**. In **Belgium**, the **Czech Republic** and **Hungary**, the system to appoint judges to the Constitutional Court remains obscure; **Belgium** introduced a bill to address the issue. In **Spain**, the appointment of new judges to the Constitutional Court is still delayed. Decisions of constitutional and supreme courts in some countries cast doubts over the independence and effectiveness of their constitutionality review. Ruling

on criticised criteria on the appointment of court presidents, the Constitutional Court in **Poland** found Article 6 of the European Convention of Human Rights incompatible with the Polish Constitution, rejecting **the primacy of European law over Polish law**. Certain practices of the **Constitutional Court** in **Romania** have led to a loss in public confidence in the institution. On a positive note, a new bill was passed in **Sweden** to facilitate appointing retired judges to Supreme and Constitutional Courts to tackle the increasing backlog of cases and improve efficiency.

The **impartiality of courts** is also affected by the **obscure allocation of cases**, as reported in particular by our members in **Bulgaria, Hungary** and **Poland**. In **Bulgaria**, for example, the chairman of the Supreme Administrative Court pushed for a new case distribution system; the next day he was allocated three cases connected to an important corruption scandal which he was involved in. In **Poland**, despite transparency initiatives by civil society and a Supreme Administrative Court ruling, the Ministry of Justice refuses to disclose the **source code of the algorithm** that allocates cases.

Challenges to the independence of the **criminal justice system** continue to raise concern in many countries, including **Belgium, Bulgaria, the Czech Republic, France, Germany, Ireland, Poland, Spain** and **Slovakia**. In **Poland** and **Slovakia**, there is an **abuse of power by the Prosecutor General**. In **Bulgaria, the Czech Republic, France, Poland** and **Slovakia**, prosecutors lack independence and/or are not **held accountable**

for their actions. Our members in **the Czech Republic** and **Poland** argue that the whole criminal justice system lacks **impartiality** and **independence**. Germany struggles with efforts by the **far right** to call on its members and supporters to become **lay judges** and far-right efforts to influence appointments, while our member in **Ireland** raises serious concerns about the Special Criminal Court.

The country reports also find issues in the **accountability of judges**. **Poland**, following a 2021 decision by the CJEU, dissolved the highly criticised Disciplinary Chamber of the Supreme Court and replaced it by a different chamber, but there are fears that little will change. In **the Czech Republic**, our members find that there are **insufficient possibilities to appeal disciplinary board decisions**. In **Romania**, a new regulation on the financial liability of judges and prosecutors negatively impacts the functioning of the justice system. Cases of judges being involved in **criminal activities**, including accepting **bribes** and **corruption**, thereby hurting the judiciary's reputation, are reported in **Bulgaria, Croatia, the Czech Republic, Hungary** and **Slovakia**. There are also positive signs in **Estonia**, where judges are held accountable and reprimanded for misconduct, and in **Ireland, Hungary** and **Slovakia**, where **judicial conduct** and **ethics codes** were strengthened – although in **Hungary**, the Supreme Court wants to revisit the decision. In **the Netherlands**, the government proposed a new draft bill aimed at **strengthening judicial integrity**, and in **Croatia**, the State Judicial Council has taken measures following a corruption scandal involving judges. As regards **remuneration**,

our members in **Poland** report of **reduced salaries of judges** and a lack of transparency regarding the **assets of corrupt judges**. In **Hungary**, the promotion system for judges is now more strictly regulated, but according to our member the practices remain substantially unchanged.

Against this background, **judicial oversight bodies** continue to face serious challenges in several member states. In **Bulgaria, Slovakia** and **Spain**, the independence of the judicial council is still threatened. While the National Judicial Council in **Poland** remains under complete **government control**, the legitimacy of the **Hungarian** National Judicial Council has been restored, although it lacks sufficient powers and its members face government smear campaigns. In contrast, **Ireland** has set in place new procedures to facilitate complaints about alleged judicial misconduct, while a discussion is ongoing in **Italy** over a proposed reform of the national judicial council.

### **Quality of justice systems**

The **quality of the justice system** still suffers from **low financial and human resources** in **Belgium, the Czech Republic, Estonia, France, Germany, Poland** and **Spain**. In **France**, this chronic underfunding results in **poor working conditions**, including unpaid overtime for legal professionals. Meanwhile, in **Spain**, the government has proposed a bill to enhance the efficiency of the justice system. Our members in **Belgium, Estonia, France, Ireland** and **Poland** raise concerns about the insufficient number of judges. In contrast,

**Croatia, Ireland** and **the Netherlands** have increased the **judiciary's budget**.

Developments in **digitalisation** are reported in **Belgium, the Czech Republic, Estonia, Ireland, Poland, Slovakia** and **Spain**. In some cases, this is positive, as it can increase quality and facilitate administrative work, but there are also concerns that the use of technology, such as **videoconferences**, affects the fairness and efficiency of hearings and trials.

A new reform in **Estonia** increases the **specialisation of courts** and modernises the management structure. In **Slovakia**, Parliament approved a **new judicial map**, deepening the specialisation of general courts and reducing the number of courts in order to improve the effectiveness and accessibility of courts, fight corruption and increase transparency.

**Access to justice** remains particularly difficult in **Croatia** and **Ireland**, where **litigation costs** are very high. This has an especially heavy impact on vulnerable groups, such as migrants and persons with disabilities. The **legal aid system** is insufficient in **Belgium, Croatia, Estonia, Ireland** and **Sweden**, which is sometimes a result of the low compensation rate of legal aid lawyers. In **Sweden**, the “loser pays” rule is often an insurmountable barrier for people to assert their fundamental rights in court. In **Germany**, undocumented migrants are blocked from seeking justice due to the risk of deportation.

As regards the **transparency of court decisions**, the picture is mixed. Our members in **Belgium, Germany, Ireland** and **Slovakia**

criticise the accessibility of court decisions, whereas our members in Croatia, Estonia and **Hungary** notice improvements thanks to reforms and digitalisation.

**Croatia** and **Ireland** have taken or are taking measures to provide **training for judges and other legal professionals**. Meanwhile, our members in **Italy** criticise the **lack of anti-SLAPP courses** for legal practitioners and journalists, and in **Sweden**, the lack of human rights training.

### *Delivering fair and efficient justice*

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**Lengthy procedures** are one of the main issues affecting the **fairness and efficiency** of the justice system. Our members in **Belgium, Croatia, the Czech Republic, Estonia, France, Germany, Hungary, Italy, Ireland, Poland** report lengthy procedures, often caused by a lack of resources, leading to immense backlogs and delays in court proceedings, especially for more vulnerable groups like prisoners or migrants. In **Hungary**, since 1 January 2022, a new law allows litigants to obtain **monetary compensation** from the court in the event of an unreasonably long court proceeding, and responses to **freedom of information requests** are timelier, partially in response to the EU rule of law mechanism. In **France**, the execution of judgements remains very long. Despite **several condemnations by the ECtHR** for violations of the right to be tried **within a reasonable time**, the judicial framework remains unchanged in **Belgium**.

**Fair trial standards** are often not respected – as reported, for example, in relation to cases concerning the expulsion and return of migrants in **Sweden**, family law proceedings in **Ireland**, and criminal proceedings in **Italy**. Discriminatory practices within the justice system are not properly monitored and addressed in **Sweden**. In **Ireland**, there is a lack of interpretation resources, which impacts especially people with disabilities, victims of discrimination and third-country nationals. In Italy, a shortage of qualified interpreters makes access to justice difficult for non-Italian speakers.

As regards **criminal justice**, the use of **pre-trial detention** is still prevalent in **Belgium**, where non-Europeans face abusive practices and discrimination, and in **Ireland**, which has seen within the last decade a steady increase in the number of women in pre-trial detention. Meanwhile, the Constitutional Court in **Romania** decided that persons unlawfully detained should receive compensation. In **Sweden**, our member reports an expanded use of temporary detention facilities which do not respect human rights standards. Our members in **France** and **Ireland** point to systemic prison overcrowding, which remains a major issue. In **Italy**, a new decree makes life harder for prisoners, in particular those sentenced to life imprisonment, for example by reducing the possibility to get **penitentiary benefits**, while on the other hand another reform facilitates the use of **alternatives to detention** and incentivises **restorative justice**. Our member in **France** is concerned about the highly controversial new police reform that would bring the **judicial police**, responsible for the most

complex crimes, under control of prefects, who are themselves under the control of the Ministry of Interior, thus risking the independence of the judicial police. On a positive note, in **Estonia**, new amendments aim to improve the availability of support to victims of crime, violence or crisis.

### **Recommendations**

#### **Governments should:**

- Ensure the independence of the judiciary by reviewing the appointment system for judges and prosecutors, with transparent processes and clear selection criteria.
- Make sure that bodies tasked with overseeing the judiciary enjoy full independence and are adequately equipped and resourced to perform their work.
- Allocate more resources to the justice system, increase the salaries of judges, court officials and other legal professionals and invest in an efficient and fair legal aid system.
- Improve the digitalization of the justice system while preventing and addressing any negative impact on the fairness of trials which the use of technology, such as remote hearings, may entail.

- Make the justice system more transparent by creating online, publicly available databases of all court decisions.
- Ensure the fairness and efficiency of the judiciary by taking steps to shorten the length of court procedures, tackling the excessive backlogs and guaranteeing fair trial standards.
- Respect relevant decisions by European and international courts and restore public confidence in the justice system.

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

- Maintain the pressure on Hungary through the rule of law conditionality mechanism and trigger the mechanism towards Poland in the absence of genuine steps to restore the independence of their judiciary.
- Use all its powers, including guidance, peer pressure and infringement proceedings, to promote and enforce international standards on the independence of the justice system.
- Use EU funding, including the recovery and resilience fund, to push for tangible and specific investments in the area of justice to make it more accessible, fairer and efficient for the benefit of all people in society.

- Ensure that EU initiatives on the digitalisation of justice<sup>12</sup> serve to promote efficiency in full respect of fair trial standards.
- Initiate work towards an EU recommendation on standards on detention, including detention conditions, pre-trial detention and alternatives to detention.

## ***Preventing and combating corruption: too little, too late***

### **Key findings**

- While in a number of countries levels of corruption remain high, there has yet again been little progress in the prevention and fight against corruption. Even in those few countries where progress is noticeable in certain areas, it comes at a slow pace.
- There have been several high-level investigations and prosecutions of corruption cases, albeit with mixed results.
- Rules to effectively fight against corruption are still insufficient overall,

particularly as regards conflict of interest laws and lobbying regulation.

- While some countries have taken measures to increase whistleblowers' protection, others are still lagging behind.

**Last year's report** showed a **bleak image of corruption levels** in the EU, particularly in Hungary, where the situation was reported as significantly deteriorating, but also elsewhere. The report pointed at how governments **misused pandemic recovery funds** through **opaque public tenders** and **weakened public procurement standards**. Progress recorded was little and limited to a couple of countries only.

Our findings from this year's report show that **the situation in 2022 has remained more or less the same**. Levels of corruption remain too high in countries like **Croatia** or **Hungary**, and governments are failing to take genuine steps to effectively prevent and fight corruption, although our member in Hungary reports slight progress. Several countries still struggle with **weak conflict of interest laws**, **poor lobbying regulations** and insufficient measures to ensure **whistleblower protection**. However, not all is grey; there have been steps in the right direction, including in the field of transparency, and **civil society organisations** continue to help detect and investigate corruption cases.

12 [https://eur-lex.europa.eu/legal-content/EN/TXT/DOC/?uri=PI\\_COM:Ares\(2020\)4029305&cfm=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/DOC/?uri=PI_COM:Ares(2020)4029305&cfm=EN)



## Levels of corruption

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**High corruption levels** remain a serious issue in numerous member states. **Hungary** in particular suffers from **systemic corruption** problems at the highest levels of state decision-making, although some progress was made thanks to requirements linked to the EU recovery and structural funds. In **Croatia**, one of the most corrupt countries in the EU according to Transparency International, and **Ireland**, 2022 saw corruption cases involving **high-level officials**.

Our members and partner organisations in **Croatia, the Czech Republic, France** and **the Netherlands** report about issues around **public procurement procedures**. In **the Netherlands**, most public procurement contracts are not published online; in **the Czech Republic**, there are obscure deals between the government and law firms; and in **Croatia** and **France** there are reports about **favouritism** and corruption in awarding public contracts. In addition, there are concerns about a **lack of transparency in decision-making** in **the Czech Republic, Estonia, France, the Netherlands** and **Slovakia**.

## Framework to prevent corruption

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**Rules to prevent corruption** remain inadequate in most of the countries covered by this report. Reports show that **insufficient transparency** is a major issue in **Croatia**, which has no **code of conduct** for MPs, in **Germany** and **Slovakia**, where **access to information** is too difficult, and in **Ireland**, where our member

criticises ineffective rules on **individual asset declarations** for elected politicians.

In **Belgium** and **Ireland**, there is a **lack of resources** and political obstacles to properly fight corruption. In **the Netherlands**, the sanction that members of parliament face when violating the code of conduct is not a sufficient deterrent to change their behaviour. **Croatia** and **the Netherlands** have a poor record of implementing the recommendation by the European anti-corruption body **GRECO**.

In many countries, **conflict of interest laws** are still weak or even nonexistent, as is the case in **Italy**. In **Slovakia**, issues remain over selection procedures for high-level officials and the legislation on asset declaration is still weak. In **Germany**, new incompatibility and conflict of interest rules leave important issues unaddressed. On the positive side, **Ireland** is undergoing a review of **ethics legislation** regarding monetary gain by politicians, and in **Italy** a new reform is addressing problems connected to its **revolving doors**. This latter point is in contrast with the **Netherlands**, where our partner organisations argue that the government is not doing enough to tackle the revolving doors; for example, the **cooling-off period** is not mandatory.

There are also concerns about poor or absent lobbying regulations. There are still no **lobby registers** in the Czech Republic, Estonia and the Netherlands, although the Czechs are planning one soon. In **Italy** there is still no lobbying law; a draft bill was approved in January 2022, but with the fall of the Draghi government the new Parliament has yet to

schedule new hearings. An ongoing review of lobbying rules is reported by our member and partner organisations in **Ireland**.

However, governments in several member states have also taken steps in the right direction. In **Italy**, for example, a new three-year anti-corruption plan was passed, and international cooperation has led Italian authorities to achieve results in combating **money laundering**. In **Estonia**, a new e-Business registry is facilitating the work of civil society and **investigative journalists** to identify **conflicts of interest** and suspicions of money laundering, although questions remain over the proportionality and the impact on the right to privacy and data protection. In **the Netherlands**, a new law currently under consultation will increase transparency on **political party financing** in order to protect against **foreign interference**, and there is a proposal aiming to improve the integrity of public officials. Even **Hungary** has adopted a number of anti-corruption laws, although our member believes that it is far from sufficient for any meaningful change and they are mere cosmetic fixes.

As regards **whistleblower protection**, the measures taken are not, or not sufficiently, implemented in **Bulgaria, Croatia, the Czech Republic, Estonia, Italy, the Netherlands, Spain** and **Slovakia**, although in some countries there is some progress. Some of the concerns raised by our member and partner organisations include the **lack of financial, legal and psychological aid** provided to whistleblowers. In contrast, **France, Ireland, Romania** and **Slovenia** have passed new measures to protect whistleblowers, although

in **Ireland** they are being implemented too slowly and in **Romania** the provisions remain unclear. In **Slovenia**, the new government adopted a new law not only transposing the European Whistleblower Directive, but even going beyond and thus claiming to be more ambitious than the European Directive.

### *Investigation and prosecution of corruption cases*

There are several ongoing **investigations and prosecutions of corruption cases**. High-level corruption cases in **Croatia** led, among others, to the arrest of an acting minister and the indictment of four former cabinet ministers. In **France**, authorities are conducting several investigations that include, among others, the President and the Minister of Justice. In **the Netherlands**, authorities are checking a corruption case linked to Rabobank. In **Croatia** and **France**, **civil society** is active in detecting and investigating cases of corruption and conflict of interest.

However, in some member states, anti-corruption authorities still face many **obstacles**. In **Belgium** and **Ireland**, for example, anti-corruption authorities lack the necessary resources to properly conduct their work. In **Spain**, our member criticises the **inefficient handling** of high-level corruption cases by the judiciary. Civil society in **Croatia** goes so far as to say that the government is simply **simulating the fight against corruption**.

## **Recommendations**

### **Governments should:**

- Adopt lobbying regulations in line with international standards and ensure that rules on lobbying activities are consistently applied, including by creating a lobby register.
- Improve transparency of public procurement procedures by publishing public contracts online.
- Publish and enact comprehensive updated public ethics legislation.
- Strengthen conflict of interest framework and create a mandatory cooling-off period with adequate sanctions to stop the revolving door.
- Transpose the European Whistleblower Directive and dedicate more resources for the protection of whistleblowers, including legal aid and psychological support.<sup>13</sup>

### **The EU should:**

- Maintain the pressure on Hungary through the rule of law conditionality mechanism as long as the government will not take genuine and effective steps to end systemic corruption.

- Strictly monitor the transparent and lawful disbursement of EU funds, including recovery and resilience funds, and use its enforcement powers to ensure respect for public procurement and other relevant EU rules.
- Take steps to prompt progress in the transposition and implementation of rules contained in the European Whistleblower Protection Directive, in close cooperation with non-state actors including civil society.

13 Learn more on whistleblowers: <https://www.liberties.eu/en/stories/whistleblower/44444>

## **More efforts needed to guarantee media freedom and pluralism in the public debate**

### **Key findings**

- In several member states, media freedom and pluralism continue to suffer from political and economic pressure. The media landscape across the EU is overall characterised by a strong ownership concentration and a lack of transparency with regard to media ownership and financing.
- Attacks against journalists, whether by the public, by politicians, by law enforcement or by social media users, remain one of the biggest issues, affecting a net majority of the countries covered in this report.
- Legal harassment and SLAPPs are on the rise, silencing journalists and activists.
- Freedom of expression and information are still under pressure in several countries, with new restrictive laws being proposed, while efforts to fight against illegal hate speech and disinformation remain largely inadequate.
- Disproportionate restrictions on access to public interest information remain common practice in many countries.

Last year's report highlighted increasing restrictions on freedom of expression and information. Our members also reported an increasingly unsafe environment for journalists, including incidents of police violence against journalists and smear campaigns. In several member states, political pressure on independent media led to a steady decline of media freedom and pluralism.

This year's report points to **some positive developments**: Estonia improved significantly on the World Press Freedom Index, the Netherlands renewed its strong political commitment to upholding media freedom at the international level and Slovenia's new government committed to reforming the country's media regulation to restore transparency and pluralism of media. Nonetheless, these remain rather isolated improvements. Sadly, the analysis of the submissions received **overall reflects a further deterioration of the plurality of the EU's media landscape and persisting restrictions on freedom of expression and information.**

### **Pluralism and concentration**

**Strong media ownership concentration** persists in **Croatia, the Czech Republic, France, Italy, the Netherlands, Poland** and **Slovenia**, negatively affecting media pluralism. While in **Slovenia**, one media conglomerate dominates television, online news and video-on-demand platforms, in the **Czech Republic**, private media conglomerates are owned by politicians and state representatives. In **Poland**, a state-owned company owns large parts of the media landscape and the acquisition of regional

press threatens pluralism and the existence of independent media. In **France**, the National Assembly voted against a bill aimed at stopping the strong media concentration. In **Hungary**, the government continues to have a strong grip on the media, shifting its focus increasingly from traditional to online media. Our members in **Croatia** highlight the **acquisition** of a television channel by a media company, further increasing ownership concentration. In **Italy**, the decision to progressively abolish direct state funding to not-for-profit print media and journalistic cooperatives has been delayed. However, journalists criticise that public resources, initially aimed at promoting media pluralism, are allocated to large or medium-sized media outlets. On a positive note, state aid in Slovenia is increasingly being shifted to more **regional newspapers** and in **Italy**, new rules are supporting **freelance journalists**.

Our member and partner organisations in **Ireland, Romania, Spain** and **Sweden** highlight issues around media independence. In **Sweden**, public funding is conditional upon signing a democracy clause, which might negatively impact media independence. Moreover, a new bill attempting to counter antidemocratic media content could have a **chilling effect** and lead to **self-censorship**. Our member in **Romania** reports that public funds are used to bribe media outlets, which become **propaganda tools** for the political parties; civil society actors have tried to shed light with freedom of information requests, but the parties declined to disclose information. In **Ireland**, a new report by the Future of Media Commission makes recommendations

on how to improve the structure and financing of the media.

Member organisations have also pointed to some challenges with regard to **online media**. In **Germany**, the bodies and authorities supervising the online ecosystem lack the necessary competences. In **Hungary**, there has been a significant increase in pro-government content on social media. According to our member, **Facebook** has become the most effective tool of government propaganda. In **Slovenia**, there are challenges with properly addressing **hate speech online**.

A **lack of transparency** with regard to **media ownership** and **financing** has been reported as problematic in **France, Italy, Ireland, Poland, Romania, Slovenia** and **Slovakia**. In Italy, this is an issue especially with regard to the digital space. In Ireland, greater clarity is needed on the decision-making process that informs which media outlets receive state advertising and based on which criteria. In **Poland**, there are no rules ensuring a **fair allocation of state advertising**. In **Romania**, there is no transparency in the allocation of funding by political parties. In contrast, in **Slovakia**, a new media act established a **public register** and improved the rules on media ownership transparency. In **Slovenia**, political misuse of state advertising seems to be addressed, but there is still no specific regulation of state advertising to require transparency and safeguards against political misuse.

**Political pressure over public service media** (PSM) remains an issue especially in **Poland** and **Hungary**, where it is under firm

government control and extremely biased in its coverage. In **Hungary** the situation remains unchanged, with **high editorial interference** from the government and uneven air time allocation for candidates and parties' programmes during the elections. Furthermore, the Hungarian PSM is trying to **destroy the credibility** of organisations critical of the government and it is **openly sharing mis- and disinformation**. In other countries, the issues around the PSM are different but nonetheless concerning. In **Sweden**, right-wing parties are trying to **undermine the legitimacy** of PSM. Our member and partner organisations in the Netherlands and Slovenia criticise a **lack of transparency**; in **Slovenia**, for example, the company managing the primary public service broadcaster has repeatedly restricted access to information. **Financial issues** are also common, as reported by our members in **Ireland, Slovakia** and **Sweden**, and may affect the future viability and potentially the independence of public service broadcasting

The situation with regard to **independent media and telecommunications authorities and bodies** is particularly worrisome in **Hungary** and **Poland**. In Hungary, the media authority is dominated exclusively by the ruling party; critical media has been closed down or starved by state advertising policy or have not had their frequency rights renewed. In **Poland**, the National Broadcasting Council is threatening to **take the licences of critical media**, gives **arbitrary fines**, and some of its members are known for having smeared NGOs or other human rights actors in the past. Moreover, there is no effective **appeal mechanism** against the National Broadcasting Council's decisions.

Our member in **Poland** highlights how the government has changed rules in a way that the media it controls reaches also households with old TV sets. But there are also positive developments. **Ireland**, for example, has a new regulatory body for online media; however, it requires more resources to conduct its work effectively. **Limited resources** for the media regulatory authority are also an issue in **Slovenia**. In **the Netherlands**, the media authority instigated three **investigations**.

**Public trust in the media** is generally low in the countries covered, with the exception of **Estonia** and **Lithuania**, although our member in Lithuania also reports of low trust in written media. Elsewhere, it does not look so good. There is a **major decline** in public trust in media and media-related professions in **Slovenia**. In **Croatia** and **Slovakia**, our members report that the majority of the population distrusts the media. In Hungary, public trust is rather low, but it varies according to the audience's political views.

### ***Safety and protection of journalists***

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**Attacks against journalists** by the public are still a major issue in many member states. In **Belgium, Croatia, the Czech Republic, France, Germany, and Ireland**, reporters have been attacked and harassed by protestors. In **Spain** and **Slovenia**, the levels of violence generally diminished, although in the latter, **online harassment** increased, an issue that is also more and more prevalent in **the Netherlands**. Politically motivated attacks are reported in **Spain**, and in **Hungary** and

**Romania**, journalists are victims of smear campaigns by politicians. Often, the violence also emanates from those who are supposed to provide safety and protection to journalists. Attacks on reporters by the police, law enforcement and/or soldiers are reported by our members in **Belgium, Italy, Poland, Slovenia** and **Spain**. Unfortunately, the perpetrators are often not held accountable for their actions because of a lack of investigation or because it is the police that provide the data. On a positive note, in **Slovenia** there is an **increase in the cooperation** between the police and the Slovenian Association for Journalists to ensure the safety of journalists, particularly during public protests.

Reports show that journalists and their sources are not sufficiently protected from surveillance methods in **Hungary, Italy, Ireland, Poland** and **Spain**. In Poland, for example, authorities do not need prior judicial authorisation to place journalists under surveillance, there is no independent oversight, and authorities must not notify the person that they were the target of surveillance. In **Hungary**, the Pegasus cases remain inconclusive, with several court proceedings pending. In **Spain** over 30 NGOs signed an open letter against the use of the **Pegasus spyware** by governments and requesting an independent investigation. Our member and partner organisations in **Italy, Ireland** and **Poland** deplore insufficient safeguards to **protect the sources of journalists**.

**Legal harassment** and **Strategic Lawsuits Against Public Participation (SLAPPs)** remain an issue in many member states, including **Bulgaria, Croatia, Estonia, France,**

**Germany, Hungary, Italy, the Netherlands, Poland, Spain** and **Sweden**. Legal safeguards against SLAPPs are almost completely lacking. In **Croatia**, they often stem from politicians and judges. In **Poland**, the number of SLAPPs keeps rising, many initiated by public institutions, state-owned companies and public officials.

While governments in **Spain** and **Slovakia** have not taken new measures to improve the protection of journalists, there have been positive developments in **France, Ireland** and **the Netherlands**. In **France**, a new bill aims to protect journalists during demonstrations. Similarly, in **the Netherlands**, new measures are planned to protect journalists, including from doxing. **Sweden** is planning on tightening the criminal law to punish crimes against journalists.

**Women journalists** are particularly hit by cyberattacks and online violence. As reported by our member and partner organisations in **Italy, Ireland, the Netherlands, Romania** and **Spain**, this is coupled with broader challenges facing women in the field of journalism, including pay gaps and an underrepresentation in management positions.

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

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Restrictions on freedom of expression and information have not diminished in the last year. Our members in **Bulgaria, Estonia, Hungary, Ireland, Poland, Romania, Slovakia, Slovenia** and **Spain** report about new incidents of  **censorship** and  **content**

**restrictions.** News laws are being proposed which would allow for even **further restrictions on free speech on public order and security grounds.** In **Poland**, a party of the ruling coalition submitted a draft law that would tighten the existing **blasphemy law**, criminalising, among other things, insults to the church. In **Ireland**, new legislation substantially overhauls the regulation of online expression; while it includes measures to improve online security, it also gives rise to censorship and multiple other concerns. A new **cybersecurity law** in **Romania** criminalises any opinion expressed online that is contrary to that of the state, such as anti-vaccination opinions. Similarly, in Slovakia, the government amended its cybersecurity law following the outbreak of the war in Ukraine, allowing its national security services to **block websites** for national security reasons. SLAPPs, mentioned previously, also play a major role in **silencing journalists.**

At the same time, **efforts to address illegal hate speech** remain disappointing in a number of countries. No genuine steps are being taken in **Estonia**, which only organised a roundtable and banned hate symbols following the Russian invasion in the Ukraine. In **Ireland**, a new bill seeks to criminalise **hate crimes**, but the proposed definition of hatred is overly broad and risks violating the right to freedom of expression. Our member in **Sweden** points with concern to a new draft proposal that targets foreign espionage, but which may have a **chilling effect** on the work of investigative journalists

In several member states, including **Croatia, Estonia, France, Hungary, Ireland, Lithuania** and **Sweden**, new initiatives have been set in place to fight disinformation, although the measures are not always adequate. In **France**, two new bills aim to reduce electoral misinformation, but there are concerns around censorship. While in **Estonia** and **Lithuania**, Russian and Belarusian TV channels and programmes were censored or even banned, Russian propaganda has been prevalent in the media in **Hungary.**

**Restrictions on access to public interest information** remain a problem in numerous member states, including **Belgium, Croatia, Estonia, Germany, Italy, Ireland, Lithuania, Poland** and **Spain.** In some cases, this is due to a strict application of **data protection rules.** On a more positive note, our member and partner organisations in **the Netherlands** and **Slovenia** are highlighting positive developments. In **Hungary**, a law was eventually passed to facilitate access to information, but other laws have undermined the little progress the new rules could have brought.



## **Recommendations**

### **Governments should:**

- Improve the transparency on media ownership and protect and promote a pluralistic media landscape, by supporting smaller media outlets, starting from a fair distribution of public funds.
- Take action to safeguard journalists' safety from attacks, both physical and online.
- End any forms of harassment and surveillance targeting journalists and other watchdogs and protect journalists' sources.
- Offer protection against SLAPPs, including through the introduction of procedural safeguards.
- Tackle disinformation and hate speech on social networks, while respecting human rights standards on the right to freedom of expression.
- Revise unduly broad or vague laws that criminalise legitimate free speech.

- Strengthen the framework for access to public interest information and public documents.

### **The EU should:**

- Support a strong European Media Freedom Act that protects media independence, guarantees media pluralism, provides greater transparency on media ownership and funding, and protects the independence of public service media and media regulatory bodies.<sup>14</sup>
- Closely monitor and report on the implementation of the EU Recommendation on the Safety of Journalists and related EU legislation, such as the Whistleblowing Directive, in consultation and cooperation with civil society and media representatives.
- Swiftly pass a strong EU anti-SLAPP Directive.<sup>15</sup>

14 Learn more on Liberties' recommendations here: <https://www.liberties.eu/en/stories/media-freedom-act-policy-paper/44625>

15 <https://www.liberties.eu/en/stories/oped-euractiv-media-freedom-day/44178>

## **Fast-track lawmaking, poor consultations and weak independent authorities still undermine checks & balances**

### **Key findings**

- Russia's invasion of Ukraine is being used by Hungary as yet another justification to enforce an emergency regime allowing for more restrictive laws and isolation of executive power.
- In a number of countries, despite COVID-19 measures being phased out, lawmaking remains in emergency mode, with the use of fast-track procedures still being common practice.
- The absence and/or ineffectiveness of public consultations in a number of member states continue to decrease the quality of checks and balances.
- In some member states, the work of watchdog bodies such as NHRIs, ombudspersons and data protection authorities has come under closer scrutiny by members of the public and human rights groups, which highlighted their lack of independence and the insufficiency of resources.

Last year's report highlighted various issues regarding the weakening of the checks and balances system. Many country reports had highlighted the abuse of COVID-19 emergency regimes by executive powers, limited transparency in the law-making process, a lack of consultation with the public and civil society and weak watchdog bodies, including national human rights institutions (NHRIs).

This year, the picture remains largely unchanged. **Hungary** has continued to make use of **State of Emergency** procedures to let the executive branch go unchecked, using the COVID-19 pandemic and the Russian invasion of Ukraine as justification. But elsewhere, too, checks and balances continue to suffer from serious deficiencies.

### **Making and reviewing laws**

The **ongoing constitutionality review of COVID-19 measures** shows that hastily passed laws carry the risk of running counter to fundamental laws, as reported in **Romania**. In **Slovenia**, the new government has been **repealing a number of COVID-19 measures** considered to be at odds with equality, human rights and the rule of law.

Yet, **fast-track procedures** have continued to be utilised regularly by the executive to implement new policies without proper review, as reported by our members in **Croatia, France, Hungary, Ireland, Romania, and Slovakia**. In **Romania**, newly proposed amendments risk expanding even more the use of urgent and accelerated procedures.

At the same time, **human rights impact assessments remain weak**, as reported for example in **Sweden**, and the **judicial review of laws is deficient**, as highlighted by country reports on **Sweden** and **Ireland** as regards constitutionality checks, and by the country reports on **Croatia** and **Hungary** as regards **administrative justice**. On a positive note, our member in **Estonia** reported a change in the practice of administrative authorities not issuing decisions open to review, following criticism by the NHRI.

A number of country reports highlight **issues affecting the legitimacy of decision-making**, such as **Croatia** and **Sweden** due to the imbalance between ruling parties and other political forces; **Ireland** due to insufficient parliamentary oversight; and **Belgium, the Czech Republic** and **Romania** due to lack of transparency. In **Bulgaria**, our member reports an **erosion of legitimacy within government institutions**, for several lawmakers and officials are still in office although their terms expired.

### **Public participation**

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Public participation and transparency are integral parts of the check and balances system. Yet, contributing organisations continue to deplore a lack of effort by the government to engage in regular and genuine consultations with the public and civil society. Our members in **the Czech Republic, France, Germany, Ireland, Romania, Slovenia**, and **Sweden** report a **lack of genuine and efficient consultancy between the government and the public**. For example, contributing organisations

deplore poor communication of laws and regulations in Ireland, while our member in Slovenia stresses the continued violation of rules on public consultations, and our member in Germany points to a malicious use of exemptions under the Freedom of Information Act as a way to hinder public participation in the law-making process.

### **Independent watchdogs**

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A number of country reports alert about **threats to the independence and effectiveness of watchdog bodies such as NHRIs and ombudspersons**. Our member in **Hungary** complains about the lack of independence and ambition of the Commissioner of Fundamental Rights, which is failing to speak up against the government's wrongdoings. In **Belgium, Croatia** and **France** contributing organisations have expressed concerns about a lack of resources and insufficient funding for the NHRI office. The Ombudsman from **the Czech Republic** has been under intense public scrutiny this past year for incompetence, xenophobia, and acting outside of the public's interest, and has been replaced since, while the country still lacks a proper NHRI, as does **Italy**, where the bill on the creation of such institution is still under discussion. In **Slovakia**, the role of the Ombudsman remained vacant for more than seven months over the past year. Our member in **Croatia** deplores that recommendations from the NHRI are often ignored by the government. On a positive note, our member in **Sweden** welcomes the establishment of its NHRI as a positive development, although it calls for the institution's existence and independence

to be stipulated in the Constitution, and for a better review of the framework governing the role and functions of the Parliamentary Ombudsman.

**Other institutions in charge of checks and balances** suffer from structural deficiencies which affect their role and functions: this is the case of the **national preventive mechanisms** in **Belgium** and **Ireland** and of **data protection authorities** in **Germany, Hungary** and **Ireland**. Our member in **Bulgaria** complained about a **general lack of transparency in the selection process** of heads and members of key institutions. By contrast, **Estonia** reported an improvement to its checks and balances system in 2022 with the new Gender Equality and Equal Treatment Commissioner, who was elected by an expert committee, ensuring a higher degree of independence.

### **Recommendations**

#### **Governments should:**

- Rein in the use of fast-track procedures and end the practice of rushing legislation at the end of parliamentary terms.
- Ensure the independence and efficiency of constitutional review mechanisms and enhance human rights impact assessments.

- Respect rules on public participation in legislative processes and increase the frequency and transparency of government consultations with the public and civil society organisations.
- Protect the independence and ensure the proper funding of watchdog bodies such as NHRIs, ombudspersons and data protection authorities.

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

- Conduct an in-depth assessment of the impact of the COVID-19 pandemic on lawmaking, in particular as regards the use of emergency and accelerated procedures.
- Foster a dedicated discussion and provide guidance on how to strengthen public participation as part of upcoming work on civic space.<sup>16</sup>
- Urge governments to set up or strengthen independent and effective watchdog authorities, by enforcing relevant existing EU standards and adopting new ones, for example on NHRIs.

16 The Commission has committed to launch a targeted dialogue with stakeholders on civic space through a series of thematic seminars on safeguarding civic space: [https://ec.europa.eu/commission/presscorner/detail/e%20n/ip\\_22\\_7521](https://ec.europa.eu/commission/presscorner/detail/e%20n/ip_22_7521)

## Attacks continue on civic space and human rights defenders

### Key findings

- Problematic laws continue to make the work of civil society difficult in a number of countries and, in some cases, have even led to the dissolution of NGOs.
- Although positive developments have been recorded as regards governments' dialogue with civil society in a few member states, the involvement of CSOs in policy-making remains overall insufficient.
- Limited funding opportunities remain a major cause of concern for civil society organisations.
- Restrictions on the right to protest continue to undermine public participation in a number of member states, and are especially affecting climate protests.
- Rights defenders remain the target of physical and verbal attacks, harassment, intimidation attempts, smear campaigns and SLAPPs in a number of countries.
- Worrying trends are reported in the online civic space, particularly regarding a rise in digital violence and hate speech.

Last year's report drew attention once again to how civil society organisations (CSOs) and rights defenders in several member states are being attacked and harassed, threatened and prosecuted with abusive lawsuits, discredited and delegitimised. The report highlighted how victims were usually those who took a critical stance against the government, but in particular LGBTQI+ activists and ethnic minorities. The general trend of last year's report was worrying, as several member states imposed rules restricting freedom of association. Existing issues, such as difficult access to funding or systemic exclusion from decision-making processes, remained.

**This year's report confirms this worrying trend**, as the situation further deteriorated in a number of countries, with very few exceptions where things got a little better.

### Freedom of association

In several countries, concerns remain or intensify as regards the enjoyment of **freedom of association**. This includes **Bulgaria, the Czech Republic, France, Germany, Hungary, Ireland, the Netherlands, Romania and Spain**. Especially worrying are the developments in **France**, where our member reports how their warning from last year's report has evolved into reality, as the so-called law on republican values was enforced to make the work of civil society more difficult and even led to the **dissolution of NGOs** working on anti-Muslim hatred and inclusion. Our partners in **the Netherlands** also point with concern to a new bill which aims to allow the prohibition or dissolution of NGOs on grounds of public order, which creates **fear**

and uncertainty among civil society due to the vagueness and ambiguity of its formulation. In Germany and Ireland, CSOs conducting advocacy work and/or work on certain issues continue to struggle with inadequate and outdated rules which limit their freedom to campaign on human rights issues. In Bulgaria, the Macedonian minority is routinely denied the right of association for manifestly discriminatory reasons. In Belgium, a counterterrorism regulation threatens the criminalisation of humanitarian aid, whereas in the Netherlands CSOs are concerned about a proposed bill that aims to criminalise persons who travel to areas controlled by terrorist organisations, with the exemption for aid organisations and journalists not appearing sufficient to dispel concerns. Our member in Hungary reports how the State Audit Office started enforcing its latest anti-NGO law and impose a burdensome and untransparent audit on NGOs that “influence public life” – an expression which makes clear that it is the government’s view that civil society and citizens should not be free to express views and positions which depart from those of the ruling majority.

CSOs in several member states also continue to express their concerns about the insufficient inclusion of civil society in policy-making. According to our members in Slovakia, civil society is ignored and not recognised as a relevant partner. Similar worries are reported by our member and partner organisations in Italy, which criticise in particular the lack of inclusion in decisions connected to the National Recovery and Resilience Plan. In Croatia, public consultations are said to be largely

pro-forma and proposals by civil society are rarely taken into account. However, there are also positive developments. In particular, in the Czech Republic, the government adopted a new strategy that aims at better involving CSOs in policy shaping and it officially recognised the importance of the work of CSOs, especially in connection with helping Ukrainian refugees. Our member in Slovenia also reports about how the new government has improved the dialogue with civil society, although there remains significant room for improvement.

Funding opportunities for civil society remain problematic in a number of countries. In Ireland, our member and partner organisations criticise the vague and overly broad wording of a law that significantly affects funding opportunities for CSOs working on a wide range of issues, ultimately threatening their very existence. In Sweden, the government has announced the review of several funding schemes, which, according to our member, threatens state funding for CSOs who criticise government policy. Our member in Slovakia criticises the lack of state aid. In contrast, the government in Estonia decided to temporarily exempt the donations to those NGOs working on issues related to the Russian invasion in Ukraine from taxes.

### *Right to protest*

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The country reports also show a negative trend regarding rules on the right to protest. In Belgium, the government published a circular that gives mayors the power to impose a preventive ban on participation in a protest

for persons considered “troublemakers”. In **Germany**, where freedom of assembly has been particularly **under pressure** during the COVID-19 pandemic, authorities have most recently tightened their grip on **climate protests**. Similarly, in **Sweden** and **the Netherlands**, climate activists have been facing disproportionate restrictions, including **criminal prosecutions**. In **Italy**, an **anti-protest law** sent shockwaves through civil society, which feared a serious threat to civic space. On a more positive note, the new government in **Slovenia** is considering revoking and reimbursing fines that the previous government issued to protestors during the pandemic.

### ***(Un)safe environment***

**Attacks against activists, journalists and rights defenders** continue to be a serious issue in a number of countries. In **Slovenia**, civil society actors argue that **physical attacks** against activists are part of a conscious effort to **silence critical voices**. In **Ireland**, there is a growing concern in the number of incidents of assaults, including physical and verbal abuses, attacks on property or intimidation attempts, by anti-lockdown, far-right and other demonstrators against activists. Physical and verbal attacks against protestors are also an issue in **the Netherlands**. In **Bulgaria**, a city court failed to prosecute a well-known right-wing radical politician who physically attacked **LGBTQI+ activists**. In **Belgium**, the government reacted to an increase in **hate speech** and **hate crimes**, especially on the basis of a person’s sexual orientation, with a new plan to protect the LGBTQI+ community. It also presented a new anti-racism plan.

Political actors continue to use **smear campaigns and negative discourses** to intimidate activists and civil rights defenders in a number of countries. In **Italy**, our member and partner organisations report that verbal attacks against civil society by members of the government, including in connection with the **Qatargate** scandal, raise fears of the beginning of a new phase of **criminalisation and defamation of civil society**, undermining its credibility in the public eye. In **Slovenia** and **Sweden**, some politicians lead smear campaigns against civil society actors, including by spreading misinformation, without facing any consequences.

Reports also cover how civil society actors, including human rights activists, are **harassed, criminalised and prosecuted** for their work. In **Croatia, France, Italy** and **Sweden** the victims are especially NGOs that help migrants or climate activists. Abusive lawsuits in the form of **SLAPPs** are becoming more prevalent in **Germany**, especially from right-wing extremists, and continue to be used in **Croatia**, especially against environmental activists. Governments in **Croatia** and **Hungary** have used intimidation techniques in the form of police raids and audits, respectively. In **Sweden**, the government has engaged in a disproportionate scrutinisation of civil society representing or acting in the interest of the Muslim community.

### ***Online civic space***

Civic space is reportedly shrinking online, too. Our member and partner organisations in **Belgium, Germany, Estonia, Ireland, Romania** and **Slovenia** report about worrying

trends, particularly regarding **digital violence** and **hate speech**. In **Slovenia**, online harassment and hate speech targeting activists and CSOs seems to be particularly common and motivated a physical attack against a renowned civil society activist.

These attacks are not being met by adequate responses. For example, our member in **Germany** expressed concern that state authorities do not take online threats seriously enough, and has also pointed at shortcoming in rules to prevent and counter doxing. In Romania, our member points to the authorities' **low capacities** to investigate cybercrime.

Existing laws are also contributing to restricting online civic space. Our member in **Belgium**, for example, has criticised a problematic **data retention law** that obliges service providers to “disable” encryption of certain users at the request of law enforcement agencies, possibly paving the way for increased **online surveillance**. In **Estonia**, our member reports of the case of an anti-racism activist behind an online petition being fined for defamation.

### **Recommendations**

#### **Governments should:**

- Enable and encourage a dynamic civil society environment by providing more funding opportunities for civil society organisations and reducing the administrative burden.

- Facilitate public participation and recognise civil society as a relevant and valuable partner in policy-making.
- Guarantee the right to protest as a crucial element of a functioning rule of law framework.
- Take measures to create a safe civic space that protects rights defenders from physical, verbal and online attacks, intimidation and harassment.
- Offer protection against SLAPPs, including through the introduction of procedural safeguards.

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

- Enhance and expand its monitoring and reporting of challenges affecting civic space, CSOs and rights defenders within its annual rule of law audit and use enforcement powers against restrictive laws breaching EU rules.
- Support the creation of a mechanism to detect and act on the first signs of attacks against CSOs and rights defenders, including a helpline, legal assistance and temporary relocation.
- Develop standards to address challenges faced by CSOs in their



enjoyment of their right to association.<sup>17</sup>

- Build on upcoming work on civic space<sup>18</sup> to develop a policy framework to enable, safeguard and protect civic space at national and at EU level.
- Swiftly pass a strong EU anti-SLAPP Directive.<sup>19</sup>
- Ensure a consistent impact assessment of existing and upcoming EU laws that are (ab)used to limit civic space, in areas such as anti-money laundering, counterterrorism and facilitating irregular migration.

## ***Systemic human rights violations and impunity remain unaddressed***

### ***Key findings***

- In 2022, discrimination and racial profiling remained a prevalent practice. Police brutality and violence continues to go unchecked or unresolved in many countries, with a serious impact on the human rights protections of underrepresented and vulnerable groups.
- Respect for the rights of refugees and asylum seekers continues to be an issue among member states, and violent pushbacks are common practice in some countries.
- There has been a regression in protections for the rights of LGBTQI+ persons among some members.
- The living conditions and rights of prisoners have not improved overall, and prison overcrowding remains an

17 See the European Parliament's proposal to that effect: [https://www.europarl.europa.eu/doceo/document/TA-9-2022-0044\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0044_EN.html)

18 The Commission has committed to launch a targeted dialogue with stakeholders on civic space through a series of thematic seminars on safeguarding civic space: [https://ec.europa.eu/commission/presscorner/detail/e%20n/ip\\_22\\_7521](https://ec.europa.eu/commission/presscorner/detail/e%20n/ip_22_7521)

19 <https://www.liberties.eu/en/stories/oped-euractiv-media-freedom-day/44178>

issue, as well as conditions for psychiatric facilities.

- Impunity persists as redress for victims of government wrongdoings continues to be ineffective, with many member countries not complying with the recommendations and judgments of international human rights bodies.

**Last year's report** revealed patterns of systemic human rights violations and weakening impunity among several countries. These included ethnic profiling and discriminatory law enforcement, regression on the rights of LGBTQI+ persons, and the arbitrary deprivation of liberty. The report pointed at how COVID-19 also had a serious impact on human rights protections, exacerbating existing inequalities and infringing on the rights of vulnerable groups.

With very few exceptions, where some progress has been made, usually initiated by advocacy efforts from civil society, **these patterns remain unaddressed and have even worsened** over the past year. In particular, **human rights violations of people on the move** were even more blatant in 2022, while human rights groups in several countries are increasing the alarm over **racist rhetoric and discriminatory practices**.

## ***Violations of human rights of migrants and asylum seekers***

Increases in border crossings have emphasised the need for countries to reevaluate and restructure existing migration policies. This includes **Slovenia**, which reported a 200% increase in border crossings compared to the previous year. However, governments' responses still fall short of ensuring compliance with human rights. The **deaths of dozens of migrants at the border** in Melilla, **Spain**, have been subject to international investigations, while **illegal, and often violent, pushbacks** continue to be reported in **Croatia, Italy, Lithuania and Slovenia**. Our members in **France, Germany, Hungary, Italy, Ireland, Lithuania, Slovenia, Spain, and Sweden** also report continued **violations of the rights of migrants and asylum seekers**, including as regards their right to seek international protection and asylum seekers' enjoyment of basic rights such as the right to housing. Italy and Sweden's new right-wing governments are slated to put in place even more restrictive laws and policies, further worsening the situation and treatment of migrants and refugees in those countries.

## ***Racism and discrimination***

Racism and discrimination remain issues in many countries. The **rights of indigenous people** have been ceaselessly violated in **Sweden**, while **racist discourse and discriminatory practices targeting Roma and travellers** continue to be reported in countries like **Belgium, France and Ireland**. Our member warned of a **rise in Islamophobia and hate crimes against Muslims in Sweden**. No progress is recorded

in ensuring the recognition, development and justice for people of African descent, as reported in particular in **Ireland**.

The country reports also show little to no progress in reducing and addressing **racial profiling and police brutality**, as reported by contributing organisations in **France, Germany, and Spain**. The lack of accountability of law enforcement authorities for these and other worrying practices is particularly alarming as **overreaching security laws** in countries like **France** and **Spain** remain in place, and governments look at possibilities to **tighten criminal policy and expand coercive measures**, as reported in **Sweden**.

**LGBTQI+ persons also continue to be the target of discriminatory discourse and practices**. Our members in **Hungary** and **Slovakia** report of a particularly unsafe socio-political climate for LGBTQI+ people. On a positive note, fierce civil society resistance led to the failure of a vicious referendum organised by the government as part of its anti-LGBTQI+ discourse. In **Italy**, individual court judgments have shown signs of potential improvement regarding protections for the LGBTQI+ community. However, an increase in homophobia and transphobia, as well as a lack of protections for same-sex couples, hinders proper improvements. Reports show some improvements in LGBTQI+ rights in **Belgium**, which has introduced new and inclusive initiatives to increase protection for the LGBTQI+ community. Meanwhile, **the Czech Republic** and **Ireland** have made no progress regarding overturning preexisting and harmful legislation affecting trans and intersex people.

## *Rights of people deprived of liberty*

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The human rights of people in closed facilities, in particular prisons, continue to be disregarded in many countries. Reports on **Belgium, France, and Ireland** document **poor detention conditions**, overcrowding and flawed complaint procedures in prisons. There has been little to no government action regarding actions to lift the **blanket ban on prisoners voting** in **Estonia**. Contributing organisations in **Belgium, Bulgaria, the Czech Republic, and Ireland** also highlighted **poor conditions in psychiatric, social care, child welfare, and general mental health establishments**. **Forced hospitalisation and coercive practices on people with mental health problems** continue to be denounced in the **Czech Republic** and **Ireland**.

## *Impunity and failure to implement decisions by monitoring bodies*

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**Reparations for victims of historical human rights violations** are still regarded as inadequate and insufficient. The country reports offer several examples, including **the Czech Republic**, regarding compensation and proceedings for victims of illegal sterilisations and obstetric violence; **Ireland**, as regards victims of abuses documented in mother and child homes; **Slovenia**, as regards stateless persons illegally erased from registers 30 years ago; and **Spain**, as regards to victims of the Civil War.

The **lack of implementation of judgments and recommendations by human rights bodies and decisions by supranational courts** also remains a common problem which perpetuates impunity. Country reports on **Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Hungary, Ireland, Italy, Lithuania, Slovakia, Spain, and Sweden** point to the failure by governments to fully implement the judgments and recommendations given to them by international human rights bodies or national and international courts. These decisions concern the violation of human rights standards in areas such as justice, rights of refugees, torture, police brutality, discrimination, racism and environmental protection. Examples include cases such as the continued border controls at the German-Austrian border by German authorities despite condemnation from the Court of Justice of the EU, and Bulgaria's failure to implement judgments of the European Court of Human Rights regarding the attempted eviction of the Roma community from settlements. On a positive note, our members in **Italy** report that the Parliament finally passed a **law introducing the crime of torture into the criminal code**, giving hope of redress to the many victims of police brutality, as long called for by the European Court of Human Rights and international monitoring bodies.

### **Recommendations**

#### **Governments should:**

- Take steps to ensure full compliance with international human

rights standards, including respecting the recommendations and judgments of human rights groups and governing bodies.

- Seek to strengthen the safety and protection of groups regularly discriminated against: refugees and asylum seekers, LGBTQI+ persons, persons in closed facilities, and victims of racial profiling.
- Provide adequate compensation and reparation schemes and dedicate more resources to redress programmes.

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

- Expand the annual rule of law audit to monitor and report on systemic human rights issues that have an impact on the rule of law environment.
- Ensure the relevance of the thematic focus chosen for the annual reports on the EU Charter of Fundamental Rights, in close consultation with international and regional monitoring bodies and with civil society.
- Use its powers to drive progress in the ratification and implementation of human rights instruments and the enforcement of international human rights standards relevant to the EU legal framework,

including in the area of equality, the treatment of persons with disabilities and the rights of migrants and asylum seekers.

- Ensure continued support of efforts by civil society organisations and other independent actors to monitor, report on and take action against human rights violations and impunity, including by making funding available to support strategic litigation in areas relevant to the EU legal framework.

## **Efforts to foster a national rule of law culture are in the hands of civil society alone**

### **Key findings**

- CSOs continue to be a driving force in advocating for new measures and laws to strengthen the rule of law, including by fostering discussions on the state of the rule of law in their countries.
- With few exceptions, no significant efforts were recorded on the side of authorities to discuss existing challenges and promote a rule of law culture.

**Last year's report** highlighted a general lack of effort to foster a rule of law culture on the side of the authorities, with very few exceptions. Governments with authoritarian tendencies reportedly misused the rule of law discourse to manipulate public opinion. Against this background, CSOs made efforts to mobilise citizens' support for rule of law and democracy through awareness raising, policy debates and advocacy, despite their limited resources.

Things have not changed this year. In **Hungary**, the government has continued to smear and discredit stakeholders engaged in the promotion and safeguard of the rule of law, and in particular CSOs, as actors working against state interests. **Reported efforts of state authorities** were limited to Ireland and the Netherlands this year. In **Ireland**, our member commended the government for being receptive to discussions on identified challenges to the rule of law, although noticing this as a rather passive instead of proactive engagement. Our partners in **the Netherlands** reported about regular debates on the rule of law within the national Parliament.

By contrast, the country reports include several examples of **civil society initiatives** contributing to the promotion of the rule of law, such as in **Estonia, France, Hungary, Ireland, Italy, Poland, Slovenia, and Sweden**. These include **public debates** on democracy and the rule of law promoted by our members in Ireland and Sweden, **proposals for reform** presented by our members in Poland and Sweden, as well as **litigation initiatives** in Estonia and Slovenia. Our members' work around **election transparency and turnout** was particularly intense in Hungary, Slovenia and Sweden.

## **Recommendations**

### **Governments should:**

- Foster a genuine and inclusive debate on rule of law challenges and how to address them, and improve cooperation between CSOs and authorities to that effect.
- Support initiatives from civil society and watchdog organisations, including independent monitoring and reporting exercises.
- Amplify actions and debates from the public regarding rule of law suggestions and changes.

### **The EU should:**

- Organise regular, transparent and inclusive national rule of law dialogues in each member state, in close consultation with civil society and other relevant stakeholders.
- Organise an annual rule of law dialogue with civil society stakeholders at EU level, to discuss common concerns and progress made and feed the preparation of future monitoring cycles.

- Better sustain efforts by CSOs and other actors, including through dedicated funding under the Citizens, Equality, Rights and Values programme.

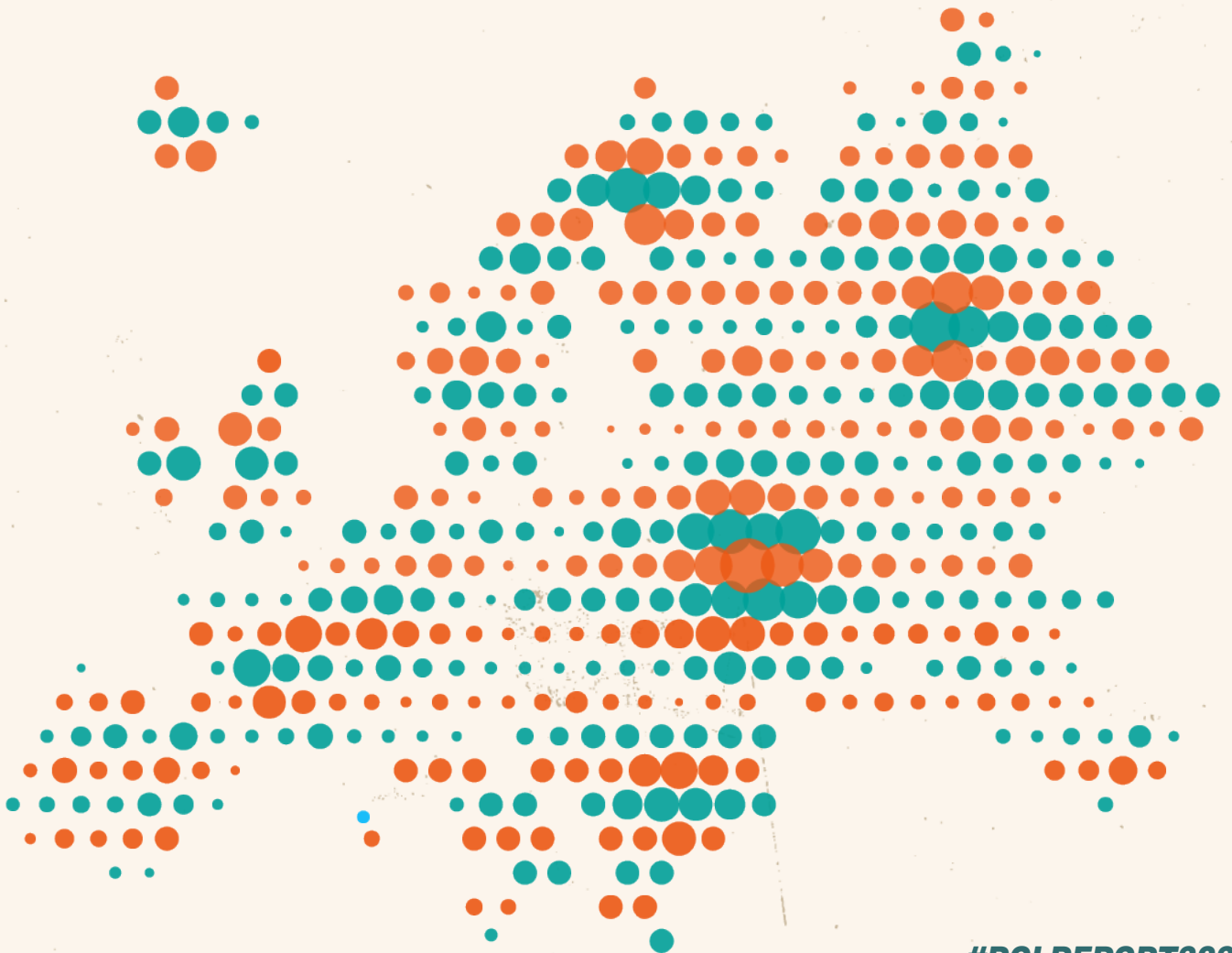
# ***COUNTRY REPORTS***

**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**BELGIUM**



**#ROLREPORT2023**



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EUROPE**

**LIGUE  
DES DROITS  
HUMAINS**



# BELGIUM

## About the authors



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

## Key concerns

The failure by the executive to respect validly rendered judicial decisions in 2022 reached levels never seen before in the country. The refusal to comply with court decisions is a very worrisome issue and shows disrespect for a founding element of the rule of law.

If steps have been taken to implement the European Commission's recommendation to "(...) provide adequate human and financial resources for the justice system (...)", the gap remains too wide: the justice system is severely underfunded and the belief in the good faith of the authorities is low.

The Belgian state continues to deprive prosecution authorities of the necessary resources (financial, human and legal) that would allow an efficient fight against financial crime and corruption, forcing them to reduce their activities.

The Belgian state doesn't guarantee the right to film the police while in action in the interest of public debate, nor does it guarantee that journalists can do their job without fear of being arrested.

If steps have been taken to implement the Commission's recommendation to "strengthen the framework for access to official documents (...)", there is still room for improvement: the system does not work and the various

authorities (federal and Walloon) do not give the mechanism the importance it should have in a democratic state.

While clear progress has been made with the establishment of the Federal Human Rights Institute, concerns remain regarding the lack of independence of certain structures and some worrying trends appear, such as the disdain for the Central Supervisory Board of Prisons or the deepening of the fragmentation of the landscape for fundamental rights protection.

The French-speaking community did not consider the Commission’s recommendation to “strengthen the integrity framework (...) and rules on revolving doors (...)” when it nominated the general delegate for children’s rights, nor did the federal government or that of the Walloon Region regarding other bodies lacking independence.

By choosing to not respect the CJEU decision on data retention and adding a provision on the end of encryption, as well as by giving the power to mayors to pass individual and preventive prohibitions of demonstrations, the Belgian state puts fundamental freedoms in jeopardy.

Belgium has been struggling with certain issues for many years (prison overcrowding, length of legal proceedings, etc.) without any noticeable progress.

## State of play

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

### Legend (versus 2022)

- ⬇ Regression
- ➡ No progress
- ⬆ Progress

## Justice system ⬇

### Key recommendations

- The Belgian state should always respect court decisions, even those that are unfavourable to it.
- To reduce the length of proceedings, it is necessary to provide for massive investment in the judicial sector and give the judiciary control over the management of its budget. The Belgian state should also invest in judicial staff to reduce the dramatic backlog of cases in all jurisdictions, with a special attention to the situation in Brussels.
- The use of videoconferencing should be banned from courtrooms, except in strictly defined exceptional cases and

never in contradiction with the right to a fair trial.

## **Judicial independence**

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

Belgian law states that half of the Constitutional Court judges must be former representatives of the legislature<sup>1</sup> and must be nominated by political parties, which leads to obscure behind-closed-doors political negotiations and deals. Their nomination can therefore trigger political rivalry, as has happened previously,<sup>2</sup> and as happened again in 2022.<sup>3</sup> This situation is unacceptable to guarantee the independence of the Constitutional Court and should be remedied: all Constitutional Court judges must be highly qualified professionals and nominated by the High Justice Council, like any other magistrate.

To remedy such a deficiency, several legislative proposals have been introduced in Parliament,<sup>4</sup>

but none of them had a positive outcome yet. In conclusion, LDH is of the opinion that:

All Constitutional Court judges should be highly qualified professionals and nominated by the High Justice Council; legislative reforms in this direction should be undertaken or pursued.

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

In a state governed by the rule of law, it is the task of the legislator to determine which conduct should be made an offence and therefore be subject to a penalty or not. To ensure compliance with these laws, the Minister of Justice then adopts criminal policy directives that give priority guidance to the prosecutors on the research policy and the prosecution of these offences. Article 151 of the Constitution thus guarantees the “right of the competent minister (...) to issue binding criminal policy directives.”

As part of the definition of this policy, the College of Prosecutors General (*Collège des*

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

2 See among others B. Henne, *Zakia Khattabi : “Le MR a tenté de marchander ma nomination à la Cour constitutionnelle contre 300 millions d’euros”*, *RTBF.be*, 6 June 2020 or P. Walkowiak, *Une Cour, la participation et madame Khattabi*, *RTBF.be*, 16 May 2022.

3 See Belga, *La Chambre confirme Kattrin Jadin comme juge à la Cour constitutionnelle*, *La Libre*, 7 July 2022

4 Proposition de loi spéciale du 2 août 2022 modifiant la loi spéciale du 6 janvier 1989 sur la Cour constitutionnelle en ce qui concerne sa composition et la procédure de nomination, DOC 55 2850/001 (<https://www.lachambre.be/FLWB/PDF/55/2850/55K2850001.pdf>) and Proposition de loi spéciale du 20 janvier 2020 modifiant la loi spéciale du 6 janvier 1989 sur la Cour constitutionnelle en vue de dépolitiser et d’assurer l’égalité de genre dans sa composition, DOC 55 0949/001 (<https://www.lachambre.be/FLWB/PDF/55/0949/55K0949001.pdf>).

*procureurs généraux*) is responsible for providing advice to the Minister, with the objective of “developing a coherent criminal policy”. To this end, it “may make binding decisions for Attorneys General by the Courts of Appeal, the Federal Prosecutor and all members of the prosecution under the supervision and direction of the Attorneys General.”<sup>5</sup>

The role of the College seems a priori well defined. However, the reality is that its role in defining criminal policy and in the public debate is growing. Indeed, several academics<sup>6</sup> and NGOs stressed the fact that “[i]f the legal texts state that criminal policy directives are issued by the Minister, after obtaining the advice of the College of Attorneys General, criminal policy is in fact set by the College of Attorneys General, under the guise of the executive.”<sup>7</sup> And the recent pandemic seems to have boosted inclinations by the public ministry to deal directly with these issues, bypassing the government and adopting a series of particularly broad measures to crack down on COVID violations.<sup>8</sup>

It demonstrates not only the disproportionate importance that prosecutors take in defining the applicable criminal policy, but also the acuteness of establishing a democratic debate on it, especially at a political moment when plans to reform the Code of Criminal Investigation may greatly increase the prerogatives of the prosecutor’s office and questions as to its relative independence remain.

The questions that arise are indeed numerous: multiplication of instruments for defining criminal policy (ministerial circulars, circulars of the College of Attorneys General, police circulars, local authorities); inconsistency of the resulting criminal policy; inequality of citizens under criminal law; the democratic deficit of criminal policy; and a loss of confidence in justice, among others.

It is to be noted that many criminal policy circulars (*circulaires du Collège des Procureurs généraux*) are not published and that the use of these legal instruments is problematic in that they are not controlled by any jurisdiction, as

5 See <https://www.om-mp.be/fr/politique-gestion/college-procureurs-generaux>.

6 C. Guillain, “La politique criminelle: épée de Damoclès du système pénal ?” in *Libertés, (l)égalité, humanité*, Bruxelles, Bruylant, 2018, pp. 1117-1134 ; C. Guillain et M. Alié, “La légalité en procédure pénale : mutations contemporaines d’une exigence constitutionnelle” in *La légalité: un principe de la démocratie belge en péril*, Bruxelles, Éditions Larcier, 2019, pp. 101-139.

7 Ligue des Droits Humains and Syndicats des Avocats pour la Démocratie, *Réforme du Code d’instruction criminelle*, May 2018, p. 10.

8 See Collège des procureurs généraux, COL n° 06/2020 du 25 mars 2020 et toutes les révisions subséquentes (<https://www.om-mp.be/fr/savoir-plus/circulaires>) and D. Tatti, C. Guillain et A. Jonckheere, *Répression des infractions en temps de COVID-19 : nul n’est censé ignorer la loi ?*, L’Observatoire, March 2021.

they are not legislative acts, administrative acts, or judicial acts.<sup>9</sup>

In conclusion, LDH is of the opinion that:

- All criminal policy circulars of the College of Prosecutors General (*circulaires du Collège des Procureurs généraux*) must be published.
- They should be endorsed by the Minister of Justice, who should bear the political responsibility of such acts.
- The criminal policy options of the College should be presented and debated in Parliament prior to their adoption.

## Quality of justice

### Accessibility of courts

As discussed in last year's report, access to justice remains complicated in Belgium, despite the fact that the Constitution expressly states that everyone has the right to legal aid, and that the legislator cannot infringe this right.<sup>10</sup>

However, it should be noted that some improvements can be observed over the years. For example, the thresholds for access to legal aid have been raised<sup>11</sup> and statistics published in 2022 show that it has had an impact on access to the justice system for those citizens who are most in need.<sup>12</sup> Moreover, the current economic crisis risks aggravating the situation.

In conclusion, LDH is of the opinion that:

- The Belgian state should proceed with an in-depth reform of first- and second-instance legal aid and allocate the necessary funding to guarantee an effective right of access to justice for all.

### Resources of the judiciary

The chronic lack of resources in the Belgian justice system has serious detrimental consequences, and is particularly felt in three aspects.

Regarding human resources, the legal framework establishing the number of judges is not respected;<sup>13</sup> in many jurisdictions there is a serious lack of personnel.<sup>14</sup> According to the

9 [Cfr Conseil d'Etat, arrêt n° 223.623 28 May 2013.](#)

10 Const., art. 23.

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

12 See Belga, [Justice: augmentation de 9% des dossiers pro deo depuis l'assouplissement du seuil d'accès](#), *La Libre*, 22 August 2022

13 M. Joris, ["Justice: des juges à bout de souffle, des délais six fois plus longs"](#), *RTBF.be*, 17 May 2021.

14 This article lists the number of magistrates in each judicial district: C. Dath, ["La justice belge est surchargée: quels sont les temps d'attente dans les différentes cours d'appel"](#), *RTBF.be*, 9 May 2019.

CEPEJ Study for the EU Justice Scoreboard, there are a total of 1,524 professional judges sitting in courts in Belgium, which is -0.1% less than in the previous cycle. More precisely, in Belgium, there are 13.23 professional judges per 100,000 inhabitants,<sup>15</sup> which is far below the EU median of 23.92 judges per 100,000 inhabitants. This lack of judges leads in some cases to the postponement and cancellation of hearings.<sup>16</sup>

Financially, the justice system is struggling as well.<sup>17</sup> Since 2018, there have been denunciations of the way the government treats its justice system. The justice budget represents 0.22% of GDP, which is far below the average of other countries of the Council of Europe (0.3%).<sup>18</sup> This way, the government does not give the justice system the means to properly carry out its missions.

On the material level, some progress has been made in digitalising the justice system, but

this is still insufficient, as highlighted by the above-mentioned CEPEJ study.<sup>19</sup> As mentioned in last year's report, the government is considering ambitious initiatives, which are to be completed by 2025.<sup>20</sup>

All in all, the means allocated to the justice system do not guarantee its independence.<sup>21</sup> The only constitutional power against the executive is the judiciary. However, successive federal governments considerably weakened it, which constitutes a danger for democracy as a whole. As the EU Commission puts it, "a lack of human and financial resources remains a challenge for the justice system".<sup>22</sup> In 2022, this is more acute than ever.

The examples of the precariousness of the judicial world could be multiplied: the press has noted that the Brussels Family Court is working "on the verge of asphyxiation"<sup>23</sup> and an NGO (La Ligue des familles) has brought an action for liability against the Belgian state

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15 See <https://rm.coe.int/belgium-country-fiche/1680a7785c>.

16 Belga, *La Justice sonne l'alarme sur son sous-financement*, *La Libre*, 18 May 2022 .

17 All data related to the justice budget can be found on the Federal Public Service website, [https://justice.belgium.be/fr/statistiques/moyens/budget\\_evolution\\_2016\\_2020](https://justice.belgium.be/fr/statistiques/moyens/budget_evolution_2016_2020).

18 See <https://rm.coe.int/cepej-fiche-pays-2020-22-f-web/1680a86277>.

19 See <https://rm.coe.int/belgium-country-fiche/1680a7785c>.

20 Belgian government (2021), National Plan for Recovery and Resilience.

21 Opinion of the President of the French Bar Association in an interview by L. Colart, "*Les avocats attaquent l'état fédéral en justice*".

22 Opinion of the European Commission in its report on the state of law in Belgium as of 2022, Document SWD(2022), of 13 July 2022, p. 4.

23 F. Delepierre, *Le tribunal de la famille de Bruxelles travaille au bord de l'asphyxie*, *Le Soir*, 21 November 2021.

because of the extent of the judicial backlog affecting this same court;<sup>24</sup> the Brussels Labour Court denounced the exhaustion of judicial actors due to the inaction of the administration (Fedasil, in this case)<sup>25</sup> in the context of the asylum seekers' reception crisis;<sup>26</sup> the High Council of Justice described the backlog of the Brussels Court of Appeal as "colossal".<sup>27</sup>

The Federal Institute for the Protection and Promotion of Human Rights repeatedly stressed in 2022 "the importance of equipping the judiciary with the necessary means to judge behaviour that the legislator has criminalised".<sup>28</sup>

### **Digitalisation**

As discussed in last year's report, following the COVID-19 pandemic, the government tried to normalise the use of videoconference for oral hearings. LDH argued in the past that the right of access to a judge must be concrete and effective, not theoretical or illusory. In certain matters, particularly in criminal matters, personal appearance is a fundamental right<sup>29</sup> recognised by the Constitutional Court.<sup>30</sup> The accused should always be able to appear in person.

Despite all those obstacles, the Minister of Interior pushed for the use of video-conferences in cases dealing with migration. The Royal Decree of 26 November 2021, amending the Royal Decree of 11 July 2003 and

24 Belga, Arriéré judiciaire au tribunal de la famille: la Ligue des familles attaque l'État belge, *RTBF.be*, 6 October 2022.

25 See below.

26 Tribunal du travail francophone de Bruxelles, Communiqué de presse - Contentieux Fedasil : plus de 1000 ordonnances sur requête unilatérale depuis le 1er janvier 2022, 24 May 2022. Between 2014 and 2019, the Brussels Labour Court was dealing with a few dozen applications per year. Since then, the number of cases has risen to more than 1,000 per year. In 2022, the figure exceeded 5,000, and the only reason is the reluctance of Belgian authorities to give shelter to asylum seekers who have a legally established right to it (G. Derclaye and M. Biermé, Chaos migratoire: Fedasil condamnée pour procédures "abusives", *Le Soir*, 28 October 2022; A. Costas-Santos, M. Deleixhe, H. El Moussawi, S. Ngo and Y.L. Vertongen, Revoir le modèle d'accueil à Bruxelles: la leçon ukrainienne, BSI Position Papers, no 3, 19 December 2022, <https://bsiposition.hypotheses.org/1425>).

27 Conseil supérieur de la justice, Audit de la Cour d'appel de Bruxelles, 30 June 2022, p. 4.

28 IFDH, Avant-projet de loi relative à l'approche administrative communale, à la mise en place d'une enquête d'intégrité communale et portant création d'une Direction chargée de l'Évaluation de l'Intégrité pour les Pouvoirs publics, Avis n° 13/2022, 30 octobre 2022, p. 7; IFDH, Proposition de loi modifiant la loi du 24 juin 2013 relative aux sanctions administratives communales, Avis n° 14/2022, 29 November 2022, p. 4.

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

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

laying down the procedure before the General Commissioner for Refugees and Stateless Persons and its functioning, was published in the Belgian Official Gazette on 9 September 2022.<sup>31</sup> This decree raises concerns regarding data protection and the loss of quality involved in remote hearing. Replacing a plea hearing with a tele-hearing is giving up on human justice and introduces biases into the debate that hinder its effectiveness. This decree should therefore be repelled.

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

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

As highlighted by the EU Commission 2022 Rule of Law Report, “The Council of Europe’s Committee of Ministers continues its enhanced supervision of Belgium regarding the excessive length of proceedings in civil cases at first instance, and has expressed deep

concerns at the persistent lack of comprehensive statistical data on the first-instance civil tribunals”.<sup>32</sup>

Indeed, data gaps remain with respect to the length of court proceedings and available data shows that the length of proceedings is particularly long. The lack of resources allocated to the justice system is one of the main reasons for the length of proceedings.<sup>33</sup>

This is not a new phenomenon. Belgium has already been condemned several times by the European Court of Human Rights (ECtHR) for violations of the right to be tried within a reasonable time.<sup>34</sup> Despite this, the judicial framework remains unchanged. In the case of *Bell v. Belgium*, the ECtHR condemned Belgium for its excessive length of civil proceedings.<sup>35</sup> As noted by the Federal Institute for Human Rights in July 2022,<sup>36</sup> this condemnation was handed down in 2008 and has not yet been implemented. Backlogs are frequent

31 Arrêté royal du 26 novembre 2021 modifiant l’arrêté royal du 11 juillet 2003 fixant la procédure devant le commissariat général aux réfugiés et aux apatrides ainsi que son fonctionnement (M.B. 9 September 2022).

32 Commission européenne, Rapport 2022 sur l’état de droit – Chapitre consacré à la situation de l’état de droit en Belgique, Luxembourg, 13 July 2022, SWD(2022) 501 final, p. 6.

33 For example, it takes 39 months for a dispute between an employee and his employer to simply be settled in the Labour Court. This example taken from an interview with the President of the Labour Court of Brussels conducted by J. Balboni <https://www.lecho.be/economie-politique/belgique/bruxelles/la-cour-du-travail-de-bruxelles-etouffe-entreprises-et-travailleurs-trinquent/10344220.html>, 5 November 2021.

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

35 ECHR, *Bell v. Belgium*, 4 November 2008, 44826/05.

36 Institut fédéral pour la protection et la promotion des droits humains, Communication au Comité des ministres du Conseil de l’Europe concernant l’affaire *Bell. c Belgique*, 29 July 2022.



in most jurisdictions in Belgium, especially in Brussels.<sup>37</sup>

Maurice Krings, the President of the French Bar Association of Brussels (the largest in the country), stated, “Justice is so slow in Brussels that we risk a return of vendettas”.<sup>38</sup>

### **Execution of judgments**

The failure to respect validly rendered judicial decisions in 2022 was significant, to levels never seen before in the country. This is very worrisome and does not respect one of the founding elements of the rule of law.

Three examples illustrate perfectly the extremely problematic nature of the situation.

In the *Trabelsi vs. Belgium* case, which the ECtHR decided on 4 September 2014,<sup>39</sup> it was shown that Belgian courts have handed down no fewer than five judicial decisions enjoining the Belgian state to respect its obligations, without it deigning to comply.<sup>40</sup> In fact, the

person concerned was convicted and served his entire sentence in Belgium. At the end of his sentence, he was handed over to the authorities of the United States of America, in flagrant violation of the injunctions of the ECtHR. This earned Belgium a severe condemnation by the Court and raised the first doubts about the willingness of the Belgian state to respect judicial decisions. As the Brussels Court of Appeal points out, the responsibility of the Belgian authorities is clear: “...the Belgian state has therefore deliberately and consciously chosen to yield to the demands of the US authorities and to disregard its obligations” and “without the violation of this injunction (...) the appellant would not have been imprisoned or prosecuted for any act whatsoever in the United States, nor would he run the risk of being convicted in the United States (...)” In this case, the Federal Executive has consciously chosen to ignore five decisions of the Brussels Court of Appeal and one decision of the ECtHR. As a result, Mr Trabelsi suffered violations of Article 3 of the ECHR, as established by competent UN bodies.<sup>41</sup>

37 See for instance Conseil supérieur de la justice, Audit de la Cour d’appel de Bruxelles, 30 June 2022.

38 M. Benayad, Maurice Krings: “La justice est si lente à Bruxelles que l’on risque un retour de vendettas”, *La Libre*, 2 August 2022

39 ECtHR, *Trabelsi c. Belgique*, requête 140/10, 4 September 2014.

40 See, for the last ones, Cour d’appel de Bruxelles (référé), 23 mai 2022, n° de rôle 2021/AR/1769 and Cour d’appel de Bruxelles (responsabilité), 12 septembre 2022, n° de rôle 2020/AR/508. See also LDH, Affaire Trabelsi : une question de respect de l’État de droit, 29 September 2022.

41 Consequently, both the UN Special Rapporteur against torture and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, as well as the Special Rapporteur on the right to physical and mental health and the Working Group on Arbitrary Detention, have questioned the Belgian and/or American states about this case, without success to date, despite clear and unmistakable evidence of treatment contrary to Article 3 of the Convention. See

Walloon authorities have awarded licences to arms dealers that authorise them to sell arms and ammunition to the Saudi National Guard, which is at the heart of the Yemen conflict.<sup>42</sup>

Despite mobilisation and warnings by NGOs, the United Nations and academic actors,<sup>43</sup> the Walloon government has not only chosen to turn its head and close its eyes, but it delivered the weapons with full knowledge of the facts, as shown by the various procedures launched by LDH and its partners at the Council of State since the end of 2018. Despite several suspensions or cancellations of the Walloon Minister-President's decisions by the Council of State,<sup>44</sup> the latter has, in the greatest opacity and in flagrant contradiction with the government agreement, granted new licences to allow these weapons to leave Belgian territory. Even more worryingly, the press recently reported<sup>45</sup> that, faced with negative opinions from the ad hoc Commission charged with advising

it, the Walloon government took the decision to change the composition of this body, with the result that the newly composed body now gives positive opinions where it previously gave negative ones.<sup>46</sup> Another dispute, but the same reality: the executive power, whether federal or Walloon, chooses to ignore judicial decisions condemning it.

Another terrible example occurred in October 2022, when the ECtHR was inundated with hundreds of requests from lawyers who fight for the rights of asylum seekers who are on the streets because of a lack of available reception places. Belgium has indeed been condemned more than 7,000 times by its own courts. Despite this, the fines are not paid and the vast majority of successful applicants remain on the streets. The ECtHR has therefore ordered an interim measure against the Belgian state in 148 cases brought before it.<sup>47</sup> In this case, the Belgian state is in clear breach of its obligation

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OHCHR, *AL BEL 2/2020*, 16 December 2020, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25770>.

42 See, among others, <https://www.liguedh.be/rapport-wallon-sur-le-commerce-des-armes-la-region-wallonne-a-continue-dalimenter-des-violations-de-droits-humains/>; <https://www.liguedh.be/10e-anniversaire-du-decret-wallon-sur-les-armes-une-nouvelle-action-en-justice-visera-la-fn-herstal/>; <https://www.liguedh.be/ventes-darmes-a-larabie-saoudite-une-decision-immorale-et-irresponsable-du-gouvernement-wallon/>.

43 See, for example, O. Dua, *La Région wallonne doit rejeter les demandes d'exportations d'armes présentant un risque pour les droits humains*, *Le Soir*, 1 July 2022.

44 See for the last ones <http://www.raadvst-consetat.be/?page=news&lang=fr&newsitem=669>. See also, among others, <https://www.liguedh.be/suspension-conseil-detat-licences-dexportation-darmes-wallonnes-vers-larabie-saoudite-decision-historique/>.

45 Médor, *Armes wallonnes : l'étrange revirement de la Commission d'avis*, Médor, 1 September 2022.

46 <https://www.liguedh.be/armes-wallonnes-les-revelations-choquantes-de-medor-demonstrent-labsolue-necessite-dune-transparence-accrue/>.

47 See ECtHR, *Msallem and 147 others v. Belgium*, press release, 16 November, 2022, ECHR 363 (2022).

and its attitude is in flagrant contradiction with the concepts of the rule of law. A judgment of 7 June 2022 questioned the government’s “deliberate, concerted and persistent practice” of not granting shelter rights to asylum seekers.<sup>48</sup> The Federal government not only recognises that the right claimed by the applicant - namely the right to shelter - is indisputable, but it admits that it is waiting to be condemned before considering fulfilling its obligation. In view of these statements, it appeared to the court that the administration is diverting the judicial procedure from its purpose, using it to make it “an extralegal condition for the recognition of the right to reception”. With this behaviour, repeated hundreds of times, the administration of justice is jeopardised. So much so that the court criticised the executive for organising “the destabilisation of a jurisdiction of the judiciary”.<sup>49</sup> The Federal Migration Centre Myria, the Federal Ombudsman, the General Delegates for Children’s Rights and the Federal Institute for the Protection and Promotion of Human Rights sounded the alarm in a joint statement on the crisis surrounding the reception of asylum seekers.

They stated that “the situation regarding the reception of asylum seekers is extremely worrying. (...) The law and the rule of law are being flouted”.<sup>50</sup> The ECtHR ordered Belgium on 16 December 2022 to receive 160 applicants for international protection in accordance with the law.<sup>51</sup> The Court again imposed interim measures on Belgium. Finally, confronted with the deliberate violation of the rule of law by the federal government, LDH decided to alert the European Commission of these repeated violations by the Belgian state.<sup>52</sup>

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

In Belgium, the use of pre-trial detention of foreign nationals remains a common practice in 2022. Funded by the EU Commission, LDH participated in a study, undertaken as part of a European partnership of NGOs, with the aim of gathering first-person accounts from detainees to determine whether they believe there are discriminatory practices in Belgian criminal proceedings, from judicial arrest to custody on remand and, if so, to identify the

48 A. François, Un tribunal bruxellois soupçonne Sammy Mahdi de violer sciemment le droit à l'accueil, *VRT*, 14 June 2022.

49 G. Derclaye and M. Biermé, Chaos migratoire: Fedasil condamnée pour procédures “abusives”, *Le Soir*, 28 October 2022.

50 Federal Institute for the Protection and Promotion of Human Rights, Recommandations pour résoudre la crise de l'accueil, Brussels, December 2022.

51 ECtHR, *Al-Shujaa and Others v. Belgium* (application no. 52208/22 and 142 others) and *Niazai v. Belgium and Others* (application no. 55140/22 and 16 others), press release, 16 December 2022, ECHR 396 (2022).

52 <https://www.liguedh.be/droit-dasile-et-etat-de-droit-la-ligue-des-droits-humains-alerte-la-commission-europenne-des-violations-a-repetition-de-letat-belge/>. See also J. Balboni, Crise de l'accueil: les avocats appellent à “ressusciter l'État de droit”, *L'Echo*, 1 December 2022.

nature of such discrimination and its possible impact on the individual's ability to exercise their rights.<sup>53</sup>

This study, part of a larger European study about equality data in criminal justice,<sup>54</sup> highlighted the fact that it would seem that an individual is more often informed of their rights during police custody if he or she is of European nationality. It was also noted that one in five people stated that they did not have their rights read to them. Moreover, some postulate discrimination relating to respect for defendants by state representatives. Indeed, at every stage of the proceedings, allegations of insults and inappropriate remarks made to some individuals are present and primarily concern nationality and ethnicity, as well as addictions, family ties, etc.

The results of this study show major failures in the safeguards provided to people in pre-trial detention. In conclusion, LDH is of the opinion that:

- The Belgian state should guarantee to every individual, regardless of their origin or nationality, equal access to procedural rights during pre-trial detention. In that

objective, it should create a national preventive mechanism against torture and inhuman or degrading treatment consistent with the Optional Protocol to the Convention Against Torture (OPCAT).<sup>55</sup>

- Preventive detention should be thoroughly reformed in order to limit its use to solely the most serious crimes and offences.

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

As of 1st September all judgments and rulings rendered by Belgian courts and tribunals were supposed to be published online in a database accessible to every citizen. This fundamental right goes beyond all commercial considerations and was guaranteed by a 5 May 2019 law, amending article 149 of the Constitution.<sup>56</sup> However, this major democratic promise remains unfulfilled because three years after its adoption, this law was not yet implemented. As the Ministry of Justice itself puts it, "Belgium is not (yet) among the best countries in terms of online accessibility of court decisions. The number of judgements already available digitally via Just-On-Web is still limited: currently only recent judgements of the police courts are available."<sup>57</sup> Therefore,

53 Ligue des droits humains, [Disparate impact - Discrimination of foreign nationals in criminal proceedings - A study of the situation in Belgium](#), March 2022.

54 Fair Trials, [Equality Data in Criminal Justice](#), 24 October 2022.

55 See below.

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

57 Service Public Fédéral Justice, [Tableau de bord de la Justice 2022: la Justice belge fait le point](#), 19 May 2022.

the deployment of this database “will be done in stages”.<sup>58</sup>

In this context, the Parliament adopted a new law aiming to create a “Central Register of Judicial Decisions and on the publication of judgments”,<sup>59</sup> which is *prima facie* good news. However, besides the fact that this law will not come into force before October 2023,<sup>60</sup> it has been heavily criticised by both presidents of representative bodies of lawyers (Avocats.be and Advocaat.be)<sup>61</sup> because it does not comply with the EU Data Governance Act<sup>62</sup> which requires public data to be made available.

In view of the difficulties that lie ahead and the unpreparedness of the Belgian authorities, it is to be feared that the entry into force of this law will be postponed once again.

In conclusion, LDH is of the opinion that:

- The Belgian state should invest in an online database for court decisions to be accessible to the public. The database should be open source and GDPR compliant.

## Anti-corruption framework 🟡

### Key recommendations

- The Belgian state should allocate the necessary resources (financial, human and legal) to allow an efficient fight against financial crime and corruption.
- It should implement all GRECO recommendations.

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

As highlighted by the EU Commission 2022 Rule of Law Report, Belgium’s corruption-related problems lie, among other places, in the link between corruption and the lack of financial means granted to the fight against

58 *Ibidem.*

59 Loi du 16 octobre 2022 visant la création du Registre central pour les décisions de l’ordre judiciaire et relative à la publication des jugements et modifiant la procédure d’assises relative à la récusation des jurés, M.B. 24/10/2022

60 It is to be noted that the coming into force of the above-mentioned 5 May 2019 law has been postponed from 1 September 2020 to 1 September 2022, and it is still not in force. Doubts arise regarding the 16 October 2022 law as well.

61 P. Sculier and P. Callens, Justice: non au progrès!, 5 October 2022. See also P. Montens and others, Face aux retards de sa digitalisation, la justice recule, 21 November 2022.

62 Regulation 2022/868 of 30 May 2022 - OJ, 3 June 2022.

financial crime<sup>63</sup> and the fact that GRECO recommendations are not fully implemented.<sup>64</sup>

Several actors have been denouncing for years the timidity of political actions in the fight against financial crime. 2022 was no exception.<sup>65</sup> Indeed, investigations are confronted with obstacles, not only because of a lack of legal and material means, but also because of political obstacles.<sup>66</sup>

Evidence of the desperate lack of resources of anti-corruption actors is easy to find. As already highlighted,<sup>67</sup> the judicial system itself has put in place incapacitation mechanisms, such as the one resulting from the mercurial decision of the Brussels Public Prosecutor,<sup>68</sup> which stipulates that, for financial files in the hands of the judicial police, the Public Prosecutor's Office will henceforth sort out which files will be dealt with and which will not. As a result, the justice system in Brussels is "putting financial crime cases on the side"

due to a lack of available resources.<sup>69</sup> To put it plainly: the justice system is deliberately choosing not to deal with a certain type of litigation, due to a lack of resources.

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

### Key recommendations

- Guarantee the right to film and to take photographs of law enforcement interventions and prevent all lawsuits, detention and prosecutions against journalists and citizens for simply filming the police.
- Strengthen the framework for access to official documents, in particular by improving request and appeal pro-

63 Commission européenne, Rapport 2022 sur l'état de droit – Chapitre consacré à la situation de l'état de droit en Belgique, Luxembourg, 13 juillet 2022, SWD(2022) 501 final, pp. 7-14.

64 See the third interim compliance report on Belgium published by the Group of States on Corruption (GRECO) on 12 September 2022: <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a7eada>.

65 See for instance the opinion of Paul D'Hayere, President of the Brussels Enterprise Court in M. Benayad, "La Belgique a un problème mafieux aujourd'hui", *La Libre*, 17 December 2022.

66 Numerous testimonies of magistrates specialized in financial crime are included in the article of L. Baudrihaye-Gérard, "The Doubts: les magistrats belges face à la lutte contre la délinquance économique et financière", *Rev. Dr. Pén. Crim.*, 2017/2, p. 100. See also Commission européenne, Rapport 2022 sur l'état de droit – Chapitre consacré à la situation de l'état de droit en Belgique, Luxembourg, 13 July 2022, SWD(2022) 501 final, p. 9.

67 See above.

68 Ministère public, Audience solennelle de rentrée de la cour d'appel de Bruxelles – Discours prononcé par le Procureur général Johan Delmulle, 1 September 2021.

69 A. Sente and L. Colard, Pourquoi la justice bruxelloise a mis « au frigo » 53 enquêtes financières, *Le Soir*, 29 March 2022.

cesses and by limiting the grounds for rejection of disclosure requests, taking into account European standards on access to official documents.

- Properly finance transparency institutions, such as the Federal Commission for Access to Administrative Documents (CADA) and the Commission for Access to Administrative Documents of the Walloon Region.

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

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

In 2022, journalists have regularly faced threats and physical violence in the field when covering demonstrations and various events, as reported by the Association of Professional Journalists (AJP)<sup>70</sup> and CIVICUS.<sup>71</sup> Some media – which have requested anonymity – have hired private security agents to accompany their journalists, especially since the COVID-19 crisis and the protests against the measures imposed by the government.

Reporters Without Borders notes that despite a relatively high level of trust in the press, Belgian journalists sometimes face violence from police and demonstrators at rallies, as well as frequent online threats, targeting mostly women journalists. As a result, Belgium faced a downgrade of its ranking in 2022 compared to 2021 (from 11th in the world to 23rd).<sup>72</sup> The Media Freedom Rapid Response (MFRR) recorded eight alerts for Belgium involving 12 attacked persons or entities related to the media in its 2022 report.<sup>73</sup>

In conclusion, LDH is of the opinion that:

- The Belgian state should guarantee the safety of journalists and prosecute adequately all perpetrators, including if they are members of a police force.

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

As highlighted in the EU Commission's 2022 report, cases of complaints filed against police officers seizing and erasing journalistic material or arresting journalists who were reporting on demonstrations and police interventions are often reported.<sup>74</sup> These complaints, when filed, are generally eventually successful, as

70 AJP, *L'agression d'une équipe de BX1 ne peut rester sans suite*, press release, 24 January 2022.

71 See <https://monitor.civicus.org/country/belgium/>.

72 Reporter Without Borders, opinion on Belgium, available on <https://rsf.org/fr/belgique>.

73 Media Freedom Rapid Response, *Monitoring Report – Mapping Media Freedom*, January – June 2022, p. 28.

74 Commission européenne, *Rapport 2022 sur l'état de droit – Chapitre consacré à la situation de l'état de droit en Belgique, Luxembourg*, 13 juillet 2022, SWD(2022) 501 final, p. 17.

the Belgian courts respect the jurisprudence of the European Court of Human Rights and the EU Court of Justice, which recognise that the role played by the media is of particular importance. The courts state that their presence guarantees that the authorities can be held accountable for their behaviour towards the public in general.<sup>75</sup>

However, police forces sometimes ignore this state of play. For a few years now, following several well-documented incidents of questionable, even illegitimate, police action against both professional journalists and citizens, the issue of the right to film law enforcement agencies has been an issue at various events, whether large scale or in everyday life. While the work of journalists in providing information is more necessary than ever, it is also under threat. Indeed, in December 2021, a Brussels civil court convicted the Belgian state for the arrest of two journalists reporting a peaceful demonstration, stating that this arrest is “a clear violation of the fundamental right to freedom of expression of journalists”.<sup>76</sup>

In conclusion, LDH is of the opinion that:

- The Belgian state should immediately cease any type of harassment or intimidation against journalists and citizens who record police action.
- The Belgian state should reaffirm clearly the right to film the police while in action in the interest of public debate by amending the law.

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

In September 2021, the Federal Commission for Access to Administrative Documents (CADA)<sup>77</sup> ceased to function because the royal decree appointing its members, which must be issued every four years, had not been renewed and there is no provision for members to extend their mandate until the decree is renewed. The president of the CADA managed to keep its work going for part of the summer 2021, in line with the continuity of public services. But since 1 September 2021, the Commission has been inoperative.<sup>78</sup>

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

76 Trib. Bxl (civ), Jugement du 23 décembre 2021 ([https://v3.globalcube.net/clients/englebert/content/medias/2021\\_12\\_23\\_jugement\\_tpi\\_bxl.pdf](https://v3.globalcube.net/clients/englebert/content/medias/2021_12_23_jugement_tpi_bxl.pdf)). See also L. Wauters, *Arrestation de journalistes en reportage au 127 bis: la police condamnée*, *Le Soir*, 23 December 2021.

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

78 See T. Denoël, *Transparence: toujours pas de bâton wallon*, *Le Vif*, 1 October 2021.



Through the Royal Decree of 21 February 2022, the federal government reconstituted the CADA.<sup>79</sup> This decree was published in the Belgian Official Gazette on 7 March 2022. The Commission could only be re-established once the members and deputy members had taken the constitutional oath before the Minister of the Interior. The decree states that requests for opinions submitted to the Commission from 1 April 2022 would be dealt with. No opinions would be issued on requests for opinions previously submitted due to the limited time available for the Commission to issue useful opinions.

As requested by applicants after 1 April 2022, the Commission noted that “the period within which it can provide a useful opinion has now expired”. Indeed, the members of the Commission could only take the constitutional oath on 22 June 2022 and the Commission was installed on 29 June 2022. They could not deliberate before then. The law of 11 April 1994 provides that if the Commission delivers its opinion late, the administrative authority must overrule this opinion”.<sup>80</sup>

As a result of such a jurisprudence, it seems that all applications filed between 1 September 2021 and 29 June 2022 were purely and simply rejected.

Difficulties of the CADA seem to also affect the Walloon Commission.<sup>81</sup> Therefore, the time taken to obtain a response to a request is extremely long, whether before the federal institution or the regional institution, as both entities seem to be underfunded and awarded little priority by the authorities. It is clear that the Belgian state has not responded satisfactorily to the Commission’s recommendation that it should “strengthen the framework for access to official documents (...)”<sup>82</sup>

## Checks and balances

### Key recommendations

- The Parliament of the Walloon-Brussels Federation should review the French Community decree of 20 June 2002 establishing a general delegate of the French Community for children’s rights to create a) a new nomination procedure guaranteeing the strict independence of the office holder; and b) clear incompatibilities with political functions and forbidding all revolving doors phenomenon, consistent with the 2022 EU Commission Rule of Law Report.

79 Arrêté royal du 21 février 2022 portant nomination des membres de la Commission d’accès aux documents administratifs, M.B. 07/03/2022.

80 CADA, Avis n° 2022/15, 29 June 2022.

81 See *Le Vif*, *Cada wallonne: des renforts, mais au forceps*, *Le Vif*, 28 September 2022

82 Commission européenne, Rapport 2022 sur l’état de droit – Chapitre consacré à la situation de l’état de droit en Belgique, Luxembourg, 13 juillet 2022, SWD(2022) 501 final, p. 2.

- The Belgian state should ratify the OPCAT as soon as possible and establish a preventive mechanism with adequate financial, human and legal means to ensure an effective, independent and impartial expertise consistent with its international obligations, without furthering the fragmentation of the landscape for fundamental rights protection.
- The Belgian state should review the composition of the investigation department of the Standing Police Monitoring Committee (Committee P) and make sure it is composed of independent experts recruited from outside the police. It should also guarantee the independence of the Supervisory Body for Police Information.
- The Parliament of the Walloon Region should review the Walloon Decree of 21 June 2012 on the import, export, transit and transfer of civilian arms and defence-related products to review the composition of the Commission for advice on arms export licences in the Walloon region in order to guarantee its independence and multidisciplinary.
- The Belgian state should guarantee adequate funding of human rights moni-

toring bodies and pay attention to their work and recommendations.

### ***Independent authorities***

As the 2022 EU Commission Rule of Law Report rightly states, the active role of the Federal Human Rights Institute (FIRM/IFDH) should be noted. However, to ensure its effective functioning, “further expansion of its activity or mandate, such as a competence to handle individual complaints, would need to be accompanied by matching additional resources”.<sup>83</sup>

The same could be said about the Central Supervisory Board of Prisons (Conseil central de surveillance pénitentiaire – CCSP).<sup>84</sup> However, regarding the latter, it should be noted that Belgian authorities are not paying attention to its work and recommendations. As stated by the CCSP itself, “(...) it has to be said that these calls have not received the expected response either in the policy choices, the political choices made by the Minister or in the administrative measures adopted to regulate the daily life of detainees. The CCSP also regrets that the Minister of Justice has not asked the CCSP for a single opinion in 2021 on the bills falling within its mandate (Art. 22, 2°, of the Law of Principles). The CCSP also regrets that it is most often informed by the

83 Commission européenne, Rapport 2022 sur l'état de droit – Chapitre consacré à la situation de l'état de droit en Belgique, Luxembourg, 13 July 2022, SWD(2022) 501 final, p. 18.

84 <https://ccsp.belgium.be/>.

press of crucial information that has a direct impact on the tasks it performs”.<sup>85</sup>

Apart from these bodies operating efficiently, there are several bodies in Belgium that do not enjoy the independence required to carry out their missions.<sup>86</sup>

As reported last year, the Standing Police Monitoring Committee (Committee P) has been criticised by many international organisations for its lack of independence, particularly because of the composition of its investigation department.<sup>87</sup> The same could be said about the Supervisory Body for Police Information.<sup>88</sup> As a result, some of its analyses seem to be

aimed at defending police forces instead of the fundamental rights of citizens. As already mentioned, it’s particularly the case about the right to film the police: the Supervisory Body analysis sheds doubt on the well-established right of citizens and journalists to film police action.<sup>89</sup>

Human rights actors fear that new institutions will deepen the fragmentation of the landscape for fundamental rights protection. Indeed, given the will of the Flemish authorities to develop regional autonomous human rights bodies (as was the case for UNIA and the creation of the Flemish Human Rights Institute<sup>90</sup>), “concerns exist regarding potential

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85 Conseil central de surveillance pénitentiaire, *Rapport annuel 2021*, p. 57.

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

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

88 <https://www.organedecontrolle.be/>.

89 Organe de contrôle de l’information policière, *Avis d’initiative concernant les situations dans lesquelles des citoyens filment des interventions de police et concernant la protection des données à caractère personnel et de la vie privée des fonctionnaires de police à l’égard de tiers pendant l’exécution de leurs missions policières*, 22 November 2021. For a contradictory analysis, see Police Watch, *Droit de filmer la police: de l’utilité d’avoir recours à la bonne focale*, Observations sur l’avis d’initiative adopté par l’Organe de contrôle de l’information policière du 22 novembre 2021 (version longue), 2022.

90 The government of Flanders withdrew from the Belgian interfederal agreement establishing the mandate of Unia (Interfederal Centre for Equal Opportunities). Instead, the government of Flanders established a Flanders Human Rights Institute (VMRI) through a decree of the Parliament of Flanders.

further fragmentation of the landscape for fundamental rights protection”.<sup>91</sup> On the contrary, competent NGOs need to create a new single body to ensure the effectiveness of the control.<sup>92</sup>

These examples reflect various and serious problems of independence within certain institutions in Belgium on the federal level. But the regional level should not be overlooked and questions arise regarding human rights monitoring bodies of regions and communities.

For instance, the nomination of a new French-speaking General Delegate for Children’s Rights (DGDE) is dragging amidst political revolving doors issues. Indeed, the government of the Wallonia-Brussels Federation should have appointed the next DGDE in September 2021. To this day, almost a year and a half later, it’s still not the case.<sup>93</sup> NGOs insist on the fact that it is essential that this

appointment be made outside of any political arrangements. However, discussions at government level are stalled because several of the six selected candidates are running with a political label.<sup>94</sup> Now, political parties are competing to impose their candidate, holding the long-awaited nomination back. Therefore, the institution of the DGDE risks being discredited, which will most certainly prevent it from fulfilling its missions in the future, since its independence is an absolutely necessary prerequisite. The associations in the field are very worried and fear difficulties in collaborating with an institution whose positions will potentially be open to question, since there will be doubts as to the real interests being defended. Henceforth, NGOs call on the government of the Walloon-Brussels Federation to live up to its role so that this institution has the capacity to monitor, promote and protect children’s rights independently and effectively

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91 Commission européenne, Rapport 2022 sur l’état de droit – Chapitre consacré à la situation de l’état de droit en Belgique, Luxembourg, 13 July 2022, SWD(2022) 501 final, p. 19.

92 For more information, see Coalition OPCAT, “Un mécanisme de prévention de la torture et des mauvais traitements pour les personnes privées de liberté? Oui, mais pas à n’importe quel prix!”, press release of 26 June 2022 and its February 2021 position paper: <https://www.dei-belgique.be/index.php/ressources-externes/publications/send/41-publications/493-avis-de-la-coalition-opcat-01-21-ratification-de-l-opcat-et-creation-d-un-mecanisme-national-de-prevention-en-belgique.html>

93 A. Hovine, “Plusieurs événements récents inquiétants ramènent chaque fois à la question de l’autorité”, *La Libre*, 11 January 2023.

94 One candidate is a former Minister of Interior and former president of a prominent political party, another is a current member of the cabinet of the Minister for Youth, another is a former cabinet member of the Minister for Youth. See N. Spies, Un marchandage politique obscur au cœur de la désignation du délégué aux droits de l’enfant, *Le Vif*, 7 September 2022.

as required by the Committee on the Rights of the Child.<sup>95</sup>

As mentioned above, another example of a flagrant lack of independence of a relevant authority is the controversy about the commission for advice on arms export licences in the Walloon region.<sup>96</sup> Indeed, the press reported that, faced with negative opinions from the ad hoc advisory commission, the Walloon government took the decision to change the composition of this body, towards one that now gives positive opinions.<sup>97</sup> This report highlights the need to substantially improve transparency on the procedures for granting Walloon arms export licences. Indeed, the decision to grant or refuse arms export licences is taken by the Minister-President alone, who receives only non-binding confidential advice. Parliamentary oversight is minimal and civil society is only informed about arms exports authorised by the Minister-President at a very

late stage and in a very limited way.<sup>98</sup> The composition of this commission must be reviewed in order to guarantee its independence and multidisciplinary.

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

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

As already stated, the granting of arms export licences is subject to a severe lack of transparency on the part of the Walloon authorities. So much so that the Parliament organised a hearing on the matter in January 2022.<sup>99</sup> However, this hearing has not been followed up by any action, either by the government or the Parliament.

Even if the Belgian state has signed and ratified the United Nations treaty on the arms trade,<sup>100</sup>

95 See Coordination des ONG pour les droits de l'enfant, "Pour un·e Délégué·e général·e des droits de l'enfant sans étiquette politique", press release, 30 August 2022

96 Commission d'avis sur les licences d'exportations d'armes (see art. 19 of the Décret wallon du 21 juin 2012 relatif à l'importation, à l'exportation, au transit et au transfert d'armes civiles et de produits liés à la défense, M.B. 05/07/2012).

97 Médor, Armes wallonnes : l'étrange revirement de la Commission d'avis, *Médor*, 1 September 2022.

98 See C. Zutterling, Les angles morts du contrôle des exportations d'armes de la Région wallonne. Analyse du "Rapport Armes", Groupe de recherche et d'information sur la paix et la sécurité (GRIP), 5 March 2021.

99 Commission des affaires générales et des relations internationales, "Compte rendu intégral", Parlement wallon, January 17, 2022. See also E. Renette, Armes wallonnes: une pétition pour plus de transparence défendue au Parlement wallon, *Le Soir*, 17 January 2022 and LDH, Armes wallonnes: Amnesty, la CNAPD, la LDH et Vredesactie déposent une pétition au Parlement de Wallonie pour plus de transparence, press release, 21 June 2021.

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

it blithely violates it – as well as European and Walloon law – by allowing arms exports to states involved in serious violations of international humanitarian law. The violations of these different rights are attested by the multiple suspensions by the Council of State of the decisions of the Walloon Minister-President to grant export licences to Saudi Arabia to Walloon arms companies.<sup>101</sup> There have been numerous political declarations stating that the Minister will not grant licences for new contracts to countries that commit serious violations of international humanitarian law or international human rights law.<sup>102</sup> In fact, these weapons are constantly found in countries that should be prohibited, which contradicts the statements of political representatives.<sup>103</sup>

In order to put an end to this opacity, NGOs ask that the decisions to grant – or refuse – licences, as well as the decisions of the Commission of Advice, in its counsel to the Walloon Minister-President, be made public;

that the date provided in the government reports be standardised with those available to the customs authorities in order to allow for a real readability of exports; that the frequency with which these reports are published be increased; and that the time limits for the publication of the reports be reduced in order to allow for an effective parliamentary and public control.

Furthermore, as already highlighted, it is of utmost necessity to review the composition of the Commission of Advice, to guarantee its independence. Indeed, the decree of 21 June 2012 on the import, export, transit and transfer of civilian arms and defence-related products<sup>104</sup> has created a “Commission for advice on arms export licences”, responsible for formulating reasoned and confidential opinions “at the request of the government or on its own initiative”. Unfortunately, the advice it has produced remains secret and its composition is

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101 For the last one, see Council of State, decision n° 249.991 of 5 March 2021: “The Council of State suspends, under the extreme urgency procedure, the execution of four export licences for arms and defence-related material issued by the Walloon Region to Saudi Arabia. It considers that these licences are not adequately motivated with regard to the clear risk that the military technology or equipment whose export is envisaged will be used for internal repression or to commit serious violations of international humanitarian law in the context of the conflict in Yemen” (<http://www.raadvst-consetat.be/?page=news&lang=fr&newsitem=669>).

102 Région Wallonne, “Déclaration de politique régionale pour la Wallonie 2019-2024”, 9 September 2019, pp. 20-21.

103 See O. Dua, *La Région wallonne doit rejeter les demandes d’exportations d’armes présentant un risque pour les droits humains*, *Le Soir*, 1 July 2022. More details are in the report of the Walloon weapons observatory, available at [https://www.amnesty.be/IMG/pdf/wam\\_rapport\\_2022-2.pdf](https://www.amnesty.be/IMG/pdf/wam_rapport_2022-2.pdf), 10 June 2022.

104 M.B. 05-07-2012.

not independent, as a majority of its members directly depend on the Walloon authorities.<sup>105</sup>

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

As highlighted above, the lack of implementation of final court decisions by public authorities is extremely worrying. Indeed, the failure to respect validly rendered judicial decisions was paramount in 2022, reaching levels never seen before in the country. It is a very worrisome issue of non-respect of a founding element of the rule of law.<sup>106</sup>

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

### **Key recommendations**

- The 25 August 2022 circular on individual and preventive prohibition of demonstrations should be withdrawn.
- The 20 July 2022 law on data retention should be withdrawn and the Belgian authorities should refrain from mas-

sively collecting personal data of citizens, in line with the CJEU decisions.

- The penal law should not be interpreted so as to criminalise humanitarian aid. To do so, a clarification of the law is necessary.

## **Regulatory framework**

### **Counterterrorism regulations, including on terrorist financing**

The Counter-Terrorism Vigilance Committee (Committee T)<sup>107</sup> analysed, in its 2022 annual report,<sup>108</sup> the criminal framework applicable to terrorist financing and looked at some case law examples in this area.

Terrorist financing acts can be covered by various offences. Firstly, they can be prosecuted as participation in the activity of a terrorist group (art. 139 and 140 of the penal code). Secondly, the financing of terrorist activities by a lone perpetrator falls under the application of article 141 of the penal code. Finally, acts of financing can also be prosecuted on the basis of article 140<sup>septies</sup> of the penal code, which criminalises the planning of a terrorist offence. Committee T analysed these provisions and

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

106 See above, chapter about the Justice system, Execution of judgments, pp. 15-17.

107 <https://comitet.be/>.

108 Comité T, Rapport annuel 2022, pp. 48-55.

reviewed the problematic changes that have been made to some of them, which undermine the presumption of innocence and the principle of legality of offences. In all three offence cases, it is not necessary for a terrorist act to have been perpetrated or to have been started: it is sufficient that it is the objective pursued by the perpetrator or, possibly, by third parties.

The judgments analysed by Committee T deal with the hypothetical financing of a terrorist group (art. 140 PC). According to the judgments, the simple transfer of funds to a member of one's own family who is part of a group such as the Islamic State or Jabhat al Nosra is sufficient to justify a conviction for participation in the activities of a terrorist group. This is so even if the helper's intention was purely humanitarian or emotional, as long as he or she is aware of the membership of his or her relative in one of these groups. Committee T considers that any assistance given to (alleged) members of a terrorist group, even if it is "strictly for humanitarian reasons" and "even if it condemns all violent actions" is problematic: this reasoning could potentially allow all humanitarian aid to be considered unlawful and could therefore apply, more generally, to any humanitarian organisation acting in camps where members (alleged or actual) of terrorist groups are detained.

## ***(Un)safe environment***

### ***Freedom of assembly, including rules on organisation of and participation in assemblies, equal treatment, policing practices***

On 25 August 2022, the Minister of Interior published a circular on individual and preventive prohibition of demonstrations.<sup>109</sup> The purpose is to give mayors the possibility to impose a preventive ban on participation in a protest or a demonstration for "troublemakers". This circular gives local authorities the ability to issue "individual and preventive bans on demonstrations". It raises questions in regards to the respect of freedom of assembly and gives very broad prerogatives to local authorities to limit this fundamental liberty.<sup>110</sup>

First of all, there is the question of the respect for the principle of legality, as this fundamental freedom is limited by means of a circular from the Minister of Interior and not by a law, debated in Parliament. As it was often the case during the COVID-19 pandemic, the executive limits fundamental freedoms by excluding Parliament and democratic debate. Furthermore, it seems *prima facie* abusive to derive from art. 135 § 2 of the communal law,<sup>111</sup> which deals with mayors prerogatives, the possibility for a mayor to prohibit individuals from participating in demonstrations.

109 Circulaire du 25 août 2022 relative à l'interdiction individuelle et préventive de manifestation, en complément de la circulaire OOP 41, M.B. 27/10/2022.

110 See M. Benayad, *L'interdiction préventive des casseurs dans une manif ne fait pas l'unanimité*, *La Libre*, September 6, 2022.

111 Nouvelle loi communale codifiée par l'arrêté royal du 24 juin 1988, M.B. 03.09.1988.



The principle of proportionality is also infringed. Indeed, if a series of guarantees are provided (motivation, limitation in time and space, rights of defence, etc.), which is fortunate, then a preventive ban may be sensible. But making it an administrative police measure also presents a series of risks: in matters of fundamental freedoms, it is better to sanction abuses *a posteriori* than to prevent them *a priori*. This is particularly true for freedom of expression: limiting this freedom *a priori* (even for notorious repeat offenders) is considered more harmful to democratic systems than introducing censorship. The same principle should apply to the freedom of demonstration: the democratic system has more to gain from bearing the inconveniences that may result from the exercise of this freedom than from censoring it *a priori*. Generally speaking, this obviously raises the question of the prior imposition of a form of sanction (even if it is very appropriately described as a police measure) even though wrongful conduct may be sanctioned after the demonstration, i.e. the compatibility of the measure with the general principle of a repressive rather than a preventive constitutional regime.

It should be noted that this position is also shared by the federal police, as revealed by the press.<sup>112</sup>

### **Other**

Belgium scores high on the ILGA-Europe Rainbow Index,<sup>113</sup> which ranks countries according to their legal and policy practices in relation to LGBTQI+ people. In May 2022, the Belgian Justice Minister presented a plan to make the country a safer place for the LGBTQI+ community.<sup>114</sup> The plan is in response to the increase in crimes on the basis of sexual orientation, including discrimination, hate speech and hate crimes.<sup>115</sup> It is a very positive step in the fight against homophobia and transphobia.

On 15 July 2022, the Council of Ministers approved the Interfederal Action Plan to Combat Racism.<sup>116</sup> The plan contains dozens of measures to address equal opportunity, employment, the economy, asylum and migration, health, justice, police, civil service, foreign affairs, digital services and mobility. Further measures also support academic research on neo-colonialism and decolonisation. It is a very positive step in the fight against racism.

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112 A. Sente, *La note “fantôme” de la police qui critiquait “l’interdiction individuelle de manifester”*, *Le Soir*, 23 December 2022.

113 See Rainbow Europe map and index 2022 (<https://www.ilga-europe.org/report/rainbow-europe-2022/>).

114 Plan d’action fédéral 2021-2024, *Pour une Belgique LGBTQI+ friendly*, 17 May 2022.

115 L. Walker, ‘Unacceptable violence’: Belgium to crack down on crimes against LGBTQ community, *The Brussels Times*, 18 May 2022

116 *Mesures fédérales du Plan d’action national contre le racisme 2021-2024*, 15 July 2022.

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## Online civic space

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### Data protection and privacy issues

In 2015, the Constitutional Court<sup>117</sup> annulled the law of 30 July 2013 amending Articles 2, 126 and 145 of the Act of 13 June 2005 on electronic communications and Article 90decies of the Code of Criminal Procedure (the so-called Data Retention Act)<sup>118</sup> transposing the European Directive 2006/24/EC,<sup>119</sup> which had itself been invalidated by the Court of Justice of the European Union.<sup>120</sup> This annulment was intended to put an end to the obligation imposed on telecommunications operators and Internet access providers to retain, for the purposes of combating serious crime, all traffic information concerning telecommunications users (also known as metadata).

Despite this first annulment, the Belgian state adopted a new similar legislation<sup>121</sup> which, although it did not have all the flaws of the

first one, nevertheless imposed a systematic and massive collection of the metadata of people present on Belgian territory. Therefore, NGOs logically asked and obtained from the Constitutional Court the annulment of this legislative norm in 2021.<sup>122</sup>

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

Unfortunately, the Belgian federal government disregarded the clear indications provided by both national and international courts. Indeed, the Council of Ministers introduced a bill, finally adopted by Parliament in 20 July 2022,<sup>123</sup> that, far from limiting itself to “repairing” the illegalities observed by

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117 C.C., 11 June 2015, n° 84/2015.

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

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

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

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

122 C.C., 22 April 2021, n° 57/2021.

123 Loi du 20 juillet 2022 relative à la collecte et à la conservation des données d'identification et des métadonnées dans le secteur des communications électroniques et à la fourniture de ces données aux autorités (dite loi DATA RETENTION 3), M.B. 08/08/2022.

the above-mentioned courts, introduced a requirement relating to encrypted messaging applications aimed at making it possible to decrypt what is exchanged by certain users, at the request of law enforcement agencies and with the agreement of an investigating judge. In other words, service providers are obliged to “disable” encryption for certain users. However, the encryption of communications makes the information sent with an application unreadable for people who are not the recipients of the message. Thus, the information that passes through an encrypted channel is scrambled, accessible only to those who are communicating with each other. This is an indispensable tool in a democracy, not only for certain specific professions (journalists, lawyers, etc.), but also for all individuals.

It should also be noted that, with regard to the other issues raised by the data retention reform, the draft bill in question has been the subject of a very critical and detailed opinion from the Data Protection Authority (DPA).<sup>124</sup> The DPA notes that there are significant risks for the respect of fundamental rights, whether from the point of view of legality, necessity or proportionality.<sup>125</sup> It also notes, among other things, the fact that the preliminary draft does not provide for access to data to always

be subject to prior control either by a court or by an independent administrative body which has the status of a third party in relation to the authority requesting access to the data, which is a European requirement.<sup>126</sup>

In view of the DPA’s conclusions regarding this preliminary draft, LDH also submitted an opinion to the Parliament.<sup>127</sup> Despite these concurring and alarming opinions, the Parliament decided to adopt the offending text without taking into account the well-founded criticism of these two authorities.

However, as the DPA concludes with regard to the preliminary draft, “It must be noted, however to note that the draft bill does not really bring about the change of perspective required by the case law of the CJEU and the CC. In its opinion, the Authority notes that the draft bill intends to impose new measures for the retention of traffic and location data which could lead to the de facto reintroduction of general and undifferentiated data retention obligations, while at the same time extending the possibilities of access to such data”.<sup>128</sup>

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124 Data Protection Authority, [Opinion n° 108/2021 of 28 June 2021](#)

125 *Ibid.*, pp. 71-75.

126 *Ibid.*, §§ 153-155.

127 LDH, [Avis de la Ligue des Droits Humains sur le projet de loi du 17 mars 2022 relatif à la collecte et à la conservation des données d’identification et des métadonnées dans le secteur des communications électroniques et à la fourniture de ces données aux autorités – DOC 552572/001, May 2022.](#)

128 *Ibid.*, p. 76.

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

### Key recommendations

- Follow international recommendations from human rights monitoring bodies (whether from the UN, the COE or the EU) and respect all decisions rendered by international jurisdictions.
- Put an end to the endemic prison overcrowding situation by developing alternatives to deprivation of liberty and by reviewing its penal policies to ensure that the prison sentence is the *ultimum remedium*.

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

### Systemic human rights violations

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

Prison overcrowding is endemic in Belgium and the resulting conditions of detention lead to inhuman or degrading treatment. As a result, the Belgian state faced several convictions of violations of article 3 of the ECHR.<sup>129</sup> The Belgian State was also sentenced by the national judicial order for endemic prison overcrowding of a Brussels establishment.<sup>130</sup> Once again, in 2022, the European Committee for the Prevention of Torture (CPT) issued a highly critical report on the situation in Belgium.<sup>131</sup>

The Belgian state must comply with the requirements of international bodies in this field, in particular of the CPT<sup>132</sup> and of the

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

130 International Prison Observatory (OIP) - Belgian section, “The Belgian State responsible for prison overcrowding”, 17 January 2019.

131 CPT, Council of Europe anti-torture Committee publishes the report on its visit to prisons in Belgium, November 29, 2022.

132 See, notably, CPT’s Report to the Government of Belgium on the visit to Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 6 April 2017, published 8 March 2018, §§ 36 and seq.; see also CPT’s Report to the Government of Belgium on the visit in Belgium carried out by the European Committee for the Prevention of Torture

High Commissioner for Human Rights of the Council of Europe,<sup>133</sup> by adopting a policy that does not involve the construction of new penal institutions. As also highlighted by the UN CAT, “the State party must consider instituting alternative measures to detention rather than increasing prison capacity”.<sup>134</sup> The CPT points out that “It is important, however, that priority should continue to be given to reducing the prison population and controlling it to a reasonable proportion [...]. This also requires ensuring that attention is not excessively given to the increase of the total capacity of the penal institution”.<sup>135</sup>

Prison expansion is a ploy, as many scientific studies have shown: the evolution of the prison population actually depends on the implemented criminal policies. Given the obvious failure of the criminal policy that has been deployed for decades and the largely counter-productive nature of freedom deprivation, it is necessary to ensure that prison sentences are

truly the *ultimum remedium*. This includes in particular the use of alternative sanctions. The Belgian State should on the one end ensure the proper implementation of cooperation agreements between the Federal State and the Communities responsible for the enforcement of unpaid work and electronic monitoring, on the other end by developing new alternatives (special confiscation, day fines, etc.), while remaining careful not to widen the criminal net.

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

As already highlighted, Belgium has serious shortcomings in following-up recommendations of international and regional human rights bodies. Specifically for the year 2021, see the UN CAT recommendations,<sup>136</sup> the UN Committee on the Elimination of Racial Discrimination<sup>137</sup> and the UN Human Rights

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and Inhuman or Degrading Treatment or Punishment (CPT) from 28 September to 7 October 2009, published 23 July, 2010, § 79.

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

134 UN Committee against Torture, “Concluding observations of the Committee against Torture – Belgium”, 21 November 2008, CAT/C/BEL/CO/2, § 18.

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

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

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

Council.<sup>138</sup> A considerable number of those recommendations are reiterations of recommendations already made in previous reports, which remain unimplemented.

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

#### *Data retention*

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

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

The incarceration of people with mental illnesses in prisons must be ended: this recommendation has been made many times before and the Belgian authorities have been frequently condemned for this, even to the extent of a pilot ruling by the ECtHR.<sup>139</sup> This underlines once more the urgency of this

issue. However, to date, and although the government seems to have become aware of the importance of this problem, in part by creating closed care facilities which are independent of prisons, the psychiatric annexes to prisons do still exist and the law of 4 May 2016 on internment and various provisions relating to justice<sup>140</sup> still allows patients to be sent there.

#### *Length of judicial procedure*

Belgium has already been condemned several times by the ECtHR for violating the right to be tried within a reasonable time.<sup>141</sup> However, the judicial framework remains unchanged. In the case of *Bell v. Belgium*, the European Court of Human Rights condemned Belgium for the excessive length of civil proceedings in Belgium.<sup>142</sup> As noted by the Federal Institute for Human Rights in July 2022,<sup>143</sup> this condemnation was handed down in 2008 and has not yet been implemented. Backlogs are frequent in most jurisdictions in Belgium, especially in Brussels.<sup>144</sup>

138 UN Human Rights Council, Report of the Working Group on the Universal Periodic Review – Belgium, 14 July 2021, A/HRC/48/8..

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

140 M.B. 13-05-2016.

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

142 ECHR, *Bell v. Belgium*, November 4, 2008, 44826/05.

143 Institut fédéral pour la protection et la promotion des droits humains, Communication au Comité des ministres du Conseil de l'Europe concernant l'affaire *Bell. c Belgique*, 29 juillet 2022.

144 See for instance Conseil supérieur de la justice, Audit de la Cour d'appel de Bruxelles, 30 juin 2022.

### *Rights of asylum seekers*

As already highlighted, in October 2022, the ECtHR was inundated with hundreds of requests from lawyers who found no other solution to have the rights of asylum seekers heard when they find themselves on the streets because of a lack of available reception places. Belgium has indeed been condemned more than 7,000 times by its own courts. Despite this, the fines are not paid and the vast majority of successful applicants remain on the streets. The ECtHR has therefore ordered an interim measure against the Belgian state in 148 cases brought before it.<sup>145</sup> It had no effect on the Belgian authorities and the situation remains unchanged to this day.

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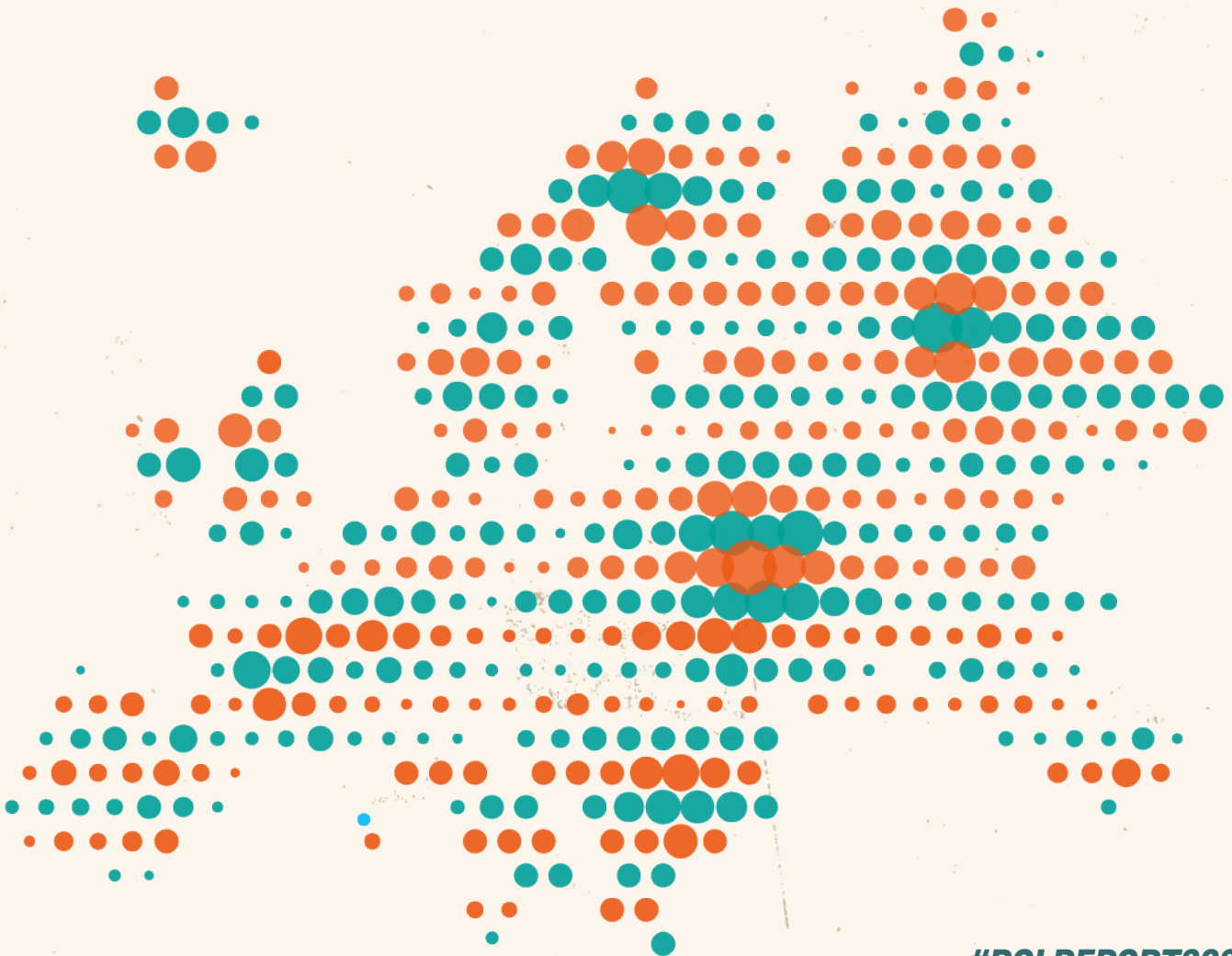
<sup>145</sup> ee ECHR, *Msallem and 147 others v. Belgium*, press release, Novembre 16, 2022, ECHR 363 (2022).

**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**BULGARIA**



**#ROLREPORT2023**



# BULGARIA

## About the authors



BULGARIAN  
HELSINKI  
COMMITTEE

### The Bulgarian Helsinki Committee (BHC)

is an independent, non-governmental organization for the protection of human rights in the Republic of Bulgaria. It was established in 1992. Among other things, the organization has a legal programme responsible for strategic litigation cases, and participates in consultations or as amicus curiae before national and international bodies and institutions.

## Key concerns

New draft amendments to the Criminal Procedure Code and the Judicial System Act have the potential to improve the justice system if adopted. However, the key piece of legislation faced strong opposition from defenders of the status quo and did not progress significantly. Neither the functioning of the Inspectorate to the Supreme Judicial Council nor the problematic composition of the Supreme Judicial Council were addressed.

Despite the proposed new legislation, parliament failed to advance much of it before the end of the year. Parliamentary discussions on

the proposed legislation revealed insufficient expert discussions.







In 2022, there were no significant changes in the media market in Bulgaria, nor any serious initiatives to improve the media environment and pluralism. The most influential Bulgarian media remain those that supported the ruling GERB party until 2021, those opposed to judicial reform, as well as those that are softer on Russia's military aggression in Ukraine. The chairman of the media regulatory body publicly attacked a journalist with complete impunity.

The ongoing political crisis following a vote of no confidence against Prime Minister Kiril Petkov's regular government in mid-2022 and the continued rule of a caretaker government appointed by the president is delaying key reforms and putting the work of a fourth parliament formed in just two years at risk. The inability of the parliament to propose the composition of key state institutions emerges as a serious problem.


In 2022, there was no development regarding the cooperation of the authorities with non-governmental organizations. In the context of the possible future membership of North Macedonia in the European Union, the problem of the freedom of association of people self-identifying as ethnic Macedonians in Bulgaria has significantly emerged.

During 2022, Bulgaria failed again to implement key ECtHR judgments affecting serious systemic problems, including an independent investigation of the Chief Prosecutor and the disproportionate evictions of vulnerable people from their only homes.

### State of play

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

#### Legend (versus 2022)

-  Regression
-  No progress
-  Progress

## Justice system

### Judicial independence

#### Allocation of cases in courts

In July the public became aware of a scandal involving the chairman of the Supreme

Administrative Court, Georgi Cholakov, under whose direction the system for the random distribution of cases was established. The new system was implemented in one day, and on the same day three cases related to a serious corruption scandal were allocated. Cholakov, who was operating the system that day, turned out to be in the panel hearing for all three cases. The cases concern petitions by Eurolab 2011—a private contractor that is operating many key and profitable activities in Kapitan Andreevo, a border checkpoint with Turkey. Earlier this year, the regular government of Kiril Petkov, formed in December 2021, publicly announced its suspicions of serious corruption at the border crossing and terminated the contract with the private company. The case was widely covered with many irregularities around it surfacing—including tapped phone recordings<sup>1</sup> and attempted physical impedance of inspecting authorities<sup>2</sup>—none of which led to criminal investigations or removal of the contractor. In regard to the suspicious presence of Cholakov in all three panel hearings of the company, the Supreme Administrative Court circulated a press release stating that this was a coincidence; that the chairman of the court was simultaneously assigning cases, while being included in the list of judges on duty, and serving on the bench that week.<sup>3</sup> In October, another scandal arose around Cholakov. This time he bought a villa with

1 <https://news.bg/crime/zapisat-za-papkata-za-100-hil-chast-sas-signal-a-za-laboratoriyata-na-kapitan-andreevo.html>

2 <https://www.svobodnaevropa.bg/a/31976357.html>

3 <https://clubz.bg/125487>

a pool full of mineral water in the village of Pchelin for 10,000 leva (around 5,100 euro).<sup>4</sup>

***Independence (including composition and nomination of its members), and powers of the body tasked with safeguarding the independence of the judiciary***

In 2022, the problem of the ratio between professional members from the judicial quota and lay members from the parliamentary quota in the judicial chamber of the Supreme Judicial Council, which is enshrined in Article 130a § 3 of the Constitution, remained unaddressed.

As a partially positive development, it can be pointed out that the draft amendments to the Criminal Procedure Code and the Judicial System Act provided for a restriction on Parliament to elect, as lay members in both chambers of the Supreme Judicial Council, people who are former judges, prosecutors, or investigators. This is in line with the recommendations in Opinion n° 1095/2022 of the Venice Commission.<sup>5</sup> However, the bill was not reviewed at first reading in parliamentary committees until the end of the reporting period in mid-January 2023.

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

The draft amendments in the Criminal Procedure Code provide for improvements in parliamentary oversight and the possibility of subjecting the Chief Prosecutor to investigation by an independent figure with a view to establishing criminal responsibility—issues key to the judgment of the ECtHR in the case of *Kolevi v. Bulgaria*.

The proposed revisions to the Code of Criminal Procedure are summarized and commented on in Opinion n° 1095/2022 of the Venice Commission,<sup>6</sup> excluding minor subsequent changes after that opinion was published. The Commission notes the issues with the Bulgarian constitution.<sup>7</sup> A meeting of the Parliamentary Legal Affairs Committee, held on 11 January 2023 to consider the bill, did not proceed to a vote, but was adjourned until 18 January to be attended by the Chief Prosecutor/until a hearing.

Thus, for the whole of 2022 progress on the issue of an independent investigation mechanism and accountability of the Chief Prosecutor has not made notable progress.

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

In 2022, the Prosecutor's Office's broad powers of general legality oversight went unchallenged.

4 <https://www.svobodnaevropa.bg/a/32101530.html>

5 See §§ 15 – 21 of the Opinion: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2022\)032-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)032-e)

6 Ibid., § 24.

7 Ibid., § 26 – 28.

In September, the Ministry of Justice requested the Constitutional Court to (a) interpret the concept of legality oversight—a core power of the Chief Prosecutor provided for in Article 127 of the Constitution, and (b) declare unconstitutional the provision of Article 145(1)(3) of the Judicial System Act in respect of the words “and actions” and “and revisions” and of Article 145(1)(6) in respect of the words “or other offence” as contrary to Article 127(5) of the Constitution of the Republic of Bulgaria. The first of those two the Constitutional Court found inadmissible, as there is no ambiguity or conflicting interpretation of this provision of the Constitution.<sup>8</sup> The remainder of the request was admitted, but was not adjudicated by the end of the reporting period.

## **Anti-corruption framework** 🟡

### **Key recommendations**

- Quicker and more timely organisation of pluralistic expert discussions on key anti-corruption legislation.

## **Framework to prevent corruption**

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

In October 2022, two almost identical whistleblower protection bills were introduced in Parliament. This was one of the key legislative amendments envisaged under the Recovery and Resilience Plan, which was due to be passed by the end of the year. Both bills implement the requirements of a European directive on the protection of whistleblowers. Both bills were rejected at first reading in Parliament’s plenary due to numerous general criticisms of the legislative technique. On 12 January 2023 another bill, prepared by GERB political party, was introduced in Parliament.<sup>9</sup>

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

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

In December 2022, Sonya Momchilova, chairperson of the Council for Electronic Media, attacked the journalist Maria Cheresheva for her participation in an international investigation into violence against migrants at

8 <https://www.constcourt.bg/bg/Acts/GetHtmlContent/eec47f52-a429-47f2-80a1-60dcb36eb49a>

9 <https://www.parliament.bg/bg/bills/ID/164632>

the Bulgarian border. The investigation<sup>10</sup> by a consortium of eight media organisations from different countries—Sky News, ARD, Times, Le Monde, the Swiss public radio and television SRF, Lighthouse Reports, Domani and the Bulgarian service of Radio Free Europe—according to Momchilova, does not meet basic journalistic standards and is the result of “incompetent efforts to undermine everything that our country does to defend its territory.” Two non-governmental organisations—the Bulgarian Helsinki Committee and the Association of European Journalists in Bulgaria—publicly demanded Momchilova’s resignation, and two members of the regulatory body submitted such a proposal for a vote. The proposal was rejected by 3 to 2 votes, where Momchilova herself voted with the majority.<sup>11</sup>

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

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

On 7 January 2022, the Sofia City Court, acting as court of first-instance, granted the claims of Svetlin Mihaylov, a judge in civil matters in the Sofia Appellate Court, against a journalist and the media who published

his impugned article, awarding the claimant 60,000 leva (approximately 30,670 euro).<sup>12</sup> The article describes the financial situation of the judge, alleges that he is a millionaire, and cites a number of cases in which his name has been involved in scandals related to a political party, the Movement for Rights and Freedoms (an ALDE member), who discussed at one point judge Mihaylov being a potential nominee to the Supreme Judicial Council. These statements of fact were described by the first instance court as “offensive.” The judge who heard this case was seconded from the Sofia Appellate Court, where the plaintiff in the case is also a judge. Moreover, the two judges are both members of the same small judicial NGO. The second instance court, the Sofia Appellate Court, reduced the granted claim to 4,000 leva (approximately 2,045 euro).<sup>13</sup>

## **Checks and balances**

### ***Key recommendations***

- The parliament should come up with an action plan regarding the selection of new members for key institutions where the term of office of a current member is passed.

10 <https://news.sky.com/story/refugee-trying-to-reach-europe-shot-near-bulgaria-turkey-border-12762033>

11 <https://www.svobodnaevropa.bg/a/32177957.html>

12 <https://www.mediapool.bg/preduprezhdenie-ako-zhurnalist-nareche-sadiya-svetlin-mihailov-skandalen-tova-struva-60-000-lv-news330817.htm>

13 <https://www.mediapool.bg/smrazyavasht-efekt-spomenavane-za-blizost-s-dps-struva-4000-lv-na-zhurnalisti-news343552.html>

## ***Independent authorities***

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In plenary, on 26 October 2022, the Speaker of the National Assembly read out a list<sup>14</sup> of state bodies and their members whose terms have expired, but who remain in their position until they are replaced, and for whom Parliament must hold elections. The list includes, among others, 11 members of the Supreme Judicial Council, the entire inspectorate of the council, two judges of the Constitutional Court, the Commission for Personal Data Protection, the Commission for Protection against Discrimination, the governor of the Bulgarian National Bank, the chairman of the Court of Auditors, the chairman of the Financial Supervision Commission, the chairman of the Anti-Corruption Commission, and a member of the National Bureau for Control of Special Means of Surveillance. This short list alone makes clear the serious erosion of the principle of term of office in Bulgaria, and stemming from that—of legitimacy in the governance of the country.

In September, the Constitutional Court delivered a judgment on whether the term of office of members of the Supreme Judicial Council and the Inspectorate to the Supreme Judicial Council is terminated upon expiry of the period that is set for it.<sup>15</sup> The court reached the decision that, “[w]here no other legal remedy is provided against the blockage

of the functioning of a constitutionally established institution of state, the continuation of the performance of the functions of that institution through its personnel until a new election/appointment [...] is a constitutionally permissible means of restraining a de facto alteration of the constitutionally prescribed balance of powers and institutions of the state [...]” With this judgment, the court made lifetime tenure legal.

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

### ***Key recommendations***

- The Bulgarian government should review and comply with the recommendations of the Council of Europe’s Committee of Minister’s Decision CM/Del/Dec(2022)1451/H46-8 of 8 December 2022.

### ***Regulatory framework***

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#### ***Formation and registration of associations, including those with a cross-border nature***

In 2022, there have been no positive developments in guaranteeing the rights of people

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14 The list is available in the verbatim records of the plenary session at <https://www.parliament.bg/bg/plenaryst/ns/55/ID/10698>.

15 Judgment no. 12 of 27 September 2022 in constitutional case no. 7/2022. See, <https://www.constcourt.bg/bg/Acts/GetHtmlContent/2ddbc14c-bcdc-4e8c-afb6-f2442517228a>

self-identifying as ethnic Macedonians in Bulgaria. These include the recognition of the Macedonian minority, the right to freedom of association and the right to freedom of assembly. No progress has been registered in the execution of the *UMO Ilinden* group of cases of the ECtHR, which are under the supervision of the Committee of Ministers of the Council of Europe since 2006.

The denial of the Macedonian ethnic identity continued in 2022 at a high political level. Already in the beginning of 2022, the then Prime Minister and the President of the Republic<sup>16</sup> set the tone by denying the existence of a Macedonian minority in Bulgaria.

In the course of 2022, officials from the Registry Agency and courts routinely denied the registration of Macedonian organizations upon application. In many cases, such refusals were motivated by manifestly discriminatory reasons. For example, in February with a final decision, the Sofia Court of Appeal refused registration of the “Union of Macedonians from Bulgaria who experienced repression, victims of the communist terror”, finding that the goals of the applying association contradict the Bulgarian constitution because they are protecting the rights and interests of an ethnic minority on the territory of Bulgaria, “[...] which objectively does not exist as a separate and established group of people possessing

religious, linguistic, cultural or other distinguishing characteristics.”<sup>17</sup>

In a number of other cases, the Registry Agency and the courts tried to find formal reasons to refuse registration to Macedonian groups. In 2022 alone, five new applications of people identifying as ethnic Macedonians were lodged in the ECtHR claiming violations of Article 11 of the European Convention of Human Rights (ECHR) in conjunction with Article 14. Thus, the number of pending cases on this subject before this court is now more than twice the number of judgments, which are currently under review before the Committee of Ministers.

In December 2022, the Committee of Ministers made strong statements and recommendations following the review of these cases. It deplored the fact that despite the adoption of the Interim Resolution CM/ResDH(2020)197 and subsequent decisions, more than 16 years after the first final judgment in this group, associations aiming to “achieve the recognition of the Macedonian minority” continue to be routinely refused registration mainly due to a wider problem of disapproval of their goals. Furthermore, they are confronted with a persistent practice of the authorities raising new grounds for refusal even though the registration documents have been repeatedly examined. It urged the authorities to take all the necessary outstanding measures

16 <https://www.president.bg/news6386/prezidentat-radev-nadyavam-se-darzhavnoto-rakovodstvo-na-rsm-da-proyavi-madrost-i-politicheska-smelost-za-reshavane-na-osnovnite-vaproshi.html?lang=bg&skipMobile=1>

17 <https://legalacts.justice.bg/Search/GetActContentByActId?actId=un3ZHEDA%2BFM%3D>

to comply fully with its Interim Resolution CM/ResDH(2020)197 and subsequent decisions, in particular by ensuring that any new registration request of the applicant associations or associations similar to them is examined in full compliance with Article 11 of the ECHR and by extending the obligation of the Registry Agency to give instructions for the rectification of registration files.<sup>18</sup>

In October 2022, the ultra-nationalist and pro-Kremlin Revival party introduced a Russia-style foreign agent registration bill into parliament.<sup>19</sup> The bill, which received numerous negative statements from NGOs and institutions, was not considered at first reading during the reporting period.

## **Attacks and harassment**

### ***Intimidation / negative narratives / smear campaigns / disinformation campaigns***

In June 2022 the Sofia City Court delivered a first-instance judgment in the case of an anti-LGBTI attack committed in 2021 by well-known right-wing radical and then-presidential candidate Boyan Stankov-Rasate. On 29 October 2021, Rasate stormed into the Rainbow Hub community centre with a dozen other people and punched an activist working there in the face. During this time, an LGBTI community event was taking place in one of the centre's rooms. The mob

vandalised the community centre, smashing furniture and equipment. Given the absence of a hate crime penalty when the conduct is motivated by the sexual orientation or gender identity of the victim, Rasate was charged with “hooliganism.” The court however found him not guilty of charges of crime motivated by “hooliganism” and of causing slight bodily harm to the LGBTI activist. It also rejected the victim's civil claim.<sup>20</sup>

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

### **Key recommendations**

- The Ministry of Justice should urgently review some of the longest-standing and most systemic cases of non-compliance with ECtHR rulings and decisively engage NGOs in drafting the necessary changes in legislation and administrative practice.
- Parliament should prioritise addressing the systemic human rights problems in Bulgaria.

18 [https://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2022\)1451/H46-8E](https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2022)1451/H46-8E)

19 <https://www.parliament.bg/bg/bills/ID/164424>

20 <https://btvnovinite.bg/bulgaria/3000-lv-globa-za-bojan-rasate-za-nahluvaneto-v-ofis-na-resursen-centar.html>



- The academic community should also be involved in the processes of finding quick and meaningful solutions to long-standing problems.

## **Systemic human rights violations**

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

In October 2022 the ECtHR delivered its judgment in the case of *Paketova and Others v. Bulgaria* (Applications nos. 17808/19 and 36972/19)<sup>21</sup> concerning the applicants' complaint that they were forced to leave their homes in the small village of Voyvodinovo in January 2019, following a fight in the village between a Roma and a non-Roma man and the gathering of angry members of the local non-Roma population, joined by radical extremist groups, shouting anti-Roma slogans and threatening violence. The Court found a violation of Article 8 in conjunction with Article 14 of the ECHR. In July, the national equality body, the Commission for Protection against Discrimination, delivered a decision, finding discrimination by the mayor of the village, Dimitar Toskov, who convinced the Roma population of the village to voluntarily leave their homes on the night of the mob gathering.<sup>22</sup>

After June 2021, the Supreme Administrative Court, a court of last instance, overturned a decision of the Commission for Protection against Discrimination, which found no discrimination in public statements of the then defence minister from the right-wing political party, Krassimir Karakachanov, in the Voyvodinovo case. Throughout 2022 the national equality body did not reopen the case. The impugned statements referred to events that took place in the village, regarding them as proof that "Gypsies in Bulgaria became extremely brazen" and of evidencing their criminal nature as an ethnic group.

Serious violations were found in the October 2022 report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).<sup>23</sup> During a visit in 2021, the delegation examined the treatment, conditions and legal safeguards offered to patients with psychiatric disorders and residents of social care institutions, as well as the treatment and conditions of detention of persons in police custody and penitentiary establishments. The most serious findings of the committee are repeated from previous visits and are related to psychiatric establishments and social care homes: ill-treatment of patients and residents by staff, lack of secure outdoor exercise areas, lack of medical and multidisciplinary clinical staff, lack of personalised care and attention, seclusion, mechanical and chemical restraint of patients,

21 <https://hudoc.echr.coe.int/eng?i=001-219776>

22 Decision no. 392 of 26 July 2022 in case no. 707/2019 of the Commission for Protection against Discrimination.

23 <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-cpt-publishes-report-on-its-2021-visit-to-bulgaria>

detention of legally competent patients who initially were hospitalized voluntarily, and poor living conditions, among others.

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

In 2022, Bulgaria again failed to implement two key judgments of the ECtHR: in the case of *Kolevi v. Bulgaria*, discussed in detail above, and in the case of *Yordanova and Others v. Bulgaria*, concerning the attempted eviction of a Roma community from their illegal settlement in the city of Sofia, consisting of their only homes and without provision of alternative housing opportunities. Delivered in 2012, the *Yordanova* judgment requires as general measures that, *inter alia*, a proportionality test must be conducted before evicting people from public property. For some years now, the Bulgarian government has claimed before the Committee of Ministers that a draft law was prepared to implement the judgment. Neither was the draft law made public, nor did civil society organizations participate in the working group. Furthermore, 2022 was yet another year in which the draft did not advance to public consultation. In an addendum to their action plan for the execution of the judgment, which was published in September 2022,<sup>24</sup> the government cites a letter by the National Association of Municipalities in the Republic of Bulgaria which specifies that following the Association's and its members' active

participation in the working group tasked with proposing legislative amendments, and despite the lack of legislative framework, the municipalities introduced an administrative practice of inspecting illegal constructions in cooperation with the police and social services to check whether the persons concerned have been entered on the list of persons in need of municipal housing. Evidence in writing that this “administrative practice” has taken place (written recommendation, decision or so) are not provided. The government further submitted that ten years after the judgment was delivered “the options for the Bulgarian authorities to amend, where appropriate, the rules which currently make it particularly difficult for persons living in unlawful dwellings or not having a registered address or persons occupying unlawfully municipal dwellings to apply for municipal housing, is still subject to consideration.”

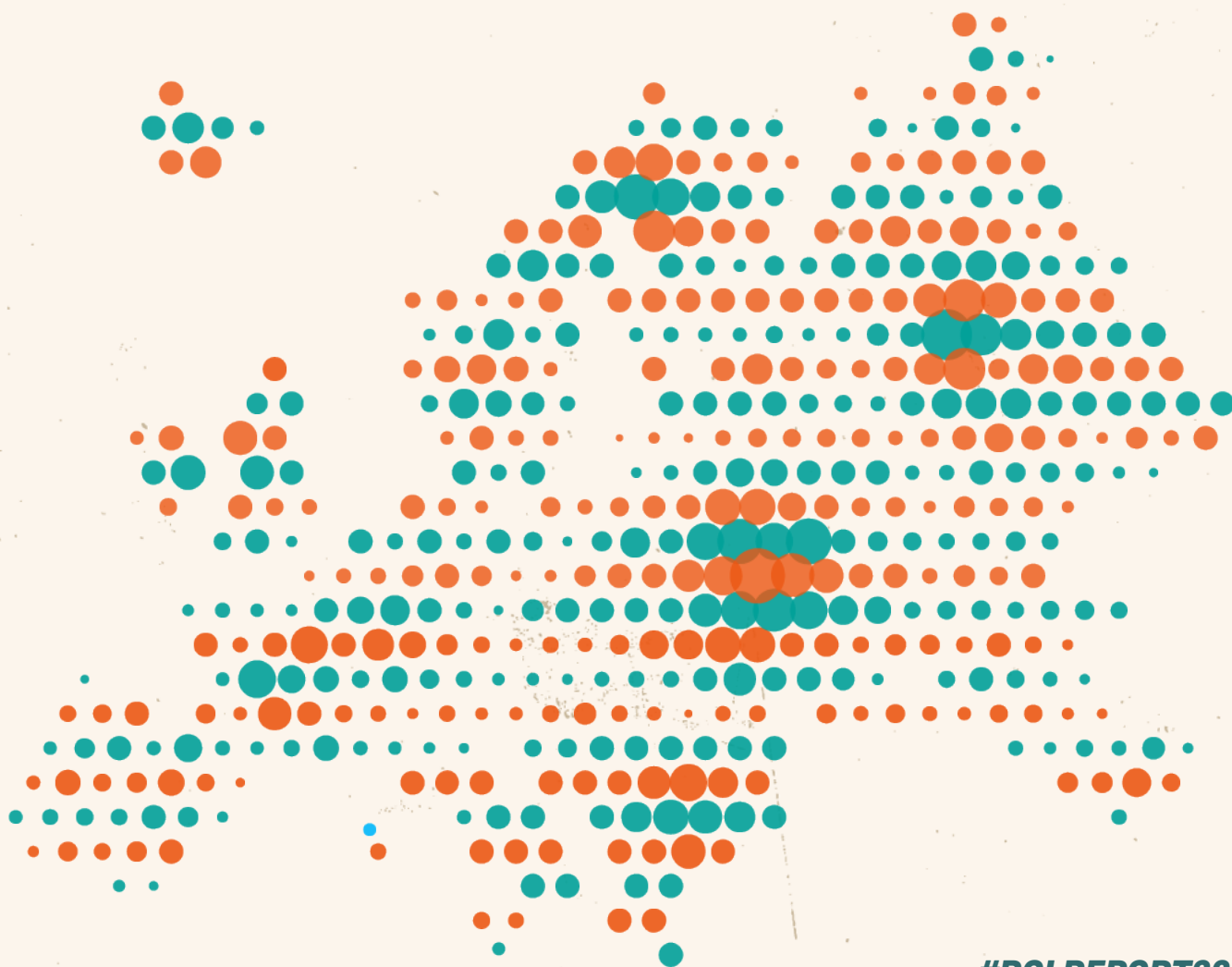
<sup>24</sup> [https://hudoc.exec.coe.int/eng?i=DH-DD\(2022\)750E](https://hudoc.exec.coe.int/eng?i=DH-DD(2022)750E)

**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**CROATIA**



**#ROLREPORT2023**

# CROATIA

## About the authors



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

## Key concerns

Despite certain developments when it comes to increase in budget and digitalisation efforts, the overall picture regarding the justice system shows no substantial progress in comparison to last year, in the assessed areas.

There are new developments on periodic security checks on judges and attorneys by the National Security Agency after publication of

the 2022 European Commission Rule of Law Report. The controversial amendments to the Law on Courts<sup>1</sup> were introduced in February 2022, although the Constitutional Court temporarily suspended these amendments to allow for constitutional review. In February 2023, the Constitutional Court abolished the controversial provisions regulating periodic reviews of judges.<sup>2</sup>

Similarly, there were no noticeable developments regarding the anti-corruption framework. There has been no comprehensive lobbying legislation, nor was a public lobby register introduced or announced in 2022.

The area of media environment and freedom of expression and of information has not progressed either. It is particularly worrisome that there are still incidents of attacks against journalists and that the number of SLAPPs against journalists and media is not declining.

The government has not taken any measures to make the framework for allocation of state advertising more fair and transparent, despite the recommendations in the European Commission's 2022 Rule of Law Report.

1 Law on Courts, Official Gazette Nos. 28/13, 33/15, 82/15, 82/16, 67/18, 126/19, 130/20, 21/22, 60/22

2 Constitutional Court of the Republic of Croatia, Decision No. U-I-2215/2022 i dr., summary, available at: [https://www.usud.hr/sites/default/files/dokumenti/Sazetak\\_odluke\\_br\\_U-I-2215-2022\\_i\\_dr\\_o\\_Zakonu\\_o\\_sudovima.pdf](https://www.usud.hr/sites/default/files/dokumenti/Sazetak_odluke_br_U-I-2215-2022_i_dr_o_Zakonu_o_sudovima.pdf)

With regard to Croatia's checks and balances system, the legislative procedure continues to be defined by the weak role of the Parliament and dominance of the executive branch. The position of independent institutions, such as the Ombudsperson's Office and other ombuds institutions is especially worrisome, as their recommendations are insufficiently implemented by the government and other competent actors. This has not changed since the publication of the 2022 Rule of Law Report, but new information will be available after the publication of the Ombudsperson annual report for 2022.

The conditions for civil society did not improve in 2022, nor did the situation of the institutional framework that is to help develop civil society. The National Plan for Creating an Enabling Environment for Civil Society has not yet been adopted. The level of participation and access to decision-making for the interested public remains unsatisfactory. There were cases of criminalisation and SLAPPs against civil society organisations and activists.

Unfortunately, the persisting lack of efficient investigations into human rights violations continues to undermine the rule of law and functioning of the legal state.

### State of play

- Justice system
- Anti-corruption framework
- Media environment and freedom of expression and of information

- Checks and balances
- Enabling framework for civil society
- Systemic human rights issues

### Legend (versus 2022)

- ↓ Regression
- No progress
- ↑ Progress

## Justice system –

### Key recommendations

- Draft a new Free Legal Aid Act and secure increased resources and multiannual funds that would make this institute more accessible to all.
- Take all necessary steps to increase the efficiency of the justice system and shorten the length of procedures in Croatian courts, especially at first-instance level.
- Ensure independent and effective investigations into allegations of illegal and violent pushbacks of refugees and migrants from Croatia.

## Quality of justice

### Accessibility of courts

Court, lawyers' and interpreters' fees are expensive for many people in Croatia, which is why they are reluctant to take legal action. Free

legal aid is provided to those with less financial means and the system of free legal aid operates at two levels. The two levels are primary and secondary legal aid, to cover what, according to the practice of the European Court of Human Rights (ECtHR), access to justice entails: a) the possibility of initiating court proceedings; b) informing and advising persons about legal mechanisms for the protection and realisation of their rights. The Free Legal Aid Act defines the scope of the primary and the secondary legal aid. Primary legal aid, provided by authorised associations, legal clinics and administrative departments in counties, includes legal advice, drafting submissions and representation before public law bodies, the ECtHR and international organisations, as well as legal aid in out-of-court dispute resolution. As in the previous years, the problem is still that the first-degree free legal aid provision is financed on a project-basis, which is inadequate and unsustainable. Project-based financing disrupts the continuity of the free legal aid program between the completion of the project in one year, the announcement of tenders the following year and the approval of project proposals. There are unofficial indications that the new projects will last for three years, but the official decisions are not publicly available yet. Another issue is the geographical distribution of associations in Croatia, as in many parts of Croatia there are no associations that provide primary legal aid, leaving citizens in rural and remote parts of Croatia without the opportunity to access legal aid.

Secondary legal aid, in addition to legal representation of attorneys in legal areas defined by law, also includes exemption from payment

of the costs of court proceedings and expert testimony, as well as exemption from payment of court fees. The financial requirements for being granted secondary legal aid are that the total monthly income of the applicant and their household members does not exceed a set amount per household member (currently 441.44 EUR), and that the total value of the applicant's property does not exceed a certain amount, currently 26,486.40 EUR. In addition to the financial criteria, free legal aid can be granted only in specified legal cases, such as proceedings to exercise the right to child support, right to compensation for victims of criminal acts of violence, and proceedings of beneficiaries of maintenance assistance or alimony related to the exercise of their rights from social welfare.

In her report for 2021, the Ombudsperson raised the issue of the lack of respect of the deadlines to decide on the free legal aid in appellate cases after the first-instance decision. In situations where a person is not satisfied with the decision on their request for free legal aid (mostly where the decision is negative) they have a right to appeal, and the deadline prescribed in Art. 17 para. 6 of the Free Legal Aid Act for the Ministry of Justice and Public Administration to make a decision on that appeal is eight days. However, the Ombudsperson noted that the official response of the Ministry of Justice and Public Administration revealed that the average time to decide on the appeal is three years. Rightfully, the Ombudsperson noted that “the long duration of the appeal process calls into

question the purpose of free legal aid, which is equality in access to justice.”<sup>3</sup>

### **Resources of the judiciary**

The budget proposal of the Ministry of Justice and Public Administration for the judiciary for 2023<sup>4</sup> amounts to 543 million EUR, which is about 70 million EUR more than planned in 2022 (473 million EUR). The largest part of the funds, in the amount of 183 million EUR, is planned for the needs of the Ministry, which compared to 2022 represents an increase of 48 million EUR (135 million EUR for 2022).

The second largest share of the budget for the judiciary goes to the municipal courts (131 million EUR), representing an increase of about 8 million EUR (from 123 million EUR in 2022). This is followed by the share of the budget for prisons and penitentiaries, about 88 million EUR, representing an increase of 3 million EUR (from 85 million EUR in 2022). The share of the budget for county courts amounts to 42 million EUR for 2023, representing an increase of more than 2 million EUR (it was about 39 million EUR in 2022).

### **Training of justice professionals**

The Judicial Academy Lifelong Professional Development Programme for 2023<sup>5</sup> covers a total of 11 areas: civil and civil procedural law, criminal and criminal procedural law, misdemeanour law, administrative law, commercial law, EU and international law, a special programme for judicial officers, education focused on skills - communication skills etc., an e-course on different topics and a category “other” covering media monitoring and reporting on the work of the judiciary intended for media editors and journalists. The eleventh area is the educational training, which results from commitments made in different national strategies (i.e. the National Plan for Combating Discrimination 2017-2022, the recommendations based on the report of the UN CEDAW Committee, the National Strategy for Equal Opportunities for Persons With Disabilities, the National Strategy for Protection Against Domestic Violence 2017-2022, the Action Plan to Combat Money Laundering and Financing of Terrorism, the Anti-corruption Strategy, the National Plan to Combat Human Trafficking, the Action Plan for the Implementation of the National Strategy for the Development of the Support System for Victims and Witnesses, the National Recovery and Resilience Plan,

3 Ombudsperson of the Republic of Croatia. Annual Report for 2021, p. 120-121.

4 The Government of the Republic of Croatia. *Proposal of the State Budget for 2023*, available at: <https://www.sabor.hr/prijedlog-drzavnog-proracuna-republike-hrvatske-za-2023-godinu-i-projekcija-za-2024-i-2025-godinu?t=134852&ctid=211070> and *Part 2 - Business expenses and expenses for the acquisition of non-financial assets in the State Budget*, available at: [https://www.sabor.hr/sites/default/files/uploads/sabor/2022-11-15/112607/1\\_2\\_POSEBNI\\_DIO.pdf](https://www.sabor.hr/sites/default/files/uploads/sabor/2022-11-15/112607/1_2_POSEBNI_DIO.pdf)

5 Judicial Academy. *Lifelong Professional Development Programme for 2023*, available at: <https://www.pak.hr/wp-content/uploads/2022/11/Program-2023-cjelozivotno.pdf>

the Action Plan for the Implementation of the National Cyber-Security Strategy). These trainings are intended mostly for judges and state attorneys, but there are some for court advisors, victims and witness support officers, depending on the training topic.

Besides the lifelong professional development programme for 2023, the Judicial Academy published three specific professional development plans for different target groups:

- A professional training programme for presidents of courts and state attorneys for 2023<sup>6</sup> covering four areas: acts of the judicial and state attorney administration and official relations, financial and material operations, public and simple procurement and management and communication skills;
- A professional training programme for directors of the judicial administration offices and state attorney's offices for 2023<sup>7</sup> also covering four areas: financial management, human resources management, training on the role of the director of the judicial

administration office and state attorney's office, and communication skills (shared management and leadership skills, conflict resolution and negotiation skills).

- A professional training programme for newly appointed court presidents and state attorneys for 2023,<sup>8</sup> which covers five areas: management skills, official relations, finances, simple and public procurement, communication skills – conflict resolution and public relations.

Regarding the evaluations of educational activities, the last available information is for 2021 and is published as part of the Judicial Academy's annual report.<sup>9</sup> The section "Collection of evaluation reports" contains a review of general and specific evaluations of participants and workshop leaders on the success of the education, along with identified educational and legal problems specific to a particular teaching topic. This publication is not publicly available. The annual report's section on the evaluation of educational activities also contains a list of recommendations by the

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6 Judicial Academy, *Professional Training Programme of the Judicial Academy for Presidents of Courts and State Attorneys for 2023*, available at: <https://www.pak.hr/wp-content/uploads/2022/11/Program-2023.-predsjednici-sudova-i-drzavni-odvjetnici.pdf>

7 Judicial Academy. *Professional Training Programme of the Judicial Academy for Directors of the Judicial Administration offices and state attorney's offices for 2023*, available at: <https://www.pak.hr/wp-content/uploads/2022/11/Program-2023.-ravnatelj-sudske-i-drzavnodvjetnicke-uprave.pdf>

8 Judicial Academy. *Professional training programme of the Judicial Academy for newly appointed court presidents and state attorneys for 2023*, available at: <https://www.pak.hr/wp-content/uploads/2022/11/Program-2023-novoimenovani-predsjednici-sudova-i-drzavni-odvjetnici.pdf>

9 Judicial Academy. *Judicial Academy's annual report for 2021*, available at: <https://www.pak.hr/wp-content/uploads/2022/03/Godisnje-izvjesce-2021.pdf>



participants of the training activities to be implemented in the following year.

### **Digitalisation**

On 22 August 2022, the Ministry of Justice and Public Administration adopted the Ordinance on Electronic Communication in Criminal Proceedings,<sup>10</sup> defining the prerequisites for document submissions in electronic form to the bodies in charge of the procedure. Documents can be submitted by the state bodies, state attorney's office, lawyers, court experts, court interpreters and legal entities or interested parties or other participants in the proceedings. The ordinance defines the method of access to the communication system (authentication and authorisation) and granting system-access rights to different parties (natural persons, legal entities and state bodies, lawyers, court experts and court interpreters, state attorney's office) as well as the complete process of the system usage.

On 2 December 2022, the Ministry of Justice and Public Administration launched a public consultation on the Ordinance on Remote Hearings,<sup>11</sup> which will prescribe remote hearings methods and how evidence can be presented electronically. On 9 December 2022, the

Ministry of Justice and Public Administration launched another public consultation to make amendments to the Ordinance on the eSpis System, an information system,<sup>12</sup> to automatically determine the competent entity via a file allocation algorithm.

### **Use of assessment tools and standards**

Access to basic data on court cases or e-Predmet (e-Case) is a public and free service for parties, attorneys and other interested persons participating in court proceedings. Searching by court and case number enables the visitor to be informed about the progress and dynamics of case resolution in regular proceedings and legal remedy proceedings. Since the system updates case data once a day, parties are given almost immediate insight into the status of their case, and the courts are thereby relieved of such inquiries and their time can be devoted to more important matters – solving the cases.

The data available to visitors through this browser comes from the Integrated System for Court Case Management – eSpis, an information system in which cases are handled by municipal, commercial, county, administrative courts, the High Criminal Court, the High Misdemeanour Court, the High Commercial

10 Ministry of Justice and Public Administration. *Ordinance on Electronic Communication in Criminal Proceeding*, Official Gazette (Narodne novine) 97/2022, available at: [https://narodne-novine.nn.hr/clanci/sluzbeni/2022\\_08\\_97\\_1441.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2022_08_97_1441.html)

11 Ministry of Justice and Public Administration. *Ordinance on Remote Hearings*, available at: <https://esavjetovanja.gov.hr/Econ/MainScreen?EntityId=22675>

12 Ministry of Justice and Public Administration. *Ordinance on Amendments of Ordinance on the eSpis System*, Official Gazette 70/2021, available at: [https://narodne-novine.nn.hr/clanci/sluzbeni/2021\\_06\\_70\\_1347.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2021_06_70_1347.html)

Court, the High Administrative Court and the Supreme Court of the Republic of Croatia. Land registry items are not available in this database, as they are maintained in a separate system and can be accessed at the cadastre.<sup>13</sup>

Since a case can, during court proceedings (for procedural reasons), change its numbers, the visitor can, by searching any of these numbers, review the entire course of the proceedings and all related case numbers. The database starts with cases that were pending or established from 1 January 2010 onwards. Data on reported appeals and data on files sent to a higher court on appeal have been monitored in the system since 1 January 2013, and will not be displayed for previously reported appeals and files previously sent to a higher court on appeal. Data on misdemeanour cases are available for all cases that were resolved on 1 January 2021 or later or that are still unresolved. Data on administrative cases are available for all cases that were resolved on 1 July 2021 or later or are still unresolved. Due to security reasons, it is not possible to find criminal and misdemeanour juvenile cases, investigation and war crimes cases, and cases under the jurisdiction of the Bureau for Combating Corruption and Organised Crime (USKOK) in this database.

The Ministry of Justice and Administration, as the highest authority for judicial

administration, ensures the technical prerequisites for the described information systems. All recorded data are under the jurisdiction of the courts where the proceedings are conducted. The competent courts should be contacted in case of objections and questions regarding the presented data.

Through the dedicated page of the Ministry of Justice and Public Administration,<sup>14</sup> the parties in the proceedings have the possibility of more detailed access to the content of their cases with the possibility of downloading documents that are available in electronic form.

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

In the Republic of Croatia, judicial power is exercised by regular and specialised courts, as well as by the Supreme Court of the Republic of Croatia.<sup>15</sup>

The process of the rationalisation of the court network started in 2005 with the opening of negotiations on accession to the European Union through the Judicial Reform Strategy. The process was carried out in several phases, the last of which was carried out in 2015.<sup>16</sup>

13 See: <https://oss.uredjenazemlja.hr/>

14 See: <https://usluge.pravosudje.hr/komunikacija-sa-sudom>

15 See: <http://www.vsrh.hr/>

16 Ministry of Justice and Public Administration. The process of the rationalisation of the court network, available at: <https://mpu.gov.hr/ostale-informacije/pravosudni-sustav-11207/ministarstvo-pravosudja-11355/reorganizacija-pravosudnog-sustava/racionalizacija-mreze-sudova/11723>

For monitoring purposes, the Council for Monitoring the Implementation of the Judicial Reform Strategy was established in 2006.<sup>17</sup> The Council should meet at least four times a year, but there is no information provided on the Council's activities since the last reform in 2015.

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

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

Changes to the Civil Procedure Act<sup>18</sup> were introduced in 2022. As one of the biggest novelties, the law included a maximum duration for proceedings: three years for first-instance proceedings, one year for second-instance proceedings, and two years for revision proceedings. However, there is a lot of scepticism among the legal experts as to whether such deadlines will be respected in practice. There are, however, no sanctions for exceeding these deadlines, which would serve as an effective deterrent. One of the experts from the Faculty of Law in Zagreb has highlighted that extending beyond the prescribed deadlines will not lead to negative procedural consequences for either the court or the parties. He also noted that similar deadlines in the Civil Procedure Act have been regularly ignored in practice. He shared the example of the time when

the courts had to make and publish a verdict within eight days at the latest; in the end the average duration of publishing verdicts was 120 days.<sup>19</sup>

Extensively long procedures and arbitrary decisions can be seen in particular in cases related to pushbacks and torture of refugees and other migrants in Croatia. Access to legal remedies in these cases is extremely difficult, but even when persons initiate criminal proceedings for a violation of their rights, proceedings almost never lead to an effective investigation according to the criteria established by the ECtHR. Although there have been numerous allegations of torture and violence towards refugees and other migrants in Croatia in the last six years, no indictments were brought and, accordingly, no perpetrators of reported crimes were identified, prosecuted or sanctioned.

Furthermore, the actions regarding the criminal complaints related to pushbacks of refugees and other migrants show that, under international and national law, the proceedings were unreasonably long (in the vast majority of cases the pre-investigation phase lasted for years, while the legal deadline is six months) and that they were not carried out with due diligence – hence the criteria for an effective investigation were not met. In cases

17 See: <https://mpu.gov.hr/ostale-informacije/pravosudni-sustav-11207/ministarstvo-pravosudja-11355/reorganizacija-pravosudnog-sustava/savjet-za-pracenje-provedbe-strategije-reforme-pravosudja/11395>

18 *Civil Procedure Act*, Official Gazette (Narodne novine) 114/22, available at: [https://narodne-novine.nn.hr/clanci/sluzbeni/2011\\_12\\_148\\_2993.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2011_12_148_2993.html)

19 See: <https://lidermedia.hr/poslovna-scena/hrvatska/uzelac-na-ubrzanje-sudskih-postupaka-mnogo-veci-ucinak-od-postavljenih-rokova-imat-ce-plan-upravljanja-parnicom-141016>

involving victims and witnesses who are refugees and other migrants, the use of expedited procedures is crucial due to frequent changes in their location. With the passage of time, it becomes increasingly difficult to identify and locate victims.

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

Court decisions are available on the search engine of the Supreme Court of the Republic of Croatia.<sup>20</sup> This includes court decisions from administrative courts, the High Administrative Court, High Misdemeanour Court, High Criminal Court, High Commercial Court, County Courts, the Constitutional Court and the Supreme Court. Decisions of the Supreme Court are published but with certain exceptions. Their publication is usually delayed from several weeks to several years. Access to court decisions through this search engine is completely free but it is lacking relevant case law from lower instances – county and municipal courts.

According to the Decision on the Publication and Anonymization of Court Decisions,<sup>21</sup> complete judicial decisions of the Supreme Court and related decisions of higher courts

are published as mentioned. However, decisions of lower courts are not published, which makes it difficult to understand the published decisions due to the lack of context. County courts' decisions are only rarely published, and the decision is left to the courts themselves, which means that only 1% to 5% of their decisions are available to the public. Decisions of municipal courts are generally not published on the Internet, and public insight into these decisions is difficult. Currently, there are various services for reviewing court practice, but only with a subscription fee. This negatively affects researchers from civil society and scholars as the fees are quite high and therefore unaffordable.

### **Corruption of the judiciary**

After his arrest<sup>22</sup> in June 2021, Darko Krušlin, a judge of the Osijek County Court, was dismissed from duty<sup>23</sup> in April 2022 by the State Judicial Council due to a corruption scandal he was involved in with his colleagues, judges Zvonko Vekić and Ante Kvesić. Vekić has left duty on his own initiative. The basis for the judges' dismissal was the investigation led by the USKOK (Office for the Prevention of Corruption and Organised Crime – a section

20 The Supreme Court of the Republic of Croatia search engine, available at: <https://sudskapraksa.csp.vsrh.hr/home>

21 The Supreme Court of the Republic of Croatia, *Decision on the Publication and Anonymization of Court Decisions*, available at: [https://sudskapraksa.csp.vsrh.hr/static/pdfs/hr/Odluka-o-objavi-i-anonimizaciji-sudskih-odluka\\_Su-IV-140-2018\\_2018-03-12.pdf](https://sudskapraksa.csp.vsrh.hr/static/pdfs/hr/Odluka-o-objavi-i-anonimizaciji-sudskih-odluka_Su-IV-140-2018_2018-03-12.pdf)

22 See: <https://n1info.hr/crna-kronika/u-osijeku-pocela-uhicenja-sudaca-koje-je-mamic-optuzio-za-kriminal/>

23 See: <https://www.jutarnji.hr/vijesti/crna-kronika/osjecki-sudac-kojeg-je-zdravko-mamic-optuzio-da-mu-je-dao-mito-razrijesen-je-duznosti-15219728>

of the Croatian State Attorney's Office) on suspicion of corruption<sup>24</sup> in the trial of Zdravko Mamić and his brother Zoran Mamić, ex-executives of the Dinamo Zagreb football club. The Mamić brothers and their cooperatives are still on trial for illegally withdrawing 19.2 million EUR from Dinamo. However, they left Croatia in 2018 and are currently in Bosnia and Herzegovina, evading justice. Krušlin, Vekić and Kvesić partied with the Mamić brothers and received gifts from them, despite knowing of the ongoing trial – which they could have possibly taken part in. It is reported that the three judges received at least 370,000 EUR from Zdravko Mamić. Mamić personally informed the court of the unlawful behaviour of the judges. In his exposé, he describes in detail how the judges promised him favourable treatment in the trial. The purpose of the exposé<sup>25</sup> was to compromise judicial authority in general and consequently the sentence already given<sup>26</sup> to Mamić. Darko Krušlin filed a complaint about his dismissal to the Croatian Constitutional Court, but the Court refused it,<sup>27</sup> confirming his liability to disciplinary action imposed on him by the State Judicial Council for damage to the reputation of the Court and judicial office.

## Anti-corruption framework 🟡

### Key recommendations

- Ensure sufficient resources for the implementation of the Protection of Reporters of Irregularities Act, including for the full access to free legal aid and psychological assistance for whistleblowers.

### Framework to prevent corruption

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

Transparency International's Corruption Perception Index for 2021 found that Croatia is among the most corrupt Member States of the EU.<sup>28</sup>

In its Second Addendum to the Second Compliance Report, published in October 2022, GRECO assessed compliance with the six outstanding recommendations issued in the Fourth Round Evaluation Report on Croatia covering "Corruption prevention in

24 See: <https://www.slobodnaevropa.org/a/mamici-sudije-korupcija-mito/31301044.html>

25 See: 2021. <https://www.slobodnaevropa.org/a/mamici-sudije-korupcija-mito/31301044.html>

26 See: <https://www.index.hr/vijesti/clanak/tko-je-uhiceni-sudac-kruslin-i-sto-je-mamic-govorilo-o-njemu/2282139.aspx>

27 See: <https://www.jutarnji.hr/vijesti/hrvatska/ustavni-sud-donio-odluku-o-sucu-kojeg-je-zdravko-mamic-optuzio-za-korupciju-zalba-se-odbija-15279792>

28 Transparency International. "[Corruption Perceptions Index on Croatia, 2021](#)".

respect of members of Parliament, judges and prosecutors.” GRECO found that out of the six recommendations, two were implemented, two were partly implemented, while two still remain not implemented. GRECO notes “that Croatia is one of the very few GRECO members where Parliament still does not have a code of conduct”, and stated that the “situation is highly unsatisfactory.”<sup>29</sup>

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

The new Protection of Reporters of Irregularities Act<sup>30</sup> that was brought in April 2022 represents a positive step for the protection of whistleblowers, but it still has certain deficiencies. The right to free legal aid was added after the public consultations, but considering the deficiencies of legislation concerning provision of free legal aid, and considering that the system of free legal aid is already inadequate, we believe that whistleblowers will not be fully protected. Furthermore, there are no provisions on psychological support for whistleblowers, who often suffer various mental health issues as a result of the pressure and

stigmatisation. Also, it is necessary to ensure sufficient resources for the Ombudsperson’s Office in order to secure full implementation of this legislation. Certain positive steps have been taken in this direction during 2022.

The Municipal Labour Court in Zagreb brought a decision in October 2022, according to which Maja Đerek, a whistleblower and former director for business spaces at the state-owned company State Real Estate, was dismissed illegally and should be returned to her workplace.<sup>31</sup> Đerek filed a criminal complaint to the Office for the Suppression of Corruption and Organised Crime (USKOK) for the abuse of position and power, and for favouring certain actors, occurring at State Real Estate. She was pressured, including by Mario Banožić, the former Minister of State Property and current Minister of Defence.<sup>32</sup>

29 GRECO, *Fourth Evaluation Round*, Corruption prevention in respect of members of parliament, judges and prosecutors, *Second Addendum to the Second Compliance Report*, Croatia, Adopted by GRECO at its 90th Plenary Meeting (Strasbourg, 21-25 March 2022), published on 28 October 2022, 2022GrecoRC4(2022)1, p.3.

30 Protection of Reporters of Irregularities Act, Official Gazette 46/2022, available at: [https://narodne-novine.nn.hr/clanci/sluzbeni/2022\\_04\\_46\\_572.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2022_04_46_572.html)

31 See: [https://www.index.hr/vijesti/clanak/sud-zvzdacicu-djerek-vratio-na-posao-tuzit-cu-ih-opet-zbog-500000-  
kn-place/2400411.aspx](https://www.index.hr/vijesti/clanak/sud-zvzdacicu-djerek-vratio-na-posao-tuzit-cu-ih-opet-zbog-500000-<br/>kn-place/2400411.aspx)

32 See: [https://www.index.hr/vijesti/clanak/zvzdacica-za-index-banozic-je-to-napravio-iz-pogodovanja-napravio-  
je-ogromnu-stetu/2336362.aspx](https://www.index.hr/vijesti/clanak/zvzdacica-za-index-banozic-je-to-napravio-iz-pogodovanja-napravio-<br/>je-ogromnu-stetu/2336362.aspx)

## **Investigation and prosecution of corruption**

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### **Criminalisation of corruption and related offences**

The Croatian Criminal Code<sup>33</sup> criminalises numerous corrupt acts. The USKOK is a special state attorney's office for the prescribed catalogue of criminal offences, and is tasked with taking the necessary procedural actions.

### **Effectiveness of investigation and application of sanctions for corruption offences and their transparency, including as regards to the implementation of EU funds**

The year 2022 saw numerous instances of high-level corruption cases.

For the first time in Croatian history, an acting minister was arrested for corruption. The then-acting Croatian Minister of Physical Planning, Construction and State Assets, Darko Horvat, was arrested in February 2022 and questioned on suspicion of abuse of office. USKOK requested that he be remanded in custody. As it spread in the media, he was "accused of abuse of office in 2018 when he served as

Minister of the Economy, Entrepreneurship and Crafts, specifically that certain companies which participated in a tender were given right of priority without the necessary documents."<sup>34</sup> He was dismissed at his own request the same day. The former minister was also actively criticised for the slow pace of post-earthquake reconstruction in Zagreb and the Banija area.<sup>35</sup> Later in the year, USKOK indicted eight defendants, including four former ministers in the ruling party-led cabinet, a minister's former assistant, a former official at the Ministry of Regional Development, the director of the state administration for government-assisted areas and a former mayor of the eastern town of Županja.<sup>36</sup> In connection to this investigation, another investigation started regarding the suspicion of corruption of the Minister of Labor and Pension System, Family and Social Policy.

In December 2022, in the so-called wind park case, the former mayor of Knin, Josipa Rimac, and eight other defendants, among them former Croatian Minister for Regional Development and European Union Funds Gabrijela Žalac, were indicted by USKOK for bribery and abusing their position and authority to favour an investor from Knin

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33 Criminal Code, Official Gazette (*Narodne novine*) 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021, available at: [https://narodne-novine.nn.hr/clanci/sluzbeni/2011\\_11\\_125\\_2498.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2011_11_125_2498.html)

34 See: <https://n1info.hr/english/news/croatias-minister-darko-horvat-denies-anti-corruption-prosecutors-allegations/>

35 See: <https://balkaninsight.com/2022/02/21/croatian-pm-criticises-timing-of-ministers-arrest-for-corruption/>

36 See: <https://glashrvatske.hrt.hr/en/politics/four-former-cabinet-ministers-indicted-in-latest-corruption-probe-10400254>

for the construction of a wind power plant, for which the mayor received a total of more than 1 million Croatian kuna (approximately 132,275 EUR).<sup>37</sup>

Also in December 2022, the European Public Prosecutor's Office (EPPO) in Zagreb filed an indictment against the above-mentioned Gabrijela Žalac, as well as the former director of Croatia's Central Finance and Contracting Agency, Tomislav Petric, and two business owners, along with their respective businesses. All four are accused of trading in influence, and of the abuse of office and authority. As it stands in the EPPO press release:

“During 2017 and 2018, the then minister launched a public procurement procedure for an information system for strategic planning and development management. It is alleged that she took several actions aimed at ensuring a privileged position for one business owner (2nd accused) and his companies. Among these actions, it is believed that she inflated the estimated value of the procurement of that information system, and decided to conduct a negotiated procurement procedure without publishing a public invitation to tender. During that negotiated procurement procedure, the

companies linked to the 2nd accused were invited to submit their bids.”<sup>38</sup>

### ***Potential obstacles to investigation and prosecution of high-level and complex corruption cases***

In March 2022, the Croatian watchdog organisation Gong issued a letter to GRECO and warned them “that in Croatia we are witnessing a new level of systematic undermining of the rule of law, and faking the fight against corruption, this time by ignoring and obstructing corruption investigations and indictments against the highest political officials.”<sup>39</sup> Additionally, in their letter, Gong noted that:

“At the same time, the government is simulating the fight against corruption, as the Ministry of Justice has announced that it will lift the immunity of members of the government for all corruption offences. However, a true commitment to fighting corruption would mean that there should be no place in the government for ministers accused by the State Attorney's Office of abuse of office, rigging tenders for non-refundable funds to entrepreneurs, as well as jobs and falsifying civil service recruitment procedures.”<sup>40</sup>

37 See: <https://www.glas-slavonije.hr/512151/1/Afera-Vjetroelektrane-Uskok-optuzio-Rimac-Zalac-i-jos-sedam-osoba-zbog-korupcije>

38 EPPO, “*Former minister and three suspects indicted in Croatia for abuse of office and authority and trading in influence*”, 29 December 2022.

39 Gong, “*Croatian PM simulates anti-corruption while keeping corruption suspects in his government*”, 24 March 2022.

40 Gong, “*Croatian PM simulates anti-corruption while keeping corruption suspects in his government*”, 24 March 2022.



The particular obstacles to investigation and prosecution of high-level and complex corruption cases are illustrated in the previously mentioned letter. The experts also noted that the Prime Minister hesitated for too long to grant the consent for investigation, i.e. to lift the immunity.<sup>41</sup>

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

### **Key recommendations**

- Put forward concrete legislative measures against SLAPPs targeting journalists and other actors.
- Enhance the level of protection for journalists against threats and attacks, as well as smear campaigns.

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

#### **Capacity of media and telecommunication authorities and bodies to effectively contribute to a free and pluralistic media environment**

The media regulator in Croatia is the Agency for Electronic Media.<sup>42</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 (EMC),<sup>43</sup> the governing body of the Agency and regulatory body in the field of electronic media. The President of the Electronic Media Council is also the Director of the Agency, and he is appointed by the Croatian Parliament. The Director of the Agency represents and manages the Agency, and is responsible for the work of the internal units of the Agency. Internal units are established to perform tasks within the scope of the Agency: The Office of the Director, the Department for Supervision and Analysis of Media Content, the Finance Department, and the Legal Department. The Agency for Electronic Media actively cooperates with other public and state bodies in its daily activities. Cooperation at the international level is also significant. In addition to membership in all relevant international regulatory networks (ERGA, EPRA, MNRA, CERF), the Council and the Agency actively participate in the work of the European Commission's Directorate-General for Communication Networks, Content and Technology (DG Connect), in line with the Audiovisual Media Services Directive. In their work, the Agency and the Council pay particular attention to respect for human dignity,

41 Gong. "Croatian PM simulates anti-corruption while keeping corruption suspects in his government", 24 March 2022.

42 Agency for Electronic Media, available at: <https://www.aem.hr/about-the-agency/>

43 Electronic Media Council, available at: <https://www.aem.hr/en/vijece/>

the protection of minors and the prevention of incitement and/or promotion of programmes which spread hatred or discrimination based on race, sex, religion or nationality.

At the moment, the Electronic Media Council has only four members, which is also a quorum for decision-making as prescribed in the Rules of Procedure of the Electronic Media Council.<sup>44</sup> In April 2022, the Ministry of Culture and Media opened a public call for three new members.<sup>45</sup> The call was open until the end of May, but the government has not yet appointed the rest of the members of the EMC, although 27 candidates applied for the three positions. In addition, the mandate for three members of the current EMC will expire in 2023 so another public call for nominations will have to be opened soon.

Among other things, the Council decides on radio and television concessions, and the distribution of funds from the Fund for Pluralism. It is only recently that they distribute funds for “fact checking” projects<sup>46</sup> under the measure “Establishment of media fact-checking and

public data publication system” of the National Recovery and Resilience Plan.<sup>47</sup>

The Croatian Regulatory Authority for Network Industries (HAKOM) is an independent regulator of the electronic communications market, postal services market and railway services market in the Republic of Croatia.<sup>48</sup> HAKOM is an autonomous and non-profit legal entity with public authority. The work of HAKOM is public. The founder of HAKOM, and founding rights, are exercised by the Croatian Parliament and the government of the Republic of Croatia. HAKOM is governed by its council, which includes five members, who are all appointed for five-year terms by the Croatian Parliament. They can also be dismissed by a vote in the Parliament upon a proposal of the government. Decisions of the council are made by a majority vote of all of its members, i.e., any decision requires three council members. The agency’s executive director is in charge of HAKOM’s staff, which performs expert, technical, and administrative roles.

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44 Electronic Media Council. Rules of Procedure of the Electronic Media Council, Article 14., available at: <https://www.aem.hr/wp-content/uploads/2021/01/Poslovnik-o-radu-Vijeca-za-elektronicke-medije.pdf>

45 Ministry of Culture and Media, [Public call for nominations for three members of the Electronic Media Council, 27 April 2022.](#)

46 Agency for Electronic Media. A public call was presented as part of the measure “[Establishment of media fact-checking and the system of public disclosure of data](#)”, 19 December 2022.

47 Government of the Republic of Croatia, National Recovery and Resilience Plan 2021-2026, available at: <https://planoporavka.gov.hr/UserDocsImages/dokumenti/Plan%20oporavka%20i%20otpornosti%2C%20srpanj%202021..pdf?vel=13435491>

48 Croatian Regulatory Authority for Network Industries, available at: <https://www.hakom.hr/en/home/8>

The competence of HAKOM is prescribed by Article 12 of the Electronic Communications Act<sup>49</sup> and Article 38 of the Act on Postal Services<sup>50</sup> and Articles 14 and 28 EUTMR of the Act Regulation of Railways Services Market Regulation and protection of passengers' rights in Rail Transport.<sup>51</sup>

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

The Croatian Journalists' Association (CJA) Ethical Council is the only self-regulatory body operating within the CJA since its founding in 1910. The council has 11 members elected by the CJA assembly among its members.<sup>52</sup> The work of the Ethical Council is regulated by the Rulebook on the Work of the Ethical Council of Journalists.<sup>53</sup>

## ***Pluralism and concentration***

### ***Levels of market concentration***

On 1 June 2022, the media company CME media enterprises announced the acquisition

of RTL Croatia, following the approval of Croatian regulatory authorities. In the week prior to the acquisition, the Agency for the Protection of the Market Competition (APMC) approved the acquisition of CME media over RTL Croatia, further increasing the media concentration. According to them, this level of concentration did not have a significant effect on competition, as it does not create a new or reinforce the existing dominant position of the merging parties on the market.<sup>54</sup>

## ***Transparency of media ownership***

### ***Rules governing transparency of media ownership and public availability of media ownership information, and their application***

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.

49 Electronic Communications Act, Official Gazette 73/2008., available at: [https://narodne-novine.nn.hr/clanci/sluzbeni/2008\\_06\\_73\\_2420.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2008_06_73_2420.html)

50 Act on Postal Services, Official Gazette (*Narodne novine*) 88/09, available at: [https://narodne-novine.nn.hr/clanci/sluzbeni/2009\\_07\\_88\\_2149.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2009_07_88_2149.html)

51 Act Regulation of Railways Services Market Regulation and Protection of Passengers' Rights in Rail Transport, Official Gazette 104/2017, available at: [https://narodne-novine.nn.hr/clanci/sluzbeni/2017\\_10\\_104\\_2382.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2017_10_104_2382.html)

52 Croatian Journalists' Association. "Ethical Council", available at: <https://www.hnd.hr/novinarsko-vijece-casti1>

53 Croatian Journalists' Association. "Rulebook on the work of the Ethical Council of Journalists", available at: <http://www.hnd.hr/pravilnik-o-radu-novinarskog-vijeca-casti-032018>

54 Croatian Journalists' Association. "CME completed the purchase of RTL Croatia", available at: <https://www.hnd.hr/cme-dovrsio-kupnju-rtl-a-hrvatska>

The Agency for Electronic Media maintains a register of electronic publications providers, in accordance with Article 80 of the EMA that is publicly available in different formats.<sup>55</sup>

Electronic publications represent editorially designed programme content that is published daily or periodically via the Internet by providers of electronic publications for the purpose of public information and education. Before the first publication of an electronic publication, a natural or legal person must submit an application for registration in the Register of Electronic Publications Providers maintained by the Electronic Media Council. The method of application is described by the Ordinance on the Register of Media Service Providers, Electronic Publications and Non-Profit Providers of Media Services, Electronic Publications and Non-Profit Producers of Audiovisual and/or Radio Programmes,<sup>56</sup> and the Ordinance on Amendments to the Ordinance on the Register of Media Service

Providers, Electronic Publications and Non-Profit Producers of Audiovisual, and/or Radio Programmes.<sup>57</sup>

The Electronic Media Council adopted the Recommendation on the Entry of Providers of Electronic Publications in the Register of Providers of Media Services, Electronic Publications and Non-Profit Producers of Audiovisual and/or Radio Programmes.<sup>58</sup>

### **Public service media**

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#### **Independence of public service media from governmental interference**

In 2022, an agreement on a new contract was reached between the Croatian Radiotelevision and the government of Croatia for the period from 1 January 2023 to 31 December 2027.<sup>59</sup> It was preceded by public consultations, organised by the Croatian Radiotelevision (CRT), which lasted from 29 April to 12 June 2022.

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55 Agency for Electronic Media, “Register of electronic publication providers”, available at: <https://pmu.e-mediji.hr/Public/PregledElPublikacije.aspx>

56 Electronic Media Council, Ordinance on the Register of Media Service Providers, Electronic Publications and Non-Profit Providers of Media Services, Electronic Publications and Non-Profit Producers of Audiovisual and/or Radio Programmes, Official Gazette 134/2013, available at: [https://www.aem.hr/repository\\_files/file/10/](https://www.aem.hr/repository_files/file/10/)

57 Electronic Media Council, Ordinance on Amendments to the Ordinance on the Register of Media Service Providers, Electronic Publications and Non-Profit Producers of Audiovisual and/or Radio Programmes, Official Gazette (*Narodne novine*) 79/2014, available at: [https://www.aem.hr/repository\\_files/file/403/](https://www.aem.hr/repository_files/file/403/)

58 Electronic Media Council, Recommendation on the entry of providers of electronic publications in the Register of providers of media services, electronic publications and non-profit producers of audiovisual and/or radio programmes, Official Gazette) 109/2014, available at: [https://www.aem.hr/repository\\_files/file/439/](https://www.aem.hr/repository_files/file/439/)

59 Agreement between Croatian Radio and Television and the government of the Republic of Croatia for the period from 1 January 2023 to 31 December 2027, available at: <https://api.hrt.hr/media/7e/b3/ugovor-izmedu-hrt-a-i-vlade-rh-za-razdoblje-od-1-sijecnja-2023-do-31-prosinca-2027-20221020125658.pdf>

The Union of Journalists of Croatia (UJC) stated in June that the consultations were pro-forma because “the proposed document is bad and should be hidden from the interested public.”<sup>60</sup> According to the UJC, the contract is too general and without necessary concrete information and indicators. The share of types of content in the aired (instead of produced) programme is presented in percentages instead of hours and the share of informative programmes is reduced both on the radio and television, while the share of other types of programmes is not increased. CRT Director Robert Šveb himself stated that he is not content with the participation of institutions and other actors in the public consultations. The contract was approved by the CRT Programme Council with eight votes for, two abstentions and one against.<sup>61</sup>

### **Other**

The Ombudsperson’s annual report for 2021,<sup>62</sup> published in March 2022, informs of the complaints made by citizens with lower incomes regarding a full or partial exemption from the mandatory monthly subscription payment to the national broadcaster CRT. It also informs of the complaint about the impossibility of

deregistering from the records of those liable to pay a subscription.

Pensioners with a pension of less than 1,500 HRK (198 EUR) are exempt from paying 50% of the monthly subscription fee if their pension is paid from the Croatian state budget and if they were registered as liable to pay the fee up until 12 October 2015. The first condition is prescribed because information on the pension amount can only be obtained from the Croatian Institute for Pension Insurance (which has such data only for pensioners who receive their pension from the Croatian insurance). The second condition serves to prevent manipulative changes of the registered taxpayer.

The Ombudsperson’s Office turned to the Tax Administration Office of the Ministry of Finance regarding the first condition. This office can submit data contained in their own records on income and receipts directly to CRT without any obstacles. The second condition of registering in the records on a certain date seven years ago is too burdensome for pensioners, since new subscribers who meet the prescribed criteria are denied the privilege,

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60 Union of Journalists of Croatia. “About the Contract between HRT and the Government of the Republic of Croatia or a public debate that is not, a Contract that is not”, available at: <https://www.snh.hr/o-ugovoru-hrt-a-ivlade-rh-ili-javna-rasprava-koja-to-nije-ugovor-koji-to-nije/>

61 Croatian Radiotelevision. Programme Council. Excerpt from the minutes of the 10th session of the CRT Programme Council, available at: <https://api.hrt.hr/media/47/06/zapisnik-10-sjednice-programskog-vijeca-davanje-misljenja-na-prijedlog-ugovora-s-vladom-rh-za-razdoblje-2023-2027-20220628141200.pdf>

62 See more: <https://www.ombudsman.hr/hr/download/izvjesce-pucke-pravobraniteljice-za-2021-godinu/?wpdm-dl=13454&refresh=63e11af630aa31675696886>

as the burden of preventing possible abuse of the system is shifted to them.

For pensioners who benefited from this exemption, the allocation of 40 HRK (5.30 EUR) instead of 80 HRK (10.61 EUR) in monthly subscription fees meant a lot to the household budget, especially during the pandemic, when they spent most of their time at home as a high-risk group.

## **Online media**

### **Impact on media of online content regulation rules**

Art. 94(3) of the Electronic Media Act (EMA)<sup>63</sup> regulates user-generated content, i.e., comments by users on articles published online. When users register to a page, publishers have to inform them in a clear and easily visible and understandable way about commenting rules and violations. In this way, the responsibility for the comments will not go to the publishers, but to those who break the law.

### **Competence and powers of bodies or authorities supervising the online ecosystem**

The Agency for Electronic Media (AEM)<sup>64</sup> maintains a register of electronic publications providers,<sup>65</sup> in accordance with Art. 80 of the EMA. As previously noted, the AEM is a media regulator performing administrative, professional and technical tasks for the Electronic Media Council (EMC),<sup>66</sup> the governing body of the Agency, and regulatory body in the field of electronic media.

The Croatian Journalists' Association's (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.<sup>67</sup>

Citizens' complaints on discriminatory content online can be addressed to the Ombudsperson's Office<sup>68</sup> in line with the office's role as the central body for combating discrimination.

From 2013 to 2022, the funds were distributed according to the following ratios:

1. Broadcasters at the local and regional level, non-profit television broadcasters and non-profit media service providers referred to in Articles 19 and 79 of the Electronic Media Act - 46.5%;

63 Electronic Media Act, Official Gazette (*Narodne novine*) 111/2021, available at: [https://narodne-novine.nn.hr/clanci/sluzbeni/2021\\_10\\_111\\_1942.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2021_10_111_1942.html)

64 Agency for Electronic Media, available at: <https://www.aem.hr/about-the-agency/>

65 Agency for Electronic Media, available at: <https://www.aem.hr/about-the-agency/>

66 Electronic Media Council, available at: <https://www.aem.hr/en/vijece/>

67 Croatian Journalists' Association, Ethical Council, available at: <https://www.hnd.hr/novinarsko-vijece-casti1>

68 Ombudsperson of the Republic of Croatia, available at: <https://www.ombudsman.hr/hr/ovlasti-i-nadleznosti/>

2. Radio broadcasters at the local and regional level, non-profit radio broadcasters and non-profit media service providers referred to in Articles 19 and 79 of the of the Electronic Media Act - 46.5%;
3. Non-profit providers of electronic publications - 3%;
4. Non-profit audiovisual content producers - 3%;
5. Non-profit radio content producers - 1%.

On 28 October 2022, the first public call for the fund was opened for one month, until 28 November 2022.<sup>69</sup> This tender was intended for for-profit providers of electronic publications from Art. 71(1) of the EMA, non-profit providers of electronic publications from Art.

55(5) of the EMA, and non-profit producers of audiovisual and radio programmes.<sup>70</sup>

On 9 November 2022, the second public call for the fund was opened for one month, until 9 December 2022.<sup>71</sup> This tender was intended for non-profit radio broadcasters and radio broadcasters at the local and regional level and non-profit providers of radio and television media services via satellite, internet, and cable from Articles 26 and 92 of the Electronic Media Act.<sup>72</sup>

On 16 November 2022, the third public call for the fund for the Promotion of Pluralism and Diversity of Electronic Media was opened for one month, until 16 December 2022.<sup>73</sup> This tender was intended for non-profit television and/or radio broadcasters and radio

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69 Electronic Media Council, “[Public tender number 1/22 for the allocation of funds from the Fund for the Promotion of Pluralism and Diversity of Electronic Media - for-profit providers of electronic publications, non-profit providers of electronic publications, non-profit producers of audiovisual and radio programmes for 2023](#)”.

70 Public tender number 1/22 for the allocation of funds from the Fund for the Promotion of Pluralism and Diversity of Electronic Media, Official Gazette 126/2022, available at: <https://narodne-novine.nn.hr/clanci/oglasia/full/o8346550.html>

71 Electronic Media Council, “[Public tender number 2/22 for the allocation of funds from the Fund for the Promotion of Pluralism and Diversity of Electronic Media - for non-profit radio broadcasters and radio broadcasters at the local and regional level and non-profit providers of radio and television media services by satellite, internet and cable as referred to in Articles 26 and 92 of the Electronic Media Act for 2023](#)”.

72 Public tender number 2/22 for the allocation of funds from the Fund for the Promotion of Pluralism and Diversity of Electronic Media, Official Gazette 132/2022, available at: <https://narodne-novine.nn.hr/clanci/oglasia/full/o8346929.html>

73 Electronic Media Council, “[Public tender number 3/22 for the allocation of funds from the Fund for the Promotion of Pluralism and Diversity of Electronic Media - for non-profit television broadcasters and television broadcasters at the local and regional level and non-profit radio broadcasters and radio broadcasters at the local and regional level](#)”.

and/or television broadcasters at the local and regional level.<sup>74</sup>

On 1 December 2022, the Electronic Media Council adopted amendments to the decisions on the public tender for the allocation of funds from the Fund for Promotion of Pluralism and Diversity of Electronic Media No. 2/22 and 3/22 that prolonged the deadlines for applying to tenders for the 2/22 (from 9 December to 23 December 2022) and for the 3/22 (from 16 December to 30 December 2022). The results of the tenders are pending.<sup>75</sup>

Additionally, each year, the Electronic Media Council publishes a call for tenders for co-financing of projects on the topic of encouraging media literacy.<sup>76</sup> The subject of this public call is the collection of offers for co-financing the preparation and creation of educational materials on various platforms, projects, events, seminars, conferences, workshops, lectures or research, on the topic of media literacy, development and awareness-raising of its importance, as well as related areas and other projects. The projects are intended to satisfy the public interest, for which financial resources are provided in the budget of the Agency for Electronic Media for 2023 in the amount of

53,089 EUR. The highest amount that can be obtained for a single project is 6,000 EUR in one year, and the lowest amount is 1,000 EUR.

The purpose of co-financing is to strengthen and develop citizens' media literacy skills, develop educational materials and programmes on various platforms, and raise public awareness of the importance of media literacy. Media literacy implies a set of individual and social knowledge, competences and skills, i.e. the ability to access and use the media and communication platform, understanding, evaluating and critically reflecting on various aspects of media and media content and creating media content and messages, as well as responsible and ethical sharing of information and media content on media and communication platforms and on social networks.

For the implementation of the first part of the measure, the establishment of an information verification system, 5,968,170 EUR in grants was provided. Higher education and scientific institutions and civil society associations will be able to apply to the public call for the allocation of funds as lead applicants, while the media can be partners. For projects of

74 Public tender number 3/22 for the allocation of funds from the Fund for the Promotion of Pluralism and Diversity of Electronic Media, Official Gazette 134/2022, available at: <https://narodne-novine.nn.hr/clanci/oglasia/full/o8347331.html>

75 Electronic Media Council, "Decisions on amendments to the decisions on the public tender for the allocation of funds from the Fund for Promotion of Pluralism and Diversity of Electronic Media No. 2/22 and 3/22".

76 Electronic Media Council, "Public call for co-financing of projects on the topic of encouraging media literacy", available at: <https://www.aem.hr/vijesti/javni-poziv-za-sufinanciranje-projekata-na-temu-poticanja-medijske-pismenosti-3/>



independent verification of the accuracy of information, a minimum of 100,000 EUR to a maximum of 200,000 EUR per project will be allocated, and the public call was published by the end of the year.<sup>77</sup> The call will be opened on 1 February and will stay open until 30 April 2023.

### **Public trust in media**

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A research carried out by the Centre for Peace Studies with a representative sample of the general public in 2022 showed that 4.1% of respondents completely trust the media, while 15.4% claim that they generally trust the media; 24.6% of respondents don't trust the media at all, 19.4% generally don't trust the media, and 36.4% neither trust nor distrust the media. This puts media after the scientific institutions, military, town and municipal mayors, education system, healthcare system, police, church, CSOs and social welfare system by the level of trust, while the level of trust in media is higher than the level of trust in unions, State Attorney's Office, courts, government, Parliament, and political parties.<sup>78</sup>

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

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

In 2022, multiple instances of various types of attacks on Croatian journalists took place. Journalist Marcello Rosanda<sup>79</sup> from the daily paper Glas Istre (the Voice of Istria) was the target of many insults (e.g. “journalist trash”, “I hope you die of cancer”) posted on the journalist's Facebook page in the comments of his article published in September 2022 that critically reported on a business enterprise of a local entrepreneur which he called out for “elements of quackery.”

An offline incident happened in the city of Požega where a 28-year-old was arrested for threatening the journalist Mate Pejaković, the editor of the news site [pozeski.hr](https://www.pozeski.hr), with death. The alleged reason for these threats<sup>80</sup> are the critical articles that Pejaković wrote about a local politician whose husband is the arrested attacker.

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77 Agency for Electronic Media, “[A public call for the establishment of a system for verifying the accuracy of information has been published](#)”.

78 Centre for Peace Studies, “[New beginning - a platform for discussion about a new approach to the positioning and work of progressive human rights organisations in Croatia](#)”.

79 Croatian Journalists' Association, “We strongly condemn the threats and insults directed at our colleague Marcello Rosanda”, available at: <https://www.hnd.hr/najostrije-osudujemo-prijetnje-i-uvrede-upucene-kolegi-marcellu-rosandi>

80 Croatian Journalists' Association, “[New attacks on journalists - a man who threatened a journalist and the editor of the portal \[pozeski.hr\]\(https://www.pozeski.hr\) was detained](#)”.

On the Croatian island Tijat, one of the key figures of Croatian journalism, the President of the Union of Croatian journalists and the European Federation of Journalists, Maja Sever, was attacked.<sup>81</sup> As she was taking photographs of the ongoing usurpation of the coast and maritime property on the island, the owner of the restaurant that she was photographing took her phone and threw it away, while yelling at her and ordering her to delete the photographs. The police first decided that there was no basis for their intervention but changed their mind after the story gained public attention.

In August, a young journalist of *Zadarski list*, Toni Perinić, received threats for investigating a tourist fraud case for which the local tourist board got more than 30 complaints in the past. The case revolved around an apartment rentier who charged advances but then cancelled reservations consistently to her clients.<sup>82</sup> Perinić was told by the rentier's father to "watch out what he writes because it's going to cost him."

In September 2022, the Croatian Journalists' Association openly condemned the verbal and physical attacks on journalists who reported

from a protest held on 10 September 2022 in Zagreb under the slogan "We are firing you." The protest, a response to the corruption at INA, the national oil company, was directed against the government of Andrej Plenković and the political party in power, the Croatian Democratic Union, and protesters demanded the government's resignation.<sup>83</sup>

A trial that started in 2020 for the attack on Živana Šušak Živković is still in progress.<sup>84</sup> The journalist was physically assaulted by two young men as she was documenting a religious ceremony happening in a church despite the imposed lockdown rules that were then in force due to the COVID-19 pandemic.

Another journalist who was verbally attacked is Željka Gavranović from the Sbplus news site. She was trying to have a conversation with high school employees and students' parents about a T-shirt inscription that they wore, which featured a word play referring to the fascist salute used in the so-called Independent State of Croatia. Instead of a civilised dialogue, Gavranović experienced unacceptable outbursts of rage from certain employees of the high school in question.<sup>85</sup>

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81 Croatian Journalists' Association, "[The president of the European Federation of Journalists, Maja Sever, was shamelessly attacked](#)".

82 Croatian Journalists' Association, "[Safe journalists: threats to journalists in Croatia for exposing fraud](#)".

83 Croatian Journalists' Association, "[CJA: An attack on a journalist is an attack on a person in public service, and that's why we will report everything to the police](#)".

84 Croatian Journalists' Association, "[The attackers of journalist Živana Šušak Živković face a sentence of six months to five years in prison](#)".

85 Croatian Journalists' Association, "[CJA: We strongly condemn the attack on our colleague in Slavonski Brod](#)".

After a corruption scandal of the conservative government currently in power, a protest was organised in Zagreb by the initiative Slobodni Zajedno (Free Together). Three journalists, including the previously mentioned Maja Sever, were attacked while reporting from the protest<sup>86</sup>. The other two victims of insults and physical pushing were Božena Matijević and Bojana Guberac.

A positive remark is to be made concerning the Croatian Journalists' Association, which is participating in a regional research<sup>87</sup> aimed at evaluating media freedom and journalists' safety in Croatia and surrounding countries. A part of the project is the implementation of a survey based on the Worlds of Journalists Study. The aim is to help media experts and creators of media policies to better understand the circumstances and changes in the conditions and limitations of journalism, while highlighting the role of journalism in social change.

2022 was also marked by the continuation of trials between the journalist Hrvoje Zovko and the Croatian public broadcaster CRT. On 3 February 2022, the Zadar County Court

dismissed the appeal of CRT against Hrvoje Zovko, and decided that the judgement of the Zagreb Municipal Civil Court of 13 November 2020 confirming the statements made by Hrvoje Zovko, president of the Croatian Journalists' Association, about the existence of censorship on CRT, were not disputed or untrue and that, in the specific case, they did not violate the honour and reputation of CRT.<sup>88</sup> In May 2022, Hrvoje Zovko won the dispute against CRT at the Zagreb Municipal Labour Court, which rejected the action of the second termination of the employment contract and ordered Zovko to be returned to the position of editor-coordinator within 15 days on a provisional measure, and ordered CRT to pay litigation costs in the amount of 331.70 EUR.<sup>89</sup>

In September 2022, another suit facing CRT and Hrvoje Zovko resumed at the Zagreb Municipal Criminal Court. This is a private case filed by CRT for libel over Zovko's statements about the existence of censorship in the public service, which was launched at the end of 2018 in the mandate of CRT Director General Kazimir Bačić as one of several lawsuits against Zovko after CRT handed him an

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86 Croatian Journalists Association, "[CJA: An attack on a journalist is an attack on a person in public service, and that's why we will report everything to the police](#)".

87 Croatian Journalists' Association, "Survey on media freedom and safety of journalists in Croatia", available at: <https://www.hnd.hr/anketa-o-medijskim-slobodama-i-sigurnosti-novinara-u-hrvatskoj>

88 Croatian Journalists' Association, "[HRT legally lost the case against Zovko due to his allegations about censorship on public television](#)".

89 Croatian Journalists' Association, "[Hrvoje Zovko won a labour dispute against HRT - the court ruled that the second dismissal of Zovko was also illegal](#)".

illegal dismissal in September 2018.<sup>90</sup> By an inconclusive verdict, passed before the Zagreb Municipal Criminal Court on 12 September 2022, Zovko was acquitted of slandering CRT.<sup>91</sup>

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

In 2022, for the first time a verdict was passed for an attack against a journalist in Croatia. This was allowed for by the new Penal Code which categorises attacks on journalists as attacks against persons working in public interest.<sup>92</sup> The case for which the verdict was passed is the above-mentioned attack suffered by Živana Šušak Živković in a church. The attacker, Ivan Lovrinčević, was penalised with a suspended term of six months' imprisonment.

On the same day when Lovrinčević attacked Šušak Živković, the same was done by Tonći Ćukušić and Antonio Ćukušić. They were initially sentenced with seven and eight months of imprisonment, however their sentence ended

up being replaced with community service – one day of prison translated to two hours of service. Šušak Živković was not dissatisfied with the change of sentence; she claims that her goal was never to send those young men to prison but to demand from the legal system to help them get on the right track.<sup>93</sup>

As far as law enforcement is concerned regarding the Perinić case (also mentioned above), the District Attorney's Office pressed charges against Marko Lisica for the threats he directed to the young journalist. The unlawfully used tourist accommodation object that Perinić informed about has been closed by inspection. Perinić claims<sup>94</sup> that he is happy with that turn of events and emphasises how journalists must never keep quiet because that way things will never change for the better.

***Lawsuits and prosecutions against journalists, including SLAPPs, and safeguards against abuse***

Lawsuits against journalists in Croatia are continuously growing in number.<sup>95</sup> In 2022 at

90 Croatian Journalists' Association, "[The court proceedings of HRT against CJA president Hrvoje Zovko continues](#)".

91 Croatian Journalists' Association, "[Zovko – HRT 7:0 - the president of CJA was acquitted of defaming HRT](#)".

92 Croatian Journalists' Association, "[The first conviction for an attack on a journalist under the new Penal Code - the attacker of the N1 cameraman was sentenced to six months in prison](#)".

93 Croatian Journalists' Association, "[For the attack on the journalist, they received a prison sentence, which was replaced by community service](#)".

94 Croatian Journalists' Association, "[The Municipal State Attorney's Office filed an indictment for threats against a Zadar newspaper journalist](#)".

95 Croatian Journalists' Association, "[HND research: the number of lawsuits against journalists and the media is increasing, at least 951 of them are active](#)".

least 951 lawsuits were active against media outlets and individual journalists. The total amount of payoff demanded by the prosecutors of all lawsuits combined reached almost 10.3 million EUR. Hanza Media, the publisher of *Jutarnji list*, *Globus*, *Slobodna Dalmacija* and other newspapers, was the target of the largest number of lawsuits, 443 in total. Amounts of financial compensations demanded by prosecutors range from a couple of hundred euros to hundreds of thousands of euros. The longest trial has been in progress for more than 32 years. From the 951 lawsuits in total, 928 of them concern civil procedures demanding compensation of damage to honour or reputation of prosecutors. The remaining 23 lawsuits are criminal procedures. Most of the prosecutors are public persons, politicians (some of them currently in governing positions), legal persons, and judges.<sup>96</sup> The working group recently founded by the Culture and Media Ministry to tackle the issue of SLAPPs still hasn't succeeded in making significant changes to the status quo in Croatia. An official definition of a SLAPP hasn't been decided on, and courts do not identify and classify SLAPP lawsuits as such. Several workshops for judicial authorities and journalists about SLAPPs were organised in 2022.<sup>97</sup> Another safeguard against

abuse is the Center for Protecting Freedom of Expression, founded by the Croatian Journalists' Association. Work in the Center is done by lawyers specialised in media who offer free legal advice and even representation in court to journalists.<sup>98</sup> However, a worrying number of lawsuits and prosecutions against Croatian journalists remains.

One of the internationally acknowledged lawsuits in 2022 was the one against Telegram. Reporters Without Borders (RSF) called on the Zagreb Court dismiss charges<sup>99</sup> filed by judge Zvonko Vrban against the news site Telegram, its journalist Drago Hedl and editor in charge, Jelena Pavić Valentić. Hedl wrote a series of articles about the judge's property, and was consequently sued for 100,000 EUR in a typical SLAPP.

Another SLAPP, filed by judge Ivan Turudić against *Novi list* journalist Dražen Ciglenečki, ended up in Ciglenečki being found guilty and fined a 1,062 EUR indemnity. The basis of the lawsuit were claims that Ciglenečki made in an opinion piece where he criticised the judge. Turudić found the statements written in 2014 offensive and sued the journalist. Unfortunately, the court didn't acknowledge

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96 Croatian Journalists' Association, "[HND research: the number of lawsuits against journalists and the media is increasing, at least 951 of them are active](#)".

97 Ministry of Culture and Media, "[Expert Working group for Development of the SLAPP combating Policy](#)".

98 Croatian Journalists' Association. "[Vanja Jurić: SLAPP lawsuits harm not only journalists and the media, but also society as a whole](#)".

99 Croatian Journalists' Association. "[Reporters Without Borders highlighted the problem of SLAPP lawsuits in Croatia and called on the court to dismiss Judge Vrban's lawsuits against Telegram](#)".

Ciglencečki's claim<sup>100</sup> that his goal wasn't to harm the judge's reputation but to simply express his own personal beliefs.

A problematic and precedent-setting verdict was brought by judge Berislav Zaninović of the Novi Zagreb Municipal Court. The verdict orders Nova TV, a large TV company, to pay 3,982 EUR in compensation to Damir Škaro, the ex-head secretary of a large Zagreb automobile club. Nova TV aired a story of the auto-club secretary, who accused Škaro of raping her. The argument for Škaro's lawsuit<sup>101</sup> was that at the time of the TV broadcast he was not yet proven guilty. The verdict against *Nova TV* thus presents a dangerous precedent that allows for control of free speech and limits the media's role as a watchdog, which is especially relevant in Croatia, considering its problematic justice system.

On another occasion, however, the Zagreb Municipal Civil Court dismissed the accusations of the Split judge Mario Franetović against the newspaper 24sata. The court dismissed Franetović's claims, ruling that the paper's freedom of expression is more of a priority than the prosecutor's right to

privacy protection and personal reputation.<sup>102</sup> The articles published in the paper criticised Franetović's verdict that sentenced a disabled young man to prison.

In February 2022, the Zagreb Municipal Court brought a verdict against Hanza Media, according to which the media company had to pay 33,178 EUR to judge Ivan Marković as compensation for emotional distress.<sup>103</sup> Judge Marković was deciding on the sentence of five young men accused of rape, sexual abuse, and filming of a 15-year-old girl. Right after interrogation, the accused were released by the judge. This decision was later revisited by the Indictment Division of the Court and the young men were sent to detention prison. Marković sued Hanza Media after some of its authors questioned his initial verdict.

In two other cases, lawsuits against journalists were dropped. Željka Markić, a conservative anti-LGBTIQ activist, lost the lawsuit<sup>104</sup> she initiated against journalist Boris Dežulović and the publisher of one of his critical articles; similarly, the judgement that initially ruled against journalist Ante Tomić for writing critically about the then newly selected minister of

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100 Croatian Journalists' Association. "[Another scandalous verdict against journalists - Dražen Ciglencečki was judged for expressing his opinion, which is extremely unacceptable](#)".

101 Croatian Journalists' Association. "CJA: the scandalous verdict against Nova TV abolishes freedom of speech", available at: <https://www.hnd.hr/hnd-skandalozna-presuda-protiv-nove-tv-ukida-slobodu-govora>

102 Croatian Journalists' Association. "The court rejected the claim of the Split judge against 24 hours".

103 Croatia. Croatian Journalists' Association. "CJA: The verdict against Hansa media is dangerous for journalism!".

104 Croatian Journalists' Association. "[Željka Markić lost the case against Dežulović and will have to pay the costs of the litigation](#)".

culture Zlatko Hasanbegović was annulled<sup>105</sup> after Tomić appealed to the Constitutional Court.

The president of the Croatian Journalists' Association, Hrvoje Zovko, has warned against censorship practices enforced by the political establishment and has announced a large journalist protest if the prosecutions continue at this pace. One of the problems that Zovko underlines<sup>106</sup> are so-called serial prosecutors. An example is Romana Nikolić, a member of Parliament, who sued the publisher of a small non-profit site, Virovitica.net, for 1,000 EUR. But this was only one of her targets – she demanded, in a series of lawsuits, more than 2,654 EUR, and won all of them in court.

Croatia continues to rank among the worst countries in the EU when it comes to the number of SLAPPs filed by judges against journalists, according to a press conference held by the Croatian Journalists' Association on 30 November 2022. The association further warned about the latest judicial hit against the journalist profession by a verdict of the Zagreb County Court according to which journalist

and association member Davorka Blažević must pay compensation to Supreme Court judge Senka Klarić Baranović of 5,308 EUR in the name of the provision of “violation of honour and reputation.” The association has been recording SLAPP lawsuits for years, and for that purpose it has established the Centre for the Protection of Freedom of Expression,<sup>107</sup> which brings together the best lawyers specialised in media law who *pro bono* represent all members and members of the associations confronted with SLAPP lawsuits.<sup>108</sup>

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

### ***Restrictions on access to information***

In April 2022, the competent committee of the Parliament accepted the final version of amendments<sup>109</sup> to the Right to Access to Information Act. One of the amendments prescribes financial penalties to responsible persons in public bodies that don't act in accordance with the decision of the Information Commissioner. Another alteration of the Act makes the implementation of decisions made by the Information Commissioner obligatory.

105 Croatian Journalists' Association. “[The Constitutional Court decided - Hasanbegović will have to return the money to Tomić](#)”.

106 Croatian Journalists' Association. “[Judicial-political attack on journalists: HND announces a protest if the serial lawsuits are not stopped](#)”.

107 Croatian Journalists' Association. “[Centre for the Protection of Freedom of Expression](#)”.

108 Croatian Journalists' Association, “[CJA: we will publish a shameful list of judges against journalists, we call for solidarity with colleague Blažević](#)”.

109 Croatian Journalists' Association, “[The Parliamentary committee accepted changes to the Right to access to information Act: fines for those who withhold the requested information](#)”.

According to the Report on the Implementation of the Right to Access to Information Act,<sup>110</sup> in 2021 there were 18,576 requests for access to information, which is similar to previous years. Public authorities provided the information 88.54% of the times it was asked. The largest amount of irregularities was identified in the disclosure of information that is of most interest to citizens: lists of donation users, sponsorships and other payments from public funds; outcomes of competition processes and public calls; names and contacts of executives and managers of organisational entities. It is problematic that the Croatian Parliament hasn't discussed either this report or the one from 2020.

One of the organisations identified in the report as making unlawful use of the limitations to the rights on access to information is the Croatian Bank for Reconstruction and Development.<sup>111</sup> For the most part, this applies to withholding information due to professional secrecy by the bank.

Furthermore, throughout 2022, the Centre for Peace Studies has been experiencing continuous difficulties in obtaining information from the Ministry of the Interior. Information that

should be publicly available has often been withheld after inquiries, and answers to formal requests for access to information have been delayed or denied without a valid explanation.

### ***Legislation and practices on fighting disinformation***

Sanctions for spreading disinformation (fake news) are elaborated in the Act on Misdemeanors against Public Order and Peace<sup>112</sup> in Article 16. This law was adopted in 1977 and it has been amended several times, most recently in 1994, but, despite this, it has not undergone significant changes, which is why it is justifiably considered an obsolete regulation. There is no information on whether sanctions have been applied for the spread of disinformation based on this Article.

As previously mentioned, on 16 December 2022, the Agency for Electronic Media publicly presented the call for tenders from the fund for the 'fact checking' projects<sup>113</sup> under the measure "Establishment of media fact-checking and public data publication system" of the National Recovery and Resilience Plan.<sup>114</sup> The general goal of the measure to establish the accuracy of information, which

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110 Croatian Journalists' Association, "[The Parliamentary committee accepted changes to the Right to access to information Act: fines for those who withhold the requested information](#)".

111 Croatian Journalists' Association, "[Pičuljan: HBOR illegally uses restrictions on the right to access information](#)".

112 Act on Misdemeanors against Public Order and Peace. Official Gazette (Narodne novine) 41-323/1977, article 16., available at: [https://narodne-novine.nn.hr/clanci/sluzbeni/1990\\_02\\_5\\_59.html](https://narodne-novine.nn.hr/clanci/sluzbeni/1990_02_5_59.html)

113 Agency for Electronic Media. A public call was presented as part of the measure "[Establishment of media fact-checking and the system of public disclosure of data](#)".

114 Government of the Republic of Croatia, [National Recovery and Resilience Plan 2021-2026](#).



is carried out by the Agency for Electronic Media and the Ministry of Culture and Media, is to strengthen society's resistance to misinformation. This is done by reducing the amount of misinformation in the public space, strengthening information reliability and security when consuming media content and using social media networks, strengthening the quality of journalism and credible reporting, and strengthening media literacy.

## Checks and balances ➔

### Key recommendations

- Prescribe an automatic suspensive effect of the legal remedy against expulsion and return orders of third-country nationals.
- The government needs to take concrete and systematic steps to ensure that the recommendations of the Ombudsperson are taken into account and implemented.

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

**Framework, policy and use of impact assessments, stakeholders'/public consultations and transparency and quality of the legislative process**

The legislative procedure in Croatia continues to be defined by the weak role of the Parliament and dominance of the executive branch, which usually submits laws and other legislative acts, while the ruling majority adopts them regardless of the debate or other arguments brought forth.

Impact assessments and policy analyses are seldom used in a meaningful way and are often intransparent and/or unavailable to the public. Public consultations are predominantly held pro forma, with relevant government bodies and institutions acknowledging the comments made by the public, but rarely incorporating them into laws and public policies. Consultations are often announced late in the legislative process or during holidays with short deadlines, so the public has little time to react.

In 2022, a total of 467 proposals were voted on, including legislative acts and various technical and procedural decisions, as well as reports. Out of those, 301 (64%) acts were sponsored by the government.<sup>115</sup> It is important to note that almost none of the proposals or amendments made by opposition parliamentary groups were supported.

### **Regime for constitutional review of laws**

The use of fast-track and urgent procedures is a widespread practice in the Croatian Parliament despite them being nominally preferred only in extraordinary circumstances ("laws may

115 Croatian Parliament, available at: <https://www.sabor.hr/hr/sjednice/pregled-dnevnih-redova>

be enacted under urgent procedure when this is required on particularly justified grounds, which have to be clearly explained”).<sup>116</sup> During 2022, a total of 256 legislative bills were voted on. Out of those, 96 (37.5%) were discussed under urgent procedure.<sup>117</sup> This represents an increase compared to the previous year.

### ***Independent authorities***

The Ombudsperson’s unannounced visits to detention centres and free access to the data of persons deprived of liberty are key tools in the National Preventive Mechanism (NPM). However, the former Ombudsperson has on many occasions raised concern that the Ministry of Interior repeatedly prevented her from carrying out these activities in relation to undocumented migrants, and denied her access to data.

Furthermore, in the case *M.H. and Others v. Croatia*,<sup>118</sup> the European Court of Human Rights (ECtHR) concluded that the evidence introduced was sufficient to deduce that the acts of restricting contact between the applicants and their lawyer and pressuring the

lawyer with a criminal investigation served the purpose of discouraging them from taking their case to Strasbourg (breach of Article 34 of the Convention).<sup>119</sup>

Also, in their report on Croatia, the Council of Europe’s Anti-Torture Committee (CPT) pointed out that their delegation was provided with incomplete information regarding places where migrants may be deprived of their liberty. The CPT also claimed to have been obstructed by Croatian police officers in accessing documentation necessary for the delegation to carry out the Committee’s mandate.<sup>120</sup>

There is a clear need for strengthening implementation of recommendations of the Ombudsperson’s Office, as well as the recommendations of other ombuds institutions.

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

#### ***Powers accorded to the courts to carry out judicial review***

116 Croatian Parliament, Rules of Procedure of the Croatian Parliament, article 204., available at: <https://www.sabor.hr/sites/default/files/uploads/inline-files/Poslovnik%20Hrvatskoga%20sabora%20-%20procisceni%20tekst%202018.pdf>

117 Croatian Parliament, available at: <https://www.sabor.hr/hr/sjednice/pregled-dnevnih-redova>

118 *M.H. and Others v. Croatia* - 15670/18 and 43115/18. The case concerns the death of a six-year-old Afghan child, MAD.H., near the Croatian-Serbian border, the lawfulness and conditions of the applicants’ placement in a transit immigration centre, the applicants’ alleged summary removals from Croatian territory, and the respondent state’s alleged hindrance of the effective exercise of the applicants’ right of individual application.

119 Judgement in the case of *M.H. and Others v. Croatia*, par. 336.

120 Council of Europe, “Croatia: anti-torture Committee publishes report on 2020 ad hoc visit”, 3 December 2021.

As a rule, judicial review of the administrative action is carried out through an administrative dispute, which is the supervisory activity of the courts when assessing whether state administration bodies act in accordance with legal norms. Article 3 of the Act on Administrative Procedure provides the scope of administrative dispute where its paragraph 2, wherein “the subject-matter of an administrative dispute is assessment of the lawfulness of a general act of the local and regional self-government legal persons vested with public powers and legal persons performing public services.”<sup>121</sup>

In principle, however, an administrative lawsuit does not have a suspensive effect. It will have a suspensive effect only in specific cases stipulated in the law. Also, the administrative courts have the authority to decide that a particular lawsuit should have suspensive effect, under certain preconditions.<sup>122</sup>

However, as once the lawsuit is filed with the request to ensure suspensive effect, it usually takes excessive time for the administrative court to reach its decision, which leaves the party in a legal void, where the administrative decision has become executive, but the court has not yet reached the decision on their

lawsuit and the request for a suspensive effect. Moreover, the deadline for the administrative decision to become executive is in most cases equal to one’s deadline to file the administrative lawsuit (and the request for a suspensive effect). This understandably creates a lot of uncertainties for the party.

Especially problematic is the absence of a suspensive effect of the administrative lawsuit filed against the decisions on the return and expulsion of third-country nationals (TRCs), with the exception of TRCs who are asylum seekers and whose request was refused on the merits. Even in the cases where one was forcefully removed from Croatia following the legal procedure prescribed in the Law on Foreigners, there is no legal remedy that would have a suspensive effect available, and therefore one does not have an available remedy with the power to prevent refoulement. Furthermore, both the Law on Foreigners<sup>123</sup> and the Law on international and temporary protection<sup>124</sup> provided that there is no avenue for lodging an administrative complaint against a detention order in a reception centre but the administrative lawsuit may be initiated in front of the competent administrative court.

121 Administrative disputes act Official Gazette 20/2010, 143/2012, 152/2014, 94/2016, 29/2017, 110/2021, Article 3, available at: [https://narodne-novine.nn.hr/clanci/sluzbeni/2010\\_02\\_20\\_483.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2010_02_20_483.html)

122 Administrative disputes act Official Gazette 20/2010, 143/2012, 152/2014, 94/2016, 29/2017, 110/2021, Article 26, available at: [https://narodne-novine.nn.hr/clanci/sluzbeni/2010\\_02\\_20\\_483.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2010_02_20_483.html)

123 Act on Foreigners, Official Gazette 133/2020, Article 135, para. 3., available at: [https://mup.gov.hr/UserDocsImages/zakoni/ALIENS%20ACT%20\(Official%20Gazette%20No%20133\\_2020\).pdf](https://mup.gov.hr/UserDocsImages/zakoni/ALIENS%20ACT%20(Official%20Gazette%20No%20133_2020).pdf)

124 International and Temporary Protection Act, Official Gazette 70/2015, Article 5, para. 12., available at: [https://narodne-novine.nn.hr/clanci/sluzbeni/2015\\_06\\_70\\_1328.html](https://narodne-novine.nn.hr/clanci/sluzbeni/2015_06_70_1328.html)

A legal remedy against the expulsion orders that does not have an automatic suspensive effect means the risk of the breach of the Articles 2 and 3 of the Convention, and therefore does not meet the standard of effective legal remedy in accordance with Art. 13 of the Convention. The said legal remedy against expulsion orders in Croatia is therefore contrary to the standards set by the Court's case law in determining their effectiveness. Precisely in situations related to violations of the rights guaranteed by Art. 2 and 3 of the ECHR, in cases of the breach of the principle non-refoulement, and in cases of collective expulsion, the Court has clearly established that an effective remedy must have a suspensive effect and that a person must have access to such a remedy in accordance with Art. 13 of the ECHR.<sup>125</sup> Violations of Article 13 were found due to the lack of an automatic suspensive effect of the remedy in *Gebremedhin v. France* (para. 66), *Baysakov and Others v. Ukraine* (para. 74), *M.A. v. Cyprus* (para. 133), *D and Others v. Romania* (paras. 128-130).

Moreover, Article 13 (1) and (2) of the EU Return Directive (2008/115/EC) provides that third-country nationals subject to a return decision must have the right to an appeal or review of a return-related decision before a competent judicial or administrative authority or other competent independent body with the power to suspend removal temporarily while any such review is pending.

## Enabling framework for civil society –

### Key recommendations

- Ensure quality access and participation in decision-making processes for citizens and civil society in Croatia.
- Stop the formal and informal criminalisation of CSOs that are active in the field of protecting the rights of refugees and other migrants, and of citizens who offer humanitarian aid to irregular migrants, by adequately limiting the scope of the prohibition to aid migrants in the Law on Foreigners, as well as clearly differentiating between the acts of solidarity for humanitarian reasons and the smuggling of migrants.
- Adopt a National Plan for Creating an Enabling Environment for Civil Society Development that will systematically tackle the issues faced by civil society, such as a sustainable financing framework, proper access and participation in decision-making processes and an institutional framework for civil society.

125 *Čonka v. Belgium*, paras 81-83, *Gebremedhin v. France*, paras 66-67.

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## Regulatory framework

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### Financing framework, including tax regulations

The programming documents for EU funds for the financial period 2021-2027 – the Efficient Human Resources Programme,<sup>126</sup> along with the Programme for Competitiveness and Cohesion 2021-2027<sup>127</sup> and Integrated Territorial Programme 2021-2027<sup>128</sup> – were introduced in 2022.

As the Efficient Human Resources Programme<sup>129</sup> is particularly important for civil society, several civil society organisations (CSOs) warned the Representation of the European Commission in the Republic of Croatia of the problematic access to participation and transparency regarding its adoption, as well as the key issues from the content side. The content of the document is problematic primarily because CSOs have been specifically included or mentioned in only a few limited actions. This is contrary to the recommendations by the European code of conduct on partnership in the framework of the European Structural and Investment

Funds to include civil society in all appropriate aspects. Compared to the financial period 2014-2020, where 94 million EUR had been allocated to civil society, for the period 2021-2027 only 64 million EUR has been allocated for civil society (54 million EUR for civil society, and 10 million EUR for social partners), which is the mandatory minimum. The significantly lowered amount for civil society will have a negative impact on the sector. It is also problematic that civil society is mentioned seemingly arbitrarily in the Programme, for example in science, technology, engineering, and mathematics (STEM), while it is not mentioned in the areas such as implementation of civic education, working with young people who are not in employment, education or training (NEETs) and unemployed youth, social inclusion of certain persons and groups at risk, social innovations, promotion of public participation etc., where civil society is highly active and productive. Furthermore, the Programme, in its introduction, emphasises good cooperation with civil society in the previous period 2014-2020, while it completely ignores the government contracted external evaluation of European Social Fund implementation for the 2014-2020 period<sup>130</sup>

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126 Programme Efficient Human Resources 2021 - 2027, available at: [http://www.esf.hr/wordpress/wp-content/uploads/2022/10/PULJP2021-2027\\_hrv\\_sfc2021-PRG-2021HR05SFPR001-1.2.pdf](http://www.esf.hr/wordpress/wp-content/uploads/2022/10/PULJP2021-2027_hrv_sfc2021-PRG-2021HR05SFPR001-1.2.pdf)

127 Programme for Competitiveness and Cohesion 2021-2027, available at: <https://strukturnifondovi.hr/wp-content/uploads/2022/11/PKK-2021-2027.pdf>

128 Integrated Territorial Programme 2021-2027, available at: <https://strukturnifondovi.hr/wp-content/uploads/2022/12/ITP-odobreni.pdf>

129 Programme Efficient Human Resources 2021 - 2027, available at: [http://www.esf.hr/wordpress/wp-content/uploads/2022/10/PULJP2021-2027\\_hrv\\_sfc2021-PRG-2021HR05SFPR001-1.2.pdf](http://www.esf.hr/wordpress/wp-content/uploads/2022/10/PULJP2021-2027_hrv_sfc2021-PRG-2021HR05SFPR001-1.2.pdf)

130 Ministry of Labour, Pension System, Family and Social Policy, Evaluation of the effectiveness, efficiency and impact of the Operational Programme Effective Human Resources 2014-2020. Group 4: Evaluation of Priority Axis 4 “Good governance”.

and its main findings, which highlight serious problems with the implementation by the implementing bodies, calls that were prepared but never published, significant administrative burden placed on civil society organisations implementing projects, etc.

## **(Un)safe environment**

### ***Criminalisation of activities, including humanitarian or human rights work***

Organisations and activists who are active in the field of protecting the rights of refugees and other migrants are experiencing the criminalisation of their activities, as are regular citizens who offer humanitarian aid to irregular migrants in Croatia. This criminalisation involves formal criminalisation (with drastic fines) and informal criminalisation (using harassment and intimidation). The current Law on Foreigners does not clearly differentiate between the acts of solidarity for humanitarian reasons and the smuggling of migrants, which gives the wide margin of interpretation to the authorities and has been misused on several occasions to criminalise persons who, for humanitarian reasons and without any personal gain or interest, helped a refugee or migrant.<sup>131</sup>

In 2022, activists providing humanitarian assistance to people on the move in Rijeka experienced intimidation and harassment

by police officers and security guards at and around the main railway station in Rijeka.

### ***Access and participation to decision-making processes, including rules and practices on civil dialogue, rules on access to and participation in consultations and decision-making***

Access to and participation in decision-making processes for citizens and civil society in Croatia is still facing negative trends, as shown by a study conducted by the Centre for Peace Studies in the first half of the year.<sup>132</sup> Public consultations are mainly held online, via the portal [esavjetovanja.gov.hr](http://esavjetovanja.gov.hr), but this is largely pro-forma, as comments and proposals by citizens and other actors are rarely really taken into account or accepted. CSOs have their representatives in the working groups for drafting certain public policies or legislation, and their representatives are elected and appointed through the Council for Civil Society Development. However, CSO representatives in the Council have limited influence on the decisions brought by the Council because most of its members come from various state institutions. This often means that the CSOs with insufficient expertise and track record in a topic that the working group is dealing with are represented in the working groups, because they are less critical of the government.

131 [Act on Foreigners, Official Gazette 133/2020](#).

132 [Centre for Peace Studies, "New beginning - a platform for discussion about a new approach to the positioning and work of progressive human rights organisations in Croatia"](#).

The new National Plan for Creating an Enabling Environment for Civil Society has still not been adopted, despite the fact that the last one expired in 2016. The working group for the design of the national plan met twice in 2022, according to the information of the Centre for Peace Studies. In July 2022, several members of the working group, representatives of civil society, wrote to the Government Office for Cooperation with NGOs, complaining that the process is not participative and that the prepared materials for the working group are not based on the analysis of the situation in the civil society. Therefore, they demanded that the Government Office create an analysis of the problems in the sector, which will be the basis for the creation of the objectives and measures of the national plan; that it delivers all the relevant data that it already obtained to the members of the working group; that it makes a clear timeline and a plan for the working group; and that it ensures the process is participative and transparent. In November 2022, a coalition of CSOs organised a round-table on the national plan, in which most of the participants criticised the delays in the process. The Head of the Government Office did not give any plausible explanations for the significant adoption delay, and said that the national plan will be adopted in May 2023.<sup>133</sup> The absence of this document makes it impossible to establish an environment for sustainable funding and other measures needed to create the necessary conditions for a regional and geographical development of civil society.

The process of designing the Efficient Human Resources Programme 2021-2027, a programming document for the new EU funding financial perspective, was especially problematic from the point of public participation, access to information, timely and quality informing of the public and transparency, as several CSOs warned in July 2022. Firstly, the representatives of the CSOs were only included in working groups for drafting the programming document late in the process. The representatives in the Working Group Solidary Croatia (responsible for drafting the programme) complained to the Council for Civil Society Development in 2021 that the process was unclear and that their proposals were not taken into account. Furthermore, the Efficient Human Resources Programme, the Programme for Competitiveness and Cohesion 2021-2027 and Integrated Territorial Programme 2021-2027, have been accessible for public consultations for only 15 days each. The Right to Access to Information Law prescribes that the public consultations must be open for at least 30 days and can only be shorter in limited circumstances, or if another legal document prescribes a different amount of time. This was echoed by the Information Commissioner, to whom several organisations reached out on this issue, and who officially demanded more information about the reason for this from the relevant public body, the Ministry of Labour, Pension System, Family and Social Policy. The Ministry replied that public bodies shortened the 30-day procedure

133 See: <https://udruga.org/2022/11/15/zar-smo-nakon-trideset-godina-jos-u-fazi-stvaranja-poticajnog-okruzenja-za-razvoj-civilnog-drustva/>

in public consultations to meet the delivery deadline for the Programme, by 15 July, and that the shortened period of consultations was approved by the Office of the President of the Government, which is not within its official jurisdiction as it is contrary to the Right to Access to Information Law, whose purpose is to prevent misuse by the government. The Information Commissioner stated that being late in finishing the final draft is not a valid reason to shorten the consultation period, especially since the document has been in its final form since April. The government provided no substantive justification for the delay in the consultation document and accompanying public announcements. Hence this shortened consultation procedure fell well below the minimum legal standard for public consultations.

### **Other**

Upon establishment of the Independent Monitoring Mechanism (IMM) in 2021, there was no public call for the participating organisations and members, nor information about the selection criteria. Members of the IMM have been lacking political and financial independence from the Ministry of the Interior, and the mechanism's financial

independence has been undermined by the EU's 2021 Emergency Funding (EMAS) grant being processed through the Ministry of the Interior, instead of being directly granted to the mechanism, as demanded by human rights organisations.<sup>134</sup> In November 2022, the Ministry of the Interior announced the signing of the new Cooperation Agreement<sup>135</sup> for the IMM, whose activities will be carried out for a period of 18 months with automatic extension, through announced and unannounced visits carried out by monitoring implementers to police stations, police administrations, the external border, including the green border and border crossings, as well as reception centres for asylum seekers and reception centres for foreigners. However, despite the advisory board's recommendations to the Coordination Committee to reflect on the selection of new/additional members, on the basis of a public call of interest and following established objective criteria, to take part in monitoring activities,<sup>136</sup> the agreement was renewed without the public call for CSOs experienced in monitoring human rights violations. Furthermore, financial means for IMM activities also continue to be managed by the Ministry of the Interior, the very body that should be monitored by the IMM.

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134 See: <https://www.ecre.org/wp-content/uploads/2021/05/NGO-Letter-Croatia-Border-Monitoring-Mechanism-March-2021.pdf>

135 Cooperation agreement to implement an independent monitoring mechanism on the protection of fundamental rights in actions of police officers of the ministry of the interior in the area of border surveillance, irregular migration and international protection, available at: [https://www.hck.hr/UserDocsImages/Nezavisni%20mehanizam/22\\_146%20Sporazum%20NMN-final\\_EN.pdf?vel=217379](https://www.hck.hr/UserDocsImages/Nezavisni%20mehanizam/22_146%20Sporazum%20NMN-final_EN.pdf?vel=217379)

136 [Recommendations of the Advisory Board on the Annual Report of the Independent Monitoring Mechanism \(June 2021 – June 2022\)](#).



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## **Attacks and harassment**

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### ***Intimidation, negative narratives, smear campaigns and disinformation campaigns***

In December 2022, on a dark afternoon, police illegally entered the premises of Green Action – FoE Croatia, a free bicycle repair shop, intimidating their employees and creating an atmosphere of fear and hostility towards civil action. More than five plainclothes police officers entered the premises without a warrant or identification, looking for “migrants and people of poor financial status”. They came in and intimidated a Green Action’s employee, taking his data and instructing his colleague not to enter it in the database, but “on the side.” When asked to leave, they did not want to do so. Luka Tomac, President of FoE Croatia, emphasised that at first they didn’t know who the group of men were, so they called the police to investigate the situation. “The police quickly responded to our call, talked to that group outside, but did not come to us. In a return call to the police, we found out that the first group was actually the criminal police, but they did not want to reveal the purpose of their actions in our space”, Tomac added.<sup>137</sup>

### ***Verbal attacks and harassment by private parties or public entities***

The 15-year-long battle of Nikola Tesla, a professional tourist guide and trainee speleologist, began in March 2007, when the Municipality of Starigrad allocated a plot of land right next to his house to a local utility company for waste management. Nikola’s family’s life turned into daily harassment and abuse by local officials – from the inability to get a job due to the criminal proceedings initiated by the municipality against him to insults by employees of the municipal utility company. Since 2009, he has been addressing various institutions – the police, the Environmental Inspectorate, the Ministry of Administration, the Ministry of Environmental Protection, and the Croatian Forests Company. Even when he managed to prove that the environmentally harmful waste was being dumped illegally and right next to his house, and when the competent institutions ordered a return of the site to the previous state, nothing happened, which is why in 2012 Nikola sought judicial protection through the institute of free legal aid and sued the municipality. Although the site was never restored to its original condition, it was rehabilitated and the utility company no longer uses it for its heavy machinery. However, Nikola lost the court proceedings and was obliged to pay immense and ever-growing court costs, currently 11,500 EUR.<sup>138</sup> The charity action for Nikola Tesla, organised by FoE Croatia

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137 Green Action, Friends of the Earth Croatia, “The police illegally entered Zelena akcija!”, available at: <https://www.hck.hr/UserDocsImages/Nezavisni%20mehanizam/Recommendations%20of%20the%20Advisory%20Board.pdf?vel=149016>

138 Green Action, Friends of the Earth Croatia, “[Donate for Nikola Tesla - environmental defender](#)”.

in 2022, raised a total of 9,370 EUR out of the target amount of 11,500 EUR. However, the collected donations will undoubtedly help Nikola Tesla and his family.<sup>139</sup>

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

Environmental organisations in Croatia continue to face Strategic Lawsuits Against Public Participation (SLAPPs) aimed to silence, censor and intimidate the work of human rights defenders in the field of environmental protection. Legal proceedings against FoE Croatia initiated in 2017 by a private investor in relation to the planned construction of a golf resort on Srđ mountain above Dubrovnik are still ongoing. The investor is claiming over 26,552 EUR from the organisation in criminal proceedings for defamation and civil proceedings for damages. Meanwhile, the investor requested that the commercial court issue a provisional measure prohibiting activism and the right to freedom of expression against FoE during the realisation of the project on Srđ mountain. Consequently, FoE experiences financial burden because of the duration and delays in the proceedings, consumption of the organisation's capacities, as well as the general public's negative perception of the organisation.<sup>140</sup>

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

### **Key recommendations**

- Conduct efficient investigations of human rights violations; implement decisions by supranational courts timely and efficiently.
- Ensure accountability of the officials involved in systematic human rights violations.

### **Systemic human rights violations**

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

Following several events that happened at the end of 2021 – the public display of police violence footage, judgement of the European Court of Human Rights in *M.H. and others v. Croatia*, and the Council of Europe's Anti-torture Committee report on Croatia – police conduct in 2022 appeared to become less violent and more legal. Since spring 2022, Croatian police have started excessively issuing

139 Green Action, Friends of the Earth Croatia, "9,370 EUR collected for Nikola Tesla! Many thanks to everyone!".

140 Human Rights House Zagreb, "Human Rights Defenders in Croatia - Challenges and Obstacles", available at: [https://www.kucaljudskihprava.hr/wp-content/uploads/2022/12/KLJP\\_Tematski-Branitelji-FIN-3.pdf](https://www.kucaljudskihprava.hr/wp-content/uploads/2022/12/KLJP_Tematski-Branitelji-FIN-3.pdf)

most persons entering Croatian territory with the so-called 7-day papers, that is return decisions ordering them to leave the European Economic Area (EEA). A return decision can, when certain requirements have been met, legally be issued to persons who enter Croatia, do not have regulated stay and do not wish to ask for international protection. Based on that document, the persons can stay in Croatia for a maximum of seven days, the state is obliged to guarantee their human rights from the European Convention, and they are obliged to leave the territory, i.e. the EEA, within the specified period. The circumstances in which these decisions have been issued throughout 2022 in Croatia, however, took place under inhumane conditions. In the second part of the year, more people were passing through Croatia and staying in public areas, sleeping in unsafe buildings, with no humanitarian response from competent institutions. Further on, there were also testimonies of persons who were denied access to asylum and were handed this document in exchange, as well as those who were illegally expelled across the green border after their return decision was issued.

According to the Danish Refugee Council's reports, 3,461 pushbacks from Croatia to Bosnia and Herzegovina were recorded in 2022.<sup>141</sup> Furthermore, in March 2022, the initiative Protecting Rights at Borders recorded testimonies of a vulnerable family of three from

Afghanistan (a mother and two children) and a student from India who travelled together after fleeing Ukraine and were illegally expelled from Croatia to Bosnia and Herzegovina on 18 March 2022.<sup>142</sup> According to the Border Violence Monitoring Network,<sup>143</sup> as well as victims and other volunteers in BiH, another practice started taking place in autumn 2022: People have been detained in police vans for up to eight hours without access to food, water or toilet, sometimes with strong air-conditioning on (cooling).

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

In cases of illegal expulsions, victims have limited access to remedies for several reasons: lack of familiarity with the legal system in the Republic of Croatia, language barriers and the fact they had been expelled outside of the Croatian territory. Most importantly, in the case of illegal expulsion, persons have no access to an effective remedy according to the standards established by the case law of the ECtHR. This case law states that in the context of collective expulsions and related torture, even if criminal proceedings were accessible after the expulsion itself, this is not sufficient to meet the criteria for the effectiveness of a remedy. On the contrary, in order for a remedy to be effective in these cases, it must necessarily have a suspensive effect - that is,

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141 Danish Refugee Council, Border Monitoring Factsheet, available at: <https://pro.drc.ngo/resources/documents/border-monitoring-factsheet-november-2022/>

142 Protecting Rights at Borders, Report #4: *When there's a will, there's a way to protect*.

143 Border Violence Monitoring Network, *Balkan Regional Report - September 2022*.

the person has to have the possibility to use the remedy before they are expelled from the country. Given that the above-mentioned illegal expulsions from Croatia take place outside the scope of any legally prescribed procedure, there is no remedy which a person could use to prevent police officers, under whose control the person is, from illegally expelling them.

Despite overwhelming evidence, the Croatian State Attorney's Office continues to reject criminal complaints against Croatian authorities, and the Ministry of Interior continuously states that 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. Results of the conducted investigations remain unknown to the public and to the Ombudsperson. 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.

In 2022, the Centre for Peace Studies received a rejection letter issued by the Croatian State Attorney's Office for a criminal complaint<sup>144</sup> from June 2020 related to a degrading treatment and torture of 33 people and their

violent, illegal expulsion from the territory of the Republic of Croatia to Bosnia and Herzegovina. These were four separate cases combined into one criminal complaint due to similarities in treatment. In particular, among other, all victims suffered torture and degrading treatment: according to their testimonies, the police marked them with permanent, orange spray all over their heads. The reasons outlined in the rejection letter of the State Attorney's Office are poorly substantiated, which further fuels concerns over the absence of effective investigations in Croatia related to pushback cases.

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

In 2022, OSCE Office for Democratic Institutions and Human Rights (ODIHR) in its report on Croatia<sup>145</sup> noted that, based on the available information, Croatia's hate crime recording and statistics do not sufficiently distinguish hate crimes from other crimes. In addition, ODIHR notices that Croatia would benefit from raising awareness among and building the capacity of criminal justice officials to address hate crime.

In 2023, a country monitoring visit from the Council of Europe's ECRI is planned. From the two interim follow-up recommendations

144 Centre for Peace Studies, "[Criminal complaint against Croatian policemen for inhumane treatment of refugees](#)".

145 OSCE ODIHR, Hate crime database for Croatia, available at: <https://hatecrime.osce.org/croatia>

issued after the 5th country visit in 2018,<sup>146</sup> one recommendation was implemented (National Roma Inclusion Strategy) and one is only half implemented (introduction of compulsory human rights education as part of civic education into all school curricula). The rest of ECRI's list of 21 recommendations are as well half-way implemented.

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

Recognising the importance of the proper implementation of ECtHR judgments, the European Implementation Network (EIN) has created a website with statistical data of each country on the percentage of successful and unsuccessful implementation of ECtHR judgments. The map of Europe shows the 47 signatory states of the European Convention on Human Rights and the number of

unexecuted ECtHR judgments that have not yet been implemented. According to the map, in 2022, Croatia had 25 leading judgments pending implementation; the average time leading cases have been pending in Croatia was four years four months and 21 days; and the percentage of leading cases from the last 10 years still pending was 25%.<sup>147</sup>

In April 2022, the Grand Chamber Panel of the ECtHR rejected the referral request of the Republic of Croatia in the case *M.H. and Others v. Croatia* (Applications nos. 15670/18 and 43115/18). Thus, the ECtHR recognised in its judgement<sup>148</sup> against Croatia, violations of the right to life, freedom from torture and inhuman treatment, the prohibition on collective expulsion, the right to security and liberty, and the right to individual petition.<sup>149</sup>

In September 2022, the Centre for Peace Studies and the Human Rights House Zagreb filed a submission<sup>150</sup> to the Committee

146 Council of Europe. ECRI report on Croatia (fifth monitoring cycle), available at: <https://rm.coe.int/fifth-report-on-croatia/16808b57be>

147 European Implementation Network, [Country Map](#), and [Data for Croatia](#).

148 European Court of Human Rights, *CASE OF M.H. AND OTHERS v. CROATIA* (Applications nos. 15670/18 and 43115/18) JUDGEMENT, 4 April 2022.

149 Centre for Peace Studies, "[The ECtHR ruling in the Hussiny family case is final - We demand an urgent dismissal of the top of the Croatian Ministry of the Interior!](#)".

150 Council of Europe, Secretariat of the Committee of Ministers, Communication from NGOs (Human Rights House Zagreb (HRHZ) and Centre for Peace Studies (CPS)) (22/09/2022) and reply from the authorities (29/09/2022) in the case of *M.H. and Others v. Croatia* (Application No. 15670/18), available at: [https://hudoc.exec.coe.int/eng#%7B%22display%22:%5B2%5D,%22tabview%22:%5B%22document%22%5D,%22EXECIdentifier%22:%5B%22DH-DD\(2022\)1039E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22display%22:%5B2%5D,%22tabview%22:%5B%22document%22%5D,%22EXECIdentifier%22:%5B%22DH-DD(2022)1039E%22%5D%7D) and Centre for Peace Studies, Recommendations of the Centre for Peace Studies and the Human Rights House Zagreb for the execution of the judgement of *M.H. and Others against Croatia*, available at: <https://www.cms.hr/en/azil-i-integracijske-politike/preporuke-centra-za-mirovne-studije-i-kuce-ljudskih-prava-za-izvršenje-presude-m-h-i-drugi-protiv-hrvatske>

of Ministers of the Council of Europe in accordance with Rule 9.2. of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in the case, a proposal of measures for the execution of the judgement *M.H. and Others v. Croatia*. After the organisations gave constructive proposals for adequate measures to execute the judgement and prevent further violations of the human rights of refugees and other migrants in the Republic of Croatia, the government failed (twice) to submit an action plan<sup>151</sup> that would include general measures aimed at stopping systemic irregularities.

Furthermore, in November 2022, Gong called on the Ministry of Economy and Sustainable Development and the government of the Republic of Croatia to stop ignoring the obligations from the judgement of the European Court of Justice and to protect the health and lives of citizens of Biljan Donji, as well as the environment of that region. Although the Republic of Croatia has been a member of the European Union for almost a decade, it is still struggling with the implementation of European regulations in the national legislation. There are numerous procedures for violations of Union rights that the European Commission has opened against Croatia, and it has been brought before the Court of the

European Union four times. For three years now, the Republic of Croatia has refused to fulfil its obligations under the judgements of the Court of the European Union, the highest court for EU law and whose main task is to interpret Union law and ensure its equal application in all Member States. At the end of 2022, the black mountain of waste slag still stands in the same place as 12 years ago, with no concrete plans to finally remove it. In accordance with their powers, the next step that the Court of Justice of the European Union and the European Commission can take is to determine a lump sum or fine that the state must pay for failure to fulfil its obligations from the judgement.<sup>152</sup>

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151 Council of Europe, Committee of Ministers, Action Plan (01/12/2022) - Communication from Croatia concerning the case of *M.H. and Others v. Croatia* (Application No. 15670/18), available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a94857](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a94857)

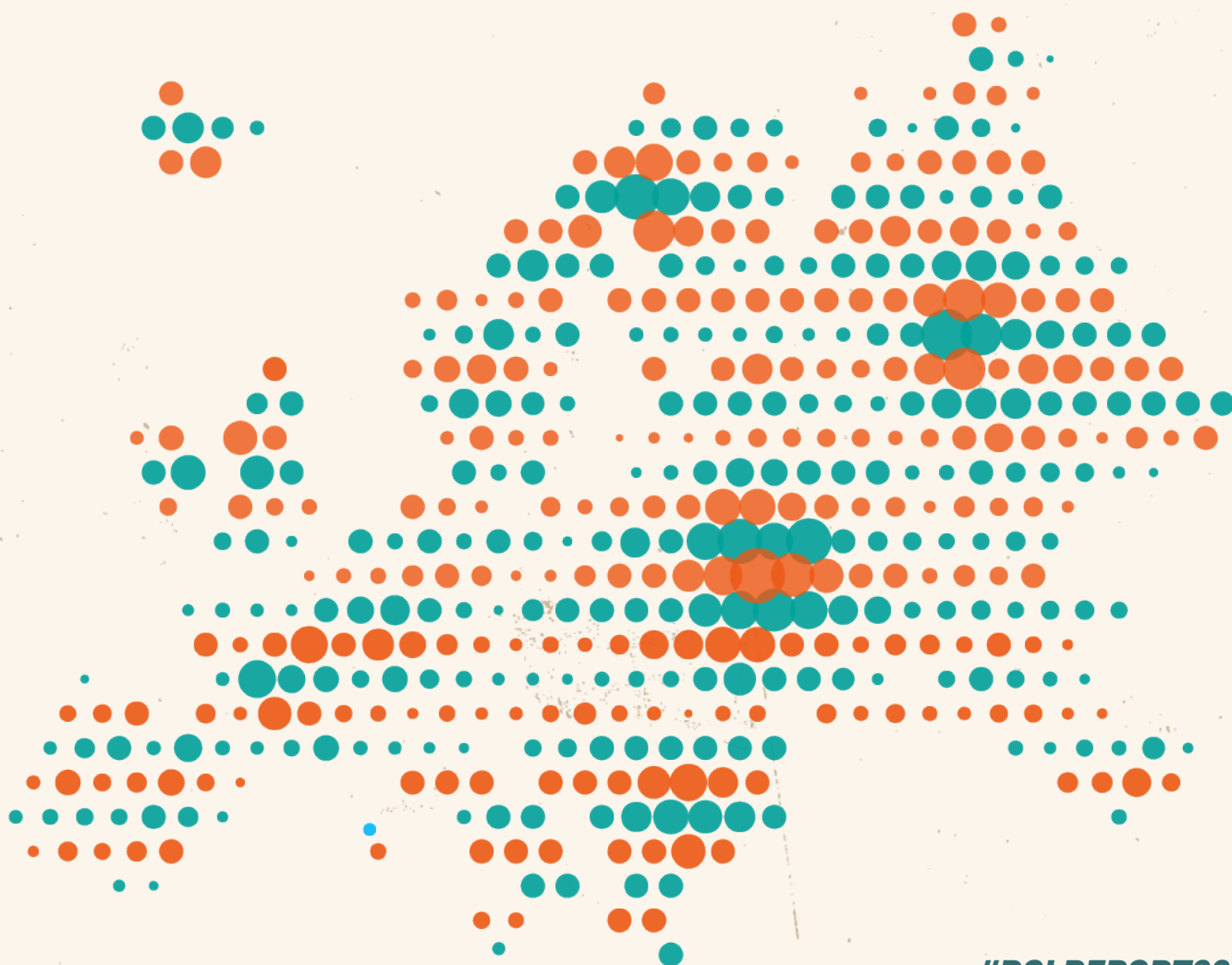
152 Gong, “[Gong called on the government to stop ignoring the judgement of the EU Court and protect citizens](#)” (Gong pozvao Vladu da prestane ignorirati presudu Suda EU i zaštiti građane i građanke).

**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**CZECH REPUBLIC**



**#ROLREPORT2023**

# CZECH REPUBLIC

## About the authors



LIGA LIDSKÝCH PRÁV

**The League of Human Rights (LLP)** is a non-governmental non-profit human rights organization that monitors the state of respect for fundamental rights in the Czech Republic, and points out their violations. LLP has long advocated systemic changes in the area of violations of fundamental rights in the Czech Republic, through various instruments. At present, we focus on the protection of the rights of vulnerable people, including patients, mothers, people with psychosocial disabilities, children and involuntary sterilized women.



**Glopolis** is a hub that provides space and networking opportunities for civil society organisations, state administrations and businesses, so they can cooperate with each other on their advocacy activities. They created the networking tool NeoN (Network of Networks) which enables the coordination of 18 platforms, representing over 450 CSOs.

## Key concerns

There has been little progress in the situation of the justice system in the Czech Republic. The new appointment system for judges is impractical. Reforms to the Public Prosecutor's Office failed, and the amendment that is now being discussed does not contain the required guarantees of greater independence. On the positive side, the digitalization of the justice system has moved forward, but it must accelerate if the Czech Republic wants to keep the recovery funds of the European Commission.

There have been no improvements either in the fight against corruption. Due to contradictions with the European directive, the law on the Register of Beneficial Owners had to be redefined. President Zeman used legal services in a non-transparent manner. The conflicts of interests of the member of parliament Andrej Babiš still affect the public space. A new code of ethics for members of parliament was not adopted. An amendment to the Whistleblower Protection Act is being prepared.

Regarding checks and balances, the ombudsman Stanislav Křeček has been criticized for his unprofessional and prejudicial statements. Conflicts with his deputy resulted in her leaving office, and there is still no ombudsman for children. The National Human Rights Institution was not created and there has been no progress in this matter either, resulting in the failure to implement the recommendation



of the 2022 European Commission's Rule of Law Report.

The framework for civil society has seen a positive development with the adoption of a new strategy of cooperation between the public and civil sectors. However, the distribution of funds for the civil sector is not balanced. The Act on Registration of Beneficial Owners is not effective for some organizations.

### State of play

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

#### Legend (versus 2022)

- ⬇️ Regression
- ⊖ No progress
- ⬆️ Progress

## Justice system ⊖

### Key recommendations

- Complete the tasks set out in the field of digitization of justice

- Analyse the effectiveness of the new system for appointing judges
- Reform the Public Prosecutor's Office system to make it more independent

## Judicial independence

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

In previous reports, LLP discussed the intended amendment to the Act on Public Prosecutor's Office. With the new government came a new proposal. Like the proposal of the previous Minister of Justice, the current minister's proposal has also been criticised. According to the project Reconstruction of the State (Rekonstrukce státu), it is even worse than the previous proposal. Compared to the original ambition - to increase the independence of the prosecutor's office - the risk is that the opposite effect will occur. The Prosecutor General will continue to be dependent on the government, with only a seven-year term. The most controversial point is the government's ability to dismiss the Prosecutor General at any time, which the proposed amendment still allows. The proposal thus goes against the criticism of the Council of the Government for the Coordination of the Fight Against Corruption and against the program statement of the government.<sup>1</sup>

<sup>1</sup> See here: <https://www.rekonstrukcestatu.cz/archiv-novinek/ministr-spravedlnosti-blazek-chysta-vyssi-zavislost-statniho-zastupitelstvi-na-vlade>

A new legal regulation on the selection of judges is in effect. At the Convention of the Assembly of Delegates of the Judicial Union of the Czech Republic, the president of the České Budějovice Regional Court, Martina Flanderová, said that there are practical problems with the new selection of judges. As part of the selection procedure, applicants can, for example, register for several selection procedures at the same time and then choose which court they would prefer. Flanderová also mentioned that according to the new law, she, as president of the court, cannot be a member of the selection committee. The vice president of the Supreme Court, Petr Šuk, also agreed with her, saying that transparency won out over common sense. The president of the Judicial Union, Libor Vávra, also agreed. Judges believe that the method of selecting new judges should be changed to make it more efficient.<sup>2</sup>

At the end of October, when appointing new district court judges, President Zeman refused to appoint two candidates. Both are prosecutors. Addressing one, he said that he was involved in the well-known trial of former Defence Minister Vlasta Parkanová, and the other should be reprimanded by the Supreme Court. In reality, the case with the former minister was overseen by a different prosecutor

than the candidate who Zeman refused to appoint as a judge. This candidate supposedly rejected Zeman's initiative to investigate possible sabotage during his hospitalization last year. The Union of Public Prosecutors criticised the president's decision and said that such personally motivated and purposeful actions cannot be tolerated.<sup>3</sup> According to the case law of the Supreme Administrative Court, the president's decision not to appoint a given candidate must be properly justified. However, the president did not issue any written justification.<sup>4</sup>

Before the end of 2022, President Zeman proposed to appoint the former dean of the Faculty of Law of Masaryk University (Brno) Jan Svatoň as the new constitutional judge, to fill the now vacant seat of Kateřina Šimáčková who became a judge of the European Court of Human Rights. However, Zeman also made it known that he could appoint a new president of the Constitutional Court six months in advance before the end of his mandate (March 2023). The mandate of the current president of the Constitutional Court ends in the summer of 2023, when Zeman will no longer be president. The Constitution explicitly says only that the president appoints a member of the Constitutional Court as president. However, according to constitutional law experts,

2 See here: <https://www.ceska-justice.cz/2022/10/vyber-novych-soudcu-slovo-transparentnost-zvitezilo-nad-zdravym-rozumem-mini-flanderova/>

3 See here: <https://www.ceskenoviny.cz/zpravy/zeman-jmenoval-necelou-padesatku-novych-soudcu-dva-jmenovat-odmitl/2274220>

4 See here: [https://www.irozhlas.cz/zpravy-domov/hrad-prezident-milos-zeman-jmenovani-soudcu-marek-bodlak\\_2210190500\\_vtk](https://www.irozhlas.cz/zpravy-domov/hrad-prezident-milos-zeman-jmenovani-soudcu-marek-bodlak_2210190500_vtk)

Zeman's intended course of action could be unconstitutional.<sup>5</sup>

The Minister of Justice did not appoint Aleš Novotný to the post of vice-president of the criminal division of the Regional Court in Brno, because he was repeatedly involved in causing damages to the state in the amount of more than 3.5 million CZK. The Judicial Union of the Czech Republic issued a press statement<sup>6</sup> against the decision of the Minister of Justice, and its President, Libor Vávra, called the minister's decision unacceptable and dangerous. He pointed out that, among other things, the decisions the minister was talking about were made by the entire senate, not by judge Novotný himself. Since the voting of judges in the senate is secret, the minister cannot know how judge Novotný voted.<sup>7</sup>

### **Remuneration for judges and prosecutors**

In January 2022, the salaries of politicians, judges and state prosecutors rose by 6%, but since February 2022, an amendment of the current government reduced the salaries to save up to 600 million CZK. This has been criticised by some, with reference to the need to protect the judges' material security to ensure their independence. In 2023, the salaries of these officials, in particular of constitutional judges, are to increase again. The Minister of

Justice and the President of the Judicial Union of the Czech Republic agree that the salaries of professional employees and administrative staff of the courts must also be valued, as they may have a salary lower by 10,000 CZK than similar positions in the state administration.<sup>8</sup>

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

In 2022, the European Court of Human Rights (ECHR) dealt with the case of Grosam, who was working as an enforcement officer and at that time faced a disciplinary punishment. He subsequently appealed to the Constitutional Court, however was unsuccessful. According to Grosman, the Court did not deal with a number of arguments, did not respect the presumption of innocence and incorrectly assessed the situation. The ECHR found him to be right and declared that the criminal justice system comprised of judges, state representatives and bailiffs of the Czech Republic suffers from significant defects, such as a lack of impartiality and judicial independence. The ECHR also pointed out that there is no possibility to appeal the decision of the disciplinary board, or to use another remedy (the only option left is to turn to the Constitutional Court) and that the selection of judges is

5 See here: [https://www.irozhlas.cz/zpravy-domov/ustavni-soud-pavel-rychetsky\\_2301021304\\_nov](https://www.irozhlas.cz/zpravy-domov/ustavni-soud-pavel-rychetsky_2301021304_nov)

6 See here: <http://www.soudci.cz/zpravy-a-stanoviska/pohledy-a-nazory/4306-tiskove-prohlaseni-su-cr.html>

7 See here: [https://www.idnes.cz/zpravy/domaci/krajsky-soud-brno-ales-novotny-ministr-spravedlnosti-blazek\\_A220822\\_110852\\_domaci\\_hovo](https://www.idnes.cz/zpravy/domaci/krajsky-soud-brno-ales-novotny-ministr-spravedlnosti-blazek_A220822_110852_domaci_hovo)

8 See here: <https://advokatnidenik.cz/2022/07/28/ministr-spravedlnosti-se-shodl-se-soudci-platy-pristi-rok-po-rostou-dle-zakona/>

not transparent. The Ministry of Justice has already announced its preparation on possible remedies, but it still does not exist. The group of states against corruption (GRECO) has the same attitude. The case will currently be heard before the Grand Senate.<sup>9</sup>

The new president of the Supreme Administrative Court, Karel Šimka, also commented on the situation regarding the disciplinary board. He noted that the disciplinary panels are primarily trying to resolve the situation with the possibility of correcting a specific judge and using a salary reduction as a punishment, rather than dismissal from office. He also mentioned that subjective relationships and opinions tend to seep into disciplinary proceedings, which exacerbates the situation. In his commentary, he encouraged its members to maintain a high level of objectivity and professionalism. According to Šimka, the function of a judge is a privilege with great responsibility, therefore higher standards must be placed on judges. He also acknowledged that the members of the disciplinary board are not only judges, but also representatives of other professions such as lawyers and academics.<sup>10</sup>

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## Quality of justice

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### Digitalisation

Digitization of the judiciary was found to be slow by the European Commission last year, and it remains slow. From July 2022, district, regional and high courts are obliged to publish final judgements in a database. The details are to be determined by a decree of the Ministry of Justice, however this is still in the legislative process. Decisions should be pseudonymized, i.e. without names and other identifying marks, in adherence with the GDPR. However, the Ministry of Justice also wants to anonymize the identification data of companies and authorities. The scope of the database is limited, as it is not intended to publish non-jurisdictional and non-meritorious decisions. However, it is possible to access the database through a request for information under the Freedom of Information Act.<sup>11</sup>

The Ministry of Justice plans to draw 416.5 million CZK from the National Recovery Plan for projects related to the digitization of justice. By September, 88.2 million CZK had been used for audio recordings from court proceedings and their subsequent transcriptions into text. So far, no funds have gone to other projects (video conferences, the justice portal

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9 See here: <https://www.ceska-justice.cz/2022/11/pripad-grosam-v-cr-jde-jako-jediny-k-velkemu-senatu-eslp-znovu-projedna-cesky-system-karnych-rizeni-se-soudci-statnimi-zastupci-a-exekutory/>

10 See here: <https://www.ceska-justice.cz/2022/02/v-karnych-rizenich-prevazuji-prutahy-nekdy-ukazou-spatne-vztahy-u-soudu/>

11 See here: [https://www.irozhlas.cz/zpravy-domov/rozsudky-zverejnovani-spravedlnost-soudy\\_2208040500\\_cib](https://www.irozhlas.cz/zpravy-domov/rozsudky-zverejnovani-spravedlnost-soudy_2208040500_cib)

and strengthening the infrastructure for the digital workplace).<sup>12</sup> According to the National Audit Office, the digitization process is progressing slowly, and information systems are often incompatible and financially demanding. In addition, the electronic file service system is still missing.<sup>13</sup>

The process of digitization of justice consists of five projects with a total cost of 416.5 million CZK. These are: the justice portal, audio recordings of court proceedings and their text transcription, strengthening of the infrastructure for the digital workplace, digital transformation and video conferencing.<sup>14</sup> The National Audit Office's audit focused on three justice digitization projects funded by the Ministry of Justice in 2016-2021, none of which were operational by the end of the year. The Ministry claims that the problems and delays are of an objective nature. It refers to the technical and administrative complexity of the technical assignment of the information system and the

subsequent public tender. At the same time, if the Ministry does not manage to implement the projects by the end of 2023, there is a risk of an obligation to return almost 178 million CZK from European funds.<sup>15</sup>

There are also problems with digitization in the use of house arrests. The monitoring of convicts through electronic bracelets is unused after a failed test (due to the unreliable original supplier of the bracelets and the lengthy selection of a replacement), and the convicts continue to be checked by the probation and mediation service, which is challenging in all respects.<sup>16</sup>

President Zeman supported the creation of the so-called Digital and Information Agency, which has been discussed for some time.<sup>17,18</sup> This agency will be in charge of managing individual public administration registers. The goal is to simplify public administration services to people.<sup>19</sup> To support the digital

12 See here: <https://www.ceska-justice.cz/2022/11/na-digitalizaci-justice-vycerpala-spravedlnost-z-planu-obnovy-882-milionu-kc/>

13 See here: <https://www.ceska-justice.cz/2022/11/elektronizace-justice-pokrocila-jen-minimalne-zjistil-nku-chybi-spisova-sluzba/>

14 See here: <https://justice.cz/web/msp//digitalizace-justice-npo>

15 See here: <https://ct24.ceskatelevize.cz/domaci/3541749-digitalizace-justice-stala-podle-kontroloru-uz-stovky-milionu-soudy-jsou-ale-dal-plne>

16 See here: <https://ct24.ceskatelevize.cz/domaci/3541749-digitalizace-justice-stala-podle-kontroloru-uz-stovky-milionu-soudy-jsou-ale-dal-plne>

17 See here: <https://www.rekonstrukcestatu.cz/archiv-novinek/spolecne-digitalne-vznik-digitalni-a-informacni-agentury-je-velkou-prilezitosti-pro-digitalni-transformaci-ceska>

18 See here: [https://www.irozhlas.cz/zpravy-domov/digitalni-a-informacni-agentura-zeman-senat-ano-spd-bar-tos\\_2212231246\\_pj?\\_ga=2.135549233.1838246627.1672929219-844232784.1672239103](https://www.irozhlas.cz/zpravy-domov/digitalni-a-informacni-agentura-zeman-senat-ano-spd-bar-tos_2212231246_pj?_ga=2.135549233.1838246627.1672929219-844232784.1672239103)

19 See here: [https://www.irozhlas.cz/zpravy-domov/digitalni-a-informacni-agentura-zeman-senat-ano-spd-bar-tos\\_2212231246\\_pj?\\_ga=2.135549233.1838246627.1672929219-844232784.1672239103](https://www.irozhlas.cz/zpravy-domov/digitalni-a-informacni-agentura-zeman-senat-ano-spd-bar-tos_2212231246_pj?_ga=2.135549233.1838246627.1672929219-844232784.1672239103)

transformation of the state, a platform of non-profit organizations called Together Digitally (Společně Digitálně) was created, which develops joint advocacy activities to ensure a faster shift of the digital transformation in the right direction.<sup>20</sup>

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

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

A long-standing problem is the length of court proceedings, especially in courts of higher instance. The most recent information available on average proceeding length is for 2021<sup>21</sup> (2022 assessment will be available in 2023). Due to the calculation mechanism where only decided cases are used, the data may not reliably show the reality (if the court is overloaded and the case is not decided in the calendar year, it may still show a reasonable length of management).

In 2022, delays in court proceedings were addressed again. One of those punished was the judge of the District Court in Třebíč, Jaroslav Krátký. He caused delays in 111 cases, while these were matters where the law stipulates a period of a few days to weeks (whereas in extreme cases the procedures were extended for up to a year). Jaroslav Krátký admitted to

the delays, but argued it was justified due to his poor health, which inhibited his ability to perform his work properly, and prevented him from working entirely in 2021. The poor state of health was proven, but only at a point when delays were already occurring on a regular basis (throughout 2020). The disciplinary board of the Supreme Administrative Court subsequently dismissed him from his position, which Krátký considered an inappropriate punishment.<sup>22</sup>

### ***Corruption of the judiciary***

Prosecutor Zdeněk Štěpánek indicted former Prague High Court judge Zdeněk Sovák and four other people on suspicion of corruption. The judge is accused of asking litigants for a significant sum of money in exchange for a judgment in their favour. In the case of the Metrostav company, it is estimated that the amount of money was around 50 million CZK. In addition, the judge is also being prosecuted for accepting a bribe in the amount of 100,000 CZK and for unauthorized handling of information from non-public information systems.<sup>23</sup>

20 See here: <https://spolecneadigitalne.cz/>

21 See here: [https://justice.cz/documents/12681/719244/Ceske\\_soudnictvi\\_2021.pdf/37d8da17-4fee-4001-a473-fdb840f78936](https://justice.cz/documents/12681/719244/Ceske_soudnictvi_2021.pdf/37d8da17-4fee-4001-a473-fdb840f78936)

22 <https://vysocina.rozhlas.cz/karny-senat-rozhodl-o-odvolani-soudce-jaroslava-kratkeho-z-trebice-kvuli-8662362>

23 See here: [https://www.irozhlas.cz/zpravy-domov/zdenek-sovak-soud-korupce-korupcni-kaouza\\_2211241605\\_sto](https://www.irozhlas.cz/zpravy-domov/zdenek-sovak-soud-korupce-korupcni-kaouza_2211241605_sto)

## Anti-corruption framework 🟡

### Key recommendations

- Ensure more transparent management of public authorities
- Enact the Whistleblower Protection Act
- Ensure proper and effective investigation of corruption cases

### Framework to prevent corruption

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

The Act on the Registration of Beneficial Owners had to undergo a fundamental amendment, because the European Commission found that the existing law was in conflict with the European Directive. The discrepancy was primarily in the definition of the real owner and the scope of exceptions to whom the law does not apply. The new regulation is effective from October 1, 2022. However, for many companies, the change can be a

significant burden, as they will spend a lot of time re-entering the mandatory data into the system. Newly, in addition to redefining the real owner, real owners are divided into final beneficiaries and persons with final influence.<sup>24</sup> The law thus affects a larger number of entities.<sup>25</sup>

Currently, the draft law on lobbying, which was prepared by the Ministry of Justice, is under review. As part of it, a lobbyist register is to be created, and MPs will have to report their meetings with lobbyists. The proposal moderately follows the proposal prepared by the previous government.<sup>26</sup>

As for transparency, the Prague Castle - the official office of the President of the Czech Republic - and President Zeman pay the law firm of Marko Nespala millions of crowns annually for legal services based on a more generally written contract from 2013. It is not clear when, how often and in what way the legal services are used. Contracts for specific cases for which the law firm provides legal services to the Office of the President of the Republic are concluded verbally, which is certainly not desirable for such an institution.<sup>27</sup>

The European Commission imposed a fine of 3.3 million euros on the Czech Republic for

24 See here: <https://advokatnidenik.cz/2022/09/30/novela-zakona-o-evidenci-skutecnych-majitelu-je-ucinna-od-rij-na-pozor-na-zmeny/>

25 See here: <https://www.dreport.cz/blog/co-prinasi-novela-zakona-o-evidenci-skutecnych-majitelu/>

26 See here: <https://echo24.cz/a/JRd7z/zpravy-domaci-zakon-o-lobbingu-vliv-politika-lobbisticke-skupiny-registr-databaze-ministr-blazek-pirati-michalek>

27 See here: [https://www.irozhlas.cz/zpravy-domov/prazsky-hrad-milos-zeman-advokat-nespala-smlouva-pe-nize-zastupovani-kaupy-soud\\_2210250500\\_pik](https://www.irozhlas.cz/zpravy-domov/prazsky-hrad-milos-zeman-advokat-nespala-smlouva-pe-nize-zastupovani-kaupy-soud_2210250500_pik)

errors in agricultural subsidies. The fine is the result of an audit carried out by the Commission in 2019 relating to the conflicts of interests of MP and former Prime Minister Andrej Babiš (at the time of writing this report, a presidential candidate).<sup>28</sup> However, it was not just conflicts of interests for Babiš. The Commission also criticised the Czech Republic for the lack of innovation in the projects or the bias of the evaluators and the involvement of Agrofert's subsidiaries (whose final beneficiary is Andrej Babiš) in the projects of other companies that belong to the Agrofert group.<sup>29</sup>

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

The Whistleblower Protection Act has still not been adopted, as the previous government did not have time to deal with it during its term. The new government has prepared its own draft law, which is currently in its inter-departmental comment procedure phase.<sup>30</sup> The main differences are that employers will have to implement an internal reporting system, as well as a narrower definition of crimes and misdemeanours covered by the law. Reconstruction of the State (Rekonstrukce

státu), Transparency International and Oživení criticize the proposal, saying that it does not sufficiently protect whistleblowers and goes against the reduction of corruption.<sup>31</sup>

## ***Media environment and freedom of expression and of information*** N/A

### ***Pluralism and concentration***

Currently, the Czech Republic ranks 20th out of 180 evaluated countries in the ranking of Reporters Without Borders.<sup>32</sup> This is an improvement of 20 places compared to last year, but the Czech Republic continues to be criticised for the private ownership of the media in the hands of state representatives.

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

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

28 See here: [https://www.irozhlas.cz/zpravy-domov/stret-zajmu-andrej-babis-zemedelske-dotace-audit-pokuta\\_2206131451\\_tec](https://www.irozhlas.cz/zpravy-domov/stret-zajmu-andrej-babis-zemedelske-dotace-audit-pokuta_2206131451_tec)

29 [https://www.irozhlas.cz/zpravy-domov/stat-zajmu-andrej-babis-zemedelske-dotace-zsif-pokuta-82-millionu\\_2207010500\\_tec](https://www.irozhlas.cz/zpravy-domov/stat-zajmu-andrej-babis-zemedelske-dotace-zsif-pokuta-82-millionu_2207010500_tec)

30 See here: <https://korupce.cz/ministerstvo-spravedlnosti-predklada-do-meziresortniho-pripominkoveho-rizeni-navrh-regulace-lobbovani/>

31 See here: <https://www.rekonstrukcestatu.cz/archiv-novinek/vlada-petra-fialy-ods-schvalila-navrh-zakona-o-ochrane-oznamovatelu-ktery-jde-naproti-korupci>

32 See here: <https://rsf.org/en/index>



In the past year, there were several incidents of verbal and physical attacks at anti-government demonstrations (demonstrators demanded an end to support for Ukraine, resignation of the government, more help for citizens to deal with the energy crisis, etc.).<sup>33</sup> One of the attacked journalists was Richard Samek, an editor for Czech Television and a co-worker of ROMEA TV. Samek was racially insulted during a demonstration against Czech Television and the government. The case is being investigated by the police.<sup>34</sup>

## Checks and balances

### Key recommendations

- To establish the National Human Rights Institution
- To establish the Office of Ombudsman for Children

- To amend the law on the public defender of rights to prevent that the ombudsman can arbitrarily remove the agenda from its own representative

### Independent authorities

Disputes between ombudsman Stanislav Křeček and his (now former) deputy Monika Šimůnková culminated in Křeček taking away the entire agenda from his deputy,<sup>35</sup> due to various differences of opinion, and her subsequent resignation.<sup>36</sup> Disputes were both professional and personal in nature. Šimůnková confirmed the same. Over time, Křeček did not allow her to exercise her mandate given by the Chamber of Deputies. Šimůnková is considering resolving the dispute through the courts.<sup>37</sup>

Křeček himself has been criticised for a long time for the way he performs the function of ombudsman and his professional opinions. In 2022, for example, the Senate criticised him

33 See here: <https://www.novinky.cz/clanek/krimi-tamhle-ten-parchant-cikanskej-napadl-demonstrant-reportera-ceske-televize-40414927> or here: <https://zpravy.aktualne.cz/domaci/fyzicky-utok-na-redaktora-aktualne-media-jsou-prostrednici-n/r-b01eaad0673711edb1f50cc47ab5f122/>

34 See here: <https://romea.cz/cz/domaci/policie-zacala-setrit-rasisticky-utok-na-novinare-richarda-samka-romea-cz-zna-identitu-agresora>

35 See here: [https://www.irozhlas.cz/zpravy-domov/ombudsman-spor-krecek-monika-simunkova-zastupkyne\\_2207221715\\_mst](https://www.irozhlas.cz/zpravy-domov/ombudsman-spor-krecek-monika-simunkova-zastupkyne_2207221715_mst)

36 See here: [https://www.irozhlas.cz/zpravy-domov/monika-simunkova-rezignace-ombudsman-krecek-verejny-ochrance-konflikt\\_2208171556\\_jip](https://www.irozhlas.cz/zpravy-domov/monika-simunkova-rezignace-ombudsman-krecek-verejny-ochrance-konflikt_2208171556_jip)

37 See here: <https://ct24.ceskatelivize.cz/domaci/3523517-krecek-neni-ombudsman-na-svem-miste-rika-simunkova-zvazuje-zalobu>

for statements against minorities. The Senate described the ombudsman's statements as prejudicial and xenophobic.<sup>38</sup> Křeček saw in the criticism an effort to limit the right to freedom of speech.<sup>39</sup> The ombudsman is also criticised by his own employees. One of his former employees drew attention to the fact that Křeček does not respect the applicable legal regulations, such as the anti-discrimination law, and distorts the conclusions of the Office's lawyers in cases where discrimination is suspected.<sup>40</sup> It was the victims of discrimination who, in connection with the departure of Monika Šimůnková, lost faith in the fact that the ombudsman, as a national body for equal treatment and protection against discrimination,<sup>41</sup> can help them in these matters.<sup>42</sup>

At the end of the year, a new representative of the public defender of rights, Vít Alexandr Schorm, was elected, who until then had worked as a government representative for the representation of the Czech Republic before

the European Court of Human Rights, the UN Human Rights Committee and other international control bodies in the field of human rights. The deputies voted for him over the candidates proposed by President Zeman.<sup>43</sup>

Last but not least, it is necessary to point out that the Czech Republic still does not have a national human rights institution. It was the new representative of the Public Defender of Rights who reminded the public before the end of the year why its establishment is important.<sup>44</sup>

The long-discussed establishment of a children's ombudsman failed to move forward. However, at the end of the year, the working group established by the Minister for Legislation, Michal Šalomoun, agreed that they would start working on its establishment.<sup>45</sup>

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38 See here: [https://www.irozhlas.cz/zpravy-domov/senat-ombudsman-krecek\\_2206241358\\_jca](https://www.irozhlas.cz/zpravy-domov/senat-ombudsman-krecek_2206241358_jca)

39 See here: <https://denikn.cz/minuta/907871/>

40 See here: [https://www.irozhlas.cz/zpravy-domov/urad-ombudsmana-verejny-ochrance-prav-stanislav-krecek\\_2207120500\\_ank](https://www.irozhlas.cz/zpravy-domov/urad-ombudsmana-verejny-ochrance-prav-stanislav-krecek_2207120500_ank)

41 See here: <https://www.ochrance.cz/pusobnost/rovne-zachazeni-a-diskriminace/>

42 See here: <https://www.novinky.cz/clanek/domaci-krecek-diskriminovanym-nepomuze-boji-se-lidskopravni-organizace-40406219>

43 See here: [https://www.irozhlas.cz/zpravy-domov/novy-zastupce-ombudsmana-vit-alexander-schorm\\_2210261456\\_ara](https://www.irozhlas.cz/zpravy-domov/novy-zastupce-ombudsmana-vit-alexander-schorm_2210261456_ara)

44 See here: [https://www.ochrance.cz/aktualne/proc\\_v\\_cesku\\_potrebujeme\\_narodni\\_lidskopravni\\_instituci/](https://www.ochrance.cz/aktualne/proc_v_cesku_potrebujeme_narodni_lidskopravni_instituci/)

45 See here: [https://www.vlada.cz/cz/clenove-vlady/pri-uradu-vlady/michal\\_salomoun/aktualne/tz-pripravujeme-zakon-k-detskemu-ombudsmanovi--na-zakladnich-principech-se-shodla-pracovni-skupina-svolana-ministrem-michalem-salomounem-201217](https://www.vlada.cz/cz/clenove-vlady/pri-uradu-vlady/michal_salomoun/aktualne/tz-pripravujeme-zakon-k-detskemu-ombudsmanovi--na-zakladnich-principech-se-shodla-pracovni-skupina-svolana-ministrem-michalem-salomounem-201217)

## Enabling framework for civil society

### Key recommendations

- Modify the regulation on the registration of beneficial owners so that it is functional for the civil sector
- Provide more funding opportunities for civil society actors working on human rights issues, specifically the protection of vulnerable people

### Regulatory framework

#### **Registration of associations, including those with a cross-border nature**

As of October 1, 2022, the amendment to the Act on the Registration of Beneficial Owners is effective. It contains a new definition of “real owner” according to the European directive and limits some exemptions from the registration obligation (e.g. for churches, associations of unit owners, etc.).<sup>46</sup>

Regardless of this amendment, however, there is a problem with the registration of the real owners of NGOs, when, for example,

foundations can be the real owner of another legal entity. This is also the case with the Partnership Foundation (Nadace Partnerství), which was founded 30 years ago by the George Marshall Fund. The Partnership Foundation cannot register the beneficial owners because the founding members of the organization are prominent American public figures. The same problem exists with the People in Need (Člověk v Tísni) organization, where Czech Television is one of the owners. Similar founding entities may no longer exist in these organizations and/or have no rights, therefore, according to some experts, it cannot be said that these NGOs have real owners. However, the obligation to register these entities is based on the European AML Directive. Several other more technical issues are also connected with the registration of real owners.<sup>47</sup>

#### **Financing framework, including tax regulations**

In the summer, an expert group was established within the Committee for Legislation and Financing of the Government Council for Non-State Non-Profit Organizations (the Council). The creation of this group stems from the Strategy for Cooperation between Public Administration and NGOs for the period from 2021 to 2030. The task of this group will be to evaluate the possibilities of

46 See here: <https://www.justice.cz/?clanek=novela-zakona-o-evidenci-skutecnym-majite-1>

47 See here: [https://www.vlada.cz/assets/ppov/rnno/legislativa-a-financovani/2008/Zapis\\_Vybor\\_pro\\_legislativu\\_financovani\\_06\\_09\\_2021.pdf](https://www.vlada.cz/assets/ppov/rnno/legislativa-a-financovani/2008/Zapis_Vybor_pro_legislativu_financovani_06_09_2021.pdf)

efficient and simple financing of public services and activities from the state budget.<sup>4849</sup>

In the middle of the year, the government approved the main areas of state subsidy policy towards non-state non-profit organizations to support public benefit activities for the year 2023. It is planned to provide the most funds for activities in the field of physical education and sports (almost 3 billion CZK). In second place will be activities in the area of social services (1.4 billion CZK). The least funds will be allocated to activities related to the fight against corruption (4.8 million CZK) and equal opportunities for women and men (7 million CZK).<sup>50</sup>

In Spring, the Working Group on Public Collections of the Committee on Legislation and Financing of the Government Council for Non-Profit Organizations adopted recommendations addressed to the Ministry of the Interior. The recommendation concerned public collections. The working group outlined two possible options for how the anchoring of public collections could be modified. Either the conditions under which public collections

are made could be changed (e.g. regulating only the collection of cash from persons who cannot be identified). Or the current law could be amended only slightly and the application practice, including the emphasis on education, could be standardised<sup>51</sup>

Non-governmental non-profit organizations have various tax advantages, however, there have been no significant changes in this regard.

### **Rules on lobbying**

As mentioned above, the draft law on lobbying prepared by the Ministry of Justice is currently under review. One part focuses on the creation of a register in which MPs will have to report their meetings with lobbyists. The proposal moderately follows the proposal prepared by the previous government.<sup>52</sup>

There is a strategy for the cooperation of public administration with NGOs for the years 2021 to 2030.<sup>53</sup> It is a document that helps the involvement of the civil sector in the adoption of public policy measures and other activities. However, the true level of involvement remains

48 See here: [https://www.vlada.cz/assets/ppov/rnno/legislativa-a-financovani/2008/Zapis\\_VLF\\_09\\_20\\_2022.pdf](https://www.vlada.cz/assets/ppov/rnno/legislativa-a-financovani/2008/Zapis_VLF_09_20_2022.pdf)

49 See here: [https://www.vlada.cz/assets/ppov/rnno/ex\\_skup\\_fin/Zapis\\_Expertni\\_skupina\\_11\\_22\\_2022\\_FIN.pdf](https://www.vlada.cz/assets/ppov/rnno/ex_skup_fin/Zapis_Expertni_skupina_11_22_2022_FIN.pdf)

50 See here: <https://www.vlada.cz/cz/ppov/rnno/aktuality/hlavni-oblasti-statni-dotacni-politiky-vuci-nestatnim-neziskovym-organizacim-na-podporu-verejne-prospernych-cinnosti-pro-rok-2023-197441/>

51 See here: [https://www.vlada.cz/assets/ppov/rnno/pskvs/Doporuceni\\_pro\\_pracovni\\_skupinu\\_MV\\_01-03-2022\\_pro\\_VLF.pdf](https://www.vlada.cz/assets/ppov/rnno/pskvs/Doporuceni_pro_pracovni_skupinu_MV_01-03-2022_pro_VLF.pdf)

52 See here: <https://echo24.cz/a/JRd7z/zpravy-domaci-zakon-o-lobbingu-vliv-politika-lobbisticke-skupiny-registr-databaze-ministr-blazek-pirati-michalek>

53 See here: <https://www.vlada.cz/cz/ppov/rnno/dokumenty/strategie-spoluprace-verejne-spravy-s-nestatnimi-neziskovymi-organizacemi-na-leta-2021-az-2030-189753/>

to be seen, and will depend on the capacity and willingness of the individuals in relevant departments, committees, groups and other actors. The strategy was followed by research on the cooperation of the state administration with umbrella organizations and NGO networks<sup>54</sup> and a subsequent analysis.<sup>55</sup>

We also very much appreciate the opportunity to participate in the meetings of the committees of the Government Council for Human Rights, as they often result in important resolutions that get into the hands of relevant actors (typically ministers and the Prime Minister).<sup>56</sup> There are more government advisory bodies,<sup>57</sup> but our organization is only a member of the Committee for the Rights of the Child and the Committee against Torture and Inhumane Treatment.

The current government recognizes the importance of NGOs and their help, especially in connection with helping Ukrainian refugees. In 2022, a new government commissioner for human rights was elected, who fights very intensively for the effective promotion of positive changes in the field of fundamental rights protection and connects individual actors from

both the public administration and the civil sector.<sup>58</sup>

In addition to the aforementioned committees, there is also the Government Council for non-governmental non-profit organizations, which aims to help ensure a better environment for non-governmental non-profit organizations to carry out their activities.<sup>59</sup> This year, the number of council members increased by more than 30, and around half are composed of representatives from the civil society sector.<sup>60</sup>

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

### Key recommendations

- Handle compensation requests for victims of involuntary sterilizations efficiently and in accordance with the law

54 See here: <https://www.vlada.cz/cz/ppov/rnno/aktuality/vyzkum-spoluprace-statni-spravy-se-stresnimi-organizacemi-a-sitemi-nno-194786/>

55 See here: <https://www.vlada.cz/cz/ppov/rnno/aktuality/analyza-spoluprace-statni-spravy-se-stresnimi-organizacemi-a-sitemi-nestatnich-neziskovych-organizaci-198808/>

56 See here: <https://www.vlada.cz/cz/ppov/rlp/rlp-uvod-17537/>

57 See here: <https://www.vlada.cz/cz/pracovni-a-poradni-organy-vlady/#urad>

58 See here: <https://glopolis.org/konference-strategicka-partnerstvi/>

59 See here: <https://www.vlada.cz/cz/ppov/rnno/zakladni-informace-767/>

60 See here: <https://www.vlada.cz/cz/ppov/rnno/aktuality/vlada-jmenovala-cleny-rady-vlady-pro-nestatni-neziskove-organizace-198463/>

- Increase the protection of persons who are involuntarily in psychiatric hospitals
- Enable midwives to fully exercise their profession
- Take measures to ensure a truly inclusive education, including for those with special educational needs

-Less invasive alternatives for averting the immediate serious threat for which the person is hospitalized are not used or do not exist.

-There are patients who are formally hospitalized with their consent, but in fact were forced.<sup>62</sup>

-Involuntarily hospitalized patients are not sufficiently educated about their rights and status.

-Involuntarily hospitalized persons are often not effectively legally represented in detention proceedings, even though they have that right by law.

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

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

There are many issues in connection with the involuntary or forced hospitalization of persons in the Czech Republic.<sup>61</sup> Here are five important findings:

-Their autonomy of will and wishes are not reflected.

The topic of protection of involuntarily or forcibly hospitalized persons was brought up several times this year. Two round tables were organized for experts and people with personal experience.<sup>63</sup> Thanks to the Office of the Public Defender of Rights and the Academy of Justice, there was also a discussion about

61 DURAJOVÁ, Z. a KAŠTYL, M. *Analýza dostupnosti a účinnosti existujících nástrojů ochrany práv pacientů při nedobrovolné léčbě*. Reforma péče o duševní zdraví. s. 8 Dostupné zde: <https://www.reformapsychiatrie.cz/sites/default/files/2022-02/Anal%C3%BDza%20ochrany%20pr%C3%A1v%20p%C5%99i%20nedobrovoln%C3%A9%20l%C4%8Db%C4%9B.pdf>. Na související problémy poukazuje také advokát Vítězslav Dohnal, vizte zde: [https://denikn.cz/1007568/tisice-lidi-konci-na-psychiatrii-nedobrovolne-soudy-vetsin-ou-nezkoumají-jestli-opravnene/?ref=pop&rtm\\_source=web&rtm\\_medium=article&rtm\\_campaign=share\\_button&rtm\\_variant=copy\\_url&rtm\\_content=db157012-6ee4-4b43-ac77-89f105123b85](https://denikn.cz/1007568/tisice-lidi-konci-na-psychiatrii-nedobrovolne-soudy-vetsin-ou-nezkoumají-jestli-opravnene/?ref=pop&rtm_source=web&rtm_medium=article&rtm_campaign=share_button&rtm_variant=copy_url&rtm_content=db157012-6ee4-4b43-ac77-89f105123b85)

62 Zpráva pro vládu České republiky o návštěvě Evropského výboru pro zabránění mučení a nelidskému či ponižujícímu zacházení ze dne 4. 7. 2019, sp. zn. CPT/Inf (2019) 23, odst. 110. Dostupné zde: <https://rm.coe.int/168095aeb2>

63 See here: <https://advokatnidenik.cz/2022/07/29/u-kulateho-stolu-o-nedobrovolne-hospitalizaci-se-sesli-advokati-soudci-i-psychologove/>

what a court procedure accessible to people with disabilities should look like.<sup>64</sup> An informal group of lawyers has been formed, who are actively interested in and advocate for greater protection of involuntarily hospitalized persons in detention proceedings.

The public also learned from the media about non-consensual hospitalizations and the connected practices. The most striking was the story of a woman who was held in mechanical restraint for over 12 years in a psychiatric hospital. The inspection team of the Ministry of Health learned about her already in 2018, but did not report it to authorities for almost four years (it was an internal document). The ministry made the results of the investigation available only after a long-term effort by a human rights activist.<sup>65</sup> Additionally, an employee of the National Institute of Mental Health filed

a criminal complaint. Criminal proceedings are now underway.<sup>66</sup> Reports from individual investigations document systemic violations of patients hospitalized in psychiatric hospitals.<sup>67</sup>

In child psychiatric care, the accommodation conditions are completely unsatisfactory, reminiscent of a nightmare. Hospitals are understaffed and underfunded, and children are mistreated.<sup>68</sup> This was also confirmed by the public defender of rights in his investigation, who emphasized the deficiency in ensuring the exercise of children's participation rights.<sup>69</sup> Ukrainian minors are also at risk.

Despite the aforementioned shortcomings, the current Minister of Health, Vlastimil Válek, plans to abolish the entire department for the reform of mental health care and dismiss several dozen people who work for it.<sup>70</sup> This can

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64 See here: <https://advokatnidenik.cz/2022/10/27/odbornici-resili-jak-by-melo-vypadat-soudni-rizeni-pris-tupne-lidem-s-postizenim/>

65 See here: <https://neklid.net/hodnoceni-kvality-lidskych-prav-v-psihiatrickych-nemocnicich/>.

66 See p.38 here: [https://www.centrumlidskaprava.cz/sites/default/files/attachement/bulletin/Bulletin%20listopad\\_2022\\_0.pdf](https://www.centrumlidskaprava.cz/sites/default/files/attachement/bulletin/Bulletin%20listopad_2022_0.pdf)

67 See here: [https://www.irozhlas.cz/zpravy-domov/ministerstvo-zdravotnictvi-izolace-lidska-prava-kvalita-psihiatrie-opava\\_2209300500\\_ank](https://www.irozhlas.cz/zpravy-domov/ministerstvo-zdravotnictvi-izolace-lidska-prava-kvalita-psihiatrie-opava_2209300500_ank), [https://www.irozhlas.cz/zpravy-domov/opava-dobrany-psihiatrie-ministerstvo-zdravotnictvi-zpravy-lidska-prava\\_2210030500\\_ace](https://www.irozhlas.cz/zpravy-domov/opava-dobrany-psihiatrie-ministerstvo-zdravotnictvi-zpravy-lidska-prava_2210030500_ace), [https://www.irozhlas.cz/zpravy-domov/psihiatrie-opava-kurtovani-ministerstvo-zdravotnictvi-zpravy-zdravi\\_2209270500\\_vtk](https://www.irozhlas.cz/zpravy-domov/psihiatrie-opava-kurtovani-ministerstvo-zdravotnictvi-zpravy-zdravi_2209270500_vtk)

68 See here: [https://www.irozhlas.cz/zpravy-domov/louny-detska-psihiatrie-pribilova-nemocnice-deti-mrize-dorst-terapie\\_2212070500\\_ank](https://www.irozhlas.cz/zpravy-domov/louny-detska-psihiatrie-pribilova-nemocnice-deti-mrize-dorst-terapie_2212070500_ank)

69 See here: <https://eso.ochrance.cz/Nalezene/Edit/10968> and here: [https://www.ochrance.cz/aktualne/v\\_komunikaci\\_s\\_detskymi\\_pacienty\\_na\\_psihiatriich\\_je\\_co\\_zlepsovat\\_jejich\\_primerene\\_zapojeni\\_do\\_rozhodovani\\_zvladaji\\_jen\\_nektere\\_nemocnice/?fbclid=IwAR3LFyzZz0WUVdQFa7VcJDA8H0xeRr6ZKZb7t-tInvzYteb-XG5rYDPmFTri](https://www.ochrance.cz/aktualne/v_komunikaci_s_detskymi_pacienty_na_psihiatriich_je_co_zlepsovat_jejich_primerene_zapojeni_do_rozhodovani_zvladaji_jen_nektere_nemocnice/?fbclid=IwAR3LFyzZz0WUVdQFa7VcJDA8H0xeRr6ZKZb7t-tInvzYteb-XG5rYDPmFTri)

70 See here: [https://www.seznamzpravy.cz/clanek/domaci-politika-vlada-se-chysta-skrtnout-mista-590-uredniku-nejvic-u-stanjury-220362#dop\\_ab\\_variant=0&dop\\_source\\_zone\\_name=zpravy.sznhp](https://www.seznamzpravy.cz/clanek/domaci-politika-vlada-se-chysta-skrtnout-mista-590-uredniku-nejvic-u-stanjury-220362#dop_ab_variant=0&dop_source_zone_name=zpravy.sznhp).

seriously jeopardize the positive change of the psychiatric care system.

In childbirth, health services are often provided without free and informed consent (using pre-printed forms instead of partner dialogue) or without indication.<sup>71</sup> These are, for example, episiotomies, C-sections or separation of mothers from newborns. These interventions constitute obstetric violence. Current standards based on scientific evidence are lacking in the Czech Republic. The patient is thus perceived as an object, not a subject.

Midwives tend to be limited in the full performance of their work, for which they have a professional university education. In practice, they cannot perform physiological births without the supervision of a doctor.<sup>72</sup> Separate births outside the hospital with only midwives are still non-existent.

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

In last year's report on the state of the rule of law, we reported that a law on compensation

for victims of involuntary sterilization is effective in the Czech Republic from 1 January 2022. It responds to past bad practice where healthcare providers performed sterilization on a patient in violation of the law, most often without the patient's free and informed consent. They were often women of Roma origin. This problem was first pointed out by the then public defender of rights in his final opinion from 2005.<sup>73</sup> According to him, women from socially weaker families were pressured to undergo sterilization. They were even provided with a social benefit for undergoing sterilization. The Ombudsman called it the state's systematic anti-Roma policy.

The law grants victims a one-off sum of 300,000 CZK. The request for compensation is handled by the Ministry of Health. However, considering the assessment of the effectiveness of the new statutory provision, we have serious concerns about partial failures in its implementation on the part of the Ministry of Health. By the end of September 2022, 421 applications were submitted. Of those, 231 were processed and only 129 of the

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[box&source=hp&seq\\_no=3&utm\\_campaign=abtest207\\_zavirani\\_clanku\\_varB&utm\\_medium=z-boxiku&utm\\_source=www.seznam.cz](https://www.seznam.cz/box&source=hp&seq_no=3&utm_campaign=abtest207_zavirani_clanku_varB&utm_medium=z-boxiku&utm_source=www.seznam.cz)

71 See here: [https://www.upr-info.org/sites/default/files/country-document/2022-11/LeagueOfHumanRights\\_Statement\\_Presession42\\_Czechia.pdf](https://www.upr-info.org/sites/default/files/country-document/2022-11/LeagueOfHumanRights_Statement_Presession42_Czechia.pdf)

72 <https://lfp.cz/blog/ministerstvo-ulozilo-pokutu-porodni-asistentce-ona-ted-zada-odskodneni-za-nezakonny-postup/>

73 Final opinion of the public defender of rights in the matter of sterilizations carried out in violation of the law and proposals for remedial measures dated 23 December 2005, file no. stamp 3099/2004/VOP. Available here: <https://eso.ochrance.cz/Nalezene/Edit/2596>.



applications were successful.<sup>74</sup> Furthermore, there were no successful appeals.

There are several issues relating to the compensatory proceedings:<sup>75</sup>

-The Ministry does not comply with the deadline for issuing a decision (instead of 2 months, sometimes up to 10).

-The Ministry does not process applications in the order in which they arrive. Some women have to wait for a very long time.

-The law allows for the submission of evidence other than medical records, but we know of only one case where the Ministry accepted other evidence. It was a proof of social benefit for undergoing sterilization. The ministry does not accept family affidavits or police records, either. So far, undocumented victims have not been compensated, even though medical records were destroyed in violation of the law. Many hospitals have long been shredding medical

documentation related to childbirth and sterilization after 10 years, instead of 40. The compensatory law allows for compensation for illegal sterilizations since 1966, and the shredding period is 40 years from the end of hospitalization.

-The Ministry does not deal with asserted legal arguments, i.e. with ECHR jurisprudence, contested discrimination, lack of informed free consent, legal sterilization process or good morals. It also rejected an application where the reason for sterilization clearly indicated the Roma origin.

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

The Committee on the Rights of the Child, as an advisory body of the Government Council for Human Rights, discusses individual recommendations of the UN Committee on the Rights of the Child at its regular meetings, with representatives of ministries and civil society. The result will be a resolution of the

74 The League of Human Rights has assisted several dozen women with filing claims for compensation and subsequent remedies. It has also written a guide for victims on how to apply for compensation, available here: <https://llp.cz/blog/jak-si-pozadat-o-odskodneni-za-nedobrovolnou-sterilizaci/>

75 We drew attention to some of the problems already in the middle of the year in an open letter to the Prime Minister and the Minister of Health, available here: <https://llp.cz/blog/otevreny-dopis-vyhodnoceni-efektivit-zakona-o-odskodneni-za-protipravni-sterilizace/>. Other points of concern were raised by the League of Human Rights as part of the universal UPR review this autumn: <https://www.upr-info.org/en/review/czechia>. The victims of illegal sterilization themselves point out shortcomings: [https://www.irozhlas.cz/zpravy-domov/psychiatrie-opava-kurtovani-ministerstvo-zdravotnictvi-zpravy-zdravi\\_2209270500\\_vtk](https://www.irozhlas.cz/zpravy-domov/psychiatrie-opava-kurtovani-ministerstvo-zdravotnictvi-zpravy-zdravi_2209270500_vtk).

Committee addressed to the government.<sup>76</sup> For example, the abolition of so-called infant institutions for children under three years of age (effective from January 2022), forms of substitute family care and an amendment to the Civil Code enshrining the explicit prohibition of physical punishments were addressed.

In November, the so-called pre-sessions No. 42 of the UN Universal Periodic Review took place with representatives from civil society. They pointed out the following problems:<sup>77</sup>

- The League of Human Rights pointed out the (in)efficiency of compensation proceedings for victims of illegal sterilizations and obstetric violence (see above).<sup>78</sup>
- The OPU pointed to the need for the protection of stateless persons, specifically statelessness determination and access to rights and arbitrary detention of stateless persons.<sup>79</sup>
- Amnesty International pointed out the need to establish a national human rights institute according to the Paris Principles,

the issue of violence against women and the fact that the Czech Republic has not yet adopted the Council of Europe Convention on preventing and combating violence against women and domestic violence. Last, but not least, it pointed out the shortcomings of legal protection and support of the rights and interests of LGBTQ+ people.<sup>80</sup>

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

The Office of the Government Plenipotentiary for the Representation of the Czech Republic before the ECHR and UN committees is an advisory body - i.e. The College of Experts for the Execution of ECHR Judgments, which meets regularly.<sup>81</sup> It is composed of representatives of public authorities and civil society. Interestingly, the current government representative Vít Alexander Schorm was elected this year as the representative of the public defender of rights Stanislav Křeček. The position of government representative has not

76 See here: <https://www.vlada.cz/cz/ppov/rlp/vybory/pro-prava-ditete/ze-zasedani-vyboru/zasedani-vyboru-dne-21--prosince-2021-193688/>

77 See here: <https://www.upr-info.org/en/review/czechia>

78 See here: [https://www.upr-info.org/sites/default/files/country-document/2022-11/LeagueOfHumanRights\\_Statement\\_Presession42\\_Czechia.pdf](https://www.upr-info.org/sites/default/files/country-document/2022-11/LeagueOfHumanRights_Statement_Presession42_Czechia.pdf)

79 See here: [https://www.upr-info.org/sites/default/files/country-document/2022-11/OPU\\_ENS\\_ISI\\_Statement\\_Presession42\\_Czechia.pdf](https://www.upr-info.org/sites/default/files/country-document/2022-11/OPU_ENS_ISI_Statement_Presession42_Czechia.pdf)

80 See here: [https://www.upr-info.org/sites/default/files/country-document/2022-11/AmnestyInternational\\_Statement\\_Presession42\\_Czechia.pdf](https://www.upr-info.org/sites/default/files/country-document/2022-11/AmnestyInternational_Statement_Presession42_Czechia.pdf)

81 See here: <https://justice.cz/web/msp/kolegium-expertu-pro-vykon-rozsudku-eslp>

yet been filled. This year, the ECHR ruled on more than a dozen complaints against the Czech Republic.<sup>82</sup> Below, for brevity, we will point out the implementations of only three selected decisions.

The decision of the European Committee for Social Rights in case No. 96/2013 - Approach against the Czech Republic concerns the physical punishment of children. The Government of the Czech Republic issued a report on this already at the end of 2021 through the Office of the Public Commissioner.<sup>83</sup> This year, the prohibition of physical punishments was explicitly enshrined in the Civil Code.<sup>84</sup>

The decision of the European Committee for Social Rights in Case No. 117/2015 - Transgender Europe and ILGA-Europe against the Czech Republic refers to sterilization as a condition for legal recognition of gender change, which is contrary to the European Social Charter and Article 8 of the Convention. The Government of the Czech Republic issued a report on this as well at the end of 2021 through the Office of the Public Commissioner.<sup>85</sup> The Czech Republic is one

of the last European countries with such conditions. The Czech Constitutional Court rejected the proposal to cancel this condition, but did not comment on the merits. A dialogue is currently underway at the Ministry of Justice with representatives of the Transparent association about the submission of a new legislative amendment.<sup>86</sup>

The verdict of the European Court of Human Rights in the case of *D.H. and others v. the Czech Republic* is an important decision regarding the discrimination of Roma pupils, which, despite the fact that the ECHR issued it in 2007, has not yet been fully implemented. Roma pupils are still often educated according to educational programs for pupils with mild mental disabilities and moved to special schools. So they continue to be segregated. An expert forum is established for implementation of the decision, which issues concrete recommendations for implementation. In September 2022, the Committee of Ministers issued a decision expressing concern that this systemic discrimination still persists. A strong problem is, among other things, the manner of diagnosing disabilities in Roma pupils. There

82 See here: [https://justice.cz/documents/12681/768738/Z%C3%A1pis\\_8.+zased%C3%A1n%C3%AD+Kolegia+expert%C5%AF.pdf/18641b0a-8d71-4c80-a911-fb004c76c14c](https://justice.cz/documents/12681/768738/Z%C3%A1pis_8.+zased%C3%A1n%C3%AD+Kolegia+expert%C5%AF.pdf/18641b0a-8d71-4c80-a911-fb004c76c14c)

83 See here: [https://justice.cz/documents/12681/1843046/Approach+proti+České+republice\\_implemентаčn%C3%AD+zpráva.pdf/83d406a3-3ce9-4e39-95b6-b9e196a8660e](https://justice.cz/documents/12681/1843046/Approach+proti+České+republice_implemентаčn%C3%AD+zpráva.pdf/83d406a3-3ce9-4e39-95b6-b9e196a8660e)

84 [https://justice.cz/documents/12681/768738/Zápis\\_8.+zasedán%C3%AD+Kolegia+expertů.pdf/18641b0a-8d71-4c80-a911-fb004c76c14c](https://justice.cz/documents/12681/768738/Zápis_8.+zasedán%C3%AD+Kolegia+expertů.pdf/18641b0a-8d71-4c80-a911-fb004c76c14c)

85 See here: [https://justice.cz/documents/12681/1843046/Transgender+Europe+a+ILGA-Europe+proti+České+republice\\_implemентаčn%C3%AD+zpráva.pdf/e8ef7890-a266-4531-bd70-577195098c26](https://justice.cz/documents/12681/1843046/Transgender+Europe+a+ILGA-Europe+proti+České+republice_implemентаčn%C3%AD+zpráva.pdf/e8ef7890-a266-4531-bd70-577195098c26)

86 See here: [https://justice.cz/documents/12681/768738/Zápis\\_8.+zasedán%C3%AD+Kolegia+expertů.pdf/18641b0a-8d71-4c80-a911-fb004c76c14c](https://justice.cz/documents/12681/768738/Zápis_8.+zasedán%C3%AD+Kolegia+expertů.pdf/18641b0a-8d71-4c80-a911-fb004c76c14c)

is also a need to distinguish between mild mental disabilities and social disadvantage, and to ensure appropriate personnel capacities for specific schools.<sup>87</sup>

### **Other systemic issues**

This year, the Ombudsman held two meetings with representatives of special schools, special pedagogic centres and non-profit organizations. They discussed the interim results of the investigation of the ombudsman's office, which looked into the impact of the amendment to the decree of the Ministry of Education on the education of children with special educational needs. He started the investigation, among other things, based on the initiative of non-profit organizations. The decree broadly denies children with combined disabilities access to certain support measures (e.g. teacher's assistant, special teaching and compensatory aids).<sup>88</sup> A round table was also organized on this topic.<sup>89</sup> In autumn, a proposal by the Ministry of

Education to amend the Education Act and the Act on Pedagogical Workers was also presented, thanks to which many children will once again lose access to the support measure of a teaching assistant. Non-profit organizations also drew attention to the risks of the amendment.<sup>90</sup> The amendment is now in the interdepartmental comment procedure.

Hospitals still violate a child's right to continuous contact with their legal representatives in connection with the child's hospitalization.<sup>91</sup> This problem was particularly pronounced at the beginning of the COVID-19 pandemic, but it persists to this day. It is possible to file a complaint against the hospital's procedure, but the complaint mechanism is not effective and does not protect patients and their loved ones who have come to harm.<sup>92</sup>

The Ombudsman dealt with a case where the father was not allowed so-called bonding after the birth of the child (caesarean section). The

87 See here: [https://justice.cz/documents/12681/768738/Zápis\\_8.+zasedán%C3%AD+Kolegia+expertů.pdf/18641b0a-8d71-4c80-a911-fb004c76c14c](https://justice.cz/documents/12681/768738/Zápis_8.+zasedán%C3%AD+Kolegia+expertů.pdf/18641b0a-8d71-4c80-a911-fb004c76c14c)

88 [https://www.ochrance.cz/dokument/zpravy\\_pro\\_poslaneckou\\_snemovnu\\_2022/2022-ii-q.pdf](https://www.ochrance.cz/dokument/zpravy_pro_poslaneckou_snemovnu_2022/2022-ii-q.pdf)

89 See here: [http://www.spoluskola.cz/aktuality/odbornici-v-senatu-je-treba-predchazet-vy clenovani-deti-se-specialnimi-vzdelavacimi-potrebami-ze-skol?fbclid=IwAR1KImB5wMPWc8ZtBxrLU\\_Ei9chesh-axDegUgZh\\_1KUoxN18iElwzAgbW8](http://www.spoluskola.cz/aktuality/odbornici-v-senatu-je-treba-predchazet-vy clenovani-deti-se-specialnimi-vzdelavacimi-potrebami-ze-skol?fbclid=IwAR1KImB5wMPWc8ZtBxrLU_Ei9chesh-axDegUgZh_1KUoxN18iElwzAgbW8)

90 See comments of League of Human Rights here: <https://llp.cz/blog/vyjadreni-ligy-lidskych-prav-ke-zmene-koncepcce-tzv-asistenta-pedagoga/> or the Czech Professional Society for Inclusive Education (České odborné společnosti pro inkluzivní vzdělávání) here: <https://cosiv.cz/cs/2022/11/27/pripominky-k-navrhu-novely-skolskeho-zakona/>

91 See here: <https://ct24.ceskatelevize.cz/domaci/3533627-168-hodin-bezte-domu-tady-nepomuzete-pritomnost-rodicu-u-deti-v-nemocnici-nemusi-byt>

92 See also the Czech Professional Society for Inclusive Education here: [https://www.ochrance.cz/dokument/zpravy\\_pro\\_poslaneckou\\_snemovnu\\_2022/2022-i-q-sankce.pdf](https://www.ochrance.cz/dokument/zpravy_pro_poslaneckou_snemovnu_2022/2022-i-q-sankce.pdf) and here: [https://www.ochrance.cz/dokument/zpravy\\_pro\\_poslaneckou\\_snemovnu\\_2022/2022-ii-q-sankce.pdf](https://www.ochrance.cz/dokument/zpravy_pro_poslaneckou_snemovnu_2022/2022-ii-q-sankce.pdf)

baby was only briefly shown to him in the changing room in the hallway. The regional office did not deal with the father's complaints, neither properly nor timely. At the same time, the Ombudsman pointed out the importance and benefit of bonding of fathers, especially for caesarean births.<sup>93</sup>

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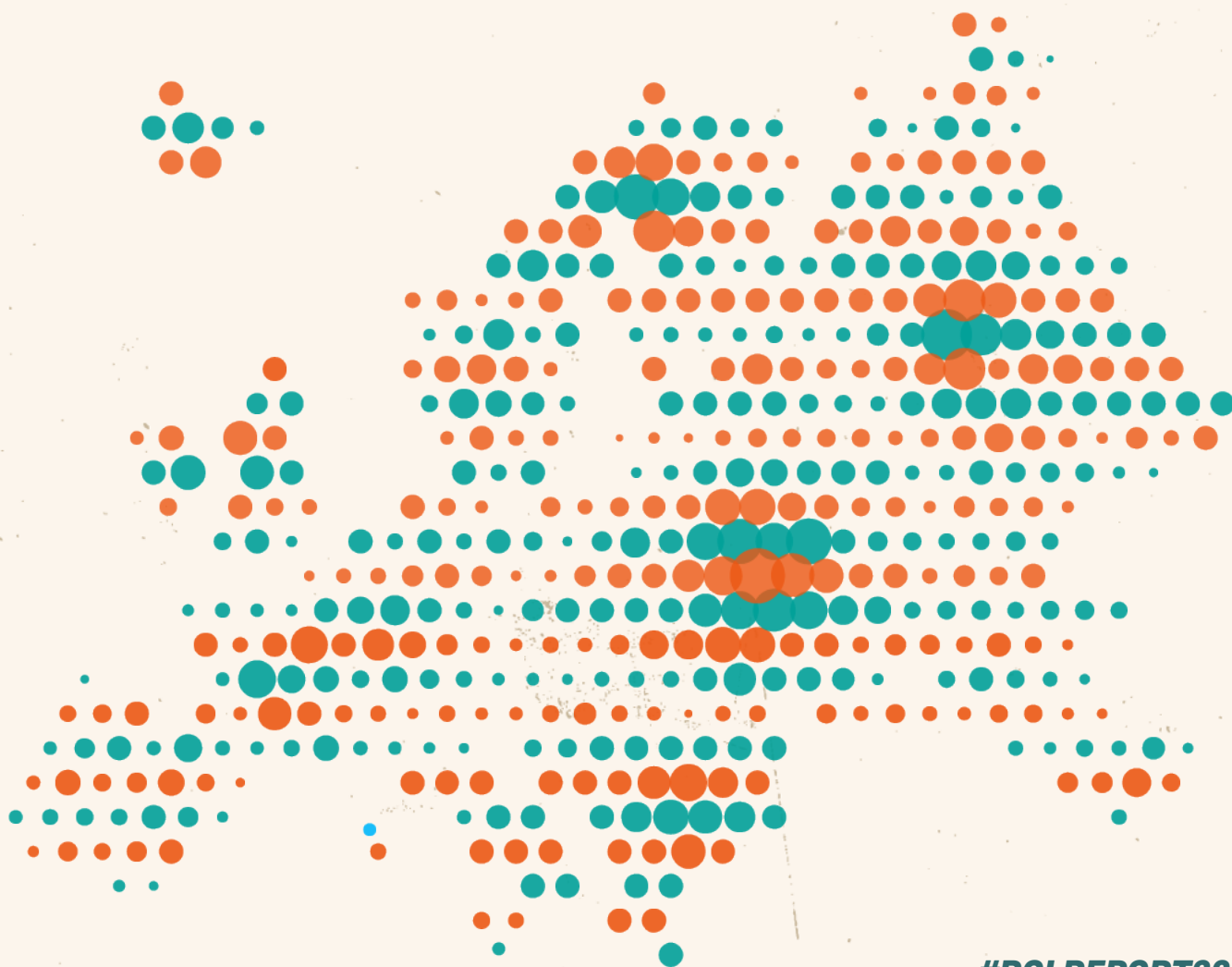
93 <https://eso.ochrance.cz/Nalezene/Edit/10602>

**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**ESTONIA**



**#ROLREPORT2023**

# ESTONIA

## About the authors



### Estonian Human Rights Centre (EHRC)

is an independent public interest foundation dedicated to the advancement of the protection of human rights in Estonia. EHRC is engaged in research, monitoring, advocacy and awareness-raising activities to advance the protection of human rights. EHRC's mission is to work together for Estonia to respect the human rights of every person in the country. EHRC develops its activities according to the needs of society. It is currently focusing on advancing the equal treatment of minority groups, promoting diversity and inclusion, protecting the human rights of asylum seekers and refugees, fighting hate speech and hate crime, and monitoring data protection and privacy. EHRC coordinates the Estonian Diversity Charter. It also monitors the overall human rights situation in Estonia and publishes independent human rights reports about the situation in the country. EHRC carries out a broad, effective and sustainable advocacy in the field of human rights.

## Key concerns

The justice system in Estonia is becoming better and more independent. More judges are being appointed to alleviate the judicial workload. Several legal amendments are on the way, which have the potential to improve the quality of judicial proceedings by having more specialist judges, digitalised court proceedings and more accessible court judgments.

The anti-corruption framework, on the other hand, has not seen much progress. Members of Parliament have shown little interest in disclosing their meetings with lobbyists, despite this being one of the main recommendations of the EU Commission in last year's rule of law report, and the EU Whistleblower Directive has not yet been transposed.

Regarding media freedom, no significant changes have occurred in 2022. The EU Commission's 2022 recommendation to bring the right of access to information and access to official documents up to European standards has not been implemented.






There have been no significant changes regarding checks and balances compared to last year. The EU Commission's 2022 report recommended that countries "continue advancing with the digital platform to make the legislative process even more visible and inclusive for public consultation". The Ministry of Justice website states that the "Co-creation

Workspace Project” is being worked on and will be launched in 2024.<sup>1</sup>



There were no major developments in terms of the civic space in 2022, and the EU Commission’s 2022 report did not make any recommendations in this area.

No progress has been made on the systemic issues affecting the rule of law environment and recommendations that EHRC has made repeatedly have still not been implemented.

### State of play

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

### Legend (versus 2022)

-  Regression
-  No progress
-  Progress

## Justice system

### Key recommendations

- The Ministry of Justice, in cooperation with the Estonian Bar Association and other relevant stakeholders, needs to take urgent action to find a solution to the state legal aid crisis.
- The government should implement the recommendations of the Estonian Council for Administration of Courts to create more circuit court judge positions and increase court officials’ salaries.

### Judicial independence

The justice system in Estonia has enjoyed a high level of independence in 2022. In general, the general public perceives the judiciary as being independent, as do judges themselves. A survey conducted in 2022 by the European Network of Councils for the Judiciary shows that Estonian judges consider the judiciary in Estonia to have a higher than average level of independence compared to other European countries.<sup>2</sup> A 2021 survey on the trustworthiness of institutions showed that 71% of respondents trust Estonian courts, while the results of four previous surveys put this figure at between 60% and 63%.<sup>3</sup>

1 Ministry of Justice (*Justiitsministeerium*), *Riigi koosloome keskkond*.

2 European Network of Councils for the Judiciary, *ENCJ Survey on the Independence of Judges*, 2022.

3 Eesti Kohtud, *Uuring: kohtuid usaldab 71 protsenti eestimaalastest*, 30 November 2021.



Between 1 September 2021 and 31 August 2022, the Chancellor of Justice (the National Human Rights Institute or Ombudsman) had to check whether the court had fulfilled all its official duties or whether a complaint about the inappropriate behaviour of a judge was true in fifteen cases. The Chancellor of Justice found no reason to initiate disciplinary proceedings in any of these cases.<sup>4</sup> However, the Disciplinary Chamber of the Supreme Court published two cases in 2022 in which judges were found guilty of improper performance of their official duties for delaying court procedures and missing deadlines. These resulted in a reprimand in one case and a reduction in salary for six months in the second case.<sup>5</sup>

## Quality of justice

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### Accessibility of courts

In its decision of 7 November 2022, the Supreme Court found that with the current compensation rates for state legal aid lawyers, the provision of state legal aid may not be sustainable and the protection of the fundamental rights of people who need legal aid may be endangered. The number of lawyers providing state legal aid has shrunk to a critical level due

to underfunding and issues in the payment system. The Supreme Court stressed that it is up to parliament to decide whether the shortage of lawyers should be alleviated by increasing their fees, abolishing the upper limit of the fees and giving the prosecutor the right to set a fair fee in each individual case, or in some other way.<sup>6</sup>

In her 17 November 2022 opinion the Chancellor of Justice also found that the provisions of Regulation No. 16 of the Minister of Justice on “Procedure for payment of state legal aid fees and reimbursement of costs to lawyers” are inconsistent with the Constitution, as the current fee system no longer guarantees the right to a fair trial or the right to a defence in criminal proceedings.<sup>7</sup>

The Deputy Chancellor of the Ministry of Justice confirmed that the ministry is trying to find resources to alleviate the situation.<sup>8</sup>

### The judiciary's resources

Recent surveys point to Estonian judges having concerns regarding their workload. According to a survey published in 2022 by the Estonian Association of Judges, 70.5% of

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4 Chancellor of Justice (*Õiguskantsler*), *Õiguskantsleri aastaülevaade 2021/2022*.

5 Supreme Court (*Riigikohus*), Disciplinary Chamber (*Distsiplinaarkolleegium*), *Case No 9-13/22-1*, 6 July 2022; Supreme Court (*Riigikohus*), Disciplinary Chamber (*Distsiplinaarkolleegium*), *Case No 9-13/22-2*, 23 September 2022.

6 Supreme Court (*Riigikohus*), Constitutional Review Chamber, *Case No 5-22-2*, 7 November 2022.

7 Chancellor of Justice (*Õiguskantsler*), *Ettepanek riigi õigusabi osutamise eest makstava tasu määrade kohta*, 17 November 2022.

8 Estonian Public Broadcasting (ERR), *Madise tegi ettepaneku tõsta riigi õigusabi eest makstavaid tasusid*, 18 November 2022.

the respondents (judges of first and second instance courts) assessed their daily workload as constantly or mostly excessive.<sup>9</sup>

In efforts to alleviate the situation, in April 2022, six additional judicial positions were created between Harju County Court and Tartu County Court.<sup>10</sup>

In September 2022, the Estonian Council for the Administration of Courts made an appeal to the government and parliament, in which it requested that two court budget priorities be taken into account. First, the Council considered it important, in order to cope with the workload of the courts and to ensure reasonable procedural time, that four new circuit judge positions be created and that additional funds be allocated for the recruitment of the necessary support staff. Secondly, the Council drew attention to the low salaries of court officials, which is a key reason why qualified personnel are leaving the courts and why it is difficult to recruit new people.<sup>11</sup>

### **Digitalisation**

On 25 January 2023, parliament adopted a law amending the Code of Administrative Court Procedure and the Code of Civil Procedure, which changes the regulation concerning court files, giving a clear legal definition of digital court files in order to ease the transition to paperless court proceedings.<sup>12</sup>

Parliament is currently reviewing a draft law amending the Courts Act, which will lead to judges specialising more and will result in a more modern management structure for county courts. According to the draft law, civil and criminal departments must be formed in county courts. The explanatory memorandum clarifies that at a time when legal disputes are becoming more and more complex and both lawyers and prosecutors are specialising, the specialisation of judges must also be supported to increase the quality of court proceedings.<sup>13</sup>

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- 9 Estonian Association of Judges (*Eesti Kohtunike Ühing*), EKoÜ töökoormuse küsimustik I-II astme kohtunikele, 20 January 2022
  - 10 Minister of Justice (*Justiitsministeerium*), Justiitsministri 27. oktoobri 2005. a määruse nr 47 „Maa-, haldus- ja ringkonnakohtu kohtunike arv ja jagunemine kohtumajade vahel” muutmine, 28 March 2022.
  - 11 Eesti Kohtud, KHN: eelarve prioriteet on ringkonnakohtunike lisakohad ja kohtuametnike palgatõus, 9 September 2022.
  - 12 Parliament (*Riigikogu*), Tsiviilkohtumenetluse seadustiku ja halduskohtumenetluse seadustiku muutmise seadus (paberivabale kohtumenetlusele üleminek) 723 SE, 17 October 2022.
  - 13 Parliament (*Riigikogu*), Kohtute seaduse muutmise ja sellega seonduvalt teiste seaduste muutmise seadus 633 SE, 6 June 2022.

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

### **Length of proceedings**

Between 1 September 2021 and 31 August 2022, the main complaint to the Chancellor of Justice regarding Estonian courts was that court proceedings were taking too long. This was especially true of cases pending in the Harju County Court. Complaints were also made about delays in administrative court proceedings. The Chancellor of Justice identified no cases in which courts could be accused of delaying procedures.<sup>14</sup> According to the EU Justice Scoreboard 2022, Estonian court proceedings are faster than in most other EU Member States. For example, Estonian first-instance courts ranked second in terms of the estimated time needed to resolve civil, commercial, administrative and other cases.<sup>15</sup>

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

Parliament is reviewing a draft law amending the Code of Administrative Court Procedure and other acts, which increases the publicity of court proceedings and the accessibility of court decisions. Currently, public access is guaranteed only to court decisions that have entered into force, while annulled court decisions and

those that have not been enforced cannot be accessed. From now on, judgments made publicly available in the Riigi Teataja database will be published immediately with the note “not in force”. If the decision takes effect or is annulled, the corresponding note will change automatically. In addition, court hearings may be livestreamed at the initiative of the court.<sup>16</sup>

On 14 December 2022, parliament adopted amendments to the Victim Support Act. The amendments aim to improve the availability of support to victims of violence, crime or crisis incidents, and to clarify the system for applying for benefits for the victims of crime.<sup>17</sup>

## **Anti-corruption framework** N/A

### **Key recommendations**

- Adopt the necessary legal amendments for MPs to start making their lobbying meetings public.
- Adopt the Whistleblower Protection Act that is currently under parliamentary review, thereby transposing the EU Directive on Whistleblowing.

14 Chancellor of Justice (*Õiguskantsler*), *Õiguskantsleri aastaülevaade 2021/2022*.

15 European Commission, *EU Justice Scoreboard 2022*, Figure 6, Estimated time needed to resolve civil, commercial, administrative and other cases in 2012, 2018–2020.

16 Parliament (*Riigikogu*), *Halduskohtumenetluse seadustiku ja teiste seaduste muutmise seaduse eelnõu (kohtumenetluse avalikkus) 574 SE*, 4 April 2022.

17 Parliament (*Riigikogu*), *Ohvriabi seadus 702 SE*, 29 September 2022.

- End the use of earmark funding, which allows MPs to distribute state funds to non-governmental organisations once a year at their discretion.

## **Levels of corruption**

According to the Global Corruption Index released by international risk analysis company Global Risk Profile (GRP), Estonia jumped a place in the last year and is now the fifth least corrupt country in Europe after the Nordic countries.<sup>18</sup> In the corruption perception index published by Transparency International in January 2022, Estonia's score decreased by one point compared to the previous year and Estonia now shares 13th spot with Austria, Canada, Ireland and Iceland.<sup>19</sup>

In 2022, one major suspicion of corruption emerged, which led to a broader discussion of corruption in local governments.<sup>20</sup> On 4 October in Ida-Virumaa, police arrested a well-known entrepreneur and several Kohtla-Järve council members and municipal

officials who are suspected of having given and received bribes and traded in influence. The information collected so far in the proceedings indicate that the suspect had influence over the decisions made in the city, directed them according to his needs and used both public and personal resources for this purpose.<sup>21</sup>

## **Framework to prevent corruption**

The biggest positive development in the field of anti-corruption took place in March 2021 when the government approved the good practice in communicating with lobbyists for officials,<sup>22</sup> allowing anyone to monitor who influences policy-making and on what issues.<sup>23</sup> Since then it has been strongly recommended for ministers and their advisers, secretary generals and their deputies, and heads of government agencies to disclose their meetings with lobbyists and stakeholders. However, the stakeholders believe that such disclosure should progress further and that MPs, to whom the current practice does not apply, should also start to disclose meetings with lobbyists.<sup>24</sup> Media coverage shows that

18 Global Risk Profile, [Global Corruption Index 2022](#).

19 Transparency International, [Corruption Perception Index 2021](#).

20 Transparency International Estonia (*Korruptsioonivaba Eesti*), [Steven-Hristo Evestus räägib korruptsioonist kohalikes omavalitsustes](#), 6 October 2022.

21 Estonian Public Broadcasting (*ERR*), [Politsei kahtlustab Ossipenkot ja Kohtla-Järve ametnikke korruptsioonis](#), 4 October 2022.

22 Ministry of Justice (*Justiitsministeerium*), [Good Practice in Communicating with Lobbyists for Officials \(\*Lobistidega subtilemise hea tava ametiisikutele\*\)](#), 18 March 2021.

23 Ministry of Justice (*Justiitsministeerium*), [Justiitsministeerium tutvustas lobistidega suhtlemise head tava](#), 1 April 2022.

24 Transparency International Estonia (*Korruptsioonivaba Eesti*), [Ettepanekud 2023. a Riigikogu valimistel kandideerijatele](#), 29 August 2022.

until now, MPs have not been very receptive towards implementing a lobbyist register.<sup>25</sup>

The biggest step forward in 2022 was in the field of data disclosure. From 1 October 2022, everyone has been able to access business register data for free. The NGO Transparency International Estonia explained that the positive effect of this development lies in the fact that free access to open data increases the possibilities for civil society and investigative journalism to identify conflicts of interest and suspicions of money laundering.<sup>26</sup> The e-Business Register is an official Estonian state portal containing the data of all legal entities registered in Estonia. It also provides access to business prohibitions, commercial practices, a list of members of political parties and artistic associations, the actual beneficiaries of legal persons, tax information and annual reports.<sup>27</sup> However, it is unclear whether publishing the data in this form is still proportionate or goes against data protection principles.

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

The Network of Estonian Non-profit Organizations has repeatedly criticised earmark funding (katuseraha) distributed by Members of Parliament. This is an opaque system which allows politicians to distribute state funds to NGOs once a year at their own discretion. In December 2018, the Network of Estonian Non-profit Organizations submitted a collective appeal to parliament requesting an end to earmark funding, although there has been no political will to end the system.<sup>28</sup>

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

In January 2022, parliament completed the first reading of the Whistleblower Protection Bill,<sup>29</sup> which aims to transpose the EU Whistleblower Directive and offer protection to people who report wrongdoing in the workplace, requiring certain organisations to set up hotlines to provide confidentiality to whistleblowers. The draft law led to lively social and political debate and caused anxiety about the potential creation of a major complaint

25 Estonian Public Broadcasting (*ERR*), [Riigikogulaste huvi lobistide registri käibele võtmiseks on leige](#), 21 August 2022.

26 Transparency International Estonia (*Korruptsioonivaba Eesti*), [Korruptsioonivastase teo tunnustuse pälvise äriregistri andmete kõigile tasuta kättesaadavaks tegemine](#), 9 December 2022.

27 Centre of Registers and Information Systems (*Registrite ja Infosüsteemide Keskus*), [e-Äriregister](#).

28 A. Rammo, [Human Rights Report 2020: Freedom of assembly and association](#) (*Inimõiguste aruanne 2020: Kogunemis- ja ühinemisvabadus*), Estonian Human Rights Centre, December 2019.

29 Parliament (*Riigikogu*), [Rikkumisest teavitaja kaitse seadus 504 SE](#), 10 January 2022.

system.<sup>30</sup> There has been no progress with the draft law in parliament since January 2022, and the European Commission has launched an infringement procedure against Estonia for missing the deadline for adopting the directive.<sup>31</sup>

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

### Key recommendations

- Amend the Penal Code to criminalise hate speech in accordance with EU law.

### Media and telecommunications authorities and bodies

Estonia moved into fourth place on the World Press Freedom Index, which assesses the state of journalism in 180 countries and is published by Reporters Without Borders (RSF). In 2021 Estonia ranked 15th.<sup>32</sup>

### Pluralism and concentration

On 25 February 2022, the Consumer Protection and Technical Regulatory Authority (TTJA) prohibited communications companies from rebroadcasting five Russian TV channels on Estonian territory. The TTJA established that on 24 February 2022, the mentioned television channels broadcast a speech by the president of the Russian Federation, justifying the military attack against Ukraine and an incitement to break the law, as well as disregard for the general principles of international law.<sup>33</sup>

### Public trust in media

In 2022, a study was published on the topic of media credibility in relation to the coverage of the Ukrainian war. The study showed that nearly 90% of Estonians have a high degree of trust in the way the Estonian media is covering the war in Ukraine. However, Estonian residents of other nationalities have less trust in all media outlets. For example, nearly 40% of residents of other nationalities either did not trust the coverage of the war in Ukraine by Estonian media outlets, or took no position on the issue.<sup>34</sup>

30 Estonian Public Broadcast (ERR), [Vilepuhumise seadus puhub ka poliitkired lõkkele](#), 31 January 2022.

31 Estonian Public Broadcast (ERR), [EU launches infringement proceedings against Estonia over whistleblower law](#), 29 January 2022.

32 Reporters Without Borders, [Press Freedom Index 2022](#).

33 The Consumer Protection and Technical Regulatory Authority (TTJA), [TTJA otsustas keelata viie telekanali taasedastamise Eesti Vabariigi territooriumil](#), 25 April 2022.

34 Eesti Ekspress, [Uuring: Venemaa telekanalid kaotavad siinsete vaatajate silmis usaldusväarsust](#), 21 December 2022.

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

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

In Spring 2022 Harju County Court fined two journalists and a newspaper publisher<sup>35</sup> over a news story published on 25 March 2022 on the Eesti Ekspress website detailing that the entire former management of Swedbank was under suspicion of being connected with money laundering that had allegedly taken place years before. The prosecutor's office claimed that the journalists should have asked them for permission prior to publishing the story. The Prosecutor General justified the imposition of a fine by stating that writing about Swedbank's money laundering does not promote public debate.<sup>36</sup> The decision was criticised as a serious threat to the freedom of the press by the Estonian Association of Journalists.<sup>37</sup> The Circuit Court later annulled the fine imposed on the Eesti Ekspress

journalists but supported the right of the prosecutor's office to restrict the media from disclosing information on pre-trial proceedings without permission.<sup>38</sup> The case has since gone to the Supreme Court.<sup>39</sup>

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

According to Reporters Without Borders, the laws protecting private data have become a pretext for the Estonian authorities to limit the media's access to public information.<sup>40</sup> The EU Commission's 2022 country report on Estonia pointed out that public administration tends to deny and/or delay access to public information in certain cases. It does not appear that any measures have been taken to improve this situation in 2022. A study published in October 2022 found that the wording of the Public Information Act encourages the frivolous imposition of restrictions on access, since the wording of the law emphasises only the balancing of the rights and freedoms of the data subject and not of those requesting access.<sup>41</sup>

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35 Estonian Public Broadcast (ERR), *Kohus trahvis kaht Eesti Ekspressi ajakirjanikku rahapesu artikli eest*, 4 May 2022.

36 Eesti Ekspress, *Kohus trahvis Eesti Ekspressi, sest kirjutasime Swedbanki rahapesu uurimisest tõde*, 25 March 2022.

37 Postimees, *Ajakirjanike liidu juhatus taunis Eesti Ekspressi ajakirjanike trahvimist*, 5 May 2022.

38 Eesti Kohtud, *Ringkonnakohus tühistas ajakirjanikele määratud trahvi*, 14 June 2022.

39 Postimees, <https://www.postimees.ee/7603513/riigikohus-hakkab-menetlema-eesti-ekspressi-ajakirjanike-trahvimise-vaidlust>, 12 September 2022.

40 Reporters Without Borders, *Press Freedom Index 2022*, Estonia.

41 Pild, M., Turk, K., Kose, K., Lehemets, M. (2022), *Avaliku teabe kasutamise võimalused*, *Arenguseire Keskus*, October 2022.

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

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The regulation of hate speech remains problematic in Estonia. The Penal Code includes a provision which bans activities which publicly incite hatred, violence or discrimination on the basis of protected grounds, although only if this results in danger to the life, health or property of a person.<sup>42</sup> In October 2020, the European Commission announced the initiation of infringement proceedings against Estonia in connection with its failure to fully transpose the Framework Decision on combating racism and xenophobia by means of criminal law. In its letter, the Commission pointed out that Estonia had not correctly criminalised hate speech, by omitting the criminalisation of public incitement to violence or hatred when directed at groups, and had not legislated for the provision of adequate penalties.<sup>43</sup>

In response, the Ministry of Justice has considered possible changes but has not come up with any proposals. In 2022, there have been no developments in relation to the

criminalisation of hate speech, apart from one roundtable held in January. At the roundtable, different parties discussed the possibilities of the criminal regulation of hate speech and hate crimes in order to find the most suitable solution for Estonian society.<sup>44</sup>

Russia's attack on Ukraine prompted the Estonian parliament to adopt amendments to the Penal Code banning hate symbols in April 2022.<sup>45</sup> According to the new provision, publicly displaying symbols relating to an act of aggression, genocide, crime against humanity or commission of a war crime in a manner that supports or justifies such acts is punishable by a fine.<sup>46</sup>

The topic of defamation has also been prominent in recent years, as shown by the increase in the number of defamation cases taken to court. As Reporters Without Borders mentions in its country report, journalists in Estonia face the risk of self-censorship due to anti-defamation legislation and cyber-bullying.<sup>47</sup> It is common for celebrities and public figures to sue people who have insulted them in the media, social

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42 Riigi Teataja, Penal Code (Karistusseadustik), § 151, 6 June 2001.

43 European Commission (2020), Combating racism and xenophobia: The Commission calls on Estonia and Romania to fully transpose EU law criminalising hate speech and hate crimes, Infringement decisions, INF-20-1687, 30 October 2020.

44 Ministry of Justice (Justiitsministeerium), Justiitsministeeriumis kogunes vaenukõne teemaline ümarlaud, 19 January 2022.

45 Parliament (Riigikogu), Karistusseadustiku ja väärteomenetluse seadustiku muutmise seadus (agressiooni toetamine) 585 SE, 21 April 2022.

46 Riigi Teataja, Karistusseadustiku ja väärteomenetluse seadustiku muutmise seadus (agressiooni toetamine), 29 April 2022.

47 Reporters Without Borders, Press Freedom Index 2022, Estonia.



media or internet comments. Some prominent cases include: *K. Timmer vs Delfi Meedia*,<sup>48</sup> *R. Sarv vs K. Kutsar*,<sup>49</sup> *K. Lust vs Veet Mano*.<sup>50</sup>

## Checks and balances –

### Key recommendations

- Ensure that third-country nationals are allowed judicial review of all decisions of the Police and Border Guard Board in accordance with the law.
- Keep strengthening the mandate and increasing the resources of the Gender Equality and Equal Treatment Commissioner so that the institution is able to fulfil its tasks in accordance with the proposed Council Directive on standards for equality bodies.

### Process for preparing and enacting laws

In 2022, the Supreme Court performed a constitutional review on legislation regarding

COVID-19 restrictions.<sup>51</sup> A total of 56 complainants filed complaints with the administrative court, stating that two orders issued by the government based on the Communicable Diseases Prevention and Control Act unconstitutionally restricted their rights, mainly because they could not participate in various activities without having a COVID-19 vaccination certificate. The administrative court upheld the complaints and requested that the Supreme Court declare the relevant provisions of the act unconstitutional. According to the administrative court, the provisions were not sufficiently clear and did not define the limits of the executive power.<sup>52</sup> The provisions in question authorised the Health Board, or in some cases the government, to take various measures to prevent the spread of an infectious disease.<sup>53</sup>

In its opinion regarding the case, the Chancellor of Justice found that the provisions of the Communicable Diseases and Prevention Act are unconstitutional as they give the executive branch of government overly broad, unspecified and unchecked authority to restrict fundamental rights. The Chancellor of Justice stated that the government has overstepped

48 Kroonika, Kohus: Kirsti Timmeri „soolapuhujaks“ nimetamine ei ole eksitav, tema teenuseid pole võimalik teaduslikult tõestada, 21 December 2022.

49 Supreme Court (*Riigikohus*), Civil Law Chamber, Case No 2-20-12495, 18 May 2022.

50 Kroonika, Riigikohus: Kuuurija“ saatejuht Katrin Lust peab Veet Manole esitatud süüdistused ümber lükkama ja talle 10 000 eurot maksma, 8 November 2022.

51 Supreme Court (*Riigikohus*), Case 5-22-4, 31 October 2022.

52 Tallinn Administrative Court (*Tallinna Halduskohus*), Case 3-21-2163, 31 May 2022.

53 Riigi Teataja, Communicable Diseases Prevention and Control Act (*Nakkushaiguste ennetamise ja tõrje seadus*), § 27 (3), § 28 (2), (5), (6), (8), 12 February 2003.

its constitutional mandate, as only parliament has the capacity to take decisions that restrict fundamental rights in this way.<sup>54</sup>

However, the Supreme Court found that the provisions in question are not unconstitutional, as the restriction of fundamental rights was proportionate to the goal of protecting life and health. The Court explained that although the state's duty to protect its people in an exceptional situation does not go against the obligation to regulate the most important issues that limit fundamental rights by law, the legislature must create a balance in its actions between the state's duty to protect and the principle of reservation of law, which in some cases may mean that more generally worded authorisation norms are permissible and some important issues can be decided by the government. The Supreme Court stressed that this balance can change over time; norms that may be acceptable in the early stages of an epidemic may no longer be precise enough as the crisis continues, so the provisions may need some adjusting.<sup>55</sup>

### ***Independent authorities***

In addition to the Chancellor of Justice (NHRI), the Gender Equality and Equal Treatment Commissioner also plays a role regarding checks and balances as an equality body. In

November 2022, a new Gender Equality and Equal Treatment Commissioner was elected based on the proposal of an expert committee. For the first time, the expert committee included a wide range of stakeholders, such as representatives of civil society organisations in the field of equal treatment and gender equality, the Office of the Chancellor of Justice, the Top Civil Service Excellence Centre, and the Gender Equality Council.<sup>56</sup> The expert committee is an important step towards ensuring the independence of the Gender Equality and Equal Treatment Commissioner. This is because the role of the Ministry of Social Affairs in the nomination of the Commissioner has been criticised as being a stain on its independence. The institution also has limited resources.<sup>57</sup>

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

There are examples of the Police and Border Guard Board (PBGB) failing to issue administrative decisions in written form, complicating access to judicial review of the decisions.

In spring 2022, the PBGB received reports of applications for temporary protection being denied and the refusal to issue the decisions. The Chancellor of Justice pointed out that this administrative practice was unlawful. The

54 Chancellor of Justice (*Õiguskantsler*), *Arvamus põhiseaduslikkuse järelevalve asjas nr 5-22-4*, 30 August 2022.

55 Supreme Court (*Riigikohus*), *Case 5-22-4*, 31 October 2022.

56 Ministry of Social Affairs (*Sotsiaalministeerium*), *Võrdse kohtlemise volinikuks saab Christian Veske*, 30 November 2022.

57 European Commission Against Racism and Intolerance, *ECRI Report on Estonia, Sixth Monitoring Cycle*, 29

PBGB has since changed its administrative practice.<sup>58</sup>

It appears from a ruling of the Tallinn Circuit Court that on 7 May 2022, a person with both Ukrainian and Russian citizenship arrived at an Estonian border crossing point to receive temporary protection in Estonia, but was instead banned from entering. The applicant reached Estonia again on 12 May 2022 through Germany and went to a PBGB service point and applied for temporary protection. On 19 May 2022, an officer of the Estonian Internal Security Service conducted an interview with the applicant. On the same day, PBGB officials also interviewed the applicant and took his belongings, including his Russian and Ukrainian passports. After the procedural steps, the applicant was taken by bus to the border city of Narva, given a bag and Russian passports, and forcibly sent out from Estonia to Russia without an expulsion decision. The applicant filed a complaint to the Tallinn Administrative Court, once back in Crimea, through a representative in Estonia. The ruling of the Circuit Court concerned the applicant's request to be admitted back into Estonia under temporary relief and to be permitted to stay in Estonia during the court proceedings until the final decision was made. The Circuit Court refused the interim relief application.<sup>59</sup>

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

### **Regulatory framework**

There were no major developments in the Estonian civic space in 2022. Some positive news is that according to the 2021 Civil Society Organization Sustainability Index (CSOSI), Estonia's performance in the field of advocacy has improved in recent years.<sup>60</sup>

### **Financing framework, including tax regulations**

An important legislative change entered into force on 15 March 2022 with the adoption of new wording of the Money Laundering and Terrorist Financing Prevention Act regarding non-governmental organisations and foundations as obliged entities.<sup>61</sup> According to the previous wording, NGOs and foundations were obliged entities if they made cash transactions exceeding EUR 5,000. A clause has now been added that classifies NGOs and foundations as obliged entities when the customer, a person involved in the transaction or the transaction itself is connected with a country that is subject to sanctions, embargos or similar measures issued by, for example, the European Union or the United Nations (independent of

58 Chancellor of Justice (*Õiguskantsler*), *Ajutise kaitse taotluste vastuvõtmine*, 6 June 2022.

59 Tallinn Circuit Court (*Tallinna Ringkonnakohus*), *Case 3-22-1245*, 10 August 2022.

60 USAID, *Civil Society Organization Sustainability Index 2021*.

61 Riigi Teataja, *Rahapesu ja terrorismi rahastamise tõkestamise seaduse ja teiste seaduste muutmise seadus*, 15 March 2022.

the amount involved). Penalties for violating this law go up to EUR 32,000.<sup>62</sup>

In April 2022, an amendment to the Income Tax Act entered into force, allowing legal persons to make tax-free donations for the purpose of preserving the territorial integrity and sovereignty of Ukraine and providing targeted humanitarian aid. Tax-free donations can be made only to the seven associations specified in the act.<sup>63</sup> The exemption will be in force from 24 February to 31 December 2023.<sup>64</sup>

### ***(Un)safe environment***

#### ***Freedom of assembly, including rules on organisation of and participation to assemblies, equal treatment and policing practices***

In addition to the constitutional review of the legislation on COVID-19 restrictions, Estonian courts have also discussed restrictions on public meetings. On 19 May 2021, the Foundation for the Protection of the Family and Tradition (SAPTK) filed a complaint with the Tallinn Administrative Court, disputing the part of government order No. 282 of 19 August 2020 “Measures and restrictions necessary for preventing the spread

of COVID-19” concerning the restrictions imposed in the spring of the same year on outdoor public meetings. According to the original complaint by SAPTK, the restrictions that took effect on 17 May 2021, according to which public meetings were allowed only if it could be ensured there were no more than 25 persons per group, and that the total number of participants did not exceed 250 persons, were disproportionate and unreasonable. The administrative court rejected the complaint, finding that the imposition of restrictions was legal and that the restrictions on holding public meetings were appropriate, necessary and moderate.<sup>65</sup> In autumn 2022, the Supreme Court dismissed SAPTK’s appeal in cassation on the topic of COVID-19 restrictions.<sup>66</sup>

#### ***Access to and participation in decision-making processes, including rules and practices on civil dialogue, and rules on access to and participation in consultations and decision-making***

In autumn 2022, the Ministry of Social Affairs strengthened cooperation with NGOs by including, for the first time, different interest groups in the election of the Gender Equality and Equal Treatment Commissioner. The

62 Riigi Teataja, *Rahapesu ja terrorismi rahastamise tõkestamise seadus*, 26 October 2017.

63 Riigi Teataja, *Maksukorralduse seaduse muutmise (ehitustööde andmete esitamine) ja tulumaksuseaduse muutmise seadus*, 23 March 2022.

64 Riigi Teataja, *Income Tax Act (Tulumaksuseadus)*, § 61 (66), 15 December 1999.

65 Tallinn Administrative Court (*Tallinna Halduskohus*), *Case 3-21-1079*, 1 October 2021.

66 Objektiiv, *Riigikohus keeldus koroonapiirangute teemalise SAPTK kassatsioonikaebuse menetluse võtmisest*, 16 November 2022.

election committee included representatives of several NGOs.<sup>67</sup>

### **Online civic space**

On 30 November 2022, the Tallinn Circuit Court ruled in a defamation case against civic activist Katrina Raiend, who had posted an online petition asking for the removal of radio show host Alari Kivisaar for chauvinism and inciting racism. The first instance court, Harju County Court, sided with Kivisaar and ordered Raiend to retract and remove statements regarding racism and chauvinism from the petition and pay EUR 3,000 in moral damages. However, in appeal proceedings, the Tallinn Circuit Court determined that Kivisaar had spread racist and chauvinistic stereotypes on his radio show. The Circuit Court also upheld the validity and legality of using a public petition as means of exercising one's freedom of expression. The Circuit Court, however, declared one statement in the petition to be defamatory because it had not been proven that Kivisaar had actually said it on the radio show. The Court declared that this sentence be retracted and removed from the petition and that Kivisaar be compensated in the amount of EUR 2,000.<sup>68</sup>

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

### **Key recommendations**

- Make the necessary changes in the Electronic Communications Act to stop indiscriminate retention of communications data, thereby bringing Estonian national law into line with EU law.
- Lift the blanket ban on prisoners voting.

### **Systemic human rights violations**

Respect for privacy and data protection remains a topical issue, as the concerns raised by the Court of Justice of the European Union (CJEU) and by the Estonian Supreme Court on the indiscriminate storage of communications data have still not been properly addressed. In 2021, the Supreme Court found that indiscriminate retention of electronic communications data based on § 111<sup>1</sup> (2) of

67 Ministry of Social Affairs (*Sotsiaalministeerium*), *Võrdse kohtlemise volinikuks saab Christian Veske*, 30 November 2022.

68 Estonian Human Rights Centre (*Eesti Inimõiguste Keskus*), *Kivisaar versus Raiend: a petition is a part of freedom of speech, racist expression can be publicly condemned* (*Kivisaar versus Raiend: petitsioon on osa sõnavabadusest, rassistliku väljenduse võib avalikult hukka mõista*), 1 December 2022.

the Electronic Communications Act is in conflict with EU law.<sup>69</sup> The Supreme Court's decision was based on a preliminary ruling of the CJEU requested by the Supreme Court in the same case.<sup>70</sup> The Electronic Communications Act § 111<sup>1</sup> requires general and indiscriminate retention of metadata by providers of electronic communications services for one year from the date of the communication.<sup>71</sup> Although the Supreme Court decision has not resulted in changes to the Electronic Communications Act, it did trigger amendments to the Code of Criminal Procedure, which as of 1 January 2022 sets forth that communications data can only be requested from service providers based on judicial authorisation, while previously such requests could also be authorised by the Prosecutor's Office.<sup>72</sup>

Parliamentary elections will be held in Estonia on 5 March 2023, but nothing has been done to lift the blanket ban on prisoners voting. There have been discussions in the media on how the general and automatic ban on prisoners voting goes against European Court of Human Rights case law.<sup>73</sup> The Estonian

National Electoral Committee sent a proposal to lift the ban to the Ministry of Justice, but the Minister found that prisoners do not have a "moral right" to elect parliamentary representatives.<sup>74</sup>

The political parties in power have discussed options for restricting voting rights of third-country nationals in local government elections. In September 2022, the Parliament completed the first reading of a draft law by which third-country nationals living in Estonia would lose their right to vote in local government elections. According to the initiators of the draft, the right of Russian citizens to vote in Estonian local elections has become a security issue. Currently, foreigners who live in Estonia on the basis of a long-term residence permit or a permanent right to residence can participate in local elections. According to the draft law, in the future only citizens of Estonia and the European Union would be able to participate in local elections.<sup>75</sup> However, in her opinion the Chancellor of Justice stated that if the draft law is passed as proposed, constitutional review must be initiated at the Supreme

69 Supreme Court (*Riigikohus*), Case No 1-16-6179, 18 June 2021.

70 Court of Justice of the European Union, Case C-746/18, 2 March 2021.

71 Riigi Teataja, Electronic Communications Act (*Elektroonilise side seadus*), § 111<sup>1</sup>, 8 December 2004.

72 Riigi Teataja, Act amending the Code of Criminal Procedure (*Kriminaalmenetluse seadustiku muutmise seadus*), 1 January 2022.

73 Estonian Public Broadcasting (*ERR*), Olesk ja Tarros: Eesti rikub vaikides kinnipeetavate valimisõigust, 15 December 2022.

74 Estonian Public Broadcasting (*ERR*), Vabariigi valimiskomisjon tahab osa vange valimistele lubada, 16 September 2022.

75 Parliament (*Riigikogu*), Kohaliku omavalitsuse volikogu valimise seaduse muutmise seadus 594 SE, initiated 21 April 2022.

Court because it is possible that the draft law is unconstitutional.<sup>76</sup>

## ***Fostering a rule of law culture***

### ***Contribution of civil society and other non-governmental actors***

One of the main ways that the Estonian Human Rights Centre (EHRC) contributes to fostering a rule of law culture is through strategic litigation. The EHRC offers legal aid to people whose cases are of strategic significance, with the aim of influencing the quality of law and its implementation. The EHRC chooses cases which are related to the thematic objectives of the EHRC's activity and either address a legal loophole, amend existing regulation or case-law, relate to systematic failure to implement the law, or raise awareness about the law.<sup>77</sup> For example, the EHRC is currently involved in a case regarding the right to report sexual harassment, supporting a young athlete who confidentially informed her school principal about the sexual harassment she had experienced as a minor, as a result of which she was sued for defamation by her coach. The first instance court sided with the EHRC in the matter.<sup>78</sup>

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76 Chancellor of Justice (*Õiguskantsler*), [Arvamus kohaliku omavalitsuse volikogu valimise seaduse muutmise seaduse eelnõu \(594 SE\) kohta](#), 12 September 2022.

77 Estonian Human Rights Centre (*Eesti Inimõiguste Keskus*), [Strategic litigation](#).

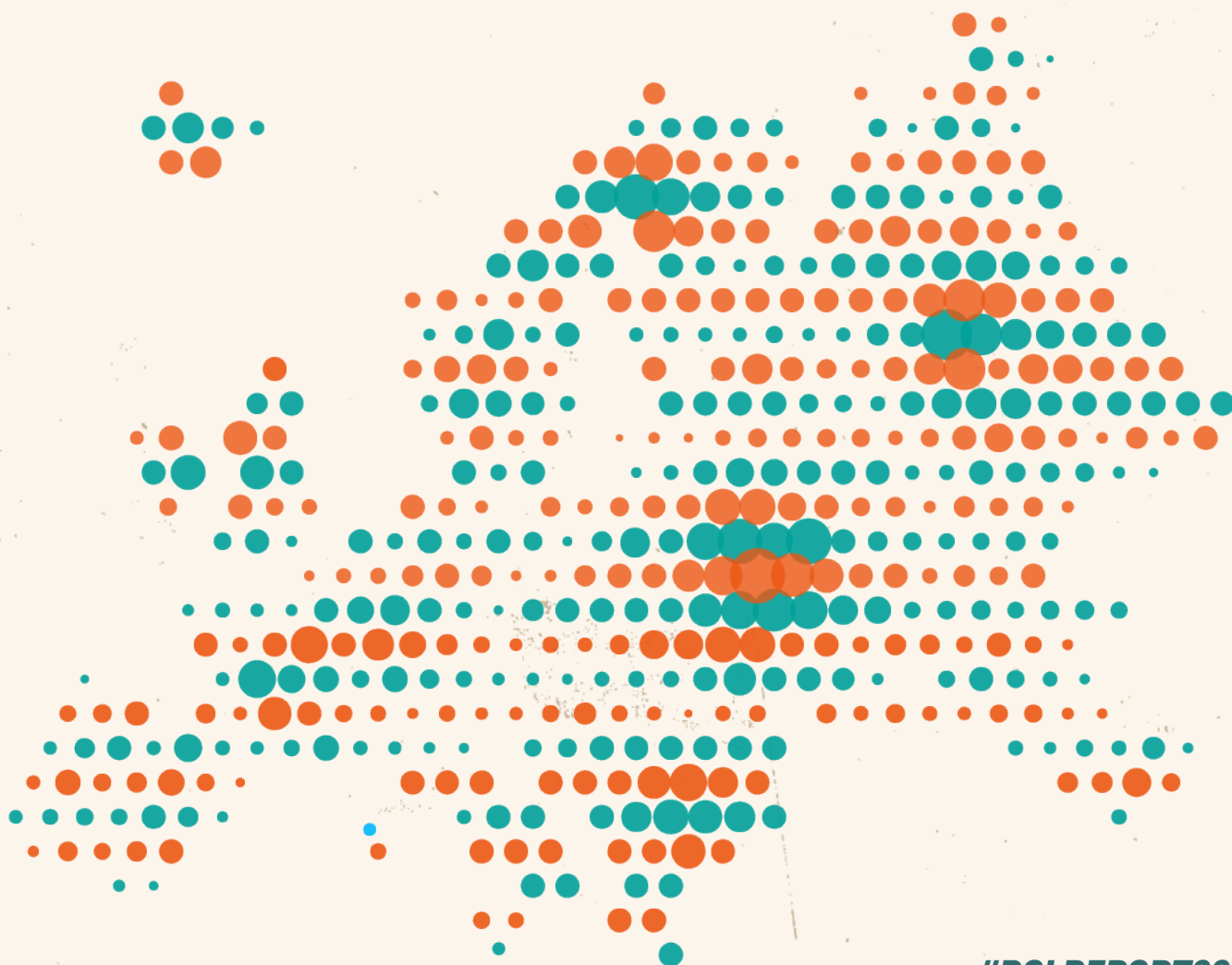
78 Estonian Human Rights Centre (*Eesti Inimõiguste Keskus*), [Victory in court: students can inform schools of sexual harassment](#), 9 September 2022.

**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**FRANCE**



**#ROLREPORT2023**



# FRANCE

## About the authors



**VoxPublic** is a non-profit organisation composed of a permanent team of four advocacy specialists based in Paris. It is governed by a seven-member executive board and receives support from an active community of volunteers, the ‘VoxPublic Agora’ members. The NGO was created in 2016 and ever since has been working on empowering French civil society organisations and citizen initiatives in their advocacy actions. VoxPublic thereby provides support and capacity building to victims of discrimination and social injustices wishing to challenge decision-makers. The team shares its expertise on a voluntary basis and thereby aims to reinforce partners’ capacities in the fields of advocacy strategies and communication skills. VoxPublic also provides partners with operational support in terms of campaign building, networking, strategic document writing, as well as strategic social media use and media.

## Key concerns

The French justice system is strained. Its lack of human and financial resources weighs on the working conditions. Slowness of prosecution and a saturation of courts affects the quality of justice.<sup>1</sup> Judicial authorities have organised many protests over the last year to make their voices heard in hope of a change.

France doesn’t invest enough in its justice system compared to other EU countries, even if the budget has been increased for 2023. During the General Estate of Justice, organised by the executive, the French justice system was described as being in a “state of disrepair”. The situation of prosecutors is alarming.

Despite convictions of high-level corruption cases and the strengthening of the legal framework regarding “consultancy agencies”, there are important structural weaknesses in the anti-corruption framework. However, the fight is well led by NGOs such as Sherpa, Transparency International - France and Anticor.

The EU Commission has made recommendations related to the strengthening of preventive frameworks. A bill has been adopted by the Senate (first reading) to frame the intervention

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1 [Syndicate of Judicial authorities on Budget and Work Conditions.](#)

of private cabinets in politics. Evaluations by the OECD are mostly positive.

While the legal and regulatory framework is conducive to press freedom and editorial independence, the tools to combat conflicts of interest are insufficient, inadequate and outdated. The strong media ownership concentration in France persists.<sup>2</sup> A coherent legal framework needs to be implemented in order to fight media concentration.

Even though checks and balances are well applied in France, the weight of the executive power continues to prevail, and has been reinforced by the successive emergency state and accelerated procedures for the adoption of laws. Public consultations look more like communication campaigns in the service to the governing majority's agenda.

Civil society is facing multiple types of attacks by the executive power. They include an oppressive and restrictive legal framework, verbal attacks, SLAPPs, political and judicial harassment against activists and leaders of civil society and the dissolution of organisations.

Even though clear references to human rights are contained in the preamble of the French Constitution, numerous groups of people have seen their rights flouted in practice: exiles, travellers, religious and ethnic minorities. The intensification of government politics has a direct impact on the disregard for human rights.

### State of play

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

#### Legend (versus 2022)

- ⬇ Regression
- ⊖ No progress
- ⬆ Progress

## Justice system ⊖

### Key recommendations

- More resources need to be allocated to the justice system.
- Reform the justice system with a real consultation of judicial authorities (the methodology of the General Estate of Justice in 2021-2022 has been qualified by judicial authorities as a “communication weapon” by the government).
- Respect the legal framework for working conditions.

<sup>2</sup> <https://rsf.org/fr/pays/france>

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## **Judicial independence**

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

In general, France has been criticised for the lack of independence of its prosecutors (appointed by the Ministry of Justice). They depend on the Minister of Justice and not on the judicial authorities.

This lack of independence has led to a crisis: Eric Dupond-Moretti, France's Minister of Justice, who is accused of a conflict of interest,<sup>3</sup> is in charge of proposing the name of his own prosecutor:<sup>4</sup> the General Prosecutor. As his superior in hierarchy, he will also have authority on them.<sup>5</sup> Despite the prosecution and his disavowal by the judiciary, Dupon-Moretti remained in office, creating an unprecedented situation in France.

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

The Dupond-Moretti case has raised a lot of questions about the independence of the justice system, affecting the public's general level of trust in French institutions.

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### **Quality of justice**

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#### ***Accessibility of courts (e.g. court fees, legal aid, language)***

Even if the jurisdictional aid per inhabitant is lower than average in Europe, access to justice in France remains mostly free.

#### ***Resources of the judiciary (human/financial/material)***

However, human, financial and material resources are still too low.<sup>6</sup> Even if human resources are going to increase in 2023, the

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3 indicted in July 2021 before the Court of Justice of the Republic (CJR)

4 On October 3, 2022, the CJR ordered a trial against E. Dupont-Moretti

5 In 2021, Justice Minister Eric Dupont Moretti was suspected of having taken advantage of his position as Keeper of the Seals to settle scores in cases in which he had been involved as a lawyer, by ordering administrative investigations into four magistrates. Despite this indictment, he was reappointed as a minister in the new government following the 2022 elections in France. In September 2022, the Superior Council of the Judiciary did not retain "any disciplinary breach" against Edouard Levraut, former anti-corruption prosecutor in Monaco, after the Minister of Justice initiated disciplinary proceedings by accusing him of having failed in "his duty of reserve". [https://www.lemonde.fr/societe/article/2021/07/16/eric-dupond-moretti-mis-en-examen-par-la-cjr-pour-prise-illegale-d-interets\\_6088477\\_3224.html](https://www.lemonde.fr/societe/article/2021/07/16/eric-dupond-moretti-mis-en-examen-par-la-cjr-pour-prise-illegale-d-interets_6088477_3224.html) [https://www.liberation.fr/societe/police-justice/lex-juge-dinstruction-de-monaco-cible-par-dupond-moretti-finalement-blanchi-20220915\\_VUNGFCLNTNASDEF3BWCUG5ZHKY/](https://www.liberation.fr/societe/police-justice/lex-juge-dinstruction-de-monaco-cible-par-dupond-moretti-finalement-blanchi-20220915_VUNGFCLNTNASDEF3BWCUG5ZHKY/)

6 <https://rm.coe.int/cepej-fiche-pays-2020-22-f-web/1680a86277>

profession is more and more deserted because of poor working conditions.<sup>7</sup> The judicial authorities condemn the lack of resources and the situation it puts them in.<sup>8</sup>

The situation is critical for prosecutors, with only three prosecutors per 100,000 inhabitants.<sup>9</sup> On top of that, they are overloaded, with 6.1 cases for 100 inhabitants, while the median in Europe is 2.8.

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

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

*The Syndicat de la Magistrature*<sup>10</sup> regrets the length of proceedings because of the lack of human resources: “with overloaded

hearings, unreasonable delays, and unexplained judgments”.<sup>11</sup>

### ***Execution of judgments***

*The Syndicat de la Magistrature* also talks about “decisions executed several months – even years – later” which affect the quality of justice.<sup>12</sup>

### ***Corruption of the judiciary***

The NGO Transparency International - France<sup>13</sup> as well as the National Association of Judiciary Police<sup>14</sup> are quite worried about the reform of national police and its implications.<sup>15</sup> Under the hierarchy of prosecutors, the reform tends to bring the judicial police under

7 The new report of the European Commission for the Efficiency of Justice states that human and financial resources are too low in France, compared to our neighbours with similar GDP (79 euros per inhabitant in Europe and 72.53 euros in France). Actu-Juridique, “[Rapport 2022 de la CEPEJ : la France toujours en queue de peloton](#)”, Olivia Dufour, 05th October 2022

8 Professionals are forced to work during their time off, or renounce being paid for their overtime, to complete their work. Tribunals are in bad shape and are using outdated software.

9 The European average is 11 per 100,000 habitants.

10 A magistrate trade union.

11 [Press release of the Syndicat de la Magistrature](#) (Syndicate of judicial Authorities) – November 17, 2022.

12 Ibid.

13 Transparency France is the French section of Transparency International, which fights against corruption.

14 The judicial police mainly deal with terrorism, organised crime, major financial crime and ‘political’ cases.

15 “The establishment of a single command for all police services at the departmental level under the authority of the prefect and the dissolution of the current judicial police into an investigation branch that would bring together all the judiciary police officers, both generalists and specialists, is worrying.” <https://transparency-france.org/actu/note-de-position-a-loccasion-de-lexamen-du-projet-de-loi-dorientation-et-de-programmation-du-ministere-de-linterieur-lopmi-transparency-france-alerte-sur-le-projet-de/>. They raise the alarm on the disastrous consequences of the reform for the security of citizens and the independence of justice. [https://www.francetvinfo.fr/societe/manifestation-des-policiers/reforme-de-la-police-judiciaire-on-vous-explique-pourquoi-les-policiers-et-les-magistrats-sont-en-colere\\_5405122.html](https://www.francetvinfo.fr/societe/manifestation-des-policiers/reforme-de-la-police-judiciaire-on-vous-explique-pourquoi-les-policiers-et-les-magistrats-sont-en-colere_5405122.html)

the control of prefects, themselves controlled by the Minister of Interior.

### **Other**

The French National Assembly decided<sup>16</sup> to widen the field of action of police officers with the criminal flat-fee fine. Whistleblowers condemn it, as it will result in a police officer substituting for a judge, with arbitrary decisions and the risk of restriction of freedoms, especially in the case of repression of protests.<sup>17</sup>

## **Anti-corruption framework** –

### **Key recommendations**

- Continue the effective investigation, prosecution and sanctioning of high-level corruption offences.
- Ensure that rules on lobbying activities are consistently applied to all relevant actors, including at the top executive level.

### **Levels of corruption**

Corruption and conflicts of interest seem present at every level of the state and within private sectors. But a few cases really had a huge impact:

- Justice: The case of Eric Dupond-Moretti, Minister of Justice, is illustrative of the situation in France. Accused of illegal conflict of interest, he is in charge of nominating the general prosecutor that will try his case.
- Politics:
  - Two investigations against the electoral campaign of President Emmanuel Macron, for using private consulting firms,<sup>18</sup> have been opened in November 2022.
  - In October 2022, Alexis Kohler, current Secretary General of the Elysee and right-hand man of the President, was indicted for “illegal taking of interests”. He is accused of not having reported his family ties with the main shareholder of the maritime freight operator MSC, even though he had been involved in a related case on behalf of the state.<sup>19</sup>

16 On 22 November 2022, in order to help the judicial authorities with their overload of work.

17 Libération, « Une nouvelle loi va-t-elle permettre de réprimer les manifestants avec des amendes de 1 600 euros, comme le dénonce LFI ? », Elsa de La Roche Saint-André, 16 November 2022.

18 <https://www.publicsenat.fr/article/parlementaire/derives-sur-le-recours-aux-cabinets-de-conseil-ce-que-contient-la-proposition>

19 [https://www.lemonde.fr/les-decodeurs/article/2022/10/04/tout-comprendre-a-l-affaire-kohler-apres-la-mise-en-examen-pour-prise-illegale-d-interets-du-secetaire-general-de-l-elysee\\_5341355\\_4355771.html](https://www.lemonde.fr/les-decodeurs/article/2022/10/04/tout-comprendre-a-l-affaire-kohler-apres-la-mise-en-examen-pour-prise-illegale-d-interets-du-secetaire-general-de-l-elysee_5341355_4355771.html)

- Education: Anticor has filed a complaint with the National Financial Prosecutor's Office concerning suspicions of favouritism in the awarding of a public contract to the American company Microsoft.

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

### ***General transparency of public decision-making (including public access to information such as lobbying, asset disclosure rules and transparency of political party financing)***

COVID-19 revealed the lack of transparency of public decision-making, especially in the use of private consultants (with the McKinsey firm, for example).<sup>20</sup> To fight for more transparency, the Senate has adopted a bill to frame the intervention of counsel private cabinet in politics (the bill still needs to be approved by the National Assembly).

### ***Rules on preventing conflict of interests in the public sector***

In order to prevent conflict of interests in the public sector, the Sapin II Law (adopted in 2016), related to transparency, fight the corruption, and the modernisation of economic life has been reinforced in March 2021.<sup>21</sup> The existence of the High Authority for the Transparency of Public Life (HATVP) allows

for essential monitoring of public officials' integrity.

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

On the matter of whistleblowers, a new law was adopted on 21 March 2022 to improve their protection in companies with more than 50 employees. This law implements an EU directive and goes beyond the European requirements.<sup>22</sup>

### ***Investigation and prosecution of corruption***

NGOs – such as Anticor, Sherpa and Transparency International-France, which are committed to the fight against corruption – are doing a great job in detecting possible cases of corruption and suspected conflicts of interest. Anticor in particular is invested in a large number of cases before the French courts. The French Anti-Corruption Agency – a national department under the joint authority of the Minister of Justice and the Minister of Finance – is also active on the matters of recommendations and control.

20 <https://transparency-france.org/actu/caroline-michel-aguirre-et-matthieu-aron-la-pandemie-nous-a-permis-de-decouvrir-lomnipresence-des-cabinets-de-conseil-au-sein-de-letat/>

21 <https://www.dalloz-actualite.fr/flash/protection-des-lanceurs-d-alerte-et-role-du-defenseur-des-droits-enseignements-des-lois-du-21->

22 <https://www.vie-publique.fr/loi/282472-loi-21-mars-2022-waserman-protection-des-lanceurs-d-alerte>

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

### **Key recommendations**

- Repeal Article 36 of the Anti-separatism law or, at least, provide guidance on its application to avoid any disproportionate impact on the exercise of the rights to freedom of expression and information.
- Enhance the transparency of media ownership, in particular regarding complex shareholding structures, building on the existing legal safeguards

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

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

The media and telecommunication authorities and bodies remain independent from political power.<sup>23</sup>

## **Pluralism and concentration**

### ***Levels of market concentration***

A strong media ownership concentration continues to raise concerns.<sup>24</sup> Intimidation techniques are still used by owners, like Vincent Bolloré, in order to silence the press. The organisation Reporters Without Borders has reported, “The legal framework remains insufficient to combat vertical media concentration in the hands of a handful of owners. While the law provides for obligations of honesty, independence and pluralism of information, it is inadequate to guarantee their respect, and the regulator does not act sufficiently to enforce their application, particularly in the

23 On this matter, Reporters Without Borders explains that “The French media, including the public media, are independent of political power and can hold politicians accountable in the public interest. The grip of public relations and communication is unfortunately becoming more and more intense on French media”. <https://rsf.org/fr/pays/france>

24 A recent study, led by Le Monde Diplomatique and ACRIMED “Média Français : Qui Possède Quoi” (French Media: Who possess what) detailed media “who makes the opinion” in France, who depends on industrial or financial interest, large group of press or State. 37 persons (moral or individuals) hold the majority of French Media (without independent media or alternative press). <https://www.acrimed.org/Medias-francais-qui-possede-quoi>

face of certain channels that tend to become more opinion than information media”.<sup>25</sup>

### ***Rules governing and safeguarding the pluralistic media market, and their application***

The National Assembly Committee on Cultural, Family and Social Affairs voted against a bill to “stop the concentration in media and cultural industry” on 16 November 2022.<sup>26</sup>

Despite the rejection of this bill, the European Commission gave a positive opinion on France’s legal framework “guaranteeing media freedom and pluralism, mainly due to safeguards stemming both from the Constitution and from legislation. A new independent authority – the French High Authority of Audiovisual Communication<sup>27</sup> has been created<sup>28</sup> with increased powers over the entire field of audiovisual and digital content. Legal and structural safeguards ensure the independence of the French public service media.”<sup>29</sup>

## ***Transparency of media ownership***

### ***Rules governing transparency of media ownership and public availability of media ownership information, and their application***

Even if the European Commission is positive about the legal framework, they are less supportive of France regarding media ownership transparency, highlighting “the persisting issue of horizontal and cross-media concentration. Challenges persist regarding the transparency of complex media ownership structures.”<sup>30</sup>

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

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

This year, reporters have been subjected to numerous physical attacks by protesters.<sup>31</sup>

### ***Rules and practices guaranteeing journalists’ independence and safety***

25 <https://rsf.org/fr/pays/france>

26 <https://www.acrimed.org/La-concentration-des-medias-en-debat-a-l>

27 Autorité de régulation de la communication audiovisuelle et numérique - ARCOM.

28 It has been created from the merger of the Higher Audiovisual Council (Conseil supérieur de l’audiovisuel – CSA) and the online copyright authority (Haute autorité pour la diffusion des oeuvres et la protection des droits sur internet – HADOPI).

29 [https://commission.europa.eu/system/files/2022-07/25\\_1\\_194023\\_coun\\_chap\\_france\\_en.pdf](https://commission.europa.eu/system/files/2022-07/25_1_194023_coun_chap_france_en.pdf)

30 This issue has been examined by a Senate Commission of enquiry, which suggested a substantive revision of the existing legislation to preserve freedom of information. [https://commission.europa.eu/system/files/2022-07/25\\_1\\_194023\\_coun\\_chap\\_france\\_en.pdf](https://commission.europa.eu/system/files/2022-07/25_1_194023_coun_chap_france_en.pdf)

31 Reporters Without Borders explains that: “The high level of distrust of journalists is reflected in attacks, both verbal and physical, including at rallies against health measures related to the Covid-19 pandemic. In recent



A new policing bill, more respectful of journalists' rights during demonstrations, has been adopted in response to police violence.<sup>32</sup>

### **SLAPPs**

Strategic lawsuits against public participation (SLAPPs) continue in France and are damaging the right to freedom of speech, particularly by silencing the press and media.<sup>33</sup>

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

### **Legislation and practices on fighting disinformation**

The French National Assembly has passed two bills aimed at reducing electoral misinformation. They would allow parties and candidates to initiate an accelerated legal procedure in case of public dissemination of false information. NGOs such as Ritimo<sup>34</sup> continue to underline how the legal framework on disinformation can be used for censorship.<sup>35</sup>

## **Checks and balances**

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

#### **Public consultations**

In 2022, the practice of nationwide public consultations was further reinforced and extended to other fields, such as the justice system. If the practice is great to ensure open democratic debate, the General Estates of Justice held in 2021-2022 were deeply criticized by the judicial authorities. They argued that it was “a vast communication operation in the service of the government majority’s orientations”.

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

The use of accelerated procedures for the adoption of laws (one reading only by each chamber of the Parliament) continued to be regularly used by the government, even for laws that would restrain individual freedoms or laws that are not consensual.

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years, journalists have also been the target of physical and online attacks by right-wing, left-wing, and Islamist groups.” <https://rsf.org/fr/pays/france>

32 [https://www.assemblee-nationale.fr/dyn/15/textes/l15b4840\\_proposition-loi#](https://www.assemblee-nationale.fr/dyn/15/textes/l15b4840_proposition-loi#)

33 At the end of the year, Mediapart was prevented by the Tribunal of Paris to publish revelations about Gaël Perdriau, the mayor of Saint-Etienne in a case of sextape blackmail. Validated by the Tribunal of Paris, who then overturned their original decision, this measure has been criticized by lots of journalists and rights advocates. This case shows violation of the freedom of expression still occurs in France. <https://www.mediapart.fr/journal/france/dossier/saint-etienne-le-maire-la-sextape-et-le-chantage-politique>

34 A network specialized in documentation and information for international solidarity.

35 <https://www.ritimo.org/Garder-les-fake-news-sous-controle-comment-la-legislation-sur-la-desinformation>

The emergency regime to address the COVID-19 crisis was extended until 31 July 2022. During that time, the power of the Members of Parliament to monitor and control the state of emergency was reduced.

### ***Regime for constitutional review of laws***

The Constitutional Council has been a safeguard of the constitutionality of laws and reviewed many provisions.<sup>36</sup> But, in the case of the anti-separatism law, the Constitutional Council only censured a few articles despite the arguments presented by eminent jurists on the liberticidal character of this law.

The State Council has been able to counteract measures taken by the government. For example, the State Council overturned the decision of the government, upon the proposal of the Minister of the Interior, in the case of the abusive dissolution of several NGOs.<sup>37</sup>

### ***Independent authorities***

The Defender of Rights (ombudsman) is an independent institution “responsible for defending individual rights and freedoms”.<sup>38</sup> This institution has been really active during the health crisis in France but also on the

matter of racial profiling. It has followed the case of the young men in Epinay-Sur-Senart (suburb of Paris) and in the area of Belleville in Paris, who had unfairly received flat-fee fines by the police during the lockdown: “the accumulation of abusive fines characterizes discriminatory police harassment of young men perceived as Arab or black, and living in working-class neighbourhoods”.<sup>39</sup> The human and financial means of this administration remain nevertheless limited, even insufficient, which leads to long delays for its interventions.

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

### ***Key recommendations***

- Repealing the law “Strengthening the respect of Republican principles” (also known as the anti-separatism law), which has reduced fundamental freedoms in a disproportionate way compared to its stated goal (to fight against extremist religious groups opposed to the Republic principles).

36 [https://commission.europa.eu/system/files/2022-07/25\\_1\\_194023\\_coun\\_chap\\_france\\_en.pdf](https://commission.europa.eu/system/files/2022-07/25_1_194023_coun_chap_france_en.pdf)

37 <https://www.conseil-etat.fr/actualites/le-conseil-d-etat-suspend-en-refere-la-dissolution-du-groupe-antifasciste-lyon-et-environs>

38 This institution “deals with the claims it receives by proposing personalised solutions, and encourages equal access to rights for all members of the public through information, training, developing partnerships and proposing amendments to the law.” <https://www.defenseurdesdroits.fr/en/an-independent-institution>

39 <https://www.voxpublic.org/Amendes-abusives-la-Defenseure-des-Droits-rencontre-la-brigade-des-mamans-et.html>

- Repeal Article 12 and Articles 16-22 of the anti-separatism law, or provide opportunities for legal appeal, and guidance on their application to avoid any disproportionate impact on the exercise of the rights of NGOs.

## **Regulatory framework**

### **Rules on lobbying**

In June 2022, the newspaper *Le Monde* revealed the “Uber files” – how the company Uber led an aggressive lobbying campaign in France to establish itself and obtain the support of the former Minister of Finance of François Hollande – Emmanuel Macron, the current president.

Even if the “Uber files” case highlighted the issues around lobbying, and despite the opportunity to include lobbying in “the intervention of private cabinet in politics” bill, these revelations on the corporate capture of public decisions have not led to any legislative proposal to strengthen the regulation of lobbying.

## **(Un)safe environment**

### **Criminalisation of activities, including humanitarian or human rights work**

During the last year, and as the Observatory of Associative Freedoms analysed, the use of police and judicial means normally reserved for criminals and terrorists has been extended to the criminalisation of movements and activists.<sup>40</sup> Their actions are diminished and they are characterised as terrorists and troublemakers.<sup>41</sup> In the same way, the Minister of the Interior accused NGOs of solidarity with exiled people, “complicity with the smugglers” and the mafia, and of human trafficking.

### **Freedom of assembly**

The report “A New Witch Hunt” by the Observatory of Associative Freedoms shows that freedom of assembly has been restricted in the name of the fight against “separatism” and “Islamism”. Under cover of this right, “the NGOs and associations defending the rights of Muslims as well as those showing solidarity with these populations, are targeted by sanctions from the public authorities”.<sup>42</sup>

40 In November 2022, environmental groups and NGOs, as well as national trade unions, called for a demonstration in the Vienne region against plans for huge water reservoirs for agricultural irrigation of cereals. A week before, the prefecture and the national authorities had decreed the banning of the demonstration and the announced rally. The organisers maintained their march despite the presence of more than 1500 riot police. Violent clashes ensued, resulting in numerous injuries on both sides.

41 Following this demonstration, the Minister of the Interior described the participants in this demonstration and the organisations that supported it as “eco-terrorists”.

42 “Since the murder of Samuel Paty (a professor assassinated by a young man in October 2020), this phenomenon is gaining strength, and looks like a real witch hunt. These sanctions are presented as a response to the role of

On a related note, the law “Strengthening the respect of republican principles” as well as the “Contract of republican commitment” continue to raise concerns regarding freedom of association. Assent and respect of the contract become a condition to request public subsidies as well as to be recognised as having a public utility. Whistleblowers condemn the possible drift, narrowing freedom of association but also freedom of expression.<sup>43</sup>

## ***Attacks and harassment***

### ***Verbal attacks and harassment by private parties or public entities***

NGOs that help migrants are constantly harassed. Authorities try to intimidate them with harassment and denigration campaigns.<sup>44</sup>

### ***Administrative harassment***

The warnings regarding freedom of association are constant in our sector of activity, with threats and intimidating speeches by public authorities. The cases of dissolution of NGOs<sup>45</sup> by the Minister of Interior shows that

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NGOs and NGOs which would influence terrorist trajectories. Those are targeted because they would be a central element of an ‘Islamist ecosystem’. This prism leads to the suspicion of any grouping of Muslims, or people considered as such. However, no serious social science research has demonstrated this phenomenon. The report rather emphasizes that the organisations targeted are in fact vectors of civic integration.” <https://www.lacoalition.fr/Une-nouvelle-chasse-aux-sorcieres-contre-les-associations-l-enquete-de-l>

43 With the case of the local NGO Alternatiba in Poitiers (center-west of France) denied its subsidies by the prefect, civil society is afraid that all the organisations which don’t conform to the directives and political guidelines of the government or local authorities, may not be able to access subsidies or judiciary agreement. NGOs reliant on the subsidies will have no other choice but to assent to this “Contract of republican commitment”, but the authorities will have “a right to examine”, which is against the independence of NGOs as a counter power. With this law and contract, the government hopes to make NGOs and associations as the extension of its will. <https://www.la-croix.com/France/A-Poitiers-financement-public-dateliers-desobeissance-civile-fait-debat-2022-11-07-1201241145>

[https://www.lacoalition.fr/IMG/pdf/note\\_synthese\\_pjl\\_separatisme\\_pour\\_parlementaires\\_vf.pdf](https://www.lacoalition.fr/IMG/pdf/note_synthese_pjl_separatisme_pour_parlementaires_vf.pdf)

44 As we could witness when France finally decided to welcome the Ocean Viking vessel in Toulon’s harbour (11/11/2022). NGOs are accused of playing a part in the “smuggler’s game” or “helping illegal immigration”. <https://www.la-croix.com/France/Migrants-Mediterranee-Calais-associations-pression-2022-11-17-1201242571>

45 On 16 May, the Council of State announced the suspension of the dissolution of the anti-fascist group Lyon et Environs (GALE), pronounced by a decree of the Minister of the Interior, on 30 March, notably for “its virulent incitement to attack” against police. While, according to the collective, it was a question of denouncing police and racist violence. This attempt to dissolve the group was largely based on the new provisions of the “separatism

every opinion the government considers as too activist or radical will result in administrative harassment until compliance or cessation of activities.

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

Strategic lawsuits against public participation continue to pose problems in France, as the example of the mayor of Saint-Etienne,<sup>46</sup> among many others, demonstrates.<sup>47</sup>

In terms of legal harassment, a lot of bills raise concerns about freedom and protection of human rights. The Law on Republican Principles,<sup>48</sup> as well as the anti-squat bill<sup>49</sup> and the bill on asylum and immigration<sup>50</sup> show

that France has been taking a repressive turn in recent years.

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

***Key recommendations***

- Welcome and protect all exiled persons in line with human rights principles. The war in Ukraine has revealed that France has the capacity to welcome exiles in decent conditions.

law”, which broadens the grounds for dissolution. It will now be not only based on act contrary to the law, but also “the incitement” of this act, which leaves a large degree of interpretation to the authorities. In a press release, the Council of State explains that “the elements put forward by the Minister of the Interior do not allow to demonstrate that the GALE incited to commit violent actions and seriously disturbed public order”. In the same way, a collective of support to the Palestinian people have avoided its dissolution thanks to the Council of State which rejected the assimilation of criticism of the State of Israel to incitement to hatred against Jewish people. These positive jurisprudences remain fragile... and will not have prevented the Ministry of the Interior from launching new similar procedures against NGOs, associations and political groups (extreme left or extreme right) in the second half of 2022. The NGO “Le Bloc lorrain” has been dissolved, and its appeals lost, at the end of 2022.

46 SLAPP launched against Mediapart to prevent them from publishing a disclosure on sex-tape blackmail against another elected official of his city.

47 In a decision rendered on 6 October 2022, the Commercial Court of Nanterre condemned the independent investigative media Reflets-info, which specializes in investigations on digital, open source data and leaks, to pay 4,500 euros to the Altice group, headed by Patrick Drahi. Above all, it “orders it not to publish on the website of its online newspaper any new information” about Altice.

48 Passed in August 2021.

49 Adopted by the National Assembly in December 2022.

50 Officially announced by the government in 2022.

France has to adopt measures to ensure that the basic needs of exiles in informal settings can be met, including by halting evictions and confiscations in informal camps. France also needs to initiate a constructive dialogue with NGOs to allow them to distribute basic necessities. France has to put an end to detaining people at the borders in waiting zones and must unconditionally protect unaccompanied minors.

- Put an end to racial profiling by changing the legal framework, creating a transparency obligation with traceability of controls, reinforcing rights of victims, and changing the practices of forces of order. The demands of the Group Action for putting an end to racial profiling against the Prime Minister, the Minister of Justice and the Minister of Interior should be implemented.<sup>51</sup>

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

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

In a context of intensification of government politics, the disregard of human rights has been continuous and persistent in France.

In 2022, the rights of exiles continued to be violated.<sup>52</sup> Travellers suffered continuous violations of their fundamental rights. They are still confined to segregated spaces isolated from public services and within places where their health could be compromised because of pollution. They are often harassed by local authorities, deprived of their rights including through forced eviction without housing alternatives. Racial profiling by French police is still a major problem, in which the international community and lawyers have constantly asked France to take actions to remedy this systemic problem.

51 <https://www.amnesty.org/en/latest/press-release/2021/07/france-class-action-lawsuit-against-ethnic-profiling-filed-over-systemic-racial-discrimination/>

52 According to the NGO Anafé, waiting zones (at airports and harbours) create a place where people don't have access to their rights: "Detaining people at the borders means perpetrating suffering and violence". Intensification of a security-based migration politics leads to disregard human rights. NGOs like Anafé condemn governmental practices at the occasion of the arrival of the Ocean Viking in Toulon. Government announced it will send back a large number of the exiles to other countries after a fast-track review of their asylum request. Hopefully, independent judges guarantee their rights. <https://www.actu-juridique.fr/administratif/libertes-publiques-ddh/ocean-viking-associations-et-avocats-contestent-la-zone-dattente-de-toulon/>

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

The police perpetuate violence, especially in working-class areas. The number of deaths following a “refusal to comply with a police order to stop” has been multiplied by five since 2017, when an easing of restrictions on the use of armed force was allowed by the Law on Self-Defence.<sup>53</sup> France has also failed to prevent and remedy racial profiling in relation to identity checks. Successive governments have refused to recognise the systemic character of this violation of rights. Six organisations are still part of a class-action suit against the government in order to get concrete action against racial profiling.

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

The ombudsman and the international community, through the United Nations Special Rapporteur on discrimination, continue to ask France to take action to end racial profiling and the violation of rights by police officers against black or Arab persons, or those perceived as such.<sup>54</sup>

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

The French National Commission on Human Rights (CNCDH) expressed concerns about the “Global Security Law” (passed in 2021), which includes preventive measures for the fight against terrorism, because their impact on human rights “has not yet been assessed independently.”<sup>55</sup>

On the matter of overcrowded jails in France, the European Court of Human Rights (ECtHR) states that “the occupancy rates of the concerned prisons reveal the existence of a structural problem.” It asked to “adopt general measures aimed at eliminating overcrowding and improving material conditions of detention.” France is rated second among 47 European countries for its prison suicide rate.<sup>56</sup>

## ***Fostering a rule of law culture***

### ***Contribution of civil society and other non-governmental actors***

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In the framework of the energetic and ecological transition, collectives of inhabitants,

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53 <https://basta.media/refus-d-obtemperer-quatre-fois-plus-de-personnes-tuees-par-des-policiers-depuis-cinq-ans>

54 [https://www.liberation.fr/societe/police-justice/controles-au-facies-pour-tendayi-achiume-nier-l'existence-du-racisme-systemique-ne-fait-que-le-perpetuer-20221218\\_YAODAOQRNH5JD7BJF3AFE4NMU/](https://www.liberation.fr/societe/police-justice/controles-au-facies-pour-tendayi-achiume-nier-l'existence-du-racisme-systemique-ne-fait-que-le-perpetuer-20221218_YAODAOQRNH5JD7BJF3AFE4NMU/)

55 [https://commission.europa.eu/system/files/2022-07/25\\_1\\_194023\\_coun\\_chap\\_france\\_en.pdf](https://commission.europa.eu/system/files/2022-07/25_1_194023_coun_chap_france_en.pdf)

56 <https://www.trtworld.com/opinion/france-s-rights-violations-in-prisons-continue-amid-a-crushing-heat-wave-59212>

associations and NGOs warned public authorities of the abuses related to urban renewal plans. They pointed out the lack of consultation of the affected population. The NGO APPUII advocates for a democratisation of urban renovation, and asked for a stop in demolishing buildings to recreate housings when it does not meet the needs of the population, as well as being an aberration from both environmental and economic perspectives. Several Parliamentarians agreed to sponsor a bill on this issue.

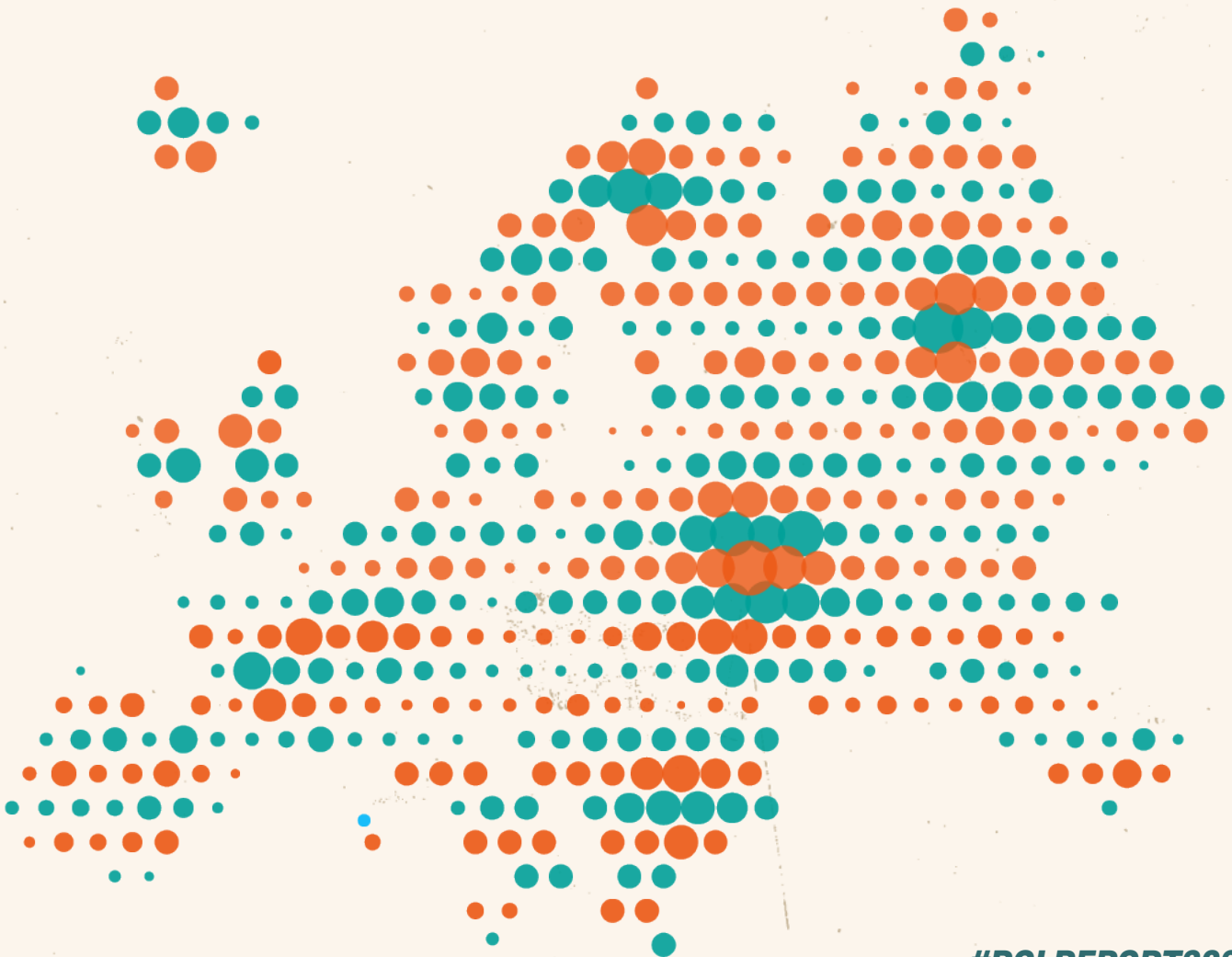


**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**GERMANY**



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# GERMANY

## About the authors



**GFF** (Gesellschaft für Freiheitsrechte - “Society for Civil Rights”) is a Berlin-based not-for-profit NGO founded in 2015. Its goal is to establish a sustainable structure for successful strategic litigation for human and civil rights (HCR) in Germany, bringing together plaintiffs and excellent litigators to challenge infringements of HCR in court. GFF’s initial cases focused on protecting privacy, freedom of information and freedom of the press against state intrusion, and on defending equal freedom for all. In recent years, it has also expanded its activities to the areas of equality, non-discrimination and social justice.

GFF was supported by the following organisations:



**FragDenStaat** is a project established by the Open Knowledge Foundation e.V. and is the central contact point for freedom of information in Germany. FragDenStaat brings information to the public that was previously gathering dust in filing cabinets. Whether

it’s an email by a lobbyist, an environmental report, meeting minutes or a calendar entry – FragDenStaat helps liberate and publish it by using the Freedom of Information Law (*Informationsfreiheitsgesetz*, IFG).



**LobbyControl** is a non-profit association that educates about power structures and influence strategies in Germany and the EU. LobbyControl advocates for transparency, democratic control and clear limits to influencing politics and the public.

## Key concerns

The structural problems of the justice system in Germany remain essentially unchanged. The federal government’s reform plans, such as the reform of custodial sanctions, fall short of the mark. In other areas, such as transparency of the judiciary, there has been no progress. The federal government and the *Länder* have not been able to reach an agreement on the extension and consolidation of the ‘pact for the rule of law’, which provides, inter alia, for the funding of judicial positions and the digital transformation of the judiciary.

Regarding its anti-corruption framework, Germany still lacks comprehensive and consistent rules to prevent corruption and provide transparency in the finances of decision-makers and political parties. Germany has not made any significant progress in implementing the recommendations of the 2022 EU Commission’s report in this area, neither in introducing the ‘legislative footprint’ nor in introducing stricter rules on revolving doors.

In the area of media environment and freedom of expression and information, systematic problems have not been addressed. The legislature has neither taken any steps to improve access to information for the press and the public, nor to improve protection of journalists against abusive lawsuits. Germany has still not moved forward with the plan to create a legal basis for a right to information of the press as regards federal authorities, even though it is included in the coalition agreement.

No progress has been made with regard to checks and balances. While the Commissioners for Data Protection and Freedom of Information enjoy a high level of independence, their level of engagement in freedom of information request procedures remains limited, which may be due to their limited powers in this regard.

The adoption of the act on the promotion of democracy (*Demokratieförderungsgesetz*) can be considered a significant improvement for creating an enabling framework for civil society. In other areas there has been no progress; the federal government neither delivered a proposal on the promised law against digital

violence nor related policies aiming at providing a safe online space. While the reform of the tax code is part of the coalition treaty of the new government, no reforms to protect public participation and advocacy work of civil society organisations were initiated.

The government has not taken up any measures against the known problems of documenting police violence and systematic and disproportionate restrictions on the rights of refugees when entering Germany.

### **State of play**

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

### **Legend (versus 2022)**

- ↓ Regression
- No progress
- ↑ Progress

## **Justice system** –

### **Key recommendations**

- Courts should no longer be obligated (or allowed) to inform migration authorities, in cases where people without residence titles file a lawsuit.

- The system of criminal sanctions must be reformed; custodial sanctions for petty offences should be abolished.
- Legislation that includes an obligation to publish all court decisions as a rule needs to be introduced.

## **Judicial independence**

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

In Germany, lay judges, so-called *Schöff\*innen*, often participate in criminal proceedings and have the same voting rights as professional judges. The number of lay judges in Germany amounts to around 40,000. In recent years, right-wing parties such as the Alternative for Germany (*Alternative für Deutschland*, AfD) and the National Democratic Party of Germany (*Nationaldemokratische Partei Deutschland*, NPD) have repeatedly called upon their members and supporters to become lay judges.<sup>1</sup> In order to prevent extremists from entering the bench, the Federal Ministry of Justice prepared an amendment of the Judiciary Act (*Richtergesetz*), namely § 44a. The proposed amendment holds that one may not be admitted as a lay judge if it cannot be

guaranteed that they will always defend and support the free democratic basic order.<sup>2</sup>

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

In Germany, judges are allowed to be members of political parties and to express their political opinions openly (out of court). In 2022, several cases of judges and prosecutors expressing far-right political opinions were reported. Germany's rules for disciplinary proceedings only allow the removal of these servants or judges in exceptional cases, so people openly opposing the constitution may in some cases stay in public service.

At the beginning of 2022, Federal Minister of the Interior (*Bundesinnenministerin*) Nancy Faeser presented an action plan against right-wing extremism which clearly states there is no place for enemies of the constitution in public service. It therefore demands that they need to be removed from office swiftly and effectively.<sup>3</sup> At its meeting on 10 November 2022, the Conference of Ministers of Justice (*Justizministerkonferenz*, Jumiko) called for a firm approach towards extremists in civil service and proposed amendments to the *Richtergesetz* as well as an amendment to

1 See <https://www.lto.de/recht/justiz/j/bmj-plan-schoeffen-ehrenamtliche-richter-extremisten-verfassungsfeinde-aufrufe-gerichte-richtergesetz-bverfg-hessen-justiz/>.

2 See <https://taz.de/Keine-Nazis-als-Schoeffen-bei-Gericht!/5840275/>.

3 Bundesministerium des Innern und der Heimat, Aktionsplan gegen Rechtsextremismus, 2022, S. 3.

the time-limit regulation in the Federal Disciplinary Act (*Bundesdisziplinalggesetz*).<sup>4</sup>

Reality, however, (still) looks different. Several right-wing judges continue to sit on the bench. Attempts were made to remove right-wing extremist judges – mainly former Members of Parliament for the right-wing party Alternative for Germany – from office. Some of these attempts were successful,<sup>5</sup> others failed.<sup>6</sup>

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

Unchanged since the formation of the *Bundesrepublik*, decisions on the promotion of judges – especially the selection of court presidents and judges of the federal courts – are made by members of the state or federal governments in cooperation with parliamentary boards, and not by the judiciary itself. In many cases judges will only be elected for top positions if they are connected to the big political parties. Although some organisations demand more independence, or at least transparency, in 2022 there were no serious initiatives to minimise or end the influence of the government on judiciary, or to establish firm procedural safeguards for judicial independence.

## **Quality of justice**

### **Accessibility of courts (e.g. court fees, legal aid, language)**

In Germany a lawsuit is only admissible if the plaintiff fully identifies themselves by name and address; exceptions to this rule are very limited. At the same time, every German public authority, including courts, that comes in contact with migrants without the required residence title is legally obligated to immediately report the names and whereabouts of these migrants to the migration authorities, to enable deportation. This blocks *sans papiers* from seeking justice, due to the risk being deported if they file a lawsuit. In 2022, the German Constitutional Court dismissed the action of an undocumented migrant who requested an interim order to allow not only anonymous lawsuits but also anonymous healthcare.<sup>7</sup>

### **Resources of the judiciary (human/financial/material)**

Although in 2020 about 22,000 judges were employed in Germany, there are not enough

4 For the whole decree see [https://www.justiz.bayern.de/media/pdf/top\\_i.19\\_-\\_extremisten.pdf](https://www.justiz.bayern.de/media/pdf/top_i.19_-_extremisten.pdf).

5 The extremist Jens Maier had to take early retirement in Saxony, cf. <https://www.sueddeutsche.de/politik/justiz-rechtsextremismus-afd-richter-1.5707814>.

6 Analogous proceedings against Birgit Malsack-Winkemann had failed at first, cf. <https://www.rbb24.de/politik/beitrag/2022/10/berlin-afd-richter-in-abgeordnete-birgit-malsack-winkemann.html>. Later, it was discovered that she was part of a terrorist network planning an attack on state structures. For more information see <https://www.tagesspiegel.de/berlin/berliner-richter-in-sportschutzzin-esoterik-fan-wer-ist-birgit-malsack-winkemann-die-militante-umsturzlerin-von-der-afd-8988766.html>. She was therefore detained and removed from office in December 2022.

7 <https://freiheitsrechte.org/themen/soziale-teilhabe/ohne-angst-zum-arzt>.

personnel in German courts to handle all cases, leading to severe delays in the judicial process. This concerns all branches of the judiciary. In criminal proceedings, this delay resulted in the release of several defendants in 2022, because the maximum time limits of pre-trial detention were exceeded.<sup>8</sup>

***Use of assessment tools and standards (e.g. ICT systems for case management, court statistics and their transparency, monitoring, evaluation, surveys among court users or legal professionals)***

The assessment of court decisions and of the process of decision-making is hampered for the public as well as for the judges themselves due to the lack of any comprehensive practice or regulation for publishing decisions.

In Germany, court decisions are not subject to copyright law and could therefore be published. Nevertheless, less than 1 percent of first-instance decisions are published.<sup>9</sup> This is a problem for both the legal practice and those seeking justice. The latter may refrain from bringing proceedings before the competent court as they cannot assess their chances of success. The lack of comprehensive publication also creates a problematic bias. The few publications create an imbalance and the impression that one or the other view is “predominant”,

although the publication rate of only 1 percent makes this assumption untenable.

Even for the highest courts, an obligation to publish only arises if the decisions are deemed “worthy of publication” by the courts. The requirement of publication worthiness is not subject to any review and is untransparent. Furthermore, the criterion of worthiness of publication is unsuitable, since unusual cases can also be of importance for the legal profession. Legislation is therefore needed that includes an obligation to publish all court decisions as a rule.

A further lack of transparency that is specific to the area of asylum and migration law affects the quality of justice. To assess the right to asylum and other questions relating to residence permission, the situation in the country of origin of the asylum seeker or claimant is crucial.<sup>10</sup> The migration authorities rely on reports written by the foreign ministry and base their decisions in large part on the reports. However, these reports are not publicly accessible. The content as well as the methodology of these reports is therefore unknown, not only to the public but also to asylum counselling services. Only lawyers receive access to the reports, but according to the Federal Agency of Migration and Refugees, passing on the reports is punishable by law. Above all, the lack of transparency makes the legal defence for asylum seekers and

8 <https://www.dw.com/de/untersuchungshaft-monatelang-ohne-urteil-ingesperrt/a-61983111>.

9 Hanjo Hamann, “Der blinde Fleck der deutschen Rechtswissenschaft - Zur digitalen Verfügbarkeit instanzgerichtlicher Rechtsprechung“, JZ 2021, 656.

10 For more detailed information, see Kube, Vivian; Vos, Hannah: *Verschlussache Lagebericht: Die intransparente Rolle des Auswärtigen Amtes in Asylverfahren*, VerfBlog, 2022/11/11,

migrants very difficult. To improve the quality of such reports as well as the quality of justice, these reports should be made public as a rule with exceptions for sensitive information, as it is done in other states such as the USA, the UK and Switzerland.

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

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

The denial of interim relief measures for access to information claims, even those of journalists and public watchdogs, impairs the efficiency of the justice system and undermines the right to access to information.

In contrast to the right to information of the press, which is enshrined in Article 5 para 1 sentence 2 of the German Basic Law and implemented in legislation at *Länder* level, courts have so far denied the necessity for interim relief measures concerning the right of access to information.<sup>11</sup> This is a problem for journalists and the public alike, because the right of access to information goes beyond the right to information of the press, as it includes the right to access any documents or other sources of information.<sup>12</sup>

Claims for accessing documents and other sources of information must be based on the corresponding freedom of information act. However, state authorities, which are required to provide information under the freedom of information act, often deny access to information (in whole or in part) so that court proceedings become necessary. Even if the journalists or any other person entitled to access information win in court, the state authorities often appeal the decision. Therefore, journalists or other persons entitled to information are only granted access after a final verdict is reached and many years have passed, and the issue of concern is no longer in the focus of the public debate. Hence, these lengthy proceedings hamper well-researched journalism on current issues as well as public debates based on facts.

Interim relief measures, as they have been accepted for the right to information for the press, should therefore also be applied to the right to access information and documents. Journalists and the public would be able to access important information when this information is still relevant.

### ***Execution of judgments***

If a convict fails to pay a fine, they will be subject to custodial sanctions. In 2022, the

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11 See, for instance, Administrative Court of Berlin (Verwaltungsgericht Berlin), decision of 14 September 2014, VG 2 L 216/21; Higher Administrative Court of Berlin-Brandenburg (OVG Berlin-Brandenburg), decision of 19 July 2016, OVG 12 S 42.16

12 Federal Administrative Court, judgment of 27 November 2013, BVerwG 6 A 5.13, ECLI:DE:BVerwG:2013:271113U6A5.13.0; Federal Administrative Court, judgment of 30 January 2020, BVerwG 10 C 18.19, ECLI:DE:BVerwG:2020:300120U10C18.19.0

number of persons who were subject to custodial sanctions exceeded the number of persons in regular imprisonment. People with a lower socio-economic status and poor people are particularly affected by custodial sanctions and thus much more likely to be imprisoned for minor offences, such as violations of sec. 265a of the German Criminal Code - using public transportation without a valid ticket. After a long public and political debate, the federal government introduced a reform that would halve the duration of custodial sanctions.<sup>13</sup> However, the reform would amount to a cosmetic change because the costly and discriminatory system of default sanctions would remain in place.

## Anti-corruption framework 🟡

### Key recommendations

- Legislative reform needs to be introduced to increase transparency and accountability for public decision-making processes including law-making; the lobby register should be complemented by a comprehensive decision-making footprint.
- The conflict of interest regulation needs to be strengthened; regulation of post-employment activities

should be improved substantially, and the scope widened to include high-ranking public officials of top-level government bodies.

- Limits for obligations to make donations to political parties transparent should be reduced drastically and extended to income through sponsoring.

### Framework to prevent corruption

#### ***Integrity framework including incompatibility rules (e.g.: revolving doors)***

With the recent reform of the *Abgeordnetengesetz*, incompatibility rules and the conflict of interest regulation for members of the Deutsche Bundestag have been strengthened. But the new law leaves important issues unaddressed. For example, MPs now must declare more of their financial assets but liabilities and assets of close family members like spouses are still not required to be made transparent. Members of parliament must report financial assets if they hold shares of more than 5 percent in a company or business. Other assets like real estate are not addressed in the regulation.

This is even more problematic with regards to members of government. For top-level executive decision-makers the risk of corruption is

13 <https://www.lto.de/recht/hintergruende/h/ersatzfreiheitsstrafe-halbierung-gefaengnis-geldstrafe-reform-sanktionen-bmj/>.



even higher, but the integrity rules for ministers and parliamentary state secretaries do not even include a requirement to report financial interests. Thus, only the rules for members of parliament are applicable if a member of government is also a member of parliament, which is quite often the case in Germany, although it is not a prerequisite.

The regulation of post-employment activities should also be improved substantially, and the scope widened to include high-ranking public officials of top-level government bodies.

***General transparency of public decision-making (including public access to information such as lobbying, asset disclosure rules and transparency of political party financing)***

Progress was made in 2022 with the introduction of a mandatory lobby register for lobbying directed at the government and the parliament. The current government coalition has agreed to reform the lobby register law. Amendments should include a greater degree of transparency on who is lobbying for what, e.g. what law is addressed. Exemptions from the register, especially for employer associations, trade unions, and religious representations, should be removed, and the scope of the law should include lobbying directed at ministries of government as a whole. Further efforts should be made to increase the level of transparency with regards to the financing of registered lobbyists, without curbing the possibilities, especially for non-profit organisations, to raise funds.

To increase transparency about which lobbyists are participating in law- and decision-making processes, the lobby register should be complemented by a comprehensive decision-making footprint. This should include information about lobby meetings of the executive branch, documentation about ministerial hearings, the publication of formal and informal written statements, and other sources or services used. The government coalition has announced plans in this area, but at the end of 2022, the decision-making process seemed to be stuck.

Unlike in most EU member states, in Germany it is possible to donate unlimited amounts of money to political parties. This is possible both for natural as well as legal persons like companies or trade associations. Thus, to limit the possible political influence of very large donations or sponsorship deals, a maximum amount per donor, party, and year should be introduced. Additionally, the level of transparency is not sufficient to set a high standard of accountability. Only donations larger than 50,000 euros are published in a timely manner. Donations between 10,000 and 50,000 euros are reported with a very long delay of up to two years. This is unacceptable, especially for donations in the context of elections. Donations below 10,000 euros are not transparent at all, even though a four-digit sum can have substantial influence at the local level. Those limits should be reduced drastically and extended to income through sponsoring, which currently is not reported on at all. Additionally, third-party campaigns during election periods should be better regulated.

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

Germany implemented the EU Whistleblowing Directive (2019/1037) on 16 December 2022, almost a year after the transposition deadline had expired.

It is to be welcomed that the draft law also covers reports and disclosures of violations of certain national laws beyond the requirements of EU law. However, the draft law also has some weaknesses and gaps. The exceptions in the area of national security are too broad. Furthermore, reports and disclosures of misconduct that is not illegal are not covered and the processing of anonymous reports is not mandatory.

### **Investigation and prosecution of corruption**

#### **Criminalisation of corruption and related offences**

The criminal law on corruption and bribery of members of parliament is in dire need of being strengthened. This is illustrated by several cases in the context of public procurement of facial masks during the Covid-19 pandemic. Several parliamentarians used their position as members of parliament and their privileged access to the ministry of health and other relevant authorities to close deals in exchange for substantial provisions and personal gain. The criminal prosecution had to be dropped, however, because the law criminalises corrupt behaviour only when it is related to the sphere

of the parliament. Members of parliament using their influence in government for private gain can thus legally not be charged. This is in stark contradiction to the public's perception of what should be legal and illegal.

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

### **Key recommendations**

- The federal government needs to introduce legislation to create a right to information of the press as regards federal authorities; Bavaria and Lower-Saxony need to introduce freedom of information at the *Länder* level.
- The Federal Freedom of Information Act should be independently and thoroughly evaluated with a particular focus on the scope of exceptions under this act and other more recent legislation, the application of these exceptions in practice, the system of fees and the enforcement of the act. Additional measures should be taken to improve public access to information at federal level, where necessary.
- The federal government needs to introduce effective safeguards against SLAPPs, by implementing the EU Commission's recommendation on strategic lawsuits against public par-

icipation, which is in force since April 2022.

## **Online media**

### **Competence and powers of bodies or authorities supervising the online ecosystem**

Despite Germany having a legal framework in place to supervise and regulate the online ecosystem, the bodies or authorities tasked with implementing it lack competence and power.

According to the Network Enforcement Act (*Netzwerkdurchsetzungsgesetz*, NetzDG), the Federal Office of Justice (*Bundesamt der Justiz*, BfJ) supervises the compliance of the online platforms with NetzDG and can further issue sanctioning proceedings should the platforms fail to adhere to the rules set out in the NetzDG. However, the case of Telegram in the beginning of 2022 showed, once more, the shortcomings of the authorities aiming at enforcing the legal framework, as Telegram deliberately chose not to comply with the rules of the NetzDG. After months of public debate and attempts by German authorities to reach representatives of Telegram based in the United Arab Emirates, Telegram's lawyers in Germany finally responded to the BfJ's claims. BfJ has now issued a fine to Telegram due to its non-compliance with NetzDG; however, it is not certain that Telegram will comply.

In addition, media regulators have their own rapport with social media companies (e.g. media regulators 'encouraging' Twitter to delete material that they deem pornographic); generally, it seems that the involved bodies or authorities do not have a joint strategy when dealing with the platforms.

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

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

The European Centre for Press and Media Freedom published a study in the beginning of 2022, showing that verbal and physical attacks against journalists, especially when reporting from demonstrations, have increased in Germany; while the numbers for 2022 themselves have not yet been published, the ECPMF indicates that the situation in 2022 for journalists has been similarly bleak.<sup>14</sup> Correspondingly, the organisation Reporters Without Borders showed in their specific country monitoring that journalists are increasingly attacked and verbally assaulted; they further showed that on 12 occasions, law enforcement attacked journalists.<sup>15</sup>

14 See <https://www.zeit.de/gesellschaft/zeitgeschehen/2022-04/pressefreiheit-journalisten-angriffe-studie-corona>.

15 See <https://www.reporter-ohne-grenzen.de/nahaufnahme/2022>.

### ***Lawsuits and prosecutions against journalists, including SLAPPs, and safeguards against abuse***

Independent journalists and small outlets have been most affected by SLAPPs. Among prominent cases are the proceedings by a real estate company against the student-run newspaper *lubze*, based in Leipzig. The real estate company United Capital had sued *lubze* for injunctive relief because the newspaper had printed quotes from tenants who criticised United Capital. Because of the very high value in dispute (50,000 euros) claimed by United Capital, the out-of-court dispute had already threatened *lubze's* existence.<sup>16</sup> After massive public protests, United Capital withdrew the claim in January 2022. Other examples for SLAPPs by private companies in 2022 include proceedings against tenant initiatives by real estate investor Ioannis Moraitis. Several initiatives have been sued for injunctive relief by Moraitis because they criticised his company's dealings with tenants.<sup>17</sup>

SLAPPs against journalists by state actors include criminal proceedings initiated by the State of Bavaria against journalist Michael Trammer. Michael Trammer had reported about protests by climate activists against the international automotive exhibition 'IAA' in Munich. Michael Trammer reported, among other things, from an abandoned building

that had been squatted by climate activists. Because the building is owned by the State of Bavaria, the State filed criminal charges against Michael Trammer for trespassing. The Munich District Court convicted Michael Trammer of trespassing without taking sufficient account of freedom of the press.<sup>18</sup>

Legal safeguards against SLAPPs are almost completely lacking; similarly, no government-funded information or support structures exist for affected journalists.

### ***Confidentiality and protection of journalistic sources (including whistleblower protection)***

The Federal Constitutional Court has strengthened the rights of journalists (decision of 30 March 2022). The Court ruled that journalists are comprehensively exempt from the criminal liability of receiving stolen data (Section 202d of the Criminal Code). Whistleblowers, intermediaries, and auxiliary persons of journalists, however, continue to be at risk of criminal prosecution.

Under the draft Whistleblower Protection Act (see above), the disclosure of misconduct to the press will only be inadequately protected. Although the draft fulfils the requirements of the EU Directive in this respect, it does not go beyond them. This means that, in principle,

16 <https://www.zeit.de/campus/2022-01/leipzig-studentenzeitung-luhze-united-capital-rechtsstreit>.

17 <http://potsdam-stadtfueralle.de/2022/06/09/abmahnungen-unterlassungsverfuegungen-die-instrumente-von-immobilieninvestoren-gegen-eine-kritische-oeffentlichkeit/>.

18 <https://dju.verdi.de/presse/pressemitteilungen/++co++07774ffc-cc70-11ec-88a6-001a4a160111>.

misconduct must not be reported directly to the press even if there is a strong public interest in disclosure.

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

Germany has still not taken forward the plan to create a legal basis for a right to information of the press as regards federal authorities, even though it is included in the coalition agreement and recommended by the EU Commission in last year's Rule of Law Report. The Federal Administrative Court has ruled that journalists cannot rely on the press laws of the *Länder* regarding federal authorities, but only on their constitutional guarantee of the freedom of the press.<sup>19</sup>

Furthermore, based on current press laws journalists, do not have the right to also access documents, and such requests have to be based on the Freedom of Information Act at federal level or those of the *Länder*. As already noted in the 2022 Rule of Law Report of the EU Commission, there are considerable divergences in the legislation of the *Länder*.<sup>20</sup> Moreover, such freedom of information acts do not exist in Bavaria and Lower-Saxony. In

addition, journalists or public watchdogs are not privileged under these freedom of information acts, which means that fees can apply to such requests (and that interim measures for access to documents claims are hardly possible). The latter is highly problematic for journalists as they often have to wait several years to be granted access to information that is naturally only highly relevant for a short time. In particular, access to digital communications by officials becomes more difficult. Due to a lack of systematic strategies to archive digital communication,<sup>21</sup> there have been numerous cases in which such communication – even if deemed highly relevant for issues of public interests and falling in principle under the freedom of information acts – has been irreversibly deleted.<sup>22</sup>

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

As noted in 2022 Rule of Law Report, the Council of Europe's Group of States Against Corruption (GRECO), in its Evaluation Report on Germany in its Fifth Evaluation Round, has recommended that the federal Freedom of Information Act should be independently and thoroughly evaluated with a

19 Federal Administrative Court (Bundesverwaltungsgericht). Judgment of 20 February 2013, BVerwG 6 A 2.12, ECLI:DE:BVerwG:2013:200213U6A2.12.0

20 <https://transparenzranking.de/>

21 See, for instance, Hans-Martin Tillack, Mails von Ministern gelöscht – Bundesarchiv fürchtet Datenverlust, Veröffentlicht am 24.12.2022, Die Welt.

22 See, for instance, [the case](#) on the SMS of former chancellor Angela Merkel; Ongoing [case](#) against the Foreign Ministry on the digital communication of former Foreign Minister Heiko Maas during the withdrawal of German troops from Afghanistan.

particular focus on the scope of exceptions under this act and other more recent legislation, the application of these exceptions in practice, the system of fees and the enforcement of the act.<sup>23</sup> Additional measures should be taken to improve public access to information at the federal level, where necessary. In October of last year, an alliance of civil society organisations and journalists' associations presented a legislative proposal and demanded reforms.<sup>24</sup> The need for reforms has been stressed at the *Länder* level as well.<sup>25</sup> Further, the government has promised reforms in the coalition contract.

However, to date no reforms have been undertaken, which means that the federal Freedom of Information Act has not been amended since 2006. In the following, the main criticisms and need for reform are summarised:<sup>26</sup>

- The federal Freedom of Information Act aims to strengthen trust between the state and citizens by making administrative actions more transparent and comprehensible to citizens. Until now, however, freedom of information has required citizens to make a large number of individual requests in order to obtain information. In addition, many state officials still perceive secrecy as the rule and publication as the exception. This understanding must be fundamentally reversed. Therefore, as is already the case in

some *Länder*, such as Hamburg, an active obligation to publish should be enshrined in the law.

- The current obligation to pay a fee for information requests discourages citizens and does not contribute to increasing participation. Requests under the Freedom of Information Act should therefore be made free of charge.

- The processing of requests often takes excessively long. As a result, the events and processes that are being enquired about often lose their relevance. For this reason, a maximum time limit should be laid down in law, e.g. as a rule with room for exceptions limited to 15 working days.

- Frequently, public tasks are delegated to private or private-law legal entities. Therefore, private entities should fall under the Freedom of Information Act if they act on behalf of the public sector or if the shareholding structure is such that the public sector is the predominant and controlling owner or actor.

- The coexistence of the Environmental Information Act and the Freedom of Information Act leads to confusion and makes it difficult for information seekers

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23 See GRECO – Evaluation Report, para 57.

24 For more information, see <https://transparenzgesetz.de/>.

25 See, for example, [the legislative proposals for a Transparency Law by the Commissioner for Data Protection and Freedom of Information Baden-Wuerttemberg](#).

26 For concrete proposals, see [legislative proposal](#) for a Federal Transparency Law by civil society organisations.

to obtain the data they are looking for. Therefore, the Environmental Information Act and the Freedom of Information Act should be merged.

- Too often, the exceptions are interpreted very broadly and used to deny unwelcome requests. The current exceptions for refusing information must therefore be interpreted more narrowly; the protection of personal data or to safeguard trade and business secrets must not be used in an abusive manner. For the same reason, the exceptions must not remain absolute, but should recede in the case of overriding public interest. Copyright legislation must not be used to prevent publication of such information.

- Increasingly, information that in principle falls under the Freedom of Information Act is being declared confidential and access in full or in large part is being denied. This practise requires a more thorough review by the Courts, which so far too quickly rely on the explanations provided by the authorities.

- Information rights are increasingly restricted via other laws, such as the Law on Political Parties (Parteiengesetz). Therefore, laws other than the Freedom of Information Act should only take precedence if they contain more extensive information rights.

## Checks and balances

### Key recommendations

- The Commissioners for Data Protection and Freedom of Information should be equipped with the competence to issue binding instructions on how the authorities should remedy their failures to comply with the freedom of information acts, and to enforce compliance by the relevant authority.
- In freedom of information request procedures, the initiation of a mediation procedure before the Commissioner for Data Protection and Freedom of Information should freeze the deadlines for legal claims.

### Process for preparing and enacting laws

Exemptions under the Freedom of Information Act are often interpreted too broadly by the competent authority in the context of law making. This practice makes it more difficult for the public to participate in the debate and to criticise the making and content of the law in question. Further, this practice disguises whose interests and which experts have been heard during the legislative process, as well as other influences.

These are just some cases to illustrate this practice: A request for access to information on the process leading the decision to establish

an unprecedented new budget for the German military after the Russian invasion into Ukraine was fully denied by the Chancellor's Office on grounds of state security and other similar grounds without any further explanation;<sup>27</sup> the Federal Ministry of Finance denied any access to information about which of the legislative projects in the coalition contract it planned to initiate during the last year.<sup>28</sup>

Other examples are information in the context of advisory bodies such as the body that advises the Federal Ministry of Finance in its annual estimation of tax revenues and budget planning,<sup>29</sup> or the general academic advisory board of the Federal Ministry of Finance.<sup>30</sup> The Ministry argued in both cases among others that the work of such advisory bodies should be confidential and that neither the members, the discussion of such bodies nor their conclusions reached should be made available to the public. A similar stance has been taken by the competent ministry with regard to several other committees – albeit consisting of external experts or state officials – that are tasked with advising the government. The authorities

continuously deny access to the minutes, the discussion, or the list of members of those committees.

### ***Independent authorities***

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Following the examples of other countries, Germany has established a Commissioner for Data Protection and Freedom of Information at federal level as well as in the 14 *Länder* that have adopted freedom of information legislation. The Commissioners enjoy a high level of independence.<sup>31</sup> They are elected by the competent parliament.<sup>32</sup> There is no official or legal supervision. The level of resources available for Commissioners at both federal and *Länder* level has been criticised; a survey concluded that many Commissioners are considerably understaffed compared to other countries.<sup>33</sup>

The Commissioners have the competence to counsel applicants of freedom of information requests and, if necessary, to initiate a mediation with authorities. Anyone who considers their right to access information to have been violated may bring an informal complaint

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27 Case is pending before the Administrative Court of Berlin, file no: VG 2 K 248/22.

28 Case is pending before the Administrative Court of Berlin, file no: VG 2 K 284/22.

29 Access to information was granted to a large extent by the Administrative Court of Berlin, judgment of 22 September, VG 2 K 35.19; for more information, see <https://fragenstaat.de/blog/2019/05/09/klage-rechnungsmodelle-steuerschatzungen/>.

30 Access to information was granted to a large extent by the Federal Administrative Court, judgment of 5 May 2022, BVerwG 10 C 1.21; for more information, see <https://fragenstaat.de/blog/2022/05/05/erfolgreiche-transparenzklage-bundesfinanzministerium-verliert-vor-bundesverwaltungsgericht-und-muss-seine-wissenschaftlichen-protokolle-offenlegen/>.

31 For the federal level, see § 10 (1) German Federal Data Protection Act (Bundesdatenschutzgesetz)

32 For the federal level, see § 11 (1) German Federal Data Protection Act (Bundesdatenschutzgesetz)

33 Tiziana Saab, [Staatlicher Auftrag geht ins Leere](#), 20 December 2022.



to the Commissioners, free of charge, and thereby initiate mediation proceedings.<sup>34</sup> The Commissioners may then request the federal authorities to submit a statement. However, they cannot issue binding instructions (*Weisungen/Verwaltungsakte*) to the authorities, but only formally state that the complaint was justified (*Beanstandung*).<sup>35</sup> The Commissioners may also offer training for administrations with the aim of increasing transparency and carry out political work, for example by providing expertise in legislation processes to strengthen transparency.

However, it is noteworthy that there are substantial differences amongst the Commissioners when it comes to using their powers. For instance, in 2021 there was not a single formal statement that a complaint was justified (*Beanstandung*) by the Federal Commissioner because of a breach of the federal Freedom of Information Act.<sup>36</sup> The Commissioner in Baden-Wuerttemberg has been an exception in this regard. Many others have focused mainly on the field of data protection.

Furthermore, there are several shortcomings when it comes to the scope of their powers. The

mediation process is often perceived as not very helpful. That is mainly because a complaint to the Commissioner does not suspend or interrupt time limits for administrative appeal and legal proceedings, which are only one month. Therefore, when waiting for the conclusion of a mediation procedure, one will inevitably lose the legal right to appeal. The initiation of a mediation procedure should therefore freeze the deadlines for legal claims.<sup>37</sup>

Furthermore, the powers of the Commissioners to investigate cases are extremely limited. They have no power to investigate the facts and they cannot oblige the authorities to submit a statement. This should be remedied by granting the Commissioners full and official access to the files of the proceedings as well as to information requested and adopt an obligation for state authorities to cooperate and respond.<sup>38</sup>

In addition, the Commissioners lack real decision-making power as explained above. They may only release a statement on their legal assessment. Therefore, the Commissioners should be equipped with the competence to issue binding instructions on how the authorities should remedy their failures to comply

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34 For federal level, see § 12 (1) German Federal Freedom of Information Act (Informationsfreiheitsgesetz)

35 For the federal level, see § 25 Federal Data Protection Act (old version) (Bundesdatenschutzgesetz a.F.)

36 See the Report for Data Protection and Freedom of Information of 2021 by the Federal Commissioner, at p. 121.

37 See, for instance, legislative proposal for a Federal Transparency Law by civil society organisations, § 20 (2), available at <https://transparenzgesetz.de/gesetzentwurf.pdf>.

38 See, for instance, legislative proposal for a Federal Transparency Law by civil society organisations, § 20 (4), available at <https://transparenzgesetz.de/gesetzentwurf.pdf>.

with the freedom of information acts, and to enforce compliance by the authority.<sup>39</sup>

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

The Berlin Constitutional Court ruled that the election for the Berlin House of Representatives in September 2021 was invalid due to serious flaws.<sup>40</sup> These flaws were, inter alia, missing or copied ballots, temporarily closed polling stations and long waiting times amounting to delay in voting. The election will therefore be repeated on 12 February 2023. Until the new parliament is elected and constituted, the current parliament will continue its work. The decision by the Berlin Constitutional Court has been heavily criticised for not applying the yardstick established by the Federal Constitutional Court for the repetition of elections. Forty-three claimants have therefore lodged a constitutional complaint.<sup>41</sup> It remains to be seen how the Federal Constitutional Court will decide on the matter.

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

### ***Key recommendations***

- The tax law that is de facto regulating most civil society organisations in Germany must be reformed to allow and protect public participation and advocacy work of civil society organisations.
- As laid out in the coalition agreement, a law against digital violence, including the possibility to file for quick and effective injunctions against social media accounts, has to be adopted in order to provide a safe online environment for marginalised communities and civil society.
- The federal government needs to introduce effective safeguards against SLAPPs, by implementing the EU Commission's recommendation on strategic lawsuits against public participation, which is in force since April 2022.

### ***Regulatory framework***

The legal uncertainties concerning public participation and political activity of civil

39 See, for instance, legislative proposal for a Federal Transparency Law by civil society organisations, § 20 (5)(6), available at <https://transparenzgesetz.de/gesetzentwurf.pdf>.

40 <https://www.berlin.de/gerichte/sonstige-gerichte/verfassungsgerichtshof/pressemitteilungen/2022/pressemitteilung.1265423.php>.

41 <https://www.zeit.de/politik/deutschland/2022-12/berlin-wahl-wiederholung-klage-bundesverfassungsgericht>.

society organisations with tax-exempt status (public benefit organisations) have not been resolved,<sup>42</sup> although the coalition treaty stipulates a reform that would improve the situation of civil society organisations. In practice, there is currently no political momentum for the intended improvements and no further legislative reforms have been initiated.

At the same time, the federal and Länder finance ministries implemented a new administrative decree (*Anwendungserlass der Abgabenordnung*)<sup>43</sup> that increases the legal uncertainty of civil society organisations' tax exemption status in cases of significant political activity.

This increases the pressure on civil society organisations. Some have increasingly faced legal action and threats by political opponents aiming to prevent them from publicly expressing criticism and generally from continuing their advocacy work. Anti-democratic actors and the Alternative für Deutschland use the legal situation to intimidate unfavourable organisations.<sup>44</sup> They continue to publicly discredit non-profit organisations that work against right-wing extremism and demand that their tax-exempt status be revoked. They argue

that tax-exempt civil society organisations are not allowed to publicly criticise a political party or to identify right-wing extremist positions or antisemitism within the party, basing their arguments on the *Attac* case law of the Federal Fiscal Court.<sup>45</sup> Many civil society organisations withdraw from public debates because of the legal uncertainties, and because of the case law around the Federal Fiscal Code that only allows tax-exempt civil society organisations to engage in political matters if strictly necessary to pursue the activities included in the Fiscal Code.

The legal uncertainties also seem to have influenced administrative proceedings, which take unreasonably long and thus become an additional burden for some organisations. For instance, in the case of Demokratisches Zentrum Ludwigsburg, the civil society organisation waited for almost three years for a decision by the financial authorities on whether their tax status remains withdrawn, inter alia, on grounds of breaching the principle of neutrality by taking a clear stance against right-wing extremism, after the first announcement of withdrawal in June 2019.<sup>46</sup> The resulting financial insecurity threatens the very existence of such donation-based local

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42 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 12.; 2021 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 17.

43 Administrative decree on tax code application, published by the Ministry of Finance, 12 January 2022, 2022/0001873, p. 5 f.

44 See for example the case of "Fulda stellt sich quer".

45 Judgment of the Federal Financial Court of 10 January 2019, V R 60/17; Judgment of the Federal Finance Court of 10 December 2020, V R 14/20.

46 For further information, see: <https://freiheitsrechte.org/themen/demokratie/demoz.>

civil society organisations.<sup>47</sup> Furthermore, the loss of the tax-exempt status excludes civil society organisations from many sources of public funding – as one of the most common requirements of state-sponsored programmes or direct government grants is the status as a tax-exempt organisation, especially in the field of civil society subsidies programmes.<sup>48</sup>

Public participation and political activity for civil society organisations are further restricted because, according to the current legal situation, any organisation that is mentioned in the public reports of the internal intelligence services (*Landesämter or Bundesamt für Verfassungsschutz*) is automatically deprived of its tax-exempt status. This is due to a reversal of proof in the Fiscal Code (sec. 51 para 3 s. 2 AO), according to which, organisations – once mentioned in such a report – must prove that they are not extremist in order to uphold the tax-exempt status.<sup>49</sup> In addition, as the sources of the intelligence services are often confidential, the civil society organisations do not have access to the information on which the claims are being made and can hardly rebut it. The possibilities of legal protection are therefore extremely narrowed. This restrictive financing framework creates a chilling effect on civil society organisations that might prevent

financially less stable local organisations from engaging in public debates.

Such a chilling effect, as well as the generally sanction-like character of the tax law, may amount to an infringement on the right of civil society organisations to pursue political goals (provided that they do so using lawful and democratic means and provided that the aims advocated for are compatible with the fundamental principles of democracy), which is guaranteed to them as freedom of expression and freedom of association under Articles 10 and 11 of the European Convention on Human Rights (ECHR).<sup>50</sup>

### ***(Un)safe environment***

The freedom of assembly guaranteed by Article 8 of the Basic Law (*Grundgesetz*, GG) has been under immense pressure in Germany since the beginning of the pandemic. State authorities and the police have developed new standards for restrictions on the freedom of assembly – standards that could be applied in other crises. The executive relied on legal instruments (administrative decrees, general orders) to ban assemblies in general and not just in individual cases. Under these instruments, the right to freedom of assembly was suspended or restricted by authorities at an

47 For another case, in which the decision of the financial authorities took more than two years after the tax declarations was submitted, see <https://freiheitsrechte.org/pm-stellungnahme-changeorg/>.

48 The latest example of this is the draft of the democracy support act (*Demokratiefördergesetz*).

49 See for instance, the case of Vereinigung der Verfolgten des Naziregimes – Bund der Antifaschistinnen und Antifaschisten VVN-BdA, an association founded by Holocaust survivors.

50 See legal [analysis](#) by Prof. Dr. Dr. Wiater.

(until then) inconceivable rate. In the beginning of 2022, right-wing groups disguised demonstrations against restrictions imposed to fight the Covid-19 pandemic as “walks” to avoid the legal obligations for holding a demonstration. In several cities, these “walks” have been banned by local authorities through the use of general orders. The lawfulness of such bans was assessed differently by the courts.<sup>51</sup>

Recent developments have shown that the instrument of general orders banning public assemblies is and will be used by the executive in other contexts. By general order, the city administration of Munich has banned assemblies in connection with climate protests, in which participants glue themselves to the streets.<sup>52</sup>

## ***Attacks and harassment***

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

SLAPPs against journalists and other watchdogs have become an increasing challenge for civil society in Germany. A lack of awareness

in the public discourse and the lack of legislative safeguards against SLAPPs can result in serious consequences for affected persons or organisations.

In 2022, several SLAPP-cases were reported, mostly targeting journalists, activists and smaller NGOs. SLAPPs have been initiated both by non-state actors and by state actors. Individuals and smaller NGOs are particularly vulnerable to these abusive lawsuits. For such groups, the financial consequences of SLAPPs are especially severe, and in Germany, even a single SLAPP can often lead to financial ruin.

A worrying trend in 2022 has been the increase in SLAPPs from the right-wing sphere. Markus Haintz, a well-known right-wing lawyer, has issued cease-and-desist letters to numerous people for critical comments on twitter. Among those affected are lawyers,<sup>53</sup> politicians<sup>54</sup> and ordinary twitter users. Other right-wing actors have targeted journalists.<sup>55</sup> The claims often lack any legal basis. Haintz often tries to overpower the victims by initiating several court proceedings, so that a defence in court not only becomes time consuming but also entails a risk of high costs.

51 dazu einerseits BayVGH, Beschluss vom 19 Januar 2022 - 10 CS 22.162 -; andererseits VG Stuttgart, Beschluss vom 12. Januar 2022 - 1 K 80/22 -, juris, Rn. 42; see also <https://www.lto.de/recht/hintergruende/h/corona-spaziergaenge-versammlungsrecht-grundgesetz-allgemeinverfuegung-vg-duesseldorf-vg-neustadt-querdenker/>.

52 See <https://www.br.de/nachrichten/bayern/kleben-geht-nicht-wie-muenchen-das-versammlungsverbot-begrundet,TPXobYo>.

53 <https://www.volksverpetzer.de/querdenker/abmahnung-bank-haintz/>.

54 [https://twitter.com/haintz\\_markus/status/1504616036754243592](https://twitter.com/haintz_markus/status/1504616036754243592).

55 <https://www.volksverpetzer.de/schwer-verpetzt/update-klage-wodarg-fuellmich/>.

The above-mentioned cases point towards a structural weakness in the protection against SLAPPs in the German legal system: cease-and-desist letters are usually connected with costs that can quickly reach several thousand euros. In many cases, even completely unfounded cease-and-desist letters therefore threaten the existence of the company and have a considerable intimidating effect. Those affected are dependent on legal advice to assess the chances of a legal defence, which in turn is associated with considerable costs, which cannot be reimbursed. Therefore, those affected by abusive cease-and-desist letters (which are often a necessary step before initiating court proceedings) must bear high costs, either if they comply or if they (successfully) defend themselves against the abusive claim in court.

In 2022, climate activists were subject to unprecedented attempts by state authorities and policies to suppress sit-in blockages, although these actions are in general protected by the right to freedom of assembly. In Bavaria, climate activists have been taken into “preventive custody” for up to 30 days in several cases because they participated in peaceful sit-ins. According to the Bavarian Police Tasks

Act (*Polizeiaufgabengesetz*, PAG), those who – according to the authorities’ findings – are planning a criminal or administrative offence can be detained for up to 30 days; the detention can even be prolonged for up to two months.<sup>56</sup> The application of this provision, which was intended to prevent terrorist attacks, to peaceful protest by climate activists has been heavily criticised.<sup>57</sup>

In December 2022, the public prosecution department of Neuruppin even opened investigations against activists of the Last Generation for forming a criminal organisation.<sup>58</sup> In the course of this investigation, the homes of eleven activists in Leipzig, Munich and other Bavarian cities were raided.<sup>59</sup>

## **Online civic space**

### **Doxing**

In 2021, Sec. 126a of the German Criminal Code was amended to ensure that doxing and the publication of so-called enemy lists (lists of names of potential targets) is punishable. While this has been a positive development, there are several shortcomings:

56 Cf. Art. 17, 20 PAG.

57 See <https://www.tagesschau.de/inland/gesellschaft/praeventivhaft-klima-protest-bayern-101.html>; <https://www.sueddeutsche.de/kultur/klimaaktivismus-letzte-generation-1.5691480?reduced=true>; <https://www.zdf.de/nachrichten/politik/praeventivgewahrsam-gefaengnis-bayern-klima-proteste-100.html>; for a general discussion about the lawfulness of pre-trial detention under the Bavarian PAG see <https://www.sueddeutsche.de/bayern/bayern-klimaaktivisten-markus-krajewski-praeventivhaft-1.5693099?reduced=true> and <https://verfassungsblog.de/gewahrsam-als-letztes-mittel-gegen-die-letzte-generation/>.

58 Cf. § 129 Criminal Code (Strafgesetzbuch, StGB).

59 <https://taz.de/Ermittlungen-gegen-die-Letzte-Generation/!5902589/>.

Those so-called enemy lists are often published in the context of law enforcement and supplied with data by law enforcement. Additionally, there have not been transparent investigations into the (often right-wing) networks within law enforcement. Secondly, even though there has been an increase in the publishing and sharing of private data and enemy lists, especially targeting politicians, prosecution is lacking. Lastly, social media accounts doxing other people often use anonymous handles. Due to the legal framework and the required necessities for legal proceedings, it is often impossible to prosecute the person that published private data.

### ***Online smear and disinformation campaigns***

In recent decisions, the District Court of Frankfurt has ruled that social media platforms such as Facebook and Twitter must actively get involved in preventing the spread of false narratives and disinformation.<sup>60</sup> However, the court decisions may open doors to so-called upload filters and the use of sometimes unreliable and often discriminatory AI in the digital space. This can further harm digital spaces and the participation of marginalised communities in the online sphere, as reports in the past have shown that AI has put marginalised communities at a disadvantage.

### ***Attacks, threats and hate speech online***

Despite the increased awareness of digital threats and the necessity to sensitise law enforcement, digital violence and hate speech are often neither recognised as such, especially in combination with forms of discrimination, nor taken seriously or investigated by state authorities. While there are, formally, legal measures in place to defend oneself against digital attacks, in practice they are barely used due to a lack of trust, awareness, knowledge and access.

As outlined by the federal government in its coalition agreement, the planned law against digital violence might address some of the existing shortcomings; however, the government has not yet announced a timetable for the drafting and implementation of the law.

### ***Law enforcement capacity to investigate online threats and attacks***

According to the law to fight right-wing extremism and hate crime, law enforcement shall be sensitised and trained to recognise and investigate online threats and attacks, as well as discrimination online. However, since the adoption of this law in 2021, resources to train law enforcement have been scarce; a media report in May 2022 showed that police officers in different states in Germany do not take digital violence and online attacks seriously.<sup>61</sup>

60 <https://www.tagesspiegel.de/gesellschaft/prozess-um-hasskommentare-auf-twitter-kann-sich-der-rechtsstaat-noch-gegen-die-tech-riesen-durchsetzen-8915926.html>.

61 See [https://www.youtube.com/watch?v=Xdm8SG8\\_v0I](https://www.youtube.com/watch?v=Xdm8SG8_v0I).

The adopted act on the promotion of democracy (Demokratiefördergesetz) also addresses support structures for those affected by discrimination and extremism; while digital violence is not mentioned specifically, this is a significant development and a step in the right direction. Nonetheless, the planned law against digital violence should also address the funding of support structures, especially if organisations can file lawsuits for those targeted as well as on their account.

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

### **Key recommendations**

- The federal government needs to reform Sec. 201 of the Criminal Code to decriminalise the recording of police operations in public.
- The federal government must phase out border controls at the German-Austrian border, which are contrary to European law.

## **Systemic human rights violations**

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

#### *Police violence*

In 2022, a debate about German police violence and brutality was sparked by several police killings that took place in summer. Four people were killed in police operations within a six-day period in August 2022.<sup>62</sup> In most of the cases the police response was condemned as disproportionate.

Despite the on-going cases of police violence and the demands of civil society,<sup>63</sup> a coherent and effective network of independent supervisory bodies has not yet been established. While some federal states have made efforts to introduce respective complaint structures, in several ways these do not meet the requirements of ensuring independent, immediate, prompt and comprehensive investigations of police violence.

Cases of police violence almost never end up in court. One problem in this regard is the difficult state of evidence. Using video material as evidence involves significant legal risks. According to the case law of several district courts, it constitutes a criminal offence to record

62 Loick/Thompson, Die Polizei erschießt Menschen, die Mehrheit schweigt, 24. September 2022, DIE ZEIT.

63 See <https://www.amnesty.de/informieren/aktuell/deutschland-polizeigewalt-unabhaengige-untersuchungen-sind-unerlaesslich>.



police operations in picture and sound.<sup>64</sup> In many cases, the police confiscate the smartphone or camera or immediately file criminal charges because the recording of film with the accompanying audio is supposedly prohibited under Sec. 201 of the German Criminal Code. This is one of the reasons it is difficult to document unlawful police actions, which often amount to human rights violations, e.g. in cases of racial profiling.

Police violence is also a topic discussed within the context of dealing with climate activists/civil disobedience. To break up climate protests and get the protesters off the streets, police apply so-called pain-compliance holds or threaten their use even though it is heavily disputed whether this is lawful.<sup>65</sup>

### *Refugee rights*

Rising numbers of refugees have reignited the debate about their rights. In this regard, several practices affecting or violating human rights have been reported.

After crossing the border, German authorities often confiscate the mobile phones of refugees

to check their identity or to identify those who helped them flee.<sup>66</sup> It is known that Germany continues this practice (even though it was found to be unlawful by UK courts<sup>67</sup>); there are, however, no official nationwide or state-specific figures.

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

In April 2022, the Court of Justice of the European Union found that there should be – in principle – no border controls in the European Union. In a case concerning Austria, the CJEU ruled that border controls may only be reintroduced in the event of a serious threat to public order or internal security, and may only be limited to a period of six months and not extended at will.<sup>68</sup> Despite this clear ruling by the CJEU, Germany has continued its border controls at the German-Austrian border, which have been in place since 2015, thus clearly violating the requirements set out by the CJEU.<sup>69</sup>

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64 OLG Zweibrücken, Beschluss vom 30. Juni 2022, Az. 1 OLG 2 Ss 62/21; for a summary of the decision see <https://www.lto.de/recht/hintergruende/vh/olg-zweibruecken-1olg2ss-smartphone-aufnahme-polizei-einsatz-film-ton-201-stgb-straftbar/>.

65 See <https://www.lto.de/recht/nachrichten/n/debatte-gewalt-polizei-letzte-generation-schmerzgriffe-verhaeltnismaessigkeit/>.

66 See <https://netzpolitik.org/2022/deutschland-und-grossbritannien-beschlagnahme-der-handys-von-asylsuchenden-kann-rechtswidrig-sein/>.

67 See <https://netzpolitik.org/2022/grossbritannien-handybeschlagnahme-bei-asylsuchenden-war-unrechtmassig/>.

68 ECJ, Judgement Cases C-368/20 and C-369/20, 26. April 2022, available [online](#).

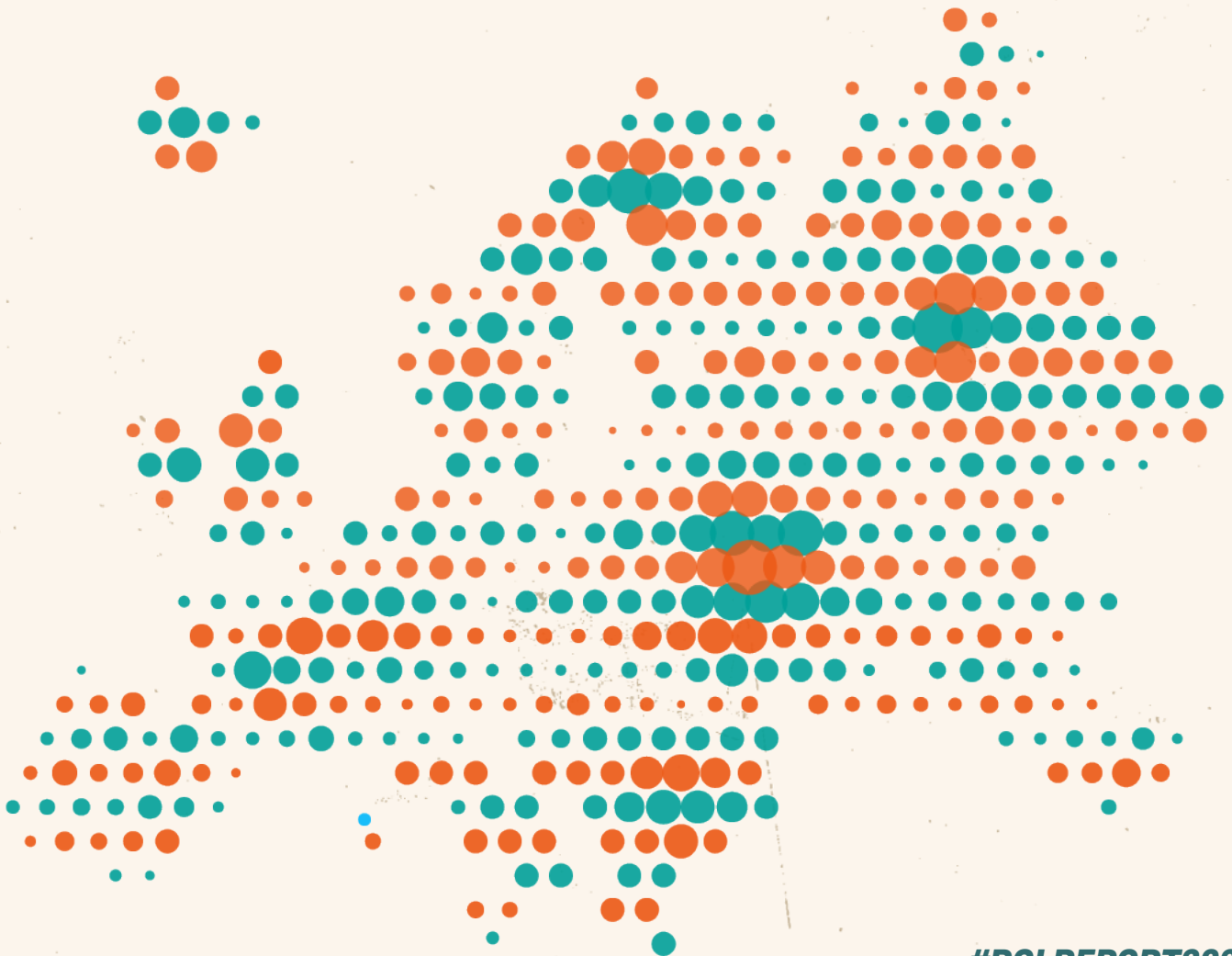
69 <https://www.investigate-europe.eu/de/2022/schengen-abkommen-eu-grenzkontrollen-illegal-eugh/>.

**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**HUNGARY**



**#ROLREPORT2023**

# HUNGARY

## About the authors



The Hungarian Civil Liberties Union is a human rights NGO. Since its foundation in 1994, the organisation has been working to make everybody informed about their fundamental human rights and empowered to enforce them against undue interference by those in positions of public power. HCLU monitors legislation, pursues strategic litigation, provides free legal aid assistance in more than 2,500 cases per year, provides training and launches awareness-raising media campaigns to mobilise the public. It stands by citizens unable to defend themselves, assisting them in protecting their fundamental rights. They are present at courts, national and international conferences, universities, in the capital and the countryside.

## Key concerns

Political pressure on judges, obstacles to the work of the Judicial Council, and reports of corruption and abuse of power involving judicial leaders have led to a deterioration of the justice system in 2022.

The European Commission's recommendations on the judiciary are completely the opposite of what actually happened in 2022. This is true both in terms of the strength of the role of the National Judicial Council and the exercise of the appointments and other administrative powers of the Curia, the Supreme Court of Hungary.

Although important changes have been made to the anti-corruption framework, there has been no reform regarding lobbying, nor has there been a comprehensive response to the revolving press phenomenon. While the rules on asset declarations have changed, effective monitoring and enforcement are questionable. Although there have been prosecutions in high-level corruption cases, the results are not yet visible.

Measures taken at the end of 2022 could help to improve the corruption situation in some areas. Never before have so many anti-corruption measures been adopted under the Fidesz government, although it is doubtful that they can bring about meaningful and systemic change.

Hungary continues to face serious challenges in the area of media freedom and pluralism and freedom of information. Although a law has been passed to facilitate access to information, other laws have undermined this. And the media situation remains largely unchanged in its propagandistic character; the takeover of

the Russian propaganda narrative has made this even more apparent.

There have been no improvements regarding the independence and efficiency of the media authority, public service media, or public advertising in line with the recommendations by the European Commission.

The perpetuation of a permanent special legal order, purportedly established to deal with the COVID-19 pandemic, and later with the war in Ukraine, continues to undermine the system of checks and balances and the separation of powers.

The level of hostility towards civil society organisations in 2022 was similar to the year before. There has been no substantive, positive change in the area of barriers affecting NGOs.

The permanent special legal order enables the government to disregard citizens' fundamental rights. The most important institution for the protection of fundamental rights, the ombudsman, has been downgraded by the Global Alliance of National Human Rights Institutions, mainly because of its inactivity.

## State of play

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

### Legend (versus 2022)

- ⬇ Regression
- No progress
- ⬆ Progress

## Justice system ⬇

### Key recommendations

- The Curia and the National Judicial Office should fill judicial and court management positions through regular and fair tendering procedures.
- The government should strengthen judicial self-governance by expanding the powers of the National Council of the Judiciary to counterbalance political influence on the judicial administration.
- Reports concluding investigations of corruption of judicial leaders must be made public by the judicial bodies in order to restore confidence in the work of the courts.

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## ***Judicial independence***

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In 2022, there were no substantive changes to the key policies and practices that undermined the independence of the judiciary. Thus, the appointment and selection of judges and court presidents, the transfers, dismissal and retirement regime of judges, court presidents, and the oversight of their promotion and practice remained substantially unchanged. Likewise, there have been no changes in the allocation of cases, but the status and powers of the National Judicial Council (hereinafter: NJC) remain problematic. This is not to say that the overall state of judicial independence has not deteriorated, as practices under these rules continue to erode it. The so-called super milestones set as a condition for payments from the EU Recovery Fund would go some way to restoring judicial independence, and therefore a positive change in the rules could be envisaged in the near future. What will be achieved and how the reforms will have a meaningful impact in practice will only become clear in 2023 and beyond.

### ***Political pressure on judges***

It would be difficult to measure whether and to what extent political pressure is exerted on the judges who adjudicate, so the best is to rely on the narratives of judges. However, judges rarely make such statements publicly, so very little reliable data is available. In 2022, in one of the most widely publicised statements,

a senior judge at the Budapest Metropolitan Court, and spokesperson of the NJC told the Observer that he and his colleagues on the bench “have been witnessing external and internal influence attempts” for several years.<sup>1</sup> He said that political overreach came from all sides of the political spectrum but his comments are an indictment of Orbán’s ruling Fidesz party, which has held a super-majority for much of its 12 years in power. One “clear internal influence attempt” he cited was a discussion among senior court officials and a prime suspect in a corruption case about firing the investigating judge or making life “uncomfortable” for them at work, according to redacted secret documents leaked to Hungarian media. The case centres on a Fidesz MP and former deputy justice minister who has been accused of accepting bribes – charges he denies. The lack of transparency in judicial appointments made by the president of the NOJ also raises concerns over nepotism, as relatively unqualified friends and family of well-connected politicians have taken senior posts in the court system. One former judge (who wished to remain anonymous) said the vast majority of cases proceeded fairly but politically sensitive matters would be heard in the Supreme Court by a “loyal panel of judges who will make decisions in favour of the government.”<sup>2</sup>

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1 [Viktor Orbán’s grip on Hungary’s courts threatens rule of law, warns judge.](#)

2 Ibid.

### ***Appointment practice and nepotism***

Every year, the NJC reviews and gives its opinion on the appointment practice of the President of the Curia, the Supreme Court of Hungary. András Zs. Varga's performance was reviewed for the first time this year. According to the unanimous opinion of the NJC members, Mr Varga Zs's actions in 2021 did not comply with the law. The evidence shows that Mr Varga Zs. was willing to circumvent the legal framework in order to fill important judicial positions, such as Curia judges and court leaders, with people who are close to the ruling party, as well as those who contributed to putting him in office. According to the law, the President of the Curia must, when evaluating the candidature, either appoint the judge ranked first by the Judicial Council or, exceptionally, with the express consent of the NJC, he may propose the appointment of a judge ranked second or third. In 5 of the 11 applications published in 2021, he did not initiate the appointment (or transfer) of the first-ranked judge. He did not even once approach the NJC to seek its consent to deviate from the ranking. In one case, he declared the fourth-ranked candidate the winner, which the law does not allow even with the NJC's consent. Importantly, the NJC's right to consent is one of the powers that give it real control over judicial appointments. Failure to give consent

is in itself a serious breach of the law. In addition, András Zs. Varga has also introduced an unforeseeable element in the evaluation of the applications, which has led to the outcome of some applications being decided not on the basis of objective and transparent criteria, but rather on the basis of a system of criteria arbitrarily set up by him.<sup>3</sup>

In June 2022, the wife of the President of the Curia was appointed to a senior judicial job despite getting fewer votes than her rival in an election held by judges. Helga Mariann Kovács, who is married to András Zs Varga, was appointed to lead a judicial panel dealing with politically sensitive cases at the Budapest court of appeal, although she had fewer than half of the votes of her rival candidate. Defenders of the decision argued that a vote by the judges is only an expression of opinion and does not bind the decision-maker.<sup>4</sup> The Curia argued that they had no role in selecting the person. The new order of case allocation also revealed that the panel of judges chaired by Helga Mariann Kovács would include Éva Kovács, the wife of the President of the Metropolitan Court of Appeal, who is also the sister of Zoltán Kovács, the Minister of State for International Communications and Relations in the Prime Minister's Office.

3 [Törvénybe ütköző bírói kinevezések a Kúrián](#) (Unlawful appointments at the Curia, Hungarian Helsinki Committee), 03.09.2022.

4 [A Kúria-elnök feleségét leszavazták, de a Fővárosi Ítéltábla elnöke szerint ettől még lehet tanácselnök](#) (The wife of the President of the Curia was voted down, but the President of the Metropolitan Court of Appeal says she can still be the President of the Council), 15.08.2022.

### ***Smear campaigns against judges***

In 2022, the statement in the Observer mentioned above led to the launch of smear campaigns by the government against judges in office and members of the NJC. In response to the statement in the Observer, Zsolt Bayer, a leading publicist for government propaganda, said: “Csaba Vasvári is a bastard who has no place on the bench. Get him out of there!”<sup>5</sup> A few weeks later, the government-controlled press demanded the resignation of judges who met the new US Ambassador to Hungary during a presentation visit. The campaign was joined by the President of the Curia, who said the judges had broken the law by meeting the ambassador. Overall, the smear campaign was designed to undermine the legitimacy of the NJC, which stands for judicial independence, and to send a signal to all sitting judges of what they could expect if they stood up for judicial independence.

### ***Operational difficulties of the National Judicial Council***

One of the most important problems currently facing the independence of the judiciary is that the legal framework governing the organisation and functioning of the NJC does not give them sufficient powers to supervise the activities of the President of the National Office of the Judiciary (NOJ). The NJC is not a legal person and has no direct legislative authority or consultation rights on legislative proposals affecting the justice system. However, the fact

that the current President of the NOJ does not question the legitimacy of the NJC and that the election of the alternate members of the NJC has taken place so that the NJC is now fully operational is a significant improvement on the previous situation. The current President of the NOJ is cooperating with the NJC, albeit only to the minimum extent required by law. Unfortunately, even cooperation at the legal minimum does not provide the necessary checks and balances.

Moreover, the limits of the NJC’s powers are, in practice, determined by the personal interpretation of the law by the respective President of the NOJ. For example, when the NJC wishes to carry out substantive control activities and investigate secondment practices, or the way in which rewards have been granted to court managers and the NOJ, the necessary document inspection is not allowed by its President. This prevents the NJC from effectively exercising its right of supervision. The President of the NOJ regularly argues in such cases, for example, that the NJC does not have the power to do so under the current legislation. However, the result of this is that the supervised entity’s interpretation of the law is what decides what is and is not within the powers of the body, in regards to supervising it. There is no legal forum to which the NJC can appeal against negative decisions of the NOJ President, and these cases therefore end up in disputes without merit.

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5 Kinek hol van helye? <https://badog.blogstar.hu/2022/08/20/kinek-hol-van-helye-/118428/>

For example, the President of the NOJ did not grant access to the files to the committee that was supposed to investigate the bonuses given to the judicial leaders appointed by the NOJ President. The President also refused to allow access to the files when investigating an extremely rampant practice of secondment that was significantly different from the original legislative intention. Nor did the President of the NOJ allow access to the file of the investigation launched against the head of the largest Hungarian court, Péter Tatár-Kis, the President of the Metropolitan Court.

### ***The Code Ethics for Judges***

In 2022, a debate emerged on the legitimacy of a code of ethics for judges. This dispute is an excellent example of the NJC's conflicts with the President of the Curia. On 2 March 2022, the NJC adopted the Code of Ethics for Judges as the first Code to be drafted by the NJC as a self-governing body of elected members of the judiciary. The Code is a result of a broad consultation process, and the NJC involved the entire judiciary in all processes, from the preparatory work on the Code, the drafting and commenting, until its adoption after the debate. The President of the Curia, the only non-elected member by the judges of the NJC, initiated a judicial review procedure before the Constitutional Court after his withdrawal from the process of drafting the Code (case no. II/01285/2022). The President

of the Curia criticised the fact that the NJC had drafted the Code without the proper authority, and the fact that the Code did not refer to the Fundamental Law. The motion has not yet been examined by the Constitutional Court.<sup>6</sup>

## ***Quality of justice***

### ***Access to justice***

Access to justice presents similar problems as expressed in the 2021 report. In many types of cases, the right of redress within the administration has been abolished, and can only be appealed immediately to the courts. This affects the ability of many disadvantaged people to enforce their rights, and still remains without any substantive change in this respect.<sup>7</sup>

### ***Increased remuneration of judges and prosecutors***

The increase in the salaries of judges and prosecutors, which was decided in 2019, was completed in 2022. The process brought the salaries of judges and prosecutors to the same level. In total (over the three years), the salary increase was close to 60 percent.

6 For our detailed position on the motion in Hungarian, see the [amicus curiae submission](#) of the HCLU, the Hungarian Helsinki Committee, the Eötvös Károly Policy Institute and the Amnesty International Hungary.

7 See the Hungarian chapter of Liberties' report on 2021.



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

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

From 1 January 2022, a new law allows litigants to obtain monetary compensation from the court in the event of an unreasonably long court proceeding.<sup>8</sup> The law was adopted in response to the ECtHR's frequent condemnations of lengthy civil proceedings. Case statistics for 2022 are not yet available, so it is not yet possible to judge whether the law has lived up to its expectations.

A separate amendment to the law was introduced to speed up freedom of information litigation as part of the response to the EU's requirements under the rule of law mechanism. The amendments to speed up trials were indeed timely. Litigation on data requests to ensure public access to data of public interest usually takes many months, if not years, to reach a final judgment. In many cases this has rendered the litigation pointless. The amendment has added procedural rules which will speed up the process. Specific procedural deadlines, set in days, and rules on the procedural steps to be taken were laid down. These rules should indeed reduce the potential for time delays in proceedings in cases starting in 2023. However, the amendment also included a rule with a slowing effect: holders of trade secrets may now intervene in a lawsuit in order to ensure that the data controller wins, which

is hardly conducive to a timely conclusion of public litigation or to the widest possible exercise of freedom of information.<sup>9</sup>

### ***Corruption of the judiciary***

One of the most important Hungarian corruption cases of 2022 concerned abuses between former Deputy Minister for Justice Pál Völner and the President of the Hungarian Association of Judicial Officers, György Schadl, which has reached some high-ranked court leaders. According to the investigation documents in the case, which have been presented to the press, Mr Schadl previously approached the President of the NOJ with a request to remove a judge from the bench. Instead of refusing the request, the President of the NOJ arranged a personal meeting with the President of the Metropolitan Court, Péter Tatár-Kis, who said that he "could not fire the judge, but could revoke his mandate as head of the team or make him feel uncomfortable at work." What makes the case particularly worrying is the fact that the President of the NOJ has kept the results of the internal investigation a secret. It is therefore feared that if they fail to clarify themselves, suspicions of impermissible entanglements will not only cast a shadow over their future careers, but could tarnish the entire judiciary. The report is currently the subject of a public disclosure lawsuit initiated by Transparency International. The case has been suspended by the court of first

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8 See also the Hungarian chapter of Liberties' 2021 Rule of Law Report.

9 <https://tasz.hu/allaspontunk-az-informacioszabadsag-szabalyozasanak-2022-oszi-modositasarol>

instance and is currently awaiting a decision by the data protection authority.<sup>10</sup>

## Anti-corruption framework

### Key recommendations

- The Hungarian government needs to undergo a fundamental change of mindset: it should internalise anti-corruption goals, rather than externalising them as a condition for access to financial resources. Furthermore, to achieve these goals, it should not undertake only sporadic anti-corruption measures, but should bring the entire organisation of the state and the exercise of power itself in line with these goals.

The so-called conditionality mechanism, the access of Hungary to the Structural Funds and the Recovery Fund, have in recent months brought particular attention to corruption in Hungary and its links to the rule of law. Many Hungarian experts, European decision-makers and EU Member States have assessed the situation in recent months, and as a result of intensive consultations, the Hungarian state has taken a large number of anti-corruption measures, drafted or amended legislation and started to implement it. Just a month ago,

decisions were taken on the adequacy and sufficiency of the Hungarian package of measures. Similar decisions are expected in the near future, while the Hungarian government is planning to take further measures to make available resources that are not yet available. The Hungarian anti-corruption framework is currently changing on an almost daily basis. Its evaluation, both as a whole and of its individual elements, is carried out on a daily basis too, both in Hungary and by the various EU institutions. The effects of 2022 events on the anti-corruption framework are all well known to the Commission, and could not be summarised in this report for reasons of limited space. Their assessment would be more superficial than the significance of these events would warrant. This is why, unlike other parts of this report, the following section focuses less on the specifics, such as the actions of the Hungarian state and their evaluation, and more on the context in a much shorter length than usual, and a more abstract analysis of the approach of the EU institutions and the Hungarian government.

### Levels of corruption

Hungary has already been identified by several domestic, European, and international organisations as having systemic corruption problems that are not primarily a problem at the level of everyday life, but at the highest levels of state decision-making. In Hungary, corruption is not a problem that can be eliminated

10 [https://hvg.hu/itthon/20221110\\_Peterfalvin\\_mulik\\_a\\_VolnerSchadlugyet\\_erinto\\_titkositott\\_OBHjelentesek\\_nyilvanosaga](https://hvg.hu/itthon/20221110_Peterfalvin_mulik_a_VolnerSchadlugyet_erinto_titkositott_OBHjelentesek_nyilvanosaga)

by individual measures, but a regularly used public policy instrument, an integral part of the system itself. The Prime Minister and the governing party use public funds as a matter of course to maintain and strengthen their own power, and regularly provide public funds to political and economic actors sympathetic to their cause, which therefore also helps them to maintain their power. Some individuals and families close to the government are getting rich at a dizzying rate. Corruption is at the heart of the political and economic system in Hungary, and the laws, the legal status and composition of state institutions, the law enforcement practices of institutions, and the economic set-up are all aligned with it, all of which serve to ensure that the level of corruption can be held or even elevated without disruption. Public opinion is also becoming accustomed to, rather than objecting to, or even assisting in, this staggering level of public corruption.

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

Under pressure from the European Union, the Hungarian state has adopted a number of anti-corruption laws and will adopt more in the near future. It is questionable how well these can be used to improve the situation in a deeply corrupt country like Hungary.

Even under the rule of law, legal guarantees are not always sufficient to solve social problems such as corruption. This is the case even when the state, at least in its public governance activities, is operating in accordance with the rule of law and when it is motivated by a sincere desire to eliminate corruption as a

systemic problem. But in a country where the rule of law and the fight against corruption are not the basis of government work, but is instead an externally imposed, anti-systemic expectation, legal guarantees designed to meet external constraints are most certainly not fit for their publicly stated purpose. In this context, it is highly revealing that the titles of the laws adopted in late 2022 state that they are being passed “to reach an agreement with the European Commission” and not to reduce corruption.

The anti-corruption laws adopted in the autumn of 2022 are a necessary but far from sufficient condition for any meaningful change in this respect, and for a significant reduction in the staggering levels of corruption criticised by the European Commission. The online Official Gazette of Hungary has no page limits, and as seen in recent years, its pages can take anything. Changing certain specific legal rules in a legal system that has been lacking guarantees regarding the rule of law for at least a decade is like dressing a reoffending criminal in new clothes and expecting him to become a law-abiding citizen. These specific legal norms that appear to be anti-corruption guarantees will remain just decorative elements of the legal system unless there is a fundamental change in the whole public and political system itself. Otherwise, the enforcement of anti-corruption norms will also be at the government’s beck and call. An independent and impartial judiciary, with independent and impartial judges, including on the Constitutional Court, is an indispensable condition for the enforcement of the rule of law. The conditions also include a prosecutor’s office that does not bow

to political will and a public legal aid service that is genuinely accessible to citizens, as well as the smooth and fearless functioning of civil society organisations and active citizens working for the rule of law. Independent authorities, which protect the fundamental rights of citizens and the rule of law in the abstract, must be genuinely independent and have the resources to operate. Moreover, public bodies must operate transparently and the press must be able to inform citizens freely from government influence on public affairs. Currently, none of these conditions are met, and the laws adopted do not promote or address these issues at all.

If there is a serious deficiency in any one of these areas, the measures presented by the Hungarian government to the European Commission are not a real barrier to the unscrupulous abuse of power. Their adoption legitimises sham measures.

It would also be important to change the mindset of the European Union institutions to achieve meaningful results. In the Hungarian situation, the problem is systemic, and therefore the solution can only be found at the systemic level. Identifying isolated problems or taking one measure at a time is not the answer. Although the Hungarian state can eliminate some of the problems identified by taking the required measures, it is doubtful whether this will affect the system as a whole. Indeed, taking a measure may prevent abuses from continuing in the same way as before, but, as the system is at its core an enabler, it is very easy to create another avenue for abuse. It follows that, while it is important for the EU

to identify the measures that the Hungarian state is required to take, it is also important to address them not only from the point of view of the institutions, procedures and powers, but also from the point of view of the results. In other words, examining and discussing the means per se is only half the job, and unfortunately very easy to circumvent. In this case, the fulfilment of the required measures does not prove that the objectives have been achieved. This would probably only be the case if both the Hungarian state and the EU had a mutual interest in achieving the anti-corruption goals. In this case, the measures taken (as a kind of indicator) would help to show where Hungary is on the road to achieving the objectives. The situation is fundamentally different: the Hungarian government does not want to achieve these goals, in fact it is explicitly opposed to doing so, and even disputes that the problems exist at all. Thus, as each indicator is met (also on the basis of decades of experience so far), it creates a situation where other measures must replace those that have just been taken. Concentrating only on the expected measures is therefore inappropriate in this situation for the EU to achieve its objective.

### ***Investigation and prosecution of corruption***

In Hungary, despite the level and volume of corruption, prosecutions of corruption offences are not common when high-ranking officials are exposed. In this light, what happened at the turn of 2021 and 2022 is particularly surprising. In one of the most serious government corruption scandals in recent years, Pál Völner, the now-resigned Deputy Minister

for Justice, was suspected of accepting bribes in the range of 10 million HUF in a series of abuses involving the Hungarian Chamber of Court Executives, which totalled hundreds of millions of HUFs. Investigations have been launched against a number of players, and the President of the Hungarian Chamber of Court Executors has been in pre-trial detention for more than a year (but is still the head of the organisation)<sup>11</sup> while the former deputy minister is still free. He was allowed to practise as a lawyer for months after his resignation, but has been barred from practising since October 2022 after he was charged by the prosecutor, and therefore suspended by the Bar Association (under a legal obligation).<sup>12</sup> The judicial phase of the criminal proceedings has not yet started.

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

### **Key recommendations**

- Parliament should restore the independence of the media authority by amending the law and creating a new media authority to replace the current one, so that it can fulfil its constitutional function of enabling a pluralist media system and fundamental rights.

To this end, it is essential that the leadership of the authority is selected on the basis of merit and not political affiliations, and that the composition of the body is not determined solely by a single centre of power.

- Parliament should limit the legal possibility to monitor journalists in order to protect journalistic sources, and provide journalists with better guarantees than at present to ensure that they have access to relevant information.
- A much more transparent and pluralistic media system, enforced by an independent media authority, should ensure that press freedom prevails and the near monopoly of government propaganda is disrupted.

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

The Media Council has existed in essentially the same form since 2010. It has regulatory functions, it decides on frequency tenders, selects public service media operators and carries out media monitoring. Parliament elects its president and members for a nine-year term. Since 2010, the Council has been composed exclusively of members nominated and elected

11 [https://hvg.hu/itthon/20221011\\_Schadl\\_vegrahajto\\_borton\\_elnok](https://hvg.hu/itthon/20221011_Schadl_vegrahajto_borton_elnok)

12 [https://hvg.hu/itthon/20221108\\_Mar\\_nem\\_dolgozhat\\_ugyvedkent\\_Volner\\_Pal\\_a\\_korrupcioval\\_vadolt\\_volt\\_al-lamtitkar](https://hvg.hu/itthon/20221108_Mar_nem_dolgozhat_ugyvedkent_Volner_Pal_a_korrupcioval_vadolt_volt_al-lamtitkar)

by the governing majority, as the governing party's two-thirds majority in Parliament did not approve any opposition candidates. The Media Council cannot, therefore, be considered independent by any standards.

The Media Council has a long history of making decisions favourable to the media interests of people close to the government while remaining silent, despite numerous moves to restrict the Hungarian media market severely and to shut down media critical of the government.

The Media Council is also unable to effectively scrutinise the compliance of state media with the standards of public service. A striking example of this is the way in which the Council assessed the presentation of news and fake news in the state media about Russian war aggression against Ukraine. Although the state media news programmes clearly adopted Putin's propaganda messages (see the section on public service media below), the Media Council's view is that it is not the activities of the public media (which it considers objective) but criticism of the activities of the public media that can be used to mislead and to inflame public opinion.<sup>13</sup> According to the HCLU and Political Capital, Hungarian public media channels use Russian propaganda as a source, while at other times they broadcast

Russian disinformation messages without criticism.<sup>14</sup> A complaint was lodged with the media authority about this, but no results were obtained.<sup>15</sup>

### ***Pluralism and concentration***

The current ruling party – which has held more than two-thirds of the seats in Parliament since 2010, with only minor interruptions, and therefore virtually unlimited power – has always treated the media as a crucially important factor of power. In their view, their electoral defeats before 2010 were largely due to their failure to put the media at their service. The almost unlimited power they gained in 2010 was therefore used from the outset to create their own media backyard. The media authority has been transformed into a body dominated exclusively by the ruling party. Many new media has been created, while others have been taken over through dubious business manoeuvres. Critical media have been closed down or starved by state advertising policy or have not had their frequency rights renewed, the public service media has been put at their service, and the originally independent newsrooms have been brought under central control. The culmination of this was the media concentration in KESMA in 2018, resulting in a significant part of the press being under its control. More recently, however, less attention

13 [https://nmhh.hu/cikk/227280/A\\_tajekoztatas\\_kolcsonos\\_feლოსsegerol\\_a\\_Mediatanacs\\_kozlemenye](https://nmhh.hu/cikk/227280/A_tajekoztatas_kolcsonos_feლოსsegerol_a_Mediatanacs_kozlemenye)

14 [https://www.politicalcapital.hu/pc-admin/source/documents/TASZ-PC\\_EC-complaint-PublicBroadcast\\_Russia\\_War.pdf](https://www.politicalcapital.hu/pc-admin/source/documents/TASZ-PC_EC-complaint-PublicBroadcast_Russia_War.pdf); [https://www.politicalcapital.hu/pc-admin/source/documents/WEB\\_Kozmedia\\_Orosz\\_haboru\\_tajekoztatas\\_20220316.xlsx](https://www.politicalcapital.hu/pc-admin/source/documents/WEB_Kozmedia_Orosz_haboru_tajekoztatas_20220316.xlsx)

15 <https://tasz.hu/a/files/Kozmedia-orosz-haboru-kozerdeku-bejelentes.docx>

and money has been devoted to traditional media, with a focus instead on the dissemination of propaganda messages on social media. This has also meant that a significant proportion of media outlets have been downsized or cut. This process is still ongoing.<sup>16</sup> This phenomenon is also important because no one imposes the same standards of content and quality on propaganda in social media, as was still the case with the traditional (written and electronic) media. In this sense, there is no need to bother with corrective statements, for example, which are very common in the government-controlled traditional press.

Although the ruling party's dominance in communication remains significant, data suggests that it may not be as far-reaching as many perceive, and the notion that voters are reached only by government propaganda is wrong. In terms of reach of the news programmes, the pro-government lead is only slight: RTL Klub's news programme is the most watched with 37% of the audience, followed by TV2's clearly pro-government *Tények* with 31%. State media news programmes are watched regularly by 19%, ATV news programmes, which are more likely to be in the opposition (although there is some uncertainty about

this recently), by 11%, and HírTV news programmes, which are part of the government media portfolio, by 5%.<sup>17</sup>

In the 2022 election campaign, TV2's reporters and newsreaders (as in 2018)<sup>18</sup> repeatedly urged people to vote in favour of Viktor Orbán. In 2018, the National Election Commission (NEC) imposed a fine of 11,000 EUR (3,450,000 HUF) on TV2. The case of 2022 is therefore significant: the management of TV2 had to realistically expect that the Election Commission would impose a fine again, and yet a pro-Fidesz campaign video was shot anyway. The expected fine was, therefore, not a sufficient enough deterrent to prevent TV2 from infringing the rules and to ensure that it complied with electoral procedure. This time, the video was shown on *tenyek.hu*, the channel's news website. According to the Media Act, employees of a media service provider who regularly contribute to news and political information programmes as presenters, newsreaders, or correspondents are not allowed to add opinions or evaluative commentaries - except for news commentaries - to political news in any programme published by the media service provider.<sup>19</sup> According to the NEC, however, *tenyek.hu* is an internet press

16 <https://telex.hu/english/2022/08/15/old-fashioned-government-media-is-being-gobbled-up-by-facebook-propaganda>

17 Zubor Zalán: Nem azért nyert a Fidesz, mert csak az ő médiája jut el az emberekhez - a kormánypárti médiafőlény igazi arca. *atlatszo.hu*, 2022.május17. És: REPUBLIKONINTÉZET: Médiafogyasztás Magyarországon Televíziós csatornák, hírportálok, közösségimédia <http://republikon.hu/media/98833/republikon-mediafogyasztas-21-06-28.pdf>

18 Herczeg Márk: 3,45 millióra bírságotlák a TV2-t, amiért a műsorvezetői nyíltan Orbánnak kampányoltak. *444.hu*, 2018.április10.

19 12. §

product, and therefore this section of the Media Act does not apply to it. The Curia rejected the request for review for lack of involvement of the applicant because “the statements made in the video were not about the applicant, nor were they specifically addressed to the applicant”.<sup>20</sup> The Curia’s decision is both worrying in terms of balanced and factual information in the media and the right to electoral redress.

### ***Transparency of media ownership***

In terms of political influence in media ownership, considering the continuous market-distorting effect of politics, concentration of ownership, the politically driven advertising market, and the lack of transparency in this area, it can be concluded that the findings of the 2021 report remain valid. There have been no significant changes in either positive or negative directions in 2022. What is significant, however, is that the governing party is increasingly shifting the focus of its communication from traditional to social media. Therefore, the importance of traditional media for government propaganda is diminishing.

### ***Public service media***

For many years now, the public (in fact, state) media have not even tried to create the impression that they are not a politically biased

media. This was evident in 2022 in the way it conducted itself during the election campaign, in its coverage of the Russian war against Ukraine, in the way it has been documented as producing media content commissioned by state leaders, and in its attitude to objective reporting.

### ***The electoral campaign of 2022***

A recurring issue throughout the campaign was the dysfunctional operation of the public service media, which, while providing mandatory airtime to nationally listed candidate organisations to present their programmes in line with their legal obligations,<sup>21</sup> failed to meet their legal requirements in other aspects. This was particularly striking in relation to the regular presentation of the government’s narrative and the stage given to its politicians, compared to the minimum air time given to the programmes and candidates of the other parties running in the elections. As an example, the six-party opposition candidate for Prime Minister only had five minutes of airtime to present his party alliance’s programme on the M1 news channel, while the speech of the current Prime Minister was broadcasted nine times<sup>22</sup> on the same channel on the very same day – within a 24 hour period on 15 March, a national holiday. It is also true that the six-party opposition did not make use of the

20 Kvk.VI.39.407/2022/4.

21 Ve. 147/A.§

22 Szalay Dániel: *Kiderült, hányszor ismételte meg 24 óra alatt Orbán Viktor beszédét az állami M1.* media1.hu, 2022.március17.



political advertising time allocated to them by law for the presentation of their programme.<sup>23</sup>

### ***War reporting and Russian propaganda***

The 2022 election campaign was largely dominated by the issue of the Russian military aggression against Ukraine. The state media repeatedly failed to meet the requirements of factuality and objectivity in their information programmes on the Russian war, which is a systematic violation of the relevant legal rules of public service information. On 24 February, the day the Russian-Ukrainian war broke out, M1 was still referring to the invasion of Ukraine as a “military operation.” In one programme, the head of the department of the state media dealing with foreign affairs repeated Putin’s narrative of special military operations and genocide in the breakaway territories. It was also in this programme that a poll conducted “a few months ago” showed that 75 percent of the Russian public would support a military conflict against Ukraine.<sup>24</sup> A security analyst, often featured in the government media, said on the day the war broke out that

the Ukrainian leadership was fooling around, and that Moscow could not tolerate Ukraine acquiring nuclear weapons. Another expert, speaking on public media’s radio, described Viktor Orbán’s narrative that the opposition wants war and the government wants peace.<sup>25</sup> This narrative was the main message of the election campaign. It is noticeable that the pro-Kremlin and anti-Ukrainian narrative is often told by not the reporters themselves, but the regularly invited experts and opinion leaders.<sup>26</sup> Dissenting experts are not invited, nor is this position otherwise countered. (Zoltán Lomnici, one of these experts, was accidentally revealed in 2019 to be an expert for the public media, who was given the text by the reporter who was preparing the material.)<sup>27</sup>

### ***Articles penned by public figures***

Although the public media should serve the objective and pluralistic information of the Hungarian public, and the media law states that the independence of the public media is “an indispensable condition for the proper functioning of the democratic social order”,<sup>28</sup>

23 Diószegi-Horváth Dóra: Több mint egy órányi lehetőséget hagyott ki az ellenzék, hogy ingyen reklámozhassa magát a közmédiában, lakmusz.hu, 2022. április 14.

24 <https://hirado.hu/kulfold/cikk/2022/02/24/szakerto-az-orosz-lakossag-haromnegyede-tamogatja-putyin-lepe-seit#>

25 The list of the most controversial statements was compiled by Political Capital: [https://www.politicalcapital.hu/hireink.php?article\\_read=1&article\\_id=2978#:~:text=kifog%C3%A1solt%20h%C3%ADrad%C3%A1sok%20list%C3%A1ja,-itt%20%C3%A9rh%C5%91%20el,-](https://www.politicalcapital.hu/hireink.php?article_read=1&article_id=2978#:~:text=kifog%C3%A1solt%20h%C3%ADrad%C3%A1sok%20list%C3%A1ja,-itt%20%C3%A9rh%C5%91%20el,-)

26 [https://politicalcapital.hu/hireink.php?article\\_id=2954&article\\_read=1&fbclid=IwAR2CU1nWL-hEOzqOKz7Qomfqv7QgLQl13rxtf81\\_0mCvDjgWAnZ8N7jwRhco&utm\\_source=pocket\\_mylist](https://politicalcapital.hu/hireink.php?article_id=2954&article_read=1&fbclid=IwAR2CU1nWL-hEOzqOKz7Qomfqv7QgLQl13rxtf81_0mCvDjgWAnZ8N7jwRhco&utm_source=pocket_mylist)

27 <https://24.hu/belfold/2019/01/14/kozmedia-propaganda-mtva-ifj-lomnici-zoltan>

28 Act CLXXXV of 2010 on media services and mass media (Media law) 6. §.

internal documents leaked in 2022 show the contrary. The national news agency, which is part of the public media, is subject to daily interference by the government, which distorts its news to suit its own political interests. The interests of government communication are pursued in several ways. Reports on Viktor Orbán's programmes are meticulously planned in advance, determining what he will be asked and what the emphasis should be. National news agency correspondents are often instructed via phone by ministry press officers on how to write a piece, sometimes even dictating the headlines. Government departments' press releases have to be published practically verbatim, as do those of Opus Global, Lőrinc Mészáros's stock exchange holding. In the National News Agency's collection of public press events, most of the programmes of pro-government politicians are deliberately omitted, so that the non-friendly press cannot report on them.<sup>29</sup>

### ***Obligation to provide objective information***

For years, the propaganda media have been trying to destroy the credibility of organisations critical of the government by telling lies. As recently as 2018, a pro-government organisation lied about an NGO at a press conference in front of the NGO's office. The state media were involved in the dissemination of these lies, and the Curia ruled that this was not in line with its legal obligations. According to the

Curia, the public media should have checked before publishing the recording whether it contained any false statements that could be offensive to the Shelter Association. In 2022, the pro-government state media appealed to the Constitutional Court arguing that, as the press, it is not its duty to provide objective information: it does not have to check the truth of what is said at a press conference or counter it with a statement by the person concerned. They may even present facts that are manifestly untrue, if they are not stated by them but by the person holding the press conference. They argue that expecting them to check sources and question the other party would in effect introduce censorship into the system. In a 2022 decision, the Constitutional Court stressed that "information on matters affecting communities must always present opposing views, thereby enabling the public to make informed choices on the issue under discussion." According to the Constitutional Court, the exercise of freedom of the press does not in itself extend to the publication of false information, and indeed one of the main responsibilities of journalists is to verify the authenticity of the news and information they publish.<sup>30</sup>

### ***Online media***

In the past year, there has been a major rationalisation of the traditional media dominated by the governing party. At the same

29 This is detailed in a report published by the investigative news portal Direkt36: [Leaked documents show how Orbán's circle dictates the news at Hungary's state news agency.](#)

30 3350/2022. (VII. 25.) AB

time, pro-government content has started to spread like wildfire, first to Facebook, then to Instagram, and more recently to TikTok, which are being pushed with a lot of money in order to achieve greater reach. Hungarian internet users are constantly coming across pro-government propaganda on YouTube and Facebook. To a lesser extent, this comes from the government itself or the party, so it is known what is being seen and who is funding it. But there are more and more actors about whom it is difficult to say at first glance exactly who they are and why they are 100% conveying pro-government messages. The best known brand of the project is the Megafon Centre, which runs social media infomercials, and which spends virtually unlimited advertising money on these platforms, spending more than a billion forints in the first three months of 2022 on Facebook alone.<sup>31</sup> What's interesting is that leading government politicians regularly claim how Facebook is biased in a "liberal direction" and that Christian, conservative, right-wing opinions are generally restricted on social media. Megafon's influencers also regularly complain about Facebook's moderation practices. Paradoxically, it is this platform that has become the most effective tool of government propaganda in this country.<sup>32</sup>

According to the Freedom of the Net 2021 report from Freedom House, Hungary's freedom index declined for the third year in a row, and the status of internet freedom of the country declined from Free to Partly Free. The reason behind the last decline reflects the events related to the anomalies experienced during the opposition primary elections in September and October 2021, when cyberattacks from unknown sources plagued electronic voting systems and independent news outlets.<sup>33</sup>

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

Trust in various media platforms and outlets is highly dependent on the audience's political views. According to the Reuters Institute's Digital News Report 2022,<sup>34</sup> the overall trust in news is extremely low, at 27% (-3% from the previous year). At the same time, 47% have trust in media they regularly use. Only 11% pay for online news. Only 15% think that media are independent from undue political or government influence, and also from undue business or commercial influence. The two independent outlets, HVG and RTL Klub, are again the most trusted brands, with the independent online brands Telex and 24.hu slightly ahead of the more widely used index. State-funded broadcaster MTV is one of the

31 <https://telex.hu/belfold/2022/03/28/ujabb-alomhatart-ertunk-el-egymilliard-forint-felett-a-megafon-face-bookos-reklamkoltese>

32 <https://telex.hu/english/2022/08/15/old-fashioned-government-media-is-being-gobbled-up-by-facebook-propaganda>

33 <https://freedomhouse.org/sites/default/files/2022-10/FOTN2022Digital.pdf>

34 <https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2022/hungary>

least trusted brands, with less than a third of respondents trusting their news.

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

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The GDPR continues to be misused by those with economic and political power, as well as by the data protection authority, to prevent factual articles from appearing in public affairs. The court cases mentioned in last year's report are still pending.

The Pegasus cases, which were partly used to target journalists for surveillance and were reported on in detail in last year's report, remain inconclusive, with a number of court and administrative proceedings pending. The most important lesson remains that Hungarian law does not provide the necessary guarantees for the protection of journalistic sources in the field of secret surveillance. In early 2022, the Data Protection Authority finally issued its report on the case, which concluded that the secret services were fully compliant with the laws specifically imposed on them.<sup>35</sup> The authority only examined whether the surveillance carried out by Pegasus complied with the law and whether the legal basis for the surveillance was always fully in place – even though the infringement lies precisely in the

fact that the regulation of the surveillance is impartial, and its order is the responsibility of the politically committed Minister of Justice. In a genuine, substantive investigation, the authority could not have ignored the fact that the Hungarian legislation has already been ruled by the ECtHR to be systematically unlawful. Nor could a real investigation have dealt with the fact that journalists (and other groups particularly sensitive to surveillance) are not subject by law to special rules that impose stricter limits on surveillance than anyone else. Indeed, in the case of journalists, it would be particularly important that an independent body authorises surveillance, as their sources could easily come to light, thus jeopardising the protection of said sources, which is a fundamental condition of press freedom. This aspect is not even mentioned in the report. The authority's misrepresentation of its role was most clearly demonstrated by the fact that it considers it necessary to prosecute those who exposed the Pegasus scandal. It would sanction those who had drawn attention to the abusive surveillance, rather than taking action against the abuse itself. It wants to punish journalistic sources in a case that is precisely about the lack of protection of journalistic sources.<sup>36</sup>

In 2022, there was also a smear campaign against journalists, together with the defamation of independent NGO staff. Fake job

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35 <https://www.naih.hu/adatvedelmi-jelentesek/file/486-jelentes-a-nemzeti-adatvedelmi-es-informaciosz-abadsag-hatosag-hivatalbol-inditott-vizsgalatanak-megallapitasai-a-pegasus-kemszoftver-magyarorszagon-torteno-alkalmazasaval-osszefuggesben>

36 <https://ataszjelenti.444.hu/2022/01/31/peterfalvi-pegasus-jelentes-csak-arra-bizonyitek-hogy-nem-tudja-megvedeni-az-embereket-a-rendszerszintu-jogsertesektol>

advertisements were published, followed by online interviews with candidates, where manipulative questions and a few bogus interviews were conducted. In these, manipulative questions and a few convoluted sentences were used to create a situation where those involved were proving the government propaganda's long-rumoured claims about the interconnections between independent NGOs, the independent press, and the foreign media's hostility to the Hungarian government. Propaganda videos leaked under cloudy circumstances swept across pro-government media, with the content being picked up by government communications executives.<sup>37</sup>

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

Despite the fact that in the 1990s Hungary was among the leaders of Eastern European countries in terms of freedom of information regulation and practice, in recent decades this edge has not only disappeared, but has been reversed. In Hungary, access to public data is currently very difficult, and the functioning of public authorities is difficult for the press and the public to control.

#### ***Deadlines for responses***

Throughout 2022, a special legal order was in force, during which it became very difficult to get data of public interest. The time limit for responding to requests for public interest

information under this special legal order was subject to a special government rule. Public bodies performing public functions had to respond to requests for public interest information (only to respond, not to fulfil them) within 45 days, which may be extended by a further 45 days. This time limit is in stark contrast to the 15-day time limit (which may be extended by 15 days in justified cases) under the Freedom of Information Act. Furthermore, public bodies were allowed to claim that responding to the request for information in a shorter time would jeopardise their specific tasks and workflow due to the emergency. This has led to the arbitrary practice whereby data controllers routinely used the possibility of an extension without any substantive consequences, without even fulfilling the constitutional requirement set out by the Constitutional Court that the extension must be factually justified. This provision, which significantly extended the deadline for responses, was in force until 31 December 2022.

#### ***Challenging enforcement of the law***

In litigation for access to data of public interest, the delaying actions of data controllers often render litigation completely pointless. Data controllers may change their reasons for refusing access at any time during the litigation, and they tend to exhaust all remedial mechanisms even in clear situations where their only point is to delay the proceedings. Experiences show that public sector bodies do

37 <https://atlatszo.hu/kozugy/2022/02/06/mutatjuk-kik-es-hogyan-csinaltak-az-ujsgirokat-lejarato-interjukat-a-fidesz-kampanyhoz/>

not necessarily disclose data even after a final judgment. The current legal environment does not provide effective enforcement mechanisms in case a public sector body does not execute a judgment requiring it to disclose data.

### ***Amendment of the freedom of information rules***

In order to reach an agreement with the European Union, at the end of 2022 Parliament amended the rules on the guarantees of freedom of information as part of the fulfilment of the conditions set out in the rule of law mechanism. These amendments were partly in response to real problems and are likely to be effective solutions to them. Indeed, changing the procedural rules for litigation for the access of public data may be able to speed up proceedings from 2023. Furthermore, the amendment also removes the possibility for public bodies to make the disclosure of public interest information subject to the payment of arbitrary and high fees. In these areas, the legislation is likely to contribute to better access to data of public interest. However, the amendment also contained some pseudo-measures. One such measure is the creation of the Central Public Information Register, which adds nothing of substance to the current rules on disclosure, and leaves the obligation to disclose data legally unenforceable. The amendment leaves many problems untouched. Overall, although the amendment

contains some forward-looking elements, it is not capable of improving the poor state of freedom of information on a systemic level.<sup>38</sup> It is striking that not only was there no public or professional debate prior to the amendment, but the results of the research carried out by the National Authority for Data Protection and Freedom of Information, with 100% EU funding (circa HUF 1 billion), on the subject “Mapping the domestic practice of freedom of information and increasing its effectiveness”<sup>39</sup> were not even used for the amendment.

### ***New barriers to data accessibility***

Since 2020, partly due to the significant risk of corruption and partly because the epidemic has had a significant impact on everyday life, there has been a lot of interest in data related to the management of the COVID epidemic. However, the data was very difficult to access, even after successful litigation, when they were often not disclosed by the public bodies obliged to do so. In 2022, the government, using its extraordinary power in the special legal order, introduced new restrictions on the accessibility of such data. Data controlled by the “Operative Board”, which plays a central role in epidemiological control, was classified ex lege as “data supporting future decision-making” (whether or not it is such), thus creating a legal basis for refusing requests for access to them.<sup>40</sup> Court proceedings are currently under way to establish the illegality of

38 <https://hclu.hu/en/position-freedom-of-information-act-hungary-2022>

39 KÖFOP-2.2.6-VEKOP-18-2019-0000

40 Government Decree 356/2022 (IX. 19.)

these rules, but in the current institutional and legal context the outcome is highly doubtful.

## Checks and balances –

### Key recommendations

- The government must stop making the special legal order permanent and stop abusing the legislative power granted by it.
- Independent bodies must operate in accordance with their constitutional mandate and the constitutional principle of separation of powers. Instead of supporting the government's interests, it must limit and counterbalance its powers.

### Process for preparing and enacting laws

2022 was the second year in a row that the country was under a state of emergency for the entire year (all 365 days). At the beginning of 2022, the country was under a state of emergency due to the COVID-19 pandemic, which was replaced by a state of emergency due to the Russian aggression against Ukraine. This required an amendment to the Constitution, which was accepted without any obstacles. All of this makes it safe to say that in Hungary, the special legal order has become the new

norm and the temporary situation has become permanent.<sup>41</sup> In this situation, the system of checks and balances and a separation of powers are not actual requirements.

While under an official State of Danger, the government has more room for manoeuvre than usual, because it can deviate from acts of Parliament by decree, and it can also restrict or suspend the exercise of fundamental rights to a greater extent than is generally acceptable. The State of Danger is a special legal order, which means two things. Firstly, it is a legal order. It is not a state outside the law, and the government cannot act without limits, but rather within the limits set by the Fundamental Law. On the other hand, it is special. The State of Danger should not be the “new normal”, and it should not become the normal framework for the exercise of public power. With the end of the pandemic, when many of the restrictions were lifted, the government decided to maintain the special legal order in order to preserve the government's ability to act – although the government already has almost unlimited power with a two-thirds parliamentary majority.

The question arises why the government needs this special power. First, the State of Danger is convenient for the government. Even with the currently available and extremely limited room to manoeuvre of the opposition, there are debates in Parliament — and no legislation without parliamentary debates. But as long as the emergency remains, it is enough

41 [Are Orban's Covid powers now the 'new normal' in Hungary?](#) By SANJAY SETHI AND EMESE PÁSZTOR

to convene a cabinet meeting and the next day the adopted decree can be promulgated; there is no need for “unnecessary” rounds in Parliament.

Secondly, the State of Danger means safety for the government. During an emergency, there is the potential for the government to freely restrict almost any fundamental right. For example, if a suspected corruption case around the Operative Board comes to light, access to data can be restricted in a day, as happened. In the event of an anti-government protest forming, a total ban on assembly can be reimposed at any time during an emergency, so the government can decide when it is convenient for people to protest. Teachers’ right to strike was essentially ended by a decree when the teachers’ walkout was organised. A state of emergency puts the government in a position where it can respond to any political situation with an immediate restriction of fundamental rights.

Thirdly, 2022 was an election year. In the election campaign, the declared State of Danger presented voters with the image of a government that is doing what it needs to do, while the opposition is arguing and creating confusion. The Prime Minister issues an order, and the promulgation of a decree via Facebook (which has become a practice in recent years) is a way of constantly communicating to the electorate that the government is in control, even when, in its own estimation, there is no situation to control.

Finally, there is nothing special for the government in this constitutionally special situation.

Usually, government decrees are passed in front of a camera. Now, government meetings are neither minuted nor audio-recorded, and there is no mandatory public consultation. In the emergency situation, the legal situation coincides with reality: both the legislative and executive powers belong to the government, and Parliament no longer has to be involved in the exercise of these powers as a decorative ornament.

### *Independent authorities*

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In Hungary, there is no change in the fact that there can be no truly independent authorities in a system in which the rules of status and competence, the appointment and removal of leaders, and the financial and technical resources are all dependent on a government having a two-thirds majority in Parliament. On paper, there is a constitutional court, an ombudsman, a data protection authority and many other institutions that exist in constitutional states and are seen as guarantees of constitutionality and fundamental rights, and the rules governing their status appear to include guarantees of independence. However, since the members or leaders are put in their positions by the will of the governing parties (there is virtually never any need to negotiate with the opposition or other branches of power independent of the government about the persons), or the guarantees can be removed at any time, they do not act as real limits on the power of the government. In 2022, an excellent example of this was the way the data protection authority closed its investigation into the Pegasus surveillance case - see the section on the safety of journalists.



The only institution that shows signs of functioning independently, and correspondingly has conflicts, is the National Judicial Council (NJC), whose members are not mandated by the government's grace. However, lacking the resources and powers to carry out their functions, this body also finds it difficult or impossible to fulfil their constitutional role.

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

The problem of judicial review of administrative decisions, which was reported last year, remains that it is primarily able to provide redress for procedural problems, but less so for substantive infringements. Administrative courts are less suitable for redressing substantive violations. This is supported by the fact that judicial review can lead to a mainly cassatory result. The possibility of the court reversing a decision found to be unlawful is exceptional.

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

### ***Key recommendations***

- The law allowing audits that harass NGOs should be repealed by the National Assembly, and the procedures launched by the State Audit Office should be terminated.

### ***Regulatory framework, attacks, and harassment***

After the European Court of Justice ruled in 2020 that a law that labelled certain NGOs as foreign-funded organisations was unlawful, the government passed a new law in 2021 to cover NGOs “capable of influencing public life.” This law gave the State Audit Office (SAO) audit powers as a new actor (for a critique of this, see last year's report). A month after the 2022 elections, the SAO saw time to apply the new law: it started auditing NGOs that could influence public life. Although the first control steps were not followed by others, it was a clear sign that the Hungarian state was still not giving up on harassing critical NGOs.

In May 2022, the SAO sent out electronic letters to CSOs about launching the audits. It was not exactly known how many CSOs received this notification, and it was not even clear whether all “non-governmental organisations engaged in activities capable of impacting public life” (i.e., whose annual balance sheet total in a given year amounts to at least 20 million HUF) received it or not. But all of the CSO partners of the author of the present report, whose annual balance total is above 20 million HUF, received the letter, regardless whether or not they receive public funds, and it is known that at least one GONGO, the Civil Union Public Benefit Foundation (CÖF, the organisation that organises huge pro-government rallies) whose total balance is far above 20 million HUF, and who receives almost only public funds indirectly, hasn't received

the letter, according to a journalist who just asked them.<sup>42</sup>

According to the data received from other CSOs, all of them had to upload the same set of documents, primarily on the organisation's own internal regulations, accounting, financial management and other regulations on the accounting policy, the internal regulation on the inventory of assets and resources, regulations for assets and liabilities, on financial management and the rules of handling invoices. The SAO letter stated that the list of the requested documents may be extended to include additional documents if they are needed to carry out the SAO's task. There was no information at that stage about how the audit was intended to be continued. The submission of these documents faces technical difficulties; it took almost a workday to upload them to the servers of the SAO for most of the organisations.<sup>43</sup>

Surprisingly, some days later, the SAO issued a press statement in which the SAO tried to clarify its position:

“So this is not yet an audit by the SAO itself. We are now in the preparatory phase of the audit, which will support the head of the audited organisation in reviewing whether

the fund is compliant. On the basis of these documents, the SAO will prepare an assessment and provide feedback to the leaders of the organisations providing the data, as a kind of mirror of what is in order and what is missing. After all this supporting preparation, the actual audit will be launched, based on the 2021 report. Those concerned will be notified separately and will have the opportunity to make improvements either immediately or as part of an action plan, while the audit is still in progress.”<sup>44</sup>

Since this statement was published, no information about the continuation of these processes has become available.

### ***Attacks and harassment, online safety***

In February 2022, a series of actions made by secret services to discredit journalists, NGO workers and other professionals were made public. It was very similar to the Black Cube operation to discredit NGOs just before the 2018 elections.<sup>45</sup> In this case, in 2020/2021, unknown individuals approached several professionals with fake job offers and requests for advice. During online job interviews with them, these unknown persons introduced themselves using fictitious names, asked the

42 <https://444.hu/2022/05/30/az-asz-meg-a-serult-gyerekekkel-foglalkozo-civileket-is-vizsgalja-a-kozelet-be-folyasolasa-miatt-de-a-cof-ot-nem>

43 See for example the experiences of DrugReporter: <https://drogriporter.444.hu/2022/05/27/7-oranyi-meditativ-zene-az-asz-civil-vizgalatahoz>

44 <https://www.asz.hu/hu/sajtokozlomenyek/mindent-a-civil-szervezetek-ellenorzeserol>

45 [https://index.hu/kulfold/2018/07/12/kormany\\_black\\_cube\\_megbizo/](https://index.hu/kulfold/2018/07/12/kormany_black_cube_megbizo/)

victims of the smear campaign guided questions, and recorded the conversation. The recordings were edited, sometimes mistranslated, and presented in an inappropriate way. These recordings were useful for articles in the government mouthpiece Magyar Nemzet and for Fidesz's election campaign. In the background of the story emerged an alleged Middle Eastern billionaire and his representatives, who through the fraudulent job advertisements came into contact with several Hungarian or Hungarian-related professionals in the course of their work. Magyar Nemzet, the journal close to the Hungarian government, twisted the interviewees' words and took them out of context to write discrediting articles that fit into the Orbán government's "Soros campaign." The Magyar Nemzet articles, based on the recordings, were published in the pro-government press at an astonishing rate, and were immediately shared by other friendly Hungarian and foreign portals, newspapers, blogs with shady backgrounds, political influencers and some members of the government. The Hungarian state media also participated in the dissemination of the defamatory articles.<sup>46</sup>

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

### Key recommendations

- The misuse of special powers granted by the special legal order to restrict fundamental rights should be stopped.
- The Ombudsman should fulfil his role and discharge the duties deriving from his function as a defender of rights.

### Systemic human rights violations

The maintaining of the special legal order, which is becoming permanent, as described in the chapter on checks and balances, relativises fundamental rights and in fact makes them irrelevant. In a non-exceptional legal order, fundamental rights could only be restricted by law, and the extent of the restriction could only be strictly necessary to achieve a specific legitimate aim (which could be the exercise of another fundamental right or the protection of a constitutional value), proportionate to the aim pursued and while respecting the essential content of the fundamental right. However, in

46 The most detailed coverage of what happened was provided by the investigative portal Átlátszó: <https://atlatszo.hu/tag/lejarato-kampany/> and [https://atlatszo.hu/kozugy/2022/03/24/\\_\\_\\_trashed-9/](https://atlatszo.hu/kozugy/2022/03/24/___trashed-9/)

Hungary – with some interruptions – a special legal order has been in force since 2020, under which the exercise of fundamental rights (with the exception of some fundamental rights) may be suspended or restricted beyond the limits of necessity and proportionality, and this may be done by a decree issued by the government.

There have been a number of examples of fundamental rights being curtailed by order in recent years. For example, in early 2023 the government, under its special legal order powers, promulgated an order under which teachers can be dismissed by extraordinary dismissal (with immediate effect and without severance pay) not within 15 days of becoming aware of the circumstances giving rise to the dismissal (as anyone else could be in Hungary), but rather at any time up to 1 August in the academic year.<sup>47</sup> The decree (according to its explanatory memorandum) is not even secretly a reaction of the government to the strikes and civil disobedience actions, which protested against its education policy and the measure that has emptied teachers' right to strike. The government is thus making the possibility of sanctions for protesting much more flexible, making the existential insecurity of protesting teachers much more burdensome, and at the same time making its own situation easier by not having to find other teachers to replace those who have been dismissed, which is otherwise used as a disproportionate sanction. The government has done this on the grounds of nothing other than the state of emergency because of the war in Ukraine.

Such decrees obviously make political expression more burdensome, far beyond the bounds of proportionality. Fundamental rights therefore do not limit the power of the government, because similar decrees can be issued at any time in the special legal order that has now become permanent in Hungary.

In the meantime, the most important institution for the protection of fundamental rights is not functioning properly in Hungary: the Commissioner for Fundamental Rights remains invisible to the public, and he does not speak out against government measures that violate fundamental rights. The decision by the Global Alliance of National Human Rights Institutions to reclassify the Hungarian human rights state institution from category "A" to "B" formally removed it from the prestigious club of ombudsmen that can be taken seriously in 2022. The reasons include the failure of Kozma Ákos, the Commissioner for Fundamental Rights, and his office to adequately address a range of human rights issues, including violations against vulnerable ethnic minorities, LGBT+ people, refugees and migrants. It has failed to protect civilians, press freedom and the independence of the judiciary. It has not referred politically sensitive issues to the Constitutional Court.

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47 Government Decree 4/2023.

## **Fostering a rule of law culture**

### ***Efforts by state authorities***

There are no honest initiatives by state authorities to foster a rule of law culture in Hungary. The requirement of the rule of law in the narrative of the state authorities is an external constraint, currently imposed on the Hungarian state by the European Union, which blackmails it by withholding development and the recovery funds, as well as other EU financial resources. And civilians and other professionals defending the rule of law have in fact been portrayed for many years as actors working against Hungarian interests.

### ***Contribution of civil society and other non-governmental actors***

There are two very important events from 2022 to highlight in this section.

In 2022, Hungary witnessed the rise of an unprecedented civil coalition to monitor and promote the fairness of the elections. Although Hungarian electoral rules do not allow for civil observers to monitor the work of the ballot counting committees, tens of thousands of people took advantage of the fact that opposition candidates and parties were unable to provide sufficient numbers of ballot counting delegates, to participate in the

voting process in their free time away from their homes, and thus exercise control over the process.<sup>48</sup> Civilians could only do this as party delegates, within the limits of Hungarian law, and accepted to even become delegates of a party they did not like. The activists had previously attended training sessions to learn how to recognise the most important abuses and how to take action against them. In addition to the civilian work in the polling stations, hundreds of volunteers outside the polling stations monitored, documented and reported voter manipulation, vote buying, chain voting, and organised the transfers of voters. Their work was supported by lawyers on the ground, who also ran a legal helpline available throughout the election day to assist those who had been extorted, threatened, bribed and those who had witnessed such incidents.<sup>49</sup> This kind and level of civic activism around elections had never been seen before 2022.

The other case also concerned not just the election, but also the referendum held on the same date. The Hungarian government, in order to stir up homophobic and transphobic sentiments, initiated a referendum to retroactively justify the legitimacy of its homophobic propaganda law adopted in 2021. This referendum was later – after the amendment of the laws preventing it – scheduled for the day of the parliamentary elections. A campaign to invalidate the referendum was launched, organised by Amnesty International Hungary and the Háltér Society, with the participation of 12

48 See <https://szamoljukegyutt.hu/> and <https://www.20k.hu/>.

49 See in detail: <https://www.cka.hu/tiszta-szavazas-osszegzese/> The HCLU participated in this coalition.

other NGOs. According to the campaign, the only answer to an invalid question is an invalid answer. Never before had such a successful campaign been carried out by NGOs: they managed to ensure that the referendum was invalid by casting 1.7 million invalid votes against approximately 3.8 million valid votes. This means that their message, against the government's unlimited communication resources, managed to reach and convince almost a third of the citizens who voted.<sup>50</sup>

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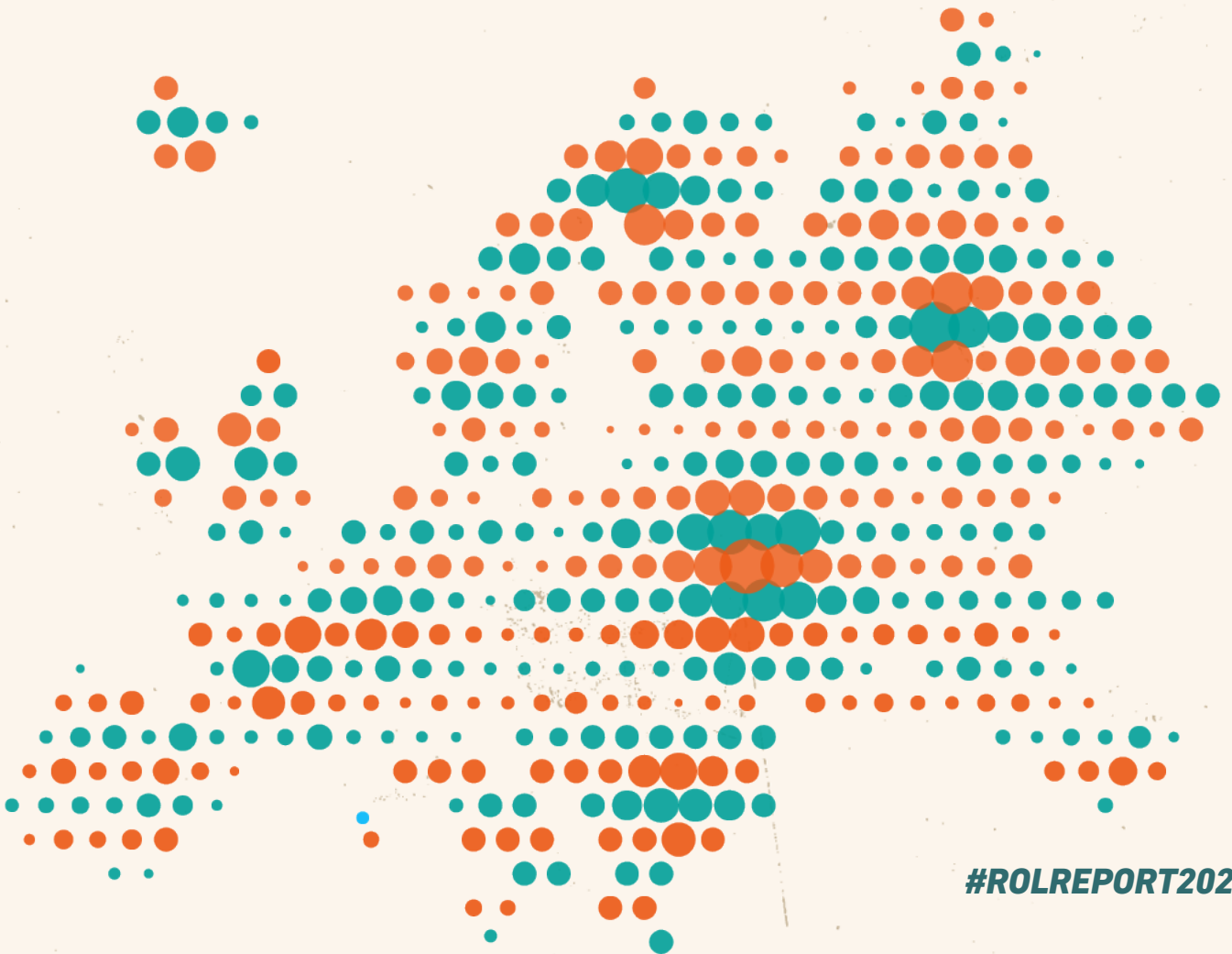
50 <https://vtr.valasztas.hu/nepszavazas2022>; <https://hatter.hu/hirek/elbukott-a-nepszavazas-vissza-kell-vonni-a-propagandatorvenyt>

**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**IRELAND**



**#ROLREPORT2023**

# IRELAND

## About the authors

### The Irish Council for Civil Liberties



The Irish Council for Civil Liberties (ICCL) is Ireland's oldest independent human rights body. It has been at the forefront of every major rights advancement in Irish society for over 40 years. ICCL helped legalise homosexuality, divorce, and contraception. ICCL drove police reform, defending suspects' rights during dark times. In recent years, ICCL led successful campaigns for marriage equality and reproductive rights.

### Trinity College Dublin School of Law



Founded in 1740, Trinity School of Law is one of the leading law schools in Europe, consistently ranked as one of the top 100 law schools in the world. The school is a community of staff, students, and alumni, dedicated to the pursuit of legal knowledge and critical engagement with the legal challenges that confront modern communities.

### Irish Congress of Trade Unions



The Irish Congress of Trade Unions (ICTU) is a single trade union federation for the island of Ireland, with some 44 affiliated trade unions operating and organised in both political jurisdictions and across all areas of the economy. As such, ICTU is the largest civil society body on the island, representing and campaigning on behalf of some 750,000 working people in both the private and public sectors, north and south of the border. It works to achieve economic progress, social cohesion, and justice by upholding the values of solidarity, fairness, and equality across the island of Ireland.

### The Immigrant Council of Ireland



The Immigrant Council of Ireland is an NGO-independent law centre, founded in 2001, working with and for migrants and their families in Ireland. The Immigrant Council of Ireland provides frontline information, support and specialised legal services, prioritising vulnerable communities to include victims of gender-based violence, victims of trafficking, refugees/stateless persons, and migrant children.



## Inclusion Ireland



Established in 1961, Inclusion Ireland is a national, rights-based advocacy organisation that works to promote the rights of people with an intellectual disability. The vision of Inclusion Ireland is that of people with an intellectual disability living and participating in the community with equal rights. Inclusion Ireland's work is underpinned by the values of dignity, inclusion, social justice, democracy, and autonomy. Inclusion Ireland uses the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) to guide our work.

## Intersex Ireland



Intersex Ireland is the only organisation led by intersex people that offers support and advocacy for intersex people in Ireland.

## Mercy Law Resource Centre



Mercy Law Resource Centre (MLRC) is an independent law centre, registered charity, and company limited by guarantee which provides free legal advice and representation to

people who are homeless or at risk of becoming homeless in the areas of social housing and related social welfare law. The Centre also seeks to advocate change in laws, policies, and attitudes which unduly and adversely impact its client group.

## Community Law and Mediation



Community Law & Mediation is an independent community law centre and charity working since 1975 in communities impacted by social exclusion, disadvantage, and inequality, through the provision of free legal, mediation, and community education services. In 2021, it expanded its services to focus on environmental justice, and established the Centre for Environmental Justice which provides free legal advice, training, and advocates for a rights-based approach to policy and law reform in the area of environmental justice.

## Justice for Shane



Justice for Shane was founded following the unlawful killing of Shane O'Farrell in 2011. The errors and failings leading to the death of Shane are such that they undermine public confidence in government and the administration of justice to an extent that it is imperative that public confidence be restored. This must be done in a manner that the whole public can be assured that the full facts can be established,

the failings addressed, appropriate action is taken, people are held to account, and to ensure that lessons are learned so that similar failings don't happen again.

### **Irish Penal Reform Trust**



Established in 1994, the Irish Penal Reform Trust (IPRT) is Ireland's leading non-governmental organisation in campaigning for rights within the penal system and the progressive reform of Irish penal policy. IPRT publishes a wide range of policy positions and research documents; it campaigns vigorously across a wide range of penal policy issues; and we have established IPRT as the leading independent voice in public debate on the Irish penal system.

### **Age Action Ireland**



Age Action is Ireland's leading advocacy organisation for older people and ageing. As well as informing and influencing policy, we provide practical programmes to support older people to age in place and to combat digital exclusion through its Care and Repair, Getting Started, and Information Service.

### **Outhouse**



Outhouse is a community and resource centre for LGBT+ people, their families, and friends.

Outhouse's vision is of a vibrant and safe space for LGBT people, groups & organisations that is inclusive of the diversity within our communities. Outhouse's mission is to provide a safe space which facilitates & encourages the growth of services and supports to the LGBT communities. In all of our work, Outhouse is guided by principles of community, equality & partnership.

### **The National Union of Journalists**



For more than 100 years, the NUJ has fought for journalists and journalism. Today, the union is one of the largest independent journalists' unions in the world. NUJ members work across the media, from newspapers, broadcasting and book publishing to magazines, websites, mobile devices, social media and PR agencies. Its members work across a diverse range of jobs – anything from reporting, writing, photography and editing to design, videography, communications and presenting.

### **The Irish Network Against Racism**



The Irish Network Against Racism (INAR) is a civil society network of anti-racism and minority rights organisations that monitors trends in racism and related forms of discrimination in Ireland, as well as government legislation, policy, and statutory agency practices in those areas.

## Irish Traveller Movement



Established in 1991, The Irish Traveller Movement (ITM) is the national advocacy and membership platform which brings together Travellers and representative organisations to develop collective solutions on issues faced by the community to achieve greater equality for Travellers. ITM represents Traveller interests in national governmental, international, and human rights settings. ITM challenges racism - individual, cultural and structural - which Travellers face and promotes integration and equality.

## FLAC-Free Legal Advice Centres



Free Legal Advice Centres-FLAC is a human rights organisation which exists to promote equal access to justice for all. FLAC's vision is a society where everyone can access fair and accountable mechanisms to vindicate their rights.

## Mental Health Reform



Mental Health Reform is Ireland's leading national coalition on mental health. Mental Health Reform's vision is of an Ireland where

everyone can access the support they need in their community to achieve their best possible mental health. Mental Health Reform drives the progressive reform of mental health services and supports through coordination and policy development, research and innovation, accountability, and collective advocacy. Together with our 80 member organisations, and thousands of individual supporters, Mental Health Reform provides a unified voice to the government, its agencies, the Oireachtas, and the general public on mental health issues.

## Pavee Point



Pavee Point Traveller and Roma Centre is a national non-governmental organisation working towards the attainment of human rights for Irish Travellers and Roma since 1985. The aim of Pavee Point is to contribute to improvement in the quality of life and living circumstances of Irish Travellers and Roma by working for social justice, solidarity and human rights.

Note:

While each of these organisations are experts in their areas of concern, not one of the organisations possesses the expertise sufficient to complete this submission in isolation. This submission represents a compilation of a wide array of material and expertise from the aforementioned organisations, coordinated by the Irish Council for Civil Liberties.

## Key concerns

There has been progression in a number of areas within the justice system since 2021. These include moves to reform the legal aid system and the commencement of outstanding sections of the Judicial Council Act. Progress has also been made in the area of reform of judicial appointments, but funding for the courts system and the number of judges per capita remains very low. The continued use of the Special Criminal Court remains a serious concern notwithstanding an ongoing review of the Offences Against the State Act.

Work is ongoing to address the two recommendations as contained in the report on the justice system (judicial appointments and legal costs). However, progress is slow and a number of issues have been identified with respect to government action on both issues; this is outlined below.

There is no evidence of widespread corruption in Ireland, and the country currently sits at 13th in the 2021 Corruption Perception Index.<sup>1</sup> Despite this ranking, individual high-profile cases have highlighted the inadequacy of Ireland's ethics legislation and serve to create the perception that elected officials are exploiting their roles for monetary gain and failing to properly declare their assets.

While 2022 has seen some piecemeal progress in areas such as lobbying regulation, a

long-promised comprehensive review of ethics legislation has yet to materialise. Political scandals in the summer of 2022 involving asset declarations and conflicts of interest have further emphasised the ineffectiveness of the laws in this area and the urgent need for reform. Progress has been far too slow on developing a new public ethics regime despite the urgent need for reform in this area and calls from CSOs, the European Commission, and GRECO. This was exposed by the political scandal surrounding the asset declarations of public officials in the summer of 2022.

The continued rushing of legislation at the end of parliamentary terms has resulted in extremely problematic behaviour. The government has added amendments and sections to legislation in which little to no time is allocated for scrutiny as debates are guillotined and legislative stages are merged. As a result, members of parliament are voting to enact legislation which has not been examined. There is an increasing concern that these practices are being used to suppress debate and pass problematic and unpopular legislation without scrutiny.

The National Union of Journalists has expressed concern at the overarching powers proposed for the Media Commission, which will replace the existing Broadcasting Authority of Ireland and its inadequate resourcing.<sup>2</sup> The expert group tasked with progressing this transition has been established, but as of January 2023,

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1 <https://www.transparency.org/en/cpi/2021/index/irl>

2 <https://www.nuj.org.uk/resource/nuj-urges-rethink-on-giant-media-commission-watchdog.html>

it is unknown when it is expected to make recommendations to the government.<sup>3</sup>







The government has refused to engage with civil society on the issue of funding restrictions for advocacy which they deem to be “political” and insists that the issue can only be examined as part of a wider review of financing for political parties and political donations. Furthermore, advice from the Charities Regulator has narrowed the ability of organisations to engage in political advocacy and retain their charitable status. ICCL is concerned that this will undermine any benefit to the proposal to add the “advancement of human rights” to the list of valid charitable purposes as it will be inoperable. This approach will further serve to confuse the issue, given that civil society funding should not be classed as political.

The compensation scheme announced for survivors of mother and baby homes has been widely condemned as inadequate and does not meet the needs of survivors. Plans to end direct provision as a system of accommodating those seeking asylum by 2024 have been shelved by the government.

The Irish Traveller movement notes a number of ongoing issues related to the lack of progression and implementation of actions committed to in the National Traveller and Roma Inclusion Strategy 2017-2021.<sup>4</sup> Concerns remain with respect to the inadequate collation

of data on Traveller experiences/outcomes and ineffective funding. They also note persistent and ongoing discrimination against Travellers, including in the national police force, remaining a day-to-day occurrence in 2021.<sup>5</sup>

### State of play

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

### Legend (versus 2022)

-  Regression
-  No progress
-  Progress

## Justice system

### Key recommendations

- Complete a comprehensive review of the legal aid system, which should include, inter alia, provision for an enhanced civil legal aid system, and a

<sup>3</sup> <https://www.independent.ie/irish-news/news/taoiseach-says-universal-levy-would-be-more-sustainable-than-tv-licence-42178156.html>

<sup>4</sup> <https://www.gov.ie/en/publication/c83a7d-national-traveller-and-roma-inclusion-strategy-2017-2021>

<sup>5</sup> <https://itmtrav.ie/wp-content/uploads/2021/03/Irish-Traveller-Movement-Submission-UPR-National-Report.pdf>

large-scale study of unmet legal needs in Ireland.

- Complete the review of the Offences Against the State Act, abolish the Special Criminal Court and ensure that all courts comply with constitutional and international fair trial standards.
- Increase overall levels of investment and systems of appointment in the Irish courts/justice system to ensure that the system is accessible, accommodative, time efficient, and meets international best practice standards.

## ***Judicial independence***

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

The Judicial Appointments Commission Bill 2022 was published in March 2022<sup>6</sup> and is still making its way through parliament. The revised bill differs from the original draft<sup>7</sup> in a number of key aspects.

The discretion of the government in the appointment of judges will be significantly curtailed. Judges can now only be appointed from a shortlist of three drawn up by the Judicial Appointments Commission (or five

names for two vacancies, and seven names for three), and only after an interview process.

The draft bill proposed a separate process for the appointment of the Chief Justice, President of the Court of Appeal, and President of the High Court – a process which would have had heavy government involvement. Following submissions by ICCL and others, this proposal has now been dropped and these positions will be filled in the same way as ordinary judges. This is a highly significant improvement and means there will be one fair and merit-based process for all appointments.

The revised bill now proposes that the Judicial Appointments Commission must address the objective that the membership of the judiciary should reflect the diversity of the population as a whole. To achieve real diversity and representativeness in the Irish judiciary, steps must also be taken to address diversity at senior levels in the legal professions.

A provision has been inserted in the bill for all candidates to undergo judicial training or continuous professional development. This is very welcome and ICCL believes that such training must include substantial training in relation to international law, human rights law, and equality, in line with the 2019 Judicial Council Act. Despite these improvements, outstanding issues remain.

6 <https://www.oireachtas.ie/en/bills/bill/2022/42/>

7 <https://data.oireachtas.ie/ie/oireachtas/bill/2022/42/eng/initiated/b4222d.pdf>

It had been recommended that the list of names sent to the Minister should be ranked in order of preference by the Judicial Appointments Commission with reasons given by the government as to if or where there is a divergence from the recommendation by the Commission. This recommendation has not been accepted. This is regrettable as rankings and reasons for divergence would have led to greater transparency in the process. It is not clear if the government received advice from the Attorney General on this point.

On which judges should sit on the Judicial Appointments Commission, the bill proposes that the Chief Justice (as chair) and the President of the Court of Appeal will always sit on the Commission (or President of another court depending on what vacancy has arisen) and two members of the Judicial Council. It was recommended that judges sitting on the Commission should be elected by their peers, as per international standards. An election process would help guard against a small number of senior judges having a disproportionate influence in the process.

Finally, it was recommended that members of the judiciary should make up at least half of the sitting members of the Commission, in line with the European Charter on the Statute of Judges. While this bill proposes that

members of the judiciary would make up half of the voting members of the Commission, we regret the retention of the Attorney General on the Commission as this could be perceived as having undue governmental involvement in the Commission's work and skews the balance away from 50% judicial membership.<sup>8</sup>

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

A Judicial Council was formally established on December 17th, 2019.<sup>9</sup> It is made up of the entire Irish judiciary. The Council Published its second annual report in September 2022.<sup>10</sup>

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

On February 4th, 2022, the Judicial Council adopted guidelines in relation to judicial conduct and ethics and published draft procedures in relation to making and investigating judicial complaints.<sup>11</sup> On the basis of this, on October 3rd, 2022, the Minister for Justice commenced the remaining sections of the Judicial Council Act (2019) with statutory instrument 489/2022.<sup>12</sup> Procedures are now in place to facilitate complaints about alleged

8 <https://www.iccl.ie/police-justice-reform/iccl-analysis-of-judicial-appointments-Bill/>

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

10 <https://judicialcouncil.ie/news/the-judicial-council-annual-report-2021/>

11 <https://judicialcouncil.ie/news/judicial-council-meeting-4th-february-2022/>

12 <https://www.irishstatutebook.ie/eli/2022/si/489/made/en/pdf>

judicial misconduct. Any complaints about the conduct of a judge that is alleged to constitute judicial misconduct will be addressed under the new procedures.<sup>13</sup>

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

In November 2022 it was confirmed in parliament<sup>14</sup> and in a letter from the Judicial Council that there are no powers to investigate the behaviour of a former judge<sup>15</sup> who allegedly engaged in inappropriate contact with a number of women, including one who had appeared in front of him in a family law matter. In a letter to the Irish Independent newspaper, the Judicial Council outlined that as the judge had ceased his work prior to the commencement of their investigative powers, they were unable to act on the matter.<sup>16</sup>

***Other***

In February 2021, the Minister for Justice announced a review of the Offences Against the State Act and the role of the Special Criminal Court in the Irish Judicial System.<sup>17</sup> The act has to be renewed in parliament each year to confirm that sufficient conditions are presented through the threat of organised crime and terrorism to warrant the act and the court's existence.<sup>18</sup> ICCL has called for the immediate abolition of the Special Criminal Court. ICCL's submission<sup>19</sup> to the review group highlights six areas of particular concern:

- the absence of a jury;
- the dual role of judges as both judge and jury;
- the extensive powers of the public prosecutor (DPP);
- claims of privilege by Gardaí;
- and the acceptance of beliefs and inferences as evidence.

13 [https://merriestreet.ie/en/news-room/releases/minister\\_mcentee\\_commences\\_act\\_to\\_facilitate\\_complaints\\_about\\_alleged\\_judicial\\_misconduct\\_for\\_the\\_first\\_time.174922.shortcut.html](https://merriestreet.ie/en/news-room/releases/minister_mcentee_commences_act_to_facilitate_complaints_about_alleged_judicial_misconduct_for_the_first_time.174922.shortcut.html)

14 <https://www.oireachtas.ie/en/debates/debate/dail/2022-11-23/13/?highlight%5B0%5D=paul&highlight%5B1%5D=murphy&highlight%5B2%5D=judges&highlight%5B3%5D=kerry&highlight%5B4%5D=judge&highlight%5B5%5D=judge#s14>

15 <https://www.oireachtas.ie/en/debates/debate/dail/2021-07-14/8/?highlight%5B0%5D=paul&highlight%5B1%5D=murphy&highlight%5B2%5D=kerry&highlight%5B3%5D=judge&highlight%5B4%5D=judges#s9>

16 <https://www.independent.ie/irish-news/courts/retired-judge-james-oconnor-will-not-be-investigated-over-claims-made-in-dail-that-he-preyed-on-vulnerable-woman-42168728.html>

17 <https://www.gov.ie/en/press-release/51927-minister-mcentee-appoints-independent-review-group-to-examine-the-offences-against-the-state-acts/>

18 <https://www.oireachtas.ie/en/debates/debate/dail/2022-06-29/12/>

19 <https://www.iccl.ie/2021/the-special-criminal-court-must-be-abolished/>



The right to a trial by a jury of one's peers is a constitutional right in Ireland. ICCL believes there is little evidence to suggest that jury intimidation is widespread, but if so, this is an issue that should be addressed by measures such as anonymous juries and through legislation at every level of the court system. It is inappropriate and out of line with the practices and protections of an adversarial, common-law jurisdiction for judges to act as both judge and juror at the Special Criminal Court. The DPP's power to decide which cases go to the court is far too broad and immensely difficult to challenge. The DPP should be required to provide the reasons they are sending a case to the court, and those reasons should be open to challenge. At the court, Gardaí can claim privilege and refuse to give important documents to the defence. Gardaí may also present their belief that someone is guilty without having to show any other evidence. Negative inferences may be drawn from a suspect's silence. These practices are clearly contrary to fair trial rights and should end immediately. ICCL's favoured course of action is the abolition of the court, with the consideration of alternative means of ensuring the safety of juries and witnesses. Pending the abolition of the court, ICCL also proposes immediate reforms in how the

court currently operates. It is expected that the review should be completed in early 2023.

## ***Quality of justice***

### ***Accessibility of courts (e.g. court fees, legal aid, language)***

The current civil legal aid system in Ireland is very restrictive and requires that applicants have a disposable income of less than €18,000 per year. There are limited exceptions to these strict means requirements, such as cases which involve child protection.<sup>20</sup> This system has been criticised for being prohibitive and a barrier to access to justice by a number of bodies such as IHREC,<sup>21</sup> UNCERD,<sup>22</sup> CEDAW,<sup>23</sup> the FRA,<sup>24</sup> Public Interest Law Alliance (PILA), and Free Legal Advice Centres (FLAC), as well as being subject to criticism by Chief Justice Frank Clarke.<sup>25</sup>

In June 2022, the Minister for Justice established a group to oversee the first review of the civil legal aid scheme in 40 years.<sup>26</sup> The review group is being led by former Chief Justice Frank Clarke and it is expected that the review will take 12 months. In November 2022, a stakeholder consultation on reform

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

21 <https://www.ihrec.ie/access-to-justice-concerns-as-80-believe-poorer-people-get-worse-legal-outcomes/>

22 [https://upr-info.org/sites/default/files/documents/2021-10/flac\\_upr39\\_irl\\_e\\_main.pdf](https://upr-info.org/sites/default/files/documents/2021-10/flac_upr39_irl_e_main.pdf)

23 [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CEDAW/C/IRL/CO/6-7&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CEDAW/C/IRL/CO/6-7&Lang=en)

24 [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2021-legal-aid-in-return\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-legal-aid-in-return_en.pdf)

25 <https://www.lawlibrary.ie/access-to-justice-conference-friday-1st-october-2021/>

26 <https://www.gov.ie/ga/preasraitis/68fab-minister-announces-review-of-civil-legal-aid-scheme/>

of the scheme was launched and will remain open until February 3rd, 2023.<sup>27</sup>

It is also of note that following a government announcement of a review of equality law in June 2021,<sup>28</sup> FLAC<sup>29</sup> and other organisations<sup>30</sup> have called for legal aid to be made available to victims of discrimination and for other civil legal purposes. In their submission, Inclusion Ireland<sup>31</sup> also noted the barriers which result in the persistent under-reporting of discrimination against people with intellectual disabilities. The current absence of access to legal aid and dedicated legal services to support victims of discrimination to make complaints has been pointed out. Groups such as people with disabilities, migrants, racial minorities, Travellers, and others have highlighted the complexity of the procedure, the lack of reasonable accommodation to support people to access justice and the limited outcomes that often dissuade people from making complaints. The Irish Network Against Racism (INAR) have also noted their concern that the review of equality laws is being carried out without comprehensive consultation with the public, particularly ethnic minority communities who experience

racial discrimination on a daily basis. The scheme should also be amended to ensure legal aid is available in eviction cases and other housing and accommodation-related matters.

As is noted in Mental Health Reform's submission<sup>32</sup> on the review of the Equality Acts, under the current regimes there are exhaustive, emotional, and psychological burdens experienced by anyone with disabilities who takes a case under the Equality Acts. Issues around the burden of proof, accessing the relevant information, and legal forms all create barriers for people with disabilities. Without representation, the person making the complaint must deal with navigating these complex issues alone, all while sitting across from the employer/service provider whom they have taken their case against. Often employers and businesses may have the financial means to pay for private legal representation for Workplace Relations Commission (WRC) cases when the person making the complaint may not, creating stark inequality in many of these cases.<sup>33</sup> In Mental Health Reform's consultation with people with mental health difficulties,<sup>34</sup> it was reported that the WRC website was

27 <https://www.gov.ie/en/consultation/a7aa6-stakeholder-consultation-on-the-review-of-the-civil-legal-aid-scheme/>

28 <https://www.gov.ie/en/press-release/24864-minister-ogorman-announces-review-of-the-equality-acts/>

29 <https://www.flac.ie/news/latestnews/2021/06/22/announced-review-of-equality-law-timely-and-necess/>

30 <https://www.flac.ie/news/latestnews/2021/07/29/43-ngos-and-advocates-join-flacs-call-on-justice-m/>

31 Inclusion Ireland 2021 "Submission on the Review of the Equality Acts"

32 <https://www.mentalhealthreform.ie/wp-content/uploads/2022/11/Final-submission-08.12.21-MHR-submission-on-the-review-of-equality-acts-1.pdf>

33 FLAC, (2021). *FLAC Guide: The Review of the Equality Acts, Making a Submission to the Review & the Key Issues Under Review.*

34 <https://www.mentalhealthreform.ie/wp-content/uploads/2021/04/MHR2021SubmissiononUNCRPDDraftStateReportConsultation.pdf>

inaccessible and that forms are not available in braille or in easy-to-read formats. INAR also notes that the lack of information and clarity on the functionality of the WRC is also a barrier to accessing justice for victims of discrimination. As evidenced by INAR's work, people from an ethnic minority background who are aware of the existence of the WRC understand it as a dispute resolution mechanism for employment discrimination only. There is a need to provide adequate information on the role of the WRC to ensure that victims of discrimination are able to access justice.

Long waiting times, overly bureaucratic processes, and at times high legal costs continue to pose barriers for those going through family court proceedings. In November 2022, the government published a Family Justice Strategy and a Family Court Bill which provides for the establishment of a dedicated Family Court and seeks to address the challenges and barriers that the existing courts system poses for families who are already dealing with a heavy burden of stress.<sup>35</sup> At the time of writing the bill has completed its first stage in the Seanad Éireann.<sup>36</sup> Inclusion Ireland's submission for the review of the Equality Acts in 2021 highlighted that a recurring theme was the complex process to report discrimination, lack

of guidance, advocacy, and legal expertise. Many expressed despair when feeling they must accept the discrimination they experience: "Sometimes having a child with complex disabilities means accepting discrimination".

The issue of costs in Ireland remains a particularly significant concern for the European Commission, with the 2019 Environmental Implementation Review Report for Ireland<sup>37</sup> noting:

"Extremely high litigation costs — which can leave litigants owing hundreds of thousands of euros — present a greater barrier to environmental litigation than legal standing. [...] However, Ireland has yet to create a system that ensures that environmental litigants are not exposed to unreasonable costs."

IPRT notes that accessibility is a particular concern for people in prison who wish to challenge conditions in prison, or other issues that arise (which would not be covered by criminal legal aid). IPRT has previously published on issues around prison litigation.<sup>38</sup>

Mental Health Reform also note the barriers in access to justice for those experiencing discrimination due to their mental health

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35 <https://www.gov.ie/en/press-release/06977-minister-mcentee-receives-government-approval-to-publish-family-court-bill-and-first-national-family-justice-strategy/>

36 <https://www.oireachtas.ie/en/bills/bill/2022/113/>

37 [https://ec.europa.eu/environment/eir/pdf/report\\_ie\\_en.pdf](https://ec.europa.eu/environment/eir/pdf/report_ie_en.pdf)

38 <https://www.iprt.ie/iprt-publications/prison-litigation-network-national-report-on-ireland/>

difficulty.<sup>39</sup> It is important to note that people with disabilities are already at an increased risk of poverty. This is outlined in the Cost of Disability in Ireland report, where those with mental health difficulties ('to a great extent') report the highest level of deprivation.<sup>40</sup> It should be concerning that disability costs are not incorporated into the means test for the Civil Legal Aid Scheme.<sup>41</sup> It is hoped that this anomaly will be rectified in the upcoming review of this scheme.

### ***Resources of the judiciary (human/financial/material)***

In 2020, the European Commission for the Efficiency of Justice noted that Ireland spent just 0.1% of GDP on its judicial system in 2018, which is the lowest of the 46 jurisdictions. The report also showed Ireland has one of the lowest number of judges, with 3.3 judges per 100,000 people compared to

an average of 21.<sup>42</sup> In its 2021 Rule of Law Report, the European Commission again criticised Ireland for having the lowest number of judges per inhabitant in the EU, stating that this 'could also affect the efficiency of the Irish justice system'.<sup>43</sup> In September 2021, the government announced the nomination of five new High Court judges.<sup>44</sup> The Judicial Panel Working Group, which was established in 2021 with the purpose of advising on the number and type of judges needed, was due to complete its report in October 2022, but this has been delayed.<sup>45</sup>

The overall budget allocation to the Department of Justice for 2023 is €3.3bn, an increase of 5% from 2022.<sup>46</sup> A total of €176.5 million was allocated to the courts service in the 2023 budget, which is more than the previous €164 million of the previous 2022 budget, including capital funding of €67 million for 2023.

39 <https://www.mentalhealthreform.ie/wp-content/uploads/2021/04/MHR2021SubmissiononUNCRPDDraftStateReportConsultation.pdf>

40 <https://www.gov.ie/en/publication/1d84e-the-cost-of-disability-in-ireland-research-report/>

41 <https://www.legalaidboard.ie/en/our-services/differences-between-criminal-and-civil-legal-aid/#whatislegalaid>

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

43 European Commission (2021), Rule of Law report. Country Chapter for Ireland (Brussels, 20.7.2021, SWD(2021) 715 final) available at: [https://ec.europa.eu/info/sites/default/files/2021\\_rolr\\_country\\_chapter\\_ireland\\_en.pdf](https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_ireland_en.pdf)

44 <https://www.lawsociety.ie/gazette/top-stories/2021/09-september/five-new-high-court-judges-nominated>

45 <https://www.oireachtas.ie/en/debates/debate/dail/2022-05-24/14/?highlight%5B0%5D=judicial&highlight%5B1%5D=working&highlight%5B2%5D=working&highlight%5B3%5D=group&highlight%5B4%5D=work&highlight%5B5%5D=group&highlight%5B6%5D=2022&highlight%5B7%5D=october#s17>

46 [https://merriestreet.ie/en/news-room/news/stronger\\_safer\\_communities\\_prioritised\\_in\\_justice\\_budget\\_2023.174883.shortcut.html](https://merriestreet.ie/en/news-room/news/stronger_safer_communities_prioritised_in_justice_budget_2023.174883.shortcut.html)

### ***Training of justice professionals (including judges, prosecutors, lawyers, court staff)***

There is no formalised training provided to judges when they are appointed to the bench. Historically, 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 organised 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 selected to attend conferences and international training events relevant to their area of work.<sup>47</sup> To ensure justice for all, training of justice professionals on racism, discrimination, and bias is key. INAR has long advocated for the training of justice professionals to ensure that they are fully equipped to deal with a diverse and multicultural Ireland.

The Judicial Studies Committee has been incorporated into the Judicial Council on foot of the Judicial Council Act 2019.<sup>48</sup>

The justice system is not reflective of the diversity that exists in Ireland, which has been highlighted by communities as a barrier to accessing justice. INAR has been advocating for inclusion and diversity in the justice system to ensure that justice is meaningful. Judges play a key role in access to justice for migrants.

In judicial review of detention, removal proceedings, asylum proceedings, family reunification cases, access to effective remedy, judges' practical understanding of the standards and principles on fundamental rights and recent case-law, and of their own role and responsibilities in the protection of these rights, are indispensable. There must be effective and coherent application of EU law on fundamental rights by training judges and other legal practitioners in the target countries; the knowledge of judges, lawyers, prosecutors and other relevant legal practitioners on EU and international law on the fundamental rights of migrants must be increased and networks between national trainers, judges, lawyers, prosecutors and other relevant legal practitioners within the state must be strengthened. Pavee Point emphasised the need for anti-racism training as per Section 42 of IHREC Act (2014)<sup>49</sup> in line with the forthcoming National Action Plan Against Racism.

### ***Digitalisation (e.g. use of digital technology, particularly electronic communication tools, within the justice system and with court users, including resilience of justice systems in COVID-19 pandemic)***

In February 2021, the Courts Service launched their 2021-2023 strategic plan.<sup>50</sup> A key element of this plan was to progress the courts' modernisation programme. This programme

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

48 <https://judicialcouncil.ie/judicial-studies-committee/>

49 <https://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/html>

50 <https://www.courts.ie/news/courts-service-strategic-plan-2021---2023-published>

was awarded €2.5 million towards its work in the Department of Justice budget for 2023.<sup>51</sup>

The pandemic expedited the use of technology in the courts, with the Civil Law and Criminal Law (Miscellaneous Provisions) Act in 2020, making provision for the use of video links. In civil matters, the judiciary facilitated hearings and motions online via Pexip,<sup>52</sup> with the exception of jury trials and non-urgent personal injury matters. In criminal matters, accused persons can be arraigned over video link and, if in custody, can attend any hearings and applications via Pexip. Requirements for the same were issued by President of the High Court Mary Irvine in March 2022.<sup>53</sup> The number of courtrooms equipped with this technology has increased from 59 in 2019 to 104 in 2021.<sup>54</sup> This 2020 Act also provides for the use of an audio link only in the definition of electronic communication in s31(6), for hearings by designated bodies.

High Court Practice Direction 98 (2020) allows for bail applications and appeals to be conducted via video link. Despite the lack of other pandemic-era arrangements persisting in the courts, the majority of High Court bail applications are still conducted via video link in Cloverhill Court House. This is despite

the fact that the majority of applicants are on remand in the adjacent Cloverhill Prison.<sup>55</sup> ICCL is concerned that this over-reliance on technology interferes with applicants' right to participate in these hearings on their liberty.

While IPRT broadly supports the increased use of video links and recognises the benefits that this can bring to prisoners and the overall efficiency of the system, IPRT acknowledges that video links will not always be appropriate in criminal proceedings and where a person is in prison. Caution must be exercised to address the potential impacts of video links on equal access to justice for children and for vulnerable adults, including people with disabilities or cognitive impairments.

The Inspector of Prisons in Ireland (OiP) has identified concerns in recent Covid-19 thematic inspection reports on Cloverhill Prison. OiP notes that “remote court hearings may result in increased unfairness/access to justice issues for prisoners”. In particular, prisoners “reported to the Inspection Team that it is difficult to engage with the court proceedings through the video link, with prisoners explaining, “you can’t mount a defence from here,” “the conversation is just happening in front of me,” and “it feels like no one is standing in court for me.”

51 <https://www.irishlegal.com/articles/courts-to-receive-eur13m-funding-boost>

52 <https://www.pexip.com/>

53 <https://www.courts.ie/content/requirement-regarding-attendance-remote-hearings>

54 [https://www.courts.ie/acc/alfresco/24bce47c-3cc6-4e86-b647-04cdc64c2445/Courts\\_Service\\_Annual\\_Report\\_2021.pdf/pdf#view=fitH](https://www.courts.ie/acc/alfresco/24bce47c-3cc6-4e86-b647-04cdc64c2445/Courts_Service_Annual_Report_2021.pdf/pdf#view=fitH)

55 <https://www.oip.ie/wp-content/uploads/2021/08/Cloverhill-Prison-COVID19-Thematic-Inspection-Report-2021.pdf>

OiP also noted that research on video-link access to courts has shown that these experiences diminish prisoners' opportunities for engagement with and expressive participation in legal procedures, and they also note that the ECtHR has emphasised the importance of effective participation in remote court proceedings in order to meet the fair trial requirements of ECHR Article 6. OiP accordingly recommended that video link court access not be used as a long-term substitute for a prisoner's right to attend court. In line with Article 6 of the European Convention on Human Rights, all measures must be taken to ensure that a prisoner can effectively participate in remote court hearings.

***Use of assessment tools and standards (e.g. ICT systems for case management, court statistics and their transparency, monitoring, evaluation, surveys among court users or legal professionals)***

It is essential that the Courts Service develops its website to improve access to persons with disabilities. FLAC recognises that technology may be developed for the Courts Service to allow for work online, so it is imperative that people with visual or motor impairments are not excluded from these.<sup>56</sup> It has also been noted by Age Action Ireland that it remains critically important that courts and tribunals

maintain and enhance clearly sign-posted and effective offline pathways for access. According to Age Action Ireland, it is estimated that 65% of older persons are digitally excluded, either due to not using the internet or because they have "below basic" skills.<sup>57</sup> As such, in order to prevent exclusion, enhanced offline access to justice is going to remain important for years to come.

The Programme for a Partnership Government under the heading "Courts and Law Reform"<sup>58</sup> contains a commitment to the commissioning of an annual study on court efficiency and sitting times, benchmarked against international standards in order to provide accurate measurements for improving access to justice. Comprehensive data is required in relation to lay litigants and persons in receipt of legal aid, persons facing repossession of their family homes or evictions in order to be able to devise accurate and effective measures for improving access to justice.

***Other: translation and interpretation***

The Courts Service regularly facilitates interpretation services. The provision of the interpretation service is outsourced to private operators, however, anecdotal evidence suggests that the quality of interpretation provided can be patchy. There is a clear need

56 Rei-Anderson, Cody and Reynolds, Graham J. and Wood, Jayde and Wood, Natasha, Access to Justice Online: Are Canadian Court Websites Accessible to Users with Visual Impairments? *Alberta Law Review*, Vol. 55, No. 3, 2018. Available at SSRN: <https://ssrn.com/abstract=3143971>

57 [https://www.ageaction.ie/sites/default/files/digital\\_inclusion\\_and\\_an\\_ageing\\_population.pdf](https://www.ageaction.ie/sites/default/files/digital_inclusion_and_an_ageing_population.pdf)

58 [https://www.merrionstreet.ie/merrionstreet/en/imagelibrary/programme\\_for\\_partnership\\_government.pdf](https://www.merrionstreet.ie/merrionstreet/en/imagelibrary/programme_for_partnership_government.pdf)

for standards and regulations in this area in order to ensure that those who do not have sufficient fluency in English can still access justice. IPRT is concerned about reports that certain judges routinely deny in-court interpretation for foreign nationals who have been residents in Ireland for some time. There is an expectation that their English should be of a standard that understands complex legal language easily. In May 2022, comments by a District Court judge were heavily criticised by INAR where she said she was “sick” of defendants requesting interpretation.<sup>59</sup> This issue of interpretation was raised in IPRT’s recently published report, “Sometimes I’m Missing the Words”: The Rights, Needs and Experiences of Foreign National Prisoners and Minority Ethnic Groups’.<sup>60</sup> This report highlighted the lack of interpretation facilities within prison, with prisoners and staff forced to rely on other prisoners who can translate, which in turn raises Art.8 concerns.

In 2017, FLAC welcomed the enactment of the Irish Sign Language Act, which made Irish Sign Language an official language of the state and placed an obligation on courts to take the reasonable steps to allow persons competent in Irish Sign Language to be heard in ISL. This includes a duty for public services to provide free interpretation services when accessing statutory services. FLAC also welcomed the

provisions in the National Disability Inclusion Strategy from 2017 to 2021, which included plans to increase the number of sign language interpreters, a registration scheme and quality assurance measures, and professional training for sign language interpreters. These are progressive measures, but it should also be acknowledged that the presence of an interpreter can change the dynamic of legal interactions and court proceedings. It is further noted that there is a lack of awareness among many in the justice system about both deaf people and their language, and the nature of interpreted interaction, and the fact that interpretation services can sometimes create additional barriers for a deaf person to overcome. As such, it is essential that the courts provide effective ISL interpretation or other appropriate mechanisms to accommodate deaf people where necessary.

Free Legal Advice Centres-FLAC notes that the National Disability Authority are engaging with An Garda Síochána and with the Courts Service in relation to developing proposals to improve the response of both organisations in interacting with people with disabilities in accessing the justice system,<sup>61</sup> however data concerning specific progress in this regard is currently unavailable. As well as access to public buildings, the legislation requires access to information, and sectoral plans for

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59 <https://www.independent.ie/irish-news/judge-sick-of-defendants-seeking-court-translators-no-need-when-they-go-buy-hooch-41681448.html>

60 <https://www.iprt.ie/iprt-publications/sometimes-im-missing-the-words-the-rights-needs-and-experiences-of-foreign-national-and-minority-ethnic-groups/>

61 National Disability Inclusion Strategy 2017-21 DE



government departments requiring that access for people with disabilities becomes an integral part of service planning and provision. FLAC acknowledges that the Courts Service has appointed a Disability Liaison Officer and disabled access and facilities are included in all court building and refurbishment projects, however this work is ongoing and there is no easily accessible information online that indicates which buildings are accessible or not.<sup>62</sup> One of the aims of the review should be to ensure that people with a disability can participate fully in the justice system and that disability issues are not considered in isolation, but integrated in all areas of access to justice. Pavee Point has noted that the integration of the values and principles of anti-racism into translation services alongside literacy training and sensitivity is essential.

## ***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 and the date of judgment of final

appeal in the Supreme Court was excessive. The court found that this delay was excessive and a violation of Article 6 of the ECHR. 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 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>63</sup> The *Keaney* case was one of many to come before the ECtHR on the length of proceedings in Ireland and *Keaney* was chosen by the Court as a lead case on the issue.

It remains to be seen whether the state’s implementation of the *Keaney v Ireland* judgment will be effective and whether this case will lead to systemic reform in terms of length of proceedings.

Delays in court proceedings is an issue that has particularly impacted those in prison. This was a point made by the Inspector of Prisons in its COVID-19 Thematic Inspection Report of Cloverhill in 2021,<sup>64</sup> where it was noted

62 Report of the Commission on the Status of People With Disabilities

63 See <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6686084-8895563&filename=Judgment%20Keaney%20v.%20Ireland%20-%20Irish%20law%20does%20not%20provide%20an%20effective%20remedy%20for%20complaints%20about%20excessive%20length%20of%20proceedings.pdf>

64 <https://www.oip.ie/wp-content/uploads/2021/08/Cloverhill-Prison-COVID19-Thematic-Inspection-Report-2021.pdf>

that the Inspection Team was “informed of situations where prisoners had experienced extended periods of time awaiting court dates that had been pushed back. One prisoner stated his trial date was now set for 2022 due to COVID-19-related delays. The Inspection Team spoke with men who had been on remand for up to and including two years. Long remand times for prisoners as a result of COVID-19 have implications both from a human rights perspective for prisoners and for prison management”. Issues with case management, availability of court facilities, and impacts on waiting times should overall be addressed.

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

The average number of people being held in pre-trial detention in Ireland is growing annually, with 584 people held in 2017, 677 in 2018, and 707 in 2019.<sup>65</sup> This trend looks set to continue and not improve.<sup>66</sup> In 2021 the number of persons held on remand grew significantly from 615 in January 2021 to 867 in November. The average number held on remand in 2021

was 712 and while this decrease (-3.5%) on the 2020 figure reflects the reduced committals, it is higher than the 2019 figure. There was evidence of a longer duration of remand on average. The proportion of remand prisoners in custody for a period of one year or more increased from 5% of all remand prisoners in March 2020 to 12.7% of all remand prisoners in December 2021.

The Director General of the Irish Prison Service has suggested that a recent feature of remand prisoners is the increasing seriousness of the criminal charges they face,<sup>67</sup> however there is limited data available to interrogate this. A general lack of data on the use of pre-trial detention makes it difficult to understand what is driving the increase. Ireland does not currently detain the remand prison population separately from the sentenced prison population (and has accordingly maintained its reservation to Article 10.2 of the ICCPR, which demands such separation).<sup>68</sup> Overcrowding in Irish prisons is cited as a barrier to the separation of remand and sentenced prisoners. The state has one dedicated remand facility,

65 Irish Prison Service, Annual Report 2019, at p.2, available at: [https://www.irishprisons.ie/wp-content/uploads/documents\\_pdf/IPS-Annual-Report-2019-Web.pdf](https://www.irishprisons.ie/wp-content/uploads/documents_pdf/IPS-Annual-Report-2019-Web.pdf)

66 See Irish Prison Service, Monthly Information Notes for Year 2020, available at: <https://www.irishprisons.ie/information-centre/statistics-information/monthly-information-note/>. See also IPRT, Progress in the Penal System (PIPS): Assessing progress during a pandemic (2020), at p.224, available at: [https://www.iprt.ie/site/assets/files/6845/progress\\_in\\_the\\_penal\\_system\\_2020.pdf](https://www.iprt.ie/site/assets/files/6845/progress_in_the_penal_system_2020.pdf)

67 Irish Prison Service, Annual Report 2019, at p.2, available at: [https://www.irishprisons.ie/wp-content/uploads/documents\\_pdf/IPS-Annual-Report-2019-Web.pdf](https://www.irishprisons.ie/wp-content/uploads/documents_pdf/IPS-Annual-Report-2019-Web.pdf)

68 Law Reform Commission Discussion Paper, Domestic Implementation of International Obligations, at p.145, available at: [https://www.lawreform.ie/\\_fileupload/Reports/LRC%20124%202020%20-%20Domestic%20Implementation%20of%20International%20Obligations.pdf](https://www.lawreform.ie/_fileupload/Reports/LRC%20124%202020%20-%20Domestic%20Implementation%20of%20International%20Obligations.pdf)

Cloverhill Prison, with a maximum capacity of 431 persons.<sup>69</sup>

There are three recent trends of concern regarding pre-trial detention. Firstly, there has been a 37% increase in the number of women remanded in custody between 2013 and 2019.<sup>70</sup> Analysis suggests that, in 2016–2019, 26.6% of women on remand had a charge in the category of ‘theft and related offences’ as their most serious offence. This figure contrasts with only 13% for men.

Secondly, figures available indicate that people are increasingly being remanded into custody for less serious offences. For example, between 2016 and 2019, there was a 56% increase in the number of committals on remand for ‘Public Order and Social Codes Offences’.<sup>71</sup>

Finally, in 2019, 7.8% (697) of all people committed to prison declared that they were of ‘no fixed abode’.<sup>72</sup>

In its November 2020 report on Ireland, the Committee on the Prevention of Torture (CPT) further noted its concern that there were rising numbers of homeless people with mental illness in prison. The CPT observed that many of these people could be granted bail by the courts but, because of their homeless status and the fact that they were therefore excluded from HSE (Health Service Executive) community mental health services, they were left instead to languish in prison.<sup>73</sup>

Regarding alternatives to pre-trial detention in Ireland, the main alternatives are for a person to be released on bail, with or without conditions.<sup>74</sup> A Bail Supervision Scheme (BSS) is in place in certain parts of Ireland for children, which aims to reduce the number of children remanded into custody through provision of specific support. This, in turn, may assist them when granted bail by the courts.<sup>75</sup> There is no such scheme available for adults, although there is an indication that consideration may

69 See Irish Prison Service, Cloverhill Prison – Operational Capacity, available at: <https://www.irishprisons.ie/prison/cloverhill-prison/>

70 Data not publically available.

71 Conor Gallagher, “Growing number of people in pre-trial custody for minor offences”, The Irish Times, 25 November 2020, available at: <https://www.irishtimes.com/news/crime-and-law/growing-number-of-people-in-pre-trial-custody-for-minor-offences-1.4418052>

72 Irish Prison Service, Annual Report 2019, at p.31, available at: [https://www.irishprisons.ie/wp-content/uploads/documents\\_pdf/IPS-Annual-Report-2019-Web.pdf](https://www.irishprisons.ie/wp-content/uploads/documents_pdf/IPS-Annual-Report-2019-Web.pdf)

73 Council of Europe, Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 September to 4 October 2019, November 2020, at p.47, available at: <https://rm.coe.int/1680a078cf>.

74 IPRT, Position Paper 11: Bail and Remand, November 2015, at pp.5-7, available at: [https://www.iprt.ie/site/assets/files/6363/iprt\\_position\\_paper\\_11\\_on\\_bail\\_and\\_remand\\_sml.pdf](https://www.iprt.ie/site/assets/files/6363/iprt_position_paper_11_on_bail_and_remand_sml.pdf)

75 The BSS is run by Extern, a leading social justice charity in Ireland. More information on the scheme is available here: <https://www.extern.org/bail-supervision-scheme-ireland>

be given to extending the BSS to young adults aged 18-24.<sup>76</sup>

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

Appellants and their representatives should be given access to any previous decisions which may be relevant to their case in quasi-judicial tribunals. Anonymized searchable databases should be established in quasi-judicial tribunals and made available to the public. This was recommended<sup>77</sup> by the UN Special Rapporteur on Extreme Poverty and Human Rights regarding the Social Welfare Appeals Office following her visit to Ireland in January 2011, yet the suggestion still remains unimplemented.

### **Corruption of the judiciary**

GRECO has criticised Ireland's judicial election process as being overly politicised. However, the Judicial Appointments Commission Bill (2022) is intended to address these concerns.<sup>78</sup> This bill is currently being considered by parliament,<sup>79</sup> and its shortcomings have been outlined previously in this submission.

### **Other**

FLAC contributed to the recent Review of the Administration of Justice and welcome a number of its recommendations. However, they have sought consultation in relation to the implementation of its recommendations. Civil society was not strongly represented on the review group. FLAC was especially dismayed to hear from the Minister that legislation is planned in relation to judicial review, as FLAC has particular concerns about those recommendations being implemented. The proposed overdue reform of rules and procedures is very much welcomed by FLAC, but there are some concerns that review recommendations. If implemented, the proposal will put too much onus on an unrepresented litigant to identify, with clarity, their claim. It is vital that these reforms are equality-, human rights- and poverty-proofed as is required by Section 42 of the IHREC Act.

The Public Sector Duty (PSD) was introduced pursuant to section 42 of the Irish Human Rights and Equality Act 2014. It provides an important legislative mechanism for mainstreaming racial and ethnic equality and protecting the human rights of ethnic minorities. In fulfilling their duties under the 2014

76 See Department of Justice, Youth Justice Strategy 2021-2027, at p.23, available at: [http://www.justice.ie/en/JELR/Youth\\_Justice\\_Strategy\\_2021-2027.pdf/Files/Youth\\_Justice\\_Strategy\\_2021-2027.pdf](http://www.justice.ie/en/JELR/Youth_Justice_Strategy_2021-2027.pdf/Files/Youth_Justice_Strategy_2021-2027.pdf)

77 <https://www.dfa.ie/media/dfa/alldfawebstimedia/newspress/publications/2011-unhcr-independent-report-mission-to-ireland.pdf>

78 <https://www.oireachtas.ie/en/press-centre/press-releases/20210614-justice-committee-resumes-pre-legislative-scrutiny-of-the-general-scheme-of-the-judicial-appointments-commission-Bill-2020/>

79 <https://www.oireachtas.ie/en/Bills/Bill/2022/42/>

legislation, public bodies, including those involved in the administration of the criminal justice system, must consider the human rights and equality impact of their policies, services, budgets, procedures and practices. The PSD requires public bodies to take a proactive approach to tackling institutional discrimination and promote the mainstreaming of an equality perspective in all their functions. The commitment of the Department of Justice and Equality to upholding and vindicating human and individual rights as a core element of its criminal justice sectoral strategy is welcomed as a means of the department meeting its obligations pursuant to the PSD.

### ***Protective costs orders***

Part 11 of the Legal Services Regulation Act 2015, Legal Costs in Civil Proceedings, sets out when a court may order someone involved in proceedings to pay the costs of a case, including the costs of another party. Section 169 provides that a party who is entirely successful in civil proceedings is entitled to an award of costs against the unsuccessful party. However, a court may choose not to make this order in certain instances which are outlined in the same section. These do not include cases which seek to clarify the law in the public interest. In the experience of FLAC, the costs incurred by litigants in vindicating their rights is one of the biggest barriers to accessing justice. Not only do applicants incur their own legal fees, they also run the risk of incurring those of their opponent. Public interest litigation is inherently unpredictable, as the case is often being litigated because the law is not clear and needs clarification. In the Irish legal

system, such cases are almost always brought by an individual who is personally concerned with the outcome.

Such cases are usually against the state, because ultimately it is the responsibility of the state to protect, defend, and promote the rights of its people. As is the nature of such examinations of the law, the public interest litigant is bringing a benefit to the public but, in facing the significant resources of the state, bears a personal risk over and above that normally borne by someone who goes before the courts. FLAC would like to see the exceptions to the rule that costs ‘follow the event’ expanded to include Protective Costs Orders (PCO) for litigants taking cases that are in the public interest. This would provide certainty as to costs at the outset of litigation. Such an order could provide that there will be no order as to costs, that the plaintiff’s liability for costs will be capped at a certain amount, or that the defendant will pay costs, even if the plaintiff is unsuccessful. In practice, while the Irish courts have occasionally departed from the usual costs rules in public interest cases, they have not developed specific rules for public interest litigation comparable to other common law jurisdictions. FLAC is concerned that the availability of PCOs is not specifically recognized in legislation. FLAC recommends that the courts should be specifically authorised to take into account the public interest nature of a case and that rules on costs be extended to expressly include the granting of Protective Costs Orders in public interest law cases.

### ***Potential restrictions on access to judicial review***

The Planning and Development Bill (2022)<sup>80</sup> contains concerning plans to restrict access to judicial review in planning matters, rowing back on the significant progress Ireland has made to standing and cost rules in recent years as a result of its adoption of the Aarhus Convention.

The bill stipulates that applicants for judicial review will have to demonstrate a “sufficient interest”, with NGOs, residents’ groups or other similar bodies expected to be incorporated as a company, have protection of the environment as part of its corporate constitution, have at least 10 members and to have passed a resolution authorising the bringing of proceedings. Residents groups can still take proceedings but if they do not comply with these rules, they will have to sue individually or collectively under their own names. A new costs protection mechanism will also be introduced, but the amounts covered have not yet been established in the bill.<sup>81</sup>

### ***Time limits on judicial review proceedings***

Mercy Law Resource Centre (MLRC) notes that many of their clients seek to challenge the decision of a public body, often a local authority through the use of the judicial review procedure. In most instances an

application for leave for judicial review must be made within three months from the date on when the grounds for the application first arose. MLRC frequently advises clients on the possibility of challenging a decision by way of judicial review; we have brought several challenges by way of this procedure. MLRC has seen the obstacles that the three-month time limit presents for individuals who are dealing with the impact of homelessness or acute housing difficulties. If, for example, a person presented to the local authority as homeless, seeking emergency accommodation and was refused, they may have a decision that can be challenged. However, difficulties arise when that person must also deal with the struggle and chaos of finding somewhere to sleep for the night. Identifying a decision that may be legally challengeable will not typically be at the forefront of their considerations.

A further difficulty arises when a person presents as homeless to the local authority on a number of occasions and is continually refused emergency accommodation. It brings up the question of whether the first refusal or the latest refusal can be challenged. The formal judicial review procedure makes no allowances for these difficulties that an applicant may face and does not marry easily with the statutory provisions in relation to the homeless assessment. A further example of the challenges the three-month time-limit presents is when an individual has had a decision made in

80 <https://www.gov.ie/en/publication/c6f60-draft-planning-and-development-bill-2022/>

81 <https://www.irishtimes.com/ireland/housing-planning/2023/01/26/government-publishes-contentious-legislation-to-reform-planning-process/>

relation to their housing matters and spends considerable time seeking to resolve it through advocacy and engagement of local councillors. Oftentimes, by the point at which they access the services of MLRC, the window for any potential challenge will have passed and it will be difficult to make out ‘good and sufficient reason’ why the time limit should be extended.

### ***Absence of an alternative forum for resolution of housing disputes***

As part of the UN Special Rapporteur on adequate housing’s report on access to justice for the right to housing, the Irish government was given a questionnaire and an opportunity to respond. The Irish government was asked if it was “aware of examples in your country of community-based initiatives to provide hearings and remedies for the right to housing outside formal court or tribunal process”. Ireland’s response was that they “were not aware of any such initiatives”.<sup>82</sup>

MLRC frequently engages with local authorities on housing matters and pursues informal appeals against refusals of housing entitlements through those authorities. MLRC notes that there is wide variation in how such appeals are processed, and that there is a general lack of transparency and a formalised process to be followed should an applicant wish to appeal a negative decision. MLRC notes that clients who are refused a service or an entitlement are frequently not informed that they have any

right of appeal, a right that arises by virtue of the right to fair procedures. Our experience is that appeals can be lengthy to determine and there is in some instances a failure to apply independent mechanisms for such appeals. We note that the new evictions procedure provided for in Part 2 of the Housing (Miscellaneous Provisions) Act 2014,<sup>83</sup> which provides for an internal appeals procedure with respect of tenancy warnings, commenced on April 13th, 2015.

MLRC would welcome the development of less formal and community-based initiatives designed to protect the right to housing. A more cost-effective mechanism of resolving disputes with local authorities with respect to housing matters may be through a tribunal or appeals office. This may make a remedy more accessible and formalised and reduce the inconsistencies and related unfairness of the current procedures.

### ***Multi-party actions***

A further barrier for litigants whose cases advance the public interest is the absence of multi-party actions. Multi-party actions (MPAs) can be an important vehicle for enhancing access to legally enforceable remedies, particularly for vulnerable groups. By taking proceedings as a group, litigants have greater combined resources that may enable them to deal with the challenges of legal action collectively and allow them to gain strength

82 <https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/Justice/Ireland.pdf>

83 <https://www.irishstatutebook.ie/eli/2014/act/21/enacted/en/html>

in numbers. MPAs equally allow groups to pursue litigation where the individual compensation might be nominal e.g. restoration of a small social welfare benefit or refund of the cost of goods or services purchased.

MPAs are also seen to increase the efficiency of the courts and to reduce the costs of legal proceedings for all parties by enabling common issues to be dealt with in one action. Ireland currently has no formal rules for MPAs, save for procedures around representative actions and test cases. As these procedures are not specifically designed to operate as class actions, their use is not as common or popular as class actions in jurisdictions that have dedicated procedures. Both representative actions and test cases are subject to certain limitations that deter their use. The Law Reform Commission produced a report in 2005 on multi-party litigation which concluded that ad hoc arrangements have been used to deal with multi-party litigation and that a more structured approach should be available based on principles of procedural fairness, efficiency and access to justice. The Superior Court Rules Committee has the power of making and changing the rules of the superior courts but has not as yet implemented the Law Reform Commission (LRC) proposal. FLAC recommends that the LRC recommendations on multi-party actions be given due consideration with a view to the introduction of a new litigation procedure to provide for class actions.

FLAC further recommends examination of the following issues which may increase access to justice for disadvantaged groups and individuals:

- developing the laws on standing to allow NGOs bringing actions on behalf of their members;
- allowing a greater use of the amicus curiae application;
- increasing the discretion of a judge to award costs to an unsuccessful litigant;
- modifying the doctrine of mootness so that courts can deal with issues which may be moot for the immediate parties, but which may continue to affect many others;
- devising more effective methods of extending the benefits of judicial decisions to those who are not directly party to the litigation;
- examining the rules of funding of litigation.

### ***Systemic Failures in the criminal judicial system***

In 2011, Shane O’Farrell was killed in a hit-and-run incident in Monaghan. The individual responsible for his death had broken numerous bail conditions and should not have been free



at the time of the killing.<sup>84</sup> There is extensive evidence of a failure within the criminal justice system in this case. The current deputy prime minister said that the case “reveals shocking malpractice and dysfunction in the criminal justice system.”<sup>85</sup>

In 2018 and 2019, both houses of the Irish parliament,<sup>8687</sup> voted to hold a public inquiry into the circumstances surrounding Mr. O’Farrell’s death; this, however, has not been progressed by the government. In its place, the government commissioned retired district court Judge Gerard Haughton to carry out a scoping exercise, conducting a preliminary review to ascertain whether there were any circumstances surrounding the death of Mr O’Farrell which required further inquiry beyond those already carried out. The Haughton Report was received by the Minister for Justice and the O’Farrell family in 2022. The family have raised concerns about the report and at present it remains unpublished. The board of the Courts Service has been warned about potential reputational damage from the impending publication of the report.<sup>88</sup> The family of Mr. O’Farrell continues to demand that the full Garda Síochána Ombudsman Commission (GSOC) public interest report into the killing is provided to them and that the parliamentary decision to hold a full public enquiry is

respected in order to vindicate their rights under Article 2 of the ECHR.

## Anti-corruption framework –

### Key recommendations

- Publish and enact comprehensive updated public ethics legislation as soon as possible.
- Conduct a public consultation on national measures required to address SLAPP litigation and associated NDAs and implement stringent dissuasive penalties with respect to those pursuing SLAPPs as a measure to deter the public and organisations from exercising their rights to access to justice and public participation, as well as access to information rights.
- Instruct local authorities to fully enforce part 15 of the Local Government Act 2001 with regard to asset disclosure of county and city councillors.

84 <http://www.justiceforshane.ie/>

85 <https://www.oireachtas.ie/en/debates/debate/dail/2017-05-03/2/?highlight%5B0%5D=richard&highlight%5B1%5D=bruton>

86 <https://www.oireachtas.ie/en/debates/debate/dail/2018-06-14/21/>

87 <https://www.oireachtas.ie/en/debates/debate/seanad/2019-02-13/10/>

88 <https://www.oireachtas.ie/en/debates/debate/seanad/2019-02-13/10/>

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## **Levels of corruption**

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In 2022, government minister Robert Troy resigned when it was uncovered that he had failed to properly account for a number of properties in which he had a financial interest.<sup>89</sup> It was also suggested that his sale of a house to a local municipality in his constituency had not been properly accounted for.<sup>90</sup> The municipality later claimed that the records had been “lost”.<sup>91</sup> The case exposed the weakness of not only the asset declaration regime, but also the absence of consequences for improper or erroneous declaration findings, as omissions can simply be “corrected” without penalisation.<sup>92</sup> The Standards in Public Office Commission (SIPO) stated that “without investigation” it could not determine if the Minister had broken public ethics guidelines.<sup>93</sup> The government announced that the sale of properties to a public body by an elected representative would be included in the ongoing review of ethics legislation.<sup>94</sup>

In January 2023, Damien English, the Minister of State at the Department of Enterprise, Trade and Employment, resigned his ministerial position but not his seat in parliament.<sup>95</sup> This resignation occurred after it emerged that he had provided incorrect information to local authorities in respect of a planning application in 2008.<sup>96</sup> He failed to declare his ownership of this property in his annual returns for a decade.<sup>97</sup>

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## **Framework to prevent corruption**

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### ***Integrity framework including incompatibility rules (e.g.: revolving doors)***

In 2021, the government announced a review of Ireland’s existing statutory framework for Ethics in Public Life.<sup>98</sup> The Review of Ethics Legislation will seek to respond to outstanding recommendations of the Moriarty and Mahon tribunals. The government has also stated that the review will take account of more recent developments including:

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89 <https://www.irishtimes.com/politics/2022/08/22/robert-troy-property-controversy-a-timeline/>

90 <https://www.ontheditch.com/council-paid-troy-more/>

91 <https://www.ontheditch.com/robert-troys-annual-asset-declarations/>

92 <https://www.irishexaminer.com/opinion/commentanalysis/arid-40943237.html>

93 <https://www.irishexaminer.com/news/politics/arid-40952780.html>

94 <https://www.irishtimes.com/politics/2022/08/17/tanaiste-has-total-confidence-in-robert-troy-amid-questions-over-property-interests/>

95 <https://www.rte.ie/news/ireland/2023/0112/1346222-english-resignation/>

96 <https://www.ontheditch.com/damien-english-planning-permission/>

97 <https://www.ontheditch.com/damien-english/>

98 <https://www.gov.ie/en/press-release/aec32-minister-mcgrath-launches-public-consultation-on-review-of-ethics-legislation/>

- the ‘Hamilton Report’ recommendations on preventing economic crime and corruption;
- the Council of Europe’s Group of States against Corruption (GRECO) recommendations on reform of Ireland’s statutory framework for ethics;
- the Standards in Public office Commission’s experience of administering the current framework.

The Hamilton Report’s<sup>99</sup> recommendations on the establishment of an Advisory Council against Economic Crime and Corruption has recommended the inclusion of a worker representative. An Irish Congress of Trade Unions (ICTU) representative was appointed as one of the civil society representatives in May 2022.

According to NGOs, the absence of an updated legal/ethical framework for public officials following the lapse of the Public Sector Standards Bill 2015 has made it extremely difficult to hold public officials to account for their actions. This includes actions taken by public officials to put in place contracts (Service Level Agreements) with NGOs, which prohibit the use of funding for any activity that involves criticism of government policy, effectively limiting the scope, and nature of NGO advocacy work. It also includes threats, either implicit or explicit, that receipt of statutory funding will

be contingent on not expressing critical views on government policy.

Despite the urgency in the need for reform in this area, there have been no further publicly announced developments since the initial consultation closed in January 2022. It is reported that the government will seek to publish the findings of the consultation and a draft Bill in Q1 of 2023.<sup>100</sup>

***General transparency of public decision-making (including public access to information such as lobbying, asset disclosure rules and transparency of political party financing)***

The Lobbying Register, which was established consequent to the Regulation of Lobbying Act in 2015, does not allow for searches against Designated Public Officials (DPOs) – which impedes the practical ability to determine the lobbying focus on key officials. The system also does not capture the internal effect of lobbying more junior members of staff who may have been targeted by lobbying to DPOs. A number of key bodies and agencies are also excluded from the lobbying register – e.g. An Bord Pleanála and The Environmental Protection Agency (EPA).

The Regulation of Lobbying (Amendment) Bill 2022, which is currently before parliament, enhances certain aspects of the principal act by increasing the type of groups which

99 <https://assets.gov.ie/99833/2f596019-69f3-444a-b2c6-2f65c26cdc7f.pdf>

100 <https://www.oireachtas.ie/en/debates/question/2022-11-09/41>

are subject to its provisions and improves the operation and enforcement of section 22 of the principal Act, which deals with restrictions on post-term employment as a lobbyist.<sup>101</sup>

Political donations are governed by the 1997 Electoral Act<sup>102</sup> and the 2001 Electoral (Amendment) Act and public financing of parties is regulated by the Oireachtas (Ministerial and Parliamentary Activities) (Amendment) Act 014.<sup>103</sup> Records of both are published by the Standards in Public Office Commission (SIPO) alongside individual asset declarations for elected representatives.<sup>104</sup> The records of asset declaration, as required for county and city councillors, under the Local Government Act 2001<sup>105</sup> remain patchy and are the responsibility for each individual county or city council.

### ***Rules on preventing conflict of interests in the public sector***

The government has voted to delay or have not progressed a number of opposition-tabled bills on conflict of interest which have received parliamentary approval, including the Regulation of Lobbying (Amendment) Bill 2020<sup>106</sup> and the Regulation of Lobbying (Post-Term Employment as Lobbyist) Bill 2020.<sup>107</sup> These bills remain within the parliamentary process and have not become law. The Regulation of Lobbying (Amendment) Bill 2022, which is currently before parliament, enhances certain aspects of the principal lobbying regulation act expanding the scope of groups which are subject to its provisions and improves the operation and enforcement of section 22 of the principal act, which deals with restrictions on post-term employment as a lobbyist.<sup>108</sup>

In 2022, the national planning authority, An Bord Pleanála (APB), was embroiled in a serious controversy<sup>109</sup> with respect to undeclared conflicts of interest on a number of planning

101 <https://www.oireachtas.ie/en/Bills/Bill/2022/85/?tab=Bill-text>

102 <https://www.sipo.ie/acts-and-codes/guidelines/donations/Guidelines-for-political-parties-on-donations-and-prohibited-donations.pdf>

103 <https://www.sipo.ie/reports-and-publications/state-financing/>

104 <https://www.sipo.ie/reports-and-publications/annual-disclosures/>

105 <https://www.irishstatutebook.ie/eli/2015/si/29/made/en/print>

106 <https://www.oireachtas.ie/en/Bills/Bill/2020/62/>

107 <https://www.oireachtas.ie/en/bills/bill/2020/49/?highlight%5B0%5D=regulation&highlight%5B1%5D=lobbying&highlight%5B2%5D=post&highlight%5B3%5D=term&highlight%5B4%5D=employment&highlight%5B5%5D=lobbyist&highlight%5B6%5D=bill&highlight%5B7%5D=2020>

108 <https://www.oireachtas.ie/en/Bills/Bill/2022/85/?tab=Bill-text>

109 <https://www.ontheditch.com/abp-deputy-chairperson-voted-build-to-rent-application-brothers-firm/>

decisions<sup>110</sup> and other matters. The controversy resulted in the deputy chairperson of ABP resigning his position.<sup>111</sup> As a response to the controversy, the Minister for Housing commissioned a senior council to compile a report on the allegations of misconduct.<sup>112</sup> The report was submitted to the Minister for Housing in July.<sup>113</sup> Based on the findings, a file was sent to the Director of Public Prosecutions, who recommended that charges be filed against the former deputy chairperson.<sup>114</sup> In December 2022, the Minister for Housing was criticised by the opposition for using the excuse of “needing to rebuild public trust” in APB to rush through a number of controversial changes to the appointments system to the board. The minister was accused of leaving the board open to charges of politicisation and further conflict of interest accusations around Ministerial appointments have been revised.<sup>115</sup>

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

The government has completed, behind schedule, the transposition of EU directive 2019/1937 on protected disclosures with the passage of the Protected Disclosures (Amendment) Act 2022,<sup>116</sup> which establishes the Office of the Protected Disclosures Commissioner and expands protections for whistleblowers. The EU opened infringement proceedings against Ireland in 2022 for not transposing the directive within the agreed timetable (INFER(2022)0098).<sup>117</sup> These proceedings are currently open. The government chose to derogate from the directive in a number of areas which would have served to strengthen protections for whistleblowers, e.g. limiting the requirements to establish internal whistleblowing channels to companies with more than 49 employees. ICCL and others called on the government to reverse this

110 <https://www.irishexaminer.com/news/arid-40975796.html>

111 <https://www.irishtimes.com/ireland/housing-planning/2022/07/08/paul-hyde-resigns-from-an-bord-pleanala-following-allegations-of-conflict-of-interest/>

112 <https://www.gov.ie/en/press-release/d34de-statement-from-the-department-of-housing-local-government-and-heritage/>

113 <https://www.irishexaminer.com/news/arid-40928732.html>

114 <https://www.irishexaminer.com/news/arid-40979903.html>

115 <https://extra.ie/2022/12/15/news/housing-minister-denies-power-grab>

116 <https://www.oireachtas.ie/en/Bills/Bill/2022/17/>

117 [https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/?typeOfSearch=true&active\\_only=1&noncom=1&cr\\_dossier=&decision\\_date\\_from=&decision\\_date\\_to=&EM=IE&title=&submit=Search&lang\\_code=en](https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?typeOfSearch=true&active_only=1&noncom=1&cr_dossier=&decision_date_from=&decision_date_to=&EM=IE&title=&submit=Search&lang_code=en)

decision and further strengthen whistleblower protections.<sup>118</sup>

### ***Investigation and prosecution of corruption***

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#### ***Effectiveness of investigation and application of sanctions for corruption offences (including for legal persons and high level and complex corruption cases) and their transparency, including as regards to the implementation of EU funds***

The ineffectiveness of the asset disclosure regime for elected officials has been highlighted by the Robert Troy and Damien English cases as outlined above. In addition to this, asset declaration record-keeping by local authority politicians, which is required by part 15 of the Local Government Act 2001 is patchy with many records missing, incomplete and difficult to assess.<sup>119</sup>

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

### **Key recommendations**

- Publish and enact legislation re-forming defamation laws and related NDA restrictions as a matter of urgency.
- Progress the review of the Freedom of Information system to ensure a regime that is transparent, user-friendly and accessible.
- Ensure that in any action designed to counter hate speech, whether by the Media Commission, the Electoral Commission or forthcoming incitement-to-hatred legislation, fully respects the right to freedom of expression.

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

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

118 [https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint\\_committee\\_on\\_finance\\_public\\_expenditure\\_and\\_reform\\_and\\_taoiseach/reports/2021/2021-12-16\\_report-of-the-joint-committee-on-the-pre-legislative-scrutiny-of-the-general-scheme-of-the-protected-disclosures-amendment-Bill-2021\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_finance_public_expenditure_and_reform_and_taoiseach/reports/2021/2021-12-16_report-of-the-joint-committee-on-the-pre-legislative-scrutiny-of-the-general-scheme-of-the-protected-disclosures-amendment-Bill-2021_en.pdf)

119 <https://www.oireachtas.ie/en/debates/question/2022-12-06/212/?highlight%5B0%5D=r%C3%83%C2%B3is%C3%83%C2%ADn>

The Future of Media Commission was established by the government in 2020 to examine the future of the media in Ireland, including Ireland’s public service broadcasters, commercial broadcasters, print, and online media platforms.<sup>120</sup> The Commission’s final report was published in July 2022<sup>121</sup> and contains over 50 recommendations on the structure and financing of media in Ireland. The report recommends moving away from the “television licence fee” model of funding public broadcasting to one of direct exchequer funding. However, the government rejected the recommendation to abolish the licence fee model and recommended direct funding. An expert group was subsequently established and charged with introducing reforms which excluded the recommendation of direct funding, the only one of five to be rejected.<sup>122</sup>

### **Other**

As previously mentioned, the Future of Media Commission report recommended the establishment of a new body, The Media Commission.<sup>123</sup> This commission will be the regulatory body for online media, the licensing

authority for radio and television, the training and development agency and the grant aiding body for a number of current and new schemes. The National Union of Journalists has called for greater transparency and direct involvement of industry voices, including trade unions and civil society, in determining the criteria for grants it is proposed that the commission will administer.<sup>124</sup>

## ***Pluralism and concentration***

### ***Levels of market concentration***

There is a high level of concentration of ownership in the print media sector, notably in the regional press sector,<sup>125</sup> with Mediahuis and Formpress being the two largest players in the regional/local market.<sup>126</sup>

### ***Rules governing and safeguarding the pluralistic media market, and their application (including regulating mergers, acquisitions and other ownership changes)***

The Competition and Consumer Protection Commission (CPC) has approved

120 <https://futureofmediacommission.ie/#>

121 <https://www.gov.ie/en/publication/ccae8-report-of-the-future-of-media-commission/>

122 <https://dublinfreelance.org/updates/nuj-slams-govt-decision-to-reject-broadcasting-reforms/>

123 <https://www.gov.ie/en/publication/ccae8-report-of-the-future-of-media-commission/>

124 [https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint\\_committee\\_on\\_tourism\\_culture\\_arts\\_sport\\_and\\_media/submissions/2022/2022-11-24\\_opening-statement-seamus-dooley-irish-secretary-national-union-of-journalists-nuj\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_tourism_culture_arts_sport_and_media/submissions/2022/2022-11-24_opening-statement-seamus-dooley-irish-secretary-national-union-of-journalists-nuj_en.pdf)

125 <https://mural.maynoothuniversity.ie/15086/1/Kerr%20The%20Media%20in%20Ireland%20V4.pdf>

126 <http://www.mediaownership.ie/list.php?media=newspaper&market=local>

acquisitions of regional newspaper titles<sup>127</sup> by a dominant player and has adopted a narrow view of the market. The NUJ has expressed concern at these acquisitions<sup>128</sup> and has noted that its online presence renders the focus on geographical markets outdated.

### ***Transparency of media ownership***

#### ***The transparent allocation of state advertising (including any rules regulating the matter)***

Greater clarity is needed on the decision-making process which informs which media outlets receive state/public advertising and the criteria used to allocate the same. The use of commercial brokers to place advertisements on behalf of the state and state agencies is a concern. One agency is owned and controlled by a company which itself owns a significant number of regional newspaper titles. In 2022, the NUJ unsuccessfully requested a review of the measures put in place by CPCC, and aimed to avoid potential conflicts of interest or the perspective of conflicts of interests.<sup>129</sup>

### ***Public service media***

#### ***Independence of public service media from governmental interference***

There is no evidence of direct government interference. In Autumn 2022, the parliamentary committee on broadcasting invited<sup>130</sup> RTÉ and Virgin Media to discuss editorial matters. Both organisations declined to appear before the committee. The failure to provide adequate funding and to reform the licence collection system has had an impact on the main public service broadcaster RTÉ. As of January 2023, the government has not provided information on long term proposals for funding of public service broadcasting. The NUJ has viewed this action as an impediment to securing the future viability of public service broadcasting.

#### ***Independence of public service media from economic interference***

The failure to provide adequate funding and to reform the licence collection system has had an impact on the main public service broadcaster RTÉ.<sup>131</sup> As of January 2023, the government has not provided information on long term proposals for funding of public service broadcasting.

127 <https://www.ccpc.ie/business/ccpc-requires-commitments-to-secure-approval-for-acquisition-of-the-mid-land-tribune/>

128 <https://www.nuj.org.uk/resource/nuj-expresses-concern-over-proposed-sale-of-mayo-news.html>

129 [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_tourism\\_culture\\_arts\\_sport\\_and\\_media/2022-11-24/speech/82/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_tourism_culture_arts_sport_and_media/2022-11-24/speech/82/)

130 <https://www.irishexaminer.com/news/politics/arid-40982258.html>

131 <https://www.thejournal.ie/licence-fee-rte-utterly-broken-dee-forbes-oireachtas-committee-5659707-Jan2022/>



### ***Editorial standards (including diversity and non-discrimination)***

In June 2022, the popular national phone-in discussion radio programme LiveLine on the state broadcaster RTÉ Radio 1 held a number of days of discussion on the issues of gender identity and transgender people in Irish society. The programmes resulted in a large degree of public commentary, with over 1,000 complaints being made to RTÉ.<sup>132</sup> The controversy around the programmes centred on the fact that degrading offensive tropes and language were used about transgender people, which went unchallenged by the host of the programme over a number of days. As noted by the Trans Equality Together Coalition, it is suspected that calls to the programme originated from and were coordinated by anti-trans organisations.<sup>133</sup> RTÉ's use of the logo of one such organisation in its promotion of the programme was also cited as a serious issue. The controversy resulted in Dublin Pride ending their media partnership with RTÉ.<sup>134</sup> In a statement, Dublin Pride stated, "We believe that fundamental human rights should not be debated, and we believe that every one of us, especially state-sponsored organisations, have a duty and a responsibility to protect and safeguard the most vulnerable and marginalised members of our society."

At a parliamentary hearing in September 2022,<sup>135</sup> RTÉ denied any that editorial, diversity, inclusion, or other standards had been breached. While intersex is rarely mentioned, this negatively affects intersex people too as while intersex and transgender are not the same thing, many intersex people are assigned a sex that is incongruent with their gender identity, often followed by irreversible genital surgery and hormonal interventions, essentially creating a transgender person. Many intersex people display physical attributes typically associated with a sex other than the one they were assigned at birth. Thus, the current anti-trans media climate contributes to creating an environment that is also hostile to intersex people.

### ***Other***

In December 2022 RTÉ reported a media gender pay gap of 13.03pc. This is reduced to 6.79pc when overtime roles (male dominated) are excluded.<sup>136</sup>

132 <https://www.irishexaminer.com/news/arid-40897364.html>

133 <https://www.irishtimes.com/opinion/letters/2022/06/17/trans-equality-together-responds-to-liveline/>

134 <https://gcn.ie/dublin-pride-interview-rte-partnership/>

135 <https://www.irishtimes.com/ireland/2022/09/24/rte-received-nine-formal-complaints-about-liveline-shows-on-transgender-issues/>

136 [https://about.rte.ie/wp-content/uploads/2022/12/RTE-Gender-Pay-Gap-Report\\_19122022.pdf](https://about.rte.ie/wp-content/uploads/2022/12/RTE-Gender-Pay-Gap-Report_19122022.pdf)

## Online media

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### **Competence and powers of bodies or authorities supervising the online ecosystem**

As noted previously, the Media Commission will have a vast workload, and as of January 2023 it is the view of the NUJ that it does not have the resources to carry out its extensive functions, despite being allocated €7.5m in Budget 2023 to cover establishment and operational expenses.<sup>137</sup>

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

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

There has been an increase in online abuse, notably of women journalists.<sup>138</sup> There have been verbal attacks on photographers and camera crews, notably outside courts, from far-right groups.<sup>139</sup>

#### **Rules and practices guaranteeing journalist's independence and safety**

While the overall situation regarding media in Ireland remains positive, the 2022 RSF Press Freedom Index specifically cited Ireland's

defamation laws as contributing negatively to the country's rankings in the index.<sup>140</sup> A review of Ireland's defamation laws has been ongoing since 2016. A 2019 report on the review of the 2009 Defamation Act was finally published in March 2022,<sup>141</sup> and made a number of recommendations for reform. These include:

- An end to juries in defamation cases
- Easier access to justice for those who feel their reputation is unfairly attacked
- Clearer protection for responsible public interest journalism
- Reducing legal costs and delays
- Measures to encourage prompt correction and apology, where mistakes are made, and new measures to combat abuse
- Making it easier to grant orders directing online service providers to disclose the identity of an anonymous poster of defamatory material

While the long-awaited publication of the review is welcome, as of January 2023 no legislation to amend the law as it currently stands has been published. Serious concerns have also

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137 [https://about.rte.ie/wp-content/uploads/2022/12/RTE-Gender-Pay-Gap-Report\\_19122022.pdf](https://about.rte.ie/wp-content/uploads/2022/12/RTE-Gender-Pay-Gap-Report_19122022.pdf)

138 <https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/man-who-harassed-six-female-writers-and-journalists-online-is-jailed-1.4083166>

139 <https://extra.ie/2022/10/16/news/gardai-monitoring-rte-campus-as-right-wing-protesters-harass-workers>

140 <https://rsf.org/en/index?year=2022>

141 <https://www.irishexaminer.com/news/arid-40819581.htmla>

been raised by a number of legal experts on the proposals to end the use of juries in defamation cases who have stated that it would undermine the principles of Ireland's common law legal.<sup>142</sup> It has also been highlighted that the promised reforms in this area will not prevent the use of NDAs (non-disclosure agreements) to silence individuals who have been subject to SLAPPs. This matter was raised under parliamentary privilege in October 2022, where an organisation and individual alleged to have engaged in this behaviour were named by a TD.<sup>143</sup>

In November 2022 at a meeting of the Oireachtas committee for European Affairs European Commissioner for Justice Didier Reynders highlighted the need for a review of Ireland's defamation laws is urgent given the chilling effect the law as it stands has on journalists.<sup>144</sup>

There has been a notable increase in anecdotal reports of the SLAPP litigation being pursued in environmental cases and against media organisations.<sup>145</sup>

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

The NUJ and media organisations met with the Assistant Garda Commissioner and her team<sup>146</sup> in 2022 and secured support for the establishment of an inter-departmental and agency committee to monitor journalist safety, threats, and to promote awareness of abuse and the need for safety for journalism.

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

There has been a public debate in the last year regarding the use, or threat of use, of defamation lawsuits by politicians to inhibit reporting and against other elected officials.<sup>147</sup> The prospect of large damages being awarded against a defendant and high court costs are cited as reasons why individuals and organisations are unwilling to pursue the matter in court. It has also been noted by the NUJ that the high cost of defamation cases leads to out-of-court settlements and a reluctance on the part of media organisations to defend actions.

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142 <https://www.irishexaminer.com/news/arid-40819581.html>

143 <https://www.thejournal.ie/neasa-hourigan-dail-slapps-5903822-Oct2022/>

144 [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_european\\_union\\_affairs/2022-11-24/2/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_european_union_affairs/2022-11-24/2/)

145 <https://www.irishtimes.com/politics/2022/10/22/the-big-chill-the-silencing-effect-of-sinn-fein-legal-threats-against-politicians/>

146 <https://www.nuj.org.uk/resource/irish-govt-urged-to-act-on-online-abuse-of-journalists.html>

147 <https://www.irishtimes.com/politics/2022/10/22/the-big-chill-the-silencing-effect-of-sinn-fein-legal-threats-against-politicians/>

### ***Confidentiality and protection of journalistic sources (including whistleblower protection)***

The General Scheme of the Garda Síochána (Powers) Bill<sup>148</sup> provides for a general search warrant provision, as recommended by the Law Reform Commission (LRC). However, Head 15(6) of the draft bill is not in line with the LRC's recommendation that urgent applications should be made to the High Court, not the District Court. It is questionable whether such an application would be appropriate at the District Court level. Clarification on why LRC's recommendation was departed from in this instance is needed. In addition, the provisions under Head 15 failed to take into account a recent High Court case concerning a journalist who refused to give the police the password to his phone, and the comments made by Mr Justice Garrett Simmons, who warned:

“The interpretation of the legislative provisions governing search warrants contended for by both parties has the consequence that there is, arguably, no statutory procedure prescribed under domestic law whereby the right to protection of journalistic sources is attended with

legal procedural safeguards commensurate with the importance of the principle at stake. This might well represent a breach of the European Convention on Human Rights. A District Court judge who has to consider an application for a search warrant, under this Head, should have to consider additional legal procedural safeguards in respect of journalists and publishers who have a constitutional right to protect their sources but who may find themselves subjected to a search.”<sup>149</sup>

This ruling was reversed by the Court of Appeal in *Corcoran & Oncor Ventures Ltd v Commissioner of An Garda Síochána* in April 2022.<sup>150</sup>

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

Following on from a political controversy in the summer of 2021 related to the proposed appointment of a former government Minister to a UN Special Envoy role,<sup>151</sup> the government announced a review of the 2014 Freedom of Information Act.<sup>152</sup> The review, which is being led by the Department of Public Expenditure and Reform, remains ongoing as of January 2023.<sup>153</sup>

148 <https://www.gov.ie/en/press-release/6ed9f-garda-powers-to-be-modernised-and-updated-under-new-Bill-from-minister-humphreys/>

149 <https://www.irishexaminer.com/news/courtandcrime/arid-40200825.html>

150 <https://www.bailii.org/ie/cases/IECA/2022/2022IECA98.html>

151 [TheJournal.ie; September 6th 2021 "Zapponegate: Ex-Minister texted Coveney to say thanks for 'incredible opportunity' in March"](https://www.thejournal.ie/September-6th-2021-Zapponegate-Ex-Minister-texted-Coveney-to-say-thanks-for-incredible-opportunity-in-March/)

152 [Freedom of Information Act \(2014\)](#)

153 <https://www.oireachtas.ie/en/debates/question/2022-11-15/112/>

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

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### ***Abuse of criminalisation of speech***

The Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 was published in October 2022.<sup>154</sup> The bill seeks to introduce hate crime legislation in the Irish system and review the provisions of the Incitement to Hatred Act (1989).<sup>155</sup> While the need for reform has been raised by multiple stakeholders,<sup>156</sup> there is a need to ensure that legislation seeking to criminalise any form of speech respects the right to freedom of expression. The proposed definition of hatred in this legislation has changed from the draft bill which was published in 2021.<sup>157</sup> While the new definition is in line with a reference to hatred in the preamble to the Council Framework Decision 2008/913/JHA of 28 November 2008 (Framework Decision),<sup>158</sup> it is not considered to be a definition as such within that decision. The Framework Decision is drafted in a broad way so that it can be applied in a context-specific manner in different states.

It has been recommended that this provision be replaced with the definition of hatred provided by the Council of Europe Commission against Racism and Intolerance (ECRI) and endorsed by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. It is worded as follows:

“Hatred’ shall mean a state of mind characterised as intense and irrational emotions of opprobrium, enmity and detestation towards the target group.”<sup>159</sup>

Civil society has also called on the government to ensure that the new bill is only one pillar of a suite of measures necessary to combat hate speech. Other forms of hate speech which might cause deep offence, for example, but do not reach a criminal threshold should be combated by other means, including education, monitoring, alternative remedies, and an enabling environment for powerful counter-speech.

A further example of the “abuse of criminalisation of speech” is the reliance on anti-social

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154 <https://www.oireachtas.ie/en/Bills/Bill/2022/105/>

155 <https://www.irishstatutebook.ie/eli/1989/act/19/enacted/en/print>

156 See e.g. ECRI, Fifth report on Ireland (adopted on 2 April 2019 / published on 4 June 2019), para 34 -35.

157 <https://www.gov.ie/en/press-release/48cb5-tough-sentences-for-hate-crimes-under-new-Bill-from-minister-mcentee/?referrer=http://www.justice.ie/en/JELR/Pages/PR21000084>

158 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008F0913>

159 ECRI, ECRI General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8 December 2015, referencing Principle 12.1 of the Camden Principles on Freedom of Expression and Equality. Available at: [www.article19.org/data/files/medialibrary/1214/Camden-Principles-ENGLISH-web.pdf](http://www.article19.org/data/files/medialibrary/1214/Camden-Principles-ENGLISH-web.pdf) and <https://rm.coe.int/ecri-generalpolicy-recommendation-no-15-on-combating-hate-speech/16808b5b01>

behaviour orders (ASBOs) pursuant to section 115 of the Criminal Justice Act, 2006. In *Tallon v Director of Public Prosecution* (2022)<sup>160</sup> the court struck down an ASBO as disproportionately infringing freedom of expression. The case concerned a Christian preacher in Wexford town who had been subjected to a ban after allegedly expressing homophobic, racist and anti-abortion views in the town for hours through a loudspeaker. An initial order handed down at Wexford District Court was deemed to be “too broad” and “infringed on freedom of expression”.<sup>161</sup>

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

The Online Safety and Media Regulation (OSMR) Act was signed into law on December 10th, 2022.<sup>162</sup> The act is a substantial overhaul of the regulation of online expression. It transposes the amended Audiovisual Media Services Directive [Directive (EU) 2018/1808] into Irish law; dissolves the Broadcasting Authority of Ireland; and establishes a Media Commission which will regulate audiovisual media services, sound media services, and designated online services. The act provides for the Media Commission to create online safety codes and to issue guidance materials and advisory notices in relation to harmful online

content and age-inappropriate online content. It provides for the commission to audit user complaint mechanisms operated by designated online services; to direct a designated online service to take specified actions, including to remove or restore individual pieces of content; to conduct investigations and inquiries; to issue compliance notices; to issue warning notices if a service does not provide a satisfactory justification in relation to any alleged non-compliance; and, where the Commission deems necessary, to apply to seek sanctions.

There is troubling vagueness in respect of the definition of harmful content, which gives rise to freedom of expression and censorship concerns. It is difficult to see how the act will be enforced without service providers unjustifiably removing innocuous material. ICCL has serious concerns that this act will lead to disproportionate restrictions on the right to freedom of expression; the unjustified removal of material, self-censorship, prior restraint; and companies using more strenuous filtering measures, use of algorithms, and AI. The act also provides no safeguards for literary, artistic, political, scientific or academic discourse, and fair and accurate reporting; and does not differentiate between age groups, i.e., children versus adults. The act also provides that the Media Commission will be able to expand the

160 <https://www.bailii.org/ie/cases/IEHC/2022/2022IEHC322.html>

161 <https://www.independent.ie/regional/wexford/news/bullring-preacher-returns-to-wexfords-main-street-after-high-court-ruling-finds-in-his-favour-41816318.html>

162 <https://www.gov.ie/en/press-release/120ff-president-higgins-signs-crucial-online-safety-and-media-legislation-into-law/#:~:text=%E2%80%9CThe%20Online%20Safety%20and%20Media,importance%20to%20protecting%20children%20online>

definition of harmful online content, thereby compounding the problem as it would permit the extension of censorship by the executive.

In addition, the vastly wide-ranging list of services which could potentially be subjected to regulation under the OSMR Act will, on the face of it, see the expressions of members of the public subjected to codes in a way usually designed for licensed bodies in Ireland. These measures will extend to essentially all human interactions online with no adequate procedural safeguards for individuals whose speech may be censored as per the Constitution, the European Convention of Human Rights, and/or the Charter of Fundamental Rights.<sup>163</sup>

In October 2022, ICCL and Digital Rights Ireland wrote to the parliamentary committee dealing with the then bill to urge them to halt the passage of the legislation given the scale of problematic issues it presents. Instead of passing the OSMR legislation, the letter argued that Irish legislators should:

1. transpose the Audiovisual Media Services Directive;
2. focus on enforcing the Digital Services Act and tackle algorithmic amplification;
3. pass the pending hate crime and prohibition of incitement to hatred legislation.<sup>164</sup>

These suggestions were not accepted by legislators.

### ***Restrictions on access to information***

There are certain categories of information that are not published routinely by government departments, meaning that civil society, journalists, and researchers must attempt to access this via Freedom of Information (FOI) legislation. For example, the Department of Social Protection (DSP) continually refuses to routinely publish their circulars. Once the FOI is submitted, departmental practice is that DSP staff will contact the applicant and state that they may provide the FOI response outside of the scope of the FOI structure if the official request is withdrawn. This speeds up the process but is clearly unnecessary and an obvious demonstration of making accessing information more difficult for the applicant, even where they are entitled to receive this information under the legislation, while simultaneously making it easier for staff to not have to draft an FOI schedule. It is common practice for departments to provide large documents in a manner that makes them more difficult to analyse, often with photocopies of printed computer files or large tracts of scanned documents which cannot be searched. The costs of accessing information held by departments is not only routinely excessively high, but there is no clarity as to how the rates are set. As noted previously, a review of the regime is ongoing but is behind schedule. It is

163 <https://www.iccl.ie/wp-content/uploads/2022/09/OSMR.pdf>

164 Unpublished Letter

expected that legislation will be published in 2023 but no clear timeline has emerged.<sup>165</sup>

Restrictions on access to information is a significant issue across the criminal justice system. Many of the data gaps are highlighted in IPRT's 2021 "Progress in the Penal System" report<sup>166</sup> which focused on 'The Need for Transparency' as its core theme. Key issues include the need for civil society to rely on information requests and parliamentary questions to obtain sometimes basic information, such as how many prisoners were recorded to have children; numbers on waiting lists for transfer to the Central Mental Hospital or for mental health and addiction treatment in prison.

### ***Legislation and practices on fighting disinformation***

In January 2021, the government published the general scheme of the Electoral Reform Bill (2020).<sup>167</sup> The draft bill went through an extensive period of pre-legislative scrutiny ending in July 2021. A key component of this

legislation is the establishment of an Electoral Commission, an institution which Ireland is unusual in a comparative sense for not having. As part of the pre-legislative scrutiny process, a number of academics and members of civil society called on the government to equip the to-be-established commission with powers to address and counter dis/misinformation.<sup>168</sup> While the subsequent committee report recommended that; "the proposed Bill provides for the maintenance of electoral integrity and the protection against election interference as an explicit function of the Electoral Commission".<sup>169</sup> The revised bill contained no reference to mis/disinformation until an entirely new section was added as an amendment by the Minister late in the legislative process.<sup>170</sup> This last-minute addition means that civil society groups were unable to assess the provisions, very little time was given in parliament for the examination of the measures<sup>171</sup> and they remain subject to infringement procedures by the European Commission.<sup>172</sup> This has meant that while the act has been passed by the houses of parliament, the sections which attempt

165 <https://www.oireachtas.ie/en/debates/question/2022-11-15/112/>

166 <https://www.iprt.ie/latest-news/progress-in-the-penal-system-the-need-for-transparency-2021/>

167 [The General Scheme of the Electoral Reform Bill \(2020\)](#)

168 [Joint Committee on Housing, Local Government and Heritage debate - Tuesday, 2 Feb 2021](#)

169 [https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint\\_committee\\_on\\_housing\\_local\\_government\\_and\\_heritage/reports/2021/2021-08-19\\_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-electoral-reform-bill-2020\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_housing_local_government_and_heritage/reports/2021/2021-08-19_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-electoral-reform-bill-2020_en.pdf)

170 <https://www.irishexaminer.com/news/politics/arid-40922930.htm>

171 <https://www.irishexaminer.com/opinion/commentanalysis/arid-40907792.html>

172 <https://www.gov.ie/en/press-release/44555-statement-on-the-electoral-reform-Bill/>



to combat mis/disinformation and regulate political advertising remain unenacted.<sup>173</sup>

The unenacted provisions mean the Electoral Commission will have explicit powers in respect of its monitoring and investigatory functions, including a power to issue during an electoral period:

- a take-down notice;
- a correction notice;
- a labelling order;
- an access-blocking order;
- a notice requiring any operator or host of any online platform to publish a statement informing all affected end-users of the manipulative or inauthentic behaviour or the use of an undisclosed bot.

Complementary to its enforcement powers, the Electoral Commission may publish codes of conduct in consultation with an Advisory Board and a Stakeholder Council, which may apply to online platforms, candidates, political parties, third parties and/or media outlets. It is highlighted that such codes of conduct would apply during an election or referendum campaign period only.

Separately, online platforms will be required to report possible disinformation, misinformation, or manipulative/inauthentic behaviour in the online sphere to the Electoral Commission in the lead up to an electoral or referendum period. They will also be required to put in place a notification mechanism for users to report possible disinformation relating to online electoral information and misinformation relating to online electoral process information.<sup>174</sup>

In submissions to the European Commission on the infringement process, ICCL and Technology Ireland<sup>175</sup> set out in detail the impact that these provisions would have on the free expression of political opinion. This is because the regulations apply not only to “electoral process information”, i.e. information regarding the holding/running of the electoral event, but also “online electoral information” which includes “any online content relating to:

1. a candidate in an election;
2. a political party that has candidates standing in an election;
3. issues that are of relevance to an election;
4. or issues that are of relevance to a referendum.

173 <https://www.gov.ie/en/press-release/72b26-proposals-to-enhance-and-protect-the-integrity-of-elections-published/>

174 <https://data.oireachtas.ie/ie/oireachtas/Bill/2022/37/seanad/6/amendment/creamList/eng/b37b22-cl.pdf>

175 <https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2022&num=376>

Head 144 of the bill stipulates that any content which constitutes “disinformation” with respect to the above topics can be removed or otherwise restricted.

“Disinformation” is defined in the bill as:

“any false or misleading online electoral information that—

- (a) may cause public harm, and
- (b) by reason of the nature and character of its content, context or any other relevant circumstance gives rise to the inference that it was created or disseminated in order to deceive;”

In this sense then, the power of the Commission to limit the freedom of expression of individuals is based on the Commission’s own interpretation of what is:

1. Misleading
2. Of a nature which “may” cause public harm
3. Deceitful in nature

It is the contention of ICCL that granting the Electoral Commission such wide-ranging powers creates the potential not only for a chilling effect on the free expression of opinion, but it also may create scenarios where statements, utterances or other online publications

incorrectly classified as “misinformation” are effectively excluded from the electoral discourse. In January 2023, documents released to ICCL under FOI from the European Commission show that the government and relevant EU authorities continue to engage in dialogue on this matter. The Commission has expressed dissatisfaction with the approach to the application of EU law that the Irish government has taken with regard to the mis/disinformation provisions as contained in the Electoral Act.<sup>176</sup>

## Checks and balances

### Key recommendations

- Immediately end the practice of rushing legislation at the end of parliamentary terms and ensure that democratic rights are respected.
- Ensure that the to be established Office of the Inspector of Places of Detention and the Electoral Commission are independent of executive interference in the governance and operation.
- Implement the government’s plan to address the recommendations in the Report of the Review Group on the Reform of the Civil Justice System as a matter of urgency.

176 Unpublished FOI Documents January 2023.

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

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### ***Framework, policy and use of impact assessments, stakeholders/public consultations (particularly consultation of judiciary on judicial reforms), and transparency and quality of the legislative process***

The transparency of the legislative process with regards to the passage of new or renewal of COVID-19 pandemic restrictions set a worrying precedent in Ireland. During the pandemic, organisations consistently raised the issue of the lack of public consultation, insufficient parliamentary oversight, and poor communication of laws and regulations regarding the pandemic. These concerns were highlighted by ICCL in a landmark June 2021 report; “Human Rights in a Pandemic.”<sup>177</sup> ICCL is concerned that these poor practices have become entrenched in the legislative process.

In July 2022, ICCL led a coalition of 23 organisations in writing to the parliamentary committee responsible for setting weekly business and the leaders of all political parties to

express our dissatisfaction with the abuse of the legislative process by the government.<sup>178</sup>

Insufficient time has repeatedly been allocated for the discussion of complex legislation, large volumes of technical additions to bills which require detailed scrutiny, are added as amendments with little to no time allocated for examination, debates are routinely curtailed or guillotined and important legislative stages are curtailed or merged to expedite the process.<sup>179</sup>

The Business Committee responded to the letter in November 2022, but with no substantive plans to address the concerns raised.<sup>180</sup>

The government engaged in this practice in December 2022 with the amalgamation of key stages of a number of complex bills, including the Planning and Development and Foreshore (Amendment) Bill 2022.<sup>181</sup> These issues were highlighted by the speaker of parliament (Ceann Comhairle) in a media interview in January 2023.<sup>182</sup>

### ***Rules and use of fast-track procedures and emergency procedures (for example, the percentage of decisions adopted through emergency/urgent procedure compared to the total number of adopted decisions)***

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177 <https://www.iccl.ie/wp-content/uploads/2021/06/Human-Rights-in-a-Pandemic.pdf>

178 <https://www.irishexaminer.com/news/politics/arid-40919231.html>

179 <https://www.iccl.ie/wp-content/uploads/2022/07/Open-Letter-on-Parliamentary-Procedures-July-15th-2022.pdf>

180 <https://twitter.com/ICCLtweet/status/1542810635376918528>

181 <https://www.oireachtas.ie/en/Bills/Bill/2022/115/>

182 <https://www.independent.ie/irish-news/politics/government-has-some-neck-to-bring-back-the-guillotine-says-ceann-comhairle-42255523.html>

Under parliamentary standing orders, a Minister can make a request to have a bill bypass the pre-legislative scrutiny process when legislation needs to be passed quickly.<sup>183</sup> Concerns have been raised that this process has been abused in order to curtail proper examination of legislation which is deemed to be of critical importance.

Recent plans have been brought forward by the Minister for Housing to “fast track” changes to planning laws which would curtail the right to judicial intervention in planning processes under the guise of addressing the ongoing housing crisis. The responsible Minister has asked that a number of key legislative steps be taken in a very short timeframe to hasten the passage of the bill.<sup>184</sup> Opposition parties have expressed their dissatisfaction with the Minister’s actions.<sup>185</sup>

### ***Regime for constitutional review of laws***

In July 2021, President Higgins wrote to the Oireachtas to raise concerns about the volume

of complex legislation he has been asked to consider in short periods of time, given his constitutional role to review and sign legislation within a short, specified period.<sup>186</sup> A government statement was issued,<sup>187</sup> in response, however, there has been little transparency on actions taken or measures implemented. The issue continues with high levels of complex legislation being passed by parliament in the weeks leading up to summer and winter recesses a particular concern.<sup>188</sup> The President expressed concern at this practice again in December 2022.<sup>189</sup>

### ***Independent authorities***

The recently published draft Inspection of Places of Detention Bill (2022)<sup>190</sup> sets out proposals for the establishment of an office of the Inspector of Places of Detention and will allow Ireland to ratify the Optional Protocol to the Convention against Torture (OPCAT) as the office will act as the National Preventative Mechanism (NPM). While the independence of the NPM is accepted in principle in the Bill,

183 [https://data.oireachtas.ie/ie/oireachtas/parliamentaryBusiness/standingOrders/dail/2021/2021-01-27\\_consolidated-dail-eireann-standing-orders-january-2021\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/parliamentaryBusiness/standingOrders/dail/2021/2021-01-27_consolidated-dail-eireann-standing-orders-january-2021_en.pdf)

184 [https://www.irishexaminer.com/news/politics/arid-41018042.html?utm\\_source=dlvr.it&utm\\_medium=twitter](https://www.irishexaminer.com/news/politics/arid-41018042.html?utm_source=dlvr.it&utm_medium=twitter)

185 [https://www.irishexaminer.com/news/politics/arid-41019713.html?utm\\_source=dlvr.it&utm\\_medium=twitter](https://www.irishexaminer.com/news/politics/arid-41019713.html?utm_source=dlvr.it&utm_medium=twitter)

186 <https://www.rte.ie/news/2021/0729/1238070-higgins-letter-oireachtas/>

187 <https://www.oireachtas.ie/en/press-centre/press-releases/20210730-statement-following-meeting-of-dail-business-committee-and-seanad-committee-on-parliamentary-privileges-and-oversight-to-discuss-letter-received-from-president-higgins/>

188 <https://www.irishexaminer.com/opinion/commentanalysis/arid-40907792.html>

189 <https://twitter.com/gavreilly/status/1601660842339991552>

190 <https://www.gov.ie/ga/preasraitis/470b9-minister-for-justice-publishes-general-scheme-of-the-inspection-of-places-of-detention-Bill/>

ICCL<sup>191</sup> and IPRT<sup>192</sup> remain concerned that sufficient details are not provided. Head 18(4) provides that an NPM ‘shall be independent in the performance of its functions under this Part of the Act’. ICCL contends that the legislation needs to be clearer in the definition of the NPM’s powers and its functions, its roles and responsibilities and its independence both financially and functionally. It is vital that this legislation specifies the NPM’s mandate and powers in a way that guarantees that the NPM has structural independence from all branches of state, above all from the executive branch.

While ICCL has welcomed the plans to appoint two additional data protection commissioners to the Data Protection Commission, ICCL reiterates the call for an independent audit of the work of the DPC to be carried out as a matter of urgency to ensure that the commission retains the technical capacity to carry out its crucial Europe-wide functions.<sup>193</sup>

The Electoral Commission (An Coimisiún Toghcháin) is in the process of being established, with a total budget of €7.5m allocated for 2023.<sup>194</sup> As set out in the Electoral Reform Act, this new body will have responsibility

for the registration of political parties, which is work currently being carried out by Referendum Commissions, Constituency Commissions and Local Electoral Area Boundary Committees. In addition, it will have responsibility for the regulation of online political advertising during electoral periods, oversight of the electoral register, and public information, research and advisory roles in relation to electoral matters. In December 2022, the government announced the appointment of four members of the Commission.<sup>195</sup>

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

#### ***Transparency of administrative decisions and sanctions (including their publication and the availability and publicity of data concerning administrative decisions)***

In May 2022, the Minister for Justice published an implementation plan to address the recommendations contained in the report of the Review Group on the reform of the civil justice system. These reforms are planned to take place on a phased basis up until 2024.<sup>196</sup>

191 <https://www.iccl.ie/wp-content/uploads/2022/08/220805-IOPD-Bill-ICCL-submission-to-Justice-Committee-FINAL.pdf>

192 <https://www.iprt.ie/iprt-submissions/iprt-submission-to-the-joint-committee-on-justice-on-the-general-scheme-of-the-inspection-of-places-of-detention-Bill-2022/>

193 <https://www.iccl.ie/2022/iccl-seeks-independent-review-of-data-protection-commission/>

194 <https://www.oireachtas.ie/en/debates/debate/dail/2022-09-28/speech/272/>

195 <https://www.gov.ie/en/press-release/76c85-government-approves-nomination-of-ordinary-members-to-an-co-imisiun-toghchain-electoral-commission/>

196 <https://www.gov.ie/en/press-release/937eb-minister-mcentee-publishes-implementation-plan-on-civil-justice-ef-ficiencies-and-reform-measures/>

Some of the key actions for implementation under the plan include:

- the replacement of multiple court documents with a single document to commence legal proceedings;
- simplification of the language and terminology in Rules of Court;
- promotion of video conferencing for the taking of expert and other evidence;
- an online information hub to provide dedicated legal and practical information for those considering bringing proceedings without professional representation;
- standardisation of arrangements for naming and vetting of suitability of next friend or guardian ad litem to act on behalf of a child in litigation;
- updated Courts Service Customer Charters to provide more specific measurements for performance and service levels;
- legislation to provide for the introduction of a more efficient and more cost effective regime for discovery and to automatically discontinue cases not progressed in 30 months.

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

### **Key recommendations**

Remove restrictions on funding for CSOs which prevent fundraising for advocacy work.

Instruct the Charities Regulator to revise their advice on political advocacy for charitable organisations.

### **Regulatory framework**

#### ***Equal treatment, including by reference to CSOs' focus of activities, type of activities, and geographical location of activities***

The 2009 Charities Act does not include the advancement of human rights as a valid charitable purpose for an organisation. Human rights organisations have been compelled to establish and operate at different legal structures to ensure their “non-charitable” human rights work is in full compliance with the law. This modus is inefficient and can be a drain on an organisation’s limited resources. Human rights organisations experience difficulties in accessing funding and reporting to donors, where those funders require charitable status as a precondition for funding. The draft Charities (Amendment) Bill (2022) should resolve this issue by including the “advancement of human

rights” as a valid charitable purpose.<sup>197</sup> This is expected to become law in 2023.

***Financing framework, including tax regulations (e.g. tax advantages for organisations with public benefit status, eligibility to receive donations via citizens’ allocation of income tax to charitable causes, eligibility to use public amenities at low or no cost, etc)***

The 1997 Electoral Act in Ireland poses a significant, restrictive regulatory burden for civil society. The wording in the Electoral Act 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 NGO which calls on the local or national government to amend policy or legislation, and which could be found in breach of the Electoral Act if someone were to donate more than €100 to their cause. A wide range of civil society organisations working on issues as diverse as education and environmental rights have been directly impacted.

As a result, NGOs are effectively banned from seeking funding for their work and can potentially be sanctioned, alongside their funders, for engaging in the public policy process. There are examples of organisations being brought to

court by SIPO for accepting funding, threatened with prosecution for accepting donations to engage with the public policy process and being forced to limit or end their operations entirely. Granting and philanthropic organisations have also faced scrutiny as a result of these laws, for example being issued with letters demanding copies of correspondence with a grantee regarding allocated funds. It is worth noting that these restrictions do not apply to commercial interests as they do not rely on donations to fund their advocacy activities. The definition of political purposes should be updated to only restrict donations and fundraising for civil society organisations to that which occurs within designated electoral periods. This would mean that legitimate day-to-day advocacy and public policy work could continue without unfair restrictions while protecting the integrity of the electoral and referenda processes.<sup>198</sup>

The human rights issues presented by the Electoral Act and the implementation of the Act by the Standards in Public Office Commission were highlighted by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association and the UN Special Rapporteur on the situation of human rights defenders in a communication to Ireland in December 2020.<sup>199</sup> Despite advancing the Electoral Reform Act<sup>200</sup> in 2022

197 <https://assets.gov.ie/222446/0c2c7a9d-5cd6-4fb9-99da-28d4d286cb3b.pdf>

198 <https://www.iccl.ie/wp-content/uploads/2021/05/CCSF-and-Sen.-Ruane-Joint-Submission-Electoral-Reform-Bill-2020.pdf>

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

200 <https://www.oireachtas.ie/en/Bills/Bill/2022/37/>

and extensive lobbying by affected NGOs and numerous international organisations, including the UN, the COE, the European Commission and the Fundamental Rights Agency,<sup>201</sup> the government refused to address these issues. They have instead insisted that the matter must be dealt with by the yet-to-be-established Electoral Commission<sup>202</sup> in a wholesale review of political financing which risks further conflating the issues of funding for advocacy and for electoral purposes.

### ***Rules on transparency***

Under the provisions of the 2009 Charities Act, organisations registered as charities are required to provide an annual report detailing their activities and finances which is published on the Public Register of Charities.<sup>203</sup>

### ***Rules on lobbying***

NGOs who engage in lobbying designated public officials must complete a lobbying register three times per year under the provisions of the Regulation of Lobbying Act (2015).<sup>204</sup> If an organisation is registered as a lobbyist, they must return a report of “nil” if they have not engaged in lobbying in the previous designated period. Details of all lobbying activities are published on lobbying.ie.<sup>205</sup>

### ***Rules on political campaigning***

The definition of “political purposes” as contained in the 1997 Electoral Act prohibits any person or organisation based in Ireland from accepting sizable or any international donations to assist them in campaigning on or seeking to change public policy. The act also places onerous tracking and reporting requirements to small domestic donations.

According to the wording of the 1997 Electoral Act, these donation restrictions apply to civil society advocacy work at all times, and not just when advocating an election or referendum result. The basic freedom of individuals and organisations in Ireland to raise funds and campaign on issues that affect them are constrained by the Electoral Act in ways that violate their constitutional rights, EU law and their freedom of assembly and association. This situation has a considerable chilling effect on funders who fear that their donations may breach electoral law.

The recently enacted Electoral Reform Act (2022) further enshrines the definition in legislation as it sets out that:

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201 <https://www.iccl.ie/wp-content/uploads/2022/08/Coalition-for-Civil-Society-Freedom-Submission-on-the-Electoral-Reform-Bill-2022.pdf>

202 <https://www.oireachtas.ie/en/debates/debate/seanad/2022-07-07/speech/185/>

203 <https://www.charitiesregulator.ie/en/information-for-charities/annual-reporting>

204 <https://www.lobbying.ie/about-us/legislation/regulation-of-lobbying-act/>

205 <https://www.lobbying.ie/app/home/search>



“Political purposes’ shall have the meaning assigned to it by section 22(2)(aa) of the Electoral Act 1997; (Section 4, 117-1).”

A further issue which has recently been drawn to the attention of the Charities Regulator concerns the operationalisation of the designation of human rights as a valid charitable purpose as previously mentioned and a potential obstacle to the same. A document entitled “Guidance on Charities and the Promotion of Political Causes” was published by the Charities Regulator in December 2021. It was noted that the language on the nature of political engagement deemed to be permissible under the Charities Act (2009) has changed somewhat from an earlier guidance document of 2018 issued by the regulator.

In the guidance document issued in February 2018, “Guidance on Charities and the Promotion of Political Causes”, the advice states: “An organisation will be considered to have a political purpose if it [i.a.]- is set up exclusively to promote a political cause such as bringing about a change in the law or policies of the Government or other public bodies.”

This text has evolved in the document issued in December 2021, which states:

“An organisation will be considered to have a political purpose if it [i.a]

Is set up primarily to promote a political cause such as bringing about a change in the law or policies of the Government or other public bodies, whether in Ireland or another country.”

The advice from the regulator has changed in two respects, the first being the substitution of the word “exclusively” in the 2018 guidance for the word “primarily” in the 2021 updated guidance. The second change is the addition of the phrase “whether in Ireland or another country.” This change has the potential to have a serious and negative impact on the ability of organisations to conduct legitimate advocacy work while maintaining, or indeed obtaining, charitable status. This could effectively prevent human rights organisations from registering as charities and nullify the impact of the amendment as proposed in the Charities (Amendment) Bill.

The ability of civil society organisations, including charities, to engage in public discourse and give voice to community concerns on matters of public policy is essential to a vibrant democracy. Civil society advocacy also gives rise to important questions of human rights, including the right to freedom of expression and freedom of association. A shift in eligibility for charitable status for organisations set up with an “exclusive” focus on campaigning to ones which “primarily” focus on campaign work has the potential to impede the important work of some charitable organisations.<sup>206</sup> The parliamentary committee

206 <https://www.iccl.ie/wp-content/uploads/2022/07/ICCL-Submission-on-The-General-Scheme-of-the-Charities-Amendment-Bill-2022-.pdf>

responsible for carrying out the pre-legislative scrutiny of the bill recommended that the Charities Regulator revert to the 2018 guidance in their pre-legislative report.<sup>207</sup>

## ***(Un)safe environment***

### ***Access and participation to decision-making processes, including rules and practices on civil dialogue, rules on access to and participation in consultations and decision-making***

Several structured and statutory instruments exist to ensure the participation of civil society in the policy formation process. These include Public Participation Networks,<sup>208</sup> the annual National Economic Dialogue,<sup>209</sup> the Shared Island Dialogues,<sup>210</sup> the Civic Forum,<sup>211</sup> The Labour Employer Economic Forum,<sup>212</sup> and Citizen Assemblies.<sup>213</sup> At a national level, most of this work is overseen by the Social Dialogue Unit within the Department of an Taoiseach.<sup>214</sup>

## ***Attacks and harassment***

### ***Intimidation / negative narratives / smear campaigns / disinformation campaigns***

Public representatives continue to engage in ongoing discriminatory and racist discourse against Travellers without consequence. In September 2022, an elected official for one of the current government parties, Fianna Fáil, said that Traveller culture was “not conducive” to living with most settled communities, adding that “history has proven” that it leads to “confrontation and general uneasiness.”<sup>215</sup> These comments were made in the context of a discussion of plans to house Travellers which the councillor opposed. While the comments were widely condemned, including the then Taoiseach, the councillor has since faced no repercussions or sanctions for his commentary.

207 [https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint\\_committee\\_on\\_social\\_protection\\_community\\_and\\_rural\\_development\\_and\\_the\\_islands/reports/2022/2022-11-14\\_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-charities-amendment-bill-2022\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_social_protection_community_and_rural_development_and_the_islands/reports/2022/2022-11-14_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-charities-amendment-bill-2022_en.pdf)

208 <https://www.oireachtas.ie/en/debates/debate/seanad/2022-07-07/speech/185/>

209 <https://www.gov.ie/en/publication/cdf2e-national-economic-dialogue-2022/>

210 <https://www.gov.ie/en/publication/3eb3c-shared-island-dialogues/>

211 [https://merriestreet.ie/en/news-room/releases/taoiseach\\_minister\\_heather\\_humphreys\\_and\\_minister\\_of\\_state\\_joe\\_obrien\\_opens\\_first\\_national\\_community\\_and\\_voluntary\\_civic\\_forum.175271.shortcut.html](https://merriestreet.ie/en/news-room/releases/taoiseach_minister_heather_humphreys_and_minister_of_state_joe_obrien_opens_first_national_community_and_voluntary_civic_forum.175271.shortcut.html)

212 <https://assets.gov.ie/40567/9711579662a048a8b7f1e39c416b4984.pdf>

213 <https://citizensassembly.ie/en/>

214 <https://whodoeswhat.gov.ie/division/taoiseach/economic-policy-unit/>

215 <https://www.irishexaminer.com/news/arid-40972157.html>

### ***Verbal attacks and harassment by private parties or public entities***

In February 2022, ICCL led a coalition of organisations in writing to a number of government Ministers<sup>216</sup> regarding commentary on an event being held by the National Women's Council of Ireland (NWC) to mark International Women's Day.<sup>217</sup> The implicit suggestion by some elected representatives that funding for NWC should be dependent on their support for government policy or inclusion of government representatives<sup>218</sup> at their events was highlighted as disturbing, and served to create a chilling effect on the ability of civil society organisations to work in an effective and independent manner. The suggestion that the government should have an expectation of influencing or directing the work of an independent civil society organisation (especially when a funder) was noted as troubling. This, unfortunately, was not an

isolated incident. In 2021, there were a number of highly inappropriate interventions by public representatives on the role and independence of the national trust for Ireland, An Taisce, with respect to their role in the planning process.<sup>219</sup> Other organisations, particularly in the areas of drugs and homeless services, have similarly raised concerns<sup>220</sup> that overt or implicit questions have been raised about their ability to access state funding unless they refrained from critical public commentary on government policy or refused to adhere to the same.

### ***Physical attacks on people and property***

There has been a concerning growth in the number of incidents of assaults by anti-lockdown, far-right and other demonstrators against activists and elected representatives over the last number of years. These have ranged from intimidatory protests,<sup>221</sup> sometimes outside the

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216 Unpublished Letter February 24 2022.

217 <https://www.irishtimes.com/news/politics/tensions-grow-over-sinn-fein-s-influence-on-party-political-national-women-s-council-1.4806223>

218 <https://www.breakingnews.ie/ireland/national-womens-council-criticised-for-excluding-women-in-government-from-rally-1259283.html>

219 <https://www.fine Gael.ie/an-taisce-a-leading-threat-to-future-of-rural-ireland/>

220 <https://www.oireachtas.ie/en/debates/debate/seanad/2021-12-15/3/>

221 <https://extra.ie/2020/07/11/news/politics/roderic-ogorman-campaigners>

homes of elected officials,<sup>222,223</sup> physical<sup>224</sup> and verbal<sup>225</sup> abuse of activists and politicians,<sup>226</sup> and attacks on property,<sup>227,228</sup> right up to the serious physical assault of a counter demonstrator which resulted in a criminal conviction.<sup>229</sup> In August 2022, the Global Project Against Hatred and Extremism published a report on the growth in far-right activity in Ireland, which noted degrees of cooperation and issue overlap between the groups which were identified.<sup>230</sup>

## **Online civic space**

### **Online campaigning, including rules and practices on illegal content, disinformation, online content moderation and regulation**

In early 2022, ICCL and Frontline Defenders produced an unpublished report stemming from a survey on the threats facing CSOs in Ireland. The survey had responses from a wide

variety of organisations working on a broad array of issues, ranging from abortion rights to anti-racism to environmental protection. The scope of topics covered by participants was also reflected in the scale of size and capacity of participants which varied in range from small grassroots organisations funded by member donations to national organisations with large scale funding and many employees. The survey provided a useful “snapshot” of the security threats facing a wide variety of Irish organisations. When asked to specifically outline the security threats which they have faced in the past three years, the most popular responses were: threats (verbal, social media, telephone); digital attacks; and defamation. One respondent made the observation that these issues have taken on an increased importance given the shift to online work since the onset of Covid-19. The vast majority of respondents also noted psychological stress as an outworking of these threats. The majority of respondents

222 <https://www.irishtimes.com/news/ireland/irish-news/who-are-the-protesters-picketing-ministers-homes-1.3796879>

223 <https://www.independent.ie/irish-news/news/gardai-called-to-protest-outside-home-of-tanaiste-leo-varadkar-40866875.html>

224 <https://www.independent.ie/irish-news/politics/minister-anne-rabbitte-and-td-ciaran-cannon-have-bags-of-st-thrown-at-them-while-attending-meeting-42262918.html>

225 <https://www.irishtimes.com/news/crime-and-law/man-arrested-following-arson-attack-on-car-of-sinn-fein-td-1.4072266>

226 <https://www.irishmirror.ie/news/irish-news/politics/roderic-ogorman-steers-clear-social-28835738>

227 <https://www.irishtimes.com/crime-law/2022/09/30/gardai-investigate-after-car-driven-through-gates-at-sinn-fein-tds-home/>

228 <https://www.irishtimes.com/news/crime-and-law/man-arrested-following-arson-attack-on-car-of-sinn-fein-td-1.4072266>

229 <https://www.irishexaminer.com/news/courtandcrime/arid-40724820.html>

230 <https://globalextrémism.org/ireland/>

cited internet/tech issues which have left them vulnerable to attack, or where abuse/threats have come from online platforms. These incidents range from the circulation of images/information about group members on far-right Telegram channels, abuse on social media, right up to DDOS attacks and hacking attempts. The same three issues were identified as most likely as those to be faced in the future also. Other respondents also cited incidents of in-person harassment and intimidation, which included verbal assault, office break in, letter writing, and much more.<sup>231</sup>

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

### **Key recommendations**

- Engage with survivors of mother and baby homes and victims of abuse in day-schools to ensure that compensation schemes and schemes designed to address their needs are compliant with human rights standards.
- Urgently finalise the review of the current National Traveller and Roma

Inclusion and Migrant Integration Strategy and the commence the now delayed development of the next iteration of both strategies without delay. These strategies must have robust implementation and monitoring plans with clear targets, indicators, outcomes, timeframes and budget lines with actions being resourced and implemented by all relevant statutory agencies.

- Expedite the development of a new system for accommodating asylum seekers and, in the interim, ratify the Optional Protocol (OPCAT) and amend the Inspection of Places of Detention Bill (which seeks to implement OPCAT) to ensure that direct provision centres and other congregated settings are subject to independent human rights focused inspections.

### **Systemic human rights violations**

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

The December 2020 publication of the final report from the Commission of Investigation into Mother and Baby Homes<sup>232</sup> highlighted the widespread human rights violations

231 Unpublished ICCL and Frontline Defenders Security Survey: Winter 2021/2022

232 <https://www.gov.ie/en/publication/d4b3d-final-report-of-the-commission-of-investigation-into-mother-and-baby-homes/>

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

Throughout 2021, the government progressed the General Scheme of a Certain Institutional Burials (Authorised Interventions), which sought to address a number of issues which are raised by the report. This bill completed pre-legislative scrutiny in July 2021<sup>233</sup> and was enacted in July 2022.<sup>234</sup> Details of a redress scheme for survivors of the homes was published in November 2021,<sup>235</sup> but was met with widespread criticism from survivors.<sup>236</sup> The

scheme was codified in legislation in October 2022, with the publication of the Mother and Baby Institutions Payment Scheme Bill (2022).<sup>237</sup> The bill is currently passing through the Irish Parliament but has been widely criticised by survivors' groups,<sup>238</sup> opposition politicians<sup>239</sup> and NGOs.<sup>240</sup>

In September 2022, the UN called on the Irish government to address the lack of adequate redress for victims of racial discrimination and systemic racism in Irish childcare institutions between the 1940s and 1990s.<sup>241</sup> It was noted that the Mother and Baby Institutions Payment Scheme Bill (2022) provided an opportunity to address this matter. As of January 2023, no provision has been made in the bill to compensate the victims of racial discrimination in these institutions.

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233 <https://www.oireachtas.ie/en/press-centre/press-releases/20210715-joint-committee-on-children-disability-equality-integration-and-youth-publishes-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-a-certain-institutional-burials-authorised-interventions-Bill/>

234 <https://www.oireachtas.ie/en/Bills/Bill/2022/23/>

235 <https://www.gov.ie/en/press-release/ce019-government-approves-proposals-for-mother-and-baby-institutions-payment-scheme-and-publishes-an-action-plan-for-survivors-and-former-residents-of-mother-and-baby-and-county-home-institutions/>

236 <https://www.thejournal.ie/mother-baby-home-redress-protest-leinster-house-5609527-Nov2021/>

237 <https://www.oireachtas.ie/en/Bills/Bill/2022/97/>

238 <https://www.thejournal.ie/mother-and-baby-homes-redress-Bill-5895379-Oct2022/>

239 <https://www.breakingnews.ie/ireland/six-month-requirement-for-mother-and-baby-home-redress-a-sword-of-damocles-1392716.html>

240 <https://www.iccl.ie/wp-content/uploads/2022/10/221026-Mother-and-Baby-Institutions-Payment-Scheme-Bill-ICCL-Briefing.pdf>

241 <https://www.ohchr.org/en/statements/2022/09/ireland-un-experts-call-adequate-redress-systemic-racism-and-racial>

In June 2022, the University of Limerick published a landmark report on the experiences of Irish Travellers in the criminal justice system. The research report, entitled “Irish Travellers’ Access to Justice”,<sup>242</sup> documents for the first time Travellers’ perceptions and experiences of the criminal justice process in Ireland – particularly with the judiciary and An Garda Síochána. The report found that one of the key barriers to accessing justice is institutional racism towards Travellers, which is found to be prevalent in the criminal justice system. The research findings reflect a need for radical changes in the way in which criminal justice institutions engage with, perceive, and address Travellers. The research finds that Travellers’ trust in the Irish criminal justice system is extremely low and that fears of wrongful arrest, excessive use of force, wrongful conviction, disproportionately high sentences, and wrongful imprisonment frame the way Travellers engage with and experience the criminal justice system.

The research makes extensive evidence-based recommendations, including:

1. The introduction of an ethnic identifier throughout the criminal process from the point of reporting to the point of sentencing, with a commitment to make the resultant data available to independent researchers and the publication of an annual report on ethnic minorities in the criminal process.
2. The development, publication, funding, and implementation of a criminal justice strategy for the Traveller community, with a remit within and across each branch of the criminal process to address gaps in trust, legitimacy and accountability impacting the Traveller community.
3. The establishment of a robust and effective independent complaints body operating across the criminal legal process and staffed by a dedicated team of investigators with no continuing connection to any of the criminal justice agencies.

The most recent National Traveller and Roma Inclusion Strategy (NTRIS) implementation period ended in 2021. The new Strategy is yet to be launched. The Irish Traveller Movement has called for the prioritisation of the finalisation of the new NTRIS, with a robust implementation and monitoring plan, and a ring-fenced budget, along with a comprehensive review of the last Strategy. NTRIS was the national strategy for Roma and Traveller inclusion and the first national policy framework to explicitly include Roma as a key focus in Ireland. Ireland, as a Member State, is obliged to develop and implement an updated Strategy as part of the European Commission’s post-2020 framework on Traveller and Roma equality, inclusion, and participation. Ireland is the only Member State without an updated Strategy which has recently been noted by the European Commission in its Assessment

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242 [https://researchrepository.ul.ie/articles/report/Irish\\_Travellers\\_Access\\_to\\_Justice/20179889](https://researchrepository.ul.ie/articles/report/Irish_Travellers_Access_to_Justice/20179889)

of Reports of Member States National Roma Strategic Frameworks.<sup>243</sup>

Another key issue affecting the Traveller community is the ongoing use of legislation to facilitate the eviction of Travellers. Section 19 (c) of Part II A of the Criminal Justice (Public Order) Act, 1994, which is one of the legislative provisions used to facilitate evictions of Traveller families from unofficial or roadside sites, is still used without any form of judicial oversight, monitoring, or intervention. In effect this legislation has prevented nomadism and curtailed a central cultural right of Travellers. The current eviction procedure, which allows for the removal of families within 24 hours, is inhumane and often conducted at times when families cannot access legal services, such as on Friday afternoons. Redress is not possible without access to a dedicated service, and many families would not be familiar with legal services or have finance to seek private legal services.

To date, no remedy to this has been advanced despite the state being found in breach of Article 16 of the European Social Charter in 2016 by the European Committee of Social Rights. They found the state “provides for inadequate safeguards for Travellers threatened with eviction” and “evictions are carried out in practice without the necessary safeguards” – findings which were upheld in

follow-up reports in 2018 and 2020. Repealing this legislation is also a key recommendation of the government-commissioned Traveller Accommodation Expert Review, published in 2019, but no progress has been made to advance this to date.<sup>244</sup>

Policies and strategies aimed at combating racism and promoting inclusion must be iterative in nature to ensure that there are no policy gaps. INAR notes with great concern that the National Traveller and Roma Inclusion Strategy and the Migrant Integration Strategy are ending without any discussion or consultations on successor strategies. The International Decade for People of African Decade 2014-2024 started halfway in Ireland and is coming to an end in 2024 and the state has failed to deliver in ensuring the recognition, development and justice for people of African descent in Ireland. The lack of implementation by the state of various strategies is concerning.

NAR continues to advocate for the effective implementation of various policies and strategies aimed at combating racism, racial discrimination, xenophobia and other related intolerances. The state must ensure full resourcing of various strategies to ensure that they are fully implemented.

Ireland’s Health Service Executive (HSE) continues to perform normalising surgeries on

243 [https://commission.europa.eu/publications/assessment-report-member-states-national-roma-strategic-frameworks-full-package\\_en](https://commission.europa.eu/publications/assessment-report-member-states-national-roma-strategic-frameworks-full-package_en)

244 [https://www.coe.int/en/web/european-social-charter/home/-/asset\\_publisher/Vugk5b0dLMWq/content/the-decision-on-the-merits-of-the-complaint-errc-v-ireland-became-public](https://www.coe.int/en/web/european-social-charter/home/-/asset_publisher/Vugk5b0dLMWq/content/the-decision-on-the-merits-of-the-complaint-errc-v-ireland-became-public)



the genitals of intersex children in Ireland<sup>245</sup> that have been described by the UN Special Rapporteur as a form of torture.<sup>246</sup> Some of these procedures, such as clitoral reduction surgery, are indistinguishable from female genital mutilation, which is illegal in Ireland.<sup>247</sup> While intersex and transgender are not the same thing, many intersex people are also transgender, having been assigned the incorrect sex at birth followed by irreversible surgery and hormonal interventions. Recently, in a Europe-wide survey, Ireland was found to have the worst transgender healthcare,<sup>248</sup> which might be used as an indicator of intersex healthcare standards in Ireland. In 2021, the Department of Children, Equality, Disability, Integration and Youth published a report highlighting the urgent need for research into the experiences of intersex youth in Ireland and their experiences of healthcare.<sup>249</sup>

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

IPRT remains concerned by the decision to not publish<sup>250</sup> the report of the Inspector

of Prisons into allegations arising from the Dóchas Centre.<sup>251</sup> IPRT remains unclear as to the details of these allegations, as the reports have not been published. However, it is clear that such reports relate to a vulnerable population (women in prison) and the lack of transparency around the findings of the reports is concerning.

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

As addressed above, in April 2020 the European Court of Human Rights (ECtHR), in the case of *Keaney v Ireland*, expressed that the delay in criminal proceedings in this case was excessive and a violation of Article 6 of the ECHR. 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. The *Keaney* case was one of many to come before the ECtHR on the

245 <https://www.ungeneva.org/en/news-media/meeting-summary/2022/07/dialogue-ireland-experts-human-rights-committee-praise>

246 [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf)

247 <https://www.hse.ie/eng/about/who/primarycare/socialinclusion/domestic-violence/female-genital-mutilation-fgm/>

248 <https://tgeu.org/trans-health-map-2022/>

249 <https://www.gov.ie/pdf/?file=https://assets.gov.ie/135654/4d466c48-34d9-403a-b48e-fdcfb7931320.pdf#page=null>

250 <https://www.oireachtas.ie/en/debates/question/2022-09-08/1372/?highlight%5B0%5D=d%C3%83%C2%B3chas>

251 <https://www.irishexaminer.com/news/arid-40848545.html>

length of proceedings in Ireland, and Keaney was chosen by the Court as a lead case on the issue. It remains to be seen as to whether the state's implementation of the *Keaney v Ireland* judgment will be effective, and whether this case will lead to systemic reform in terms of the length of proceedings.

### **Other systemic issues**

IPRT continues to have serious concerns about the Prison (Amendment) Rules 2020 (SI No 250/2020).<sup>252</sup> These amendments allow a Governor or the Director General to suspend, restrict, or modify entitlements to physical exercise, recreation, training, and visits. These amendments have no sunset clause and appear to have received very little scrutiny before they were brought into force. They also do not only relate to COVID-19 but to any infectious disease.<sup>253</sup> Most recent indications<sup>254</sup> from the Minister suggest that there are no plans to repeal these amendments, despite numerous calls from IPRT for the government to do so.

In addition, there has been a persistent failure to implement a new prison complaints policy<sup>255</sup> despite repeated promises to do so, in addition to the Inspector of Prisons' consistent remarks that the current complaints system remains unfit for purpose in their annual reports.<sup>256</sup> The impact of such inadequate complaints processes in prison is illustrated in a recent death in custody report from the Inspector<sup>257</sup> and such a gap in accountability in a closed environment such as prison raises human rights and transparency concerns regarding the prison system. Issues regarding prison overcrowding and the treatment of prisoners with mental health issues were also raised in the concluding observations of Ireland's 2022 ICCPR review.<sup>258</sup>

The Assisted Decision-Making (Capacity) Amendment Bill 2022,<sup>259</sup> which will amend the Assisted Decision-Making (Capacity) Act 2015, is due to be enacted in early 2023. This is a very welcome piece of legislation that abolishes wardship in Ireland. However, Mental

252 <https://www.irishstatutebook.ie/eli/2020/si/250/made/en/print>

253 [https://www.iprt.ie/site/assets/files/7125/iprt\\_irish\\_prisons\\_and\\_covid-19\\_-\\_lessons\\_learned\\_from\\_the\\_pandemic.pdf](https://www.iprt.ie/site/assets/files/7125/iprt_irish_prisons_and_covid-19_-_lessons_learned_from_the_pandemic.pdf)

254 <https://www.kildarestreet.com/wrans/?id=2022-11-08a.2440>

255 <https://www.iprt.ie/latest-news/urgent-action-needed-on-reform-of-prison-complaints-system-following-third-successive-year-of-being-classed-as-unfit-for/>

256 <https://www.oip.ie/publications/annual-reports/>

257 <https://www.gov.ie/en/publication/ce0f5-office-of-the-inspector-of-prisons-death-in-custody-investigation-report-ms-x-2019/>

258 <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsieXF-SudRZs%2FX1ZaMqUUOS%2BbcAGuuCi614l7uiVhbuLp%2F2IGSD7bncJtztRhGdU%2Buuibeg7sXz%2F-5gGDvOE3%2BT1IgNIx3fUqWN8gmOpFITlqn>

259 <https://www.oireachtas.ie/en/bills/bill/2022/59>

Health Reform remains concerned that while the government extended the right to the provisions of this act to persons involuntarily detained under Section 3(1)(b) of the Mental Health Act 2001,<sup>260</sup> those involuntarily detained under Section 3(1)(a) of the Mental Health Act 2001 are the only cohort of people deprived of the rights extended under this new legislation (including legally binding Advance Healthcare Directives). The government has stated its intention to remedy this discriminatory omission in the reform of the Mental Health Act 2001.<sup>261</sup>

Mental Health Reform (MHR) commissioned researchers at the National University of Ireland, Galway (NUIG) to develop an independent, human rights analysis<sup>262</sup> of the Draft Heads of Bill to amend the Mental Health Act 2001. The authors highlighted some discrepancies in Part 8, relating to the consent and capacity of 16 and 17-year-olds. There is a lacuna in law between the Mental Health (Amendment) Bill and the Assisted Decision Making (Capacity) Act 2015, where under-18s are not included in the Assisted Decision Making (Capacity) Act 2015 despite this being the referenced legislation in the amendment bill. This issue was repeatedly

highlighted during the pre-legislative scrutiny of both bills, however the government did not take the opportunity to address this gap.

Another concern is that the amending legislation for the 2001 Act (at the time of writing) still includes provisions for children to be admitted to adult inpatient centres (Head 128 – Section 108, p. 286). It also provides for coercive practices including seclusion and restraint. For Ireland’s mental health legislation to be compliant with the UN Convention on the Rights of the Child, these provisions should be deleted or repealed and should be prohibited. The action statement pertaining to the admission of under-18s to adult units in the national mental health policy “Sharing the Vision”<sup>263</sup> is also inadequate in its aspirations:

“In exceptional cases where child and adolescent inpatient beds are not available, adult units providing care to children and adolescents should adhere to the CAMHS inpatient Code of Governance.”

### ***Direct provision***

In February 2021, the government announced a plan to end the use of direct provision as a

260 <https://www.irishstatutebook.ie/eli/2001/act/25/section/3/enacted/en/html>

261 <https://data.oireachtas.ie/ie/oireachtas/debateRecord/dail/2022-12-14/debate/mul@/main.pdf>

262 <https://www.mentalhealthreform.ie/wp-content/uploads/2021/11/Legal-analysis-MH-Act-28-October-1.pdf>

263 <https://www.gov.ie/en/publication/2e46f-sharing-the-vision-a-mental-health-policy-for-everyone/>

system for accommodating asylum seekers in Ireland.<sup>264</sup> A programme board<sup>265</sup> was established to progress the plans to end the system and to furthermore establish a new International Protection Support Service. A three-person independent group was appointed by the responsible Minister in September 2021 to oversee and measure progress.<sup>266</sup> It was reported in November 2022 that the plans to end direct provision by 2024 are no longer possible and will be shelved.<sup>267</sup> The reason given for this is the increase in the number of individuals seeking asylum and the additional resources which have been required to accommodate Ukrainian refugees since February 2022.<sup>268</sup> Direct provision is a stain on Ireland's human rights record. INAR is concerned by the lack of urgency by the State to live up to its commitment to end DP and create a better system that promotes human dignity of asylum seekers and their families.

In December 2021, a regularisation scheme was announced by the Minister for Justice,

which would allow undocumented migrants and asylum seekers who have been in direct provision for at least two years the opportunity to regularise their status.<sup>269</sup> This scheme was open for applications between January and July 2022.<sup>270</sup>

### ***Child and family homelessness***

In November 2019, the Oireachtas Joint Committee on Housing, Planning and Local Government published their recommendations as to what action needs to be taken to address what has, according to the committee, “become one of the most pressing issues facing Irish society at present”. The committee noted that living in an emergency accommodation has negative impacts on children and family life. Drawing attention to findings<sup>271</sup> from the Ombudsman for Children's Office, there are negative effects of emergency accommodation on parenting; individual and family privacy; children's ability to rest, sleep, learn and study; children's health, well-being and development;

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264 <https://www.gov.ie/pdf/?file=https://assets.gov.ie/124757/ef0c3059-b117-4bfa-a2df-8213bb6a63db.pdf#page=null>

265 <https://www.gov.ie/en/press-release/edef3-minister-ogorman-announces-membership-of-the-programme-board-overseeing-the-end-of-direct-provision-as-set-out-in-the-white-paper/>

266 <https://www.gov.ie/en/press-release/9bec5-minister-ogorman-appoints-independent-group-to-track-progress-on-ending-direct-provision/>

267 <https://www.irishtimes.com/ireland/social-affairs/2022/11/26/plan-to-end-direct-provision-by-2024-no-longer-possible-says-expert/>

268 <https://www.irishtimes.com/politics/2023/01/05/state-facing-many-obstacles-to-delivering-properties-for-refugees-department-warns/>

269 <https://www.justice.ie/en/JELR/Pages/PR21000292>

270 <https://www.irishimmigration.ie/regularisation-of-long-term-undocumented-migrant-scheme/>

271 <https://www.oco.ie/app/uploads/2019/04/No-Place-Like-Home.pdf>

opportunities for play and recreation; freedom of movement; and children’s ability to maintain relationships with friends and family. MLRC has urged the government to adopt the recommendations<sup>272</sup> of the Joint Committee in full.

## ***Fostering rule of law culture***

### ***Efforts by state authorities***

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The government is receptive to discussions on rule of law issues, but interventions seem to exclusively originate from CSOs or the European Commission. For example, the visits of Vice President of the European Commission for Values and Transparency Věra Jourová<sup>273</sup> and Commissioner for Justice Didier Reynders<sup>274</sup> both prompted parliamentary debates on rule of law issues and the reporting cycle. However, understanding of the issues remains weak with parliamentarians based on the committee hearings.

### ***Contribution of civil society and other non-governmental actors***

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In October 2022, ICCL organised an event<sup>275</sup> to launch the 2023 reporting cycle, and on rule of law issues in general. The event was held in

the European Commission Headquarters in Dublin and featured contributions from the now former Minister for State for European Affairs Thomas Byrne TD, Dean of the UCD Sutherland School of Law Professor Laurent Pech, Head of the European Commission representation in Ireland Barbara Nolan and Irish Examiner Political Editor, Daniel McConnell. The event was well attended and ensured a higher level of interest in the reporting cycle for 2023.

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272 [https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint\\_committee\\_on\\_housing\\_planning\\_and\\_local\\_government/reports/2019/2019-11-14\\_report-on-family-and-child-homelessness\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_housing_planning_and_local_government/reports/2019/2019-11-14_report-on-family-and-child-homelessness_en.pdf)

273 [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_justice/2022-10-11/3/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_justice/2022-10-11/3/)

274 [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_european\\_union\\_affairs/2022-11-24/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_european_union_affairs/2022-11-24/)

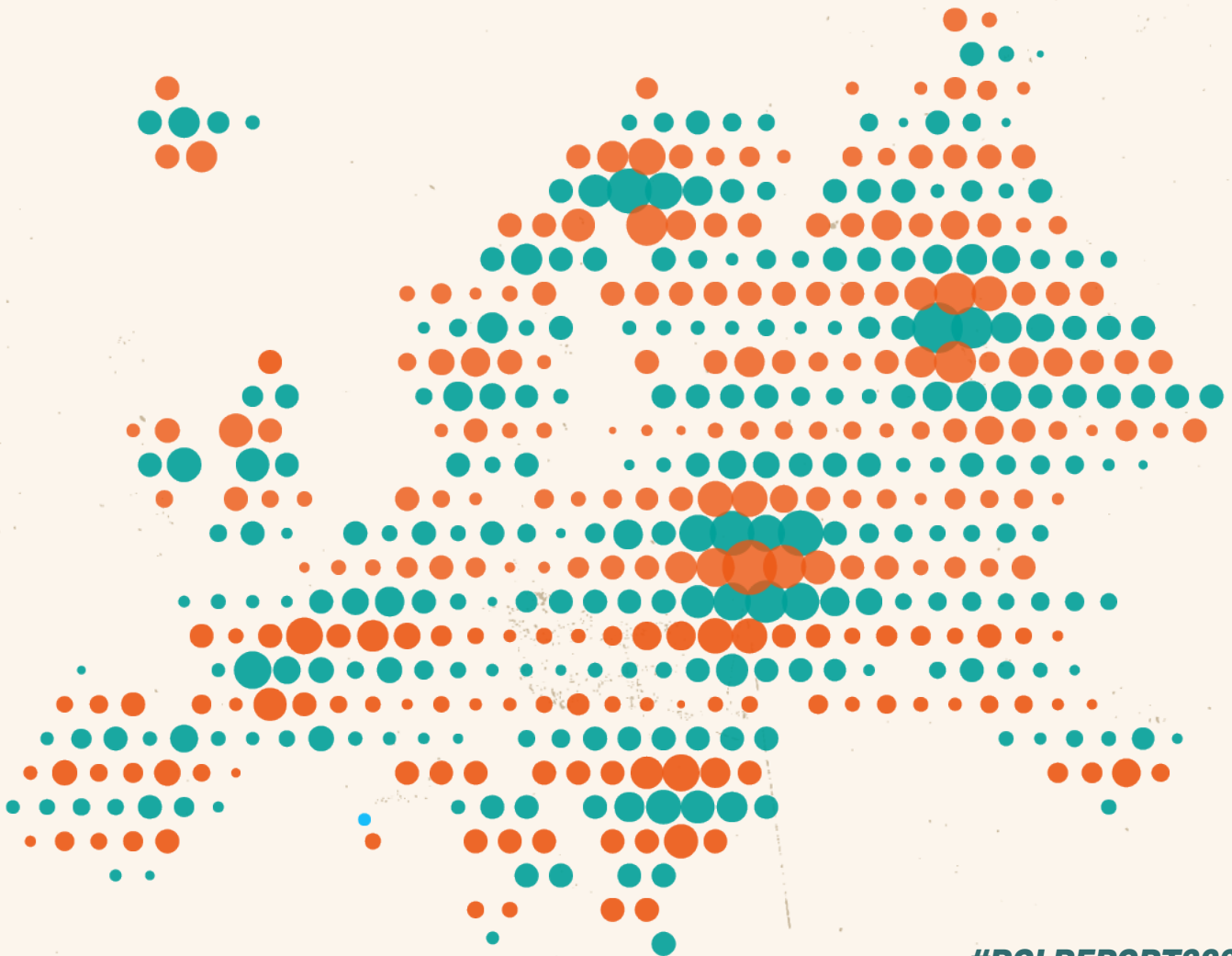
275 <https://www.iccl.ie/wp-content/uploads/2022/10/221019-Rule-of-Law-event.pdf>

# LIBERTIES

# RULE OF LAW REPORT

# 2023

# ITALY



#ROLREPORT2023



CIVIL  
LIBERTIES  
UNION FOR  
EUROPE



ANTIGONE



# ITALY

## About the authors

This report has been coordinated and authored by Antigone Association and Italian Coalition for Civil Liberties and Rights (CILD). Buon Diritto Onlus, Association for Juridical Studies on Immigration (Associazione per gli Studi Giuridici sull'Immigrazione or ASGI) and Osservatorio Balcani e Caucaso (OBCT) participated in the report as authors. This submission represents a compilation of a wide array of material and expertise from the aforementioned organisations in their areas of concern.



Antigone is an Italian NGO founded in 1991, which deals with human rights protection in the penal and penitentiary system. Antigone carries out cultural work on public opinion through campaigns, education, media and publications. It conducts studies and research and it cooperates in writing normative texts. Thanks to its Observatory on Italian prisons for adults and minors, it monitors conditions in all prisons in Italy and publishes a report on the Italian penitentiary system. Antigone also has an Ombudsman and legal clinics around Italy that collect complaints from prisoners. Antigone also carries out investigations about ill-treatment and is at times formally involved in the related trials.



Founded in 2014, the Italian Coalition for Civil Liberties and Rights (CILD) is a network of civil society organisations that protect and expand the rights and liberties of all, through a combination of advocacy, public education and legal action.



A Buon Diritto Onlus, since its establishment, has been carrying out activities of rights promotion, legal assistance, social guidance, monitoring, research and advocacy, with a focus on migration. The organisation works to safeguard fundamental rights, offering qualified assistance to those who are deprived of their liberty, those who are trying to integrate in our country, those who are victims of discrimination or racist episodes, and those who have suffered abuse and torture.



The Association for Juridical Studies on Immigration (ASGI) is a membership-based association focusing on all legal aspects of immigration. As a pool of lawyers, academics, consultants and civil society representatives, ASGI's expertise relates to various areas of immigration and migrants' rights, including

but not limited to anti-discrimination and xenophobia, children's and unaccompanied minors' rights, asylum and refugee seekers, statelessness and citizenship. ASGI's members provide their contributions at various levels: administrative, policy-making and legal, both in national and European contexts.



Established in 2000, OBCT is a think tank focused on Southeast Europe, Turkey and the Caucasus that explores and reports on the socio-political and cultural developments of Italy and six other EU Member States, namely those taking part in the EU enlargement process and those included in the European Neighborhood Policy. As an operational unit of the Center for International Cooperation, OBCT is committed to strengthening the European project by supporting transnational relations and raising public awareness on areas at the heart of many European challenges, thanks to a participatory and multi-sectoral approach that weaves together online journalism, research, training, outreach, and policy advice.

## Key concerns

In the area of justice, there have been some improvements regarding the backlog in civil and penal courts. However, the issue of excessive length of proceedings persists. There are also problems with the implementation of fair trial rights of the Stockholm Roadmap. There have been reforms regarding the execution of

judgements and life imprisonment, the latter of which does not live up to the standards set by international human rights bodies. A positive development can be found regarding the issue of "liberi sospesi", i.e. those who are waiting for alternatives to incarceration.

In 2022, no progress was made on lobbying regulation. A draft law on lobbying, approved on 12 January 2022, was about to be discussed in the Senate when the government of Mario Draghi fell. The new Parliament has yet to schedule new hearings to discuss the introduction of a regulation on lobbying activities. The debated issue of the exclusion of Confindustria - Italy's largest employers' union - and trade unions from the transparency obligations, which should be foreseen by all stakeholders, has slowed down the proceedings in the past.

Media freedom and media pluralism are guaranteed by a solid legislative framework, but some issues remain unsolved, including the passing of a law on the right remuneration of freelancers and the long-standing issue of criminalisation of defamation. Lawsuits and prosecutions against journalists, including SLAPPs, also remain common and can entail serious financial costs for the defendants. Attacks and threats against journalists also remain an issue of concern. The Mapping Media Freedom Platform recorded 45 alerts, representing 11 percent of all alerts in the EU in 2022, out of a population which corresponds to about 13 percent of the EU population.

Regarding checks and balances, no progress has been made since last year. In its 2022 report, the European Commission urged Italy to



establish a National Human Rights Institution in line with the UN Paris Principles. However, little has been done. On a parliamentary initiative, a new bill on the establishment of a Data Protection and Human Rights Authority was proposed in November 2022. According to the proposed bill, the Data Protection Authority will also serve as the body responsible for the protection of human rights in a broad sense. The discussion of the draft bill began in early January in the Italian Senate.

Verbal attacks by members of the government raise fears of the beginning of a new phase of criminalisation and defamation of civil society, while the introduction of restrictive regulations hamper the on-field activities of humanitarian NGOs. Particularly worrying is the approval of the so-called Rave Decree, which introduces a new article into the Criminal Code, 633-bis, so vague in the first version presented to Parliament (which referred generically to “gatherings of more than 50 persons” invading a field or a public or private building) that it was feared it could be applied not only to punish participants in rave parties but to dangerously restrict civic space, the right to protest, and freedom of assembly as provided for in Article 17 of the Constitution.







The rule of law environment has suffered from a failure to properly address systemic human rights issues, in particular regarding hate speech, violence against women and homophobic and transphobic attacks. No progress was made on proposals to strengthen the legal framework. Italy’s record of implementation of judgments of the European Court of Human Rights remains poor, with no advancement

on the implementation of leading decisions in important areas.




Also the conversion into law of Decree No. 1 of 2/1/2023 containing urgent provisions for the management of migration flows is worrying as it is indicative of a new attempt to criminalise NGOs that carry out rescue operations at sea and of the continuing desire to associate migration with the issue of respect for public order and security.

The European Commission’s Rule of Law Report has received very little attention in Italy over the course of 2022; only two articles related to the report have been published in the three most read mainstream media.

### *State of play*

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

### *Legend (versus 2022)*

-  Regression
-  No progress
-  Progress

## Justice system ➔

### Key recommendations

- Bring the regulation of life sentences into compliance with international standards.
- Ensure the application of fair trial rights within the criminal justice system.

## Quality of justice

### **Training of justice professionals**

The European Commission's anti-SLAPP recommendations, adopted in April 2022, called for the promotion of anti-SLAPP training courses for legal practitioners.<sup>1</sup> This need has not been met. In addition, while in Italy a limited number of journalists' associations offer this kind of training to media professionals, more efforts should be undertaken to widen the scope of recipients. Beyond journalists, anti-SLAPP training courses should be directed towards legal professionals, such as judges and lawyers, as well as university law students, as there is an evident need to raise awareness and equip them with the relevant

legal knowledge to identify and counter abusive lawsuits.

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

#### **Length of proceedings**

Compared to the end of 2021, in November 2022 the total number of pending civil justice cases decreased by 5.4 percent.<sup>2</sup> The overall number of pending cases is for the first time since 2003 below 3 million. In criminal justice, the reduction in pending cases is 9 percent, or 4.9 percent if excluding proceedings before the justices of the peace, i.e. ordinary courts.

The length of proceedings, particularly in civil justice, represents a threat for journalists and other media workers who are victims of SLAPPs.<sup>3</sup> Although the situation is improving thanks to the reform of the justice system, the problem of lengthy proceedings cannot be considered solved. This is why in September 2022 OBCT called for the introduction of a procedure for the timely dismissal of legal actions classifiable as SLAPPs.<sup>4</sup>

1 <https://www.rcmediafreedom.eu/OBCT-Dossiers/Focus-on-SLAPP/Focus-on-SLAPP/Synergies-and-training-are-needed-against-SLAPP-or-gag-complaints>

2 [https://www.giustizia.it/giustizia/it/mg\\_2\\_9\\_13.page#](https://www.giustizia.it/giustizia/it/mg_2_9_13.page#)

3 <https://www.balcanicaucaso.org/eng/Occasional-papers/Who-is-afraid-of-journalists-The-MFRR-Italy-Mission-Report>

4 <https://www.balcanicaucaso.org/eng/Occasional-papers/Who-is-afraid-of-journalists-The-MFRR-Italy-Mission-Report>

### **Execution of judgments**

Law Decree 162/2022, which entered into force on 31 October 2022, modified the sentence of life imprisonment without parole (*ergastolo ostativo*). It is a direct response to Constitutional Court Sentence 253/2019, which imposed a deadline to the Parliament to modify Art 4-bis of the Penitentiary Law, which was found to be unconstitutional by the Court. The judgement of the Constitutional Court came after the 2019 ECtHR judgement in *Viola v. Italy*, which urged Italian authorities to review the legislation on life imprisonment without parole.

However, the new law does not seem to live up to its expectations, as it poses significant problems under many points of view.

First of all, the crimes that rule out perpetrators from filing a request for penitentiary “benefits” (such as special leave or alternative measures to detention) are not limited anymore to those listed in Art 4-bis of the Penitentiary Law, but are widened to any intentionally committed crime. This means that now any crime could theoretically fall under Art 4-bis.

A second problem is represented by the issue of “cooperation.” Under the new Art 4-bis, the main way to gain access to penitentiary benefits remains that of cooperating with judicial authorities. Before the amendments, it was possible to gain access to penitentiary benefits if the cooperation was impossible or irrelevant (e.g. the information known by the inmate is irrelevant or already known). Now, this possibility does not exist anymore. Instead, the

article now contains a procedure that establishes whether the non-cooperating person has carried out all civil obligations and pecuniary reparations connected with the crime, as well as restorative justice activities. Furthermore, the person has to show good behaviour in prison and must have participated in penitentiary activities, so that it is possible to exclude that they still have ties with the criminal world.

Another issue is represented by the a priori exclusion of detainees subjected to the 41-bis regime (the regime for mafia-related crimes) to penitentiary benefits.

Furthermore, the new law changes the minimum timeframe for the possibility to file a request of conditional release: those with a definite sentence have to serve three quarters of their sentence to have the possibility to access conditional release (same regulation as before the new law), while those with a life sentence have to serve 30 years to have the possibility to access conditional release (instead of the previous 26 years). Those who cooperate with judicial authorities “only” have to serve 10 years in order to ask for a conditional release.

Because of all these elements, unfortunately the new regulation on penitentiary benefits does not improve the situation of those with a life sentence.

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

The situation of the implementation of the European Directives of the Stockholm Roadmap on procedural rights of arrested

people and fair trial rights has not improved. For example, people under investigation or on trial whose mother tongue is not Italian continue to face difficulties in participating in trial hearings, as there is a shortage of qualified interpreters.

Here below are two practical examples of the repercussions of this problem. The first one<sup>5</sup> relates to a German defendant arrested in Italy because of a European Arrest Warrant issued by the United Kingdom and for which a proceeding was already open in Germany. The UK refused to revoke the EAW despite assurances by the German court that the case was being prosecuted (note that the German courts stopped extraditions to the UK since they are not part of the EU anymore). The defendant was arrested in Italy, where he was spending his holidays, unaware of the EAW. The defendant spent two weeks in prison in Italy and 74 days under house arrest while the authorities were deciding how to resolve his situation. While he was in prison, there was no interpreter or translator available to help him understand why he was being detained. During the court hearings, the assistance given by the interpreter was of very poor quality; a five-minute hearing was summarised into one sentence. However, aside from the issue of interpretation, this is also an example of the lack of guarantees for defendants involved in a European Arrest Warrant procedure and

the uneven application of rules by different Member States.

A second case<sup>6</sup> concerns one of the defendants of the *Iuventa* case, the NGO ship that in 2016 rescued more than 14,000 people<sup>7</sup> in the Mediterranean Sea. The defendant, who risks twenty years in prison for criminal association aimed at aiding illegal immigration, is German and lives in Germany, while the trial is held in the court of Trapani, in Sicily. Within the span of three months, the defendant travelled three times to be interrogated by the judge – with little success. The last time, the interpreter was a former police officer, who was not on the Court’s list of experts. After thirty minutes, the questioning of the defendant was stopped. After the hearing it was discovered that the report of the questioning did not properly represent the defendant’s statements. Therefore, both the defence lawyer and the defendant decided not to sign the report to authenticate its content.

Among the problems that hinder the participation of qualified interpreters in hearings is the lack of an official national list of interpreters and the possibility for each judge to appoint any person as an interpreter regardless of their qualifications. Also, the hourly pay rate for interpreters and translators is much lower than the market price and payments are made with much delay. Therefore, despite the presence of

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5 <https://www.fairtrials.org/articles/case-studies/arrested-abroad-stefans-story/#timeline-of-events-28>

6 <https://www.breakinglatest.news/news/migrants-the-impossible-trial-of-the-german-ngo-there-are-no-interpreters/>

7 <https://iuventa-crew.org/en/case>

interpreters being guaranteed at hearings, the quality of their service and their effectiveness is questionable.

### **Other**

The so-called Cartabia reform (law n. 199/2022) entered into force on 30 December 2022, bringing many changes into the criminal justice system.

One novelty regards the so-called *liberi sospesi*: those people who have been sentenced to less than four years of prison and who request an alternative measure to detention. This request must be granted by a Surveillance Judge. However, because of the high workload of Surveillance Judges, the requests of the people who remain free but in limbo, waiting for the judge's decision, fall behind the prioritised requests of detained people. The reform tackles this problem by giving the judge the power to immediately grant the alternative measure to detention, thus shortening the list of *liberi sospesi*.

The reform also incentivises the use of restorative justice. The indicted person and the victim, if they are willing to do so, under the guidance of mediators can participate in meetings to take stock of the crime that was committed. If the proceeding concerns a crime where the investigation is opened "ex officio", the sentence can be reduced by up to one third and detainees, after the meetings with the victims, can access penitentiary benefits (e.g. special leave, alternative measures to detention and even conditional release). If the proceeding concerns a crime where the investigation

is opened only if the victim files a complaint with the police, the participation in the restorative justice programme extinguishes the proceeding.

## **Anti-corruption framework** 🟡

### **Key recommendations**

- Lobbying regulation should not excuse business associations, unions, and religious bodies from the obligation to join the transparency register. All decision-makers (and not only former members of the government), should wait a period of no less than two years before joining the lobbying profession.
- Italy must align itself with EU Directive 2019/1937 on the protection of persons who report breaches of Union law. Laws, regulations and administrative provisions necessary to comply with the Directive should be brought into force in the shortest time possible. The transposition process should be transparent and public. External stakeholders should be consulted and audited.

### **Levels of corruption**

According to the Global Corruption Index (GCI), Italy ranks 18th out of 196 countries

and territories, meaning it faces relatively low risks of corruption and other white-collar crime.<sup>8</sup> In particular, the country has strong corporate and ownership transparency and Italian authorities can cooperate effectively at international level to combat money laundering.

### **Framework to prevent corruption**

In January 2022 the Italian Anti-Corruption Authority (ANAC) adopted a three-year plan to prevent corruption for the years 2022-2024.<sup>9</sup> The plan includes all the measures that are mandatory by law, as well as the specific measures adopted according to the specific features of each administration.

It aims to pursue the following objectives:

- identifying activities with high corruption risk;
- providing mechanisms for the training, implementation and controlling of decisions that are suitable for preventing the risk of corruption;
- providing information about obligations of the Prevention of Corruption and Transparency Officer called upon to supervise the operation of and compliance with the plan;

- defining the methods for monitoring compliance in adherence to deadlines laid down by law or regulations for the conclusion of proceedings;
- defining the procedures for monitoring relations between administrators and the individuals who enter into contracts with them, including by verifying any relationships of kinship or affinity existing between the owners, administrators, partners and employees of those entities and the administration's managers and employees;
- identifying specific obligations of transparency in addition to those provided for by law.

### **Integrity framework including incompatibility rules**

As of January 2023, the discussion regarding a reform proposed by the former Minister of Justice Marta Cartabia<sup>10</sup> concerning the Superior Council of the Judiciary (Consiglio Superiore della Magistratura), i.e. the body that allocates jurisdiction and guarantees the autonomy and independence of ordinary magistrates, is still ongoing. The reform is aimed, inter alia, at preventing magistrates from holding a political office, thus putting an end to the so-called revolving door mechanism. If

8 <https://risk-indexes.com/esg-index/>

9 <https://www.anticorruzione.it/amministrazione-trasparente/altri-contenuti-prevenzione-della-corruzione/piano-triennale-di-prevenzione-della-corruzione/anno-2022/2024>

10 <https://temi.camera.it/leg18/temi/riforma-dell-ordinamento-giudiziario-e-del-csm.html>

approved, the reform will include the prohibition for magistrates to run as political candidates in the constituency in which they have served in the last three years. In addition, if elected, magistrates must, upon acceptance of their candidacy, be placed on unpaid leave for the entire duration of their mandate. If they are not elected, on the other hand, they may not be placed back in tenure for the next three years. Although the approval process of the reform has been delayed, the initiative is to be welcomed as it will provide obligations that will prevent the recurrence of cases of magistrates holding simultaneously elected and/or political offices.

***General transparency of public decision-making (including public access to information such as lobbying, asset disclosure rules and transparency of political party financing)***

As of January 2023, Italy still lacks a legislative framework on lobbying<sup>11</sup> of members of the government. On 12 January 2022, the Chamber of Deputies finally approved a draft law on lobbying, as proposed by the Lobbying4change Coalition.<sup>12</sup> This draft law was about to be discussed in the Senate

when the government of Mario Draghi fell. The new Parliament has yet to schedule new hearings discussing the introduction of a regulation of lobbying activities. The debated issue of the exclusion of Confindustria (Italy's largest employers' union) and trade unions from the transparency obligations, which should be foreseen by all stakeholders, has slowed down proceedings in the past. It is among the key issues the civil society coalition Lobbying4change keeps advocating for.

***Rules on preventing conflict of interests in the public sector***

Italy still lacks a law concerning conflict of interest.<sup>13</sup> While the text of a draft law (n. C-702) on this matter was adopted in October 2020 by the Constitutional Affairs Committee of the Chamber of Deputies,<sup>14</sup> with the end of the last legislature, the draft has not been approved.

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

Italy has not yet transposed EU Directive 2019/1937 on the protection of persons who

11 Proposta di legge 196-721-1827, Disciplina dell'attività di rappresentanza degli interessi particolari e istituzione del registro pubblico dei rappresentanti di interessi. See: <https://www.thegoodlobby.it/qui-si-fa-la-storia-ok-della-camera-alla-legge-sul-lobbying-ora-il-senato-deve-migliorarla/>

12 <https://www.thegoodlobby.it/campagne/lobbying-italia/>

13 <https://www.thegoodlobby.it/campagne/conflitto-di-interessi/>

14 <https://www.camera.it/leg18/126?tab=&leg=18&idDocumento=0702>

report breaches of Union law.<sup>15</sup> This shortcoming was pointed out in the European Commission's 2022 Rule of Law Report. The new European Delegation Law (127/2022)<sup>16</sup> led to the presentation on 12 December 2022 of a draft legislative decree implementing the EU Whistleblower Directive. The Chamber of Deputies began consideration of the draft decree on 21 December 2022 and should conclude deliberations by 19 January 2023.<sup>17</sup> ANAC (the National Anti-Corruption Authority) gave a positive opinion of the text.<sup>18</sup>

Whistleblowers play a fundamental role in exposing corruption and illegal acts that undermine the rule of law, but in Italy the lack of socialisation about what whistleblowing means is confirmed by the lack of an accurate Italian translation of the word.

According to a report<sup>19</sup> issued by Transparency International Italia, there are at least 1,500 entities that have joined Transparency International Italia's alert platform that allows them to report breaches of the law, and over half of them are municipalities. However, it should be highlighted that the sanctions to

entities which are not compliant with the current regulation about whistleblowing are very few and far between: only three in one year, according to the report.

Transparency International Italia and The Good Lobby asked the government to ensure greater publicity for the transposition process and full stakeholder involvement. The two organisations are advocating for a public update on the progress of the transposition process and for the possibility for external stakeholders to provide their observations and comments, in order to take into account multiple points of view.

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

### **Key recommendations**

- The Freedom of Information Act (FOIA), which is applied to all public institutions including public broad-

15 <https://www.transparency.it/informati/news/direttiva-ue-sul-whistleblowing-30-giorni-al-termine-previsto-per-la-trasposizione>

16 [https://www.gazzettaufficiale.it/atto/serie\\_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2022-08-26&atto.codiceRedazionale=22G00136&elenco30giorni=false](https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2022-08-26&atto.codiceRedazionale=22G00136&elenco30giorni=false)

17 <https://www.camera.it/leg19/824?tipo=C&anno=2022&mese=12&giorno=21&view=&commis-sione=0211&pagina=data.20221221.com0211.bollettino.sede00010.tit00010#data.20221221.com0211.bollettino.sede00010.tit00010>

18 [http://documenti.camera.it/apps/nuovosito/attigoverno/Schedalavori/getTesto.ashx?file=0010\\_F002.pdf&leg=X-IX#pagemode=none](http://documenti.camera.it/apps/nuovosito/attigoverno/Schedalavori/getTesto.ashx?file=0010_F002.pdf&leg=X-IX#pagemode=none)

19 [https://www.transparency.it/images/pdf\\_pubblicazioni/report-whistleblowing-2021.pdf](https://www.transparency.it/images/pdf_pubblicazioni/report-whistleblowing-2021.pdf)



casters, should be amended to prevent any attempt to obtain documents from a journalist or disclose a source's identity.

- Support the work of journalistic unions and organisations in fostering solidarity with local journalists, who are often left alone in their newsroom and in the field. The work of support centres and unions is needed to ensure their connection with national and international organisations, in order to build a network of solidarity.
- Italian institutions should address the severe gender gap in the media sector including in holding top management positions, editorial decision-making and equal salaries. Current defamation laws should be amended to prevent abusive lawsuits and excessive claims for damages aimed at silencing journalists and human rights defenders. This should encompass both criminal and civil proceedings, allowing judges to dismiss lawsuits in early proceedings and assess when public interest issues are at stake.
- The Parliament should respond to the repeated calls of the Constitutional Court that invited Italian lawmakers to reform defamation laws in accordance with freedom of speech and protection of one's reputation.

- The Italian Federation of Publishers and the Italian Federation of Journalists, together with the Chamber of Journalists, should come to an agreement concerning the application of Law 233 of 2012, which plans to introduce a mandatory minimum wage for freelancers.

## ***Pluralism and concentration***

### ***Rules governing and safeguarding the pluralistic media market, and their application***

According to the latest report by Freedom House, ownership concentration remains a major concern in Italy. On the other hand, media pluralism is ensured, with citizens enjoying many different opinions and viewpoints, and access to the internet is unrestricted.<sup>20</sup>

### ***Fairness and transparency of licencing procedures***

During a meeting organised within the Media Freedom Rapid Response (MFRR) mission in Italy, the discussion with the Order of Journalists representatives showed the limits of having only one professional disciplinary body. The stakeholders agreed that Italy would benefit from a journalistic self-regulatory body that would bring together journalists, media owners and civil society following the model of "Press Councils." Such a body could increase the level of trust in the Italian media.

20 <https://freedomhouse.org/country/italy/freedom-world/2022>

Italian stakeholders, including the National Council of the Order of Journalists, are highlighting the need for a reform of the legislation that regulates the provision of the title of “professional journalist.” A set of guidelines for the reform curated by the National Council in 2018 never got to Parliament for approval.

In January 2022 the National Council appointed a Special Commission for the reform.<sup>21</sup> This was the first step in a process that should lead to a new proposal being submitted to the Parliament to revise the rules of the profession. The reform will open the profession to new categories of media workers, acknowledging the numerous transformations of the media market, including the digital one.

Among the most recent changes is the decision to update the procedures to become a professional journalist with a valid accreditation. On 8 November 2022, the National Council of the Order approved<sup>22</sup> a rule allowing, exceptionally and in specific cases, the start of the apprenticeship period even in the absence of a registered media outlet and editor-in-chief. According to the President of the Order, Carlo Bartoli, this is a way to support freelance journalists and precarious workers.

According to the Vice-President of the Order, there is a possibility that starting from January 2023 social media managers who work in the information sector will be able to enrol in the register of practitioners as well.<sup>23</sup>

### *Other*

The decision of progressively abolishing direct state funding to not-for-profit print media and journalistic cooperatives has been delayed by Law Decree 183/2020 and Law Decree 73/2021. It is now foreseen that the reduction of direct state funding will start in 2024, building to a complete abolition in 2027. According to the same decrees, funding for private radio stations that carry out information activities in the public interest will be abolished from 31 January 2025.<sup>24</sup>

However, overall subsidies more than doubled (+120 percent) between 2020 and 2021 compared to 2019.<sup>25</sup> Direct state funding increased as well, but the amount has not been criticised per se.

What emerges as a negative trend is that resources that should be aimed at promoting media pluralism – through support for not-for-profit, small and local media outlets – are

21 <https://www.odg.it/il-cnog-nomina-la-commissione-speciale-riforma/43249>

22 <https://odg.mi.it/notizie/giornalismo-accesso-al-praticantato-anche-senza-testate/>

23 <https://www.editorialedomani.it/idee/cultura/social-media-manager-potranno-isciversi-ordine-giornalisti-ttrp9931>

24 [https://temi.camera.it/leg18/temi/tl18\\_interventi\\_editoria.html](https://temi.camera.it/leg18/temi/tl18_interventi_editoria.html)

25 <http://www.datamediahub.it/2021/12/27/i-due-anni-piu-che-raddoppiati-i-contributi-alleditoria/#axzz7ZxiOD-ke2>

essentially assigned to large or medium-sized media outlets that define themselves as journalistic cooperatives. Concentration of funding is identified as a serious problem by Italian journalists.

### ***Transparency of media ownership***

According to the Media Pluralism Monitor 2022,<sup>26</sup> media ownership transparency in the online environment in Italy scores a higher risk when compared to the overall score for this indicator. As in the past, the main risks in this sector stem from the high concentration of horizontal and cross-media ownership, a concentration that is also increasing due to the defensive strategies implemented by media companies to cope with their economic difficulties. Also according to MPM2022, high concentration also characterises the online advertising market, where a few platforms dominate.

Finally, MPM2022 reports that the indicator concerning access to media for women reflects a high risk. In this regard, in 2022 there was just one woman among the editors-in-chief of the leading media companies, and in 2021 no woman held that position.

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

#### ***Rules and practices guaranteeing journalist's independence and safety***

Media freedom and media pluralism are guaranteed by a solid legislative framework, but some issues remain unsolved, including the passing of a law on fair remuneration of freelancers and the reform of defamation laws.

Regular employment in the media sector has been steadily decreasing in recent years. Active workers with a regular employee contract in 2021 decreased by 550 units in comparison to 2020, while the number of journalists without a regular contract is increasing.

Attacks and threats against journalists remain issues of concern. The Mapping Media Freedom Platform recorded 45 alerts (11 percent of the EU27 total, out of a population which corresponds to about 13 percent of the EU population) in 2022.<sup>27</sup> However, many cases remain unreported.

Gender inequalities in the media sector include different degrees of freedom to choose what to report about, wage gaps, and an imbalance in representation at the management level.

Sexual harassment is the most worrisome category of threat for women journalists, and

26 <https://cadmus.eui.eu/bitstream/handle/1814/74694/MPM2022-Italy-EN.pdf?sequence=1&isAllowed=y>

27 <https://www.mapmf.org/explorer>

the newsroom is often the first place where harassment takes place.

A big share of online attacks target women journalists who cover politics, organised crime, court reporting, and migration issues.

The vulnerability of local journalists is intertwined with the decline of the local news industry.<sup>28</sup> Local reporters are increasingly working as freelancers or independent bloggers. Some of these reporters should be included in the category of human rights defenders for their commitment to exposing political wrongdoings and criminal activities.

Support centres and organisations are particularly needed at the local level, where journalists are more vulnerable.

There is also a need to ensure journalistic sources are protected and to reform the legal framework on professional secrecy of journalists. Only professional journalists, meaning those who are registered in the Order of Journalists,<sup>29</sup> have a right to journalistic confidentiality. In spite of the fact that some court decisions have granted the right to professional secrecy also to publicists, this is a serious “legal gap” which needs to be addressed.

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

The Italian Coordination Centre on Intimidation Acts against Journalists is a body established within the Ministry of Interior which publishes data on harassment, intimidation and attacks against journalists collected by the police.<sup>30</sup> In the first nine months of 2022, 84 intimidation acts were reported (-48 percent compared to the same period in 2021). Nine episodes were related to organised crime. Of all the acts, 29 percent happened online. Lazio, Lombardia and Toscana are still the regions with the highest number of threats recorded.

The setting up in 2017 of the Coordination Centre has improved the relationship between journalists and Italian authorities. However, several aspects of the body could be improved. First, the data used is based on police reports. This might not be comprehensive, considering that not all journalists file police reports in cases of threats or attacks. Another worrying element is that basing the monitoring on police reports means that no case of violence or harassment coming from the police itself is taken into account. The MFRR delegation concluded that its self-regulatory nature hampers the independence of the monitoring system.

28 <https://www.rcmediafreedom.eu/OBCT-Dossiers/Analysis-of-support-mechanisms/Analysis-of-support-mechanisms/Interviewing-Journalism-II.-Needs-and-gaps-in-support-for-women-and-local-journalists>

29 <http://www.inpgi.it/sites/default/files/Inpgi%20-%20Bilancio%20preventivo%202022%20AGO.pdf>

30 [https://www.interno.gov.it/sites/default/files/2022-12/report\\_9\\_mesi\\_2022.pdf](https://www.interno.gov.it/sites/default/files/2022-12/report_9_mesi_2022.pdf)

Second, the data collected does not take into account all types of threats: legal threats and SLAPPs are not monitored, although they are prevalent issues in Italy.

Third, the independence of the Coordination Centre from any political influence should be better guaranteed. Its decoupling from politics should be seen as a step in this direction, considering that the Coordination Centre itself is chaired by the Ministry of the Interior.

Alongside the Coordination Centre, the recognition of the importance of journalistic work passes through two other institutional entities: The Parliamentary Anti-Mafia Commission and its subcommittee on mafia, journalists and world of information, as well as the parliamentary intergroup focused on matters related to media and journalism set up during the previous legislature. They are proof of the long-standing recognition by the legislature of the role played by journalists.<sup>31</sup> However, both represent little more than good intentions while - according to the MFRR delegation - it would be vital to move beyond monitoring and analysis towards more concrete actions.

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

The calls formulated by the Italian Constitutional Court in 2020 and 2021 stated, respectively: 1) prison sentences for defamation to be unconstitutional, except in cases of exceptional gravity; and 2) the need for the Parliament to promote a comprehensive reform of defamation laws. Both calls went unheard by Italian lawmakers.

We have noticed a worrisome trend characterised by an increasing number of SLAPPs instigated by politicians targeting media professionals. In some cases, these proceedings have been initiated in recent years and had their hearings scheduled over the past semester or in the first months of 2023. Others have only been recently formalised. Targets of SLAPPs have ranged from freelance journalists targeted by local politicians (*Sara Manisera vs local administration Abbiategrasso*)<sup>32</sup> to editors-in-chief and renowned journalists and writers sued or threatened to be sued for defamation by high-level government officials (formalised lawsuits: *Roberto Saviano vs Giorgia Meloni*,<sup>33</sup> *Roberto Saviano vs Matteo Salvini*; *Roberto Saviano vs Gennaro Sangiuliano*; *Stefano Feltri*

31 <https://www.rcmediafreedom.eu/Tools/Stakeholders/Parliamentary-inquiry-commission-into-mafias-and-other-criminal-organisations-including-foreign-ones>

32 <https://www.mapmf.org/alert/25172>

33 <https://www.rcmediafreedom.eu/OBCT-Dossiers/Focus-on-SLAPP/Focus-on-SLAPP/Italy-a-call-in-support-of-Roberto-Saviano-defendant-in-a-defamation-trial>

and *Emiliano Fittipaldi vs Giorgia Meloni*,<sup>34</sup> threatened lawsuits: *Editoriale Domani vs Guido Crosetto*,<sup>35</sup> *Il mattino and Il Messaggero vs Roberto Calderoli*<sup>36</sup>). Furthermore, large companies and businessmen connected to public funding allocation have also been relying on SLAPPs to silence media professionals and human rights defenders (*Irpi Media & The Good Lobby Italia vs private company*,<sup>37</sup> *Gad Lerner vs Ilva*<sup>38</sup>).

Finally, the recent case of a prosecutor's demand for a six-month prison sentence for three journalists in response to their factual reporting in a case involving a former minister (*Mary Tota, Danilo Lupo and Francesca Pizzolante vs Teresa Bellanova*),<sup>39</sup> once more draws attention to the dangers that SLAPPs pose to the public debate. Firstly, the length of the proceeding, initiated in 2014, has delivered a chilling effect for each of the journalists involved, who have refrained from any reporting on the plaintiff throughout the past years. Secondly, while eventually dismissed by the judge, the prison sentence request for the three journalists advances a dangerous signal to

media professionals, alongside the reluctance of Italian policymakers to respond to the calls of the Constitutional Court.

The fact that the highest governmental officials consistently resort to SLAPPs to silence critics signals the urgent need for a comprehensive reform of defamation laws encompassing both civil and criminal proceedings.

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

Generalised civic access to information held by the public administration (FOIA) was introduced in the Italian legislative system in 2016, whereas access to public documents for requesters who have a specific interest is regulated by Law 241/1990.

The MFRR mission in Italy was an opportunity to highlight the difficulties experienced by journalists who cover the legal system following the transposition into Italian law (with Italian decree 188/2021 which entered into force on 14 December 2021) of Directive

34 <https://www.rcmediafreedom.eu/News/Italy-Newspaper-Domani-sued-for-defamation-by-Prime-Minister-Giorgia-Meloni>

35 <https://www.fnsi.it/conflitto-di-interessi-il-ministro-crosetto-minaccia-querela-il-domani-non-ci-faremo-intimidire>

36 <https://www.articolo21.org/2023/01/i-ministri-e-quel-vizietto-delle-querela-bavaglio-ora-tocca-a-il-mattino-e-il-messaggero/>

37 <https://mappingmediafreedom.usahidi.io/posts/25479>

38 <https://www.ilfattoquotidiano.it/2023/01/10/quella-a-gad-lerner-e-una-querela-bavaglio-non-lasciamolo-solo-articolo-21-non-lo-fara/6930901/>

39 <https://www.rcmediafreedom.eu/News/Italy-Concern-about-prosecutor-s-demand-for-prison-sentence-for-three-journalists-in-response-to-their-factual-reporting>

2016/343 on the protection of the presumption of innocence.<sup>40</sup> Although the Directive does not deal with journalistic activities, the Italian legislature has focused its attention on the relationship between the public prosecutor and the press.<sup>41</sup> Despite the necessity to respect the right to the presumption of innocence, some public prosecutors interpret the text in a very restrictive way, claiming that they can no longer deliver any information to journalists about ongoing judicial investigations. Academics, unions and organisations have raised concerns on the compatibility of this transposition with the Charter of Fundamental Rights of the EU and the European Convention on Human Rights, particularly regarding the notion of news of public interest.

The implementation of such provisions often leads to denial of access to information, creating significant obstacles to professionals dealing with court reporting. In fact, the General Data Protection Regulation (GDPR) is used instrumentally in these cases to prevent journalists from having access to data. Finally, the GDPR can be used to invoke the right to be forgotten even when court cases are still ongoing.

The FNSI (National Federation of Journalists' Unions) sent a formal protest<sup>42</sup> to the European Commission on 22 February 2022. The letter

called on the EU “to monitor the Italian legislation transposing the Directive and to draw the Italian legislature’s attention to the need to remove from the transposition decree the provisions restricting press freedom.”

The publication of decree 188/2021 led to difficulties in verifying news, accessing sources and ultimately ensuring that citizens’ right to be informed is guaranteed.

The main challenge remains striking a balance between the right to access information, to protect personal data, and to protect journalistic sources.

## Checks and balances

### Key recommendations

- The Italian government should urgently enhance its efforts to establish a sustainable, functional and independent institutional body for human rights protection. Compared to last year, no progress has been made and serious shortcomings remain both concerning the independence of the Italian equality body (UNAR) implementing Directive 2000/43 and the establishment of a National Authority

40 <https://www.ilfattoquotidiano.it/2023/01/10/quella-a-gad-lerner-e-una-querela-bavaglio-non-lasciamolo-so-lo-articolo-21-non-lo-fara/6930901/>

41 <https://www.rcmediafreedom.eu/News/Italy-Concern-about-prosecutor-s-demand-for-prison-sentence-for-three-journalists-in-response-to-their-factual-reporting>

42 <https://www.rcmediafreedom.eu/Dossiers/Italy-journalism-and-the-rule-of-law>

complying with UN Resolution No. 48/134 of 1993.

## ***Independent authorities***

Thirty years after the adoption of UN Resolution 48/134 and countless recommendations from European and international bodies – most recently the European Commission in its Rule of Law Report 2022 and the UN Committee on Economic, Social and Cultural Rights in its report<sup>43</sup> on Respect for the Rule of Law in Italy 2022 – Italy has yet to establish a national human rights institution in line with the Paris Principles.

Over the last year, little progress has been made on the normative level. In November 2022, a member of the Italian Senate proposed a draft bill<sup>44</sup> for the establishment of a Data Protection and Human Rights Authority. According to the proposed bill – which was discussed in the Italian Senate in early January<sup>45</sup> – the body would be responsible for ensuring the respect and protection of human rights, including online, in a broad sense, going beyond the mere protection of personal data.

With regard to the Italian equality and anti-discrimination body (UNAR), in August 2022 the Minister for Equal Opportunities

of the former government appointed through ministerial decree a new Director General.<sup>46</sup> The appointment appeared to be a rather political choice, as the new Director – who was the personal secretary of Minister Elena Bonetti – had no experience nor competence on anti-discrimination or human rights protection. Such an appointment shows yet again the lack of independence from the government, which ultimately undermines its legitimacy and function.

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

### ***Key recommendations***

Italian political parties should abandon the aggressive rhetoric against civil society, which seriously risks weakening a sector that is fundamental for the functioning of a liberal democracy. We recommend yet again that the Italian government set up transparent and accountable funding mechanisms to empower CSOs and allow them to work in an independent and effective way and be a reliable partner in the promotion of a culture based on fundamental rights and the rule of law.

43 <https://www.ohchr.org/en/news/2022/09/experts-committee-economic-social-and-cultural-rights-welcome-it-aly-s-guaranteed>

44 <https://www.senato.it/service/PDF/PDFServer/BGT/01361649.pdf>

45 <https://www.senato.it/attualita/archivio-notizie?nid=68724>

46 <https://www.ilfoglio.it/politica/2022/08/10/news/il-segretario-di-bonetti-a-capo-dell-unar-lo-ha-nominato-il-ministero-di-bonetti-4318301/>



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## **Regulatory framework**

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On 30 December 2022, the Parliament approved the conversion into law of the so-called Rave Decree, which introduces a new Article in the Penal Code, 633-bis, under which “anyone who organises or promotes the arbitrary invasion of other people’s land or buildings, public or private, for the purpose of carrying out a musical gathering or having other entertainment purposes, shall be punished by imprisonment from three to six years and a fine from 1,000 to 10,000 EUR, when the invasion results in a concrete danger to public health or public safety due to non-compliance with the regulations on narcotic substances or on the safety or hygiene of shows and public entertainment events, including by reason of the number of participants or the state of the places. The confiscation of the things that served or were intended to commit the crime referred to in the first paragraph, as well as those used to carry out the purposes of the occupation or those that are the product or profit thereof shall always be ordered.”<sup>47</sup>

The introduction of this criminal offence is particularly worrying. An earlier draft was much more vague, as it referred generically to “gatherings with more than 50 people” who invaded a public or private field or building. This could have been applied to many other cases, such as workers on strike occupying or

picketing a factory to protest layoffs, or high school or college students occupying schools or universities to draw attention to problems in the education system. Therefore, it would have been a dangerous restriction on civic space, the right to protest and freedom of assembly as provided for in Article 17 of the Constitution. Many CSOs were audited on this first draft of the decree and had the opportunity to express their concerns on the necessity of the introduction of a specific “anti-rave” crime and on other specific issues posed by the text. The decree was reformulated and passed by the Parliament despite the attempts of filibustering by opposition parties, which were cut short by the President of the Chamber of Deputies to allow the vote to take place. This could be a warning signal of the way the new government wants to act on human rights issues; therefore, CSOs will remain vigilant and act against any restrictions of civic space.

### ***Access and participation to decision-making processes, including rules and practices on civil dialogue, rules on access to and participation in consultations and decision-making***

With regard to the implementation of the National Recovery and Resilience Plan (NRRP), in 2022 the Civic Observatory<sup>48</sup> – a coalition of more than 30 CSOs created in 2021 to monitor the transparency and

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47 [https://www.gazzettaufficiale.it/atto/serie\\_generale/caricaArticolo?art.versione=1&art.idGruppo=66&art.flagTipoArticolo=1&art.codiceRedazionale=030U1398&art.idArticolo=633&art.idSottoArticolo=2&art.idSottoArticolo1=10&art.dataPubblicazioneGazzetta=1930-10-26&art.progressivo=0](https://www.gazzettaufficiale.it/atto/serie_generale/caricaArticolo?art.versione=1&art.idGruppo=66&art.flagTipoArticolo=1&art.codiceRedazionale=030U1398&art.idArticolo=633&art.idSottoArticolo=2&art.idSottoArticolo1=10&art.dataPubblicazioneGazzetta=1930-10-26&art.progressivo=0)

48 <https://osservatoriocivicopnrr.it/news/26-la-prima-relazione-del-tavolo-di-partenariato.html>

inclusiveness of the decision-making process – participated in all meetings of the NRRP advisory body with governmental, regional and local authorities, representatives of academia and of trade associations. Both during the meetings and in 12 official statements sent to the advisory body’s coordinator, the Civic Observatory has constantly stressed the need for more transparency of data regarding projects financed through the NRRP and more openness of the decision-making process to social actors. However, most of the requests advanced by the Observatory have gone unheeded so far, as information on the management of NRRP funds remain opaque and not easily accessible. For this reason, in November 2022 the Observatory mobilised to launch the campaign [datibenecomune.it](https://www.datibenecomune.it).<sup>49</sup> Within the campaign – which has been shared by over 60 civil society actors – they prepared a joint statement addressed to the Italian Prime Minister and the Minister for European Affairs responsible for the management of the NRRP asking that their demands finally be given due consideration.

### ***(Un)safe environment***

The appointment of the new government led by the far-right party Brothers of Italy marked the return of attacks on humanitarian non-governmental organisations (NGOs) working on migration issues: the introduction of restrictive regulations and verbal attacks

smearing the work of NGOs harks back to the difficult atmosphere suffered by the Italian civil society sector between 2016 and 2019, when the criminalisation of humanitarian NGOs ultimately led to the delegitimisation of the entire sector.

### ***Criminalisation of activities, including humanitarian or human rights work***

Between October and November 2022, the new Italian government introduced two ministerial decrees aimed at limiting search and rescue (SAR) activities of humanitarian ships of the NGOs SOS Humanity and Doctors Without Borders. In addition, at the beginning of January 2023, a new legislative decree introducing “urgent provisions for the management of migratory flows” entered into force.<sup>50</sup> The decree has been severely criticised not only by a number of established SAR NGOs, such as Emergency and Doctors Without Borders, but also by journalists and other CSOs, which have denounced its illegitimacy and contrast with key principles of international law. The decree, which introduces for the umpteenth time a code of conduct for NGOs involved in migrant rescue in the Mediterranean Sea (which are accused of posing a general threat to public security), limits once again the work of humanitarian NGOs and hinders SAR activities in Italian territorial waters.

49 <https://www.osservatoriocivicopnrr.it/news/28-datioggi-per-un-pnrr-bene-comune-non-possiamo-piu-attendere.html>

50 <https://www.gazzettaufficiale.it/eli/id/2023/01/02/23G00001/sg>

## Attacks and harassment

While the introduction of restrictive regulations hampers the field activities of humanitarian NGOs, verbal attacks by members of the government raise fears of the beginning of a new phase of criminalisation and defamation of civil society. For example, during an interview in October 2023, the Italian Minister of Defence referred to SAR NGOs as “floating social centres”<sup>51</sup> (meaning self-managed squat centres, as a derogatory expression for their non-legal status) and questioned NGOs’ good intentions, arguing that they seem to be more interested in criticising and going against governmental decisions rather than saving migrants’ lives. Because of such defamatory statements, the reputation of NGOs is yet again at stake, with potential negative repercussions on civil society as a whole.

Moreover, the great resonance at the national level of the so-called Qatargate, which involved Italian MEPs and two NGOs, also had a negative impact on the credibility and legitimacy of civil society. Many CSOs warn of a generalisation of misconduct and corruption of the entire civil sector risks, and the risk of a negative narrative on civil society as a whole, causing confusion and public distrust on the role and function of CSOs.<sup>52</sup>

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

### Key recommendations

- The government should stop delegitimising maritime arrivals and hindering the activity of SAR organisations rescuing people in the Mediterranean by either closing ports, delaying disembarkation, or enacting decrees (e.g., law decree 1/2023) that require NGOs to rapidly bring the shipwrecked to a disembarkation port, thus de facto disengaging themselves from further SAR operations at sea.<sup>53</sup> Ports must remain open to any private vessels providing relief to people in distress. Rather than allocating a “*place of destination*”, far from the area of distress, access should be given to the next place of safety as soon as reasonably practicable and in line with the UNCLOS as well as the SAR and SOLAS conventions.

51 <https://www.huffingtonpost.it/politica/2022/11/14/news/migranti-10631927/>

52 <https://www.panorama.it/news/cronaca/qatargate-ong-soldi-euro-panzeri>

53 For further discussion, see, ASGI, ‘Contro la Costituzione, le ONG e i diritti umani: l’insostenibile fragilità del decreto legge n.1/2023’ (5 January 2023), <https://www.asgi.it/primo-piano/contro-la-costituzione-le-ong-e-i-diritti-umani-linsostenibile-fragilita-del-decreto-legge-n-1-2023/>; and Giuffrè M (2022). ‘Le vent nous portera’: Rescue and Confinement at Sea under Human Rights Law, *Erasmus Law Review* 2023

- National courts should discharge members of NGOs accused of facilitating irregular migration and irregular border crossings. They should also dispose of their cases in accordance with the recent ruling of the Court of Justice of the European Union in joint Cases C-14/21 and C-15/21. In interpreting Directive 2009/16, the CJEU therein concludes that the port state does not have the power to demand proof that those rescuing ships hold certificates other than those issued by the flag state.
- Rather than imposing upon the shipwrecked the requirement to claim asylum onboard rescue boats, so as to engage the responsibility of the flag state for disembarkation, the Italian government should cooperate with other EU Member States to build up a concrete common European approach to SAR, with precise rescue and disembarkation arrangements. It must be clear that neither ministerial decrees or directives nor ordinary laws or policies can derogate from the international legal obligation to disembark the shipwrecked in the next place of safety in line with non-refoulement guarantees.
- The Italian Maritime Rescue Coordination Centre shall cooperate with other coastal states by intervening as soon as it receives a distress call, in line with the SAR Convention. “Distress” should be interpreted as a

situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance. There need not be immediate physical peril before a distress claim can be made.

- Resume the discussion on a law that can protect LGBTIQ+ people from all forms of discrimination.
- De-pathologise issues concerning transgender persons while maintaining adequate public health care.
- Equate same-sex civil unions with heterosexual marriage and protect children born and raised in homoparental and trans families through the approval of stepchild adoption.
- To ensure effective prosecution of crimes of alleged torture committed in prisons, each prison should be equipped with a video surveillance system that covers every room in the building and has long-term archiving arrangements. Another necessary measure is to ensure the identification of the officers at least when engaged in law and order restoration activities within prisons.
- It is recommended that health authorities provide training for doctors deployed within prison institutions, in order to underline the importance of recording any suspicious facts and

reporting to the authority if there is a need.

- People on trial for torture or violent acts should not remain in prison service (or at least not in sensitive roles) to avoid the potential risk of similar acts being repeated.

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

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

#### *Immigration and Search and Rescue*

The condition of migrants and refugees in Italy continues to be concerning, especially in relation to pushbacks by proxy at sea (conducted by Libyan and Tunisian authorities). In 2022, 24,684 people were intercepted and removed to Libya, while more than 30,600 were pulled back to Tunisia.<sup>54</sup> 2,011 people lost their lives in the Mediterranean Sea, of which 525 are confirmed to have died and 848 went missing on the Central Mediterranean route.<sup>55</sup>

Italy's new right-wing government attempted to close Italian ports to people rescued at sea

by NGO rescue vessels, and in some cases they tried to implement a selective disembarkation mechanism.

#### *Rights of LGBTQIA+ people*

In 2022, Italy has not seen any significant legislative changes in terms of the rights of LGBTQIA+ people.

The few improvements that have been made are through individual court judgements, rather than thanks to politicians. For instance, the ruling issued on 7 March 2022 by the Court of Rome,<sup>56</sup> allowed for the first time the rectification of the gender and name of a transgender boy with a non-binary identity who did not want to undergo hormone replacement therapy and carried out only a mastectomy and no other surgeries.

In Italy, the subject is regulated by Law 164/1982. Originally, the rule provided for the need of a gender reassignment surgery in order to access the legal procedure for name change and gender update at the registry office. This application was then modified in 2015 with sentence no. 15138/2015 of the Court of Cassation and with sentence no. 221/2015 of the Constitutional Court, which established

54 Several media reported IOM statistics on sea interceptions, see in particular <https://libyaupdate.com/iom-over-1000-migrants-intercepted-and-returned-to-libya-between-1-7-january/> and <http://www.infomigrants.net/en/post/45890/iom-migrants-repatriated-to-libya-decreased-by-24-in-2022>; Statistics on Tunisia are collected by FTDES (Forum Tunisien de Droits Economiques et sociaux), see <https://ftdes.net/en/politiques-meurtrieres-en-mediterranee-pour-que-cessent-ces-naufrages-consciemment-provoques-au-large-de-la-tunisie/>

55 IOM (2022), Missing Migrants Project, available at <https://missingmigrants.iom.int/region/mediterranean>

56 See A. Caruso in the LGBTQI+ Chapter of the 'Report on the conditions of rights in Italy' (*Rapporto sullo stato dei diritti in Italia*) available in Italian at: <https://www.rapportodiritti.it/lgbtqi#capitolo>

that a transgender person, in order to ask the court to change gender in official identification documents, no longer needs to undergo compulsory genital surgery. However, access to the transition still requires psychological reports and a phase at the courts, which is often long and expensive, and activists remain concerned that the procedure remains excessively medicalised.

Therefore, even if the sentence of 7 March 2022 constitutes a judicial precedent, the hope of lawyers and activists is that Law 164/1982 will be amended and updated, and that the legal gender change will be made self-determined and feasible without going through the court but simply by going to the registry office with the chosen name and gender, as it happens in other European countries.

From a legal point of view, the rejection by the Parliament in the Autumn of 2021 of the DDL Zan bill, which provided “measures to prevent and combat discrimination and violence based on sex, gender, sexual orientation, gender identity and disability”, blocked any discussion of a law against homophobia, biphobia and transphobia.

The absence of a law of this kind is even more problematic when considering that the LGBTQIA+ population is among the main targets of hate speech in our country. This has been even worse during the pandemic, as shown in an Amnesty International report.<sup>57</sup> Especially in the attacks against individuals

through direct invectives, there was a clear predominance of comments against LGBTQIA+ people (see the chart from *Rapporto Diritti - Rights Report*).

Today, Italy still fails to recognise a series of rights for LGBTQIA+ people. Civil unions do not involve a true equivalence with heterosexual marriage in terms of rights, protections – especially towards minors – and obligations. Parenthood for same-sex couples is still legally impossible. The possibility of being able to adopt the partner’s children from previous heterosexual relationships is denied, not to mention the possibility of adoption or assisted reproduction or gestation techniques for others.

The hope for 2023 is that relevant political processes will fill these gaps as much as possible and move forward ensuring greater rights for all.

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

Almost 30 years after ratifying the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the Italian Parliament approved Law N. 110/2017, which introduced the crime of torture into the Criminal Code (Article 613bis).

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57 <https://www.amnesty.it/barometro-dellodio-intolleranza-pandemica/>

The definition of torture provided by the law diverges in several aspects from the one provided by the UNCAT. The first difference is that the offence is applicable to anyone and not only to public officials. Secondly, the text states that the offence occurs if there is “violence and threats” (plural, not singular) and if “the act is committed by more than one conduct.” The third difference is that the act must “cause acute physical suffering or verifiable psychological trauma.” The specification that the trauma must be verifiable can create difficulties in its ascertainment.

Even if the text of the law did not live up to expectations, the introduction of the new crime represented an important step forward. The first two convictions for torture, which came at the beginning of 2021, and the numerous proceedings that are still ongoing are proof of this. On 15 January 2021, for the first time, a prison officer was convicted of torture inflicted on a person detained in the prison of Ferrara. The trial also included a nurse among the defendants, accused of forgery and aiding and abetting.

On 17 February 2021, ten prison police officers at San Gimignano prison were convicted of torture and aggravated injury for the brutal beatings suffered by a detainee during transfer from one cell to another. At the same hearing, a prison doctor was also tried for refusing to perform official acts and for not having examined and reported the victim’s conditions. This was also an important decision, as it was the

first time that a doctor was convicted for refusing to document a prisoner’s statement.

To date, there are several open proceedings for torture allegations. The most important one, in terms of people involved and media coverage received, is undoubtedly the trial for the brutal violence committed by hundreds of prison officers against detainees at the Santa Maria Capua Vetere Prison in April 2020. Thanks to surveillance footage, it was possible to prosecute more than 100 people, including police officers, doctors and prison administration managers.

On the contrary, a case initiated for similar violence and ill-treatment that took place in March 2020 in the Melfi Prison, for which the NGO Antigone received many witness testimonies, was recently archived. In that case, due to the periodic backup of the video surveillance system, the court argued that it was not possible to certify the facts and recognise the persons involved. In addition to the lack of video evidence, a detriment to the establishment of the facts was that all the officers involved had their faces covered and were therefore not recognisable.<sup>58</sup>

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

Italy has a particularly poor record of implementing the judgements of the European

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58 <https://www.open.online/2021/07/16/carcere-melfi-violenze-telecamere-non-registrano/>

Court of Human Rights. Statistics indicate a very high number of leading judgments pending implementation, as well as a high percentage of leading cases which are still pending.

As of 10 January 2023, relevant data from the European Implementation Network<sup>59</sup> include the following:

- Number of leading cases pending: 58 (+4 from beginning of 2022 total)
- Average time leading judgments have been pending: 5 years, 10 months (improving, last year it was 6 years, 3 months)
- Proportion of leading cases pending from the last 10 years: 58 percent (+2 percent from 2022)
- The pending cases against Italy show that relevant human rights problems are still unresolved, including the following:
  - Criminal convictions for acts of free speech on matters of public interest (*Belpietro v. Italy*), pending implementation since 2013.
  - Failures to enforce court judgments (*Therapic Center S.r.l. and Others v. Italy*), pending implementation since 2018.

◦ Extremely long court proceedings across the Italian justice system (*Abenavoli v. Italy*, *Ledonne v. Italy* [no.1], *Barletta and Farnetano v. Italy*), with the first case dating from 1997.

◦ Failures to address domestic violence (*Talpis v. Italy*), pending implementation since 2017.

◦ Police brutality not properly criminalised (*Cestaro v. Italy*), pending implementation since 2015.

The above-mentioned judgments have been pending implementation for a long period of time. The oldest pending leading judgments against Italy are *Ledonne (no .1)* and *Abenavoli*, which have been pending implementation since 1999 and 1997, respectively. They concern the excessive length of criminal and administrative proceedings. The delayed implementation of these judgements creates an ongoing risk that similar violations will continue to occur.

59 <https://www.einnetwork.org>



## ***Fostering a rule of law culture***

### ***Contribution of civil society and other non-governmental actors***

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Too little attention is paid to the publication of the Rule of Law Report in EU Member States. In Italy, over the course of 2022, only two articles related to the report have been published in the three most read mainstream media.<sup>60</sup> Targeted efforts to increase the impact of the reports are necessary.

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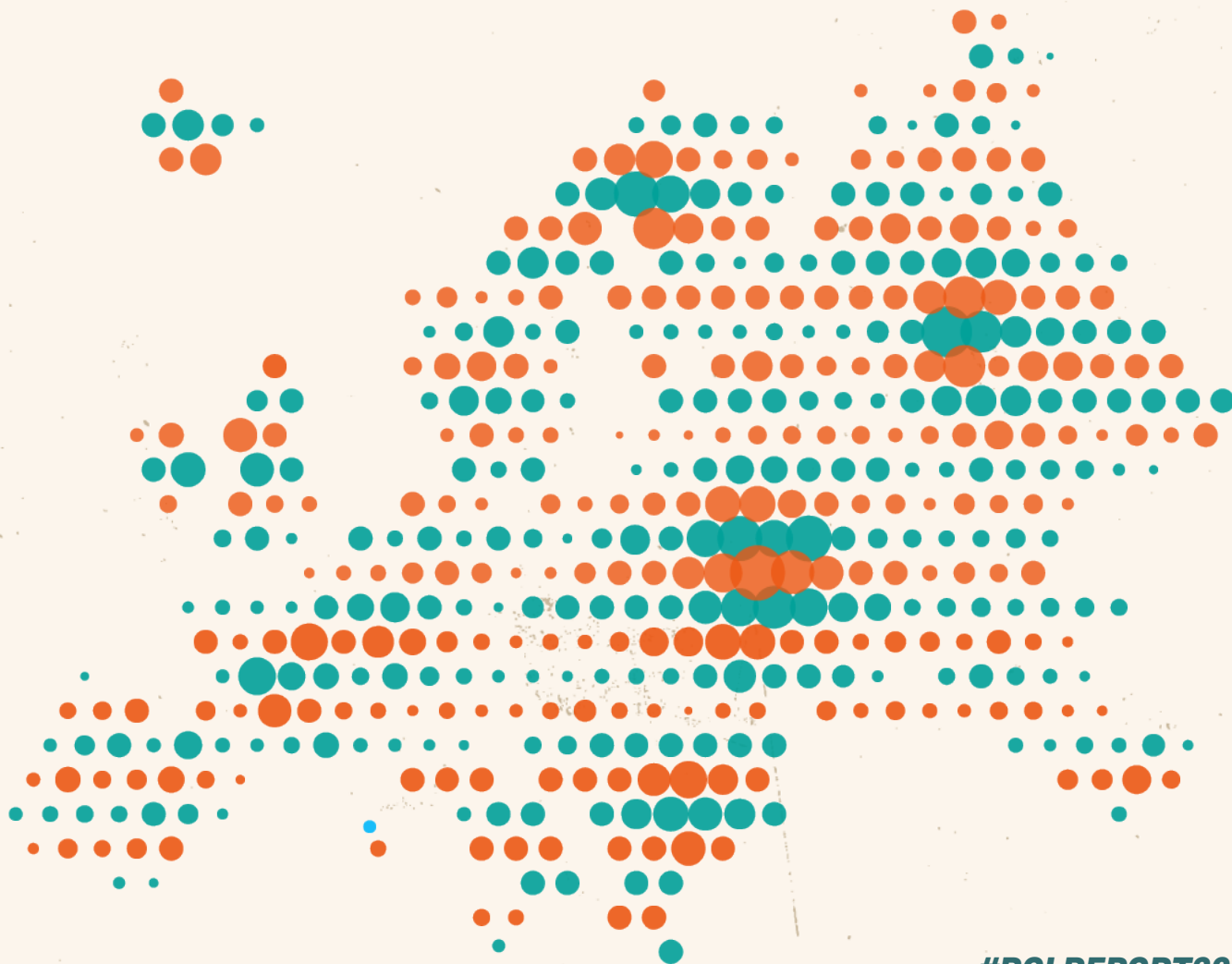
60 The exam was carried out selecting the three most read mainstream media according to the October 2022 ranking published by Prima Comunicazione. The only articles identified with specific reference to the reports are: <https://www.ilsole24ore.com/art/contrasto-illeciti-l-allarme-corrruzione-resta-alto-allerta-anche-pnrr-AEaXsYOB>; [https://www.repubblica.it/esteri/2022/07/13/news/raccomandazioni\\_ue\\_justizia-357671153/](https://www.repubblica.it/esteri/2022/07/13/news/raccomandazioni_ue_justizia-357671153/)

**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**LITHUANIA**



**#ROLREPORT2023**

# LITHUANIA

## About the authors



Human Rights Monitoring Institute (HRMI) is a non-governmental, not-for-profit human rights organisation. Since its establishment in 2003, HRMI has been advocating for full compliance of national laws and policies with international human rights obligations, and working to ensure that rights can be exercised in practice.

The team of HRMI experts carries out research, drafts legal and policy briefings, compiles reports to international human rights bodies, undertakes strategic cases before domestic and international courts, provides expert consultations, engages in various national and international projects, delivers conventional and distance trainings to law enforcement officers and other professionals.

## Key concerns

In the area of media freedom and freedom of expression, no significant legal steps or

legislation have been taken to improve the situation of access to information of public interest for journalists. Overall, freedom of speech and expression are protected in the country. The European Commission's Rule of Law Report recommended that Lithuania should "continue improving the practice of granting access to official documents [...] including by journalists". However, media access to documents of public interest is still often restricted on the basis of data protection.

Regarding its human rights obligations, Lithuania has extended an open-door policy to Ukrainian refugees fleeing the war in the form of the ability to enter the country under any circumstance as per the EU directive for temporary protection.<sup>1</sup> Unfortunately, this policy is in direct contrast with the ongoing pushback strategy enforced on the irregular migrants crossing the Lithuania - Belarus border. This practice violates Lithuania's human rights obligations.

Furthermore, there is currently a draft amendment due to be reviewed by the Parliament that would legitimise pushback practice by law when a state of emergency is declared. One of the concerns raised in the European Commission's Rule of Law Report recommendations outlined an emphasis on "restrictions on the rights

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1 <https://www.15min.lt/naujiena/aktualu/nuomones/lyra-jakuleviciene-kaip-elgtis-su-pabegeliais-ka-numato-tarp-tautine-ir-europos-sajungos-teise-18-1653594>

of individuals such as migrants' right to receive and disseminate information, and the right to travel within the territory".<sup>2</sup> There has been a positive development concerning the right of asylum seekers and irregular migrants to leave accommodation centres and move freely upon a favourable decision from migration authorities. Nevertheless, there have been instances where migrants and asylum seekers were detained and their freedom of movement restricted for extended periods of time, which has resulted in several complaints filed by individuals to the European Court of Human Rights over unfounded restrictions to their freedom of movement within the Foreigners Registration Centre.<sup>3</sup> The situation seems to have improved for migrants that have crossed into Lithuania during the initial wave of 2021. The challenges that do remain are continued pushbacks at the border, lack of information on available options for relocation, and short notice times to leave the migration centres.<sup>4</sup>

### State of play

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

### Legend (versus 2022)

- ⬇️ Regression
- ⊖ No progress
- ⬆️ Progress

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

### Key recommendations

- The Ministry of Culture (with the help of the Ministry of Justice) should clarify in "The Public Information Act of The Republic of Lithuania" the conditions and restrictions of media access to information of public interest to prevent the courts' selective interpretation of data protection reg-

2 [https://commission.europa.eu/system/files/2022-07/35\\_1\\_193984\\_coun\\_chap\\_lithuania\\_en.pdf](https://commission.europa.eu/system/files/2022-07/35_1_193984_coun_chap_lithuania_en.pdf)

3 <https://www.lrt.lt/en/news-in-english/19/1856835/migrants-from-cuba-syria-iraq-sue-lithuania-over-rights-violations>

4 <https://www.lrt.lt/en/news-in-english/19/1737400/lithuania-is-releasing-migrants-but-leaving-them-in-limbo#:~:text=In%20June%2C%20Lithuania's%20Interior%20Ministry,for%20them%20might%20be%20impossible>

ulation from barring journalists from said information.

## **Public trust in media**

According to 2022 Eurobarometer research, around 56 percent of the population in Lithuania considers the public broadcaster and radio a reliable provider of information. Around 28 percent of Lithuanians trust written media - news portals, newspapers, etc. Lithuanian youths aged 15-24 receive news mostly through social networking platforms and blogs (65 percent). 70 percent of Lithuanian residents indicated television, half - news portals, and a third - radio as the most frequently used media in the last seven days. At least eight percent of the population indicated that they read the written (printed) press.<sup>5</sup>

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

### **Legislation and practices on fighting disinformation**

The Public Information Act of The Republic of Lithuania was changed to include a ban on radio programmes, television programmes,

and stand-alone programmes from information outlets belonging to or controlled by the Russian Federation and the Republic of Belarus. This was done as a countermeasure to the incitement of hatred and violence and dissemination of propaganda related to Russia's war of aggression in Ukraine.<sup>6,7</sup>

### **Other**

Overall, media pluralism, independence, freedom of content, and access to information is relatively good in Lithuania. Instances remain where access to information of public interest is denied on the grounds of EU general data protection regulation, however, often times later the court grants access to the data where a conflict of interest by the data-denying party is established. Reporters Without Borders has ranked Lithuania no. 9 in their 2022 Press Freedom Index.<sup>8</sup>

5 <https://europa.eu/eurobarometer/surveys/detail/2832> (Country Fact Sheets - Lithuania)

6 <https://www.lrt.lt/en/news-in-english/19/1626345/lithuania-bans-russian-belarusian-tv-channels-over-war-incitement>

7 <https://www.lrt.lt/en/news-in-english/19/1779836/lithuanian-watchdog-advises-against-rebroadcasting-russian-belarusian-tv-programmes>

8 <https://rsf.org/en/index>

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

### **Key recommendations**

- For the Parliament of the Republic of Lithuania to abstain from adopting the draft legislation that would legitimise pushbacks at state borders.
- For the Ministry of the Interior of the Republic of Lithuania to stop the policy of pushbacks against foreigners crossing from Belarus and uphold Lithuania's obligations under international and European law to allow people to request asylum, regardless of how the border was crossed.

### **Systemic human rights violations**

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

The predominant continuing violation of international and EU human rights obligations is

Lithuania's pushback policy implemented as a response to irregular migrants crossing the border from Belarus, which is seen as a hybrid attack consisting of instrumentalizing people. The turning-away strategy effectively expels irregular migrants and prevents them from filing for asylum at the border. It also forces them to return to Belarus, which cannot be considered a safe third country. The policy began in 2021 and continues to this day. The pushback policy also has grave consequences for the wellbeing of irregular migrants, since people have lost limbs to frostbite due to staying in harsh winter weather conditions in the forests between Lithuania and Belarus, unable to enter either country.<sup>9</sup> Thereby, the pushbacks force migrants to look for ever more secluded areas to cross and increases the danger of the journey.<sup>10</sup> There have been further suggestions of violation of treaties when seven migrants were deported the night of their denied asylum without due process of allowing them their right to appeal within a seven-day period while in the country.<sup>11</sup> Additionally, there have been concerns by MSF over inadequate legal representation provided to migrants seeking asylum, information availability on their legal rights and housing, and the conditions for migrants in detention.<sup>12</sup>

9 <https://www.lrt.lt/en/news-in-english/19/1865535/lrt-english-newsletter-migrant-pushbacks-migrant-death>

10 <https://www.lrt.lt/en/news-in-english/19/1781283/lithuania-s-pushback-policy-traumatizes-migrants-mentally-physically-msf>

11 <https://www.lrt.lt/en/news-in-english/19/1844366/rights-group-says-lithuanian-authorities-broke-law-with-night-time-deportation-of-asylum-seekers-to-nigeria>

12 <https://www.msf.org/serious-concerns-migrant-welfare-lithuania-and-latvia-remain-projects-close>

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

This pushback strategy has been implemented concurrently with several successive extensions of the declaration of state of emergency, which legitimises the pushback policy as a needed exception to the rule of law in the fight against what the government perceives as a hybrid attack from Belarus. Recently, Lithuania's cabinet has also proposed and approved a draft amendment that "formalises in law the policy of turning away irregular migrants at the border."<sup>13</sup> It would codify the pushback strategy as applicable and legal during states of emergency. Considering the use and prolongation of states of emergency, which have been consequently prolonged several times, it is believed this would further violate international obligations, effectively legalising collective expulsions that are against Lithuania's international obligations.<sup>14</sup>

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

It is recommended for human rights monitoring bodies to remain focused on the situation. Monitoring of individual and group cases of pushbacks will add transparency to the real effects on lives and any human rights violations.

It is also desired to further advocate for the Lithuanian government's abandonment of the pushback strategy as a policy for dealing with the hybrid war, and to consult and advocate for the government to seek solutions to the current situation that are aligned with human rights obligations.

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

The European Court of Justice has declared the practice of not allowing people to claim asylum as violating EU law. The decision renders both the detention of persons and the pushback strategy as being in breach of European law.<sup>15</sup> Progress has been made on the conditions of people allowed to move freely within the country, but the pushback strategy remains in practice.

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13 <https://www.lrt.lt/en/news-in-english/19/1864010/lithuanian-cabinet-endorses-controversial-migrant-push-back-legislation>

14 <https://www.lrt.lt/en/news-in-english/19/1517865/unhcr-lithuania-s-pushback-policy-illegal>

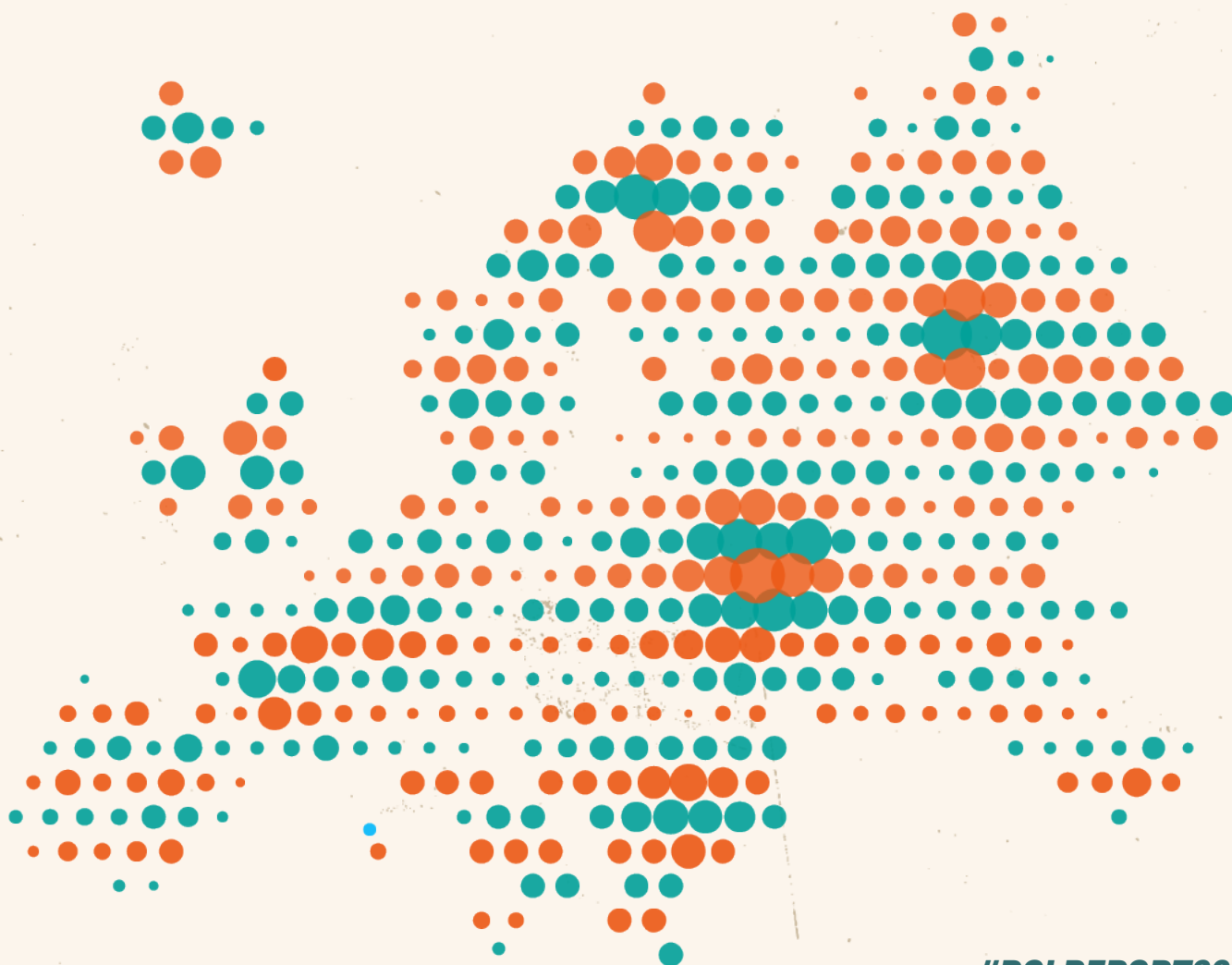
15 <https://ecre.org/eastern-borders-cjeu-finds-lithuanias-legislation-unlawful-amid-new-reports-of-abuses-polish-court-ruling-on-the-illegality-of-pushbacks-poland-replaces-a-no-access-zone-with-steel-wall/>

**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**NETHERLANDS**



**#ROLREPORT2023**





# NETHERLANDS

## About the authors

This report has been compiled by Liberties on the basis of the official submission jointly authored by the Netherlands Helsinki Committee (NHC), Free Press Unlimited (FPU) and Transparency International Nederland (TI-NL) to inform the 2023 public consultation on the rule of law in the EU launched by the European Commission – subject to the consent of the authors. While not altering its content, this report is based on an edited version of the original submission and is structured on the basis of a reporting template drawn up by Liberties. Progress ratings of the various areas covered is the sole responsibility of Liberties.



**The Netherlands Helsinki Committee (NHC)** is a non-governmental organisation that promotes human rights and strengthens the rule of law and democracy in all countries of Europe, including the Central Asian countries participating in the OSCE.



**Free Press Unlimited (FPU)** is committed to promoting and defending press freedom and access to reliable information, particularly in countries with limited (press) freedom. Together with over 40 local media partner organisations, Free Press Unlimited strives to give people the information needed to help them survive, develop themselves, and monitor their government.



**Transparency International Nederland (TINL)** strives for a world in which government services, the political world, business, civil society and citizens are free from corruption. The emphasis is on improving integrity, transparency and accountability in Dutch society.

## Key concerns

In the area of justice, steps have been taken to strengthen judicial integrity, particularly regarding possible conflicts of interests. The government reacted to protests from judges by substantially increasing the budget for the judiciary to improve the general efficiency and tackle the systemic underfunding of the justice system.

As regards corruption, the Netherlands received its lowest score ever on the 2022 Corruption Perceptions Index. This strongly correlates with weak rules and enforcement in the field of political integrity. The government proposed a cooling-off period for members of the government, but failed to make it mandatory and include adequate sanctions. To improve transparency, the government started publishing the agendas of public officials; however, a lobby register is still missing. The government continues to neglect whistleblower protection, remains opaque in its public procurement practices, and still shows weaknesses in its enforcement capacities.

The media environment continues to enjoy good levels of independence. The media landscape is still characterised by a high concentration of media ownership. Furthermore, national law does not contain specific regulations directed at SLAPPs nor does the Netherlands specifically monitor SLAPPs. On top of that, recent findings have shown that women journalists in particular face high levels of violence, mostly online. On the other hand, the government has announced extra measures to protect journalists and press freedom, such as better protection for journalists' addresses in the Dutch Chamber of Commerce. Parliament approved the allocation of funds for the establishment of an international independent investigative task force that can investigate cases of murdered journalists when impunity is a likely outcome.

Civil society still enjoys an open civic space. There are, however, concerning trends in relation to freedom of assembly, public participation, the safety of journalists, and the impact

of new (pending) safety and anti-terrorism laws.

### State of play

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

### Legend (versus 2022)

- ↓ Regression
- No progress
- ↑ Progress

## Justice system –

### Judicial independence

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

Judges are required to inform the president of the court of positions they hold outside their office. The president has a duty to check whether holding these positions is detrimental to their duties as judges, or to maintaining impartiality and independence or trust therein.

In response to GRECO reports, the Minister of Interior and the Minister of Justice and Security have initiated a bill to strengthen

judicial integrity, independence and impartiality, particularly regarding possible conflicts of interests. The internet consultation on the bill ended on 6 January 2022. One of the proposals aims to no longer allow judges to be members of the Senate or of the European Parliament. Judges are already prevented from being members of the lower house of Parliament.

The bill also aims to strengthen the rules regarding judges' financial interests in line with the rules for civil servants. A judge is not allowed to have financial or equity interests, or deal in securities, if trust in his or her impartiality or independence would not reasonably be ensured. The bill imposes a legal duty to report to the president in the case that such a situation occurs.

Finally, the bill makes it mandatory for every court to have an integrity policy for judges, taking into account guarantees of their independence. Based on an act to prevent money laundering and the financing of terrorism, the Minister of Finance has made rules for judges in apex courts and the Council for the Judiciary, their spouses and children and the partners of their children, to explain the origin of their assets. These rules do not apply to judges in district courts or courts of appeal.

### ***Remuneration/bonuses for judges and prosecutors***

The courts are financed based on a system that encourages them to work efficiently. Over the last ten years, however, for several reasons the government has economised on the budget for

the judiciary. As a result, there is very high pressure on judges to work as expediently as possible. It has repeatedly been established in research that judges, especially criminal and family judges, worked structural overtime. These judges claimed that it damaged the quality of their work. To improve this situation, the Council for the Judiciary asked representatives of judges to establish standards for the quality of judges' work. The standards helped to increase the budget for criminal cases and so lower the workload of criminal judges, but not for family cases. In 2022, the government acknowledged the judges' protests and the budget for the judiciary was substantially increased.

Another debate concerns the question whether, through exercising their financial powers, the Council for the Judiciary and the boards of courts might have excessive influence on how justice is administered. For example, financial incentives are used to ensure that cases are handled efficiently, making it less economical to handle cases with a three-judge panel instead of with a single judge. Re-assigning cases from a panel to a single judge may also be applied if a court has a backlog, as the corona crisis has shown.

## **Anti-corruption framework** 🟡

### **General**

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The OECD has published revised Recommendations on Transparency and Integrity in Lobbying of the OECD.<sup>1</sup> Transparency International has provided input on these recommendations. The recommendations provide a new definition of lobbying and a comprehensive set of recommendations that countries should adhere to when it comes to transparency and political integrity. It is noteworthy that many of these recommendations from previous report are not implemented by EU member states, including the Dutch government.<sup>2</sup> More information and a comprehensive analysis of laws regulating lobbying can be found in the OECD's Lobbying the 21st-century report.<sup>3</sup>

In the field of corruption, the commission recommended that the Netherlands complete the implementation of revolving door legislation. The minister of Interior affairs and Kingdom Relations has since provided a proposal (that is currently undergoing consultation). Only minor policy changes have taken effect: mainly, a prohibition for public servants to contact former ministers or state secretaries when they become lobbyists. This already existed, but has been expanded to include adjacent

duties in response to the revolving door case of Cora van Nieuwenhuizen (see response to questions below). The proposed revolving door legislation (Wet regels gewezen bewindspersonen), currently up for consultation, includes non-binding, cooling-off rules. The proposal prescribes that ministers and state secretaries (henceforth: public officials) request advice on the admissibility of a new function in the private sector. The advice is provided by the board on the legal status of public officials (Adviescollege rechtspositie politieke ambtsdragers). The commission bases their advice on a questionnaire to be filled by a public official in advance. If the public official accepts their new position, the advice is published on a website. The commission is unable to sanction public officials that do not adhere to the advice. The government presumes that naming and shaming will be sufficient sanctioning.

### **Framework to prevent corruption**

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#### **Integrity framework including incompatibility rules**

As mentioned above, the government provided a proposal for the cooling-off period (Wet regels gewezen bewindspersonen). We are concerned that the government does not follow international best-practice. The proposal should include a mandatory cooling-off period with adequate sanctions to deter the revolving door between the public and private

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1 <https://www.oecd.org/gov/ethics/lobbying/public-consultation-lobbying-influence.htm>

2 <https://www.oecd.org/gov/ethics/oecdprinciplesfortransparencyandintegrityinlobbying.htm>

3 <https://www.oecd.org/corruption-integrity/reports/lobbying-in-the-21st-century-c6d8eff8-en.html>

sector. This requires that there be mandatory rules and that the oversight commission has sufficient expertise. GRECO has stipulated some very clear requests, and we doubt that the current rules follow these requirements. For example, the case of Cora van Nieuwenhuizen<sup>4</sup> shows that existing norms are insufficient to deter unwanted integrity risks. We doubt that the proposed rules will change that. In their current format, the rules rely too heavily on individual responsibility, whereas mandatory rules would reduce ambiguity. In addition, the commission does not have the remit to conduct an independent review. Instead, it depends on the information provided by public officials. This one-sided information flow should be addressed, by giving the commission sufficient investigative capacities. We would argue that the current legislation does not follow best-practices and does not have the necessary preconditions to prevent this kind of behaviour in the future.

For the first time, the new code of conduct of Parliament was applied, following a breach of the code by one of the Members of Parliament. The rules (Gedragcode Leden van de Tweede Kamer der Staten Generaal) indicate that politicians should provide their ancillary positions and additional income. A Member of Parliament failed to provide this information. For this reason, he received, as the first MP ever, a sanction after a majority vote in the House of Representatives. The punishment

did not lead to a change in his behaviour. We are concerned about this development. We recommended that the government equip the independent oversight body (College Onderzoek Integriteit) with the ability to institute sanctions toward MPs that do not follow the rules, and increase the penalty for neglecting the political integrity rules.

There are still no provisions on trading in influence in the Netherlands' legal framework. The legal framework does not make any specific mention that bans illicit enrichment.

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

The government started publishing the agendas of public officials. This is an improvement regarding transparency. However, research by the NGO Open State Foundation shows that these public officials do not always disclose their meetings and that compliance with current rules is generally low. This means that the public still receives very little information about third party contacts with public officials.<sup>5</sup> When we consider lobbying transparency more broadly, we find that the Dutch government is still very opaque. This is in stark contrast to some neighboring countries and institutions such as Germany, France or the EU that have since adopted measures, such as a lobbying register, to improve transparency across the board.

4 <https://www.volkskrant.nl/nieuws-achtergrond/vraagtekens-bij-vertrek-minister-van-nieuwenhuizen-naar-energiebranche~b7359c68/>

5 <https://openstate.eu/nl/2022/10/agendas-ministers-iets-meer-openbaar-maar-nogsteeds-onvoldoende/>

There have been several proposals put forward by parliamentarians to institute more lobbying transparency, including a resolution for a lobby register and memorandum written by Pieter Omtzigt and Laurens Dassen that puts forward several proposals for creating a lobbying register and compliance with GRECO recommendations.<sup>6</sup> The government, to this day, does not comply with any of the GRECO recommendations put forward in the Fifth Round of Evaluations.

In the Law for Political Parties (*Wet op politieke partijen or Wpp*), which is currently under consultation, financing of or financial support for political parties from foreigners is prohibited. The aim is to protect the functioning and organisation of political parties against foreign interference. Dutch citizens living abroad will be excluded from these measures. Donations above 250 EUR require a name, address and a date to be provided. Moreover, the proposed amendment to the Political Finance Act contains a proposal to increase the transparency on gifts from legal entities. Political parties will be obliged to report the names of the natural persons who are the ‘ultimate beneficial owners’ of the legal entity. We consider many of these measures to be good progress in the matter of political financing. A drawback of the current law is that the UBO registers has been closed following a ruling by the ECJ. This will likely mean in practice that the UBO cannot be traced. It remains to be seen in

practice to what extent donations from legal entities will be prohibited in that case.<sup>7</sup>

### ***Rules on preventing conflict of interests in the public sector***

See the measures on the cooling-off period in the section above. In addition, the government published a proposal to improve the integrity of public officials. In the explanatory memorandum, the government explicitly mentions that there have been no new rules added. Rather, the new policy document is a bundling of existing rules. In addition, a full review of the rules will be conducted in spring of 2023.

The government should take further steps to make the current process more inclusive and include third party stakeholders. Creating a risk-based integrity strategy was part of the recommendations by GRECO in their fifth evaluation, and the Netherlands is still not GRECO compliant in this regard.

There have been no new rules introduced in Parliament nor the Senate to prevent conflicts of interest.

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

In the Netherlands, the Whistleblower Authority (Huis voor Klokkeluiders) is responsible for the practical implementation

6 [https://www.tweedekamer.nl/debat\\_en\\_vergadering/commissievergaderingen/details?id=2022A06553](https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2022A06553)

7 See law under consultation at: <https://www.internetconsultatie.nl/wpp/b1>

of the law protecting whistleblowers, currently the Whistleblowers' Authority Act. This law was adopted in 2016. New legislation is currently under consideration in the Senate following the transposition of the EU Whistleblower Directive that standardizes whistleblower protections across EU member states.

To this day, the law does not sufficiently protect whistleblowers. The Parliament requested two researchers to investigate the extent to which the Dutch implementation of the Directive followed the minimum requirements of the EU Directive. The researchers concluded that the law follows the regulation only in the most formal sense, but not in spirit. They conclude that the law is not sufficient to protect whistleblowers in the Netherlands.

We would like to note several shortcomings in the new law, especially where the law fails to meet the requirements of the EU Whistleblower Directive. First, the law does not protect all whistleblowers. The law only protects whistleblowers who report wrongdoing in the public interest (*maatschappelijke misstand*). This definition does not include cases of sexual misconduct or, in some cases, corruption. And second, the law does not provide for financial, legal and psychological aid to whistleblowers, something that the Whistleblower Directive requires from EU member states.

### ***Sectors with high-risks of corruption and relevant measures taken/envisaged for preventing corruption and conflict of interest***

The Netherlands does not publish procurement sufficiently. An analysis by Follow the Money shows that more than 60% of procurement contracts are not published online.<sup>8</sup> This makes the Netherlands the worst performing country in Europe. The Netherlands only publishes contracts above the European threshold of 140,000 EUR, which leads to an incredibly low publication rate and means less than 90% of the total amount of money spent on procurement is published online. Whereas other European countries have made efforts to improve procurement systems and the subsequent quality of the published data, the Netherlands has made no such efforts. This leads to inadequate reporting and substantial gaps in the visibility of public procurement contracts. This is especially striking given that, as we mentioned in our previous consultation, a contract had been awarded to a company providing faulty PPE masks. The Dutch government should improve transparency in public procurement contracts, as many of its European peers have done.

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8 <https://www.ftm.nl/artikelen/nederland-meest-intransparante-eu-land-bij-openbare-aanbestedingen>

## ***Investigation and prosecution of corruption***

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### ***Criminalisation of corruption and related offences***

Transparency International finds in their 2022 annual report “Exporting Corruption” that the Netherlands still falls in the category of limited enforcement.<sup>9</sup> In the period 2018-2021, the Netherlands opened 11 corruption investigations, commenced two cases and concluded three cases with sanctions. The main weaknesses are the tendency to enter into settlements that are opaque; a failure to increase prosecution of individuals with responsibility for foreign bribery; the decentralised organisation of enforcement and the inadequacy of complaints mechanisms and whistleblower protection. There are no published, updated statistics on foreign bribery enforcement. An annual enforcement report contains overall developments, statistics and data but does not have separate foreign bribery enforcement data.

### ***Other***

The Dutch Public Prosecution Service (OM) launched a criminal investigation into Rabobank, which is suspected of non-compliance with the Money Laundering and Terrorism Prevention Act. The investigation focuses on Rabobank’s role as gatekeeper for the purpose of combating money laundering and terrorist financing. Dutch banks have been

financed on multiple occasions for not adhering to money laundering legislation. This legislation is based on European anti-money laundering directives.

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

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

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

The Dutch Media Authority is led by a board of commissioners, all of whom are appointed by the Minister of Education and Media. However, the grounds on which the commissioners are appointed and/or dismissed are unclear.

The Dutch Foundation for Public Broadcasting has been criticised for not functioning properly within Dutch society. One of the main issues is the easy access to becoming a broadcaster by applying to the Foundation with 50,000 signatures and representing a “social movement”. Due to the increased number of broadcasters (this year Ongehoord Nederland and Omroep Zwart were added) the organisation has

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<sup>9</sup> [https://images.transparencycdn.org/images/2022\\_Report-Full\\_Exporting-Corruption\\_EN.pdf](https://images.transparencycdn.org/images/2022_Report-Full_Exporting-Corruption_EN.pdf)



become more complex. Simultaneously, the current regulations provide little to no power to hold dysfunctional broadcasters accountable.

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

In 2022, the Dutch Foundation for Public Broadcasting sanctioned one of its broadcasters, ‘Ongehoord Nederland’ (ON), with multiple fines. ON is a broadcaster branding itself as a proponent of “the unheard voices” of the Netherlands, often inserting extreme-right political viewpoints. In a report, journalism ombudsman Margot Smit concluded that ON has broadcast discriminatory content as well as the spread of misinformation. The NPO believes that the broadcaster has “failed to comply with the legal obligation to cooperate with the performance of the public media assignment” since it entered the media landscape. The broadcaster was sanctioned for not acting in accordance with public values and not meeting “high journalistic quality standards” according to the NPO. In December 2022, the Dutch Foundation for Public Broadcasting sanctioned ‘Ongehoord Nederland’ with another fine of 56,000 EUR.

In 2022, the Netherlands served as the co-chair along with Canada in the Media Freedom Coalition (MFC). The Netherlands is also part of the High Level Panel of Legal Experts on Media Freedom within the MFC collaboration. The MFC is a partnership between 51 countries which work together to

fight for media freedom and the protection of journalists within their borders and abroad. The High Level Panel of Legal Experts on Media Freedom is an independent advisory board, which provides legal advice to the MFC members to stimulate or preserve media freedom through legislation or organisations. Dutch Minister of Foreign Affairs Wopke Hoekstra welcomed the co-chair position of the Netherlands in a letter where he reiterated the signed “Global Pledge on Media Freedom” by the 22 EU member states, a written commitment to improve media freedom at home and cooperate internationally.<sup>10</sup>

In 2022, the Dutch Media Authority instigated three investigations regarding violations of journalistic codes, conflicts of interests, as well as top incomes of employees within the Dutch Public Broadcaster. They want to scrutinize the independence of the Dutch Public Broadcaster due to suspicions of the above listed issues. Results of the investigations have not yet been published.

### ***Transparency of media ownership and safeguards against government or political interference***

#### ***Safeguards against state or political interference***

The safeguards against state or political interference have not changed in 2022. The Dutch

10 <https://www.rijksoverheid.nl/documenten/kamerstukken/2022/04/05/kamerbrief-inzake-mediapluriformiteit-in-de-eu>

Foundation for Public Broadcasting is still not mandated to concern itself with the content of public broadcasters. In the past, we have noted that there is a lack of transparency regarding the decisions on, for example, how money is spent and which programmes will be aired. No clear changes have been made regarding this issue.

In September 2022, the European Commission published the legislative proposal European Media Freedom Act (EMFA) which is an initiative aiming to settle the growing concerns about malign foreign influence, hostile state acts towards journalists and the use of state media for propaganda. Even though this is a ground-breaking development within the EU, there is clear room for improvement within the EMFA. One main concern is enforcing transparency within the media in relation to government interference. Moreover, in the EMFA, the transparency is directed towards state advertising and not overall state financing; however, these rules only apply to local governments of cities with more than one million citizens. In the Netherlands, there are no cities with more than one million inhabitants, which would insinuate that no city qualifies for the transparency rule.

### ***Rules governing transparency of media ownership and public availability of media ownership information, and their application***

The Dutch media landscape is still characterised by a high concentration of media ownership. However, the announcement of the merger between the RTL Group and

Talpa Network, which was supposed to take place in 2022, has not yet been confirmed. The merger would be another setback for Dutch plurality in the audio-visual media industry, as there would be a total of two major commercial broadcasters monopolizing the field. The merger was under review during the majority of 2022 by the Dutch Consumers & Market Authority and came close to being sealed in October, but in December the merger still had not been given a green light. There are doubts about the merger due to differences within the two companies (organisationally as well as culturally) and about the implication of an even higher concentration of media ownership. Another related concern is that the owner of Talpa Network, John de Mol, is also part-owner of commercial channel SBS6. The merger between Talpa and RTL would thus mean a large concentration of commercial broadcasters as well as channels.

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

#### ***Rules and practices guaranteeing journalists' independence and safety***

In June 2022, the Dutch government announced that it wants to take extra measures to protect journalists and press freedom after reviewing the publication of the World Press Freedom Index and the mission report from Media Freedom Rapid Response (MFRR). The Ministry of Culture and Media as well as the Ministry of Justice and Security announced it would continue financing PersVeilig ('PressSafety') until 2024. PersVeilig

is a collaboration of the NVJ trade union, the Dutch Association of Chief Editors, the police and the Public Prosecution Service. It is an organisation where journalists can report threats and receive proper safety training. Additionally, the government wants to ensure a properly functioning system to counter reports of online harassment of journalists. State Secretaries Uslu and Van Huffelen will talk to the Dutch Association of Journalists (NVJ), the Association of Editors-in-Chief, the police, the Public Prosecution Service and social media platforms about what steps are needed. Another important government initiative to promote press freedom and safety of journalists is the proposed law by Minister Yesilgöz-Zegerius to combat ‘doxing’, the sharing of someone’s personal data with the aim of intimidating that person.

In October 2022, an incident took place that challenged the independence and safety of journalists in the Netherlands. Member of Parliament Gideon van Meijeren secretly recorded his ambush of a political journalist from SBS6 and posted this on YouTube. He walked up to her office, unannounced and with a camera, and questioned her about a publication. The Association of Journalists stated the action was alarming and intimidating and called it a threat to the work of journalists, as van Meijeren clearly tried to intimidate the journalist.

In November 2022, a motion was approved by the Parliament to install a task force consisting of experts that will solve cold cases of murdered journalists. This was an important step taken towards installing practices to further

ensure the protection of journalists within the Netherlands and hopefully abroad.

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

Media Freedom Rapid Response (MFRR) launched a mission in 2022, which gave insight to the violence against women journalists in the Netherlands and the lack of monitoring thereof by the Dutch government. As a result, PersVeilig conducted research that showed 8 out of 10 women journalists in the Netherlands experience violence, most of which is online. Almost a third of the women journalists claimed to experience such violence at least once a month. Most of the violence happens online, such as on Twitter. Many of the respondents also stated that they feel as though their employers do not take enough action to halt or prevent these disturbances. It is still unclear which concrete actions will be taken to help the situation.

There is still an issue of doxing regarding publicly available information on freelance journalists within the Netherlands. The Kamer van Koophandel (Chamber of Commerce) requires freelance journalists to list a business address. This address is often their home address, which can lead to direct attacks on freelance journalists. Journalist Marcel van Roosmalen gave a critical statement during a radio interview about Member of Parliament Gideon van Meijeren, which led to threats received at his home address and the publication of data about his children’s locations. The Chamber of Commerce already adjusted its policies in

January 2022 when it removed home addresses in its public database. However, business addresses are still available, which as mentioned, are often freelancers' home addresses. New laws are planned to be adopted to solve this issue.

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

In April 2022, the European Commission announced its intention for an Anti-SLAPPs Directive and an accompanying recommendation within the EU. One of the recommendations is that states need to monitor SLAPPs. There is still no official data on SLAPPs within the Netherlands collected by the Dutch government. However, there have been cases that would be classified as SLAPPs that have taken place in the Netherlands in the past, as shown by independent researchers (CASE coalition). Furthermore, Dutch law does not contain specific regulations directed at SLAPPs. In fact, the government takes the position that Dutch procedural law has sufficient safeguards to protect against SLAPPs. It points to the doctrine of abuse of procedural law and abuse of law (see Article 3:13 BW). The government argues that the proposed regulations against SLAPPs are too vague and may lead to undesirable procedural complications. However, civil society organisations are pushing back on this stance, as they feel the Dutch position is too short-sighted.

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

In October 2021, the new Government Information Act (Wet open overheid) was adopted and replaced the current Government Information Act (Wet openbaarheid van bestuur). The new Government Information Act should create more transparency and make government information easier to find, share and archive. The Act went into effect in 2022. The Act introduces an Advisory Council which consists of five people that oversee the implementation of the Government Information Act. Since the new Act went into effect, the Advice Council has been assigned a mediating role when it comes to handling complaints regarding information requests. Research has shown that the processing of complaints takes approximately 161 days, which is three times longer than the law requires. Interestingly, the website Platform Open Overheidsinformatie (known as Plooi), the platform that hosts documents required to be published and shared with open access, was put to a halt at the end of 2022. The website was undergoing major changes for the new Act (the government invested approximately 28 million euros for its development). However, the Advice Council stated it was best to continue with the development of Plooi because of IT problems. A brand new website is expected, but it is not clear when this will launch. Until then, information can be found on the Rijksoverheid (central government) website.

## Enabling framework for civil society

### Regulatory framework

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Civic space in the Netherlands can be identified as open. There are, however, some concerning trends in relation to freedom of assembly, public participation, the safety of journalists, and the impact of new (pending) safety and anti-terrorism laws. The Netherlands has no comprehensive strategy to protect civic space. As recommended in the OECD report on civic space, formulating such a strategy could address these challenges and lead to proactive action to protect and expand civic space in the Netherlands.

- WTMO update

No progress has been made on the Civil Society Organisations Transparency Act (Wet transparantie maatschappelijke organisaties) after the Memorandum of Amendment published in 2021. Civil society organisations remain critical about this lack of progress.

- Update on proposed bill to criminalize persons travelling to areas controlled by terrorists organisations

The proposed bill to criminalize persons travelling to areas controlled by terrorists organisations (Wet strafbaarstelling uitreis naar terroristisch gebied) that, despite criticism

from CSOs and the Council of State, passed the House of Representatives in 2019 is still under the consideration of the Senate. The bill will be taken under further consideration as soon as an additional bill that arranges for the exemption of aid organisations and journalists, for which a public consultation was held in early 2022, passes. Although this exemption should take away the biggest concern for the freedom of movement of CSOs, human rights organisations remain critical about the added value of the bill, which is not proportionate to the restrictions it proposes.<sup>11</sup>

- Update on proposed bill for the Administrative prohibition of subversive organisations

The proposed bill for the Administrative prohibition of subversive organisations (Initiatiefvoorstel Wet bestuurlijk verbod ondermijnende organisaties) passed in the House of Representatives and is still before the Senate. This bill aims to grant the power to the Minister of Legal Protection to prohibit an organisation insofar as this is necessary in the interest of public order if this organisation creates, promotes or maintains a culture of lawlessness. The Minister is also authorised, in the case of a legal entity, to dissolve it. The bill is problematic because it contravenes the Constitution and does not provide sufficient safeguards against potentially politically motivated decisions.

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11 [https://www.eerstekamer.nl/wetsvoorstel/35125\\_strafbaarstelling\\_verblijf](https://www.eerstekamer.nl/wetsvoorstel/35125_strafbaarstelling_verblijf)

### ***Financing framework, including tax regulations***

There are different channels for CSOs and HRDs to access financial support. At government level, different funding programmes are offered by the ministries, where the Ministry of Foreign Affairs also allocates specific funding for human rights protection and protection of civic space in third countries. These funds are usually disbursed through open calls for application, with clear evaluation criteria.

When it comes to funding for activities in relation to advocacy for human rights and rule of law within the Netherlands, it is much more challenging to find resources. The Dutch government has no dedicated fund in this regard, so CSOs are largely dependent on funding from the private sector; e.g. philanthropic organisations, crowdfunding etc. There are some funding programmes on the government side when it comes to education, culture or service provision, but for advocacy work in relation to human rights or rule of law there is no dedicated fund.

Since last year, the CERV programme offers opportunities for funding. However, as there is only a small pool of funders that fund activities that fall within the scope of CERV in the Netherlands, with high competition and no government funding, securing the required co-funding is a big challenge for CSOs. This restricts the access of many CSOs to these funds, especially for those with no core funding. CSOs all over Europe are struggling with this.

Lastly, due to trends of a declining percentage of overhead that is allowed by donors, including the Dutch Ministry of Foreign Affairs, many CSOs struggle to cover their general operations beyond direct activity costs. This puts very high pressure on CSOs and their employees, increasingly leading to mental health issues. The same challenge exists with EU funding. As is the case in the whole of Europe, funders that provide flexible and longer-term funding are scarce and competition for these funds is very high. This leads to what has been described as a non-profit starvation cycle.

### ***Access and participation in decision-making processes, including rules and practices on civil dialogue, rules on access to and participation in consultations and decision-making***

Formally, there are multiple channels through which CSOs and HRDs can engage in the decision-making processes. This can be through public consultations about new laws, through direct contact with decision makers, or through different CSO networks and platforms that have regular talks with different branches of the government on their topics. For example, the Dutch Human Rights Network (Breed Mensenrechten Overleg) is in continuous dialogue with the Ministry of Foreign Affairs on human rights and civic space related topics.

However, there is a continuous trend of decreasing trust in politicians in the Netherlands, which is also reflected in the fact that many people do not feel represented. A recent study

showed that almost half of the Dutch citizens do not feel they have any influence over decision-making, and feel that decision makers do not care much about them. A large majority indicates that it would be good if there would be more opportunities for citizens to engage in decision-making.<sup>12</sup> This shows that there is room for improvement to the current channels for participation, where ‘nothing about us without us’ should be the leading principle. Consultations are too often seen as a ‘tick the box’ exercise, with little follow up on what has been done with this input. This is also often the experience of CSOs.

In a conference on ‘Democracy Under Threat’ in November 2022, organised by a coalition of CSOs from the Netherlands, a manifesto was shared with the Ministry of Interior and the Ministry of Foreign Affairs listing recommendations for actions in relation to the protection of democracy worldwide and in the Netherlands. This included multiple recommendations on improving the participation of citizens and civil society.<sup>13</sup>

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

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Worrisome trends have been signalled in relation to the right to protest. Last year a group of protesters from the action group ‘Kick Out Zwarte Piet’ were violently attacked while the

police failed to intervene and protect the protesters, which led to them being forced to stop the protests.<sup>14</sup>

Too often, unnecessary restrictions are proposed to the regulations and rules around protests, or protests are banned based on arguments related to maintaining public order and safety. Many cases of arrests of peaceful protests have been reported, especially in relation to climate protests. Amnesty Netherlands, who is monitoring the right to protest in the Netherlands, published a critical report on the right to protest.<sup>15</sup>

## ***Fostering a rule of law culture***

Debates in the national Parliament on the rule of law take place on a regular basis, mainly as part of the activities of the EU Committee of the House of Representatives. These activities (such as a debate with the Minister of Foreign Affairs, roundtable conversation between committee members or preparation for the GAC) are generally open to the public.

For example, the meeting between Commissioner Reynders and the Parliament on the Rule of Law Report 2021, covering

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12 <https://www.scp.nl/publicaties/publicaties/2022/12/29/continu-onderzoek-burgerperspectieven---bericht-2-2022>

13 <https://democracyunderthreat.com/manifest/democracy-under-threat-manifesto/>

14 <https://www.volkskrant.nl/nieuws-achtergrond/wat-er-gebeurde-in-staphorst-het-is-hier-niet-veilig-zegt-de-politie-tegen-kick-out-zwarte-piet-en-rijdt-weg~bcd7c60e/?referrer=https%3A%2F%2Fwww.google.com%2F>

15 <https://www.amnesty.nl/wat-we-doen/demonstratierecht-in-nederland/rapport>

the chapter on the Netherlands in particular, was scheduled for 9 November 2022. Those interested were able to join the committee members present in Parliament for the entire conversation, while Commissioner Reynders called in via an online connection. A year prior, the meeting was fully online due to Covid-19 restrictions and the general public was at the time only allowed to partake in the first half of the meeting, after which the Commissioner and committee members continued the conversation behind ‘closed doors’.

A debate on ‘rule of law developments in the European Union’ – as part of the activities of the EU Committee - was initially scheduled for 24 November 2022, but postponed due to a simultaneous debate taking place on the budget of the Ministry of Foreign Affairs. This debate instead took place on 1 February 2023, during which the Minister of Foreign Affairs also discussed matters related to the GAC meeting of 6 February 2023. While this deferral was announced very last minute, the updates from the commission about the rescheduling, and the proposal by the Ministry of Foreign Affairs to merge the debate with the preparations for the GAC, are available to the public.

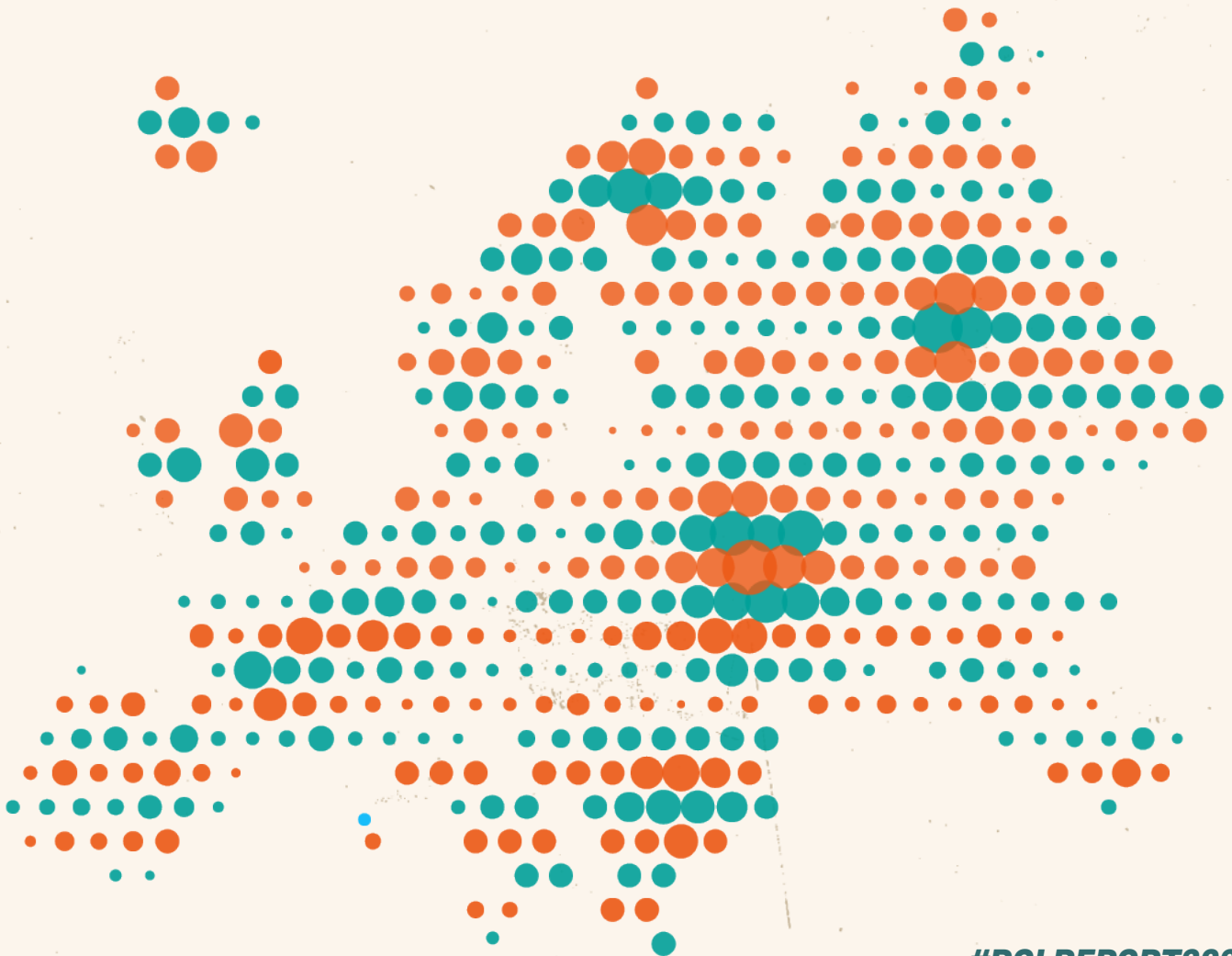


**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**POLAND**



**#ROLREPORT2023**

# POLAND

## About the authors



**The Helsinki Foundation for Human Rights (HFHR)** is a non-governmental organisation established in 1989 and based in Warsaw, Poland. The HFHR is one of the largest and most experienced non-governmental organisations operating in the field of human rights in Eastern and Central Europe. Since 2007, the HFHR has had a consultative status with the United Nations Economic and Social Council (ECOSOC). The HFHR's objective is the protection and promotion of human rights.

## Key concerns

On the one hand, Poland implemented some of the EU institutions' recommendations regarding the disciplinary system for judges, with further-reaching legislation underway. On the other hand, the wrongfully composed judiciary council continued to nominate judges, whereas suspension or transfer of judges were used as repressive measures.

Regarding the justice system, Poland implemented only one commitment made under the Recovery and Resilience Plan (RRP), namely that judges cannot be held liable for

submitting a request for a preliminary ruling. The Disciplinary Chamber - much criticised for its partiality - continued to adjudicate all disciplinary cases against judges, despite the 2021 CJEU interim measure. The same person continues to occupy the functions of the Minister of Justice and the Prosecutor General.

Concerning media freedom and pluralism, the composition and functioning of the media regulatory body raises concerns as to its independence from the government. Poland continues to lack provisions regulating fair allocation of public advertising. The number of SLAPPs is rising, whereas cases of use of excessive force against journalists are not investigated effectively. New legislation is underway that poses a threat to the protection of journalistic sources.

### State of play

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

### Legend (versus 2022)

- ⬇ Regression
- ⊖ No progress
- ⬆ Progress

## Justice system –

### Key recommendations

- The adoption of legislation fully implementing the “milestones” determined in the Recovery and Resilience Plan, as well as the CJEU’s judgement of 15 July 2021 (C-791/19), as regards the disciplinary regime for judges – in particular, by safeguarding that disciplinary cases are heard by an independent and impartial court established by law, exempting the content of judicial decisions from disciplinary liability and providing judges affected by the Disciplinary Chamber’s decisions with the possibility of having their cases reviewed by an independent court.
- The immediate cessation of the practice of using disciplinary proceedings or proceedings for the waiver of immunity, as well as suspensions or unjustified transfers of judges as repressive measures.
- The restoration of the National Council of the Judiciary in a form compatible with the Constitution, EU law and the ECHR – in particular, by guaranteeing that its judge-members are appointed by other judges, not politicians, so that in every procedure for judicial nominations that includes the participation of the NCJ, independence is safeguarded.

## Judicial independence

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

#### *Appointment of judges*

On 12 May 2022, the Sejm - Poland’s lower house - elected 15 judicial members of the National Council of Judiciary. From 12 May 2022 to 8 January 2023, the new National Council of Judiciary has appointed 175 judicial assessors and recommended the appointment of 274 judges. Overall, the National Council of Judiciary (the so-called new NCJ), the composition of which was constituted mostly by Parliament, appointed about 2,500 judges.

#### **Appointment of court presidents**

On 10 March 2022, the Constitutional Tribunal issued a judgment concerning the constitutionality of Art. 6, which guarantees everyone the right to a fair and public hearing, of the European Convention of Human Rights. The case was initiated by the Public Prosecutor General directly after the European Court of Human Rights’ (ECtHR) ruling in the cases Broda and Bojara v. Poland (applications nos. 26691/18 and 27367/18).

The Constitutional Tribunal found the aforementioned provision of ECtHR in violation of Arts. 8, 89, and 176 of the Polish Constitution. The Tribunal recognised Art. 6 as unconstitutional to the extent that the ECtHR judgment recognises the concept of “civil rights and obligations” to include the subjective right of a judge to occupy an administrative function in

the structure of the common judiciary in the Polish legal system. In other words, the K 7/21 judgment has been used to assess the constitutionality of the ECtHR judgment in the cases Broda and Bojara v. Poland.

In the dialogue with the Council of Europe Committee of Ministers, public authorities indicated that no specific general measure is needed to implement the holdings of the Broda and Bojara cases, as the competence of the Minister of Justice to dismiss presidents of courts was temporary. Nevertheless, the Minister of Justice still enjoys significant discretion when deciding on managerial positions within the structure of common courts, while presidents of the courts who have been dismissed from their positions have no effective right to challenge the Minister's decision before a court.

#### *Appointment of prosecutors*

There are different, detailed prosecutorial appointment procedures for first-time appointments and promotions. In the former situation, candidates are usually selected through a competitive process. However, in particularly justified cases, the Prosecutor General may waive this requirement and simply appoint a candidate named at the request of the National Prosecutor. According to an HFHR report<sup>1</sup> the Prosecutor General has since 2016 provided notice of a vacancy or newly created position to be filled at district prosecutors' offices on more

than 650 occasions. The publicly available data does not indicate the number and locations of prosecutors' offices where the vacancies or new posts were filled without a competitive process. However, a review of the notices posted by the Prosecutor General shows that such competitions have not been organised at certain units of the prosecution service for the last six years. Two prosecutorial offices in central districts of Warsaw constitute examples of this situation. The vacancies in those offices have been filled at least several times in the last six years without any competitive process having been announced.

The non-compulsory competitive procedure notably applies only to first-time appointments for prosecutorial posts in district prosecutors' offices. Promotions to higher-level prosecutorial positions are wholly discretionary and guided by no criteria whatsoever. The appropriate professional experience of a candidate is generally a sufficient eligibility criterion. However, the law allows for waiving even this requirement "in particularly justified cases". This means that the promotion of prosecutors to higher-level units of the prosecution service can only take place through a discretionary procedure that sets no formal criteria and involves only the Prosecutor General and his senior deputy. As such, the Prosecutor General has unrestricted freedom to develop the cadres of the prosecution service, which includes the authority to take away promotion

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1 Accessible here: <https://hfhr.pl/en/news/a-state-of-accusation-polish-prosecution-service-2016-2022--a-new-report-of-the-helsinki>

opportunities from any prosecutors who do not prove loyal to the head of the prosecution service.

In 2022, the media published information concerning the appointment of two prosecutors in the Świdnica prosecution service units. According to the coverage, both candidates for the prosecutorial position had been unofficially discussed in e-mail communications between one of the Members of Parliament (MPs) of the ruling party and a local politician from the Lower Silesia region. Shortly thereafter, both candidates were appointed to the prosecutorial position in a non-competitive way.

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

Since 2021, suspension or transfer of judges to other court departments continues to be one of the forms of repression levied against Polish judges.

A judge's suspension may be ordered by the Disciplinary Court as part of disciplinary proceedings. Additionally, the Minister of Justice or the president of the court may suspend a judge for one month in the event a judge has committed a crime.

Until mid-2022, the former Disciplinary Chamber ordered several judicial suspensions. Some of these decisions were made in highly politicised procedures (e.g. the cases of judges Paweł Juszczyszyn and Igor Tuleya). Furthermore, since 2021 the Minister of Justice and some presidents of the courts have

cited contents of judicial decisions as reasons for possible suspensions of judges. The judicial decisions constituting grounds for suspension involved the status of judges appointed by the National Council of Judiciary in its current composition (e.g. the cases of judges Piotr Gąciarek, Maciej Ferek, Maciej Rutkiewicz, Adam Synakiewicz, Joanna Hetnarowicz-Sikora, Agnieszka Niklas-Bibik and Marzanna Piekarska-Drażek).

The former Disciplinary Chamber was dissolved in 2022, with its jurisdiction being transferred to the new Professional Accountability Chamber of the Supreme Court (PAC). According to the PAC president, cases involving judicial suspensions received priority in PAC proceedings. For instance, the Chamber lifted the suspensions of judges Igor Tuleya, Maciej Dutkiewicz and Krzysztof Chmielewski. In December 2022, the Voivod Administrative Court in Gdańsk ruled in the case concerning the suspension of Judge Agnieszka Niklas-Bibik, finding her suspension in violation of the law.

Other forms of repression concerning judges still persisted in 2022. These included transfer of judges to other court departments. For example, in 2022 the Disciplinary Chamber lifted the suspension of Judge Paweł Juszczyszyn. Judge Juszczyszyn returned to work, however the president of the court ordered his transfer to another court department. In 2022, Piotr Schab, president of the Appellate Court in Warsaw, decided to transfer three judges (Ewa Gregajtys, Ewa Leszczyńska-Furtak and Marzanna Piekarska-Drażek) to other court departments. The judges have adjudicated for

many years in the criminal department and, upon the decision of the court's president, were transferred to the department of labour law and social security. The ECtHR issued a decision on interim measures suspending the transfer in all three cases. Furthermore, in December 2022, Judge Dorota Lutostańska of the Regional Court in Olsztyn was transferred from the criminal department of the second instance to the criminal department of the first instance.

None of the above-mentioned transfers involved consent of the relevant judges.

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

#### *The promotion of judges*

On 21 December 2022, the President of Poland promoted 11 judges to higher judicial positions. These included the promotion of the head of the National School of Judiciary and Prosecutorial Service (a former director in the Ministry of Justice and partner of the judge who heads the National Council of Judiciary) from the Kraków Regional Court to the Supreme Court. Moreover, the President decided to promote two members of the National Council of Judiciary. Both of them have been appointed as new judges of appellate courts, despite the fact that their experience concerned only adjudicating cases in district courts.

According to the 2022 HFHR report “The costs of the reform: Functioning of the judiciary system in years 2015–2022”,<sup>2</sup> members of the National Council of Judiciary (NCJ) have relatively often sought promotion to a higher court. In the course of the previous term of office, the NCJ recommended seven of its 15 judicial members for higher judicial positions. Secondly, persons closely linked to NCJ members – spouses, partners and siblings – also sought the Council's recommendation. According to media coverage, in 2018–2022 the NCJ appointed more family members or other associates of its judicial members to judgeships than it had during the past 27 years of the Council's functioning.

#### *Judicial review of NCJ decisions*

Applicants taking part in the competition for the judicial posts before the NCJ have the right to challenge the legality of the NCJ's decision at the Supreme Court. However, this does not apply to candidates seeking a judicial position on the Supreme Court.

However, it is the Chamber of Public Affairs and Extraordinary Appeal that reviews appeals from NCJ decisions. In 2021, in the case *Dolińska-Ficek and Ozimek v. Poland* (application no. 39650/18), the ECtHR once again indicated that said Chamber does not meet the criteria of an independent and impartial court.

This judgment has not been implemented either in a general or individual way. In 2022,

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<sup>2</sup> <https://hfhr.pl/upload/2022/12/cost-of-a-reform-report.pdf>

the Ministry of Foreign Affairs (MFA) refused to pay compensation to both applicants in that case. In the reasoning for its decision, the MFA cited the Constitutional Tribunal judgment of 10 March 2022 (case no. K 7/21), which found Art. 6 of the ECHR to be in partial violation of the Constitution of Poland.

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

In May 2022, the Supreme Administrative Court ruled that<sup>3</sup> the source code of the Random Case Allocation System, or RCAS (*System Losowego Przydziału Spraw*), constitutes public information and, therefore, should be disclosed by the Minister of Justice.

RCAS is a network application based on a number generator used to designate members of adjudicating benches in common courts (in criminal and civil cases). It was introduced in 2017 to eliminate the possibility that a particular judge be allocated to a case arbitrarily. It was also supposed to guarantee an equal distribution of workload among judges.

Reports from NGOs<sup>4</sup> and the Supreme Audit Chamber<sup>5</sup> cite numerous irregularities in RCAS functioning (e.g. lack of transparency, risk of manipulation, and unequal workload distribution).

The judgment stemmed from actions taken by the Citizens Network Watchdog Poland (*Sieć Obywatelska Watchdog Polska*). In 2017, the Network successfully petitioned the Ministry of Justice via a public information request for the source code's disclosure. The NGO complained about the Minister of Justice's failure to act before the Provincial Administrative Court in Warsaw. However, the court agreed with the Minister's position (stating that the code constitutes information of a technical character and, as such, does not fall under the scope of the Freedom of Information Act) and dismissed the motion.<sup>6</sup> The Network appealed against this judgment to the Supreme Administrative Court.

In its judgment of May 2022, the Supreme Administrative Court ruled that RCAS was not merely ancillary to the functioning of courts (like, e.g., office programs).<sup>7</sup> In the

3 Poland, Judgement of the Supreme Administrative Court of 26 May 2022, case no. III OSK 1189/21: [https://siecobywatelska.pl/wp-content/uploads/2022/05/orzeczenie\\_kod\\_zrodlowy.pdf](https://siecobywatelska.pl/wp-content/uploads/2022/05/orzeczenie_kod_zrodlowy.pdf)

4 Fundacja Moje Państwo, Algorytm Losowego Systemu Przydziału Spraw: <https://mojepanstwo.pl/postepowania/7>

5 Supreme Audit Chamber, Post-Inspection no. P/19/038, 23 February 2019: <https://siecobywatelska.pl/wp-content/uploads/2021/09/P-19-038-LWR-410.023.02.2019-01.pdf>

6 Poland, Judgement of the Provincial Administrative Court in Warsaw of 11 December 2018, case no. II SAB/Wa 502/18: <https://orzeczenia.nsa.gov.pl/doc/C712B83438>

7 D. Gajos-Kaniewska, NSA: kod źródłowy sądolotka jest informacją publiczną, Rp.pl, 29 May 2022: <https://www.rp.pl/sady-i-trybunaly/art36393531-nsa-kod-zrodlowy-sadolotka-jest-informacja-publiczna>

court's opinion, RCAS in practice replaces people in the task of allocating judges to cases, the outcome of which is an irreversible decision – therefore, RCAS performs a public function and the information about its source code should be disclosed.

In a decision issued in August 2022,<sup>8</sup> the Minister of Justice refused to publish the source code of the RCAS.

In April 2021, in another case, initiated by e-State Foundation (*Fundacja ePaństwo*), the Supreme Administrative Court ordered the disclosure of the RCAS algorithm.<sup>9</sup> The Minister of Justice published the algorithm. However, based only on the algorithm it is impossible to assess if the entire system functions properly.<sup>10</sup>

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

On 15 July 2022, an amendment to the Act on the Supreme Court and certain other

acts<sup>11</sup> came into force. The key points of the amendment included the dissolution of the Disciplinary Chamber of the Supreme Court and the establishment of the Chamber of Professional Responsibility to replace it. The law also introduced certain changes concerning the disciplinary liability of judges.

The amendment was adopted in relation to a ruling of the CJEU, issued in July 2021,<sup>12</sup> in which the court confirmed that the Disciplinary Chamber's lack of independence results from the participation of the NCJ in nominating its judges.

The new chamber consists of judges appointed by the President of Poland from among Supreme Court judges. The chamber's jurisdiction remains almost the same as that of its predecessor and includes hearing disciplinary cases of judges as a court of second instance and waiving judicial and prosecutorial immunity. The law does not proscribe the NCJ, in its present form, from appointing judges, which does not guarantee the chamber's independence.

8 Minister of Justice, Decision no. BK-IV.082.270.2022, 4 August 2022: [https://small-eod.siecozywatekska.pl/media/BK-IV.082.270.2022\\_Minister\\_Sprawiedliwosc%9Bci\\_algorytm\\_losowania\\_s%C4%99dzi%C3%B3w\\_-\\_Decyzja\\_odmowna\\_epuap10.08.2022.pdf](https://small-eod.siecozywatekska.pl/media/BK-IV.082.270.2022_Minister_Sprawiedliwosc%9Bci_algorytm_losowania_s%C4%99dzi%C3%B3w_-_Decyzja_odmowna_epuap10.08.2022.pdf)

9 Poland, Judgement of the Supreme Administrative Court of 19 April 2021, case no. III OSK 836/21: <https://orzeczenia.nsa.gov.pl/doc/1F39F17D6C>

10 K. Batko-Tołuc, *Losowanie sędziów a zaufanie społeczne*, 22 September 2021.

11 Poland, Act amending the Act on the Supreme Court and certain other acts, 9 June 2022: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001259/O/D20221259.pdf>

12 Judgment of the CJEU of 15 July 2021, case no. C-791/19: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=244185&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=135187>



With respect to judicial disciplinary liability, the amendment on the one hand stipulated that submitting a request for a preliminary ruling in the CJEU should not entail disciplinary liability. However, the amendment also introduced a new type of disciplinary offence, the “refusal to administer justice”, which may be intended to suppress the practice of judges refusing to participate in panels together with peers nominated by the new NCJ.

In 2022, several major developments occurred involving politically motivated disciplinary and criminal proceedings against judges in Poland. In May 2022, the former Disciplinary Chamber lifted the suspension of Judge Paweł Juszczyszyn, whose disciplinary proceedings for requesting lists of persons supporting candidates to the NCJ is pending.<sup>13</sup> In November 2022, the Chamber of Professional Responsibility made a similar decision in the case of Judge Igor Tuleya, whose immunity was waived in 2020 as the prosecution intends to charge him with disclosing information from an ongoing investigation.<sup>14</sup>

On the other hand, in December 2022 a special disciplinary officer appointed by the President of Poland brought charges against the former president of the Supreme Court, Małgorzata Gersdorf.<sup>15</sup> The charge concerns

a resolution adopted by the joint chambers of the Supreme Court in January 2020, in which the court implemented the CJEU’s judgment of 19 November 2019 (related to the status of the NCJ).

In December 2022, the governing majority presented draft legislation introducing further changes in the disciplinary regime. The draft law provides for disciplinary proceedings against judges to be transferred from jurisdiction of the Supreme Court to the Supreme Administrative Court. Yet again, the draft proposal does not prevent the judges appointed by the NCJ in its current composition from adjudicating in disciplinary cases.

### ***Remuneration/bonuses for judges and prosecutors***

In 2022, the Polish Parliament changed the rate used to calculate the salaries of judges and prosecutors. Until 2022, the reference rate was the average salary in the second quarter of the previous year. In 2022, the Parliament changed the regulation and introduced the fixed rate of 5,444.42 PLN (lower than the 2021 average salary of 6,156.24 PLN).

The Association of Polish Judges (IUSTITIA) and the Trade Union of Prosecutors and

13 HFHR, Izba Dyscyplinarna Sądu Najwyższego uchyla zawieszenie sędziego Juszczyszyna, 24 May 2022:

<https://hfhr.pl/aktualnosci/izba-dyscyplinarna-sedzia-juszczyszyn>

14 K. Żaczkiewicz-Zborska, SN: Sędzia Tuleya odwieszony, nie będzie też doprowadzenia do prokuratury, 29 November 2022.

15 M. Jałoszewski, Skandaliczne represje wobec byłej prezes SN Gersdorf. Człowiek Ziobry ściga ją za historyczną uchwałę SN, 7 December 2022.

Prosecutorial Employees strongly criticised the changes. According to IUSTITIA's estimations, in practice, judicial salaries will shrink by 5% in 2023 in comparison to 2022 and by 16% in comparison to 2020.

On the other hand, there were several developments in 2022 concerning the disclosure of Constitutional Tribunal judges' assets. In 2022, the President of the Constitutional Tribunal ruled that the asset declarations of five judges should not be published. Former MP Krystyna Pawłowicz was among this group of five judges. The President of the Constitutional Tribunal based the decision on provisions of the Act on Common Courts, which provides that the declaration of assets may not be published upon a judge's request. The Act on the Status of Judges of the Constitutional Court, however, states that declarations of Constitutional Tribunal judges shall be published.

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

In 2022, there have been no legal changes reinforcing prosecutorial independence. All the concerns regarding the unrestricted competences of the Prosecutor General indicated in the 2021 Rule of Law Report persisted.

In 2022, the media reported that spyware was installed on the phone of Warsaw District Office Prosecutor Ewa Wrzosek. In 2020,

Ms. Wrzosek opened an investigation into the preparation of mail-in voting for presidential elections. Her supervisors took over the case and soon discontinued it. In 2022, media reports indicated that prosecutors were pursuing disciplinary proceedings against Ms. Wrzosek, and planned a motion to lift her immunity and charge her with disclosing information from an ongoing investigation. Prosecutor Wrzosek was suspended in the course of the disciplinary proceedings.

The HFHR report "The state of accusation: Functioning of the prosecution service in years 2016-2022"<sup>16</sup> indicated the rising number of disciplinary proceedings against prosecutors, especially against those prosecutors who publicly criticise changes in the prosecution service or speak publicly in defence of the rule of law. For example, in 2022, the media reported on new disciplinary proceedings against Prosecutor Katarzyna Kwiatkowska. Ms. Kwiatkowska was disciplined for giving a media interview in which she commented on the National Prosecutor's decision to delegate her to another city. The National Prosecution also sued her for defamation and claimed PLN 250,000 in damages (the lawsuit was filed in 2021).

### ***Independence of the Bar (chamber/association of lawyers) and of lawyers***

In April 2022, a group of the governing majority's MPs filed a motion to the Constitutional

16 <https://hfhr.pl/upload/2022/12/a-state-of-accusation-report-eng.pdf>

Court,<sup>17</sup> requesting the review of Article 38 of the Law on the Profession of the Advocate (*Prawo o adwokaturze*), as well as Articles 49(1) and 49(3) of the Law on Legal Advisers (*Ustawa o radcach prawnych*). These provisions govern the membership of advocates and legal advisers, respectively, in local bar associations (*izby adwokackie* in the case of advocates and *okręgowie izby radców prawnych* in the case of legal advisers). The provisions make affiliation to a particular local bar association dependent on the place of performance of the profession (advocates) or the place of residence (legal advisers). At the same time, the national bars of both legal professions (*Naczelna Rada Adwokacka* for advocates and *Krajowa Rada Radców Prawnych* for legal advisers) have exclusive competence to determine the number and territorial jurisdiction of the local bars.

As the applicants argued in their pleading,<sup>18</sup> the current provisions grant the national bars of advocates and legal advisers the exclusive power to shape the territorial (local) structures of their self-governments, but, on the other hand, make membership in a particular local bar association dependent solely on the

geographical criterion. These violate Article 17(1) of the Constitution, among others. The applicants put forth that, according to Article 17(1), which allows for the establishment of self-governments within professions of public trust, it is possible to establish more than one self-government for each profession. Such self-governments could differ in terms of, e.g., worldview.

The motion was considered an attempt by the governing majority to limit the independence of advocates and legal advisers, who often are at odds with the government when defending the rule of law in Poland, and to reshape the structure of the Bar in future.<sup>19</sup> In reaction to the MPs' motion, national bar associations of advocates<sup>20</sup> and legal advisers<sup>21</sup> adopted resolutions emphasising that the Bar's autonomy and independence serve the right to defence and the right to a fair trial.

In May 2022, the Commissioner for Human Rights informed the Constitutional Court it was joining the relevant proceedings and requested their discontinuation.<sup>22</sup>

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17 Motion of a group of MPs of 22 April 2022: [https://ipo.trybunal.gov.pl/ipo/dok?dok=3827d368-76e1-43e0-bca1-e2bc23fe0386%2FK\\_6\\_22\\_wns\\_2022\\_04\\_22\\_ADO.pdf](https://ipo.trybunal.gov.pl/ipo/dok?dok=3827d368-76e1-43e0-bca1-e2bc23fe0386%2FK_6_22_wns_2022_04_22_ADO.pdf)

18 Ibid, p. 18.

19 P. Rojek-Socha, A. Partyk, *Wyrok TK w sprawie samorządów może uderzyć w prawnicze dyscyplinarki*, Prawo.pl, 16 May 2022.

20 National Bar Association, Resolution no. 63/2022, 4 July 2022: [https://www.adwokatura.pl/admin/wgrane\\_pliki/file-uchwala-nra-nr-63-2022-002-34218.pdf](https://www.adwokatura.pl/admin/wgrane_pliki/file-uchwala-nra-nr-63-2022-002-34218.pdf)

21 National Chamber of Legal Advisers, Statement, 4 July 2022: [https://www.adwokatura.pl/admin/wgrane\\_pliki/file-krrp-stanowisko-tk-34217.pdf](https://www.adwokatura.pl/admin/wgrane_pliki/file-krrp-stanowisko-tk-34217.pdf)

22 Pleading of the Commissioner for Human Rights of 24 May 2022: [https://ipo.trybunal.gov.pl/ipo/dok?dok=225acd1a-7450-4a93-b663-8e1950c80f0f%2FK\\_6\\_22\\_rpo\\_2022\\_05\\_24\\_ADO.pdf](https://ipo.trybunal.gov.pl/ipo/dok?dok=225acd1a-7450-4a93-b663-8e1950c80f0f%2FK_6_22_rpo_2022_05_24_ADO.pdf)

As of January 2023,<sup>23</sup> the case before the Constitutional Court is pending (with no hearings scheduled or any new pleadings filed).

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

In 2022, an investigation continued into the so-called hatred scandal in the Ministry of Justice. The scandal refers to the series of incidents when either the media loyal to the governing majority or anonymous social media accounts spread defamatory content targeting specific judges or judicial associations. In 2019, the media reported that former Deputy Minister Justice Łukasz Piebiak, among others, inspired some of the incidents. The prosecution has been investigating the case since 2019, however no one has been charged.

In 2022, the media reported on the cases of two judges who shared, along with a group of other judges, information used in the smear campaigns. Interviews with both judges confirmed the information reported by the media three years earlier.

In 2022, the appellate court discontinued proceedings against one of the journalists, Ewa Siedlecka, who reported on the scandal.

Furthermore, public attacks on the judicial community continued in 2022. For example, in public statements Deputy Minister of

Justice Marcin Romanowski referred to some judges as an “extraordinary caste” and compared some of their activities to treason.

***Quality of justice***

***Resources of the judiciary***

Besides the excessive length of judicial proceedings, the 2022 HFHR report<sup>24</sup> also highlights the long-running problem of the declining number of professional judges. According to the report, there were 901 fewer judges in 2020 than in 2016. The highest number of judges (over 600) left district courts, which examine the largest portion of cases submitted to all common courts. These negative developments were not even partially mitigated by the appointment of associate judges; in 2020, there were 434 associate judges.

The secondment of judges to posts in the government administration and higher-instance courts also influenced the staffing situation in the courts. According to information obtained by HFHR on 31 March 2022, a total of 153 judges were seconded to the Ministry of Justice and the organisational units subordinated to or supervised by the Ministry, whereas 221 judges were seconded to higher courts.

Furthermore, it is difficult to ignore the negative situation of court support staff (including judicial clerks) and the stability of their employment. Both administrative staff and

23 Poland, Constitutional Court, [case no. K 6/22](#).

24 <https://hfhr.pl/upload/2022/12/cost-of-a-reform-report.pdf>

judicial clerks are among the lowest-earning justice system employees. Their salaries have long been uncompetitive, especially when compared to the responsibilities and the pressure associated with these roles. This, in turn, translates into staff shortages and the necessity to often repeat the onboarding process for newly recruited employees, reducing overall court efficiency.

As of 31 December 2021, the justice system included 28,693 administrative employees and 3,855 judicial clerks (compared to 27,045 administrative employees and 2,749 judicial clerks ten years ago).

Each year the Polish justice system processes between 13 to 17.5 million cases.

### ***Digitalisation***

The digitization of the judiciary remains a problem in Poland. The COVID-19 pandemic accelerated some reforms in this realm. These included, inter alia, introduction of an electronic information delivery system from courts to advocates and legal advisers. However, the hasty adoption of the new tools resulted in various problems with their functioning.

In the context of digitalisation of the justice system, Poland lacks solutions that maintain case files in electronic form. The court case files are generally kept in paper form with the exception of administrative courts and some higher-level prosecutorial offices. This significantly extends the communication between the courts and the parties, thus lengthening the duration of Polish court proceedings.

In 2022 the Commissioner for Human Rights urged the Minister of Justice to use the Electronic Platform of Public Administration Services (ePUAP) for processing communication of citizens with courts and prosecutors' offices. The Minister of Justice has not yet responded to the Commissioner's statement.

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

On 21 July 2022, the ECtHR delivered its judgment in the case *Bieliński v. Poland* (case no. 48762/19). The case originated from the 2016 amendment to the Act on old-age pensions of Punctionaries of the Police, the Internal Security Agency, the Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, the Central Anti-Corruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service, the Prison Service and their families. It significantly decreased the amount of retirement pension received by people serving in those entities during the communist era in Poland. The applicant in the case *Bieliński v. Poland* challenged the decision of the Director of the Board for Pensions that decreased his pension. Due to statutory requirements, all appeals challenging the decision of the Director of the Board for pensions must be lodged at the Warsaw Regional Court. Moreover, in the beginning, the proceedings in the case of the applicant have been stalled, since in a similar case pending before the same court, the court referred a legal question to the Constitutional Tribunal regarding the

constitutionality of the provisions introducing new calculation methods for old-age pensions.

In its judgment, the ECtHR noted that the Warsaw Regional Court had to deal with an exceptionally heavy workload following the reduction of social benefits for thousands of former functionaries of the uniformed services. It referred to data provided by HFHR, which indicated that the vast majority of cases challenging the decisions of the Director of the Board of Pensions have still not been reviewed. According to HFHR, only 2,100 appeals out of 26,000 lodged to the court have been reviewed.

The ECtHR found such a situation to be in violation of Article 6 and Article 13 of the Convention. It pointed out that it is a state's duty to organise its judicial system in such a way that its courts can meet the obligation to hear cases within a reasonable time.

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

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

Excessive length of judicial proceedings remains the burning issue of the Polish justice system. Among 1,027 ECtHR rulings in which the Court found Poland to violate the European Convention of Human Rights, 445 included excessive length of the proceedings.

The 2022 reports by HFHR indicate the average duration of proceedings before Polish courts increased between 2015 and 2021. In 2021, the duration of judicial proceedings was, on average, 7.1 months. This means it increased by about 66 percent since 2015.

Although no comprehensive data showing the length of the proceedings in Poland in 2022 is available as of this writing, the situation is not likely to deviate significantly from the trend visible throughout preceding years. As indicated in the 2022 HFHR report "Cost of a reform",<sup>25</sup> except for 2018, the average duration of proceedings has been increasing year-on-year since 2015. In 2021, the duration of judicial proceedings was, on average, 7.1 months, which means that it has increased by about 66 percent since 2015. This resulted mainly from the ongoing changes in the judiciary (including the significant number of judicial vacancies occurring in 2015-2017), lack of improvements in the organisation of judicial work, and, for the last two years, the limitations on the work of the courts related to the COVID-19 pandemic.

Against the background of the increasing length of proceedings, the Ministry of Justice made an effort to artificially understate the problem. At the beginning of 2022, the Ministry changed the rules of work of court registries<sup>26</sup> and ordered that proceedings for the declaration of enforceability of a judgment

25 M. Wolny, M. Kalisz, M. Szuleka, *The cost of a reform: The work of the justice system, 2015-2022*, July 2022.

26 *The ordinance of the Minister of Justice of 30 December 2021 amending the ordinance on the organisation and scope of operation of court secretariats and other judicial administration departments* (Journal of Laws of 2021, item 328).

or a court-approved settlement be treated as a separate category of proceedings. As the process of granting the enforceability clause is brief, this will lead to a reduction in the average duration of all civil proceedings.<sup>27</sup>

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

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

#### **Independence and enforcement powers of media and telecommunication authorities and bodies**

The functioning of the media regulatory bodies indicate that Poland has failed to effectively implement the EU Audiovisual Media Services Directive 2018/1808. One of the indicators is their biased approach, e.g. differences between the way in which the National Broadcasting Council (KRRiT) exercises its oversight powers over the public service media (PSM) and over the private broadcasters. Despite the strong pro-government bias of the PSM, incompatible with their statutory obligations, the KRRiT does not react to such irregularities. The attitude towards the private media is different. In December 2022, the

KRRiT Chairman initiated an examination about whether a documentary broadcasted by TVN24 had “propagated false information and activities contrary to the Polish *raison d’état* and endangering public security” and “to what extent, if any, the dissemination of untrue and unreliable information breaches the terms of TVN S.A.’s licence”.<sup>28</sup> The broadcaster risks a fine of up to 986,010 PLN. Moreover, should the examination lead KRRiT to a conclusion that the broadcaster is ‘in flagrant breach’ of the conditions set out in the Broadcasting Act or in the terms of the licence, KRRiT would be legally obliged to withdraw the broadcaster’s licence; KRRiT may also withdraw the licence if the dissemination of the programme endangers security. The proceedings can therefore be seen as an attempt to create legal uncertainty around the licences granted to TVN S.A.

There are also doubts whether the law provides for an effective and independent appeal mechanism against the KRRiT Chairman’s decisions. Such an appeal would be eventually examined by the Chamber of Extraordinary Control and Public Affairs in the Supreme Court, which, according to the ECtHR case-law, is not a ‘court established by law’ within the meaning of the European Convention on Human Rights.

Another example raising concerns about media authorities’ impartiality was the way in which a new broadcasting system for

27 Konkret24, Ziobro: “sądy przyspieszyły”. A co pokazują dane ministerstwa? Analiza, 17 May 2022.

28 <https://www.gov.pl/web/krrit/postepowanie-w-sprawie-ukarania-nadawcy-tvn-sa-w-trybie-okreslonym-w-art-53-ust-1-urt>

terrestrial television was introduced (i.e. how the decision of the European Parliament and the EU Council 2017/899 was implemented). The change of the broadcasting standard meant that older models of TV sets and tuners that are not adapted lost access to television. In March 2022, the Minister of Interior Affairs requested the President of the Electronic Communication Office (UKE) to grant an exception to public television, so it would reach households with old receivers until the end of 2023. According to the Minister, continued access to public television is needed to, among other things, “boost the morale of the population and counter disinformation”. After receiving an approval from the KRRiT, the UKE granted the requested exception, amending the frequency reservation decision. According to the latest estimates published on 25 October 2022 by the state National Institute of Media, almost one million households still haven’t changed their old receivers – and therefore receive only public television.

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

The conditions and procedures for the appointment of the members of the regulatory authorities do not provide sufficient guarantees for their functional independence and impartiality. In 2022, the full composition of the five-member National Broadcasting Council changed, but past activities of the majority of newly elected members cast doubt on whether they would exercise their powers in accordance with requirements provided in Article 30 of

the EU Audiovisual Media Services Directive (AVMSD).

The current chairman, Maciej Świrski, is well known for his harsh criticism of TVN, one of the biggest private TV stations in Poland. In 2018, he called on ruling party politicians to boycott the station and, referring to TVN, wrote “Down with the FakeNewsMedia” on his Twitter account. Between 2016 and 2018, he was a vice-president of the Polish National Foundation (Polska Fundacja Narodowa, PFN), which was set up and funded by state-owned companies to promote Poland abroad. In 2017, PFN organised the campaign “Fair courts”, which was supposed to be an answer to the massive protests which took place in July 2017 (the protests were organised under the slogan “Free Courts”). The campaign’s aim was to explain the necessity to reform the justice system by presenting cases where judges had made alleged wrongdoings (most of the information presented turned out to be either misinterpreted or simply false). Maciej Świrski was also the initiator of the “Polish League Against Defamation”, which he headed until December 2022. The organisation, supported by government funding, aims to “defend Poland’s good name”. It is known, among other things, for its involvement in the court case initiated against two renowned holocaust historians, Barbara Engelking and Jan Grabowski (the League supported the plaintiff).

Hanna Karp, another newly elected member, authored an analysis that was the basis for imposing in 2017 an exceptionally high fine on TVN by the previous Chairman of the



National Broadcasting Council. The penalty was imposed because of the manner in which TVN 24 covered the events in and outside the Polish Parliament in December 2016 (including demonstrations), which the KRRiT considered as endangering the state security and being contrary to the Polish *raison d'état*.

Marzena Paczuska, another new member, headed the public television main news programme, *Wiadomości*, from January 2016 to August 2017. During this period, *Wiadomości* among others ran a smear campaign against several NGOs and harshly criticised the Commissioner for Human Rights (the Ombudsman) for cooperating with international organisations, including the UN Human Rights Committee.

## ***Transparency of media ownership***

### ***The transparent allocation of state advertising***

There are no rules ensuring fair allocation of public advertising. Advertisements by the government, local government units, state-owned (SOEs) and municipal companies, as well as other public institutions, can freely target selected media, regardless of their circulation and how this circulation is bought.

An example of this are the advertisements SOEs targeted at dailies. *Gazeta Wyborcza*, the third largest title in Poland in terms of

reach, is consistently misused by the SOEs as a means of advertising. In 2021, the number of digital subscribers to *Gazeta Wyborcza* reached over 280,000, so it is an important channel to reach a wide range of readers. At the same time, the niche daily *Gazeta Polska Codziennie*, whose pro-government position is unquestionable and whose sales results were withdrawn from the survey in mid-2021 (which usually indicates that circulation is very low and sales results are getting worse) has an increasing public advertising market share. The level of advertising spent by SOEs in this title is more than 30 times higher than in 2015.<sup>29</sup>

There is a lack of regular studies at the local government level, and the central register contracts concluded by local governmental units are not yet in place. The following cases can be used to exemplify that the lack of rules regarding allocation of advertisement allow for “punishing” media which are not supportive to those in power and to favour those who support them.

The example of *Dziennik Wschodni*, an independent daily based in Lublin, illustrates well how state advertising can be used as a tool to exert pressure on the media. In 2019, when a battle began in the city to build facilities on one of the green spaces, the *Górki Czechowskie*, the newspaper reported about the resistance of citizens. Suddenly, the inflow of advertisements stopped. While in 2019, the

29 [https://www.researchgate.net/publication/359603356\\_OKRES\\_RZADOW\\_ZJEDNOCZONEJ\\_PRAWICY\\_Analiza\\_wydatkow\\_reklamowych\\_spolek\\_skarbu\\_panstwa\\_SSP\\_w\\_latach\\_2016-2021\\_Aneks\\_Wydatki\\_reklamowe\\_ministerstw\\_i\\_centralnych\\_urzedow\\_w\\_2021\\_roku\\_na\\_podstawie\\_monitorin](https://www.researchgate.net/publication/359603356_OKRES_RZADOW_ZJEDNOCZONEJ_PRAWICY_Analiza_wydatkow_reklamowych_spolek_skarbu_panstwa_SSP_w_latach_2016-2021_Aneks_Wydatki_reklamowe_ministerstw_i_centralnych_urzedow_w_2021_roku_na_podstawie_monitorin)

newspaper received orders from the city hall totalling PLN 58,000, it dropped to less than PLN 25,000 in 2021.<sup>30</sup>

In Wrocław, municipal companies outright buy media to use them for political purposes. In November 2022, a year and a half before the local government elections, the little-known (less than 3,000 followers on Facebook) portal TuDolnySlask.info from the Lower Silesian region, run by a company registered in May 2022, was supported financially by two municipal companies. At the same time, it published a text about Akcja Miasto, a Wrocław-based urban movement that is often critical of the actions of the Mayor of Wrocław. It suggested that the movement had fraudulently obtained funding and had ties to Poland's ruling party, Law and Justice. The portal promoted the text on social media.<sup>31</sup> Apart from that, the portal did not write about anything relevant.

### Other

An important risk for media pluralism is also related to the fact that the state-owned company PKN Orlen has bought not only the publisher of the majority of regional press, but also the second largest press distribution company in Poland, Ruch. While the acquisition of Ruch was completed in 2020, the later events indicate some concerning cases where potentially the vertical ties between the

press distribution company (Ruch) and the press publisher (Polska Press) could have been exploited to the detriment of the competitors on the media market.

For instance, Ruch refused to distribute the newly founded “Zawsze Pomorze” weekly (created by former journalists of the Polska Press “Dziennik Bałtycki”), explaining that the title “does not promise optimal sales” (the other major press distribution companies agreed to distribute it).

Moreover, in May 2022 Ruch started terminating press distribution contracts with several independent local media who did not respond to Ruch's offers on the additional distribution fee and announced further terminations with other media outlets. According to the magazine ‘Press’, “the publishers claim that Ruch's decision may be politically motivated. The issue may be that local titles - usually weeklies - compete with daily editions of regional titles owned by Polska Press”.<sup>32</sup>

The Chamber of Press Publishers (*Izba Wydawców Prasy*) assessed Ruch's offered additional distribution fees as unjustified and indicated that they could harm not only publishers, but also the distributor itself. According to the Chamber, the additional fees could only temporarily improve Ruch's financial condition while drastically worsening the situation

30 [https://drive.google.com/file/d/1blbj\\_CvTe1gxuCu-e4g9u16p4xVtMIW/view?usp=share\\_link](https://drive.google.com/file/d/1blbj_CvTe1gxuCu-e4g9u16p4xVtMIW/view?usp=share_link)

31 [https://drive.google.com/file/d/1NZEK2vmWLGJIIkolGfrv3CCcjdDYS6S3/view?usp=share\\_link](https://drive.google.com/file/d/1NZEK2vmWLGJIIkolGfrv3CCcjdDYS6S3/view?usp=share_link)

32 <https://www.press.pl/tresc/71063,ruch-sa-wypowiada-umowy-wydawcom-lokalnym-i-zada-dodatkow-ej-oplaty-za-dystrybucje>

of local publishers who are already working at the limit of their possibilities.<sup>33</sup> Eventually, new contracts with the local publishers were offered, but with higher fees – and follow-up negotiations were to follow.<sup>34</sup> In December 2022, Ruch again started terminating press distribution contracts with some independent local media.<sup>35</sup>

In December 2022, the lower chamber of the Parliament, the Sejm, adopted the government draft Electronic Communications Law – the so-called Lex Pilot. If the draft comes into force, TV operators will have to put public media channels in the first five places of the channel list. While the government explained that the regulation was intended to implement Article 7a of the revised AVMSD, the current state of the public media does not allow them to be classified as genuinely offering “media services of general interest”, referred to in Article 7a.

## **Public service media**

### **Independence of public service media from governmental interference**

The coverage of public media remains extremely biased. Opposition leaders are systemically demonised, including on EU-level politics, where, for instance, the European People’s Party was portrayed as “European Putin’s

Party” in March 2022. While the political interferences are mostly visible through their effects on screen, the alleged leaked email conversations involving M. Dworczyk, then Prime Minister’s Chief of Staff, might potentially provide behind-the-scenes insights. M. Dworczyk refused to comment on specific mails, but he claimed that some of the leaked emails are genuine, some are manipulated and some are fakes. In the alleged leaked emails published in January 2022, M. Chłopik, an advisor to the Prime Minister, turned to the then-head of the public television main news programme Wiadomości, J. Olechowski and, referring to a court judgement unfavourable to the Prime Minister, requested that “tomorrow TVP should beautifully attack those people who made this judgment and the Warsaw Court of Appeal in general”, adding some ideas for the “attack”. Once the email was published, J. Olechowski commented that he does not recall receiving it. At the same time, after the email was allegedly sent, the main edition of Wiadomości aired a piece on the judgement that used, among other things, the ideas provided in the alleged mail from Chłopik.

Cases of potentially politically inspired interference have also been identified within the regional media owned by Polska Press, bought in 2021 by state-owned PKN Orlen. For instance, in July 2022, an interview with a professor of economy criticising the government’s

33 *ibid.*

34 [https://www.press.pl/tresc/71698,ruch-wycofuje-sie-z-wypowiedzenia-umow-lokalnym-wydawcom\\_-renegocjacje-nowych---jesienia](https://www.press.pl/tresc/71698,ruch-wycofuje-sie-z-wypowiedzenia-umow-lokalnym-wydawcom_-renegocjacje-nowych---jesienia)

35 <https://www.press.pl/tresc/74188,ruch-znow-wypowiada-kolportaz-gazetom-lokalnym>

tax reform was withdrawn from the website of “Dziennik Polski”. According to the official comment of its editor-in-chief, the decision to remove the interview was only related to the fact that “the interview was unreported to the editorial board and published arbitrarily without consultation with the editorial management”.<sup>36</sup>

There has also been a case of interference with editorial independence with regard to a fully private outlet, “Dziennik Wschodni”, a regional daily published in Lublin. In December 2022, a new management board of the publisher blocked the online publication of an investigative article about a Lublin real estate developer accused of influence peddling. The article described, among other things, the real estate developer’s close contacts with the Mayor of Lublin, K. Żuk. The publisher explained that the publication was withheld because of legal risks (the real estate developer issued a pre-litigation letter). In response to the decision of the publisher, the deputy editor-in-chief P. Buczkowski resigned, explaining that “it is the editor-in-chief, or in his absence the deputy editor-in-chief, who decides which articles are published”. After that, the deputy editor-in-chief was dismissed for “statements in the media negatively assessing the work of the management board”.

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

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

The last year provided new examples indicating problems with the effective investigation into cases of excessive force used by law enforcement officers against journalists.

In April 2022, the prosecutor’s office closed an investigation into police violence against journalists covering demonstrations on 11 November 2020 because of the failure to identify perpetrators. Video footage of the event showed police using truncheons to beat media workers despite them either wearing PRESS signs or being clearly identifiable as journalists. According to the prosecutor’s office, police officers on site were either wearing a mask or a helmet and this made it impossible to identify them. Moreover, police officers that were questioned (those who participated in the events and their supervisors) were also unable to identify anyone.

The prosecutor’s office has also refused to open an investigation into soldiers’ harassment of photojournalists Maciej Moskwa and Maciej Nabrdalik near the Polish-Belarusian border. The soldiers aggressively stopped, handcuffed and searched the photojournalists, as well

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36 [https://www.press.pl/tresc/71695,\\_dziennik-polski,\\_usuwa-ze-strony-wywiad-z-prof\\_-mazu-rem-za-krytyke-polskiego-Ladu](https://www.press.pl/tresc/71695,_dziennik-polski,_usuwa-ze-strony-wywiad-z-prof_-mazu-rem-za-krytyke-polskiego-Ladu)

as examined photos stored in their cameras, despite their protests invoking journalistic secrecy. Even though the whole situation was voice recorded and the recording includes, among other things, officers discussing wiping their fingerprints off the searched cameras, the prosecutor's office considered that the actions did not amount to an abuse of authority. The photojournalists filed an appeal against the decision of the prosecutor's office; the case is pending.

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

The number of SLAPPs initiated against journalists has been constantly rising. From 2015 to June 2022, "Gazeta Wyborcza" alone was targeted with at least 100 legal actions, while many more legal actions have been initiated against several other outlets. Many of the lawsuits were brought by public institutions, state-owned companies and public officials. The problem of SLAPPs has also been particularly acute for local media, especially since they have fewer resources for long legal proceedings and, at the same time, their cases receive less attention from the public.

While civil and criminal defamation are the most often applied tools, sometimes more serious criminal charges are brought. This has been the case, for example, for Piotr Maślak, a journalist at the TOK FM radio, who has been charged in March 2022 by the military prosecutor's office of defaming and insulting the Polish Border Guard. The charges refer to a message posted by the journalist on Twitter,

in which he criticised the actions of the Polish Border Guard against a group of refugees at the Polish-Belarusian border. Reacting to the tweet, the interior minister and the vice-president of the ruling party, M. Kamiński, filed a notification to the prosecutor's office. The charges pressed against the journalist – criminal defamation through mass media and criminal insult of a public official – are both punishable by up to one year in prison.

The Ministry of Justice, responding to the HFHR request for public information, declared in July 2022 that "at this moment, the government has not set designated actions for the implementation of the European Commission's Recommendation [on SLAPPs]" and emphasised that "the Recommendation [(EU) 2022/758] has no binding force and aims to present the European Commission's point of view [...] without imposing any legal obligations on Member States".

### ***Confidentiality and protection of journalistic sources (including whistleblower protection)***

The current legal regime governing secret surveillance does not envisage sufficient safeguards for the protection of journalistic sources and communications. With regard to the access of authorities to retained communications data, the law does not envisage a prior review carried by a court or any other independent body, contrary to the requirements of the EU Privacy and Electronic Communications Directive 2002/58/EC. Therefore, there are no effective safeguards that would prevent authorities from accessing communications data of

journalists. While surveillance of the content of communication in general requires a prior judicial authorisation, in practice it does not provide an effective protection – courts grant authorisation based only on very limited information provided by the requesting authorities. As a result, around 98-99 percent of requests filed by the authorities are accepted by courts. What is more, there is no independent oversight body that could later effectively review the legitimacy of the applied surveillance measures. In addition, the concerned persons will not receive any notification that they were surveilled, especially if the case does not lead to criminal proceedings. This is contrary to the requirements of the Privacy and Electronic Communications Directive. On top of that, even when journalists manage to learn that they were the subject of targeted surveillance, this might not lead to an effective examination of authorities' actions. This is the case for the investigative journalist Mariusz Gierszewski, whose communications data was accessed by the police in 2014. The prosecutor's office decided to discontinue the proceedings; the complaint against this decision is still pending.

Additionally, in December 2022, the government submitted a draft Electronic Communication Law,<sup>37</sup> which extends current rules on general and indiscriminate retention of traffic and location data to a new group of service providers and broadens the category of data that must be retained. Such regulation

would further deepen the incompatibility of the national electronic communication rules with the Privacy and Electronic Communications Directive – and increase the risks for journalists and their sources.

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

2022 was not as fraught with problems related to the right to information as 2021. However, it was a year in which Poland was subject to the Universal Periodic Review (UPR), which was conducive to a deeper analysis of the problems.<sup>38</sup>

The analysis identified that the right to information is not functioning. If public authorities “skilfully” use existing procedures to withhold information, there is a good chance they will succeed. And they face no real sanctions for doing so.

Court procedures for protecting the right to information are structured in such a way that it is possible to delay answering requests for years. First, the obligated entities can claim that the requests do not concern public information. When they lose in court, they can restrict the information on grounds such as the protection of other rights, like the right to privacy. Ultimately, the case may end up in court for several years. This is exemplified by the case mentioned in the discussion on

37 <https://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?id=66C7F7C637867159C12589170035C136>

38 <https://siecobywatelska.pl/watchdog-polands-submission-in-the-4th-cycle-of-the-universal-periodic-review/?lang=en>

the allocation of cases in courts in the section “Justice System”. It took four and a half years to establish in the courts that the source code of RCAS is public information. After the court ruling, the Ministry of Justice did not provide this information and issued a decision to deny it on the grounds of system security and integrity. It will take another four or five years until the final judgment. During this time, it is not known whether the system is working well and whether it is indeed random. This is particularly relevant in view of the destruction of the justice system by the ruling coalition. Due to long and inefficient procedures, many journalists do not use the FOI Act at all, to which they are entitled to by Article 3a of the Press Law.<sup>39</sup>

The situation of multiple requests and changing reasons for withholding information is very common, and the only sanction is usually a small reimbursement of court costs to the winner, paid from the public budget anyway (if the public entity loses). Sometimes - extremely rarely - a fine can be enforced, which will also be paid from public money. A viable sanction may be the criminal provision of Article 23 of the FOI Act. But in the absence of the rule of law, it does not work either. The prosecution cannot be counted on to bring an indictment against institutions associated with those in power. With persistent efforts, private parties can become subsidiary prosecutors. But this route was also undermined by a judgment of the District Court in Warsaw (IX Ka 815/22). The court ruled that in cases

involving access to information, as concerning the general good of transparency in public life, neither a natural person nor a legal entity can have the status of a victim. And therefore cannot become a subsidiary accuser. A cassation appeal was filed to challenge the ruling. If the verdict is upheld, there is no sanction for failure to implement the right to information, nor is there any possibility for citizens to act on their own in the face of the inaction of a prosecution service dependent on the ruling coalition.<sup>40</sup>

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

One of the parties of the ruling coalition, United Poland, has submitted a draft law that would tighten the existing blasphemy law. The draft law, supported by the Minister of Justice, would criminalise, among other things, insulting or ridiculing church or religious dogmas. The current regulations criminalises only an insult to “objects of religious worship or a place intended for the public performance of religious rites”. The blasphemy law in its current form has already been used to open proceedings against journalists, for instance with regard to a cartoon showing the Virgin Mary wearing a face mask with a lightning bolt on it – a symbol of women’s resistance against limitations on reproductive rights in Poland – published in “Wysokie Obcasy”. The new proposed form would significantly increase the risks of more criminal investigations being opened against journalists.

39 <https://siecobywatelska.pl/sadowa-ochrona-prawa-do-informacji-podsumowanie-seminarium-na-universytecie-wroclawskim/>

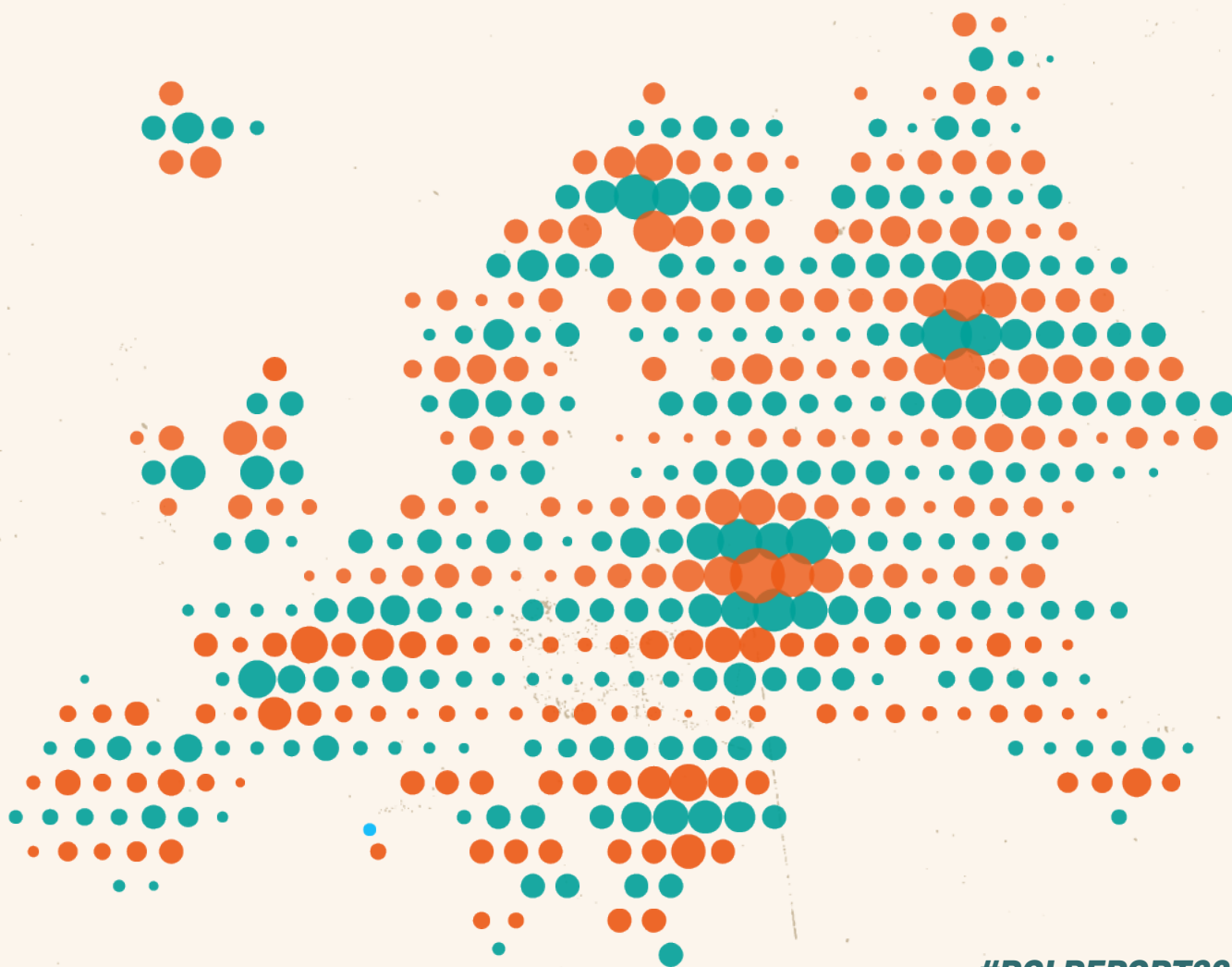
40 <https://siecobywatelska.pl/apelacja-w-sprawie-fundacji-lux-veritatis-ustne-uzasadnienie-wyroku/>

**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**ROMANIA**



**#ROLREPORT2023**



# ROMANIA

## About the authors



The Association for the Defense of Human Rights in Romania - the Helsinki Committee (APADOR-CH) is a non-governmental organization. It was established in 1990 and ever since it has been working on increasing awareness and respect towards human rights standards and the rule of law in Romania and in the region.

In reaching its goals, APADOR-CH carries out advocacy, fact-finding visits to prisons and police lock-ups, research and monitoring to assess compliance of laws and policies with human rights standards and rule of law principles, strategic litigation as well as capacity building to empower other civil society groups and individuals to enforce their rights.

## Key concerns

The much contested “justice laws” (the Law on the Superior Council of Magistracy, the Law on the Judicial Organization, and the Law on

the Status of Judges and Prosecutors) finally entered into force in December 2022. Some of their more controversial provisions have been challenged before the Constitutional Court by political parties as well as the Ombudsman. The challenged provisions have been declared constitutional by the Court.<sup>1</sup>

The Ministry of Justice’s draft law amending the Code of Criminal Procedure (CCP), sent to the Senate in December 2022, aimed primarily to bring the provisions of the CCP in line with several decisions of the Romanian Constitutional Court. In this respect, amendments have been proposed that reflect the solutions adopted in 38 decisions of the Court issued in the period from 2015 to 2022. The constitutional corrections that will be introduced into the CPP will lead to increased quality of the criminal code, as the Constitutional Court decisions have resolved controversial issues that have arisen in practice.

Three justice laws entered into force in December 2022. It will take further developments in practice to determine whether the changes they introduced have benefited the judiciary. For example, one of the EC recommendations refers to the disciplinary regime of magistrates. Currently, failure to comply with the decisions of the Constitutional Court

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1 Constitutional Court Press Release, 9 November 2022, <https://www.ccr.ro/comunicat-de-pres-a-9-noiembrie-2022/>

(CCR) or the decisions of the High Court of Cassation and Justice (ICCJ) in the resolution of appeals in the interest of the law no longer constitutes a disciplinary offence, according to the new law no. 303/2022 on the status of judges and prosecutors. How the absolute abolition of this disciplinary offence has benefited the judiciary remains to be seen.

There has been some progress in the legislative process. Compared to last year, a series of important laws have finally been adopted or are underway, and have generally been appreciated (including by the Venice Commission). However, the recommendations coming from civil society (see below) have not been taken into consideration by the Ministry of Justice and the Parliament and no explanation was provided in relation to them, as the law requires.

In the field of anti-corruption, the whistle-blower legislation was adopted at the end of 2022 (a year after the transposition date). While the transposition law contains the minimum standards required by the EU Whistleblower Directive, some of its provisions are unclear (particularly as they apply to the private sector).

Regarding checks and balances, the Romanian state has failed to ensure effective public consultations before the adoption of draft legislation. The 2022 experience of APADOR-CH during the legislative processes of three major draft laws (the law on the statute of judges and prosecutors, the cybersecurity law and the law on the protection of whistle-blowers) can attest to the fact that consultation of civil society organizations is a mere formality, when it

even occurs. In 2022, there were no efforts to establish a National Human Rights Institution taking into account the UN Paris Principles (no new legislative proposal was initiated in this sense).

No major developments regarding the regulatory framework for civil society organizations have produced effects in 2022. In November 2022, a group of parliamentarians from the majority coalition initiated a legislative proposal aimed at amending Government Ordinance 26/2000 concerning the functioning of associations and foundations. The draft law introduces several conditions for the initiation by an NGO of a legal action with the object of legality control over an administrative act and it mainly targets environmental organizations. Its main targets being environmental organizations. Should this draft law be adopted in this form, it will most likely be challenged before the Constitutional Court as it severely limits the right of free access to justice.

### State of play

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

### Legend (versus 2022)

- ↓ Regression
- No progress
- ↑ Progress

## Justice system

### Key recommendations

- The Constitutional Court must be protected and its role as guarantor of the supremacy of the Constitution cemented. Measures should be taken to improve the predictability of its decisions. The law on the organization and functioning of the Constitutional Court should be changed in order to specifically include the categories of decisions that the Court can pronounce. There is also a need for more precise criteria when electing the members of the Court, i.e. less political and more oriented towards promoting competence.
- The law on the statute of judges and prosecutors should be amended to correct important omissions regarding the financial liability of judges and prosecutors.

### Judicial independence

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

In the past few years, problems have arisen with the contradictions between the decisions of the Constitutional Court and the decisions of the Court of Justice of the European Union (CJEU). Judges were faced with the choice between respecting the CCR's decisions or the CJEU's decisions. Some judges have chosen to comply with the latter to the detriment of the Constitutional Court decisions, thus risking being disciplined for not complying with the CCR decision, based on the text of the former Law on the Status of Judges and Prosecutors.

Failure to comply with the decisions of the Constitutional Court (CCR), or the decisions of the High Court of Cassation and Justice (ICCJ), in the resolution of appeals in the interest of the law<sup>2</sup> no longer constitutes a disciplinary offence according to the new law no. 303/2022 on the status of judges and prosecutors (entered into force in December 2022).

The legislature opted for the radical solution consisting of the total elimination of the offence, although a middle-way solution could have been chosen, in the sense of keeping the disciplinary offence but redefining it. Thus, the text could have been amended in order to establish an order of preference regarding the respect of decisions/judgments of the relevant domestic and international courts, which would have allowed the courts, in case of conflict between the CCR decisions and the

2 An appeal in the interest of the law (RIL) is a procedure by which, in the event that two courts pronounce different solutions regarding the same legal issue, the highest court in the country (High Court of Cassation and Justice) intervenes, and determines which solution is correct. The decision of the High Court is binding for all courts in the country. The RIL ensures the uniform interpretation and application of the law by all courts.

CJEU decisions, to give priority to the CJEU decisions.

The practical consequence of totally abolishing this disciplinary offence is that it creates conditions for eroding national jurisprudence's consistency. Removing the sanction for non-compliance with CCR decisions may result in a situation in which a law/provision of law declared unconstitutional by a CCR decision is also considered constitutional by a court of law that holds a different opinion than the CCR. As a result, conflicting scenarios may occur in which a legislation/provision of a law is both constitutional and unconstitutional, depending on the court that rules, which may or may not agree with the Constitutional Court.

In connection with these problems, the Romanian Ombudsman referred the matter to the Constitutional Court. Included among the reasons for the unconstitutionality of the new law on the status of judges and prosecutors is the elimination of the disciplinary offence of failure to comply with CCR decisions.

The CCR judgement no. 520 of 9 November 2022 rejected the Ombudsman's complaint. In essence, CCR ruled that the elimination of this disciplinary misconduct is constitutional, because failure to comply with CCR decisions may subject the judge or prosecutor to disciplinary liability to the extent that it is demonstrated that he or she exercised his or her office in bad faith or with gross negligence.

In other words, with the implementation of Law 303/2022, it is no longer possible to argue that every failure to comply with CCR

judgments will be sanctioned as a disciplinary offence, but only failure to comply with CCR decisions done in bad faith or with gross negligence. Thus, the sanction cannot be applied when the judge presents a reasoning that contradicts the reasoning of the CCR decision and claims that this is his decision. It will not be bad faith or gross negligence, but rather the legal conviction and reasoning of the judge who does not respect the CCR decision and is presumed to be in good faith.

However, the constitutionality or unconstitutionality of a legal text should not be a matter that differs according to each judge's conviction, regardless of the arguments. Otherwise, it can lead to legal instability/chaos, which will manifest itself in the fact that, in parallel cases of the same type, some judges will consider a text of the law to be constitutional, and other judges will consider precisely the exact text of the law to be unconstitutional.

It remains to be seen whether or not the absolute abolition of this disciplinary offence has benefited the judiciary. APADOR-CH considers that, despite the current, justified criticism in relation to the nominal makeup of the Constitutional Court, as well as some particularly contentious rulings at the institutional level, it is necessary to protect the role of the Constitutional Court as a guarantor of the supremacy of the Constitution. This role can be exercised only if the CCR decisions are respected effectively, not declaratively.

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

Two decisions of the Romanian Constitutional Court (CCR) concerning the interruption of the statute of limitations of criminal liability, the latest issued in 2022, have destabilized criminal investigations and the trials of criminal cases (some concerning well-known politicians).

The first CCR decision (no. 297 of 26 April 2018) established that the text of the Criminal Code (Art 155) which stipulated that the statute of limitations is interrupted by the performance of “any procedural act in question” (i.e. also of a procedural act which is not communicated to the suspect/defendant) is unconstitutional. This is because the suspect/defendant cannot know the moment the statute of limitation of his criminal liability was interrupted, thus marking the beginning of a new statute of limitation, as long as the statute of limitations can be interrupted by procedural acts initiated by judicial bodies which must not be communicated to the suspect/defendant. In its motivation, the Constitutional Court mentioned that in order for the interruption of the statute of limitations to be constitutional, the judicial body has to carry out a procedural act which is communicated to the suspect/defendant.

Surprisingly, in 2022, when several criminal cases involving politicians and well-known public figures were at an advanced stage of completion, the Court issued a new decision on the matter of interrupting the statute of limitations, assessing the conduct of the judiciary after the 2018 decision.

In its decision No. 358 of 26 May 2022, adopted by a majority of 7 to 2, the Court established that after the publication of the 2018 decision, the statute of limitations period could not be interrupted at all, i.e. not even by carrying out a procedural act that is communicated to the suspect/defendant (despite the 2018 decision stating that the limitation period could be interrupted by carrying out a procedural act that is communicated to the suspect/defendant).

The Constitutional Court argued that the 2018 decision was not an interpretative one, which would have allowed for the partial application of the criminal procedure code. Rather, the Court argued, its decision was one which stated that the article allowing for the interruption of the limitation period was utterly ineffective (practically “eliminated”). Moreover, the Court added that after the 2018 decision, the only possibility to interrupt the statute of limitations was to amend the article of the criminal code with an express provision allowing for the statute of limitations to be interrupted exclusively by a procedural act communicated to the suspect/defendant.

In the past, the Constitutional Court has issued numerous decisions open to interpretation that did not result in the suspension or elimination of a legal text. They only corrected specific unconstitutional formulations (in such decisions, the RCC mentions that the text in question is constitutional only to the extent that it refers to or does not refer to specific aspects).

Alongside other controversial decisions, the 2022 Constitutional Court decision further decreased the public confidence in its authority because it led to the closure of some cases under investigation (even in the trial phase). Since 2018 there were criminal investigations carried out, and judges ruled on the basis of the interpretative character of the CCR decision. In 2022, the same Court ruled that that decision was not interpretative but ordinary.

APADOR-CH recommends that all legislative measure that could contribute to improved predictability of the Constitutional Court decisions and an improvement of the general trust in this institution should be taken. Criteria for electing Constitutional Court members should be preciser, less political and more oriented towards promoting competence. In addition, there is a need for more straightforward regulations concerning the law on the organization and functioning of the Court concerning the categories of decisions that it can pronounce. This would avoid the situations where it is not clear when the Constitutional Court adopts an interpretative decision, an ordinary decision or a decision of another nature.

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

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

The Ministry of Justice's draft law amending the Code of Criminal Procedure, sent to the Senate in December 2022, aimed primarily to bring the provisions of the CCP in line with several decisions of the Romanian

Constitutional Court. In this respect, amendments have been proposed that reflect the solutions adopted in 38 decisions of the Court issued in the period 2015-2022 (8 years). The constitutional corrections that will be introduced into the content of the CPP will lead to increased quality of the provisions of the criminal code, as the Constitutional Court decisions have resolved controversial issues that have already arisen in practice.

Among the positive developments when it comes to pre-trial detention, the Constitutional Court decision 136/2021 concerns the situation of a person who has been lawfully arrested but whose case has been closed/the person has been acquitted. In such a situation, the Code of Criminal Procedure did not provide for the possibility of compensation for the person placed in pre-trial detention and subsequently acquitted. Only the person who had been unlawfully detained could be compensated, i.e. only the person against whom the measure of pre-trial detention was not justified at the time of detention (it had no legal basis).

The Constitutional Court stated that it did not matter whether the measure of arrest was justified at the time of the arrest, but what mattered was how the case was closed. If the case was closed/person was acquitted, this means that the basis for the arrest never existed, because a person cannot be arrested for an act that is not an offence and for which he cannot be convicted.

## **Other**

The current regulation on the financial liability of judges and prosecutors has at least two deficient aspects which negatively impact the good functioning of the justice system. APADOR-CH's concrete recommendations made in relation to the law on the statute of judges and prosecutors, made at the various stages of the draft's evolution in 2022, were ignored without any explanation.

Under Article 268 of Law 303/2022, the state is liable for damages caused by judicial errors committed by judges and prosecutors. This fact does not remove the liability of judges and prosecutors who, even if they are no longer in office, exercised their functions in bad faith or with gross negligence. Under Article 269 of the same law, the injured party may bring an action for damages only against the state, represented by the Ministry of Finance. In other words, the injured party can only sue the state, not the judge/prosecutor who committed the miscarriage of justice. If the injured party is granted damages in court, the state will pay the compensation within a maximum of 6 months from the date of communication of the final judgment to the Ministry of Finance.

After the Ministry of Finance has received the final court decision by which the state is obliged to pay compensation for judicial errors, a verification procedure of the file in which the judicial error was committed is automatically triggered. If the verifications show that the judge or prosecutor acted with bad faith or gross negligence, the material liability of the judge or prosecutor will be engaged. In other

words, in such a situation, the state will sue (through a recourse action) the judge or prosecutor who made the miscarriage of justice in bad faith or gross negligence, and will ask the court to oblige the judge/prosecutor to pay the state the amount that the state paid to the victim of the miscarriage of justice.

It should be emphasized that the judge/prosecutor is liable for the payment of compensations (the liability for payment of compensation is only towards the state, through the obligation to return to the state the money that the state has paid to the victim of the judicial error) only if he/she committed the judicial error with bad faith or gross negligence. If the judge/prosecutor has committed a miscarriage of justice, but through simple negligence (not gross negligence) or acting in good faith (good faith is presumed), there is no question of the judge/prosecutor being liable to pay compensation. As a result, in these cases, the state will pay compensation to the victim of the miscarriage of justice but will not recover from the judge/prosecutor the amount paid to the victim (the state will no longer bring a recourse action).

The referral to the Superior Council of Magistracy by the Ministry of Finance triggers the verification procedure regarding the material liability of the judge/prosecutor. After several verifications, which also involve an evaluation by the Judicial Inspection, and the hearing of the judge/prosecutor (which is mandatory), the SCM (appropriate section) will adopt a decision finding that the judicial error was committed or not committed with bad faith or gross negligence. If it finds bad faith or gross negligence, the SCM will send

its decision to the Ministry of Finance, which must bring a recourse action against the judge/prosecutor.

The new law (art. 269 para. 3 of Law 303/2022) no longer provides for a deadline within which the Ministry of Finance is obliged to refer the matter to the SCM by sending the final court decision obliging the state to pay compensation for the judicial error. The old law of 2004 stated that a deadline of 2 months from the receipt of the final decision to order compensation should be observed, by which the Ministry of Finance had to refer the matter to the Judicial Inspection so that it could verify whether there was bad faith or gross negligence.

The omission of such a time limit in the new law may compromise the liability of the judge/prosecutor since it is possible that, in the absence of a time limit that must be respected, the Ministry of Finance may refer the matter to the SCM very late, at the limit of the expiry of the limitation period of material liability thus making useless, on the grounds of lateness, the whole verification procedure described in the law.

The new law also fails to provide for a procedure whereby the SJC would have to carry out checks on the existence or non-existence of bad faith or serious negligence on the part of the magistrate in the event of the state being obliged to pay compensation by a judgment of the European Court of Human Rights (ECHR) or by an amicable settlement agreement in a civil case. The existing procedure in Law 303/2022 (art.269) does not cover domestic civil cases brought before the ECHR

in which Romania is obliged to pay damages. Therefore, the procedure in article 269 should be extended to domestic civil cases subject to an ECHR judgment by which the state has been ordered to pay damages.

## **Anti-corruption framework** N/A

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

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

The legislative saga of the adoption of the whistle-blower protection legislation ended in December 2022, one year after the transposition deadline. Law 361/2022 which transposes the EU Directive 2019/1937 entered into force on 23 December 2022 after being adopted by the Parliament in July 2022, challenged before the Constitutional Court, and sent for re-examination in Parliament by the President on 29 July 2022.

Civil society organizations managed to push back against many of the detrimental provisions of the various draft laws on whistle-blower protection (initiated both by the Ministry of Justice and the Parliament). However, CSO experience during the legislative process can attest to the fact that the political class is not yet committed to real protection of whistle-blowers, showing an institutional resistance to regulations and procedures which have the potential to unveil illegalities and corruption.



Monitoring how the law is applied in practice remains crucial for its effective implementation. In this sense, the National Integrity Agency (ANI) has to be equipped with all necessary resources (financial and technical) in order to fulfil its crucial and complex role of promoting and monitoring the implementation of the law. Equally important remains the education of judges, who remain generally unaware of the existence of whistle-blower protection legislation.

As an overall assessment, it can be stated that the domestic law has transposed the EU Directive provisions. However, there are certain aspects that must be clarified, completed and reformulated for the transposition of the Directive to be complete. Currently, some private companies who already have internal procedures in place do not think this legislation applies to them, since they already have regulations and procedures in place as part of their compliance policies. Their interpretation is supported by the ambiguous/incomplete wording of the transposition law. Art 1 para 3 does not clearly state whether special regulations that do not contain the minimum standards of whistle-blower protection provided for in the Directive have to be amended in order to contain, if not higher standards, at least the minimum protection standards provided in the Directive.

## **Media environment and freedom of expression and of information** N/A

### **Online media**

#### ***Financing framework (including allocation of advertising revenues, copyright rules)***

During recent years, political parties in Romania have developed a system of bribing the press with public funds. In return for the millions of euros it receives, the press no longer fulfils its role as a watchdog of democracy, but has become a propaganda tool for the parties that pay - the parties in power.

In 2018, an amendment to the law on the financing of political parties dramatically increased the subsidies granted to parliamentary parties from the state budget. According to data published by the Permanent Electoral Authority (AEP), in the last 6 years the parliamentary parties have received a budget totally 200 million euros. They are allowed to spend unlimited amounts of this money on press and propaganda, which can't be controlled by state institutions such as the Court of Auditors.

Parties spent €22.3 million on media appearances in 2019-2020, the years in which elections, including four election campaigns, took place. But spending has continued and increased after the election campaigns (2021-2022), through a mechanism that circumvents the Broadcasting Act and through confidential contracts, even though public money is

involved. In 2021 alone, political parties paid €12.6 million to various media outlets.

Through FOIA requests, several NGOs and independent media have tried to find out how much the parties pay to the press and to which media outlets, but have only received answers from some opposition parties. The main parties in power, which also receive the largest sums from the budget (according to the percentages they obtained in the elections) have refused to disclose the amounts paid and the media outlets with which they have contracts, citing commercial secrecy. They have been taken to court to comply with the FOIA laws, but the trial takes years.

Several media investigations in 2021 and 2022 had some success unravelling the system, however it remains in place. The leaders of Romania's two largest parties, who have effectively rebuilt the single party through the left-right coalition in government, have also become private media investors to control national news.

The Broadcasting Law prohibits the financing of TV stations by parties outside election campaigns, but TV stations use front companies that own the websites of the TV stations to circumvent the law. Through subscription payments, the parties constantly transfer money to certain advertising agencies, which in turn transfer it to the TV stations' front companies. In this way, party leaders gain the obedience of the media through TV programs and

articles that are not reported as politically paid advertising. Viewers and readers are unaware that the information they receive is carefully filtered and disseminated only with political approval. More than 50% of the country's population gets its news from the TV.

The few independent media outlets, struggling to operate under complicated financial conditions, manage to deliver important articles and investigations that expose corruption and dysfunctional state institutions. However, because most of the press is politically financed, these articles and investigations of real public importance rarely make it onto the public agenda. As a result, the authorities rarely feel compelled to take an official stance or respond in any way to independent media investigations.

At the end of 2022, the PEA proposed an amendment to the Law on Political Parties, which would limit party spending on the media to a maximum of 30% of the budget allocations received. However, the draft law does not include mechanisms to make party spending on the media transparent.

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

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### ***Smear campaigns***

In January 2022, journalist Emilia Șercan published an investigation claiming that Romania's Prime Minister had plagiarized

his doctoral thesis.<sup>3</sup> Shortly after this revelation, on 16 February 2022, Şercan received a Facebook message from a stranger containing personal photos of her, which the sender said he had found on an adult website. The images were taken in a private setting decades ago, and the journalist believes they were taken from a personal device.

On 17 February 2022, Şercan filed a criminal complaint with the Criminal Investigation Service of the Bucharest General Police Directorate. Only a day later, on 18 February 2022, she realized that the images and screenshots she had only sent to the police had been published on the website [realitateadinmoldova.md](http://realitateadinmoldova.md).

The journalist reported the information leak to the Minister of Interior, who promised an internal investigation and facilitated a discussion with the head of the Romanian Police. The latter assured her that he would investigate the case and directed the journalist to file a criminal complaint with the Internal Affairs Directorate of the Romanian General Police Directorate for information leakage and violation of privacy.

On 21 February, Emilia Şercan was informed by the police chief that the internal investigation revealed that the prime source of the information that appeared in the press was not the police, but another website, which had released the photos and screenshots before the

journalist had taken them to the police. Hence, the police chief suggested that the journalist's phone had been hacked.

However, three independent international institutions specialized in computer security breaches examined the journalist's phone and concluded that it was not compromised. The same organizations have also demonstrated that the websites that published the photos backdated the posts. Personal investigations revealed that behind these websites are Romanian media owners and a former Romanian MP who fled to the Republic of Moldova to avoid prosecution. Following the journalist's criminal complaints, more criminal investigation files were opened against these individuals, but prosecutors refused to merge them, even though they pertained to the same offence.

Throughout 2022, the journalist filed several criminal complaints, including for abuse of office, failure to report (against the police and the Minister of Interior), violation of privacy, harassment, threats, blackmail, concealment, obstruction of justice, and false testimony (against the persons running the websites in the Republic of Moldova). The journalist claims that her case is currently the subject of seven criminal cases at various stages in several institutions, including the Public Prosecutor's Office of the Bucharest Court, the Public Prosecutor's Office of the Bucharest District 1 Court, the Public Prosecutor's Office of the

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3 <https://pressone.ro/premierul-nicolae-ciuca-a-plagiat-in-teza-de-doctorat-printre-sursele-copiate-se-numara-alte-doua-teze-de-doctorat>

Bucharest Court of Appeal, and the Public Prosecutor's Office of the High Court of Cassation and Justice (January 2023).

*“Splitting a case into as many components as possible is one of the tactics prosecutors employ to bury a case so that no one is charged. The fragmentation of the case complicates the investigation since other prosecutors would have to conduct the same thing, examine the same facts, question the same persons, and request the same evidence,”* Emilia Șercan adds.

Although the initial posts containing the photographs were removed, they were taken up and reproduced on dozens of other sites throughout 2022. The discrediting of the journalist, with the motivation of terrorising her, has been the topic of various media and civic protests urging the authorities to conduct a prompt investigation and prosecute the perpetrators. Unfortunately, little has changed a year later.

### **Other**

In January 2022, following the press disclosure regarding the fact that Prime Minister Nicolae Ciucă had plagiarized his doctoral thesis, several referrals to verify this suspicion were filed in court.<sup>4</sup> The case was tried in April before the Bucharest Court of Appeal, but information appeared in the press that there had been

interventions in the random distribution of the case in order for it to reach a judge accused of older connections with the party to which the prime minister belongs (the National Liberal Party). The file was resolved by the respective judge, who dismissed the three plagiarism accusations on grounds that the journalist who formulated them made abstract general assessments.<sup>5</sup> A few days after this ruling, the judge applied for retirement and his request was approved.

In another file, the Prime Minister himself requested in court the suspension of the effects of the registration of the plagiarism complaint. Another panel of the Bucharest Court of Appeal admitted the Prime Ministers' request on grounds that Romania needs stability and that the plagiarism scandal could become a weapon for his political opponents.

The suspicions of manipulation of the file distribution system in the case of the Romanian Prime Minister are the subject of an April 2022 unfinished investigation by the General Prosecutor's Office (April 2022). The public information available in this case, as well as the reasoning given by the two judges in the decisions concerning the plagiarism complaints, have negatively impacted the public trust in the justice system and the perception of its proper functioning.

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4 <https://www.g4media.ro/breaking-surse-sectia-de-urmarire-penala-si-criminalistica-din-parchetul-general-investigheaza-procedura-de-repartizare-aleatorie-a-dosarului-in-care-premierul-nicolae-ciuca-a-obtinut-anular-ea-sesizar.html>

5 <https://www.g4media.ro/motivarea-judecatorului-care-a-anulat-sesizarile-de-plagiat-din-doctoratul-premierului-ciuca-analiza-emiliei-sercan-este-o-simpla-apreciere-general-a-in-abstract-partiala-iesita-din-context.html>

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

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### ***Abuse of criminalization of speech***

On 22 December, the Romanian Senate voted on the new cybersecurity law. The law contains many problematic provisions which are highly contested by civil society organizations. One of the most dangerous articles amends law 51/1991 on national security. According to the law, any opinion expressed online contrary to that of the state will become an offence. For example, anti-vaccination opinions, a subject which has polarized Romanian society.

The qualification as threats to national security of public positions contrary to the official state policy will make those with critical positions become authors of an offence against state security, an offence provided for in Art 404 of the Criminal Code as “communicating or spreading, by any means, false news, data or information or falsified documents, knowing their falsity, if this endangers national security, is punishable by imprisonment from one to 5 years.”

Until now, because these critical positions directed against the state position were not qualified by Law 51/1991 as threats to national security, this criticism of power could not be included in the offence provided for in Art 404 of the Criminal Code. Now, after the inclusion of these critics in the category of threats to national security, it will be relatively simple to initiate criminal files against critics of the political power. This represents a gross violation of freedom of expression. On 27

December, the Ombudsman challenged the law before the Constitutional Court.

## **Checks and balances**

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

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#### ***Framework, policy and use of impact assessments, stakeholders/public consultations (particularly consultation of judiciary on judicial reforms), and transparency and quality of the legislative process***

Overall, the transparency and quality of the legislative process have not improved. Important legislation, including the one regulating the transparency of the decision-making process of the public administration, continues to be adopted through emergency procedures.

For example, In March 2022 law 52/2003 on the transparency of public administration in the decision-making process was amended, triggering criticism from civil society organizations. According to the amendment “in the event of the regulation of an urgent situation or one which, due to its exceptional circumstances, requires the adoption of immediate solutions, to avoid serious harm to the public interest, draft legislative acts shall also be subject to adoption before the expiry of the deadline [of 30 days for public debate]”. Government Emergency Ordinance 16/2022 amended the content of Article 7 para 13 of law 53/2003.

Prior to the amendment in 2022, Law no. 52/2003 on transparency in decision-making in public administration contained, in article 7, paragraph 13, an ambiguous provision, which would have established a more accelerated derogation procedure for the debate of draft legislation if these drafts concerned special situations needing urgent and immediate regulation. Before the 2022 amendment, the ambiguous provision mentioned above was interpreted by the vast majority of courts in case law to mean that in exceptional situations, which require immediate regulation, the draft regulatory act covering such a situation does not need to be submitted for public debate and can be adopted immediately.

Criticisms have been made in the public space about the content of the amending legal text, in the sense that the reference to “urgent situations” and “exceptional circumstances” is too broad and therefore ambiguous, leading to abuses in practice stemming from the issuer of the legal act deeming any situation, even ordinary, normal, as urgent, or exceptional. Also, that the text would allow a draft legislative act to be adopted in urgent/exceptional situations without being subject to public debate, even for a very short period (e.g. one day, 3 days, etc.).

The Ombudsman referred the matter to the Constitutional Court in March 2022 regarding the ambiguities of this amendment. In essence, the criticisms of the Ombudsman relate to:

-GEO 16/2022 was issued unconstitutionally because its adoption does not aim to regulate an

urgent, exceptional situation. In other words, the amendment of Article 7, paragraph 13 of Law 52/2003 should have been made through law, not through an emergency ordinance;

-GEO 16/1992 was issued without the prior opinion of the Economic and Social Council (ESC);

- the reference in the legal text to emergency situations and exceptional circumstances is unclear and unpredictable as it is impossible to determine the legal basis, no objective criteria are provided, and there is no competent body to determine whether a situation is an emergency or an exceptional situation. Thus, public authorities are given the opportunity to arbitrarily and erroneously interpret the urgency or exceptional nature of a situation, thus committing an abuse of power by avoiding the legal regulations on decision-making.

The Romanian Constitutional Court has not yet adopted a decision. The case was registered on 24 March 2022, and the report is being drafted (by the judge-rapporteur appointed by the President of the RCC) with no date yet set for the proceedings.

### ***Regime for constitutional review of laws***

In 2022, the flawed nature of the process for preparing and enacting laws was once more emphasized by the Constitutional Court and further deepened citizens’ distrust in the legality and seriousness of the measures taken by the authorities. For example, in February 2022, the Constitutional Court declared unconstitutional the government Ordinance

192/2020 (popularly known as the law imposing the mandatory requirement to wear a mask in public spaces during the pandemic). The government Ordinance produced effects during November 2020 and March 2022, and it was declared unconstitutional for failing to comply with the Governmental Rules and procedures for adopting normative acts, namely, for not having the opinion of the Legislative Council when it was adopted. Considering that the general population had mixed beliefs about the restrictions imposed by the government to prevent the spread of Covid-19, the decision of the Constitutional Court would have created a state of chaos if this decision had taken during the pandemic restrictions. Despite civil society requests, no public servant has been held accountable for not fulfilling their responsibilities and breaching laws and regulations when adopting normative acts.

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

### **Regulatory framework**

**Access to justice, including rules on legal standing, capacity to represent collective interest at court, and access to legal aid**

In November 2022, a group of parliamentarians from the majority coalition initiated a legislative proposal aimed at amending Government Ordinance 26/2000 concerning the functioning of associations and foundations.

According to the draft law, the legislative proposal aims to eliminate blockages caused by litigations initiated by some NGOs which delay major infrastructure works (highways, hydropower plants). Environmental NGOs are targeted and being accused of committing “*serious damage to the public interest by depriving a modern and developed society of essential services*”. The initiating senators argue that an administrative act on the basis of which a major infrastructure work is carried out, worth billions of euros, or a real estate project, can be challenged in court with the payment of a very small fee (appr. 4 euros for the action of suspension and appr. 10 euros for the cancellation action). And the administrative act can be suspended, causing great damages, even if in the end it is annulled but declared legal.

The motivation also invokes the provisions of article 11 of EC Regulation no. 1367/2006 of the European Parliament and the Council of 6 September 2006. Namely, that in order for an NGO to initiate litigation on environmental issues with a community institution/body, it must have declared as it’s the main objective to the goal to promote environmental protection within the framework of environmental law. Also, the NGO must be established for more than 2 years and actively pursue the stated main objective.

The draft law introduces several conditions for the initiation by an NGO of a legal action with the object of legality control over an administrative act, for example:

- the introduction of a guarantee to the amount of 1% of the value of the

investment - not exceeding 50,000 RON when filing such an action in court (the percentage of 1% is calculated in relation to the value of the investment)

- the challenged administrative act must be related to the object of activity and the mission of the association in accordance with the constitutive act and its statute
- the challenged administrative act must be issued after the establishment of the association, etc.

There are other criteria stipulated by the draft law which also include a transitory provision, in the sense that these new conditions are to be applied for the pending litigations, and NGOs must prove the fulfilment of these new conditions in each case before the court within 45 days from the entry into force of the law.

The Legislative Council favourably approved the legislative proposal, but formulated several observations, some of them regarding the constitutionality of the proposal. The Council appreciates that the introduction into the law of these additional conditions for NGOs in order to challenge administrative acts violates the right of free access to justice, provided for in the Constitution and in the ECHR. The Council also mentions that the decision 8/2020 of the High Court of Cassation and Justice is also infringed (according to it, an NGO can challenge an administrative act even

if the NGO does not have a legitimate private interest, but nonetheless there is a direct link between the challenged administrative act and the direct objectives of the NGO).

Despite being criticized by many civil society organizations, there was no reaction from the MPs and almost no press coverage of this subject. It is to be expected that if the draft law will be adopted by the Parliament and becomes law, it will be challenged before the Constitutional Court (most likely by the Ombudsman).

### ***Online civic space***

#### ***Law enforcement capacity to investigate online threats and attacks***

The capabilities of the Romanian police to investigate cybercrime are low. This information comes from a 2022 media investigation,<sup>6</sup> but also from statements obtained by APADOR-CH in various informal discussions with representatives of the system.

According to the cited investigation, the General Inspectorate of the Romanian Police (IGPR), which has been entrusted with this task since 2019, has a small number of police officers (63 officers nationwide) who have to deal with a disproportionately high number of cybercrime cases. The situation has worsened in the past three years, when the number of complaints has exploded, as shown by police

6 <https://www.g4media.ro/motivarea-judecatorului-care-a-anulat-sesizarile-de-plagiat-din-doctoratul-premierului-ciuca-analiza-emiliei-sercan-este-o-simpla-apreciere-general-a-in-abstract-partiala-iesita-din-contex.html>



statistics: out of a total of over 34,000 complaints nationwide, 11,817 have been resolved, most of which have been closed or prosecutions dropped for lack of evidence. In only 412 cases did the police complete the prosecution and refer the case to the public prosecutor's office.

The number of unresolved cases increased from 5,057 to 21,245 between March 2020 and March 2022, marking a 320% increase. The police officers interviewed by the author of the investigation claim that they are neither adequately trained for this responsibility, nor do they have the necessary equipment, as they are forced to conduct investigations either from their personal mobile phones or from a work laptop that is not equipped with the appropriate software.

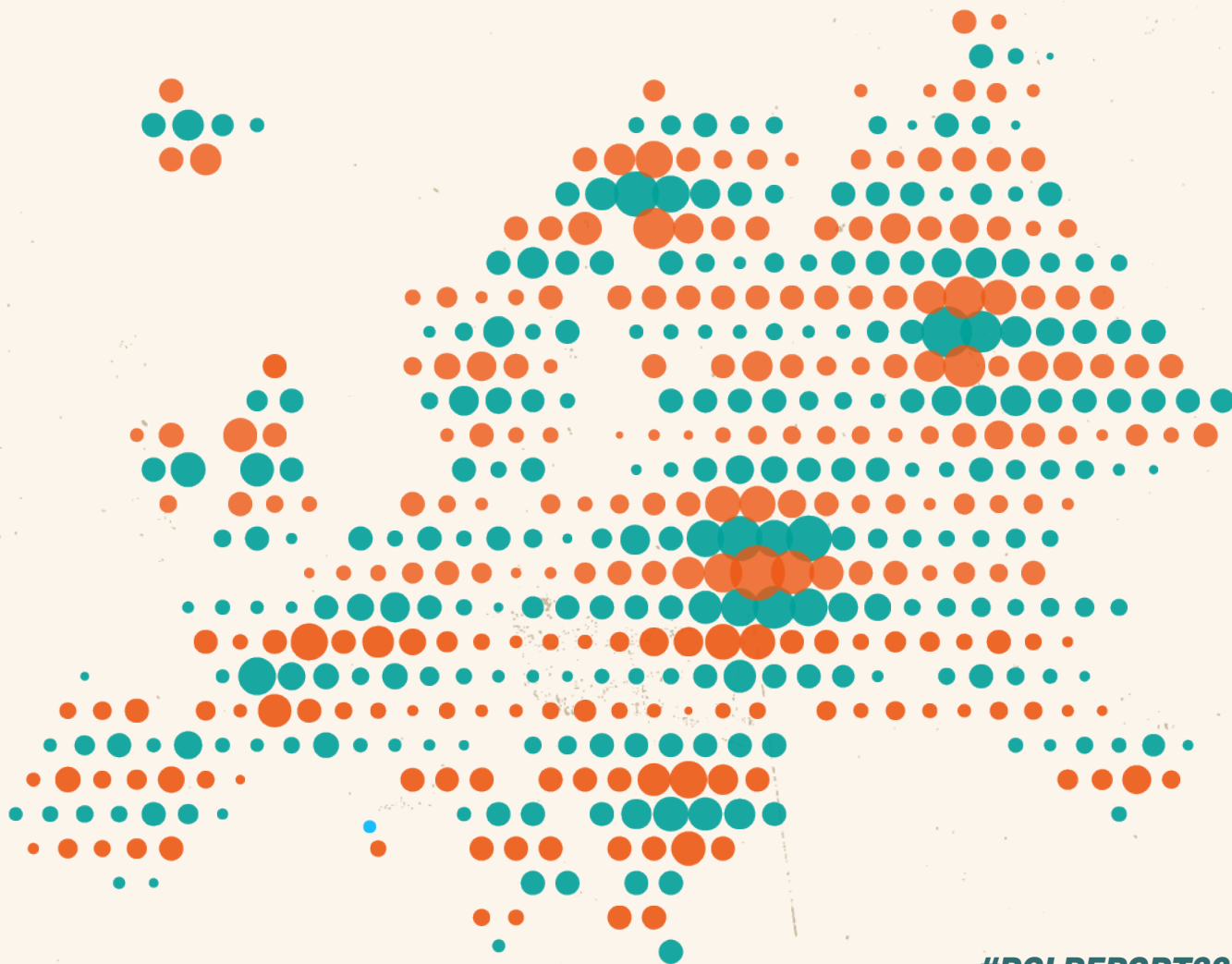
In 2022, under the pressure of internal reports, the management of the IGPR set up cybercrime units at district level, but only on a formal basis, without increasing the number of staff and without equipping them with the necessary technology.

**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**SLOVAKIA**



**#ROLREPORT2023**

# SLOVAKIA

## About the authors



**VIA IURIS** is a non-partisan, not-for-profit organisation, which has been officially registered in Slovakia as a civic association since 1993. It is a national organisation whose head office is in Banská Bystrica in Central Slovakia, although it has a regional office in the capital city Bratislava. Our mission is to use the law as an instrument of justice, to bring systematic solutions to rule of law issues, and to promote the equal application of law for all.

## Key concerns

The biggest challenges facing the judiciary in 2022 were the unclear and unpredictable application of Section 363 of the Criminal Procedure Code by the Prosecutor General. This resulted in major setbacks in serious corruption cases in Slovakia. The Prosecutor General did not clearly communicate important issues and showed no willingness to debate them, which undermined public trust in the prosecution and the judiciary as a whole.

No legislation on restricting the Prosecutor General's power to annul prosecutorial decisions (Section 363 of the Criminal Procedure

Code) reached a second reading, and the Prosecutor General refused to enter debate with other stakeholders. No changes that would guarantee the independence of members of the Judicial Council were reached. Concerning the crime of "abuse of law", the Ministry of Justice proposed an amendment to the legislation, although this is yet to be approved.

Investigations and trials in major corruption cases went ahead, but were slowed down by dubious procedural obstructions. These included the application of the Section 363 of the Criminal Procedure Code, filing of inadmissible motions, motions of the Constitutional Court without clear merits and objections of bias. A number of criminal charges against high public figures were dropped and no rules on preventing corruption or conflicts of interest, or to improve the transparency of tendering procedures, asset declaration and lobbying activities were adopted.

The adoption of the new Media Acts is positive, although the practical application of some provisions remains questionable. The fact that Radio and Television of Slovakia (RTVS) receives the majority of its funding from the state budget means it is not independent, which poses a serious threat.

No changes were made to improve the physical safety and working environment of journalists, and in fact this issue has not even been

the subject of public debate. Amendments to the Criminal Code may affect rules on defamation, but this has not been approved yet and its future is unclear, considering that the government resigned in December 2022. The legislative environment regulating public service media has worsened with the approval of a law annulling concession fees and introducing contributions from the state budget as the main income of RTVS. However, the Slovak president vetoed the law towards the end of the year and it is unclear whether parliament will approve it again.

No previous governments have managed to circumvent the rules on legislative procedure to the extent that the current government has. Approving laws in fast-track procedures has ceased to be an exception to the rule. The government is now submitting draft laws through coalition MPs in order to avoid standard legislative procedures, in which all relevant stakeholders (including the public) can submit their comments and amendments. The legislative procedure is even being circumvented in the National Council, by introducing parliamentary amendments in the second reading, which changes the basis of the original proposal. Moreover, even when the public has not been fully closed out of the legislative procedure,

their participation has been purely a formality in many cases.

The current government has treated civil society as an irrelevance, and is trying to minimise or circumvent its participation in public processes to formal rights only. The public funding of civil society is close to rock bottom.

The entire society was shaken by the brutal murder of two LGBTI+ people on 13 October 2022. Despite this, no legislation providing at least minimal rights to the LGBTI+ community has been enacted. On the contrary, society is becoming more polarised and attacks like this are becoming commonplace.<sup>1</sup> In addition, many politicians, including from the ex-governing coalition,<sup>2</sup> are adding fuel to the fire, using hate speech in order to gain political popularity. There have been various forms of public action across Slovakia, such as petitions,<sup>3</sup> marches, public festivals and educational events, but these have not led to change. On the contrary, many LGBTI+ people are more fearful for their safety and lives than ever before.

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1 See: [d-v-skalici/?ref=list](#).

2 As the snap elections are approaching, the former prime minister and minister of finances is now leading a campaign against trans-gender people. See: <https://domov.sme.sk/c/23106243/matovic-statusy-facebook-lgbt-trans.html>.

3 E. g. petition addressed to the government and the National Council with more than 32,000 signatures – available at: <https://www.mojapeticia.sk/campaign/ide-nam-o-zivot--vyzva-vlade-a-parlamentu/62f1a870-3cd3-460d-8d5b-118ae3781f23>

## State of play

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

### Legend (versus 2022)

- ↓ Regression
- No progress
- ↑ Progress

- Further clarification of the competence and activities of the Judicial Council.

## Judicial independence

### Appointment and selection of judges and prosecutors

Announcing the selection process for the position of judge is the responsibility of the Ministry of Justice, and the process is regulated in Ministry of Justice Decree No. 160/2017 Coll. which establishes the details of the selection procedure.<sup>4</sup> The selection procedure consists of two parts. The first part is written, with a case study, a translation from a foreign language, the preparation of a court decision and a psychological assessment. The second part is oral, during which a candidate answers questions from the selection committee. The necessity of the professional knowledge part of the procedure is questionable, as candidates undergo several proficiency tests before they reach this point. Furthermore, the evaluation criteria of the written and oral parts of the selection procedure are often unclear and there are ambiguities concerning the documents and materials required from applicants.

Judges are then appointed by the president of the Slovak Republic, on the basis of a recommendation from the Judicial Council of the Slovak Republic, which assesses whether a

## Justice system ↓

### Key recommendations

- Revision of Section 363 of Act No. 301/2005 Coll. Criminal Procedure Code and consideration of comprehensive reform of the prosecutor's office (including regulation of internal relations, competences, external and internal independence, the relationship between the General Prosecutor's Office and the Special Prosecutor's Office, training and appointment of future prosecutors).
- Full and timely implementation of the new judicial map.

<sup>4</sup> Available in Slovak at: <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2017/160/20170925>

candidate meets the prerequisites of “judicial qualification”.

The recommendations of the Judicial Council are provided after the candidates are interviewed in public hearings. From the beginning of the pandemic until spring 2022 these were livestreamed, although they are now happening in person again. The judicial council still publishes audio recordings of these meetings on its website within 24 hours of a meeting. Even though the hearing process is relatively transparent, besides a constitutional complaint, there is no ordinary remedy against the resolution of the Judicial Council, or against the decision of the president to appoint a candidate.

Moreover, based on our monitoring of the Judicial Council’s activities, it is clear that its members have divergent perceptions of the content and criteria for evaluating judicial competence, including the factual content of the legal terms as “moral standard”, “integrity of a judge”, “business, property or financial relations with persons from the environment of organised crime”. In addition, some members have also questioned the need for psychological assessments during the selection procedure.

The public has very little say in the selection procedure for prosecutors. There are still lots of applicants for the position of trainee prosecutor since the completion of preparatory practice and passing the bar exam is often seen as purely a formality.<sup>5</sup> Also, even though the official length of the preparatory practice for trainee prosecutors is three years, a prosecutor general can grant exceptions and shorten this to as little as 18 months, and in fact these exceptions are usually granted. Towards the end of 2022, an amendment<sup>6</sup> to the Act on prosecutors<sup>7</sup> was approved, which equalised the conditions when applying for prosecutor at the Special Prosecutor’s Office and changed the recognition of the professional practice trainee prosecutors have obtained in other legal positions.

Minutes of the selection procedures for the prosecutor trainees provide rather general information and the selection procedure itself is not public. The selection committee consists only of prosecutors. Even though the judicial examination after finishing the professional training is public, it only verifies the professional prerequisites and it does not include any form of psychological assessment.

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5 “If a legal trainee at the prosecutor’s office completed a preparatory practice and then successfully passed the bar exam, the Prosecutor General will appoint him to the position of prosecutor from the first day of the month following the month in which he successfully passed the professional bar exam.” (Article 248 of Act No. 154/2001 Coll. on prosecutors and legal assistants of the prosecutor’s office).

6 Act No. 11/2023 Coll. which amends Act No. 154/2001 Coll. on prosecutors and legal assistants of the prosecutor’s office, as amended.

7 Act No. 154/2001 Coll. on prosecutors and legal assistants of the prosecutor’s office, as amended.

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***Judges cannot be removed from post or forced to transfer***

Judges' requests for transfer are discussed at public sessions of the Judicial Council, so the course of the discussion is captured not only in the minutes but also on an audio recording. The transfer of a judge is a subject of the resolution of the members of the Judicial Council, ruling by simple majority of votes.

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

In 2022, the Judicial Council elected its vice-chairman<sup>8</sup> and five new members<sup>9</sup> (members of the Judicial Council elected by judges), thus reaching the constitutionally established number. Public sessions of the Judicial Council were still quite transparent, even though the Judicial Council stopped livestreaming public sessions after pandemic restrictions were eased. The audio recordings (with accompanying documentation) have remained however, and are published within 24 hours of the session. Closed meetings are more problematic, as they do not have clear codes of conduct.

As open questions on the constitutional status of the Judicial Council remain unclear, the questions of its independence, and the scope of its competence and activities also remain open. For example, some of its activities appear to be rather formal and are dealt with only to a limited extent (some mandatory documents are merely 'noted', including reports on the results of the courts review and reports on the implementation of appropriations).

The rules on deciding on the preconditions of judicial competence in the appointment of judges are also unclear, as is the scope of the competence of supervising judges' term in office, specifically whether the supervision should be exercised *ex officio*. The rules on the examination of judges' declarations of assets are also not totally clear.

Further discussion is required on how members of the Judicial Council communicate, given the increasing presence of blogs, social media posts, open letters, and media articles that contain messages addressed to various constitutional officials (e. g. the president of the Slovak Republic,<sup>10</sup> the former ministry of justice<sup>11</sup> and the chairman of the Judicial

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8 Press release available at: <https://www.sudnarada.gov.sk/7894-sk/sudna-rada-si-zvolila-svojho-podpredsedu/?cs-rt=171734673461512747>.

9 Press release available at: <https://www.sudnarada.gov.sk/sudna-rada-slovenskej-republiky-pozna-svojich-piatich-novych-clenov/>.

10 See: <https://ereport.sk/otvorenemu-listu-sudcu-stevika-prezidentke-sa-bude-venovat-sudna-rada-mal-pravo-sa-vyjadrit/>.

11 The case regarded the refusal to provide information on initiatives for disciplinary proceedings of judges delivered to the Ministry of Justice (within the framework of free access to information), in this case a member of the judicial council also proclaimed filing a lawsuit. See: <https://www.trend.sk/pravo/kolikovej-rozhodnutie-celi-zalobe-pre-netransparentnost>.

Council<sup>12</sup>) and even NGOs.<sup>13</sup> Moreover, some of these personal contributions are reshared directly on the official web page of the Judicial Council.<sup>14</sup>

No changes have been made in relation to ensuring that the process of removing members of the Judicial Council is independent and non-partisan, although no members of the Judicial Council has been dismissed during this period.

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

In December 2015, the Judicial Council approved the new Principles of Judicial Ethics.<sup>15</sup> We monitored the disciplinary proceedings against judges between 2015 and 2021, in order to ascertain how the rules of judicial ethics were being applied. Our findings show that during this period there were only a few references to the Principles of Judicial Ethics, although they gradually increased. Some decisions even contained interpretative provisions

on certain concepts and provided some short explanations on the individual ethics rules.

However, the disciplinary chambers did not use the opportunity to expand on these ethical rules in depth, so the ethical rules remain largely abstract. Moreover, the adoption of the new Principles of Judicial Ethics should have been accompanied by the adoption of the interpretative rules for the Principles, yet these are still missing.

In August 2021, the Supreme Administrative Court of the Slovak Republic took over the agenda of disciplinary justice. There were several shortcomings with this, such as the lack of legislation on disciplinary rules and competence disputes. However, the fluency of disciplinary justice improved in 2022. In January 2022, the Judicial Council elected the presiding judges of the Disciplinary Chambers of the Supreme Administrative Court. The process was quite transparent, with the candidates' hearings being broadcast online. The disciplinary chambers subsequently heard and decided cases quite smoothly in 2022. The publication of disciplinary decisions on the

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- 12 See: <http://www.pravnelisty.sk/clanky/a1105-otvoreny-list-predsedovi-sudnej-rady-sr-reagujuci-na-jeho-nepravdive-vyjadrenia>.
- 13 VIA IURIS became also the centre of questionably assessed facts by one of the members, claiming that our organisation deceived the European Commission with the information provided in our contribution to the 2021 EC Rule of Law Report. This was also taken over by some standard opinion shaping media, unfortunately without any additional context or confronting opinion. See our [article](#) about the topic and the former [blogpost](#) of the member of the Judicial Council.
- 14 See: <https://www.sudnarada.gov.sk/nazory-prispevky-a-vystupenia-v-mediach-cleniek-a-clenov-sudnej-rady-slovenskej-repub-liky/?csrt=4724989383903578693>.
- 15 Available in English at: <https://www.sudnarada.gov.sk/data/files/697.pdf?csrt=4724989383903578693>.



website of the Supreme Administrative Court has also improved.<sup>16</sup>

With regard to the need to ensure that sufficient safeguards are in place and duly observed when subjecting judges to criminal liability for the abuse of law, according to Section 326a of Criminal Code, as recommended in the 2022 Rule of Law Report,<sup>17</sup> no legislation or any other proposals / activities were conducted in 2022 and there was no mention of this in the September 2022 Criminal law recodification either, even though in April 2022 the Ministry of Justice declared its interest in introducing changes.<sup>18</sup>

### ***Independence of the Bar***

The former president of the Slovak Bar Association recently became the minister of justice. Since then, closer cooperation between the Bar and the ministry has been clear, although there is yet to be any sign of a conflict of interest. The Bar still refrains from proactively publishing all its disciplinary decisions. Only selected decisions are available on its website (and in older book compilations). However, the chamber is obliged to make

decisions available upon request, based on the Act on Free Access to Information.<sup>19</sup>

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

Criminal proceedings in several corruption cases, including against judges, prosecutors and attorneys in key positions, proceeded:

- In May 2022 the former special prosecutor Dušan Kováčik (in office 2004-2020) was sentenced by a final and binding judgement for accepting a bribe of EUR 50,000 and for leaking information from the prosecutor's office (the so-called case of "God's mills"). An action has also been filed against him in another case for accepting a bribe for removing two cases from the supervising prosecutor (these proceedings were later terminated because the offence allegedly did not happen. This is known as the Goliath case).
- The procedures of some judges and prosecutors currently in office are also questionable. One of the biggest cases, known as "Purgatory" concerns Dušan Kováčik

16 The database of decisions available at: <https://www.nssud.sk/sk/rozhodovacia-cinnost/rozhodovacia-cinnost-vo-veciach-disciplinarnych/>.

17 European Commission. *2022 Rule of Law Report*. Country Chapter on the rule of law situation in Slovakia. 13 July 2022.

18 See: <https://www.aktuality.sk/clanok/0LfEIrK/podla-riaditelky-via-iuris-je-ohybanie-prava-vyuzivane-ako-nastroj-natlaku/>.

19 Act. No. 211/2000 Coll. Act on Free Access to Information and Amendments of Some Acts (The Freedom of Information Act).

and the former president of the police Tibor Gašpar. The judge hearing the case interrupted the proceedings and submitted a petition to the Constitutional Court, in which he objected to the independence of the special prosecutor's office (even though the special prosecutor's office has exclusive jurisdiction in the matter). His petition asserting prosecutorial bias (lack of impartiality of the prosecution) has already been rejected three times by the general prosecutor. The proceedings are therefore suspended until the matter has been decided by the Constitutional Court.

- The court hearing of probably the biggest case regarding the number of accused judges and attorneys, known as "Storm" and "Windstorm" started in 2022. This is a criminal case against at least 12 current and former judges. Charges against the former president of the Bratislava district court, David Lindtner, were brought for accepting a bribe and interfering with the independence of the courts. The former vice-president of the Supreme Court, Jarmila Urbancová, was indicted for bending the law, bribery and indirect corruption. Disciplinary proceedings were initiated in connection with these cases against several judges too, yet some of them were, in the meantime, terminated due to expiration of the limitation period. This is in part because many disciplinary senates were not functioning fully during 2021 and

2022, due to the transfer of the agenda of disciplinary justice from the Supreme Court to the Supreme Administrative Court.

- In the so-called "Weed II" case, former president of the Regional Court in Žilina, Eva Kyselová, and former judge Mária Urbanová were accused of accepting bribes. Eva Kyselová was eventually acquitted. The case will be decided by the Supreme Court of the Slovak Republic.

- Several attorneys were also subject to criminal proceedings. In the Caiaphas case, attorney Marek Para (acting as the advocate of Marián Kočner) was accused of cooperating with a criminal group and discrediting the supervising prosecutor (the case returned to the pre-trial stage). Attorney Svetozár Chabada, representing the former prime minister Robert Fico, was accused of abusing public office when, as a former prosecutor, he deliberately failed to act in several cases.<sup>20</sup>

### **Other**

Between 20 and 27 June 2022, a representative public opinion survey on the public's perception of the prosecutor's office was conducted on our behalf. The survey was conducted using the f2f method (omnibus) among respondents over 18 years of age. Data collection was conducted by the FOCUS s.r.o. agency in

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20 For more structural information on the biggest Slovak criminal cases – see the overview of the Stop Corruption Foundation: <https://kauzy.sk/> or one of the leading independent media outlet Aktuality yearly overview of Slovak most prominent cases: [https://issuu.com/aktuality.sk/docs/kauzy\\_2022\\_-\\_k09](https://issuu.com/aktuality.sk/docs/kauzy_2022_-_k09).

Slovakia, followed by data analysis by a sociologist using the SPSS statistical program. The key findings are as follows:

- The competence of prosecution:

- Many people have no clear knowledge about the prosecutor's competences. Although more than three quarters of the respondents were able to spontaneously name the basic competences of the prosecutor's office (namely the supervision of an investigation or overseeing compliance with the law), the results were significantly worse when asking for further knowledge about the prosecutor office's work.
- As many as 56% of respondents are wrongly convinced that the prosecutor decides on the guilt / innocence of an accused, while 45% of respondents mistakenly stated that a prosecutor represents people in court proceedings and 37% thought that prosecutors provide people legal advice.
- As little as 2.5% of respondents were able to correctly state all the prosecutor's competencies.

- How prosecutors communicate:

- Respondents mostly wanted prosecutors to publicly explain their decisions in specific cases (65%), to answer

journalists' questions (62%) and to provide information on the progress of the investigation (62%).

- Respondents were least interested in information about the private life of prosecutors; only 8% of people strongly agreed with this type of communication and the majority of respondents thought that prosecutors should not communicate with the public via social media.
- The public is also not interested in prosecutors' comments on the current social and political situation (only 13% of respondents strongly agreed with this type of communication).

- Internal relations:

- As many as 53% of people think that the prosecutor's office is disjointed, which, in our opinion, may be the result of ongoing disputes between the top representatives of the prosecutor's office, who often send messages to each other through the media.

- Only a small proportion of respondents had any direct personal experience with the prosecutor's office. Most of them have formed their opinion about the institution indirectly, primarily based on the decisions of prosecutors as well as on the basis

of communications and the behaviour of high-ranking prosecutors.<sup>21</sup>

## **Quality of justice**

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### ***Digitalisation (e.g. use of digital technology, particularly electronic communication tools, within the justice system and with court users, including resilience of justice systems in COVID-19 pandemic)***

A positive development in e-justice is the amendment to Act No. 513/1991 Coll. Commercial Code, which came into effect on 1 January 2023,<sup>22</sup> according to which it will be possible to establish a company through an electronic memorandum of association (to be published on the website of the Ministry of Justice in both Slovak and English).

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

In April 2022, after almost 16 months parliament finally approved the judicial map. The first version of the new judicial map was submitted into inter-ministerial comment procedure in December 2020, but was later changed significantly. The first proposal was a result of the long-term analysis of the Analytical Centre of the Ministry of Justice and the CEPEJ’s Report on the efficiency and quality of the Slovak judicial system. The approval

of the new judicial map was also a condition for Slovakia drawing funding from the EU Recovery and Resilience Plan. The aim of the map itself is to deepen the specialisation of the general courts, diminish corruption in the judiciary and create new judicial districts in view of the real caseload of the courts.

A necessary part of the change of judicial districts was to close down courts in some cities. However, there was no political consensus for this and it was used as a tool to gain political popularity and led to some public protests. Moreover, several judges disagreed with the reform, through protests, open letters and calls, saying they had not been consulted properly.

The former proposal was then revised several times and discussed, although this had nothing to do with the former analytical basis. The legislative process had several shortcomings:

- Significant changes were incorporated into the draft law at the last minute.
- Extensive amendments proposed by the deputies were not published by the deadline.
- The last changes in the judicial map took place without adequate public discussion and control.

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21 See our full communication about the topic. Available at: <https://viaiuris.sk/aktuality/prokuratura-ma-vysvetlovat-rozhodnutia-a-komunikovat-s-novinarmi-mysli-si-verejnost/>.

22 Available at: <https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=8910>.

With regards to the form of the judicial map itself, according to the previous draft, the number of regional courts was supposed to be reduced from eight to three. In the approved version, the number of regional courts remained the same, with specialisation supposedly being ensured by concentrating the agenda in selected regional courts. Moreover, the regional courts should no longer be in charge of the administrative agenda, which will be taken over by three newly established administrative courts (which complemented the Supreme Administrative court established in August 2021). The number of district courts was reduced from 54 to 36 (in 33 districts), and two municipal (city) courts were established in the two largest cities (Bratislava and Košice), created by the unification of all the district courts in these cities. Each of the municipal courts was supposed to have its own specialisation and agenda. The reform was supposed to take effect on 1 January 2023.

In September 2022, the former Minister of Justice, Mária Kolíková, under whose leadership the reform was prepared, resigned (as a result of the ongoing government crisis) and was replaced by the former chairman of the Slovak Bar Association, Vladimír Karas. Shortly after entering office, he announced

that the effectiveness of the reform would be postponed until 1 June 2023. The only real reason he gave for this was a lack of judges for the new administrative courts,<sup>23</sup> even though the creation of the administrative courts is only a part of the whole reform. The Minister declared that the ministry had previously failed to prepare the implementation of the judicial map and therefore it was under the crisis supervision of the Recovery and Resiliency Plan. However, he said that the future drawdown of payments should not be threatened by the postponement. The elimination of background checks for judges transferring to the new administrative courts also appears problematic.

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

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

The Analytics Centre of the Ministry of Justice conducts a long-term month-to-month analysis of the length of cases. VIA IURIS does not conduct any kind of complex observation of this kind.<sup>24</sup>

23 See: <https://domov.sme.sk/c/23029552/posunutim-ucinnosti-nedojde-podla-karasa-k-zmenam-vo-vecnych-otazkach-sudnej-mapy.html>

24 The web page of the Analytics Centre of the Ministry of Justice: <https://web.ac-mssr.sk/> Yearly overview for the 2020 has not been published yet, monthly analysis are accessible at <https://web.ac-mssr.sk/mesacny-obeh-veci-ks/> for the regional courts, <https://web.ac-mssr.sk/mesacny-obeh-veci-os/> for the district courts, <https://web.ac-mssr.sk/mesacny-obeh-veci-sts/> for the specialised criminal court, <https://web.ac-mssr.sk/mesacny-obeh-veci-or/> for the commercial register.

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

As regards the publicly accessible (web) database of court decisions, the complexity of the published decisions is not guaranteed and the interface is not user friendly, meaning that most legal professionals prefer to pay for access to commercial legal databases.

### **Other**

Probably the biggest challenge to the law in 2022 in Slovakia was the questionable and unpredictable usage of an extraordinary legal remedy belonging exclusively to the Prosecutor General. According to Section 363 of Act No. 301/2005 Coll. the Criminal Procedure Code (hereinafter referred only as the “Criminal Procedure Code”), the Prosecutor General may revoke any valid decision in preliminary proceedings before the case reaches court.

Formerly, the institute was supposed to create the possibility for the Prosecutor General to annul any unlawful decisions made by investigators or prosecutors, or if the proceedings that

preceded it were violated to such a degree that it could influence the decision. Section 363(1) of the Criminal Procedure Code provides the Prosecutor General with too many powers to intervene in pre-trial proceedings. It also creates a space to potentially circumvent the prohibition of so-called negative instructions.<sup>25</sup> This results from the absence of a regulation which would specify which decisions, issued by prosecutors and police officers, of the Section 363 could be applied. Details of the annulment procedure of valid decisions in preliminary proceedings are regulated by the Prosecutor General himself through an order on the procedure of prosecutors in criminal proceedings on extraordinary remedies.<sup>26</sup> Therefore, the Prosecutor General is solely responsible for applying this extraordinary remedy, and for deciding in which cases to do so. The order in question contains a demonstrative list of decisions that can be applied under Section 363. The most problematic is an annulment of an indictment order, which was added to the list only at a later stage.<sup>27</sup> The Constitutional Court expressed its concerns about the application of this extraordinary remedy in connection to

25 Note: The application of this institute in preliminary proceedings is excluded in case of a valid decision issued by a judge for preliminary proceedings.

26 Order of the Attorney General on the procedure of prosecutors in criminal proceedings on extraordinary remedies (IV/1 Spr 661/22/1000) – available at: <https://www.genpro.gov.sk/legislativa/zbierka-sluzobnych-predpisov-generalneho-prokuratora-308f.html?a=download&id=1920>.

27 Order no. 3/2012 Order of the Prosecutor General of the Slovak Republic dated 29 February 2012, amending the order of the Prosecutor General of the Slovak Republic, Lt. no. 4/2006 of 31 January 2006 on the procedure of prosecutors in criminal proceedings on extraordinary remedies – available at: <https://www.genpro.gov.sk/legislativa/zbierka-sluzobnych-predpisov-generalneho-prokuratora-308f.html?r=2012>.

procedural decisions.<sup>28,29</sup> Nevertheless, Section 363 of the Criminal Procedure Code was used in several criminal cases, with high public interest, including in the criminal proceedings involving the former Prime Minister Robert Fico and former Minister of the Interior Robert Kaliňák (both SMER-SD party) in November 2022 (the so-called Twilight case), the governor of the National Bank of Slovakia and ex-minister of finances Peter Kažimír (SMER-SD party) and the influencer Zuzana Plačková.

The main issue is that the current application of Section 363 is not transparent. The Prosecutor General, however, refuses to debate more transparent legislation, even after VIA IURIS, together with the Stop Corruption Foundation, submitted a petition with 24,780 signatures<sup>30</sup> and led several professional debates with other high legal

representatives.<sup>31</sup> In 2021, he also refused to communicate with journalists on a number of occasions.<sup>32</sup> Yet, rather than explaining his decisions, he recently published a statistic suggesting that the number of cases in which Section 363 had been applied was lower than in previous years, although this analysis lacked any qualitative evaluation of the cases in question. Paradoxically, Maroš Žilinka had the opposite attitude during the hearing for the post of General Prosecutor, during which he stated that the use of the Section 363 should be re-evaluated.<sup>33</sup>

Despite the fact that in the government's 2021-2024<sup>34</sup> programme stated (translated from Slovak) that "*The Government of the Slovak Republic will consistently insist on observing the prohibition of negative instructions and, among other things, in this context will examine the narrowing of the legal regulation of § 363 of the*

28 Resolution of the Constitutional Court of the Slovak Republic, II. ÚS 494/2014 of 22 August 2014).

29 The decision was issued back then when Section 363 could be used only in case of procedural decision, however, the Constitutional Court cites the decision up until today.

30 Petition available at: <https://www.mojapeticia.sk/campaign/vyzva-na-upravu-ss363-trestneho-poriadku/f6df5411-913b-49cf-855c-34fa396be-e4c>

31 The audio-visual recording of the discussion available at: <https://www.facebook.com/events/1128733104716053>.

32 e.g., in September 2021 he allowed the entry of only selected media – available at: <https://www.aktuality.sk/clanok/bln9kyq/zilinku-sa-chcu-na-medialnom-vybore-pytat-na-selekciu-novinarov/> or answers the questions of only selected media – available at: <https://www.aktuality.sk/clanok/bln9kyq/zilinku-sa-chcu-na-medialnom-vybore-pytat-na-selekciu-novinarov/>.

33 Translated from Slovak language: "It is needed to deal with it, and it is also in the program statement of the government, the authorization of the general prosecutor to annul valid decisions in preliminary proceedings, since this seems as a problem for all of us, especially at the Special Prosecutor Office lately..." – video recording of Maroš Žilinka's hearing for the post of general prosecutor available at: <https://www.youtube.com/watch?v=dc4b-bu3nlbU>

34 Available at: <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=494677>.

*Criminal Code so that it corresponds to its original meaning*”, none of the three legislative parliamentary initiatives passed to a second reading.<sup>35</sup> In addition, in September 2022, former minister Mária Kolíková submitted a recodification of Act No. 300/2005 Coll. The Criminal Code<sup>36</sup> and a recodification of the Criminal Procedure Code<sup>37</sup> (hereinafter referred to as the “September 2022 criminal law recodification”). The proposals were submitted shortly after she handed in her resignation<sup>38</sup> due to the Freedom and Solidarity party leaving the government coalition. The Criminal Procedure Code also contained the changes on Section 363, and the proposals can be seen as a positive change.<sup>39</sup> A relatively long period of time was granted for commenting on the regulations in the inter-ministerial comment procedure (until the end of November 2022). However, in December, a vote of no-confidence was passed against the

government, which is a lame duck, meaning that legislative progress is unlikely.

In 2022, the miscommunications between the Prosecutor General and the Special Prosecutor continued via traditional media and social media.

In September 2022, the Russian embassy spread false information regarding the alleged desecration of graves in Lodomirová, near Svidník, by the mayor of the municipality. Even after this was debunked by the police and historians, the Prosecutor General insisted that the case be investigated and foreign interests be protected.<sup>40</sup> However, the prosecutor of the Svidník District annulled the decision of the police investigator, arguing that no crime had been committed at the cemetery and ordered the investigations to proceed.

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35 For information on the application of Section 363 of Act No. 301/2005 Coll. the Criminal Procedure Code. See our legal analysis from 2019: <https://viaiuris.sk/wp-content/uploads/2021/09/363-VIA-IURIS.pdf>.

36 [Legislative procedure no.: LP/2022/511](#).

37 [Legislative procedure no.: LP/2022/513](#)

38 See: <https://dennikn.sk/minuta/2997102/>.

39 The illegality of the decision would need to reach a qualified level – infringement of the law in essential circumstances or existence of essential defects in the procedure preceding that decision. Moreover, a Prosecutor General would not be able to annul an order of indictment already decided by the court. The proposal also reduced the time period for filing a motion from three months to 10 working days since the decision became final and narrowed the range of persons entitled to file a motion. In addition, those entitled persons would be entitled to file it only after they exercised all the possible remedies or if the superior authority has reversed the first instance decision and ruled against them without their presence.

40 For more information see the official statement of the Police of the Slovak Republic on its [Facebook page](#).



Shortly before the start of the Russia-Ukraine war, Maroš Žilinka also attended the celebrations of the anniversary of the Russian Prosecutor General's Office<sup>4142</sup> where he signed the treaty on the Cooperation program between the General Prosecutor's Office of the Slovak Republic and the General Prosecutor's Office of the Russian Federation for 2022.<sup>4344</sup>

After the Russian invasion of Ukraine in February, when confronted about this, he only declared that the agreement would not be implemented<sup>45</sup> (even though Russia listed Slovakia as an "unfriendly country" on 8 March 2022<sup>46</sup>). Similarly, questions were raised regarding Žilinka's communication on Facebook, as it was unclear whether the profile used was the official page of the Prosecutor General or his private page, as he had posted private pictures and statements unrelated

to his role.<sup>47</sup> Regardless,<sup>48</sup> towards the end of December 2022 he published an order according to which any further communication by the Prosecutor's Office through social networks would be subject to approval by the General Prosecutor's Office.

## **Anti-corruption framework** 🟡

### Key recommendations

- Conducting a transparent investigation into and closing major Slovak corruption cases.

41 For more information, see e. g.: <https://domov.sme.sk/c/22815369/zilinka-sa-chysta-na-oslavy-do-ruska-seligahovyzyva-aby-tam-nesiel.html>.

42 Followed by several public messages between the Prosecutor General and other public figures, e. g. former minister of foreign affairs – the statement available at: <https://www.topky.sk/cl/10/2247411/Korcok-o-Zilinkovej-ceste-do-Ruska-nevedel--Dam-mu-cislo--nech-sa-poradi--TVR-DA-reakcia-sefa-GP>, The reaction of Maroš Žilinka available at: <https://www.facebook.com/104581384898700/photos/a.110190917671080/323832962973540/?type=3>.

43 For more information see: <https://domov.sme.sk/c/22820803/zilinka-v-moskve-podpisal-program-spoluprace-s-generalnou-prokuraturou-ruska.html>.

44 Note, after the start of the Russian invasion on Ukraine territory, Žilinka announced that the General Prosecutor's Office of the Slovak Republic will not fulfil the program in question – see Žilinka's statement on [his Facebook profile](#).

45 See [Maroš Žilinka's statement](#).

46 See: <https://www.euractiv.com/section/global-europe/news/russia-adopts-list-of-enemy-countries-to-which-it-will-pay-its-debts-in-rubles/>.

47 His Facebook profile is available at: <https://www.facebook.com/profile.php?id=100064021966129>.

48 [Order of the Prosecutor General of the Slovak Republic, No. 15/2022](#) of 23 December 2022 on the method of informing the public about the activities of the prosecutor's office through mass media, website and social networks (I/1 Spr 62/22/1000).

- Improving the transparency of public procurement procedures and encouraging active public participation.
- Making use of soft-law mechanisms to prevent corruption and building a corruption free transparent culture, even at the highest level. Ensuring more transparent selection procedures for the appointment of high state officials.

## **Framework for preventing corruption**

### ***General transparency in public decision-making (including public access to information such as lobbying, asset disclosure rules and transparency of political party financing)***

In November 2022, the amendment to Act No. 211 / 2000 Coll. on Free Access to Information, was approved. However, the process was lengthy and chaotic (it started in August 2021 and in a wider sense in 2017). During this time, VIA IURIS took part in several working groups. The only result of the lengthy negotiations from winter 2021-2022 was the approval of the amendments on the extent of the implementation of the Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast). On 6 April 2022, the European Commission issued a reasoned opinion for not implementing the stated EU legislation (INFR(2021)0512). In response, the Ministry

of Justice stated that the amendment would be approved only in the scope of the Directive, in a fast-track legislative procedure, not giving any extra time for negotiations on the rest of the proposal (even though the interdepartmental comment procedure had been finished and the proposal was heading to the National Council). In August 2022, the discussions about the rest of the proposal were renewed. VIA IURIS, Transparency International Slovakia and Fair Play Alliance submitted comments in the interdepartmental comment procedure. At the same time, two MPs from the government coalition submitted their own amendment proposal, which was later approved by the National Council.

Even though the public was able to submit its comments, the proceedings differed from the standard legislative procedure, when comments to the government proposals are officially evaluated by the state authorities.

The approved amendments brought some long-awaited improvements, but also some set-backs. Among the positive contributions are:

- An obligation for majority state-owned entities to provide information (the former legislation imposed the obligation to provide information only to legal entities established by public entities, regardless of their ownership share).
- An explicit establishment of the right to further disseminate information.
- A more precise definition of information.

- Where a reason to restrict access to information exists, the applicant must be provided with all the information, to which the restriction does not apply.
- A more precise regulation of remedies.
- Broader obligation to publish documents accompanying the obligatory published contracts.
- Obligatory publication of annexes and subcontracts following the obligatory published contracts.
- Publication of obligatory published contracts for a longer period of time.

One set-back is the restriction of access to information in the case of possible damage to economic competitiveness, or exemption from further dissemination of information in the event that it contains the personal data of a third party. However, whether the law is enforceable in practice remains a key problem, with long-term lawsuits often resulting in such cases.

### ***Rules on preventing conflicts of interests in the public sector***

The legislation on conflict of interests in Slovakia is minimal and is complemented by soft law in many cases. The only legal sources are Constitutional Act No. 357/2004

Coll. on the Protection of Public Interest in the Performance of the Functions of Public Officials and Act No. 55/2017 Coll. on Civil Service and on amendments to certain laws. By law, they are complemented by Decree of the Government Office of the Slovak Republic No. 400/2019 Coll. of 21 November 2019, issuing the Civil Servant's Code of Ethics and the Commentary on the Civil Servant's Code of Ethics.<sup>49</sup>

In March 2022, following a long-standing criticism and an open letter from NGOs criticising the lack of transparency in the selection procedures for high level state officials, the Prime Minister Eduard Heger created a working group consisting of state and NGO representatives. As part of this working group, VIA IURIS submitted an analysis and proposals to the Government Office in August 2022, although since then the matter has not moved forward.

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

A draft amendment to Act No. 54/2019 Coll. on the protection of whistle-blowers notifying activities undermining the functioning of society and the amendment of certain other acts has been under legislative review for more than a year. The draft amendment was mainly an implementation of Directive (EU) 2019/1937 of the European Parliament and

49 Available at: <https://radaprestatnuszbu.vlada.gov.sk/eticky-kodex-statneho-zamestnanca-publikovany-v-zbi-erke-zakonov/>.

of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, but it was also supposed to clarify and supplement some provisions in view of the issues arising from the practical application of the law. The proposal was submitted to the interdepartmental comment procedure by the Government Office of the Slovak Republic in November 2021<sup>50</sup> and approved by the government on 25 May.<sup>51</sup> However, it has not yet reached the first reading at the National Council.<sup>52</sup>

### ***Any other relevant measures to prevent corruption in the public and private sector***

In the 2021 Rule of Law Report, the European Commission recommended introducing proposals to strengthen the legislation on asset declarations. In 2021, a coalition MP and the Head of the Constitutional Law Committee, Milan Vetrák, set up a working group on this matter, inviting several civil society representatives. In September 2021, the working group prepared a new detailed form, which was supposed to be discussed at the government session, although there are as yet no developments on the issue.

As regards the September 2022 Criminal law recodification, the changes that were

introduced were rather minimal. They included introducing the offence of “passive corruption” (requesting bribes) and a more precise definition of electoral corruption (Section 336a of the Criminal Code), including an increase in the penalties for this offence.

Two amendments to the Act on Public Procurement were approved in 2022. Act No. 64/2022 Coll.<sup>53</sup> introduced an exemption from the obligation of a public tender in case of feed purchase for breeding and rehabilitation stations and 50% forfeiture of the bail if the party’s objections are upheld only partly. Act No. 86/2022 Z. z. Coll.<sup>54</sup> introduced a further restriction on participation in public procurement from third countries, which was set out in a Ministry regulation (in connection to the Ukraine invasion).

### ***Investigation and prosecution of corruption***

#### ***The effectiveness of investigation and the application of sanctions for corruption (including for legal persons and high level corruption cases) and their transparency***

A proposal to amend Act No. 300/2005 Coll. the Criminal Code<sup>55</sup> submitted by MP Tomáš Taraba (a former MP of the extremist ĽSNS

50 Legislative procedure no. LP/2021/637. Available at: <https://www.slov-lex.sk/legislativne-procesy/SK/LP/2021/637>

51 <https://lrv.rokovania.sk/200962022-/?csrt=228523497987649315>.

52 <https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=9003>.

53 Act No. 64/2022 Coll. amending Act no. 343/2015 Coll. on Public Procurement

54 Act No. 86/2022 Z. z. Coll. Act amending Act No. 343/2015 Coll. on Public Procurement

55 See: <https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=8933>.

party) is currently before parliament. The amendment proposes a significant reduction in prison sentences for economic criminality, narrows the scope for imposing financial penalties, and shortens the statute of limitations for the most serious crimes. The proposal has seen support from the current Head of Government Boris Kollár, who brought discussions about the proposal up during Coalition Council sessions.<sup>56</sup>

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

### **Key recommendations**

- To open discussion about legal protection of journalists, providing safeguards not only for their physical safety but also the protection of their honour and dignity.
- To ensure effective and fully working mechanisms to prevent the dissemination of false content or hate speech on social networks.

- To prevent Radio and Television of Slovakia (RTVS) becoming fully dependent on the state budget without proper safeguards ensuring editorial independence.

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

#### ***Independence and enforcement powers of media and telecommunication authorities and bodies***

In June 2022, new Media Acts<sup>57</sup> were approved, which came into effect in August. This led to the replacement of the Council for Broadcasting and Retransmission by the Council for Media Services. The structure of the bodies de facto remained the same (until November 2022), but the scope of supervision and the portfolio of competences widened. In addition to controlling television and radio broadcasters, the new regulatory authority is responsible for supervising the activities of both video sharing platforms and on-demand audiovisual providers. In cases defined by law, such as cases of child pornography, extremist material or incitement to terrorist offences, the

56 Interview with Boris Kollár about the topic available at: [https://dennikn.sk/3108752/boris-kollar-mame-drakonicke-tresty-19-rokov-je-vela-pre-kohokolvek-aj-pre-kocnera/?ref=inm&\\_ga=2.193443886.2058047771.1673105954-464326563.1633617064](https://dennikn.sk/3108752/boris-kollar-mame-drakonicke-tresty-19-rokov-je-vela-pre-kohokolvek-aj-pre-kocnera/?ref=inm&_ga=2.193443886.2058047771.1673105954-464326563.1633617064).

57 Act No. 264/2022 Coll. on Media Services and on Amendments to Certain Laws (Act on Media Services) and Act. No. 265/2022 Coll. on Publishers of Publications and on the Register in the Field of Media and Audiovisual and on Amendments to Certain Laws (Publications Act) – replacing Act No. 167/2008 Coll. on periodical press and agency reporting and on the amendment of and amendments to certain acts (Press Act) and Act No. 212/1997 Coll. on compulsory copies of periodical publications, non-periodical publications and reproductions of audiovisual works.

Council will be able to apply mechanisms to prevent the dissemination of such content on platforms.

The authority will also have the competency to assess the property connection and personal connection of the content service provider in order to examine whether there is an obvious risk of misusing the media service for illegal purposes.

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

Questions were raised after the departure of Ľuboš Kuklíš from the position of director of the Council for Media Services, after 16 years as director of the media regulator. The reason for this departure was allegedly divergent opinions between the former director and chairwoman and some members of the Council.

### ***Pluralism and concentration***

#### ***Levels of market concentration***

In 2022 there were signs of greater regional market integration in the commercial TV sector. The TV channel Markíza launched a joint streaming service with Czech TV Nova. Both belong to the Czech-owned Central European Media Enterprises. The platform, called Voyo, had 300,000 subscribers by January 2022. In the same month, local multimillionaire Ivan Kmotřík sold rolling news channel TA3 to the

owner of the Czech news website Parlamentní listy (Parliament papers).

In 2021, the financial group Penta sold its stake in Petit Press, which publishes the daily newspaper and leading online site SME. Penta's entry had provoked a staff walk-out in 2014, when the former editor-in-chief and around 30 journalists left to found Denník N. SME marked Penta's departure with a front-page displaying the hashtag #neustupiliSME (WE stood our ground). Penta, whose co-owner Jaroslav Haščák was arrested in December 2020 on suspicion of political corruption, before the charges were dropped last year, remains a dominant force in Slovak publishing through its subsidiary News and Media Holding, which owns Trend, Plus 7 dní, and Plus 1 Deň.<sup>58</sup>

### ***Fairness and transparency of licencing procedures (including allocation of licences, fines and penalties)***

The new Media Acts have, in some ways, changed the regulator's decision-making: the nine-member plenary board will from now on decide only on the allocation of radio frequencies, on major property and personnel changes of broadcasters and on some appeals. Complaints on the content of broadcasting will be considered by three-member panels set up by the Council. Some decisions of an administrative and technical nature, such as authorisations of programme services and their changes, will be transferred to the

58 <https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2022/slovakia>

council's office. The details should be specified in the new statute and rules of procedure of the council.

## ***Transparency of media ownership***

### ***Rules governing transparency of media ownership and public availability of media ownership information, and their application***

The new Media Acts have increased media transparency because all media outlets now have to be registered in the Register of Public Sector Partners (RPSP) regardless of whether they trade with public entities. This allows the public to find out who is really behind specific media outlets. Outlets may receive a warning or a fine of up to EUR 20,000 for non-compliance.

At the same time, editorial offices are obliged to publish a list of all investors and donors who provided contributions of more than EUR 2,000 during the year or else risk a fine of up to EUR 100,000.

The Ministry of Culture is also supposed to create and administer a new media and audio-visual register within 30 months of the adoption of the Acts. The aim is to create a publicly accessible data source of information about providers, services and products in the media and audio-visual field. This register should contain data on publishers of periodical publications, web portal operators, retransmission operators and distributors of audio-visual works. Moreover, the Ministry will have the right to remove any outlet (both offline and

online) from the register if it is financed by someone who appears on EU or UN sanctions lists.

The new Media Acts also revised the “right of reply” for politicians which was introduced by the previous government. What is now called the “right of a statement” will allow not only responses to statements of fact published in media but also to subjective judgements stemming from those. In the original draft media laws, it was only possible to deny, clarify or explain statements of fact. The right of reply will also now apply to news websites.

On the other hand, the new Media Acts have strengthened the protection of minors, improved access to audio-visual content for people with disabilities by increasing quotas for multimodal access, and now specifically promotes broadcasting for national minorities and ethnic groups in public service broadcasting.

The new legislation also creates more room for media self-regulation which means that the regulator will have the competence to issue implementing regulations in particular areas or content service. The Council will supervise the delegated competencies and if the self-regulatory body would not deal with the disputed content, the power of council to act remains. The Council will also keep a register of self-regulatory bodies and assess their codes of conduct.

## **Public service media**

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### ***Independence of public service media from governmental interference***

Currently, the biggest threat in this area seems to be the cancellation of the concession fees en masse, which was approved by the National Council in December 2022. Concession fees were used to finance RTVS and were paid by both households and employers that employ at least three people. Based on the new legislation, the main income of RTVS would be a claimable contribution from the state budget. However, the legislative Act that included this cancellation was vetoed by the president towards the end of the year. In order to break the presidential veto, it will now be necessary to have second and third readings of the bill and have it approved by a supermajority of MPs.

The fact that the director and members of a supervisory board of RTVS are elected by the National Council based on political agreements also remains problematic. If the cancellation of the concession fees does eventually pass, politicians will have even more influence over the funding of the public service media.

### ***Editorial standards (including diversity and non-discrimination)***

In 2022, the tendentious supply of information to the public about current events has led to the dismissal of several leading functionaries of RTVS news. On 22 February, RTVS reported on the tensions in Ukraine in “News and commentaries”, in which

pro-Russian statements made by the former Head of Government and Minister of Justice, Ján Čarnogurský, were allowed to air unopposed and without counter-statements or a factual basis. After an immediate wave of criticism, on 24 February the former director of the news and journalism section of RTVS, Vahram Chuguryan, resigned. Subsequently, on 24 February, the day the Russian invasion began, RTVS did not immediately report on the attacks. The morning news was broadcast without mentioning the attacks and RTVS proceeded with its regular TV program, with the first non-scheduled news being broadcast only at 10 a.m.

However, on 28 February RTVS launched a temporary 24-hour news service on the war, which has been acting as a rolling news channel ever since.

A similar situation also occurred on 18 November when the director of the news section of RTVS and three other functionaries had to leave after RTVS broadcast an hour-long speech by the former Prime Minister Robert Fico, which was delivered at the party congress Smer-SD. The speech was broadcast on the Struggle for Freedom and Democracy Day (17 November), without adding any context or reaction from experts or any opposing opinions.



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## **Online media**

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### ***Impact on the media of online content regulation rules (including content removal obligations, liability rules)***

One of the key changes of the new Media Acts is that the new legislation will now apply also to the online environment; namely electronic periodical publications, web portals and video sharing platforms. However, the latter raises uncertainties regarding the added condition that the platforms have to “maintain a stable and effective connection with the economy of the Slovak Republic”. As the scope of the Acts widened to online areas, it also therefore broadened the right to protect the confidentiality of sources also to journalists from online media (in the past this was guaranteed only for broadcast and print media journalists).

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### **Public trust in media**

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According to the 2022 Globsec Trends,<sup>59</sup> only 37% of respondents trust the standard opinion shaping media in Slovakia. On the other hand 61% responded that they distrust the standard media. GLOBSEC also stated that in Slovakia, the phenomenon of an attempt to control the media and the presence of attacks against journalists even intensified during the COVID pandemic.

According to another study conducted by Reuters Institute for the Study of Journalism in June 2022,<sup>60</sup> only 26% of Slovaks trust the standard opinion shaping media in Slovakia, which was the lowest figure of the 46 countries analysed. Only 16% of respondents think that Slovak media is free of political influence and only 15% think that it is free of business influence. Only 14% are willing to pay for online news, even though internet penetration in Slovakia is as high as 85%. The number of people using Slovak news providers declined, as did brand trust scores (with the exception of local and regional newspapers, trust in which held steady). On the other hand, the use of social media as the main source of news increased (Facebook and Youtube being dominant, with Instagram rivalling them in the 18-24 age group). 35% of respondents stated that they share news via social media, messaging or email.

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

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According to the World Press Freedom Index compiled by Reporters Without Borders, which measures the press freedom of journalists and media, in 2022 Slovakia was ranked 27th out of 180 countries, scoring 78.37 points (marked as satisfactory). There was no remarkable change in comparison to 2021 in terms of

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59 Available at: <https://www.globsec.org/sites/default/files/2022-05/GLOBSEC-Trends-2022.pdf>.

60 Available at: <https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2022/slovakia>.

points (76.98), although Slovakia improved on its ranking of 35 in 2021).<sup>61</sup>

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

Igor Matovič, a former prime minister and finance minister, often harshly attacks journalists, associating them with so-called progressive fascism<sup>62</sup> and corruption.<sup>63</sup> In September 2022 the editors-in-chief of Slovak media outlets<sup>64</sup> criticised this, as did a joint statement from several international journalists' organisations (including Reporters Without Borders) from October 2022.<sup>65</sup> Independent media is also commonly associated with disinformation about George Soros.<sup>66</sup>

### **Rules and practices guaranteeing the independence and safety of journalists**

In terms of establishing legislative and other safeguards to improve the physical safety and working environment of journalists, as recommended by the European Commission in the

previous Rule of Law Report, no changes, initiatives, or any activities were conducted in this matter. The issue has not been discussed at all. Moreover, verbal insults by some politicians aimed towards journalists have continued.

Concerning the criminal offence of defamation based on Section 373 of Criminal Code,<sup>67</sup> the proposal for a legislative amendment was part of the September 2022 Criminal law recodification, which proposed an offence of deliberate intent to cause actual damage to reputation, as a condition for assessing the conduct as criminal. At the same time, a non-custodial sentence was proposed for this offence.

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

#### **Abuse of criminalisation of speech**

In September, the Ministry of Justice, as a part of the proposal for the recodification of

61 For more information about Slovakia's ranking, see: <https://rsf.org/en/country/slovakia>, for methodology of World Press Freedom Index: [https://rsf.org/en/index-methodologie-2022?year=2022&data\\_type=general](https://rsf.org/en/index-methodologie-2022?year=2022&data_type=general)

62 During a parliamentary session on 28 September, he said (translated from the Slovak language): "*What has been going on here for two and a half years in the media is a form of modern fascism,*" and thus described himself as a 21st-century Jew. See: <https://dennikn.sk/minuta/3030138>.

63 See the interview confronting Matovič regarding statement (translated from the Slovak language): "*You can hire a journalist for five hundred for a month today, who will write well about you,*" - Available at: [https://www.youtube.com/watch?v=jaDEG\\_CCGbE](https://www.youtube.com/watch?v=jaDEG_CCGbE).

64 Available at: <https://komentare.sme.sk/c/23021637/novinari-odmietaju-matovicove-utoky.html>.

65 Available at: <https://rsf.org/en/slovakia-deputy-pm-s-attacks-undermined-government-s-broader-eforts-strengthen-press-freedom>.

66 See: <https://dennikn.sk/minuta/2834909/>.

67 Legislation procedure no. LP/2022/511.

the Criminal Code. The response of professionals and the general public to the proposal was quite varied, even though the second draft proposal outlined stricter conditions for criminalising disinformation. Strong criticism eventually resulted in the Ministry cutting out the draft offence in question from the whole draft amendment, as it was already a few days into the inter-ministerial comment procedure.

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

Soon after the outbreak of the war in Ukraine, Slovakia amended its cybersecurity law,<sup>68</sup> empowering the National Security Office (hereinafter referred to as “NBÚ”) to block websites publishing harmful content. Despite the operational efficiency of the legislation, the NBÚ’s ability to block disinformation websites was problematic, as it did not have sufficiently clear rules and processes for deciding whether to block them. In addition, definitions of some key terms were lacking. Moreover, after the sites were blocked, the reasons were unknown or explained, even to the operators of the affected sites. Shortly after the amendment was approved, the NBÚ clarified the rules through a decree, but at the time the first website had already been blocked, and the decree was only to be submitted to the interdepartmental comment procedure. The amendment was supposed to be only temporary, until 30 June 2022, with the blocking of websites being

limited to this date. On 15 June 2022, the effect of the amendment was extended by the parliament until 30 September (at that point, four well-known websites had been blocked). Yet, even in June 2022, the blocking rules under which the NBÚ proceeded had not been published, even though the March amendment to the law imposed such an obligation to the NBÚ.

In November 2022, the government approved new rules, according to which the NBÚ could only block content that could threaten the security, foreign policy or economic interests of Slovakia and which constitutes a hybrid threat. Moreover, NBÚ would be able to block not only websites, but also accounts on social networks or communication platforms. The Bureau would, on the other hand, be able to act on only the basis of a “reasoned proposal” from the state’s security forces, e. g. the police, the Slovak Information Service or military intelligence. Blocking would require the approval of the Supreme Administrative Court of the Slovak republic, which would have to make a decision within 15 days and blocking could last a maximum of nine months. The NBÚ would publish all blocking decisions on its website. The proposal is now to be approved by the National Council,<sup>69</sup> with the proposed effectiveness from 1 April 2023.

68 Act No. 69/2018 Coll. on Cybersecurity

69 Proposal available at: <https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&ZakZborID=13&CisObdobia=8&CPT=1289>.

## Checks and balances

### Key recommendations

- To ensure full compliance with the rules of the legislative process in each legislative procedure (minimising fast-track legislative procedures, circumvention of the standard legislative process with parliamentary motions and parliamentary amendments, avoiding indirect amendments).
- To ensure the precision of the constitutional process and the protection of the constitution amending procedure.
- To ensure full public participation in the legislative processes.
- To limit the use of expedited legislative procedures only to situations stated in the Rules of Procedure of the National Council.

### Process for preparing and enacting laws

**Framework, policy and use of impact assessments, stakeholders'/public consultations (particularly consultation of the judiciary on judicial reforms), and trans-**

### ***parency and quality of the the legislative process***

The public has a legal right to participate in legislative proceedings on government draft proposals. When draft laws are introduced by members of parliament, there are no public consultations, unless decided otherwise and recently, the government has tended to submit draft laws through individual MPs rather than as government draft bills. Although this may be perceived as circumventing the rules of legislative procedures and public participation, the procedure in question is not unlawful.

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

During its analytical work<sup>70</sup> VIA IURIS found that among all functional governments, the last one (in office since 2020) used fact-track legislative procedures the most frequently. By October 2022, the current government had adopted a total of 403 laws, 97 (24.07%) of which were adopted through fast-track procedures. We acknowledge that this high number is partly a consequence of the pandemic; in 2020, almost half (47.58%) of the adopted laws (59 out of 124) were approved in expedited procedures. This means the current executive circumvented the standard legislative procedure up to five times more often than during the two previous governmental terms. Between 2012 and 2016, 5.27% of all laws were adopted in expedited legislative

70 [Press release, VIA IURIS, 11 November 2022.](#)

71 [Data from November 2022.](#)

procedures, and between 2016 and 2020 this figure was 5.80%.

The rules of expedited legislative procedures are set down in law (Section 89 of Act No. 350/1996 Coll. on the Rules of Procedure of the National Council of the Slovak Republic), which explains that expedited legislative procedures should be used only in extraordinary circumstances and only at the request of the government or MPs.

However, it seems that politicians have managed to claim that all kinds of legislative proposals are taking place under extraordinary circumstances. The most serious violation of the rules on legislative procedure in 2022 was a series of draft laws known as the “anti-inflation package”, which was submitted by the Minister of Finance. Even though the laws in question would affect the state budget by more than a billion euros, no public debate on the proposals was conducted. Experts, state organisations and local governments were deprived of a space to comment on the proposal in any way. It took only three days from the submission of the proposal in parliament to the law being passed. This legislation was later put before the Constitutional Court of the Slovak Republic, which in December 2022 decided unequivocally that a violation of the rules of legislative procedure may be a reason to deem a law unconstitutional.<sup>72</sup>

Indirect amendments also remain a long-term problem. These are also known as legislative “stickers” – a submission of an amendment proposal to the draft law, which adds an amendment to a completely different law, unrelated to the legislative draft. Even though this technique is forbidden by law,<sup>73</sup> it is quite common even among MPs belonging to the government coalition (even though the parties of the government coalition frequently criticised this technique and the misuse of the expedited legislative procedure when they were in opposition).

The regular submission of legislative proposals by MPs belonging to the government coalition can also be perceived as a circumvention of the rules of the legislative process. If a proposal is submitted by the government, the proposal is subject to an interdepartmental comment procedure, during which all state institutions (including expert state bodies such as the Value for Money Department (UHP), etc.), as well as the public, may submit their comments, reservations and suggestions for improving the proposal. However, if the proposal is submitted by an MP, the proposal proceeds directly to a first reading in parliament, without the public being able to comment on it. It is very rare for MPs to submit proposals to the interdepartmental commenting procedure. A number of very important laws, including some that had a significant effect on the state budget, were submitted by coalition MPs and

72 The [press release](#) of the Constitutional Court of the Slovak Republic from 13 December 2022.

73 Section 94 (3) of the Act. No. 350/1996 Coll. on the Rules of Procedure of the National Council of the Slovak Republic as amended.

some of them were even approved in an accelerated procedure. At the same time, during the second reading MPs often approve amending proposals which completely change the former draft law (this may also happen in the case of government proposals, after having gone through the whole interdepartmental comment procedure). However, even though MPs and the government frequently violate the rules of legislative procedure, no legal sanctions are imposed, only the possibility of a presidential veto and the possibility of a declaration of unconstitutionality by the Constitutional Court. This happened for just the first time in 2022, and the Constitutional Court itself declared that the declaration of unconstitutionality of an act, in case of violation of legislative procedure rules, is permissible only if the violation reaches an unacceptable level. All of the mentioned issues as well the constitutional process, including the number of proposals to amend the Constitution submitted by MPs, have increased exponentially in the past two election periods (1992-2002: 16 proposals; 2003-2012: 42 proposals; 2013-2022: 116 proposals; September 1992 – September 2022: 174 proposals overall; note: a proposal to amend the Constitution may be submitted by a lone MP) and despite the fact that only a small proportion of these proposals have been approved, several provisions of an unconstitutional character have made their way into the Constitution. Although there is no unanimous opinion among legal professionals about the

appropriate frequency of amendments to the Constitution, it is a fact that since the approval of the Constitution on 1 September 1993, it has been directly amended 20 times.

In March 2022, VIA IURIS held a conference on the rules for amending the Constitution, which was attended by judicial and academy representatives. The conference agreed on the following main recommendations:

- To exclude the possibility of expedited legislative procedure when adopting changes to the Constitution.
- To prohibit the possibility of shortening deadlines in between the readings in parliament when constitutional changes are being adopted.
- To allow professionals and the general public to comment on proposals for changes to the Constitution, even if the proposal comes from an MP.
- To make the constitutional process part of the Constitution itself.<sup>74</sup>

### ***Independent authorities***

For more than seven months, the post of Ombudsman (Public Defender of Rights) was vacant due to repeated failures to reach an agreement in parliament (the ombudsman

74 For more information, see our analysis on rules and procedure of constitutional amendments in Slovakia and the output of the March conference - available at: <https://viaiuris.sk/pravny-stat/pravidla-a-proces-zmeny-ustavy-na-slovensku-zbornik-z-konferencie/>

is elected by the National Council). During this period, none of the submissions could be closed, as all of them are being signed by the Public Defender of Rights. The increasing number of pending submissions was repeatedly pointed out both by the office's employees and by non-governmental organisations. During this period, approximately 600 proposals were collected and were awaiting final assessment.<sup>75</sup> The term of office of the previous ombudswoman Mária Patakyová ended on 29 March 2022, the new ombudsman Róbert Dobrovodský was elected on 9 November 2022.

## Enabling framework for civil society –

### Key recommendations

- Strengthening the structural funding of the civil society and lowering the administrative burden in connection with funding schemes.
- Enabling full public participation in public processes, perceiving civil society as an equal partner.
- Providing more protection against hate speech from politicians.

## Regulatory framework

### *Financing framework, including tax regulations*

The lack of institutional financing leads to only small state grants for short-term projects, with limited availability. Most of the time these also come hand in hand with a heavy administrative burden. Civil society is not being recognized as a relevant partner to the current government, even after supplementing governmental activities during the spring migration crisis at the start of the war in Ukraine.

### *Rules on lobbying*

Despite the fact that information about the initiation of the first phase of the legislative procedure on the draft law on lobbying was published back in November 2021,<sup>76</sup> no comprehensive material has been published since (the estimated date for the start of the inter-ministerial comment procedure was scheduled for January 2022). The regulation on lobbying was pencilled in as a legislative task for the government for the June-December 2021 period.

### *Travel restrictions / visa bans*

On 6 April 2022, the decree of the Public Health Authority of the Slovak Republic regulating the border regime was repealed. This means the obligations to register when

75 See: <https://vop.gov.sk/robert-dobrovodsky-zlozil-slub-a-ujal-sa-funkcie-ombudsmana/>.

76 Available at: <https://www.slov-lex.sk/legislativne-procesy/SK/PI/2021/264>.

entering the territory of Slovakia and mandatory quarantine for unvaccinated persons were abolished. However, during September 2022, the Czech Republic and Austria renewed border checks at their borders with Slovakia due to an increase in illegal migration.

Slovakia has not changed its visa policy in relation to Russians fleeing military mobilisation (Slovak legal orders do not recognise humanitarian visas). Each case is to be assessed individually, as it was before. However, the processing of visa applications in Russia has become lengthier after Russia decided to reduce the number of staff at its Slovak embassies.

## ***Unsafe environment***

### ***Access to and participation in decision-making processes, including rules and practices on civil dialogue, rules on access to and participation in consultations and decision-making***

Even though the public can participate in legislative procedures initiated by the government, in many cases this is treated as purely a formality to fulfil a legal requirement. For example, the public can submit a collective comment on a bill (with more than 500 signatures) that is formally

discussed, although such comments are not actually taken into account. Similarly, the public is involved in the processes within the Recovery Plan as a part of some bodies or councils, but play only an advisory role and lack any executive powers. In general, the current government does not perceive the public as a relevant or equal partner.

Public participation in processes, as such, was also threatened by the new legislation on construction and EIA introduced this year:

The government's first draft of the new Construction Acts was introduced in 2021. Due to a large number of comments and public pressure, it was withdrawn and resubmitted in 2022. Even in the new draft, there were still broad restrictions on public participation in siting and construction proceedings (albeit to a lesser extent than in the original proposal). During the legislative procedure, public comments were taken into account to some extent. In both proposals, we submitted the collective comments on the bill (with 11,664 signatures in 2021<sup>77</sup> and 5,633 signatures in 2022<sup>78</sup>). However, the wording approved in April 2022<sup>79</sup> included a draft amendment significantly limiting public participation. This was submitted by MPs from the government coalition.<sup>80</sup> If the proposal were to be approved, a unilateral decision by

77 <https://www.mojapeticia.sk/campaign/hromadna-pripomienka-k-navrhom-zakonov-v-oblasti-uzemneho-planovania-a-v-ystavby/ed0ec26b-cb5a-4940-8cb6-599f8109a648>.

78 <https://www.mojapeticia.sk/campaign/hromadna-pripomienka-k-navrhom-zakonov-o-uzemnom-planovani-a-vystavbe/26f67472-d9ef-4678-b2ca-d5e1e4b19dc2>.

79 Act No. 200/2022 Coll. the Spatial Planning and Act No. 201/2022 Coll. the Construction Act.

80 Proposal by members of the National Council of the Slovak Republic Miloš Svrček, Jozef Lukáč and Petra Hajšelova to issue a law amending and supplementing Act No. 50/1976 Coll. on spatial planning and building



the municipality would be sufficient to permit construction (the draft amendment is currently in the first reading of the parliament). In addition to the limitation of public participation, the proposal has several other shortcomings: To issue a territorial decision, it would be sufficient if the municipality confirms that the planned construction is in accordance with a territorial plan of the municipality. However, approximately half of all municipalities do not have an approved territorial plan. Moreover, a unilateral territorial decision of the municipality would be sufficient for the confirmation of a land expropriation. Last but not least, a concentration of decision-making in municipal authorities would also lead to increased corruption.

Similar issues occurred in relation to the draft amendment to Act No. 24/2006 Coll. on environmental impact assessment (the EIA Act)<sup>81</sup> which was also submitted by coalition MPs. In the second reading in the National Council, through the MPs' amendments, the previous wording of the proposal was completely left out and provisions were submitted into the draft bill that had been the subject of an earlier parliamentary proposal that eventually had to be withdrawn due to sharp public criticism (the former proposal limited the rights of a public in favour of developers, contradicted both the EIA Directive and the Aarhus Convention, limited submissions of the expert state bodies during the

EIA process, etc.). The approved act was finally vetoed by the president in December 2022, who described the process of adopting the amendment as unclear and chaotic, citing limits on professional discussion and that the approved law had nothing in common with the draft that had originally been submitted. He also mentioned that important stages of the legislative process had been completely bypassed.<sup>82</sup> The draft law must now be discussed again and approved by a majority of all deputies.

### ***Access to justice, including rules on legal standing, capacity to represent collective interests in court, and access to legal aid***

The public has legal rights in only a fraction of proceedings in the Slovak legal system. An example of this is that it is possible for the public to participate in administrative proceedings in environmental matters, according to Section 42 of Act No. 162/2015 Coll. of the Administrative Court Proceedings Code (implementing the obligations arising from Article 9 of the Aarhus Convention). In a formalised civil society (e. g. as a civil association) members of the public should have full legal standing.

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

In January 2022, former prime minister and minister of finances, Igor Mativič accused NGOs of

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regulations (Building Act) as amended and which amends Act No. 282/2015 Coll. on the expropriation of land and buildings and on the forced limitation of the ownership right to them and on the amendment of certain laws. Available at: <https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=8913>.

81 Available at: <https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=9040>.

82 The statement of the President of the Slovak Republic available at: <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=522927>.

stealing hundreds of millions of euros intended for work with the Roma community.<sup>83</sup> NGOs are also commonly victims of disinformation campaigns and are associated with George Soros. For example, former prime minister Robert Fico accused NGOs of taking advantage of the murder of the journalist Ján Kuciak.<sup>84</sup>

Moreover, the key role of NGOs in the Ukraine crisis (both in Ukraine and at the SK-UA borders and Slovak territory overall) has for a long time been widely overlooked. Everyone mentioned the work of volunteers but no one talked about NGOs.

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

### **Key recommendations**

- Regulation of at least elementary rights of the LGBTI+ minority, providing higher level of safety:<sup>85</sup>

◦ Adding sexual orientation and gender identity to the grounds of hatred in Section 423 and gender identity in Sections 140 and 424 of the Criminal Code.

◦ Strengthening the specialisation, staff capacity and technical equipment of law enforcement agencies dedicated to countering extremism to enable them to effectively monitor, detect and clarify extremist crimes, including those motivated by hatred of LGBTI+ people in the online environment.

◦ Improving exchange of information between the different components of the Slovak Republic security system so that potential indicators of radicalisation of individuals in the online environment can be identified in a timely manner and adequate measures can be taken against them.

◦ Ensuring a functional and effective system of monitoring and removing unlawful extremist content and content inciting hatred against LGBTI+ people on the internet.

83 Igor Matovič (translated from Slovak): “Their sole aim was plundering of the funds intended to help the most deprived people”. See: <https://dennikn.sk/minuta/2697982/>.

84 See: <https://www.webnoviny.sk/fico-vrazda-kuciaka-bola-zneuzita-na-politicke-ciele-a-sorosove-mimovladky-sa-isli-roztrhnut-od-aktivity/>

85 See link for the recommendation of initiative Ide nám o život (freely translated as “It is our life in question”; led by the initiative Inakosť) who also organised the above-mentioned petition. See the following websites of the organisers: <https://idenamozivot.sk/vyzva/>; <https://inakost.sk/>.

◦ Adopting a Code of Ethics for members of the National Council, which would introduce disciplinary liability for statements inciting hatred on the grounds of race, nationality, ethnicity, religion, sexual orientation and gender identity.

it was the first case from Slovakia submitted to the CRC. Otherwise, Slovakia has had no migration related CJEU judgments. However, the study suggests that the biggest issue in the field of judicial decision-making regarding migration is the non-implementation of domestic judgments.

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

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

VIA IURIS is not conducting any analysis or research on how CJEU and EHRC decisions are implemented. However, the Hungarian Helsinki Committee together with the Human Rights League and other NGOs conducted a joint study on the level of implementation of judgments in the field of asylum and migration in Czechia, Hungary, Poland, Slovakia and Slovenia (October 2022).<sup>86</sup> The study showed that Slovakia did not respect the interim measure ordered by the ECtHR in the Labsi case which was the first and only time that the Slovak government did not comply with an interim measure of the ECtHR. Slovakia did not respect an interim measure ordered by the Committee of the Rights of the Child (CRC) either (case concerning an Afghan national and mother of four minors, CRC/C/90/D/93/2019, 9 June 2022). However,

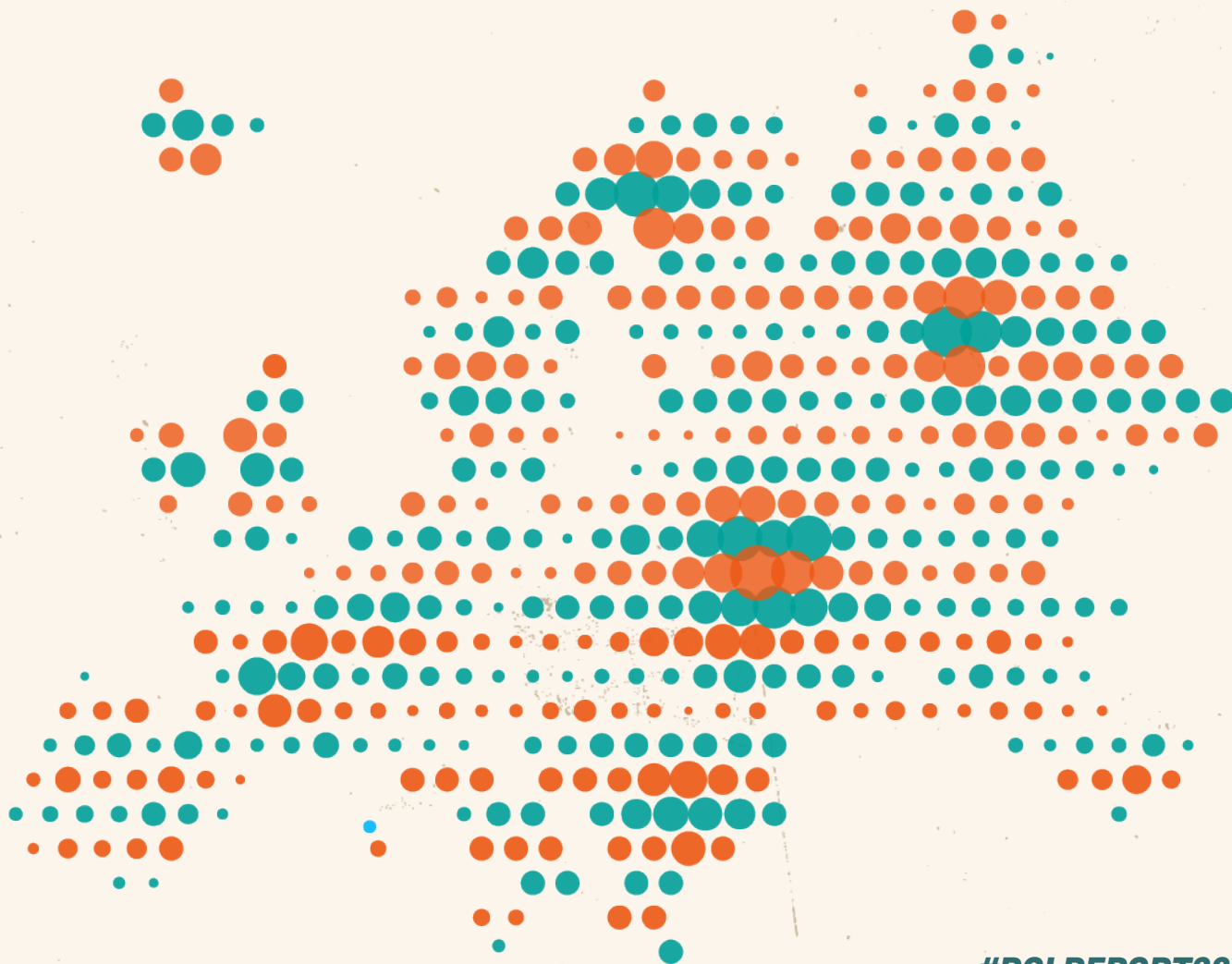
86 Available at: <https://helsinki.hu/en/wp-content/uploads/sites/2/2022/11/Implementing-judgments-in-the-field-of-asylum-and-migration-on-odd-days.pdf>.

**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**SLOVENIA**



**#ROLREPORT2023**

# SLOVENIA

## About the authors



**The Peace Institute – Institute for Contemporary Social and Political Studies** – is an independent, non-profit research institution founded in 1991 in Ljubljana, Slovenia, by individuals who believed in peaceful conflict resolution, equality, and respect for human rights standards.

The Peace Institute (PI) uses scientific research and activism aimed at creating and preserving a society capable of critical thought and based on the principles of equality, responsibility, solidarity, human rights, and the rule of law.

The Institute develops interdisciplinary research, educational, advocacy, and awareness-raising activities in four thematic fields: human rights and minorities, politics, media, and gender. Acting as a research and civil society organisation, it focuses mainly on Slovenia, but also participates in numerous cross-border collaborative actions and comparative research projects on the EU level and in the region of South East Europe. The PI acts as an ally of vulnerable groups and, in partnership with them, counteracts discrimination. It has carried out projects in support and advancement of the rights of children, women, victims of

crimes, defendants in criminal proceedings, Roma communities, “erased people”, refugees and migrants, stateless people, LGBT communities, journalists, and others.

## Key concerns

The new government, appointed after the April 2022 parliamentary elections, has replaced the hostile measures and toxic environment for media and journalists with supportive measures that promote the independence of public media, and committed itself to broader media reform.

Amendments to the law on the public service broadcaster, RTV Slovenia, were adopted by the new government and endorsed by the majority of voters in a referendum. Focusing on the depoliticisation of the public broadcaster, the amendments put various independent institutions and organisations in charge of appointments to key supervisory and management bodies.

The new government repealed the regulation on funding of the public service of the Slovenian Press Agency (STA), which was adopted by the previous government and allowed the Government Communication Office (UKOM) to take arbitrary decisions on the public funding of the agency. Financial pressure of UKOM culminated, in 2021, when the government office withheld monthly payments of STA’s public service for almost the

entire year. The regular monthly financing was re-established in late 2021, after the new STA director was appointed and a new agreement between UKOM and STA was signed, which included provisions on “per-item” financing. In late 2022, the new government repealed the regulation which introduced this model of financing STA’s public service. The new regulation has re-established bulk financing.

The pre-election promise of financial support to professional journalism has not been realized yet. The funds in the existing annual scheme for project funding of media content production have even decreased. Responding to new lay-off measures affecting journalists in daily newspapers, the Association of Journalists has urged publishers and the government against the undermining of professional journalism.

Checks and balances saw little to no progress this year. In spite of small improvements from June 2022, when the new government took office, both the former and the current government often did not respect the relevant national provisions concerning the duration of public consultations in the process of adopting laws and regulations.

In June 2022, the change of government brought about a more favourable and improved climate for Slovenian civil society. The new government, for example, revoked the orders adopted by the former government regarding the preparation and filing of lawsuits for the reimbursement of police costs at unregistered public gatherings. The related proceedings, which, for example, targeted one of the most visible individuals attending the Friday cycling

protests, have been halted. The new government also adopted a position paper regarding misdemeanour proceedings initiated unlawfully, including under the Public Assembly Act.

In 2022, the Slovenian police dealt with 32,042 irregular border crossings. 6,787 asylum applications were lodged, and 200 people were granted international protection. The discrepancy in the number of irregular crossings, the number of people that actually apply for international protection, and the number of people receiving international protection indicates the need for thorough research and monitoring of the situation.

30 years after the authorities illegally erased 25,671 individuals from the register of permanent residents, the president of the Republic of Slovenia formally apologized in the name of the state for the erasure. However, still, more than half of those erased did not receive any form of redress. There are still some erased persons who live in Slovenia without regulated status since the erasure. The remedies available to them are inadequate, as the path to a permanent residence permit takes at least seven years and the success of parts of the process is at the discretion of the competent authority.

## State of play

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

### Legend (versus 2022)

- ⬇️ Regression
- ⬇️ No progress
- ⬆️ Progress

in the media shall be introduced by the government, particularly focusing on the safety of journalists, financial support to quality journalism, protection of media pluralism, transparency of media ownership and finances, strengthening independence and capacities of media regulatory authorities, etc.

- New regulation introduced by the government shall particularly provide stronger safeguards against political misuse of public funds distributed to media through state subsidies, state advertising, and other financial mechanisms.

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

### Key recommendations

- Enforcement of the amendments to the law on RTV Slovenija, adopted in 2022, shall be provided to introduce a depoliticized model of the public broadcaster's governing and management; it should be followed by further strengthening of RTV Slovenija's institutional autonomy, editorial independence, and financial sustainability in the more comprehensive revision of the regulation on public service media.
- Comprehensive reform of media legislation to protect the public interest

Recommendation 1 on strengthening the rules and mechanisms to enhance the independent governance and editorial independence of public service media has been implemented to a large degree by:

- a) the adoption of the amendments to the law on public service broadcasting, RTV Slovenija and introduction of a new "depoliticized" model of governing and management (the law implementation has been delayed and obstructed by the previous ruling party and its appointees in the RTV Slovenia governing and management bodies);
- b) the repealed regulation on the financing of the public service of the Slovenian Press Agency.

Regarding recommendation 2 on legislation and other safeguards to protect journalists,

particularly online: no legislative safeguards have been introduced. There is improved cooperation between the Association of Journalists and the police: at the September 2022 training on the safety of journalists organized by the Association, a high representative of the police was one of the trainers.

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

The main media and telecommunication regulatory authority in Slovenia, the Agency for Communication Networks and Services (AKOS), serves as an independent regulatory authority for several sectors, including telecommunications, postal services, railway traffic, radio, and television. It is a body functionally separate from the government. However, the appointment of the Agency's Director (the highest individual decision-making body) falls directly under the control of the government. Such powers given to the government remain one of the main threats to the independence of the media and telecommunication authority. The Agency's Council is also appointed by the government. The Council supervises the work of the Agency in terms of annual plans and reports, and can propose the dismissal of the Director.

The AKOS Director's term of office expired in autumn 2022, and the new government (in power since June 2022) is in charge of the appointment of the Director for a 5-year mandate.

The AKOS resources devoted to the enforcement of media regulation remain insufficient in terms of the number of staff in the department on electronic media (11 employees). It is highly disproportionate to the resources of similar media authorities in the EU.

As highlighted in the 2022 Rule of Law Report, such limited resources and the predominantly passive and invisible role of AKOS in the enforcement of media regulation mostly reflects the internal policy of the AKOS leadership (appointed by the government) to keep a low profile in the politically sensitive field of media regulation. Limited resources, and a lack of ambition to build strong capacities and an authoritative presence, are at odds with the growing expectations of national regulatory authorities set by the new media regulation at the EU level.

In 2022, progress was made for a second consecutive year in the AKOS enforcement of the audiovisual media regulation on hate speech. In November 2022, AKOS found that the Nova24TV channel (affiliated with the current opposition party, SDS) had incited violence and hatred on the grounds of belief, political opinions, or other judgements in its show "Who is Lying to You?", aired on 28 June 2022. Nova24TV thus violated the Audiovisual Media Services Act. AKOS imposed several measures on the TV channel, including publishing the AKOS decision within the program and removing the controversial part of the show from all platforms.<sup>1</sup>

1 For more information see: <https://www.akos-rs.si/nadzor-odlocbe/tv-radio-in-vod/odlocba/odlocba-06121-13-2022-7>.



AKOS has simultaneously published the guidelines for audiovisual media service providers on the implementation of content regulation regarding the prohibition of inciting hatred and violence in audiovisual media services, particularly in TV programs.

In addition to AKOS, the role of Media Inspector exists as a part of the Inspectorate for Culture and Media, a body under the responsibility of the Ministry of Culture which handles complaints related to certain provisions in the media regulation. The Media Inspector remains a weak part of the complex yet inefficient media regulatory framework because of limited resources and diminishing competence, as observed in 2022 with the controversial handling of complaints regarding bias in the public service broadcaster's programs.<sup>2</sup>

The Journalists' Court of Honour,<sup>3</sup> a self-regulatory body on a national level operating within the Slovenian Association of Journalists, which includes representatives of journalists and the public, continues its long tradition of having a good reputation. The self-regulatory body was co-founded by the Association and the Union of Journalists, and appointed by their representative bodies. It handles complaints based on the Code of Ethics and publicly announces

its own decisions on a regular basis. In 2022, it published decisions on 16 complaints.

In addition, there is an Ombudsman of public media RTV Slovenia,<sup>4</sup> who handles complaints on the basis of Professional Standards and other self-regulatory documents of RTV Slovenia. The Ombudsman is appointed by the governing body of RTV Slovenia for a mandate of five years, and its independence is guaranteed by internal acts.

In 2022, the new Ombudswoman (appointed in late 2021) performed her duty in a difficult period of politically driven changes of staff and programme of RTV Slovenija (under influence of the former government), causing a strike of journalists and a public outrage. More than one thousand complaints per month were recorded during certain periods of 2022. The new Ombudswoman handled the complaints in a manner that did not endear herself to journalists and critical observers, who claim that she is aligned with management that is politically connected to the former government.<sup>5</sup> She took the side of the management in the case of TV Slovenia daily news bulletin's presenter and editor, and decided to disclose to viewers that a report in the bulletin covering a controversial political issue was prepared without the knowledge and editorial control of

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2 For more information see: <https://www.akos-rs.si/smernice-in-stalisce-akos/tv-radio-in-avms/smernica-stalisce/stalisce-agencije-in-priporocilo-izdajateljcem-glede-izvajanja-dolocbe-zakona-o-avdiovizualnih-medijskih-storivah-o-prepovedi-spodbujanja-k-nasilju-ali-sovrastvu>.

3 For more information see: <https://razsodisce.org/>.

4 For more information see: <https://www.rtvlo.si/varuh>.

5 For more information see: <https://vezjak.com/2022/10/25/varuhinja-marica-ursic-zupan-se-dalje-sciti-vodstvo-rtv-slovenija/>.

the daily editor, but under instructions of the editor-in-chief. The management sanctioned the presenter and daily editor.

### ***Pluralism and concentration***

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As mentioned in the 2022 Rule of Law Report, the level of media concentration in Slovenia is high. The media group “Pro Plus” dominates the television, VOD, and online media<sup>6</sup> market. There are also dominant media groups in print and radio. Concentration of print media distribution remains a concern.

Direct and indirect state ownership in commercial media (e.g. in media group Salomon through the Bank Assets Management Company, now merged into the Slovenian Sovereign Holding, and in TSmedia through the state-owned Telekom Slovenije) continues to present a risk of government interference.

The existing regulation providing safeguards for media pluralism remains outdated and inefficient. The implementation of the provisions on the restriction of media concentration has been deficient for many years.

The new government (in power since June 2022) has committed to reform of the entire media regulation, referring particularly to transparency and pluralism of media. In 2022, the media regulation change was focused

towards amendments to the law on public service broadcasting, RTV Slovenija, to introduce a new and depoliticized model of governing and management. The government has not specified the timeline of the media regulation reform.

In early 2022, the annual state aid scheme has been again used by the Ministry of Culture (during the term of the former government) to provide substantial financial support to the pro-government media by providing direct subsidies to the media for their content production projects. In autumn 2022, the new government revised the criteria for direct subsidies to media by prioritising quality and regional components, as well as fact-checking and new voices,<sup>7</sup> but allocated smaller funds in total for the annual call for project proposals (2.9 million euros in comparison to 3.1 euros previous year). The Ministry also replaced the previous members of the expert body involved in the selection of projects with media experts selected by the new Minister following the public call for nominations.<sup>8</sup>

### ***Transparency of media ownership***

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There is no specific regulation of state advertising that requires transparency and safeguards against political misuse.

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6 For more information see: <https://pro-plus.si/eng.html>.

7 For more information see: <https://www.dnevnik.si/1043000254>.

8 For more information see: <https://www.gov.si/novice/2022-11-14-imenovane-nove-stalne-strokovne-komisije-ministrstva-za-kulturo/>.

Political influence on the distribution of advertisements, from state bodies and public companies, to media that is close to political groups in power, has been observed and reported by watchdogs for many years under various governments. Under the previous government, in power until June 2022, political misuse of state advertising included an allocation of advertisements for public bodies and companies to the media affiliated with the ruling party, who were clearly disseminating propaganda, disinformation, and hate speech.<sup>9</sup>

The government coalition has introduced a parliamentary inquiry to look into alleged illegal financing of “party political propaganda in the media with funds of state-owned companies, state institutions or foreign institutions or entities”, with the inquiry targeting the media owned by or linked with the former ruling party, SDS.<sup>10</sup>

Among pre-election commitments of the current government parties, there is a commitment to provide that the distribution of public funds to the media, including advertising public bodies and companies, must be independent of political groups and bodies, transparent, non-discriminatory, and based on market indicators and public procurement rules. In

the answers provided to the civil society initiative Voice of the People, which conducts the monitoring of pre-election promises, the government refers to the proposed regulation on the EU level regarding political advertising and to the provisions on state advertising in the proposal of the European Media Freedom Act, with the expectation of finding appropriate solutions to integrate them into the national regulatory framework.

Meanwhile, the Government Office for Communication is drafting the guidelines for the state administration on the allocation of advertisements to provide common and clear criteria and transparency. It is expected to be adopted in the first half of 2023.<sup>11</sup>

There are provisions in the Mass Media Act obliging the media outlets to report media ownership above 5% in the Media Register, which is administered by the Ministry of Culture. They also must annually publish the data and updates on ownership changes in the Official Gazette. However, the register is not accurate. The beneficiary owners are often hidden and therefore subject to journalistic investigations.<sup>12</sup> According to the Ministry of Culture, revisions of the media register will be introduced to provide accurate and updated

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9 For more information see the September 2022 analysis of Domen Savič, an independent journalist and researcher: <https://www.dsavic.net/2022/09/09/subvencionirano-sovrastvo-in-strankarska-propaganda/>.

10 The act on establishing the parliamentary inquiry was published in [the Official Gazette](#).

11 The information was provided by the Government Office for Communication to the civil society coalition Voice of the People’s monitoring of pre-election promises, in January 2023. The Peace Institute has been a founding member of the Voice of the People.

12 For more information see: <https://podcrto.si/oznaka/medijsko-lastnistvo/>.

data on media ownership and enable an upgrade of the database to include the data on state advertising allocated to concrete media in the register.<sup>13</sup>

There is no obligation imposed on the Agency for Communication Networks and Services (AKOS), a national regulatory authority for audiovisual media services, to provide accessible information concerning the ownership structure of audiovisual media service providers, including the beneficial owners. The 2021 amendments to the Audiovisual Media Services Act, transposing the AVMS Directive, did not include such a legislative measure, despite the inclusion of such a possibility in the Directive.

### **Public service media**

Legal safeguards for the independence of public service media have been improved. In November 2022, the amendments to the law on the public service broadcaster, RTV Slovenija, were adopted by the new government and endorsed at the referendum by the majority of voters. Aiming at depoliticization of the public service broadcaster's governing and management, the amendments put various independent institutions and organisations in

charge of appointments to the key governing bodies of RTV Slovenija. A single 17-member governing council has been introduced by the amendments to include representatives of civil society and RTV Slovenia employees. It is in charge of appointing the top management and overseeing the public broadcaster's programming and finances. The new body replaces two governing councils counting altogether 40 members, with a majority of them appointed – since 2005 – by the parliament and the government. Under the reformed system, the management structure includes a four-member management board, headed by a president.<sup>14</sup> Independent experts on media regulation and rule of law gathered around the civil society initiative, Legal Network for Democracy Protection, to contribute to the elaboration of the new governing system of RTV Slovenia in the adopted amendments.<sup>15</sup>

At the same time, the new government repealed the regulation on the public service of the Slovenian Press Agency (STA) which was adopted by the former government and allowed the Government Communication Office to take arbitrary decisions on public funding of the agency. The financing of the STA public service is again provided with an

13 The information was provided by the Ministry of Culture to the civil society coalition Voice of the People's monitoring of pre-election promises, in November 2022. The Peace Institute is a founding member of the Voice of the People.

14 For more information see: <https://ipi.media/slovenia-media-freedom-groups-back-legislative-efforts-to-depoliticise-public-media/>.

15 For more information see: <https://pravna-mreza.si/predstavitev-izhodisc-za-spremembe-zakona-o-radioteleviziji-slovenija-zrtvs-1/>.

annual funding agreement instead of funding on a per-item basis.<sup>16</sup>

However, the new legal safeguards of RTV Slovenija independence have not been implemented yet. The former ruling party, SDS, has used various legal instruments<sup>17</sup> to challenge and delay the implementation, including the referendum, held on 27 November 2022. At the referendum, the majority of voters (more than 62%) supported the amendments.<sup>18</sup>

Meanwhile, the independence of the public broadcaster has been severely undermined by the politically affiliated appointees of the previous government, dominating the governing, management, and editorial structures of RTV Slovenija, and adopting numerous controversial measures on staffing and programming, particularly on the public television station TV Slovenija. These measures include cutting quality, flagship news and current affairs programs, and replacing them with shows hosted by biased and unqualified individuals with links to the previous government. The editor-in-chief of the TV Slovenia news program

has been appointed, despite the majority of the newsroom staff (80%) voting for another candidate. The Director General simply disregarded the legal procedure stipulated for this case.<sup>19</sup> The Director of the Government Office for Communication in the previous government is personally responsible for the pressure and financial draining of the national press agency, STA, and was appointed Director of TV Slovenia in July 2022.<sup>20</sup> The advisor in the Cabinet of the former Prime Minister has been appointed Head of Legal Department of RTV Slovenija.<sup>21</sup> Several individuals previously working for the SDS media or communication operations have been employed by RTV Slovenija to take senior editorial positions. The appointment and employment of individuals connected to the former ruling party, SDS, to senior editorial and management positions at RTV Slovenija have particularly increased after the party lost the April 2022 parliamentary election.

The unions of journalists at RTV Slovenija have been staging strikes in various forms since May 2022, demanding journalistic autonomy

16 For more information see: <https://english.sta.si/3120452/government-repeals-contested-regulation-on-sta-public-service-obligation>.

17 For more information see: <https://sloveniatimes.com/sds-files-signatures-for-referendum-on-new-rtv-slovenija-act/>.

18 For more information see: <https://balkaninsight.com/2022/11/28/slovenians-vote-in-referendum-to-restore-public-broadcasters-independence/>.

19 For more information see: <https://www.rtvlo.si/slovenija/v-nasprotju-z-mnenjem-novinarjev-za-odgovorno-urednico-informativnega-programa-imenovana-rebernik/614591>.

20 For more information see: <https://www.dnevnik.si/1042993071>.

21 For more information see: <https://moj.vecer.com/slovenija/iz-jansevega-kabinetna-na-kolodvorsko-na-rtv-slovenija-izbrali-novega-vodjo-pravne-pisarne-10286922>.

and social dialogue, and an end to political interference and destruction of the public media outlet.<sup>22</sup> Dozens of journalists received warnings about the potential termination of their employment due to their public support in the studio for two colleagues, sanctioned by the management for disclosing interference in their professional autonomy.<sup>23</sup>

The dramatic situation stemming from the political capture of public broadcasters and daily clashes concerning preserving standards and autonomy has led to dozens of journalists of TV Slovenia quitting their jobs. It has also resulted in a significant drop in viewership and a loss of public trust.<sup>24</sup>

TV Slovenia's two referendum broadcasts confronting opinions of civil society representatives who were registered in the pre-referendum campaign on the amendments to the Law on RTV Slovenija, were politically biased in favour of the opinions against the amendments. They aligned with the views and interests of the former ruling party, SDS, an initiator of the referendum. Based on a detailed complaint from the Peace Institute,

the RTV Slovenija Ombudsman confirmed the violation of Professional Standards and Principles of Journalistic Ethics in RTV Slovenija regarding the biased design and unequal presentation of opinions in both shows.<sup>25</sup>

### **Online media**

There are challenges to the implementation of the Digital Services Act (DSA) in establishing adequate legal and technical conditions and appointing the Digital Services Coordinator. The Government Office for Digital Transformation (converted into the Ministry of Digital Transformation, in January 2023) in charge of the DSA implementation has announced that countering hate speech online is among its priorities.<sup>26</sup> The prioritisation has been backed by the Prime Minister, who announced the establishment of the interdisciplinary advisory body. Coordinated by the Ministry of Digital Transformation, the interdisciplinary advisory body will consist of representatives of relevant government departments, independent state bodies, and civil society aiming at coordination and evaluation of the measures against hate speech,

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22 For more information see: <https://europeanjournalists.org/blog/2022/05/20/slovenia-journalists-at-public-broadcaster-rtv-voted-for-strike-action/>.

23 For more information see: <https://europeanjournalists.org/blog/2022/10/13/slovenia-new-assault-on-trade-union-rights-at-rtv-as-38-striking-journalists-received-pre-layoff-notices/>.

24 For more information see: <https://ipi.media/slovenia-media-freedom-groups-back-legislative-efforts-to-depoliticise-public-media/>.

25 For more information see: <https://slovenia.postsen.com/local/77113/The-ombudsman-found-bias-in-the-design-of-the-referendum-broadcasts-on-the-law-on-RTV-Slovenia.html>.

26 For more information see: <https://siol.net/novice/slovenija/stojmenova-duh-med-prioritetami-interoperabilnost-in-izvajanje-akta-o-digitalnih-storitvah-593997>.

particularly hate speech online, including the measures aimed at regulation, as well as education and public awareness.<sup>27</sup>

Progress has been made in the regulation of copyright and compensation for the authors. In September 2022, amendments to the Copyright and Related Rights Act and the Collective Management of Copyright and Related Rights Act were adopted by the parliament. With the amendments, Slovenia transposed the provisions of two European Directives into the Slovenian legal order. According to the government, the amendments ensure higher protection of copyright while not restricting the use of materials for educational purposes. Authors will start receiving a flat-rate compensation for the use of materials in the digital learning environment. The costs of compensation will be covered by the Ministry of Education, Science, and Sport for all educational institutions financed by the state budget.<sup>28</sup> According to the Slovenian Association of Journalists, the amended copyright legislation is good news for Slovenian authors, including journalists. Journalists can expect a 50% share of remuneration from the new related rights of media publishers. The Association highlights the problem of the observed absence of the journalists' collective

management organisation (CMO). At the same time, the print and online media publishers are not organized in their association and the larger print media does not support the collective management of copyright, therefore journalists have to negotiate with each print and online media they produce individually.<sup>29</sup>

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

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The regular public opinion research on trust in institutions and professions, conducted in March 2022, revealed a sharp decline of trust in the public service broadcaster RTV Slovenija compared to the previous year (falling by 24 points). Among all institutions in Slovenia covered by the 2022 opinion poll, RTV Slovenija experienced the highest decline in public trust. The trust in media in general also declined by 10 points, and trust in media professions such as journalism and TV presentation declined by 5–6 points.<sup>30</sup>

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

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The online platform Report Attack coordinated by the Slovenian Association of Journalists, registered 20 attacks on journalists

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27 For more information see: <https://www.dnevnik.si/1043000528>.

28 For more information see: <https://www.gov.si/en/news/2022-09-29-the-adopted-amendments-to-the-copyright-laws-do-not-burden-the-educational-process/>.

29 Report of the Slovenian Association of Journalists for the IFJ/EFJ Expert Group for Authors' Rights (AREG), December 2022.

30 For more information see: <https://www.rtvlo.si/slovenija/ogledalo-slovenije-ljudje-najbolj-zaupajo-gasilcem-opazen-padec-zaupanja-v-medije/620697>.

in 2022.<sup>31</sup> This is less than the 33 attacks reported in the previous year. In 2022, verbal attacks and online harassment were most frequent, but there were also physical attacks reported towards photojournalists. Journalists and editors at public broadcaster RTV Slovenija were the most frequent targets of verbal attacks. Several intimidating measures of the RTV Slovenija management towards journalists were also registered in the database of the attacks. The former Prime Minister and former Minister of the Interior were reported as the perpetrators of online verbal harassment several times.<sup>32</sup>

There is an increase in cooperation between the police and the Slovenian Association of Journalists (SAJ) on the issue of the safety of journalists,<sup>33</sup> particularly at public protests. In April 2022, a meeting was held between SAJ, including the photojournalists' branch, and high representatives of the police aimed at establishing a regular communication channel for mutual learning and information to increase the safety of journalists. In September 2022, a representative from the police provided

a training session on safety measures for journalists working in the field.<sup>34</sup>

Legal procedures related to Strategic Lawsuits Against Public Participation (SLAPPs) continued in 2022.<sup>35</sup> They account for more than 50 lawsuits by Rok Snežič, a tax expert close to the former Prime Minister, against journalists of Necenzurirano. The lawsuits have severely affected human and financial resources of the investigative media outlet. The media outlet in question reports to have spent tens of thousands of euros for legal costs.<sup>36</sup> Meanwhile, one of the Necenzurirano founders and senior journalists left the media outlet to become head of public relations of the ruling party in the new government.<sup>37</sup>

After the long efforts of organizations fighting corruption, there has been important progress in the protection of whistleblowers in Slovenia. In October 2022, the new government adopted the Act on the Protection of Whistleblowers, transposing the respective EU Directive. It is expected that the parliament will adopt the Act in late January 2023, providing the legal framework for reporting breaches and

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31 For more information see: <https://novinar.com/prijavi-napad/>.

32 For more information see: <https://novinar.com/prijavi-napad/>.

33 Information provided by the Slovenian Association of Journalists, 4 January 2023.

34 For more information see: <https://novinar.com/novica/ucilnica-varnost-novinarjev-pri-delu-na-terenu/>.

35 For more information see: <https://necenzurirano.si/clanek/aktualno/dan-za-sojenje-snezic-proti-necenzurirano-si-1008800>.

36 For more information see: <https://necenzurirano.si/clanek/aktualno/dan-za-sojenje-snezic-proti-necenzurirano-si-1008800>.

37 For more information see: <https://www.rtvlo.si/slovenija/vesna-vukovic-zapusca-necenzurirano-si-posta-la-naj-bi-piarovka-gibanja-svoboda/636786>.



using protective measures. The Minister of Justice claims the legislation is “more ambitious than the directive”, providing more protective measures for whistleblowers and the obligation to process anonymous reports.<sup>38</sup> The obligations are set for both the public and private sectors. Companies with over 50 employees will have to introduce two separate channels for whistleblowers, and employers will be prohibited from laying off, bullying, or transferring whistleblowers to a lower-paid job.<sup>39</sup> The government departments, such as the Ministry of Justice and Ministry of Public Administration, together with the independent state body Commission for the Prevention of Corruption and with local authorities, are coordinating secondary legislation and a series of training courses to prompt the implementation of the new obligations regarding whistleblowers protection.<sup>40</sup>

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

The management of the public service broadcaster RTV Slovenija, which is politically affiliated with the previous government, has repeatedly restricted access to information on the (decline of) viewership of TV programmes to journalists of other media. This has been done not only by not replying to requests

from journalists for information or providing only partial information, but also by not respecting the decisions of the Information Commissioner, which serves as an appeal body in the legal framework on access to public information.<sup>41</sup>

## **Checks and balances**

### ***Key recommendations***

- The authorities should respect national provisions related to public consultations in the process of adopting laws and regulations.

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

The obligation of public consultations is set in the Resolution on Legislative Regulation, adopted by the National Assembly of the Republic of Slovenia in 2009.<sup>42</sup> The resolution was aimed at improving standards for drafting laws and regulations. Among other things, the resolution in question provides for minimum standards as regards public consultations, with a minimum period of 30 to 60 days allocated for consultation with the public. The Rules of

38 For more information see: [https://www.euractiv.com/section/all/short\\_news/slovenia-adopts-whistleblowers-act/](https://www.euractiv.com/section/all/short_news/slovenia-adopts-whistleblowers-act/).

39 For more information see: [https://www.euractiv.com/section/all/short\\_news/slovenia-adopts-whistleblowers-act/](https://www.euractiv.com/section/all/short_news/slovenia-adopts-whistleblowers-act/).

40 For more information see: <https://skupnostobcin.si/novica/priprave-na-sprejem-zakona-o-zasci-ti-zvizgacev-in-na-vzpostavitev-prijavnih-poti-za-zavezance/>.

41 For more information see: <https://www.dnevnik.si/1043002026>.

42 Text available at: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5516>.

Procedure of the Government of the Republic of Slovenia were later also amended to include the provision related to the minimum period for public consultations.<sup>43</sup>

The Centre for Information Service, Co-operation and Development of NGOs (CNVOS) established a violation meter, a mechanism to monitor the frequency of violations of the obligation of 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 1 June 2022 until 9 January 2023, data gathered through this monitoring mechanism revealed that the current government did not respect provisions concerning public consultations in 63% of the cases. The former government, in office from 13 March 2020 until 1 June 2022, did not respect the relevant provisions in 70% of the cases.<sup>44</sup>

## Enabling framework for civil society

### Key recommendations

- The government should create regular and efficient mechanisms for access to, and participation of, civil society in policy and decision-making pro-

cesses across all departments of the government; disregard by government departments of the rules on access to and participation of civil society in policy and decision-making, as well as the rules on public consultations in law making, should be sanctioned.

- Legal framework and law enforcement, including soft law mechanisms, aimed at protection of civil society activists and organisations (particularly defenders of human rights and democracy from attacks and harassment), should be strengthened, including protection from online harassment.
- The government should actively protect and support spaces for civil society and community work, both those existing and the creation of new spaces, including inclusive public spaces such as autonomous areas.

### Regulatory framework

In April 2022, the previous government attempted to misrepresent the pre-election information and mobilisation campaigns of civil society organisations (8 March Institute and the civil society coalition Voice of the People, bringing together more than 100 civil society organisations and groups), which

43 Text available at: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=POSL32>.

44 For more information see: <https://www.cnvos.si/stevec-krsitev/>.

aimed at encouraging voters to take informed participation in elections, by equating them with pre-election political party campaigns and claiming violation of the election regulation. The then Prime Minister Janša's tweets on that matter, publicly asking if these civil society organisations were not breaking the law by failing to open a special election-related bank account,<sup>45</sup> had seemingly prompted the Ministry of the Interior to initiate an investigation procedure requiring from the 8 March Institute information and documents on their information campaign, referring to the regulation on election campaigns and threatening to introduce misdemeanour proceedings.<sup>46</sup> However, the Ministry of Public Administration had provided the opposite opinion that "the activity, the purpose of which is to inform citizens and encourage their electoral participation, does not mean the implementation of an election campaign, to which this law [on election and referendum campaigns] would apply."<sup>47</sup> The civil society coalition Voice of the People responded to statements in which government representatives accused them of campaigning for certain political parties. They emphasized that the

accusations were "false, insulting and manipulative" statements, since the main aim of their information and mobilisation campaign is to inform and increase electoral participation.<sup>48</sup>

The ODIHR election assessment mission in their report on the parliamentary elections in Slovenia referred to the advertising campaigns of the media affiliated with the former ruling party, SDS, and to the civil society campaigns encouraging civic participation in elections when recommending to authorities to regulate third party campaigning.<sup>49</sup>

### ***(Un)safe environment***

#### ***Criminalisation of activities, including humanitarian or human rights work***

There was an attempted criminalisation of civil society activities in the new autonomous area, which has been addressed by the Ministry of Culture (in the new government), but has not yet been resolved.

In September 2022, a group of civil society activists, mainly young, established a new

45 The Janša's tweets are inserted in the report of an online media under control of his party, SDS, see: <https://e-maribor.si/koncno-inspektorat-nad-institut-8-marec-zaradi-krsenja-volivne-zakonodaje/amp/>.

46 For more information see: <https://www.24ur.com/novice/slovenija/osmi-marec.html>.

47 The Ministry of Public Information provided such a statement to the fact-checking platform of the investigative journalism centre Oštro published the report, checking the accuracy of the claim that civil society organisations are conducting pre-election political campaign. The platform found the claim »not true«. For more information see: <https://www.ostro.si/si/razkrinkavanje/objave/iniciativa-glas-ljudstva-ne-vodi-uradne-volilne-kampanje>.

48 For more information see: <https://www.rtvlo.si/slovenija/parlamentarne-volitve-2022/glas-ljudstva-ocitki-o-izvajanju-kampanje-za-dolocene-politicke-stranke-zaljivi-in-manipulativni/617479>.

49 For more information see the report at: <https://www.osce.org/files/f/documents/f/c/533558.pdf>, pp. 11-12.

autonomous area in Ljubljana, on the premises owned by the bad bank (a state-owned Bank Assets Management Company - DUTB) but left to decay for several years. The users of what has been named the Participative Ljubljana Autonomous Zone (PLAC) expressed expectations of the new government to support them in creating inclusive, lively public space from the abandoned and decaying area.<sup>50</sup> They referred to the pre-election promises of the current government parties to protect autonomous spaces for civil society and to provide new ones.<sup>51</sup> At first, the police only visited the area to collect personal data on the people there.<sup>52</sup> But later, in December 2022, these people – 46 of them, including not only participants but also journalists present when the police collected personal data – have received lawsuits from DUTB.<sup>53</sup> The PLAC users have called on the government coalition to prevent pressure on them. The Union of Journalists protested against the DUTB lawsuits as “unacceptable threats to the journalistic profession and community spaces.”<sup>54</sup> The Ministry of Culture has intervened by conducting dialogue with DUTB in search of a solution.<sup>55</sup>

***Freedom of assembly, including rules on organisation of and participation in assemblies, equal treatment, policing practices***

In 2022, the new government carried out an analysis of the legal bases that were applied in misdemeanour proceedings against individuals for violations of measures against the spread of COVID-19. The analysis covered proceedings initiated in the period between 12 March 2020 and 30 May 2022. The aim of the analysis was the revocation of fines imposed on the basis of unconstitutional regulations. The analysis was limited to misdemeanour proceedings under the Communicable Disease Act and misdemeanours proceedings relating to the alleged organisers of public gatherings under the Public Assembly Act. The findings of the analysis presented in September show that 533 decrees were issued to prevent the spread of the coronavirus and that slightly more than 62,000 misdemeanour proceedings were initiated on the basis of inadequate legal grounds. In 93% of these cases, the proceedings targeted natural persons, while 7% of the cases involved legal persons. In total, fines in the amount of €5,754,540.63 have been imposed, of which approximately 30% have been paid voluntarily,

50 For more information see: <https://english.sta.si/3077787/new-autonomous-zone-established-in-ljubljana>.

51 For more information see: <https://glas-ljudstva.si/zahteve/177/>.

52 The police came to PLAC twice within the span of a few days. They applied pressure by collecting personal data of the people around as a preventive measure.

53 For more information see: <https://siol.net/novice/slovenija/dutb-s-tozbami-nad-uporabnike-plac-a-ki-od-koalicije-pricakujejo-zascito-video-594028>.

54 For more information see: <https://sindikatsindikat-novinarjev.si/nedopustne-groznje-dutb-novinarskemu-poklicu-in-skupnim-prostorom/>.

55 For more information see: <https://www.dnevnik.si/1043002998>.

while the rest of the fines imposed have been subject to enforcement proceedings.<sup>56</sup> In the past, these misdemeanour procedures were often used as a tool for harassment, e.g. against protesters. During the second half of November, the government adopted a position paper for the preparation of normative solutions in relation to misdemeanour proceedings. The authorities intend to provide the legal bases for allowing reimbursement of fines paid, costs of misdemeanour proceedings and the related enforcement proceedings initiated on the basis of unlawful or unconstitutional legal provisions, for stopping ongoing misdemeanour proceedings, as well as proceedings related to community service, to imprisonment for a failure to pay a fine or to fine enforcement proceedings. The reimbursement of fines paid and the costs relating to the relevant procedures shall be automatic, that is – it shall be carried out ex officio. The funds for this undertaking shall be available in the state budget.<sup>57</sup>

### ***Access and participation in decision-making processes, including rules and practices on civil dialogue, rules on access to and participation in consultations and decision-making***

The new government, in power since June 2022, has improved dialogue with civil society. At the very beginning of the term of the new government, in July 2022, the Omnibus Act prepared by the 8 March Institute and filed to parliament with voter signatures was adopted, changing eleven laws passed by the previous government in fast-track procedures and without public consultation; the provisions in the repealed laws were harmful to equality, human rights and the rule of law.<sup>58</sup>

However, the initial commitments of Prime Minister Robert Golob to regular and substantial dialogue and participation of civil society have not been yet realized in practice across the government departments.

Initially, at the beginning of the term of the new government, two meetings of the Prime Minister and the Minister of Public Administration with civil society representatives were organised, in June and July 2022. Civil society representatives have expressed

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56 For more information see: <https://www.gov.si/novice/2022-09-07-analiza-pravnih-podlag-prekrskovnih-postopkov-v-casu-epidemije-covid-19/>

57 For more information see: <https://www.gov.si/novice/2022-11-24-vlada-sprejela-izhodisca-za-pripravo-normativnih-resitev-v-zvezi-s-prekrskovnimi-postopki/>.

58 For more information see: <https://english.sta.si/3060472/mps-pass-omnibus-act-repealing-previous-govts-dozen-laws>.

high expectations in terms of improved dialogue and increased participation.<sup>59</sup> Civil society played a major role in informing and mobilising voters for the April 2022 parliamentary elections, contributing to the increase of election turnout from 52.64% in 2018 to 70.97% in 2022 (the highest election turnout since 1996). The government parties committed to 122 policy changes in 11 policy areas<sup>60</sup> in the pre-election debates,<sup>61</sup> with the civil society initiative Voice of the People gathering more than 100 civil society organizations and groups.<sup>62</sup> This included the Friday cycling protest movement, which launched in April 2020 and pledged to march continuously for more than 100 Fridays against authoritarianism, repression and overall undermining of democracy by the previous government.<sup>63</sup>

After the initial meetings with the new Prime Minister, improved dialogue with civil society has been expected on the ministerial level.

There are some examples of ministries where participation and dialogue have increased. In the case of migration policy, the Ministry of the Interior has introduced new mechanisms for consultations and participation of civil society.<sup>64</sup> Civil society was strongly involved in drafting amendments to the law on public service broadcasting, RTV Slovenija.<sup>65</sup>

There are also examples of a lack of dialogue and even disrespect for civil society actions advocating for the implementation of the government's pre-election promises. An example includes the reform of the public health system and actions by civil society organisations to prevent its further privatisation. The Ministry of Health has mostly ignored calls for dialogue by the civil society coalition Voice of the People.<sup>66</sup> The civil society coalition has organised several public rallies against the privatisation of the public health system, for the protection of public interest, and for the

59 For more information see: <https://n1info.si/novice/slovenija/prvo-srecanje-roberta-goloba-z-nevladniki/> and <https://www.delo.si/novice/slovenija/vlada-zeli-okrepiti-sodelovanje-z-nevladnimi-organizacijami/>.

60 For more information see: <https://glas-ljudstva.si/drzavnozbornice-volitve-2022/>.

61 For more information see: <https://www.rtvsl.si/slovenija/deset-strank-se-je-opredelilo-do-zahtev-civilne-inicijative-glas-ljudstva/612375>.

62 For more information see: <https://glas-ljudstva.si/pogosta-vprasanja/>.

63 For more information see: [https://sl.wikipedia.org/wiki/Protivladni\\_protesti\\_v\\_Sloveniji\\_\(2020%E2%80%932022\)](https://sl.wikipedia.org/wiki/Protivladni_protesti_v_Sloveniji_(2020%E2%80%932022))

64 For more information see: <https://www.gov.si/novice/2022-07-07-nova-migracijska-politika-bo-temeljila-na-solidarnosti-vkljucevanju-in-spostovanju-clovekovih-pravic/>.

65 For more information see: <https://n1info.si/novice/slovenija/pravna-mreza-predstavlja-spremembe-zakona-o-rtvs/>.

66 The calls for dialogue included letters, requests for meeting, submitted written proposals for policy solutions to follow the pre-election promises etc. The information on the attempted dialogue with the Ministry of Health is provided by the civil society coalition Voice of the People, 4 January 2023. The Peace Institute, contributing this report, has been a founding member of the civil society coalition Voice of the People.

rights of patients in the health system reform.<sup>67</sup> While the Minister of Health labelled the protests in civil society as “extremism”, the Prime Minister attended the major protest on 10 January 2023. However, according to the media reports, the new 22-member advisory board appointed by the government to assist the Prime Minister and Minister of Health in developing the health system reform does not have a single expert from a civil society initiative that advocates against privatisation and reminds the government of its pre-election promises.<sup>68</sup>

***Access to justice, including rules on legal standing, capacity to represent collective interest at court, and access to legal aid***

Court procedures for the eviction of more than 20 non-governmental organisations from their offices at Metelkova 6 in Ljubljana have continued in 2022. The eviction has been initiated by the Ministry of Culture during the term of the former government. The new government is preparing contracts with non-governmental organisations to provide a legal basis for their continuing use of the offices.<sup>69</sup>

***Attacks and harassment***

Like in the past, the Slovenian Democratic Party and its leader were among the major promoters of negative narratives about civil society in 2022. The former leading party of the government coalition (until early June 2022) has subsequently become the major opposition party. For instance, in February 2022, the party launched the so-called ‘2022 consultations with voters’. It included highly suggestive questions and possible answers. A question relating to non-governmental organisations suggested that funding them was the opposite of funding the right projects. It reads as follows:

“The government negotiated more than €10.5 billion of European funds for investments and other projects in the country. The funds will be used for the renovation and construction of schools, kindergartens, hospitals, apartments, nursery homes, roads and sports facilities, for the construction and renovation of water supply systems, for flood protection and many other projects. I believe that: a) funds are invested in the right projects; b) we should allocate more money to non-governmental organisations.”

67 For more information on the protest in front of the Health Center Ljubljana-Polje, held on 15 December 2022, see: <https://www.delo.si/novice/slovenija/ministru-za-zdravje-se-obeta-ulica/>, and on the protest ‘Strike of Patients’ on the Republic Square in Ljubljana, held on 10 January 2023, see: <https://www.rtvsllo.si/slovenija/stavka-pacientov-se-je-koncala-s-sporocilom-vladi-danes-ste-nas-poslusali-jutri-zacnite-delati/653753>.

68 For more information see: <https://www.delo.si/novice/slovenija/koga-je-robert-golob-povabil-v-svoj-novi-strateski-svet/>.

69 For more information see: <https://www.mladina.si/220724/nevladniki-ostajajo-na-metelkovi/>.

The results show that 90% of respondents were in favour of the first response.<sup>70</sup>

Also in February, the party leader and then Prime Minister posted via Twitter a list with a number of civil organisations and initiatives disparaging their work. He asked: “Does anyone know of any national achievements of any of the recipients of your money listed below?” The tweet prompted further comments depicting the NGO sector e.g. as parasitic.<sup>71</sup> During the July 2022 wildfires in Slovenia, which captured the Karst area and were the largest in the history of the country, a party member and MP in a tweet blamed the 8 March Institute and the rest of civil society for initiating a successful referendum the previous year in which the voters rejected amendments to the Water Act.<sup>72</sup> According to civil society organisations, these amendments threatened the safety of Slovenian waters by allowing the construction of public use infrastructure (e.g. inns, business and administrative facilities, shops) on water land and coastal areas. The MP stated that the referendum rejection of amendments prevented the building of simple infrastructure (e.g. water tanks), including in the Karst area, implying that civil society is to be blamed for the lack of infrastructure,

which would be of help in fighting wildfires. The party leader and previous PM replied in a tweet that pests from Metelkova 6 (i.e. the address where a number of NGOs are housed) and mainstream media should receive credit for this.<sup>73</sup> The party leader further claimed in another tweet that left-wing governments have allocated more money in 10 years to useless NGOs at Metelkova 6 than it would be needed for purchasing two new Canadair firefighting planes.<sup>74</sup> In August, after a media outlet reported that the government intended to help the economy with a €40-million package, the head of the party felt obliged to disparage the work of organisations at Metelkova 6 and state via Twitter that only the so-called non-government people from Metelkova 6 in Ljubljana have so far cashed in 10 times more from public funds.<sup>75</sup>

### ***Physical attacks on people and property***

In October 2022, after being exposed to verbal attacks and harassment for a long period of time, the director of the 8 March Institute, Nika Kovač, was physically attacked in Ljubljana city centre. It was the second attack she reported to the police in that month. Earlier, a man broke into the Institute’s premises, insulted

70 For more information see: <https://www.sds.si/posvet-volivci-2022>.

71 For more information see: [https://twitter.com/JJansaSDS/status/1493628220733898756?ref\\_src=twsrc%5Etfw](https://twitter.com/JJansaSDS/status/1493628220733898756?ref_src=twsrc%5Etfw).

72 For more information see: <https://twitter.com/andrejhoivik/status/1550009509673852929>.

73 For more information see: <https://twitter.com/jjansasds/status/1550021484415942658>.

74 For more information see: <https://twitter.com/jjansasds/status/1550068663927148545>.

75 For more information see: <https://twitter.com/jjansasds/status/1560280415549591553>.



her, and returned several times.<sup>76</sup> The political leaders have condemned the physical attack.<sup>77</sup> However, the former Prime Minister and his opposition party, SDS, expressed doubts that someone really attacked Kovač. The former PM led the government until June 2022 and orchestrated various forms of attacks on civil society organisations, groups, and individuals for a long period. The media, controlled by SDS, requested that Kovač show the medical report to confirm her statements.<sup>78</sup> The police have identified the perpetrator of both attacks. According to Nika Kovač, physical attacks on activists are not a coincidence, but the result of systematic and orchestrated efforts. “This is something that someone is very consciously planting in our society, reproducing it every day with a single idea, and that idea is to abolish critical voices,” she said.<sup>79</sup>

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

In December 2021, the Ministry of the Interior ordered the State Attorney’s Office to initiate proceedings for protesters regarding the costs of policing certain unregistered protests. The

Office, for example, has issued a series of payment orders to one of the most visible protesters, Jaša Jenull, during the so-called Friday cycling protests. These informal anti-government protests against its role in weakening Slovenian democratic standards were taking place between April 2020 and April 2022. In March 2022,<sup>80</sup> for example, Jenull received a request to pay €34,340.56 for the costs of policing a 2020 protest. At this protest, protesters were sitting on the Republic Square and reading out the Constitution in protest against restrictions on the rights to freedom of expression and peaceful assembly in the context of the pandemic. As they did not leave the square voluntarily, the police removed the protesters by force. The State Attorney’s Office threatened a lawsuit if Jenull failed to pay this amount. In total, the protester was required to pay more than €40,000 for policing costs. According to data collected by Amnesty International, the State Attorney’s Office processed 28 claims amounting to €269,778.48 by the middle of March 2022. Apart from Amnesty International and the Legal Network for the Protection of Democracy, an initiative providing legal support to individuals and organisations involved in legal proceedings

76 For more information see: <https://tekdeeps.com/nika-kovac-described-yesterdays-nightmare-while-the-police-tracked-down-the-second-perpetrator/>.

77 For more information see: <https://english.sta.si/3097736/ngo-head-kovac-physically-attacked-in-ljubljana>.

78 For more information see: <https://tekdeeps.com/nika-kovac-described-yesterdays-nightmare-while-the-police-tracked-down-the-second-perpetrator/>.

79 For more information see: <https://tekdeeps.com/nika-kovac-described-yesterdays-nightmare-while-the-police-tracked-down-the-second-perpetrator/>.

80 For more information see: <https://www.amnesty.org/en/documents/eur68/5344/2022/en/>.

due to non-violent public action,<sup>81</sup> the Council of Europe Commissioner for Human Rights has also raised concerns over the legal developments in Slovenia, and have requested from the government to refrain from the financial and administrative harassment of civil society activists. The Commissioner warned that such actions ran contrary to the country's international human rights obligations as well as the relevant national legislation.<sup>82</sup> Only after the 2022 parliamentary election and after the government changed hands were the orders, adopted by the former government in late 2021 regarding the preparation and filing of lawsuits for the reimbursement of police costs at unregistered public gatherings, revoked.<sup>83</sup>

### **Online civic space**

There are continuous smear campaigns and online harassment targeting activists and civil society organisations engaged in defending human rights and democracy. In the 2022 pre-election and pre-referendum campaigns, the civil society groups and activists that engaged in informing and mobilising voters were particularly targeted by officials and supporters of the former government. It led to the physical attack on one of the most exposed

civil society activists, Nika Kovač, director of the 8 March Institute.<sup>84</sup>

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

### **Key recommendations**

- The state should consider re-opening and reviewing special legislation regarding access to permanent residence and compensation for all the erased, regardless of where they currently reside, so that all erased people have fair access to redress.
- Establishment by law of a specific procedure for determining statelessness and protection status in accordance with good practice, in order to give full effect to the rights under the 1954 Convention for stateless persons in Slovenia. Also, Slovenia should assume its responsibility and immedi-

81 For more information see: <https://www.amnesty.org/en/documents/eur68/5344/2022/en/> and <https://pravna-mreza.si/poziv-vladi-rs-da-umakne-vlozeni-tozbi-in-zahtevke-za-vracilo-strokov-mirnih-shodov/>.

82 For more information see: <https://www.coe.int/en/web/commissioner/-/slovenia-lawsuits-and-fines-against-peaceful-demonstrators-should-be-dropped>.

83 For more information see: <https://www.gov.si/novice/2022-06-09-preklicani-sklepi-za-povrnitev-strokov-policije-na-shodih/>.

84 For more information see: <https://tekdeeps.com/nika-kovac-described-yesterdays-nightmare-while-the-police-tracked-down-the-second-perpetrator/>.

ately ratify the 1961 Convention on the Reduction of Statelessness.

- The government should consider changing the ministry in charge of migration policy: the Ministry of the Interior, which is currently responsible for the area, treats migration primarily as a security issue, rather than from the perspective of human rights, solidarity, and inclusion.

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

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

In 2022, the police processed 32,042 illegal border crossings. The number is higher by 214% compared to 2021 when 10,198 unauthorized crossings were dealt with. Most often, citizens of Afghanistan, Burundi, and India were apprehended. In 2022, 31,447 intentions to apply for international protection were expressed. The number is higher by 456.6% compared to 2021, when 5,650 intentions were recorded.<sup>85</sup> However, 6,787 asylum applications were lodged,<sup>86</sup> and 200 people were granted international protection.<sup>87</sup>

In 2022, 2,361 foreigners were handed over to foreign security authorities on the basis of international agreements. The number is 41% lower compared to the previous year, when 4,000 foreigners were handed over to foreign police. Most foreigners were handed over to the Croatian security authorities. In 2022, 427 persons were accepted by foreign security authorities to Slovenia on the basis of international readmission agreements. The number is 72.2% higher compared to 2021 when 248 foreigners were accepted to Slovenia.<sup>88</sup>

The discrepancy in the number of irregular border crossings, the number of people that apply for international protection, and the number of people receiving international protection indicate the need for thorough research of the situation. This is especially so in regard to persons who returned to Croatia, where they are at risk of violence and inhumane treatment, and further to Bosnia and Herzegovina.

Most importantly, these large numbers show that new (alternative) legal pathways to Europe are needed, so that people do not take irregular dangerous routes, often on foot.

85 For more information see: <https://www.policija.si/images/stories/Statistika/MejnaProblematika/IlegalneMigracije/2022/December2022.pdf>.

86 For more information see: <https://www.gov.si/assets/vladne-sluzbe/UOIM/STATISTIKA/December-2022/Novo-nastanjeni-prosilci-po-mesecih-2022-12.pdf-correctedByPAVE.pdf>.

87 For more information see: [https://www.gov.si/assets/vladne-sluzbe/UOIM/STATISTIKA/December-2022/Osebe-s-priznано-mednarodno-za\\_ito-po-mesecih-2022-12.pdf-correctedByPAVE.pdf](https://www.gov.si/assets/vladne-sluzbe/UOIM/STATISTIKA/December-2022/Osebe-s-priznано-mednarodno-za_ito-po-mesecih-2022-12.pdf-correctedByPAVE.pdf).

88 For more information see: <https://www.policija.si/images/stories/Statistika/MejnaProblematika/IlegalneMigracije/2022/December2022.pdf>.

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

February 2022 marked 30 years since the authorities illegally erased 25,671 individuals from the register of permanent residents of the Republic of Slovenia. The president of the Republic of Slovenia (finally) formally apologized on behalf of the state “for the unconstitutional act of erasure from the register of permanent residence, for the violation of human rights and all injustice and suffering. With this, according to him, the state assumed moral responsibility.”<sup>89</sup>

The erasure was not just a mere administrative error, but a systematic and deliberate removal of what was seen as an ‘undesirable’ part of the population. The consequences for the victims of the erasure did not disappear over the years, especially since the state decided to implement only the minimum measures required by the European Court of Human Rights (*Kurić and Others v. Slovenia*). More than half of the erased did not receive any form of redress - neither the restitution of the illegally taken away status nor the financial compensation for the damage suffered. There are still some erased persons who live in Slovenia without regulated status since the erasure. The remedies available to them are very limited, do not acknowledge the injustice done to them, and disregard their long stay in the country. Their distress is great; many of them are elderly and sick people, who, without a permanent residence, cannot rely on

the social services. The state must urgently ensure that these people, who have been living in Slovenia for decades, arrange a permanent residence permit so that their special position is acknowledged and their right to private and family life and their dignity is respected.

Given that more than half of those who have been erased have not received adequate access to restitution of their permanent resident status or compensation, the state should revise past legislation and open up the application period so that all those who have been erased have fair access to redress.

The state must also provide such legal remedies to all individuals who, due to various circumstances, have a long-term undocumented residence in the country, as required by international human rights standards and the case law of the European Court of Human Rights. The Human Rights Ombudsman has been using the term ‘long-term tolerating of undocumented residing of persons who reside in the territory of Slovenia for longer periods of time’. According to the Ombudsman and the ECHR case law, such persons cannot be removed from a state territory, as they have established cultural, social, and family ties with their long-term residence.

In addition to erasure, some individuals have also been affected by statelessness. The issue of statelessness is persistently ignored by the state. Slovenia should assume its responsibility

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89 For more information see: <https://www.rtvsllo.si/slovenija/pahor-izbrisanim-opravico-je-potrebno-za-nazaj-in-kot-zaveza-za-naprej/613688>.

and immediately ratify the 1961 Convention on the Reduction of Statelessness.

## ***Fostering a rule of law culture***

### ***Contribution of civil society and other non-governmental actors***

In autumn 2021, Slovenian civil organisations and initiatives joined forces and set up an informal coalition called Voice of the People. The coalition, which currently brings together more than 100 civil society organisations and initiatives, materialised in the context of the 2022 super election year, with parliamentary, presidential and local elections all taking place in Slovenia. Its aim was to put a substantive discussion on a democratic, green, and fair society at the centre of the pre-election period, and to achieve a record voter turnout. In this respect, the coalition, amongst others, drafted 138 demands divided into 11 different policy areas and submitted them to political parties participating in the parliamentary election. The parties were asked to provide their position on the relevant issues. Based on these responses, an online tool was designed, allowing voters to inspect similarities between their views and the views of political parties.

To promote voter turnout, the initiative also organised a travelling festival of democracy named ‘We will decide: Let’s go vote’. Across the country, discussions with residents on the importance of democracy were carried out, whereby the importance of electoral participation was highlighted. In addition, a live debate between representatives of political parties participating in the parliamentary election was also organised, and took place in the historic Republic Square in Ljubljana.<sup>90</sup> On 24 April 2022, the day of the parliamentary election was marked by a considerable turnout, with 70.79% of eligible voters casting their vote.<sup>91</sup> Such a turnout has not been recorded since the 2000 parliamentary election. The turnout in the 2018 and 2014 elections, for example, was 52.64% and 51.73%, respectively.<sup>92</sup>

In early 2021, Amnesty International Slovenia, the Legal Centre for the Protection of Human Rights and Environment, Today is a New Day, and the Institute for Culture of Diversity Open established the Legal Network for the Protection of Democracy. The structure provides legal assistance to individuals and organisations involved in legal proceedings due to non-violent public action. According to the initiative, the imbalance of access to finance and legal between the state and individuals is substantial, so it is necessary to strengthen the position of those whose human rights are

90 For more information see: <https://glas-ljudstva.si/pogosta-vprasanja/>.

91 For more information see: <http://pisrs.si/Pis.web/pregledPredpisa?id=DRUG5046>.

92 For more information see: [www.dvk-rs.si/fileadmin/user\\_upload/dokumenti/volitve/drzavni\\_zbor\\_2018/011dyenp.pdf](http://www.dvk-rs.si/fileadmin/user_upload/dokumenti/volitve/drzavni_zbor_2018/011dyenp.pdf) and [www.dvk-rs.si/fileadmin/user\\_upload/dokumenti/volitve/drzavni\\_zbor\\_2014/Porocilo-o-izidu--predcasne-volitve-v-DZ-2014--anonimizirano.pdf](http://www.dvk-rs.si/fileadmin/user_upload/dokumenti/volitve/drzavni_zbor_2014/Porocilo-o-izidu--predcasne-volitve-v-DZ-2014--anonimizirano.pdf).

violated. Within the network, professional assistance is provided by highly qualified lawyers and law firms.<sup>93</sup> In 2022, the network continued with its activities. Among other things, in the first six months of 2022, 275 individuals saw legal assistance provided to them by the network, mostly relating to measures to prevent the COVID-19 pandemic, persecution of public gatherings, as well as fulfilment of other human rights and freedoms. In this same period, prompted by the network's requests for legal protection, the courts and the police stopped misdemeanour proceedings in 18 cases, as a consequence exempting individuals concerned from paying fines. Prompted by the network's appeals, the Ministry of the Interior eventually stopped the procedures in which individuals who participated in informal gatherings were required to pay the costs of policing these events. In 2022, the European Parliament awarded the network the European Citizen's Prize for providing support to organisations and individuals in the use of legal means to challenge measures, procedures and policies that are illegal, unconstitutional and undemocratic.<sup>94</sup>

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93 For more information see: <https://pravna-mreza.si/o-nas/>.

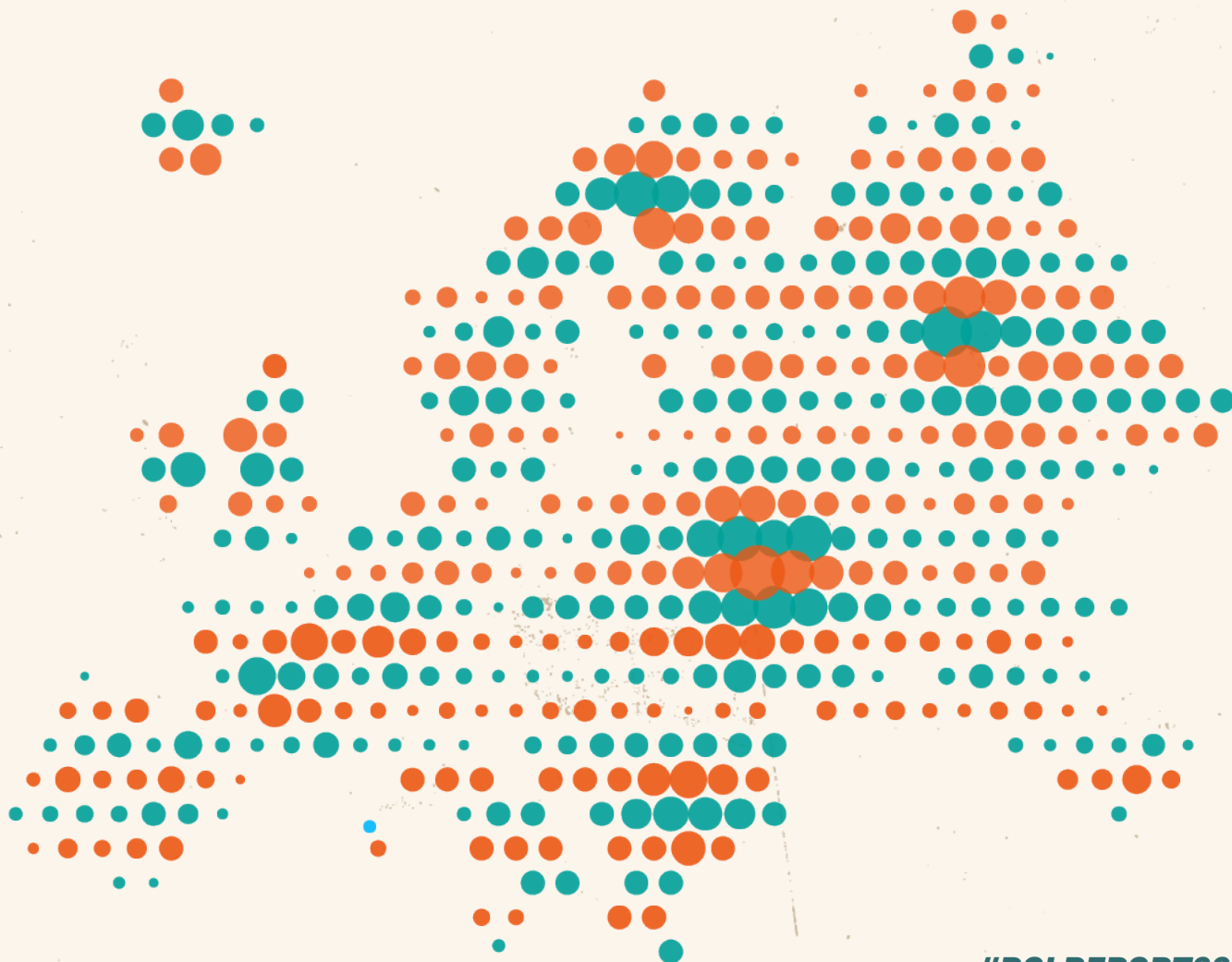
94 For more information see: <https://pravna-mreza.si/dosezki/>.

**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**SPAIN**



**#ROLREPORT2023**

# SPAIN

## About the authors



**Rights International Spain (RIS)** is an independent, not-for-profit NGO working to hold the Spanish state accountable for its obligation to protect and respect human rights and civil liberties through a more effective use of international law principles and mechanisms. RIS's mission is to strengthen human rights accountability in Spain by monitoring government activity, with a particular focus on rule of law and access to justice, as well as raising civil society's awareness and mobilising support to demand justice. To accomplish its mission, RIS develops timely and rigorous policy and legal analyses, produces other advocacy and communications resources and tools for the general public, and supports strategic litigation activities.

## Key concerns

The situation of the justice system has seen no overall progress in 2022. There have been no changes in relation to the independence of the judiciary and the government failed to implement the 2022 EU Commission recommendations: no measures were taken to address the independence of the State General Prosecutor, the General Council of the Judiciary (CGPJ) has not been renewed, and there has been no progress on the efficiency in handling high-level corruption cases. On the contrary, penalties for misappropriation of public funds have been reduced in particular situations.

Measures taken to improve the anti-corruption framework have not been successful and the recommendations of the EU Commission were not addressed. A new audiovisual law<sup>1</sup> was approved, however, the new legislation does not include the 2022 EU Commission report recommendation to create an independent national audiovisual authority.<sup>2</sup> Similarly, the new legislative proposal on Official Secrets has been highly criticised by media associations as it limits freedom of expression.<sup>3</sup> According to the Journalist Federation Union, the new

1 [Ley General de Comunicación Audiovisual, Ley 13/2022 7 July.](#)

2 [La nueva Ley General Audiovisual, un peligroso paso atrás - FeSP - Federación de Sindicatos de Periodistas \(fesperiodistas.org\)](#)

3 [La FAPE rechaza el Anteproyecto de Ley de Información Clasificada al limitar los derechos de libertad de expresión e información](#)



audiovisual law does not create an independent audiovisual authority and delegates the control of the fulfilment of the law to the National Commission for Markets and Competition, an agency that has proven its lack of efficiency in this regard. In relation to the new legislative proposal on Official Secrets,<sup>4</sup> the biggest federal journalists' association has reported that the new legislation reintroduces censorship and limits freedom of expression as well as the right to information.<sup>5</sup> In August 2022, the Platform for Freedom of Information published a report that highlights these allegations in opposition to the proposed legislation, specifically that the proposal should respect the recommendations of the Organization for Security and Cooperation in Europe (OSCE), of which Spain is a member – that is, to reduce the length of time it takes to declassify official secrets and clarify which materials cannot be classified.<sup>6</sup>

The lack of investigation into the June 2022 incidents that occurred on the Spanish-Moroccan border shows an absence of interest by Spanish authorities in enforcing human rights in cases concerning migrants. There are still concerns in relation to specific systemic issues identified by human rights groups, including RIS in 2022. This includes the lack of exhaustive investigation of ill-treatment allegations and insufficient reparation for the victims of the Civil War and the dictatorship.

### State of play

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

#### Legend (versus 2022)

- ↓ Regression
- No progress
- ↑ Progress

## Justice system –

### Key recommendations

- Strengthen the statute governing the State General Prosecutor, bringing it in line with European standards.
- Renew the General Council of the Judiciary and immediately thereafter modify the legislation incorporating European standards in the way judges are selected.
- Take measures to address the long duration of investigations and pros-

4 <https://www.mpr.gob.es/servicios/participacion/Documents/APL%20Informacio%CC%81n%20Clasificada.pdf>

5 <https://elpais.com/espana/2022-08-11/la-principal-organizacion-de-periodistas-de-espana-denuncia-que-la-nueva-ley-de-secretos-resucita-la-censura.html>

6 [ALEGACIONES-ANTEPROYECTO-LIC-AGOSTO-2022-anonimizado.pdf \(libertadinformacion.cc\)](#)

ecution of offences to increase efficiency in high-level corruption cases.

## ***Judicial independence***

### *Independence*

The reform of the General Council of the Judiciary (CGPJ), due to take place in 2018, is still on hold.

EU Justice Commissioner Didier Reynders's visit to Spain at the end of September 2022 made the government and the leader of the main opposition party revive conversations about the reform of the General Council of the Judiciary.<sup>7</sup> However, on 27 October 2022, the leader of the main opposition party announced that they would not come to an agreement on this reform.<sup>8</sup>

Legislation passed in 2021 removed the ability of the General Council of the Judiciary to cover judicial vacancies. On 9 October 2022, the President of the General Council of the Judiciary and of the Supreme Court announced

his resignation. He stated that the lack of reform of the General Judiciary Council had caused serious problems in the quality of the Spanish justice system in general and specifically of the Spanish Supreme Court.<sup>9</sup>

The situation has become even more critical in recent months. The Constitutional Court must be renewed as judges' mandates expire. The General Council of the Judiciary has a mandate to select two of the members of the Constitutional Court, however, some conservative members of the General Council of the Judiciary decided that they would not propose any candidates for the Constitutional Court as a protest against their situation.<sup>10</sup> The government considered this attitude from the conservative members unacceptable as it blocks the renewal of the Constitutional Court.

To prevent further delays in the renewal of the Constitutional Court, the government made an urgent legislative proposal to amend the way Constitutional Court judges are to be selected by enabling the General Judiciary Council to reduce the number of votes required to nominate.<sup>11</sup> The main conservative opposition party

7 <https://confilegal.com/20220926-el-comisario-de-justicia-reynders-visita-esta-semana-espana-con-la-renovacion-del-cgpj-en-mente-y-los-fondos-europeos-como-palanc>

8 <https://confilegal.com/20221101-69-vacantes-sin-cubrir-la-ruptura-del-acuerdo-entre-pp-y-psoe-para-elegir-un-nuevo-cgpj-ahonda-la-crisis-en-la-justicia/>; [Frustrada la negociación para renovar el CGPJ: el PP acusa al al PSOE de ocultarle su intención de modificar el delito de sedición - Confilegal](#)

9 <https://www.europapress.es/nacional/noticia-carlos-lesmes-formalizara-manana-renuncia-presidente-cgpj-supremo-20221009203220.html>

10 <https://elpais.com/espana/2022-09-14/los-ocho-vocales-rebeldes-del-poder-judicial-dilatan-un-acuerdo-para-el-constitucional-que-no-garantizan.html>

11 <https://www.elindependiente.com/espana/2022/12/10/la-reforma-para-asegurar-la-renovacion-del-tc-rompe-con-el-modelo-constitucional-de-nombramiento-por-tercios/>

opposed the way the proposed legislation was going to be pushed through the Spanish Parliament and presented an appeal before the Constitutional Court requesting that the court stop the voting on the proposed legislation by the Senate, where it was awaiting approval. The Constitutional Court accepted the arguments of the conservative majority opposition and ordered the Senate to cease voting on the specific amendment. The situation has created very strong criticisms of the Constitutional Court and very serious accusations between the government, the progressive parliamentary groups and the conservative party.<sup>12</sup>

Finally, the General Council of the Judiciary came to an agreement to propose two nominees to the Constitutional Court.<sup>13</sup>

The Civic Platform for Judicial Independence (Plataforma Cívica por la Independencia Judicial) has continued in 2022 to address the European Parliament and other European institutions for assistance regarding monitoring the Spanish legal reforms that affect the judiciary and its independence and the separation of powers. This primarily concerns the

applicable legal regime of the CGPJ and the election procedure of its spokesperson.<sup>14</sup>

In October 2022, on the European Day of Justice, the Civic Platform for Judicial Independence issued a communication recognising that European pressure is an important element in the fight to obtain a real independent judiciary in Spain.<sup>15</sup>

### ***Autonomy of the prosecution service***

On 19 July 2022, the Association of Professional and Independent Prosecutors issued a statement criticising the appointment of the new State General Prosecutor, highlighting that he was very close to the former State General Prosecutor and co-responsible for the damages she caused to the institution.<sup>16</sup>

### ***Quality of justice***

#### ***Resources of the judiciary (human/financial/material)***

There are two legislative proposals in the works. One is to improve the efficiency of the justice services, presented in Parliament on

12 [DIRECTO | El Constitucional decide impedir la votación del Senado sobre su renovación: todas las reacciones \(eldiario.es\)](#)

13 [El Poder Judicial elige por unanimidad a los magistrados propuestos por el sector conservador para el Constitucional | España | EL PAÍS \(elpais.com\)](#)

14 [Llamando a las puertas de Europa - Plataforma Cívica Independencia Judicial \(plataformaindependenciajudicial.es\)](#)

15 [DÍA EUROPEO DE LA JUSTICIA \(Comunicado Plataforma\) - Plataforma Cívica Independencia Judicial \(plataformaindependenciajudicial.es\)](#)

16 [AF y APIF observan una tendencia “continuista” en el nombramiento de Álvaro García como fiscal general \(europapress.es\); ULTIMO COMUNICADO \(apifiscales.es\)](#)

13 April 2022. The second is to improve the digitalisation of the judicial services, presented on 21 July 2022. Both legislative proposals are on track.

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

### **Key recommendations**

- Eliminate those elements of Law 4/2015 on the Protection of Citizens' Security that limit the right to information and the right to protest.
- In relation to the pending legislation on Official Secrets, the Spanish government should pay attention to the allegations presented by civil society groups to avoid limitations of freedom of information and expression rights.
- Incorporate anti-SLAPP measures to guarantee a balance between access to justice, privacy and protection of freedom of expression and information.
- Maintain the recommendation to incorporate an independent audiovisual national authority.

### **Public trust in media**

In its Annual Report on the Journalistic Profession,<sup>17</sup> the Madrid Press Association found no improvement to the level of independence of the media and the precariousness of employment that exists in the sector. It highlights the increase of journalists that work in digital newspapers and the relevance of social media in journalism. It also points out the increase of women in the profession.

The report states that journalists believe the high level of political polarisation is a risk to their work. The score for media independence dropped one-tenth, from 4.6 to 4.5 (on a scale of 1 to 10). Fifty percent of journalists state that their sources for news stories are increasingly public officials and not professionals. On many occasions, they feel increased pressure from private interests and managers of media to amend their news pieces. The report indicates confidence in the information remains at 5.4 on the same scale.

On International Women's Day, several journalists' associations expressed concerns about the situation of women journalists in Spain, such as lower salaries, higher rates of unemployment and an underrepresentation of women in managerial positions.<sup>18</sup>

17 [Madrid Press Association 2021 Annual Report of the Journalist Profession Informe-anual-Profesion-Periodistica-2021\\_web\\_lite.pdf \(apmadrid.es\)](#)

18 [La Asociación de la Prensa denuncia la brecha salarial y la ausencia de mujeres directivas en los medios \(horasur.com\)](#) [La Asociación de la Prensa de Madrid señala las desigualdades a las que se siguen enfrentando las mujeres](#)

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

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### ***Smear campaigns***

As reported by Reporters Without Borders in their 2022 report on Spain, “the level of violence against journalists has fallen considerably thanks to a decline in the tension over Catalan independence demands, although political polarisation and patchy legislation threaten the right to information”. Spain has fallen from 29th to 32nd in the World Free Press ranking of Reporters Without Borders.<sup>19</sup>

In a seminar organised on 22 October, the Federation of Journalists Association concluded that cyberattacks against journalists are mainly directed at women journalists. These attacks have the purpose of limiting the voices that cover certain information.<sup>20</sup>

The Madrid Press association expressed its rejection of the discrediting campaign initiated by the Russian Embassy in Spain against ABC newspaper. The accusation was that the newspaper censored a supposed interview with

the Speaker of the Russian Foreign Ministry. The interview was in fact never granted, and instead the Russian authorities submitted a written statement by the Speaker of the Russian Foreign Ministry. The newspaper then refused to publish that written statement.<sup>21</sup>

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

In spite of the 2021 government compromise to amend Organic Law 4/2015 on the Protection of Citizens’ Security (commonly known as “gag law”), article 36.23 of this law, covering the “diffusion of images” of police officials in the exercise of their functions, still remains in effect, which is a limitation on journalists’ ability to perform their job. In May 2022, the Platform for Freedom of Information reported that human rights organisations such as Amnesty International have protested against the block on modifying the law.<sup>22</sup>

The following instances are examples of judicial proceedings initiated against journalists where right to freedom of information has been and can be potentially limited.

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[periodistas | APM. Asociación de la Prensa de Madrid \(apmadrid.es\)](#)

19 [Spain | RSF](#)

20 [El ciberacoso a periodistas tiene sexo femenino \(fape.es\)](#)

21 [La APM rechaza la campaña de desprestigio de la Embajada rusa contra ‘ABC’ | APM. Asociación de la Prensa de Madrid \(apmadrid.es\)](#)

22 [Organizaciones en defensa de los derechos humanos denuncian seis años de bloqueo parlamentario de la reforma de la Ley Mordaza y exigen a los partidos políticos avanzar hacia la libertad de expresión - Plataforma por la libertad de información \(libertadinformacion.cc\)](#)

Iberdrola, a big Spanish hydroelectric corporation, initiated a lawsuit against the Spanish digital newspaper *El Confidencial* for “offences against its honour”. The Federation of Associations of Journalists of Spain and the Madrid Press Association supported *El Confidencial* and the right to freedom of information.<sup>23</sup>

Ignacio Cembrero, a journalist specialising in the Maghreb and working for the digital newspaper *El Confidencial*, has been sued by the Moroccan government for publishing his suspicion that his telephone had been subject to Pegasus spyware while in Morocco.<sup>24</sup> The Madrid Press Association issued a statement in support of Cembrero and expressed the belief that this new legal complaint has no other intention than to intimidate journalists like Cembrero and to prevent them from continuing to publish any irregularities observed in the course of their work.<sup>25</sup>

Pilar de la Fuente, a journalist for the public outlet Valencia TV, has been cited for disturbing public order and refusing to identify herself while she was covering a housing eviction

in Valencia. Police suggested they would issue a fine to the journalist. Journalists’ associations and other media have strongly criticised the police for their attitude against the right to information.<sup>26</sup>

### **Confidentiality and protection of journalistic sources (including whistleblower protection)**

The Directive 2019/1937 of the European Parliament and Council,<sup>27</sup> which refers to the protection of persons who report on violations of EU law in the fight against corruption, has not been transposed yet. The Spanish government presented a proposal in March 2022, but it is still pending approval.

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

The Madrid Press Association has condemned the treatment of TV6 reporter Andrea Roperó, who tried to approach the President of the Madrid Autonomous Region in a public act. The President’s Chief of Staff pushed

23 [La FAPE y la APIE defienden la libertad de información de ‘El Confidencial’ | APM. Asociación de la Prensa de Madrid \(apmadrid.es\)](#)

24 [Marruecos denuncia al periodista Ignacio Cembrero por vincularle con Pegasus \(elconfidencial.com\)](#)

25 [Marruecos denuncia al periodista Ignacio Cembrero por vincularle con Pegasus \(elconfidencial.com\); La APM respalda a Ignacio Cembrero ante la demanda de Marruecos | APM. Asociación de la Prensa de Madrid \(apmadrid.es\)](#)

26 [La Policía denuncia por desobediencia a una periodista de la televisión pública valenciana que cubría un desahucio \(eldiario.es\)](#)

27 Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report infringements of Union law.. Seen in the Official Journal of the European Union: <https://www.boe.es/doue/2019/305/L00017-00056.pdf>

the reporter when she was trying to ask a question.<sup>28</sup>

The Madrid Press Association denounced the fact that when the leader of the government makes public appearances, as well as during press conferences, journalists are given little opportunities to ask questions. On 29 December, journalists complained when the President appeared to submit his accountability report and only representatives from six media outlets were able to ask questions, and that they had to be approved before the beginning of the press conference.<sup>29</sup>

The Madrid Press Association also denounced the attitude of the president of the Popular Party (the main opposition party), Alberto Nuñez Feijó. After convening the press to present his plan as president of the party, Feijó refused to take any questions. The Madrid Press Association laments that increasingly often those with institutional responsibilities act as if journalists were only transmitters of their words.<sup>30</sup>

The Spanish digital newspaper *elDiario.es* reported an incident that took place on 9 July 2022, on the public outlet Catalan TV3. After

an interview in the programme's Frequent Questions to Laura Borrás (a Catalan politician and former President of the Catalan Parliament), Catalan parliamentarian Fransec de Dalmases grabbed the journalist who interviewed Borrás by her wrist and locked her in a room as she was leaving the studio. He scolded this journalist for the content of the interview, which he considered uncomfortable, and which had apparently breached a previous pact "not to make a public trial" of Borrás. The newspaper confirmed the information from four different sources.<sup>31</sup>

RSF and the Committee for the Protection of Journalists (CPJ) have requested the immediate release of Spanish journalist Pablo Gonzales, who was arrested in February 2022 in Poland and charged with spying for Russia while using his credentials as a journalist.<sup>32</sup>

On 3 November 2022, the Spanish Constitutional Court ordered the reopening of a case of police violence against photojournalist Sira Esclasans for lack of a proper investigation because there had been a violation of her right to a fair trial and her right to information. According to the Court, her claim that a foam ball from the Catalan Police hit

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28 [El empujón de Miguel Ángel Rodríguez a Andrea Roperó: "No puede tratar así a la prensa" \(lasexta.com\)](#)

29 [La APM reclama al Gobierno mayor pluralidad en la participación de medios en las ruedas de prensa | APM. Asociación de la Prensa de Madrid \(apmadrid.es\)](#)

30 [La APM denuncia que Feijó no aceptara preguntas tras hacer balance de su gestión | APM. Asociación de la Prensa de Madrid \(apmadrid.es\)](#)

31 [Un diputado de Junts abroncó a una periodista de TV3 por las preguntas de una entrevista a Laura Borràs \(eldiario.es\)](#)

32 [Polonia acusa de espionaje al periodista español detenido \(rtve.es\)](#)

her leg when covering a protest in Barcelona in 2019 was not properly investigated.<sup>33</sup>

The Madrid Town Hall prevented access of photojournalists to the terrace in November 2022, to cover a demonstration against the situation of the Health System in Madrid. The Municipal Police received orders to stop anyone with professional equipment.<sup>34</sup>

The Council of Europe published an alert following the arrest of a journalist and a photojournalist of El Salto digital newspaper, who had covered a protest act by climate activists in El Prado Museum in November 2022. Both have been investigated for an alleged offence against historic patrimony.<sup>35</sup>

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

### **Key recommendations**

- The Spanish government must incorporate effective and real measures

to guarantee the accountability and transparency of law enforcement officers.

- Incorporate measures to combat racial profiling in policing.

## **Systemic human rights violations**

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

In October 2021, the association Foreigners Online (“Extranjeristas en Red”) reported to the Ombudsman that the National Police broke into a B2-level Spanish exam (required to acquire Spanish nationality) to demand the identification of those migrants taking the exam. The lawyer that presented the complaint informed the newspaper *Público* that from a legal standpoint this action did not have any justification.<sup>36</sup>

In November 2022, *SOS Racism Catalunya* published a report on how racial profiling – a practice widely denounced by different human rights organisations – is used and the extent to which it is used. The NGO states that for every one Spanish national who was identified

33 [El Constitucional ordena reobrir un cas d'agressió policial a una fotoperiodista perquè no es va investigar - directa.cat](#); [El TC ampara a una fotógrafa y ordena investigar el impacto que recibió de una pelota de foam de los Mossos \(elperiodico.com\)](#)

34 [El Ayuntamiento de Madrid impide el acceso de periodistas a la azotea para cubrir la manifestación \(eldiario.es\)](#)

35 [El Consejo de Europa publica una alerta sobre la detención de periodistas de El Salto por cubrir la protesta del Prado \(eldiario.es\)](#)

36 [Público: https://www.publico.es/sociedad/policia-irrumpe-examen-nacionalidad-e-identifica-participantes.html](https://www.publico.es/sociedad/policia-irrumpe-examen-nacionalidad-e-identifica-participantes.html)



by the police in 2021, 3.48 foreigners were identified.<sup>37</sup>

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

The Committee on Equality of the Parliamentary Assembly of the Council of Europe (PACE), the EU Agency for Fundamental Rights (FRA), the European Commission against Racism and Intolerance (ECRI) and the Committee for the Elimination of Racial Discrimination (CERD) of the UN have been recommending that Spanish authorities:

- Clearly and expressly condemn and prohibit by law the use of racial profiling.
- Establish independent police oversight and reporting mechanisms, ensuring they are sufficiently staffed and resources.
- Systematise the use of identification forms and ensure that police officers can be clearly identified when performing stop-and-search operations. This measure is also supported by the Ombudsman, since 2013.<sup>38</sup>

### ***Other systemic issues***

There are still concerns in relation to specific systemic issues identified by human rights groups, including RIS in 2022.<sup>39</sup>

#### ***1. Lack of exhaustive investigation of ill-treatment allegations***

There has not been any modification in the way ill-treatment allegations are handled by law enforcement authorities in Spain.

Law 14/2015 on the Protection of Citizens' Security remains the legal instrument that most negatively impacts civic space and on the activities of civil society organisations in Spain. The project to amend the law presented in 2021 has not progressed in the Parliament. This legislation presents limits to freedom of expression, information, and assembly as well as some aspects of treatment of migrants.

A statement by the Council of Europe Commissioner for Human Rights following a visit to Spain in November 2022 expressed concern that the 2015 Citizens' Security Law continues to have a serious negative impact on the enjoyment of freedoms of expression and assembly, in particular for human rights defenders and journalists. Allegations of

37 SOS Racisme Catalunya (noviembre 2022): <https://sosracisme.org/pareu-de-parar-me-2021/>

38 Defensor del Pueblo. Recomendación 45/2013. (17 de abril de 2013). Anexo E.1, pp. 154-156. Disponible en: [https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2013\\_Anexo\\_E\\_1\\_Recomendaciones\\_2013.pdf](https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2013_Anexo_E_1_Recomendaciones_2013.pdf)

39 RIS en Twitter: "Estamos frente al @Congreso\_Es exigiendo la reforma de la #LeyMordaza que respete los Derechos Humanos. #GobiernoCumpleTuPalabra Pedimos libertad de expresión e información y el fin de las identificaciones policiales por perfil racial <https://t.co/a3woOns1p0>" / Twitter

disproportionate use of force by law enforcement officials, inappropriate use of anti-riot weapons and the lack of clear and visible police identification numbers, especially during demonstrations, are also issues of concern. The Commissioner stressed that the review of the law should be used as an opportunity to bring it fully in line with European and human rights standards.<sup>40</sup>

Amnesty International reports that the main concerns continue to be the way the law punishes “resistance, disobedience or refusal to identify oneself” to police and “disrespect for authority”; the ban on publishing images of security forces; the lack of independent supervising mechanisms; immediate and collective deportations at border; race-based police checks and raids; prostitutes and victims of trafficking being forced to move to isolated areas; and the use of rubber bullets and prohibition of spontaneous demonstrations.<sup>41</sup>

In July 2022, the “We Are Not a Crime” platform, made up of more than 100 organisations of activists, lawyers, and citizens, published a manifesto protesting that the proposal for the reform of the Citizens’ Security Law has not been processed. In addition, the reform does

not propose eliminating the most harmful elements for human rights, despite proposing some changes, such as the possible elimination of the article related to the “dissemination of images” of police actions (36.23). In the years that it has been in force, the law has been used to limit social protest and information through sanctions based fundamentally on two articles: “resistance, disobedience or refusal to identify oneself” (36.6) and “disrespect for authority” (37.4), which account for 70% of the total sanctions imposed under the law. These articles are not addressed in the reform. The proposal does not reduce the broad powers of the security forces, nor does it establish adequate control and accountability mechanisms, leaving the door open to arbitrary actions. The use of rubber bullets is also not prohibited. It does not include the express prohibition of police identifications based on racial profiling, nor does it propose to eliminate the legality of “hot returns” (pushbacks at the border).<sup>42</sup>

The situation at the border with Morocco has caused many complaints of police brutality. In March 2022, international NGOs requested an investigation into alleged police brutality against migrants that attempted to enter Spain by jumping the fence in Melilla.<sup>43</sup> On 24 June

40 [Spain should advance social rights, better guarantee freedoms of expression and assembly and improve human rights of refugees, asylum seekers and migrants - Commissioner for Human Rights \(coe.int\)](#)

41 [Organizaciones denuncian seis años de bloqueo parlamentario de la reforma de la Ley Mordaza y exigen a los partidos políticos avanzar hacia la libertad de expresión \(amnesty.org\)](#)

42 [No somos delito \(01/07/2022\), manifiesto contra la Ley Mordaza y las devoluciones en caliente: https://nosomos-delito.net/article/2022/07/01/manifiesto-contra-la-ley-mordaza-y-por-el-fin-de-las-devoluciones-en-caliente](#)

43 [ONG internacionales exigen investigar agresiones a migrantes durante los saltos en Melilla | España | EL PAÍS \(elpais.com\)](#)

2022, the massive jumping of the fence in Melilla caused 23 deaths and 37 injuries. The deaths and injuries were the result of a massive crush of migrants. Local NGOs claimed that there were a greater number of casualties than those officially recognised and that Moroccan authorities attempted to hide the real number of deaths. They also claimed that Spanish authorities refused to provide proper assistance to the injured and that immediate deportations did not comply with current legislation. Almost 120 NGOs have requested a congressional investigation into the events. The Spanish Ombudsman opened an investigation and travelled to the area in July 2022, where he met with authorities, security forces and NGOs.<sup>44</sup> Human Rights Watch has also requested an independent investigation of the events.<sup>45</sup> The Spanish Minister of Defence claims that the events took place in Morocco.

In an interview to El País, the UN Special Rapporteur on the human rights of migrants, Felipe Gonzalez Morales, stated his concern for the lack of an investigation of the Melilla border events in June 2022.<sup>46</sup>

In May 2022, over 30 Spanish NGOs, including RIS, signed an open letter against the use

of Pegasus spyware by governments, requesting an independent investigation into the use of the spyware to prevent violation of human rights.<sup>47</sup>

## ***2. Insufficient reparations for the victims of the Civil War and the dictatorship***

Spain has approved new legislation to address some of the outstanding claims in relation to reparations for the victims of the Spanish Civil War through Law 20/2022, named the Law of Democratic Memory.

The new legislation addresses some of the concerns expressed: (a) it places the burden to search and exhume victims on the state; (b) it expands the definition of victims; (c) it extends the terms “recognition, reparation and restoration” and includes the creation of an index of seized property during the Civil War and the Franco era; (d) it provides for free access to all available documents, both public and private, in relation to the Civil War and Franco era; (e) it recognises the right to truth for the victims and creates an academic commission to clarify violations of human rights; (f) it states that all Spanish laws should be interpreted in accordance with international law, specifically

44 [El Defensor del Pueblo visitó Melilla para investigar las muertes por el salto a la valla | Público \(publico.es\)](#)

45 [¿Qué se sabe del salto a la valla en Melilla que ha dejado decenas de muertos? \(europapress.es\)](#); [Casi 120 ONGs piden por carta que se investigue el salto a la valla de Melilla \(elfarodemelilla.es\)](#); [HRW solicita una investigación “a fondo” de lo acontecido durante el asalto a la valla de Melilla \(europapress.es\)](#)

46 [El relator de la ONU para los derechos de los migrantes: “Es lamentable que no se haya aclarado la tragedia de Melilla cinco meses después” | Internacional | EL PAÍS \(elpais.com\)](#)

47 [La Ley de Memoria Democrática en 10 claves \(antena3.com\)](#); [Estas son las claves de la nueva Ley de Memoria Democrática \(elconfidencial.com\)](#)

international humanitarian law; (e) it creates a special prosecutor at the Supreme Court to protect victims' rights and investigate crimes in the Franco era; (f) the law maintains the validity of the 1977 Amnesty Law.<sup>48</sup>

The UN Special Rapporteur's visit to Spain in February 2022 for the promotion of truth, justice, reparation and guarantees of non-recurrence resulted in the statement that although the new proposed legislation improved previous legislation, it was "insufficient".<sup>49</sup>

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48 [La Ley de Memoria Democrática en 10 claves \(antena3.com\)](#); [Estas son las claves de la nueva Ley de Memoria Democrática \(elconfidencial.com\)](#)

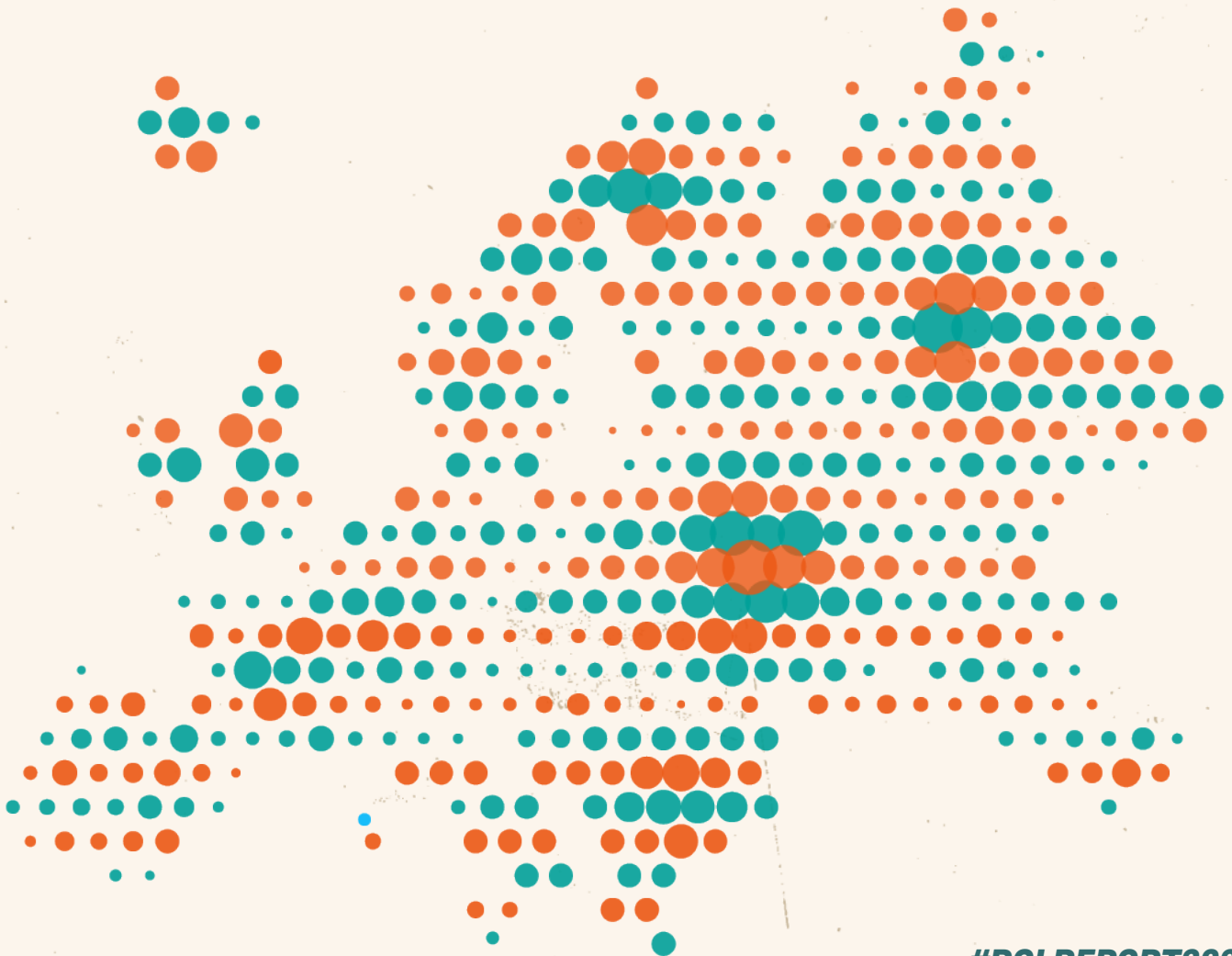
49 [Memoria Democrática: El relator de la ONU para la Verdad, la Justicia y la Reparación, en el Congreso: "La nueva Ley de Memoria es insuficiente" | Público \(publico.es\)](#)

**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**SWEDEN**



**#ROLREPORT2023**

# SWEDEN

## About the authors



**Civil Rights Defenders** is a politically and religiously independent international human rights organisation. Its mission is to defend civil and political rights as well as local human rights defenders, by increasing their security, capacity and access to justice. We work as part of a global movement of human rights defenders and partner with those at risk. Through legal means and public advocacy, we hold states, individuals, and non-state actors accountable for human rights violations. We advocate for the norms and values of the International Covenant on Civil and Political Rights and other relevant human rights standards, as we encourage people to use these rights to promote democratic societies.



The Swedish section of the **International Commission of Jurists (ICJ-Sweden)** - whose members are lawyers - works to promote human rights and the rule of law in Sweden and internationally. At the national level, ICJ-Sweden monitors Sweden's international

and regional and constitutional obligations in the field of human rights, ensuring that the rights of individuals are observed, that the judiciary is independent and accountable and works to strengthen its compliance with fundamental rights. ICJ-Sweden works for equality before the law and non-discrimination, and claims the right to a fair trial is a right in itself, and promotes active resistance when violations of rights occur. ICJ-Sweden designs a Programme for Justice in Sweden and organises debates and seminars on current issues and collaborates with other rights organisations when individual and structural rights violations have been identified. At the international level, ICJ-Sweden monitors trials in order to promote human rights and the rule of law.

## Key concerns

In October 2022, the current Swedish government was established. The Moderates, Liberals and Christian Democrats are formally in government, but negotiated with the Sweden Democrats to get a majority. This resulted in a written political agreement named the Tidö Agreement, which covers seven policy areas (healthcare, climate, criminality, migration and integration, school, economy, and others).<sup>1</sup> It remains to be seen what the new policies

<sup>1</sup> <https://crd.org/wp-content/uploads/2022/10/>

will look like in practice, but the agreement's measures point in a worrying direction and send seriously concerning signals; the proposals in the agreement will clearly be repressive if realised. The proposed measures focus on detentions (including those of children and young people), harsher sentences, increased opportunities to monitor and deport people, and measures that undermine the rule of law and human rights.<sup>2</sup>

Regarding media freedom, there is increased political pressure on public service from the Sweden Democrats, the Moderates and the Christian Democrats, which may affect the future role of public service. Amendments to the basic law as well as a new legislative proposal enabling the revoking of broadcasting permits, together with Sweden's first SLAPP case, risk having serious chilling effects on journalists and whistleblowers.

Some positive steps have been taken in 2022 to ensure checks and balances. The Swedish Human Rights Institute started to operate on 1 January 2022. There has also been an investigation on how to strengthen the independence of the parliamentary ombudsman authority.

The Sweden Democrats (SD), the second largest party in Parliament, which has a supporting role to the minority government, has lashed out against civil society and questioned whether CSOs that criticise the government should receive state funding. The SD and the

government have simultaneously agreed to review and change funding schemes to civil society. The new government has withdrawn previously proposed legislation introducing so-called democracy criteria for state funding to civil society. This is a positive step as the proposal was flawed in several ways. What the new government's review of funding schemes to support CSOs will bring instead, is still unclear.

Measures planned by the government in the areas of criminal and migration policy will have significant negative impact on human rights standards and the rule of law, in particular for people with a migrant background and children. Islamophobia and other kinds of racism are on the rise, fueled by right-wing extremist groups as well as rhetoric and policy by public officials.

### State of play

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

### Legend (versus 2022)

- ↓ Regression
- No progress
- ↑ Progress

<sup>2</sup> You can read the full review here: [https://crd.org/wp-content/uploads/2022/12/Analysis-of-the-Tido-Agreement\\_Civil-Rights-Defenders\\_221024.pdf](https://crd.org/wp-content/uploads/2022/12/Analysis-of-the-Tido-Agreement_Civil-Rights-Defenders_221024.pdf)

## Justice System

### Key recommendations

- The government should ensure stronger constitutional protection limiting the easy possibility of decisions contradicting democratic values and human rights. There must at least be a qualified majority for a decision made by the Parliament.
- The government should ensure increased independence of the courts as well as increased effectiveness for individual's human rights – a better programme of legal aid ought to be developed.
- The government should ensure that the handling of migration cases where non-citizens are considered by the Security Police to be a threat to national security live up to fair trial standards and the principle of non-refoulement.

### Judicial independence

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

The Supreme Court has issued a memorandum entitled 'An extended possibility to appoint retired justices to temporarily serve in the Supreme Court and the Supreme Administrative Court', which proposes expanding the scheme under which a former judge who retired with an old-age pension

may be appointed to temporarily serve on the Supreme Court or the Supreme Administrative Court. According to the proposal, it should include situations when a need has arisen due to the processing of one or more cases at the court for a limited time that takes up large resources. According to current legislation, such an appointment can only be considered if an ordinary justice council is absent due to illness or a comparable circumstance. The proposed scheme causes changes in, i.e., the Code of Procedure and in the Act (1971:289) on general administrative courts. The new regulations are proposed to enter into force on 1 January 2024. Such an arrangement may be considered to be essentially in line with what applies in the Nordic neighbouring countries and there is no reason to believe that such an expansion would have any negative consequences for society or individuals.

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

The influx of cases to the Supreme Court and the Supreme Administrative Court has increased by over 35 percent over the past five years. For the courts to be able to fulfil their tasks, the extension of service of judges outlined above may help to maintain the efficiency and quality of judging in times when the work situation is particularly strained.

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

The Chancellor of Justice has made a clear statement that she opposes her powers to



harass judges and courts and that she thinks such power is contrary to the principle of judicial independence – but there has been no action taken to change this.<sup>3</sup>

The Committee of Inquiry on Strengthening the Protection of Democracy and the Independence of the Judiciary, taking into account European standards on judicial independence, has not yet reported its findings.

- The Committee has not yet reported if the appointment of judges is deemed to be without political interference and governed by the Constitution.
- Public service is in total governed by the government, which appoints the head of the public service foundation's board; this foundation appoints all directors in all the public service. The system is completely open for political influence.
- The Committee on 100 Years of Democracy has been tasked with planning, coordinating and implementing a collection of efforts and activities for a strong democracy during the years 2018-2021. On 1 June 2022, the committee's report was handed over to the government, thus concluding the committee's activities. In the final report,

the committee presents proposals to continue strengthening democracy. The proposals have been sent for consultation and include, among other things, the establishment of a national democracy function, that democracy be included in the authority regulation, and that more public authorities have democracy written into their mandates.<sup>4</sup>

## **Quality of justice**

### **Accessibility of courts (e.g. court fees, legal aid, language)**

While fundamental rights are expressed in various laws in Sweden, concerning the accessibility of the courts, in terms of the practical assertion of e.g. fundamental rights, the “loser pays” rule is a clear hindrance to the realisation of those rights. For example, persons who tend to be the targets of discrimination also tend to have limited resources. Even if they overcome the lack of knowledge concerning the law and a lack of trust in the legal system, the risk of being required to pay the opposing party's legal costs is often an insurmountable barrier to asserting those rights. Access to legal aid for asserting fundamental rights is extremely limited, if it exists at all. This can be compared to those with the power to discriminate, e.g. government agencies, employers, unions,

3 Interview from 23 October 2021 with Chancellor of Justice Mari Heidenborg in Ekots lördagsintervju, Sveriges Radio. Available at: [JK Mari Heidenborg om skadeståndet till en våldtäktsman REPRIS 8 januari 2022 - Ekots lördagsintervju | Sveriges Radio](#)

4 SOU 2022:28 Vår demokrati - värd att värna varje dag, <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2022/06/sou-202228/>

merchants and landlords, who tend to have experience with the law and the legal system, which means that they can utilise procedural rules like the loser pays rule to ensure that discrimination cases are seldom filed and/or carried out to completion – regardless of the facts in the case. Having rights in law has little meaning unless there is some reasonable means of asserting those rights. At least concerning fundamental rights, the loser pays rule should be repealed. Furthermore, the legal aid system should be reformed and expanded so that cases involving fundamental rights are clearly covered.

### ***Training of justice professionals (including judges, prosecutors, lawyers, court staff)***

The government has over the years initiated certain tasks related to the implementation of human rights by government authorities. The Swedish agency for public management was given the task of following up these tasks. A conclusion of the evaluation is that the training of justice professionals concerning fundamental rights clearly needs to be expanded, especially judges. More generally, law schools need to pay greater attention to the role of fundamental rights in the legal system.<sup>5</sup>

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

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

As previously reported, the proceedings on expulsions under the Swedish migration law in cases where non-citizens are considered by the Security Police to be a threat to national security do not live up to fair trial standards as neither the individual, their legal counsel, nor the decision-making bodies have access to and can review the information that the Security Police bases its accusations on. Furthermore, in these cases there is a lack of independent judicial oversight as decisions made in the first instance by the migration board can be appealed only to the government. The Migration Court of Appeal issues a non-binding opinion only. In 2022, there were legal amendments to the Act concerning Special Controls in Respect of Aliens that extended the possibility to expel persons that are considered a national security threat.<sup>6</sup> The negative impact on individuals of this flawed regime has become even more apparent during 2022 due to expulsions to Turkey.<sup>7</sup> Following Sweden's application for NATO membership, Turkey has put pressure on Sweden to hand over individuals that the Turkish government considers to be terrorists.<sup>8</sup>

5 Statskontoret, *Uppföljning av vissa insatser inom området mänskliga rättigheter*, s. 27, available at [https://www.statskontoret.se/siteassets/rapporter-pdf/2022/2022\\_13.pdf](https://www.statskontoret.se/siteassets/rapporter-pdf/2022/2022_13.pdf)

6 <https://www.regeringen.se/rattsliga-dokument/proposition/2022/03/prop.-202122131/>

7 <https://crd.org/2022/12/21/sweden-must-respect-human-rights-in-connection-with-deportations-to-turkey/>

8 <https://www.svt.se/nyheter/utrikes/har-ar-personerna-som-erdogan-vill-ha-utlamnade>; <https://sverigesradio.se/artikel/turkiet-har-pek-ut-42-personer-som-de-vill-ha-utlamnade>; <https://blankspot.se/sveriges-fortsatter-utvisa-kurder-till-turkiet-med-chartrade-plan/>;

While some extraditions requested by Turkey have been blocked by the Swedish Supreme Court based on the principle of non-refoulement, non-citizens continue to be deported to Turkey under migration laws and the regime under which the Security Police deems individuals to be a threat to national security in Sweden.

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

As described in the previous report, the Discrimination Act does not explicitly cover discrimination when it comes to the judiciary, police and prosecutors. It makes it difficult to investigate discriminatory practices or to provide redress for victims. In 2022, a government investigation that proposes relevant changes of the law was sent out for consultation, but so far, no further action has been taken.<sup>9</sup>

### **Other**

The Ministry of Justice has forwarded a memorandum with proposals that increase the police's ability to use temporary detention facilities in special situations. The purpose is to give the police better conditions to maintain order and security during, for example, large demonstrations.

However, the proposal means that it should be possible to use holding rooms in temporary

police custody that deviate from the requirements in terms of floor area, cubic content and room height. It is also proposed that, when there are special reasons, it should be possible to use holding rooms in temporary police custody that deviate from certain other design and equipment requirements. This applies, among other things, to the requirements for windows, sound insulation, privacy protection and equipment requirements such as chair, table, bed and storage of belongings. The signatory organisations see no reason to implement the proposals presented. Instead of deviating from international standards, the police authority and the correctional service should be tasked with renovating existing holding rooms that are not in use.

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

### **Key recommendations**

The government must ensure that Swedish public service retains its political and financial independence.

The government must ensure strong support to and implementation of the EU

<sup>9</sup> SOU 2021:94, Ett utökat skydd mot diskriminering: <https://www.regeringen.se/rattsliga-dokument/statens-of-fentliga-utredningar/2021/12/sou-202194/>

Commission's proposed anti-SLAPP Directive.<sup>10</sup>

The government must ensure that any amendments or limitations on the freedom of expression do not disproportionately infringe on the work and protection of journalists, whistleblowers and civil society.

## **Public service media**

### **Independence of public service media from governmental interference**

Public service, which includes radio and TV services, is run by Swedish Radio (SR), Swedish Television (SVT) and Swedish Educational Radio (UR) and is owned by the Administrative Foundation for SR, SVT and UR. The media companies' broadcasting services are regulated in the Radio and Television Act (2010: 696, amended no later than 2019: 654).

In 2022, the Swedish government put forward a draft legislative proposal to protect people against the dissemination of anti-democratic and false messages (DS 2022 20 "Återkallande av sändningstillstånd med hänsyn till Sveriges

säkerhet"). The proposal contains two central suggestions: the first is that a broadcasting permit can be revoked if a court believes that there has been a broadcast that implies a threat to national security; the second central suggestion is that the court can revoke the permit if there has been a serious abuse of the freedom of speech (see more under "freedom of expression and of information").

The proposals in DS 2022 20 can lead to a form of self-censorship and thereby have a chilling effect on journalists and broadcast media. Within the referral lies a suggestion such that a broadcasting permit can be revoked if the permit holder makes a criminal statement that can be considered as exploitation of freedom of expression. The reason for why this may be seen as a form of censorship is that a permit holder may choose to be more careful during their broadcasts so as to not risk any criminal statement.

For many years, party representatives of the Sweden Democrats (SD) have been highly critical of Swedish public service,<sup>11</sup> claiming its reporting to be biased<sup>12</sup> and favouring the former government's politics, and that it hides the truth about crime and immigration in Sweden – and that it is therefore in need of major reform.<sup>13</sup> The current Chair of the

10 Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation", COM/2022/177 final)

11 <https://www.expressen.se/nyheter/mattias-karlsson-vill-skrota-svts-debatter/>

12 <https://sverigesradio.se/artikel/7031365>

13 <https://twitter.com/bjornsoder/status/1569768478692851714?lang=en>

Committee of Justice, who belongs to the SD, has on several occasions expressed his admiration for how public service has been undermined in Poland and Hungary.<sup>14</sup>

It is important to see these views in the context of the new role of the SD as a party that directly affects government policy (see further “other systematic issues”). In the election cycle before the 2022 elections, SD announced that the budget for public service should be cut, and their mission clarified – for example by focusing their broadcasting more on the Nordic countries. They elaborated on this in two very similar motions in Parliament that were put forward in October 2021<sup>15</sup> and November 2022.<sup>16</sup> There they proposed that promoting the Swedish language, culture and environment for the Swedish people should be favoured instead of productions that could be served by commercial actors. They also state that public service media have failed their mission of objective reporting and impartial content due to “some of the big challenges facing Sweden today could have been avoided if citizens would have gotten full understanding and insight into the consequences of certain legislation”, where they further claim that only politically correct ideas and positions

supported by “the elite” have been tolerated. This all refers to reporting on immigration where SD has claimed that major media outlets or mainstream media have been hiding the truth. SD also differs from other parties when treating all mainstream media outlets, public service included, as a single actor and an enemy.<sup>17</sup>

The Moderate and the Christian Democrat parties have expressed similar positions, suggesting that the scope of public service should be tightened with a focus on “more impartial and objective reporting”,<sup>18</sup> which in practice would be done by budget cuts and detailed political control.<sup>19</sup>

In the budget presented by the end of 2022 by the government together with SD, no funding cuts were made to public service or other media.<sup>20</sup> This is most likely due to the current broadcasting permit, that lasts until the end of 2025, which sets guidelines on the budget levels for the public service-companies. However, these guidelines are not legally binding and could therefore be changed any time a new budget is to be set.<sup>21</sup> The government will shortly put forward directives to an Official Report on Public Service that, when finished,

14 <https://twitter.com/bjornsoder/status/1569768478692851714?lang=en>

15 [https://www.riksdagen.se/sv/dokument-lagar/dokument/motion/\\_H9022472](https://www.riksdagen.se/sv/dokument-lagar/dokument/motion/_H9022472)

16 [https://www.riksdagen.se/sv/dokument-lagar/dokument/motion/public-service-fragor\\_HA02991](https://www.riksdagen.se/sv/dokument-lagar/dokument/motion/public-service-fragor_HA02991)

17 <https://expo.se/sd-och-kampen-om-medierna>

18 <https://www.svt.se/kultur/sa-kan-politikerna-forandra-public-service>

19 <https://www.dn.se/kultur/kulturbedatt-liberalerna-behover-massivt-stod-i-kampen-om-public-service/>

20 <https://www.journalisten.se/nyheter/regeringens-forsta-budget-inga-stora-andringar-medierna>

21 <https://www.svt.se/kultur/budgetkommentar-per-andersson>

will form the basis for the next broadcasting permit that takes effect in 2026.

### ***Editorial standards (including diversity and non-discrimination)***

People with disabilities and who are from a particular ethnic group lack protection when it comes to hate crimes, such as incitement against ethnic groups. The protection against incitement against ethnic groups applies to race, skin colour, national or ethnic origin, creed, sexual orientation or transgender identity or expression.

### ***Financing (including transparency of financing)***

On 27 June 2022, the Media Support Inquiry presented its proposal on how the financial support for news media should be designed from 2024. The new media support will be technology neutral and focus on local media. It is mainly news media of importance for local and regional democracy that will receive support. National newspapers can receive support if it is of particular importance for diversity.

The investigation also proposes a so-called democracy clause. The paragraph means that support is given to media that have journalistic activities that do not conflict with the foundations of democratic governance and respect for the equal value of all people and the freedom, integrity and dignity of the individual.<sup>22</sup>

The signatory organisations believe that the proposal is good, but that the principle that the state should not set requirements linked to content is central to freedom of expression. If a democracy clause is to be introduced, it is important that it is designed in a clear way. There should be no scope for the government or authorities to arbitrarily exclude certain media from support.

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

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

Until the case of Realtid, a Stockholm based newspaper, Sweden had witnessed few cases of strategic litigation against public participation (SLAPPs). After publishing eight articles in 2020, the Swedish businessman Svante Kumlin, based in Monaco, sued Realtid for defamation in British courts. Realtid investigated the financial aspects connected to Kumlin's company, Eco Energy World. During its investigation, Realtid had received threats about legal consequences from Eco Energy World's lawyers. In May 2022, a London court found that five of the eight articles did not harm the company's image. It considered that the remaining three could be prosecuted but has not yet ruled on them. Importantly, the court questioned the circumstances that

22 Ett hållbart mediestöd för hela landet, Ds 2022:14, available at <https://www.regeringen.se/rattsliga-dokument/departementsserien-och-promemorior/2022/06/ds-202214/>

led Kumlin to use the British court system for pursuing a legal process.<sup>23</sup> However, even if there will be no verdict against Realtid's journalists, the overall process has presumably led to both financial and mental harm for the individuals affected. The process might have a silencing and chilling effect on Swedish journalistic work in the future, especially for journalists who investigate corruption or other crimes or negative behaviours of powerful actors. The case of Realtid has led to an extensive mobilisation among Swedish and European journalists and their associations. The national legislation does not offer protection against cross-border SLAPPs directed at Swedish newspapers.

### **Other**

A government inquiry has suggested stricter sentencing for certain crimes committed against officials whose work is considered to fulfil certain social functions, and towards journalists.<sup>24</sup> The inquiry was submitted for consultation responses in February 2022 and is now awaiting input from the Legislative Council before any draft legislation is submitted to the Parliament.

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

In November, the Parliament passed a draft proposal amending the Swedish law regulating freedom of expression.<sup>25</sup> The amendment is supposed to target foreign espionage but has been criticised for a potentially chilling effect on the work of investigative journalists – especially freelancers who do not have the support of an employer with financial and legal resources.<sup>26</sup> The legislation criminalises acts of unauthorisedly forwarding, leaving, or disclosing secret information that is apt to bring serious harm to Sweden's relationship with another state or an intra-state organisation. There is no requisite of intent, entailing that disclosure of such information could be punishable. This means that anyone who, for example, acquires and/or passes on information for publication is no longer protected by the freedom of acquisition and communication. Apart from its effect on journalists, the amendment means that whistleblowers also risk being prosecuted for foreign espionage and sentenced to prison.

23 <https://europeanjournalists.org/blog/2022/05/13/uk-court-dismissed-most-of-the-defamation-case-against-newspaper-realtid/>

24 [En skärpt syn på brott mot journalister och utövare av vissa samhällsnyttiga funktioner - Regeringen.se](#)

25 [Utlandsspioneri Proposition 2021/22:55 - Riksdagen](#)

26 ["Låt inte Erdogan få styra svensk medierapportering" - DN.SE](#)

## Checks and balances

### Key recommendations

- Relevant regulations (förordningen (2007:1244) om konsekvensutredning vid regelgivning and kommitteförordningen (1998:1474)) need to be amended so as to obligate the government to carry out impact assessments to ensure transformation of rights in ratified conventions is included in all new legislative proposals. Committees, special investigators, the Government Office and other state administrative authorities must undertake impact analyses in relation to Sweden's international obligations.
- Ensure the mandate, independence and powers of the Institute for Human Rights will be formulated in the Constitution.
- Recommendations from the Council on Legislation should obligate the government to review the proposal further or amend it in any other way.

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

**Framework, policy and use of impact assessments, stakeholders'/public consultations (particularly consultation of judiciary on judicial reforms), and transparency and quality of the legislative process**

As described in our previous rapport, a governmental inquiry is often appointed without adequate consideration being given to Sweden's international agreements on human rights. Every year, committees, special investigators, the Government Office and other state administrative authorities produce a large number of impact studies before making decisions and proposals on laws and regulations and other public commitments. The ordinances that regulate impact assessments are primarily the ordinance (2007:1244) on impact assessment in rulemaking (consequence assessment ordinance) and the committee ordinance (1998:1474). Criticism has been directed at the impact assessments that form the basis of public decision-making in Sweden, i.e. those from the National Audit Office, the State Treasury and the Organization for Economic Co-operation and Development (OECD). In order to overcome existing weaknesses, the government appointed an investigation that was sent out for consultation in 2022. However, the proposed impact regulation is not proposed to include impact analyses in relation to the European Convention or the Convention on the Rights of the Child, which are Swedish laws, nor to Sweden's other internationally binding obligations in the area of human rights.

### **Regime for constitutional review of laws**

The government is obliged to refer draft legislation in most areas to the Council on Legislation, which consists of members from the Supreme Court and the Supreme Administrative Court. The examination by the Council on Legislation constitutes an



important ex-ante constitutionality check of draft legislation. However, recommendations from the Council does not oblige the government to review the proposal further or amend it in any other way. As such, the government is free to proceed with the proposal to Parliament, who is equally free from obligations to consider the Council on Legislation's recommendations. This is especially concerning as the Council on Legislation assess proposals in, amongst others, relation to the fundamental laws of Sweden and the rule of law, as well as obligations according to EU law or the ECHR.

There is a possibility of judicial review in the Constitution (Instrument of Government IG 11:14 and 12:10).<sup>27</sup> This possibility may become very important particularly given the fact that a number of the ideas in the Tidö Agreement, if adopted, will presumably violate the Swedish Constitution as well as the ECHR, et cetera. Nevertheless, more widespread education within and of the legal community, as well as outside the legal community, would be important concerning the rights and duties included

in the Swedish Constitution, in particular that the government is bound by the Constitution. IG 11:14 and 12:10 also underline the possibility of examining if the preliminary constitutional analysis carried out by the Council on Legislation has bearing on individual cases that are actually filed in the courts.

### ***Independent authorities***

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Since 1 January 2022, Sweden finally has a national human rights institute. The purpose of the Swedish Institute for Human Rights is to promote and protect human rights in Sweden, based on the Swedish Constitution, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the EU Charter of Fundamental Rights and other obligations in the area of human rights that are binding on Sweden under international law. The institute will also perform the tasks of an independent national mechanism under the Convention on the Rights of Persons with Disabilities. The institute is an authority placed under the government, but according to the law regulating the institution, the institute

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27 Chapter 11 judicial review Art. 14.: If a court finds that a provision conflicts with a rule of fundamental law or other superior statute, the provision shall not be applied. The same applies if a procedure laid down in law has been disregarded in any important respect when the provision was made. In the case of review of an act of law under paragraph one, particular attention shall be paid to the fact that the Riksdag is the foremost representative of the people and that fundamental law takes precedence over other law. Judicial review Art. 10: If a public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision shall not be applied. In the case of review of an act of law under paragraph one, particular attention shall be paid to the fact that the Riksdag is the foremost representative of the people and that fundamental law takes precedence over other law.

itself decides the framework of its tasks, its organisation and the closer focus of its work.<sup>28</sup>

During autumn the institute's board decided that intensified preparatory work would be initiated in order to be able to apply for membership to the Global Alliance of National Human Rights Institutions (GANHRI) and achieve A-status at the appropriate time. As a first step in this preparatory work, the institute applied for and was granted membership in the European Network of National Human Rights Institutions (ENNHRI) in autumn 2022. The application for membership in ENNHRI shows that the institute intends to formulate a goal, carry out an analysis and adopt a strategy that together create good prospects for a future accreditation procedure.

Against the background of the hardening social climate in Sweden and the fact that the new government, through the Tidö Agreement, proposes measures that do not always take into account Sweden's international obligations, as well as that a law can easily be changed, the undersigned organisations are worried about the institute's future. The institute's existence and independence must be stipulated by the Constitution.

The Board of the Swedish Riksdag decided on 19 February 2020 to convene a parliamentary committee (the committee) with the task of conducting a review of the Riksdag's Ombudsman (JO). The primary reason for the investigation is that a long time has passed

since the last review of the JO was carried out, in the mid-1980s, and that both the JO's operations and its conditions have changed in several respects since then. The committee carried out a broad review of the JO office. It appears from the directives that the review, seen from the investigation's mission, should deal with various issues that apply to, among other things, the JO's constitutional position, tasks, activities, and organisation. The JO is a well-functioning institution, and the investigation should have as its starting point preserving the basic mission and structure of the JO office. The committee's proposal aims to introduce an appropriate set of regulations to ensure that the JO office is also given good conditions for conducting its activities in the future.

While the appointment of this inquiry and the committee's proposals are generally to be welcomed, it would have been desirable for the investigation to have a broader mandate right from the start. Now several issues remain which need further investigation. Critically, the committee itself sometimes chose not to submit proposals for constitutional amendments that would make Sweden live up to international recommendations and regulations on ombudsman institutions to a greater degree.

There needs to be an exhaustive list of limits for the dismissal of an ombudsman or deputy ombudsman in the manner set out in the 2019 Venice Principles. Further, the obligation

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28 Lag (2021:642) om Institutet för mänskliga rättigheter, 4 §

to provide reasons regarding write-off cases will completely disappear if the committee's proposal that the Förvaltningslag (2017:900) (English: Administration Act) should not be applied in the JO's supervisory activities goes through. The committee proposes that Lag (1986:765) med instruktion för Riksdagens ombudsmän (English: JO instruction) should state that the ombudsmen within the JO's operations should take the investigative measures the person deems necessary. There needs to be a clarification of what this means. The committee's proposal on the JO's position as a special prosecutor in relation to general prosecutors' rules needs to be supplemented with an investigation that examines the need for a legally secure mechanism for cases where JO chooses not to investigate or bring charges.

There is room to adapt the JO's activities as a national visiting body to a greater extent according to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Opcat). Particularly questionable is the committee's position that current regulations, along with established practices, offer equivalent protections to what regulation in law would do. Matters of an institution's independence must be guaranteed by regulation in law or a constitution. Other neighbouring Nordic countries have implemented the international governing documents related to this mission in a more detailed way than Sweden. Sweden should do the same.

It would have been desirable for the investigation to have included a review of individuals' ability to have complaints heard when it comes to children, as they do not have the opportunity to do so either through Barnombudsmannen (the Children's Ombudsman) or Institutet för mänskliga rättigheter (the Institute for Human Rights, as mentioned above).<sup>29</sup>

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

### Key recommendations

- The government must clearly and publicly speak out and act in support of civil society and the role of CSOs to monitor public administration and other duty-bearers and decision-makers and hold them accountable.
- The government must ensure that civil society will continue to have access to public funding and that planned reviews of funding schemes will not impact negatively on CSOs in this regard, including those that take on a watchdog role and criticise duty-bearers and decision-makers.
- The government must ensure that the judicial authorities have the right

29 Read Civil Rights Defenders' full opinion here: <https://crd.org/wp-content/uploads/2022/11/JO-ambetet-remissvar-Civil-Rights-Defenders.pdf>

competence and enough resources to identify, prevent and obviate crimes and threats against civil society actors.

## **Regulatory framework**

***Financing framework, including tax regulations (e.g. tax advantages for organisations with public benefit status, eligibility to receive donations via citizens' allocation of income tax to charitable causes, eligibility to use public amenities at low or no cost, etc)***

The financing framework for civil society still gives access to public funding. However, as part of a package of policy changes, and measures to realise these changes, negotiated between the minority government and the Sweden Democrats (SD), the parties have announced the review of several funding schemes that provide public funding to CSOs. This is concerning since SD, as a response to Civil Rights Defenders and other organisations raising concern that the agreement was not in line with human rights and the rule of law, nor with commitments to address climate change, threatened to strip CSOs that criticise government policy of state funding.<sup>30</sup> Moreover, the SD made attempts to map major private donors that provide support to civil society. What makes the situation even

more worrying is that the government parties have not come out clearly against these statements and in support of civil society. Despite continued attacks by SD on CSOs, labelling rights-based and environmental organisations as being political and part of the “liberal left” and “producers of ideology”, the government remains silent. The attacks, the allegations made, and the verbal threats of withdrawn funding has had an immediate chilling effect on CSOs and their readiness to be vocal and raise their concerns. The announced reviews of public funding schemes for CSOs and the authorities that administer these funds must be seen in this context, and it is highly likely that access to public funding, at least for parts of Swedish civil society, will be limited in the future.

## **(Un)safe environment**

***Freedom of assembly, including rules on organisation of and participation to assemblies, equal treatment, policing practices***

The Swedish prosecutor and courts have during 2022 in a large number of cases charged and convicted climate activists of serious criminal offences as a result of traffic blockades. Previously such actions of civil disobedience have been seen as minor offences, resulting in fines, while recent judgements concern the crime of sabotage and prison sentences.<sup>31</sup> Historically, the crime of sabotage has rarely

30 <https://www.expressen.se/debatt/bjorn-soders-hot-kan-inte-tysta-var-granskning/>; <https://www.etc.se/inrikes/regeringen-tyst-naer-sd-attackerar-civilsamhaellet>

31 <https://www.dn.se/debatt/orimliga-straaff-vantar-dem-som-deltar-i-klimataktioner/>

been applied and then only for actions that have much more severe consequences than causing traffic disturbances. This sudden change is not due to any legislative change but rather initiated by the public prosecutor and the judiciary itself. Also, it follows upon statements made by politicians that traffic blockades by climate activists should not be tolerated and must be met harshly. The judgments are disproportionate and do not take into consideration the right to freedom of assembly and the right to protest, nor does it take into account recent recommendations made by the Special Rapporteur on the rights to freedom of peaceful assembly and of association in the report ‘Exercise of the rights to freedom of peaceful assembly and of association as essential to advancing climate justice.’<sup>32</sup>

***Access to justice, including rules on legal standing, capacity to represent collective interest at court, and access to legal aid***

CSOs have some capacity to represent collective interests in e.g. individual discrimination cases, but even CSOs generally do not have the means to overcome the risks related to the loser pays rule. Here again the problems related to legal aid in fundamental rights cases is also a problem.

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

### ***Key recommendations***

- The government must swiftly present a bill to the Swedish Parliament to strengthen the Discrimination Act, based on the legislative proposals in government inquiry SOU 2021:94, taking into account the recommendations given in consultation responses over the inquiry on how to further develop the proposal to ensure that the Police cannot escape accountability for discrimination by referring to national security.
- The government must ensure that all aspects of criminal policy adhere to the rule of law, entailing an adequate legislative process, limiting the scope of application and period of validity, as well as independent and thorough assessments of such policy changes.
- The government must ensure rule of law, anti-discrimination and rights including human dignity for persons with a migration status, such as

32 Swedish Migration Agency, Rättsligt ställningstagande. Prövning av skyddsbehov för medborgare från Afghanistan - RS/089/2021. [Dokument - Lifos extern \(migrationsverket.se\)](#)

asylum seekers, undocumented migrants and other non-citizens.

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

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

#### *Migration policy*

In 2022 there were several significant developments within the migration policy field that threaten human rights and the rule of law for persons with a migration status, and which affects the rule of law for all persons living in Sweden.

The most significant development in 2022 concerned proposals by the newly elected government and the far-right party Sweden Democrats that also have a majority of seats in the Parliament, which is described above. The Tidö Agreement expresses a political will concerning migration-related issues and often expresses planned legislative or administrative measures. The Swedish migration policy has gone in a more restrictive direction since 2015, however, in some ways the agreement takes concrete steps towards a larger shift on migration policy in Sweden. The current migration policy exposes a systemic disregard of human rights obligations on behalf of the government. In the following, some aspects of the migration policy as expressed in the Tidö Agreement will be commented on.

The expressed aim of the present Swedish migration policy is to only provide temporary

protection to people that are fleeing the nearby area. By increasing border controls and making migration legislation and rights for non-citizens as restrictive as possible according to EU law, the government expressly intends to restrict migration to Sweden as much as possible (with some exceptions regarding work and study permits). Looking at the proposals altogether, it is also clear that the government intends to expel as many people as EU and other international obligations allow.

To restrict migration and make it harder to settle in Sweden, the government says it will look at amendments of legislation in different ways. For instance, an inquiry will look at the possibility of revoking granted permanent residence permits and fully removing permanent residence permits as a legal basis in the migration legislation. Other examples concern more severe requirements for family reunification and humanitarian protection. Another worrying proposal regards deportation of non-citizens due to immoral behaviour. The government states it would like to investigate the possibility of expelling those who do not show respect in relation to basic Swedish values and in their action disrespect the population. There are concrete examples given of what behaviour should then lead to expulsion, which include prostitution and substance abuse, or if there are clearly established remarks regarding their way of life.

The government is also planning to restrict access to healthcare and other welfare services for non-nationals. At the same time, there will be more criteria to fulfil to become a

Swedish citizen, including a criteria on moral behaviour.

The government would like to provide more resources and directions to the Migration Agency and the Border Police to withdraw protected status and to increase internal border controls in order to find undocumented migrants.<sup>33</sup> In addition, there will be an inquiry into an obligation for state bodies to report undocumented migrants to the Swedish Migration Agency and the police authority and an increase of coercive measures. This proposal will, if implemented, threaten fundamental social and economic rights of persons.

For asylum seekers there will, according to the government, equally be an increased control with, inter alia, an increase of the use of biometric data and coercive measures, including migrant transit centres in some geographical areas. In connection, it is concerning that the government will investigate the possibility of externalising the asylum process and depriving asylum seekers of their liberty. Furthermore, the government would like to decrease procedural guarantees for asylum seekers through, inter alia, a fee to seek asylum, less access to interpreters, legal representatives paid by the state and an increase of evidentiary requirements. The government says it intends to

investigate rule of law in the asylum process, which would have been a positive step if no further proposals were included in the Tidö Agreement that expressly aim at making the rights protection as low as possible. Hence, future government inquiries might be made to decrease the procedural standards and rights protection, not the opposite, in order to try to restrict migration to and settling in Sweden.

As reported last year, the Swedish migration system has had rule of law challenges even before the Tidö Agreement that regularly result in violations of the principle of non-refoulement.

Since last year, the Swedish Migration Agency has started to reconsider asylum applications of Afghan nationals whose requests had previously been denied.<sup>34</sup> However, Sweden continues to conduct stricter protection-needs assessments for Afghans than many other EU countries and grants 60% of all asylum seeking Afghans international protection status. For instance Germany, Switzerland and the Netherlands grant protection in 96-99% of cases.<sup>35</sup> A legal position from November 2022 in which the SMA recognises a general protection need for women and girls from Afghanistan due to the severe gender-based human rights violations occurring

33 Increased border controls also risk having arbitrary and discriminatory effects on both citizens and non-citizens of colour in Sweden, including due to ethnic and racial profiling by the police.

34 Swedish Migration Agency, Rättsligt ställningstagande. Prövning av skyddsbehov för medborgare från Afghanistan - RS/089/2021. <https://lifos.migrationsverket.se/dokument?documentSummaryId=47090>

35 According to asylum lawyers in an op-ed that mentions Eurostat statistics: <https://www.etc.se/debatt/sverige-utvisar-hazarerna-till-doed-och-foertryck>

in Afghanistan is welcomed. However, most asylum seekers from Afghanistan are men, so it is necessary that the SMA updates its assessment also with regard to Afghan men to increase international protection for this group.<sup>36</sup>

Shortly after Russia's full-scale invasion of Ukraine in February, Sweden amended its legislation with a so-called carrier liability that puts an obligation on ferry carriers to control valid identity documents of passengers.<sup>37</sup> From the individual's perspective, this measure increases the border control in practice.<sup>38</sup> As the UNHCR points out, people on the move commonly lack travel documents. Also, there are groups such as Roma that, due to statelessness or other discriminatory experiences, have never accessed identity documents. Consequently, due to the measures on carrier liability, international protection in Sweden became less accessible overall, and it disproportionately affected some vulnerable groups.

In order to approve Sweden's application for NATO membership, Turkey has requested Sweden to extradite non-citizen Kurds to Turkey for prosecution on terrorist charges. In December 2022, Civil Rights Defenders expressed concern over reported extraditions and expulsions to Turkey.<sup>39</sup>

With regards to non-citizens that are expelled for national security reasons (either in connection to an asylum process or a revoking of a temporary or a permanent residence permit), please see further above under *Respect for fair trial standards including in the context of pre-trial detention*.

#### *Indigenous rights of the Sámi People*

The situation with regard to the systemic disregard of human rights obligations in connection to the situation of the Sámi people has remained unchanged in the last year.

In 2022, Sweden passed a new law on consultation with the aim to promote the Sámi people's

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36 See report (November 2022) by the Refugee Law Center that has reviewed and analysed first-instance decisions concerning Afghan asylum claims after the Taliban takeover in August 2021. Among other recommendations, the Refugee Law Center asks the Migration Agency to ensure the quality with regard to assessments of protection needs and the use of country specific information. It also asks for compliance with UNHCR recommendations and guidelines. <https://sweref.org/flyktingskapsbedomningar-i-forsta-instans/>

37 <https://www.regeringen.se/rattsliga-dokument/departementsserien-och-promemorior/2022/11/obligatorisk-identitetskontroll-vid-resa-med-passagerarfartyg/>

38 The Swedish Border police consider that this practice does not constitute a border control. <https://polisen.se/om-polisen/polisens-arbete/granspolisen/>

39 <https://crd.org/2022/12/21/sweden-must-respect-human-rights-in-connection-with-deportations-to-turkey/>



influence over their affairs in matters that may have special significance for the Sámi.<sup>40</sup> The law prescribes that the government and state administrative authorities have an obligation to consult with Sámi representatives in these matters. There are no rules in the new law that specify which matters are considered of special significance. Further, there is no guarantee that the Sámi knowledge and perspectives will be taken into account and effectively influence the decision.

The new law is a step in the right direction towards respecting Sámi rights that have been systematically violated for centuries, and to enhance the Sámi people's influence on decisions that affect Sámi culture, something that has been lacking especially in regard to their traditional lands.

However, in light of the international standard on indigenous right to influence,<sup>41</sup> Sweden should provide resources to Sámi representatives in order to ensure their meaningful and effective participation in consultation processes.

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

A government inquiry was presented in December 2021 which recommended that the prohibition against discrimination in the National Discrimination Act be expanded to also entail discriminatory *measures* (and not only discriminatory *treatment*) by public-sector employees, including the judiciary, police and prosecutors. As explained in the 2021 Rule of Law Report, the proposal would contribute to closing a massive accountability gap if adopted. Since then, Sweden has a new government supported by the Sweden Democrats, and there are legitimate fears that the government will not adopt the proposal and present it to the Parliament. During 2022, the Sweden Democrats proposed that the National Discrimination Act be amended so that the grounds for discrimination are entirely removed from the act, which would undermine the protection against discrimination. The party secretary, who is also heading the Justice Committee of the Swedish Parliament, has explained that his personal opinion is that

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40 Lag (2022:66) om konsultation i frågor som rör det samiska folket, available at: [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-202266-om-konsultation-i-fragor-som-ror\\_sfs-2022-66](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-202266-om-konsultation-i-fragor-som-ror_sfs-2022-66)

41 Articles 5, 18, 36 and 37 of the Declaration on the Rights of Indigenous Peoples (UNDRIP) affirms that indigenous peoples have the right to effectively influence external decision-making affecting them if they choose to participate in such processes; Civil Rights Progress report on the study on indigenous peoples and the right to participate in decision-making, A/HRC/EMRIP/2010/2: The principle of free, prior, and informed consent can redress the power imbalance between indigenous peoples and states; Expert Mechanism advice No. 11 on Indigenous Peoples and free, prior, and informed consent, point 10. "States should ensure equality throughout the process and that the issue of the imbalance of power between the State and indigenous peoples is addressed and mitigated, for example employing independent facilitators for consultations and establishing funding mechanisms that allow indigenous peoples to have access to independent technical assistance and advice."

the National Discrimination Act should be abolished altogether. In light of this, it is likely that the proposal presented in 2021 will not move forward.

The current government and the Sweden Democrats have also agreed to appoint a government inquiry to look into whether so-called stop-and-search zones can be established in Sweden. The purpose of such zones is to enable police officers to stop and search individuals for weapons and other dangerous items without reasonable cause. If a government inquiry finds that legislation may be adopted that allows for the establishment of stop-and-search zones, this would create a real risk for a sharp increase of discriminatory controls by police officers against individuals belonging to ethnic and racial minorities. Given the legislation in place, it will also become even more challenging for individuals who are seeking accountability and redress to prove that the measure was taken on discriminatory grounds, as police officers do not need to show reasonable cause.

The situation is continuously difficult for young persons who sought asylum in 2015-2016 without their families, the majority being Afghan nationals, and who couldn't access international protection. In many cases, inaccessibility of international protection was due to insufficient rule of law or substantial

assessments conducted without a child rights' perspective. Many live at the margins with an irregular migration status or have moved to other EU countries such as France to access international protection there. Another group lives in Sweden with temporary residence permits according to a law for studies.<sup>42</sup> Out of this last group, in March 2021, it was reported only 171 persons had been granted a permanent residence permit, which is due to a very strict work criteria.<sup>43</sup>

A government inquiry regarding expanding the usage of secret coercive measures even when there is no suspicion of crime was presented in October 2022.<sup>44</sup> The inquiry recommends that such an expansion is legitimate due to the state's interest in combating crime. In January 2023, the consultation response period will end and thereafter the legislative process is expected to continue. Both the previous government (which established the inquiry) and the current government are in favour of such an expansion, and there is a great risk that the proposal will eventually pass Parliament as well. If translated into legislation, the proposal might increase the likelihood of violations of the right to integrity if used wrongly or even abused. The Swedish Commission on Security and Integrity Protection has already raised concern about how the current legal framework on secret coercive measures is faulty.<sup>45</sup> Such flaws may increase with this proposal.

42 <https://www.migrationsverket.se/Privatpersoner/Skydd-och-asyl-i-Sverige/Gymnasielagen.html>

43 <https://www.svt.se/nyheter/lokalt/ost/stress-och-oro-jag-har-svart-att-sova-och-koncentrera-mig>

44 [Utökade möjligheter att använda preventiva tvångsmedel - Regeringen.se](https://www.regeringen.se/utokade-mojligheter-att-anvandna-preventiva-tvangsmedel)

45 [Årsredovisningar - Säkerhets- och integritetsskyddsnamnden \(sakint.se\)](https://www.sakerhetsmyndigheten.se/arsredovisningar-sakerhets-och-integritetsskyddsnamnden)

### *Other systemic issues*

With the Tidö Agreement, the Sweden Democrats are not formally part of the government but have major influence. The policy areas covered by the agreement are to be undertaken in cooperation, where Sweden Democrats will have the same influence as the governmental parties. This includes partaking in all negotiations and preparation processes, including directives to commission of inquiries, draft proposals to the Parliament, EU areas that affect the policy areas of the agreement, as well as directions to authorities. Through this, the Sweden Democrats have gained the influence of a governmental party without being part of government, which renders serious concerns regarding accountability and transparency.

The agreement contains over 300 reform proposals, of which a hefty part concerns criminal policy and migration policy. The reform proposals are not legally binding, and many are to be subject to further investigation (such as legislative processes or governmental directions to authorities). Nonetheless, the structure of the government in combination with the content of the proposals is very worrying as many of them disregard the rule of law and fundamental human rights. If the agreement's proposed measures become a reality, "rights will no longer be based on people's needs but on their group affiliation and legal status. This will create a hierarchy between people in Sweden, placing people with citizenship at the

top and vulnerable groups, as well as people who are racialized, at the bottom".<sup>46</sup>

Focusing on criminal policy, the Tidö Agreement amplifies an on-going trend of stricter sentencing, expanding the scope of secret coercive measures as well as extending deprivation of liberty. Many of these measures are supposedly legitimised by the motive of combating "gang criminality", though there is still no legal definition of what "gang criminality" constitutes. Despite this, the Tidö Agreement still wants to investigate the possibility of criminalising participation in a "criminal gang", deporting non-Swedish citizens who commit crimes in the context of "gang criminality" even without a conviction, double sentences for gang criminality and the above-mentioned proposal on implementing visitation zones and using secret coercive measures without a suspicion of crime, amongst other reform proposals.

Furthermore, juvenile delinquents are also targeted by the Tidö Agreement. This includes the establishment of special juvenile detention as well as extending the maximum time for juvenile compulsory care, considering lowering the age of criminal responsibility as well as a review of the penalty discount for those under 18, and the possibility to use secret coercive measures against youths who are under the age of 15. This part ignores both psychological and criminological understandings of juvenile delinquency, thus also ignoring the child's rights.

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46 [Analysis-of-the-Tido-Agreement\\_Civil-Rights-Defenders\\_221024.pdf \(crd.org\)](#)

The language used in the Tidö Agreement between the current government and the Sweden Democrats equates migration and criminality in different ways. Citizens and non-citizens living in Sweden that have a migration background are scapegoated for societal problems, mainly crime. This discriminatory narrative will likely influence the work of authorities and courts such as the Swedish Migration Agency. Among other things, there is a concrete risk that the implementation of the law in individual cases will become more subjective to the detriment of the individual. One example regards a risk for more rejections on asylum applications where asylum claims contain a margin of appreciation (after the evidence evaluation).

#### *Different treatment between international protection seekers*

The reception in Sweden of people fleeing the war in Ukraine has mobilised both authorities, private actors and individuals. For Ukrainians, the implementation of the EU Temporary Protection Directive has meant a fast track to international protection, however many are facing problems with inclusion in society due to a lack of access to language education and other social and economic services.

At the same time, protection seekers from outside Europe that need a visa to enter the Schengen territory experience difficulties

accessing asylum procedures in the EU and they are systematically subjected to violent border regimes. As opposed to Ukrainians, the Swedish political narrative is increasingly portraying this group as a threat to society, which has a negative effect on public opinion and, consequently, the situation for those that survive the migration routes and manage to seek asylum in Sweden (see above).<sup>47</sup>

#### *Islamophobia and Hate Crimes against Muslims*

Though reports indicating a rising prevalence of racist and Islamophobic sentiment and discrimination in Sweden have become mainstay in the national research output, 2022 marked an inflection point in the country's institutional engagement with ethnic, racial and religious antagonisms. In particular, this development was informed by the 2022 Swedish parliamentary election and its constitutive parties' campaigns leading up to it, through which, apart from legislative proposals expressly addressing racial, ethnic and religious minority groups as problems, racist and Islamophobic stereotyping, rhetoric, discourses and narratives also entered the political mainstream, across party lines and levels of representation. Examples of senior political officials engaging with racialising discourses include the party leader of the Social Democratic Party and the former – and at the time current – Prime Minister of Sweden proclaiming that they did not want to see any

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47 <https://crd.org/2022/05/09/why-is-it-important-to-treat-all-refugees-equally/>

“Somali towns” in Sweden;<sup>48</sup> a statement, in turn, made in response to criticisms against the Minister for Migration and Integration proposing an ethnic cap for residential areas (limiting the number of nationals with foreign background to 50 percent).<sup>49</sup>

Other examples include when the co-spokesperson for the Green Party and former Minister for Gender Equality and Minister for Housing discussed the implementation of family planning for women with an immigrant background in segregated areas,<sup>50</sup> a proposal which was criticised for appealing to notions of so-called reproductive racism;<sup>51</sup> the party leader for the Christian Democrats and the current Deputy Prime Minister calling for Swedish police to shoot more (at least 100) “Islamists” following riots in Swedish suburbs in April of 2022;<sup>52</sup> the Moderate Party proposing the administration of ADHD testing for all children living in segregated residential areas;<sup>53</sup> the Liberal Party leader and current Minister for Integration proposing language

testing for children as young as two years old, and forcibly removing them from their parents should they fail the test,<sup>54</sup> as well as both senior elected representatives of the Moderate Party and the Liberal Party petitioning the Parliament to institute nationwide bans on the wearing of the Muslim headscarf.<sup>55</sup> Though not exhaustive, the list of examples serves to show the commonality, normalisation and viability of organising politics through engaging with practices pointed – expressly or suggested – toward minorities.

One particularly revelatory shift in Sweden’s political trajectory as regards its relation to race was the success of the far-right Sweden Democrats in the 2022 election. The staunchly anti-Muslim and anti-Islamic party seized 20.54% of total votes, their biggest electoral success since the party’s inception,<sup>56</sup> becoming the second biggest party in the Parliament and gaining access to executive power. Though the party has since its foundation regularly and routinely employed both discriminatory,

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48 [Dagens Nyheter, ”Andersson kräver färre läsningar från de andra partierna: ”Lättare att bilda regering efter valet”, 2022-08-09.](#)

49 [Dagens Nyheter, ”Ygeman: Max hälften med ”utomnordisk bakgrund” i utsatta bostadsområden”, 2022-07-31.](#)

50 [Dagens Nyheter, ”Mammorna i utsatta Skäggetorp delade sin vardag med MP-toppen”, 2022-04-17.](#)

51 See, amongst others, [Läkartidningen, ”Vården måste försvara reproduktiva rättigheter”, 2022-06-01](#) and [Ottar, ”Reproduktiv rasism”, 2022-09-27.](#) For the notion and theory of reproductive racism, see Siddiqui, S. (2021). *Racing the nation: towards a theory of reproductive racism.* *Race & Class*, 63(2), 3–20.

52 [Sveriges Radio, ”Busch kritiserar polisen: Varför har vi inte minst 100 skadade islamister?”, 2022-04-22.](#)

53 [Moderata Samlingspartiet i Region Stockholm, ”Förslag: Snabbtest för ADHD i utsatta områden”, 2022-08-12.](#)

54 [Göteborgs-Posten, ”Liberalerna vill införa språktest för tvååringar”, 2022-08-09.](#)

55 [Konstitutionsutskottet, 2022/23:1695, Slöjor på Flickor, Robert Hannah \(L\), Juno Blom \(L\), 2022-11-23;](#) [Aftonbladet, ”Nu måste vi utreda slöjförbud i skolan”, 2022-11-27.](#)

56 [Valmyndigheten, 2022 Swedish election results, 2022-11-07.](#)

exclusionary and incensing rhetoric as well as material policies targeting racial, ethnic and religious minorities,<sup>57</sup> anti-racist organisations reported an increase in the Sweden Democrats’ racialising efforts leading up to the 2022 election.<sup>58</sup> Amongst other initiatives, the secretary of the party elected to supplement the party’s campaign tour with his own tour.<sup>59</sup> Self-described as an “anti-Islamic tour”, the secretary campaigned in 12 cities warning about the “threat of Islam.”<sup>60</sup>

Said secretary, one of the party’s most senior officials and part of the founding members of the modern iteration of the Sweden Democrats,<sup>61</sup> has served the party as its leading anti-Muslim and anti-Islamic ideologue, and regularly been criticised for racist, Islamophobic and otherwise hateful statements levied at minority groups. Examples of criticised statements

include calling Islam an “abhorrent ideology and religion”,<sup>62</sup> an “anomaly/perversion of a religion”,<sup>63</sup> a “bigger threat than Nazism and communism combined”,<sup>64</sup> incompatible with democracy and Western values”,<sup>65</sup> as well as denoting Ramadan as “delusion”,<sup>66</sup> describing Muslims as “strangers”,<sup>67</sup> and calling for politicians and journalists with foreign backgrounds to be removed from Sweden.<sup>68</sup> One particularly egregious example of the secretary strumming up Islamophobic sentiment was when he responded to a picture of a non-white woman clad in a Muslim headscarf and a Swedish folk costume, calling the picture a “rape on Sweden.”<sup>69</sup> Since the conclusion of the election, the secretary has been elected chair of the parliamentary Committee on Justice, the highest parliamentary committee on issues regarding law-making, legislative process and the judiciary policies, standing at a powerful

57 For a full collection of discriminatory statements made by representatives or members of the Sweden Democrats, see the website <https://www.sd-citat.nu/>.

58 Expo, “Ett radikaliserat SD går till val”, 2022-09-10.

59 The tour was announced on the party’s own communication channel “Riks”, see Riks, “Islamkritisk turné – vårt sätt att leva är värt att försvara | Richard Jomshof (SD)”, 2022-08-26.

60 Ibid.

61 Aftonbladet, “De fyras gang”, 2016-05-26.

62 Sveriges Radio, “Sverigedemokraten Richard Jomshof får kritik efter kommentarer om islam”, 2021-03-12.

63 The comment was made on Twitter, published on the secretary’s official Twitter page. Retrieved 2023-01-10 from <https://twitter.com/RichardJomshof/status/1524403364582334464>.

64 SVT Nyheter, “Islam värre hot än nazismen”, 2022-11-12.

65 Dagens ETC, “10 islamofobiska uttalanden från Richard Jomshof (SD)”, 2021-03-22.

66 Ibid.

67 Ibid.

68 Ibid.

69 The comment was made on Twitter, published on the secretary’s official Twitter page. Retrieved 2023-01-10 from <https://twitter.com/richardjomshof/status/1534091189183447047>.

position to affect the course of Swedish legislation for the upcoming term of office.<sup>70</sup>

Racialising discourse and practices disseminated within the higher strata of the political parties also find their counterparts on the local levels, with municipal bodies passing or implementing anti-Muslim policies. The development is spearheaded by increasingly arbitrary usage of the appendage “Islamist” to justify infringements in the right to freedom of religion, speech, and assembly, freedom from discrimination, as well as disproportionate scrutinisation of Muslim civil society perpetrated by state-funded or state-sanctioned investigations. Though the decisions and legislation are often overturned or found unlawful on the judicial or administrative level, their easy passing coupled with a lack of deferral to the principles of rule of law and rights-based safe-guards lead to prolonged durations of the unlawful policies being in effect, negatively impacting the personal, legal, and financial wellbeing of people belong to the afflicted minority groups. Administrative investigations clearing the accused persons or organisations are also seldom considered in the subsequent decision making.

Examples of anti-Muslim policies passed by local governing bodies and engineered

by the instrumentalisation of accusations of “Islamism” during 2022 include the Board of Education of Gothenburg refusing to pay school vouchers to a private Muslim school, a decision which was criticized by the city’s auditor for being made without legal basis and on discriminatory grounds, in strict contradiction of the Swedish School Act.<sup>71</sup> Similarly, the Social Welfare Board of Gothenburg denied the Muslim adult education association Ibn Rushd public granting in defiance of the Swedish National Council of Adult Education, which had previously found that allegations of Islamism levied against the association in media and by politicians lacked factual basis, and that the association was entitled granting in accordance with Swedish legislation.<sup>72</sup> The board’s decision was criticised by the Swedish section of Amnesty International, which urged for the respect for freedom of religion, assembly, and freedom from discrimination.<sup>73</sup> The verbiage of cutting state-funding has increasingly been instrumentalised in the political configuration against ethnic, racial and religious organisations, including proposals to attach arbitrary requirements of level of democracy to the legal framework for granting civil society organisations state funding.<sup>74</sup> The Tidö Agreement also includes several references to stopping funding to “Islamist” or “extremist” organisations, including “cultural,

70 [SVT Nyheter, “Richard Jomshof \(SD\) blir ordförande för justitieutskottet”, 2022-10-01.](#)

71 [Göteborgs-Posten, ”Revisionen riktar hård kritik mot politikerna om Römosseskolan”, 2022-03-23.](#)

72 [Folkbildningsrådet, “När tilliten prövas: En studie av Studieförbundet Ibn Rushds samhällsbidrag”, 2019.](#)

73 [Amnesty International, ”Beslutet att neka Ibn Rushd bidrag riskerar att hota religions- och föreningsfriheten”, 2022-02-23](#)

74 [Prop. 2021/22:272, Statens stöd till trossamfund samt demokrativillkor vid stöd till civilsamhället, 2022.](#)

ethnic or religious organisations [which] are used for Islamist and separatist interests”, as well as making explicit reference to schools with “Muslim profiles” as a problem.<sup>75</sup>

Not only Muslim organisations are met with state-mandated stigmatisation, securitisation and scrutinisation, but so too are Muslim individuals engaging in the public debate and civil society, to the point where Muslim organisations report trouble finding members and especially public representatives, stating fear of reprisals and harassment as key concerns.<sup>76</sup>

While state-funding for Muslim organisations is increasingly curtailed, several far-right and Islamophobic media outlets gained access to financial support from the Swedish Press and Broadcast Authority during 2022, including the website “Exakt24”, which has a long history of publishing racist, antisemitic and Islamophobic articles.<sup>77</sup> Meanwhile, analyses of traditional media’s engagement with questions regarding Islam, Muslims and Islamophobia find that Muslims are largely depicted in negative terms or correlates, while

issues regarding Islamophobia rarely get addressed.<sup>78</sup> Research further shows a sharp decline in the public perception of Muslims in Sweden, with data gathered as late as in July of 2022 showing that over two-thirds of the Swedish population regard Islam as a threat against Western values.<sup>79</sup>

The institutional and discursive facets of Swedish Islamophobia work in conjunction and interactive fashion with rising levels of hate crime and violent attacks committed against Muslim persons and organisations. While the number of Islamophobic hate crimes committed remained high in 2022, the number of cases cleared continued to stay low, and designated specialist groups within the police handling hate crime remain concentrated in the three metropolitan areas. The latter half of 2021 brought with it hitherto unseen levels of violence and scale of crimes committed on the bases of Islamophobic logic, namely two violent school attacks executed by perpetrators aged 15 and 16.<sup>80</sup> Both perpetrators reported having been influenced by Islamophobic

75 “Tidöavtalet: Överenskommelse för Sverige”, 2022, pp. 37, 45, 54.

76 Poljarevic, E., Ardin, A., Irving, M., “Islamophobia in Sweden: National Report 2021” in Bayrakli, E., Hafez, F., (ed.), *European Islamophobia Report 2021*, Vienna: Leopold Weiss Institute, 2022, p. 582.

77 Expo, “Miljonbelopp till högerextrema medier”, 2022-03-03.

78 Myndigheten för stöd till trossamfund, “DEL 8: Mellan religionsfrihet och yttrandefrihet: Det mediala samtalet om religion och trossamfund”, 2021-10-27.

79 Expo, “Kampen om värderingarna: Sociokulturella konflikter i en polariserad tid”, 2022.

80 Aftonbladet, “15-åringen döms för skolattacken i Eslöv”, 2021-12-22; Aftonbladet, “Pojke dömd för skolattacken i Kristianstad”, 2022-06-14.



propaganda, including the Great Replacement theory.<sup>81,82</sup>

2022 was also a particularly conspicuous year as regards Islamophobic hate speech and hate propaganda. Beginning in April of 2022, during the Muslim holy month of Ramadan, far-right politician Rasmus Paludan set out on a tour burning the Qur'an in front of mosques and in areas with relatively large densities of Muslim and otherwise non-white inhabitants. The express purpose of the tour was self-described as systematically provoking Muslims and people with an immigrant background, in order to portray them as violent, barbaric, irrational, non-integrable and thus not belonging in Western society. The demonstrations, which were authorised by police, sparked massive counter-protests and led in some places to riotous situations and violence committed against civilians, police and property. In the wake of the demonstrations and their counter-protests, civil rights organisations such as Amnesty International and Civil Rights Defenders reported waves of Islamophobic hatred being spread.<sup>83</sup>

Paludan held a total of at least 29 demonstrations between 2022-04-14 and 2022-06-05, during 19 of which at least one copy of the Qur'an was burned in conjunction with Paludan giving inflammatory speeches about Islam and Muslims. Civil rights organisations, private individuals and, in one case, the municipality where the demonstration were held, reported a total of seven demonstrations to the police, arguing that the facts of the case constituted hate speech under Section 16 Article 8 of the Swedish Penal Code. Though Sweden has regularly received criticisms from international bodies such as United Nations Human Rights Committee and United Nations Committee on the Elimination of Racial Discrimination for failing to grant sufficient protection against racist and xenophobic expression, especially such conducted with regards to black Swedes and Swedish Muslims, including effectively implementing the legal framework protecting against such speech by investigating cases and prosecuting suspected perpetrators, the Swedish Prosecution Agency and Police Agency elected to immediately dismiss six of the reports. In five of the dismissed cases, the dismissals lacked motivation, and in one case categorically denying that burning a Qur'an could be constituted as hate propaganda, not addressing the systematic, inciteful, purpose

81 The "Great Replacement" theory is a white supremacist conspiracy theory rooted in 20th century French nationalist thought, describing beliefs that white Europeans are being replaced in their countries by non-white immigrants, signaling the extinction of the white race.

82 [Aftonbladet, "15-åringen döms för skolattacken i Eslöv", 2021-12-22; Aftonbladet, "Pojke dömd för skolattacken i Kristianstad", 2022-06-14.](#)

83 [Amnesty International, "Efter helgens oroligheter: har rasismen mot muslimer blivit rumsren i Sverige?", 2022-04-20; Civil Rights Defenders, "Oroligheterna i samband med koranbränningarna är en människorättsfråga bortom yttrandefrihet", 2022-04-27.](#)

and context of the demonstrations, in contradiction with both international and Swedish law.

## **Fostering a rule of law culture**

### ***Contribution of civil society and other non-governmental actors***

During 2022, Civil Rights Defenders monitored the Swedish general elections from a human rights and democracy perspective. Through this method, Civil Rights Defenders presented 20 reform proposals to strengthen the state of democracy and rule of law in Sweden, of which seven were presented in an op-ed in Swedish media.<sup>84</sup> Furthermore, the political parties were asked to position their views towards the proposals through a survey.<sup>85</sup> Based on this, Civil Rights Defenders then arranged a seminar during Almedalen where political party representatives presented their views on the state of democracy in Sweden.<sup>86</sup> During autumn 2022, Civil Rights Defenders also ordered a survey from the analysis and research company Novus about democracy and rule of law in Sweden.<sup>87</sup> The results show that during the year, worry has increased regarding democracy and rule of law in Sweden, with almost 33% agreeing with the statement that

Swedish democracy is threatened, and 40% experiencing a threat towards fundamental rule of law and democracy principles during the last year.<sup>88</sup>

In September 2022, Civil Rights Defenders held the second Nordic Rule of Law Forum in Stockholm. The goal of this annual event is to bring together both civil society actors, including legal practitioners and non-governmental actors, as well as representatives of the judiciary and other state authorities, and create a platform for dialogue and learning around important human rights and rule of law issues. The theme of this year's forum was Developments in Criminal Policy and Procedure. The day's discussions examined the changing criminal policies throughout Europe – more specifically, the increasingly repressive measures that numerous governments have introduced and the effect of such developments on individual human rights and the rule of law. Speakers included current and former judges of the European Court of Human Rights, representatives from civil society organisations and national authorities, academics, and legal practitioners. Civil Rights Defenders received overwhelmingly positive feedback from the nearly 100 participants who attended in person.

84 ["Sju förslag som skyddar den svenska demokratin" - DN.SE](#)

85 [20 förslag för demokratin - så svarade partierna - Civil Rights Defenders \(crd.org\)](#)

86 [Träffa Civil Rights Defenders i Almedalen - Civil Rights Defenders \(crd.org\)](#)

87 [Fler oroliga för den demokratiska utvecklingen i Sverige - Civil Rights Defenders \(crd.org\)](#)

88 [PowerPoint-presentation \(crd.org\)](#)

## **Contact**

### ***The Civil Liberties Union for Europe***

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of 19 national civil liberties NGOs from across the EU.

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