

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

## A security imperative for Europe

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

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

**Thorbjørn Jagland**

126th Session of the  
Committee of Ministers  
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2016

**French edition**

*Situation de la démocratie,  
des droits de l'homme  
et de l'État de droit – Un impératif  
pour la sécurité de l'Europe*

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# FOREWORD

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**Thorbjørn Jagland**

Secretary General of the Council of Europe

**T**he past 12 months have seen a gear shift in Europe's security concerns. Recent terrorist attacks have sent a shockwave through our societies. Unco-ordinated responses to the migrant crisis have sustained chaos at our borders. Lasting peace has still not been secured in eastern Ukraine. The recent resumption of hostilities in Nagorno-Karabakh has reminded us how swiftly frozen conflicts can thaw.

Combined with ongoing economic uncertainty, such insecure conditions are creating fertile ground for nationalists and xenophobes who seek to exploit public anxiety. Hate crime, anti-Semitism and Islamophobia are on the rise. Trust in state as well as European institutions is in decline.

At the same time, a dangerous tendency towards legislative nationalism has emerged. Over recent months there have been attempts in a number of states to introduce laws which risk contravening international standards, most notably as governments try to stem the arrival of refugees. More broadly, a growing chorus of voices now openly questions the authority of the European Court of Human Rights and the obligation to execute its judgments.

Such developments pose serious problems for our shared security. In today's Europe nations must work together if they are to successfully combat the many threats which cross our borders. Yet the rules and norms which constitute the basis of this co-operation are being challenged from multiple sides and increasingly, in public discourse, we see the politics of solidarity, generosity and tolerance give way to chauvinism, division and fear.

I am therefore using my third annual report to issue an appeal to all in Europe who value open democracies and inclusive societies: we must urgently demonstrate that safe and stable states are those which foster cohesion and act in concert with their neighbours. I encourage governments, parliamentarians and civil society to examine carefully the detailed analysis across these pages: it exposes Europe's democratic shortcomings, which require our immediate attention.

Across the continent we have found holes in the systems of checks and balances meant to restrain executive power. Too many national judiciaries suffer from undue political interference, for example. Almost half of member states are failing to guarantee the safety of journalists. Too frequently the freedoms of expression, assembly and association are coming under attack.

We have also found widespread weaknesses in the rules and practices put in place to promote integration and cohesion. For instance, all member states now have laws criminalising incitement to hatred, violence and discrimination, but a worrying number of authorities are failing to properly implement them. Certain groups, including migrants, refugees and also LGBT and Roma, remain especially vulnerable to prejudice and exclusion.

Such conditions compound the disconnect many individuals feel towards their political systems as well as to other communities and society at large. So the Council of Europe will now step up our support to member states as we seek to build and maintain strong democracies which command public confidence, encourage participation and promote mutual respect among their members.

To this end, we will embark on a comprehensive programme of judicial reform in order to shore up the independence and impartiality of Europe's courts. Through our Venice Commission we will help states maintain robust checks and balances across their democratic institutions.

■ We will work with states to safeguard freedom of expression, including by preparing a set of common standards on the blocking and filtering of Internet sites and codifying, for the first time, international standards pertaining to mass surveillance. We will continue to champion press freedom, renewing our efforts to ensure that journalists present at public protests are given special status. We will strengthen protection for human rights defenders against reprisals which flow from their interaction with our Organisation.

■ The Council of Europe will help Europe's governments promote inclusion by making sure that domestic legislation relating to migrants and refugees meets international standards, by training public officials and law enforcement in the human rights of these groups, and by assisting with special safeguards for unaccompanied children. Social rights will remain at the top of our agenda, in particular securing more ratifications of the revised European Social Charter and the Protocol on Collective Complaints. Across Europe, we will support teachers to equip young people with the skills and understanding needed to operate as democratic citizens in diverse societies.

■ This is a programme built on our common laws and shared values and it is only made possible by the European Convention on Human Rights. The Convention remains an indispensable basis for joint action between European states. It guarantees the fundamental freedoms which constitute a contract between Europe's citizens and their governments. The Convention establishes, in black and white, the clear rights and responsibilities all individuals within a society have to one another, too.

■ At a time of increased fragmentation between nations and mistrust within them, such benefits should not be downplayed. In addition to calling on member states to implement in full the recommendations in this report, I urge them to make clear their commitment to the European Convention on Human Rights and the Strasbourg Court. Our Convention system can never be taken for granted: it depends on the active and constructive engagement of all governments. By embedding these fundamental freedoms into the legal, political and social fabric of their nations, Europe's leaders can build democracies which are more open and inclusive and, as a result, more secure.

■ As guardians of a safe and stable Europe, the Council of Europe will support these endeavours in every way we can.



**Thorbjørn Jagland**

Secretary General of the Council of Europe

# DEMOCRATIC SECURITY AND ITS FIVE BUILDING BLOCKS

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**A**s early as the 1700s philosophers were arguing that, in nations governed by majority rule, people were far less likely to choose war – as were their leaders, wary of bearing the blame for heavy losses.

■ Experience over the last 300 years has overwhelmingly supported this view. In a rare example of consensus among political scientists it is now widely accepted that democracies rarely, if ever, go to war with each other. Democratic practices equally protect states from internal strife.

■ The reasons are threefold.

■ First, democratic systems provide for effective checks on executive power. Independent judiciaries and strong parliaments prevent power from being abused, mismanaged and corrupted. Free media hold the whole system to account.

■ Second, democracies foster tolerance, based on a shared set of civic values.

■ Third, a genuine competition of ideas and plurality of voices makes for more dynamic societies, better able to innovate in the face of new threats.

■ “Hard security” continues to be vital – based on traditional models of deterrence and military capacity. But the ongoing migration crisis in Europe has shown that the distinctions between “hard” security and democratic security are increasingly blurred. As this report will show, defaulting on democratic norms, human rights and respect for the rule of law – including international law – hinders efforts for rational, effective and humane solutions and consequently creates serious security threats and concerns. It is proven once again that democratic norms and practices are vital foundations for lasting peace.

■ The five fundamental building blocks of democratic security are:

- ▶ efficient and independent judiciaries;
- ▶ free media and freedom of expression;
- ▶ freedom of assembly and a vibrant civil society;
- ▶ legitimate democratic institutions;
- ▶ inclusive societies.

## GUIDE TO THE REPORT

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**T**his is the third annual report of the Secretary General on the state of democracy, human rights and the rule of law in Europe. The methodology and the structure of this report are similar to last year’s report. It builds on it, improves its methodology, the measurement criteria and the parameters. The findings have also been expanded. Several “thematic boxes” throughout the report highlight the standards of the Council of Europe on important topical areas, related to recent developments.

■ The report assesses the extent to which the Council of Europe’s 47 member states are able to make the five building blocks of democratic security a reality.

■ Each block is explored in its own chapter and broken down into its key parameters. The list is not exhaustive, but includes the most important aspects of democratic security. The parameters have been selected in accordance with Council of Europe legal standards and norms and reflect the reports and recommendations of relevant Council of Europe institutions and bodies. Notably this includes the Committee of Ministers, the European Court of Human Rights, the

Parliamentary Assembly, the Congress of Local and Regional Authorities as well as the reports and opinions by the Commissioner for Human Rights and the Venice Commission.

■ Each parameter is accompanied by the detailed criteria by which compliance can be judged. In this way, the report can act as a yardstick for anyone wishing to assess the performance of an individual state. It should therefore be seen as much as a tool for ongoing analysis as an evaluation of the current state of play. Where data is available these assessments are quantified. The lack of available and usable data has prevented formulating meaningful findings in some of the parameters.

■ This will try to identify and highlight pan-European trends and priority areas for joint action, where key recommendations have been made.

■ The new recommendations are building further on the work done in the implementation of the recommendations set out in the previous reports. We fully expect member states to continue implementing the recommendations set out in the previous reports while simultaneously acting on the conclusions set out here.

# EXECUTIVE SUMMARY

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## AN EFFICIENT, IMPARTIAL AND INDEPENDENT JUDICIARY

■ The rule of law and the proper functioning of democracies depend on independent and efficient legal systems which ensure access to justice for all.

■ More than half of member states have satisfactory levels of judicial independence. As this report highlights, the issue is not the absence of formal legal guarantees – all our member states have them – but rather the actual practices regarding how the state, judges, prosecutors, politicians and the society as a whole interact.

■ In countries where judicial independence is rated as unsatisfactory, judicial systems suffer from attempts to use the judiciary for political purposes, corruption, interference with state institutions or inadequate funding. Several member states launched important judicial reforms, which have yet to show tangible results.

■ Member states have invested significantly in improving the efficiency of court procedures and, as a result, the overall situation in this area has improved. Positive steps include the implementation of backlog reduction plans and suggested quotas for the work of judges, the introduction of new digital tools and performance assessments for judges, and the development of more reliable registration systems that generate higher quality data allowing for a better understanding of the problems and consequently more effectively targeted remedies.

■ Issues with enforcement of court judgments are found to a certain extent in all our member states. Overall there is evidence of improvement, due in particular to the reconfiguration or capacity building of bailiff systems, or the simplification of legal frameworks. Non-enforcement of domestic judicial decisions continues to be a problem in a few countries. The states facing the biggest challenges are generally those where court decisions have been taken against state bodies.

## Proposed actions and recommendations

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### Judicial independence

- ▶ ensure the effective follow-up of the Council of Europe's Action Plan on the Independence and Impartiality of the Judiciary;
- ▶ ensure that relevant parts of the action plan are reflected in all bilateral co-operation efforts;
- ▶ develop the methodology and establish a regular in-house evaluation mechanism on the independence and impartiality of the judiciaries of the Council of Europe member states by the end of 2016.

### Access to justice for vulnerable groups

- ▶ encourage member states to review their legal aid schemes with a view to ensuring their continuing effectiveness in giving access to justice for vulnerable groups.

### Efficiency through e-justice

- ▶ encourage member states to actively develop e-justice solutions as a means of improving efficiency and broadening access to justice.

## FREEDOM OF EXPRESSION

Without genuine freedom of expression and free media, there can be no safeguards against the abuse of power.

Close to half of member states do not satisfactorily guarantee the safety of journalists and the situation has deteriorated in the last year, with an increase in violence against journalists, including very serious threats such as physical attacks and destruction of journalistic property. Incidents of prosecutions and criminal investigations of journalists have been registered even in countries regarded as “established democracies” with exemplary human rights protection. A rising problem is the pressure on journalistic sources, both directly and as a result of targeted surveillance of journalists.

Most member states have sufficient protection against arbitrary use of the law. The abusive use of defamation laws remains problematic and prison sentences for defamation are still imposed in some member states. In a number of countries, the law still gives enhanced protection to politicians and public officials, in contradiction of the European Court of Human Rights (the Court) case law.

Several countries saw decriminalisation processes being rolled back and criminal defamation laws re-introduced. Among positive developments, the report refers to fewer instances of the use of hate speech and blasphemy laws and abolishment of the blasphemy laws in two countries.

Interference by owners in media content is a major issue. Instances where media outlets have been brought under governmental control have been recorded. Another concern is the use of government funding and government advertising as a tool to influence media.

Interference with media regulators and the governing bodies of public broadcasters was reported. The risk to the financial independence of the public service broadcaster exists in many member states. The financial position of journalists is weak; many journalists earn below-average salaries, making them vulnerable to pressure. In a small number of countries, the state controls most media outlets and censors content both offline and online.

The situation with regard to media pluralism and diversity is assessed as unsatisfactory in 26 member states. New restrictions on foreign investment in the media have been introduced in one member state. Media concentrations are considered as threatening independent regional media and thereby limiting citizen participation.

Some of the most serious concerns with regard to the freedom of expression on the Internet relate to cases in which the blocking, filtering and taking down of Internet content lack legal basis, or are arbitrary. The majority of member states do not have specific comprehensive laws regulating these issues.

Most member states provide for the possibility of judicial review; however, the lack of case law often makes it difficult to guide the proportionality of assessments. Concerns have been raised about the administrative blocking of websites in the absence of judicial control.

The large majority of member states limit the liability of intermediaries to the cases in which the intermediaries were aware of the illegal content they were transmitting and did not act accordingly.

## Proposed actions and recommendations

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### Freedom of expression online

- ▶ draft a set of common standards for all member states on blocking and filtering of Internet sites, using, *inter alia*, the findings of the 2015 study on blocking and filtering of Internet sites, to be presented to the Committee of Ministers by the end of 2016;
- ▶ establish a platform for governments, major Internet companies and representatives' associations on their respect for human rights online, including on measures to protect them and remedy challenges and violations.

### Mass surveillance

- ▶ launch, before the end of 2016, a process to codify international standards, good practices and guidance relating to “mass surveillance”, in the context of the right to privacy and freedom of expression.

## Safety of journalists during protests

- ▶ request the Venice Commission to update its 2010 Opinion on the freedom of assembly, including the guidelines on securing status for journalists during protests.

## Regulatory authorities and public service broadcasting

- ▶ encourage all member states to implement the Council of Europe standards on the independence of media regulatory authorities, the remit of public service broadcasters and media concentration.

## FREEDOM OF ASSEMBLY AND FREEDOM OF ASSOCIATION

■ In most Council of Europe member states, legislation regulating freedom of assembly is in compliance with the Convention standards.

■ The main issues lie primarily with the implementation of laws. Public assemblies are not always seen as an integral aspect of a pluralist democracy, including, as observed in recent years, in countries with long-standing democratic traditions. There is the problem of a notification procedure provided for by law not being applied in accordance with Convention standards, resulting in a *de facto* authorisation requirement for the holding of public demonstrations.

■ In a few cases, content-based restrictions, including blanket prohibition, are imposed on assemblies perceived by public authorities as promoting homosexuality. Pride marches continue to be banned in some countries. There were cases where judicial review mechanisms were not effective and fair-trial standards were not respected.

■ Excessive use of force and ill-treatment by and impunity of law-enforcement officials is an issue. In some member states, there is no effective remedy for violations of the right to freedom of assembly by law-enforcement officials.

■ As regards the freedom of association, the legislation of the vast majority of member states meets international legal standards. However, there is a trend among an increasing number of member states towards a more restrictive approach to freedom of association as a result of either the manner in which the existing legislation is implemented or changes to the legislation. In these countries, NGOs encounter various impediments to their creation, activities and funding.

■ In a few cases, national legislation provides for the blanket de-registration of NGOs, their dissolution or their qualification as “undesirable” on grounds that are not admissible. NGOs face obstacles in their operations, and are subject to financial reporting obligations, limits on foreign funding and/or other requirements. In one country, an overly broad definition of “political activity” in legislation limits the ability of NGOs to engage in activities aimed at voicing opinions, shaping policies or influencing policy-making processes.

## Proposed actions and recommendations

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### Freedom of assembly

- ▶ focus the bilateral work with member states, including through action plans and co-operation projects, to:
  - ensure that notification requirements for peaceful assemblies are not interpreted and applied by the authorities as authorisation requirements; offer assistance, including through training, in order to promote the right to exercise freedom of assembly and association; disseminate information on best practices in the Council of Europe member states;
  - ensure that the use of force to disperse public events remains an exceptional measure; offer assistance, including through training, to countries where problems have occurred in order to ensure that law-enforcement agencies receive proper instructions and apply them correctly.

### Freedom of association and civil society

- ▶ commission, by the end of 2016, a review on the standards applying to foreign funding of NGOs in the member states; based on the findings, consider the need for new Committee of Ministers guidelines.

- ▶ focus bilateral work with member states, including through action plans and co-operation projects on:
  - aligning legislation, regulations and practice concerning the exercise of freedom of association (notably registration requirements) with Council of Europe standards;
  - ensuring that NGOs do not face unnecessary hurdles (disproportionate sanctions, excessive reporting obligations, discrimination) in their functioning;
  - ensuring that effective appeals and complaint mechanisms are available.

## Protection of human rights defenders

- ▶ establish, under the authority of the Secretary General, a mechanism strengthening the protection of human rights defenders; the new mechanism will focus on reprisals against human rights defenders related to their interaction with the Council of Europe.
- ▶ reinforce interinstitutional dialogue on the issue of human rights defenders and strengthen the capacity of the Court to swiftly address the most urgent cases.

## DEMOCRATIC INSTITUTIONS

■ The key concerns here are related to the non-respect of the separation of powers, as well as the misuse of majorities in the parliament to rewrite constitutional and legislative rules in ways which are causing problems with regard to states' compliance with Council of Europe standards.

■ Elections in the Council of Europe area can be generally assessed as competitive and respectful of democratic processes. Improvements have been observed notably with regard to the professionalism of electoral administration, competitiveness of the campaign environment, increased voter turnout and a slight increase in the number of women elected in the legislative and local authorities in some countries.

■ Poor access to media by the opposition parties, lack of independence of journalists, cases of intimidation of journalists, a lack of transparency of media ownership and unbalanced media coverage undermined the principle of equality of suffrage and remained issues of concern in some member states.

■ The situation of local and regional governments has generally improved. In response to the financial and economic crises, several European countries have taken steps limiting to a certain extent the autonomy of local authorities by diminishing transfers, replacing local taxes with transfers, cutting a part of some shared taxes and creating new financial obligations for local authorities.

■ Important reforms have been observed in most European states in the area of good governance, engaging civil society through better and innovative means and improving transparency and public ethics. Progress has been recorded in particular in central and eastern Europe as regards the quality and performance of human resources.

## Proposed actions and recommendations

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### Separation of powers and functioning of democratic institutions

- ▶ call on the member states to seek, uphold and implement opinions of the Venice Commission on issues affecting the separation of powers and functioning of democratic institutions, and in particular on questions related to constitutional justice, laws on the judiciary, electoral legislation or legislation on specific human rights issues and the rights of minorities.

### Political process

- ▶ develop Council of Europe guidelines concerning the role and the responsibility of the political majority and its interaction with the opposition.

### Free and fair elections

- ▶ focus bilateral work with member states, including through action plans and co-operation projects on:
  - ensuring the accuracy and regular update of the voters registers;
  - taking further legal and practical measures to ensure fair and equal conditions for political contestants, notably through regulations concerning funding of political parties and electoral campaign

- financing, with a view to transparency of funding, ceilings for expenditures, as well as clear reporting rules and comprehensive oversight;
- enhancing the capacity of domestic election observation.

## INCLUSIVE SOCIETIES

■ The economic crisis in Europe and the austerity measures continued to have a negative impact on social rights. In 2015, the European Committee for Social Rights adopted 762 conclusions in respect of 31 states, including some 239 findings of non-conformity to the European Social Charter (31%). A third of all conclusions concerned the right of children and young persons to protection, a quarter related to the right of migrant workers and their families to protection and about a sixth concerned the right of employed women to protection of maternity.

■ A general rise in racism and intolerance has been observed. Most member states now have legislation against incitement to hatred, violence or discrimination. Not all countries have specific criminal legislation in place punishing offences motivated by hatred on account of the victim's sexual orientation, and even fewer on account of the victim's gender identity. LGBT people are particularly vulnerable and access to their human rights is frequently hindered by discriminatory treatment and intolerant attitudes.

■ The low school attendance rate of Roma continues to be an issue, as access to quality education by this population group in general remains fragmentary.

■ In 2015, the European Committee of Social Rights examined reports from 25 states on the application of all or part of Article 19 on the rights of migrant workers and their families to protection and assistance. The committee found that in almost a third of the cases the situation was not in conformity with the Charter.

■ The European Commission against Racial Intolerance (ECRI) monitoring reports highlight difficulties for migrants in various areas of everyday life, such as reduced access to education, inadequate housing, exploitation in the labour market and limited access to health care. ECRI has also observed that intolerant speech by public figures and media frequently targets migrants, and that the legitimate discussion on migration and the challenges it poses is often appropriated in populist politics and election campaigning.

■ Through the Council of Europe/UNESCO Lisbon Recognition Convention, 53 countries have committed to facilitating the recognition of refugees' qualifications, but the most recent survey shows that 70% of the state parties have taken no steps towards implementation.

## Proposed actions and recommendations

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### Treatment, rights and integration of migrants

- ▶ strengthen co-operation between Council of Europe monitoring bodies with a view to following more closely the honouring of commitments and obligations by member states with respect to the rights of migrants, asylum seekers and refugees;
- ▶ promote exchanges of good practice on the reception of migrants, asylum seekers and refugees and the integration of newcomers at national, regional and local level;
- ▶ train civil servants, police and other officers on the human rights of migrants, including irregular migrants, and reinforce measures aimed at the prevention of trafficking in human beings and the protection of victims in this particular context;
- ▶ ensure that special measures and safeguards are in place for asylum-seeking and refugee, including unaccompanied, children;
- ▶ aim at early integration measures for newcomers, design comprehensive policies and develop strategies for their rapid implementation; pay particular attention to the situation of migrant women and children, and take steps to prevent migrants from falling victim to trafficking;
- ▶ encourage all member states to ratify and effectively implement the Council of Europe's Istanbul, Lanzarote and anti-trafficking conventions;
- ▶ call on the states parties to implement fully Article VII of the Lisbon Recognition Convention and send clear supporting signals to national recognition authorities and education institutions that refugees' qualifications should be recognised as fairly and flexibly as possible; lay out, by the end of 2016, a road

map, identifying solutions to the convention's non-implementation, drawing on existing good practice, with the goal of submitting a recommendation to states parties; encourage states that are not parties to sign and ratify the convention;

- ▶ develop a targeted reference instrument to serve as a template for volunteers and NGOs which can be adapted for use in different linguistic settings and social contexts, as part of wider linguistic integration programmes to ensure that they address the specific needs of migrants and refugees.

### Non-discrimination

- ▶ secure the efficient implementation of the Council of Europe Action Plan on Building Inclusive Societies (2016-2019) and the Thematic Action Plan on the Inclusion of Roma and Travellers (2016-2019).

### Social rights

- ▶ encourage effective follow-up by the member states of the conclusions of the European Committee of Social Rights, as provided in the 2014 "Turin Process" Action Plan;
- ▶ encourage further ratifications by member states of the revised European Social Charter, including the acceptance of the collective complaints procedure.

### Hate speech

- ▶ promote national campaigns in all member states;
- ▶ update the definition of hate speech and develop and disseminate tools and mechanisms for reporting hate speech;
- ▶ develop and co-ordinate initiatives for combating hate speech among and by political forces in co-operation with the No Hate Parliamentary Alliance.

### Democratic citizenship education

- ▶ review the Council of Europe's activities on Democratic Citizenship Education and Human Rights Education (DCE/HRE), evaluate progress and identify and share best practice, as well as assess the need for turning the current Charter on DCE/HRE into a binding legal instrument;
- ▶ improve the visibility for DCE/HRE in school curricula, by supporting national co-ordination mechanisms for DCE/HRE and by promoting comprehensive and sustainable national approaches;
- ▶ endorse the Council of Europe Reference Framework of Competences for Democratic Citizenship, as a key part of any government's response to the challenges facing our societies; invite member states to make full use of the reference framework by piloting and integrating it into national education systems.

### Safe spaces

- ▶ develop a "safe spaces" project around teaching controversial issues, with a view to drawing up guidelines for use in schools and other formal and non-formal education settings that allow teachers and pupils to address difficult and controversial issues relating to faith, culture and foreign affairs, while respecting each other's rights and upholding freedom of expression.

# CHAPTER 1

## AN EFFICIENT, IMPARTIAL AND INDEPENDENT JUDICIARY



# INTRODUCTION

## Chapter 1 – Efficient, impartial and independent judiciary

**T**he rule of law and the proper functioning of democracies depend on independent and efficient legal systems that ensure access to justice for all.

As the guarantor of justice and arbiter of disputes, the judiciary enjoys a particular importance in the eyes of the people. It acts as their protector against the possible excesses of the state. Without the effective, independent, timely and competent protection and enforcement of rights and freedoms guaranteed by the judiciary, democratic security is not conceivable.

The six parameters by which the judiciary can be assessed remained unchanged from last year's report: judicial independence, efficiency of court proceedings, enforcement of court judgments, legality and legal certainty, access to legal aid and the existence of a professional association for lawyers.

Following on from the recommendations of the 2015 report, a study has been prepared jointly by the Bureau of the Consultative Council of European Judges (CCJE) and the Bureau of the Consultative Council of European Prosecutors (CCPE) on the challenges to judicial independence and impartiality in the member states of the Council of Europe and submitted to the Committee of Ministers. In addition, a review of the action taken by member states as a follow-up to Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities is under way.

Drawing upon the above-mentioned study and review, a Council of Europe Action Plan to Strengthen Judicial Independence and Impartiality has been launched at a Conference of Ministers of Justice and representatives of the judiciary in Sofia in April 2016.

The judiciary is able to perform its functions only when it is allowed to maintain and run its administration independently and it is free to provide justice in accordance with the law, without any interference. The study commissioned by the Secretary General has given us a better understanding of the situation in our member states. It constitutes an important step towards a more effective, more accurate and comprehensive methodology to evaluate the strengths and weaknesses with regard to the independence and impartiality of judicial systems. It also sheds light on a number of challenges to the independence and impartiality of judges and prosecutors in member states, and demonstrates the urgent need to step up the capacity of the Council of Europe and of the member states to identify and remedy shortcomings

with regard to the efficiency and the independence of judicial systems.

As this report highlights, often the issue is not the absence of formal legal guarantees, but rather the actual practices of the member states regarding how the state, judges, prosecutors, politicians and the society as a whole interact.

While conformity with Council of Europe standards is an essential prerequisite for judicial independence, it does not in itself guarantee independence. On the contrary, the majority of states are able to demonstrate formal compliance with international standards. However, in several, there are problems due to the absence of proper checks and balances between the judiciary and the other branches of power. Of particular concern are states in which legality and legal certainty are deteriorating as a result of governments and parliaments abusing their powers, including through hastily passed laws and exerting undue interference over the judiciary.

In other places judicial independence is unsatisfactory due to corruption, political interference and inadequate funding. Lack of transparency in judicial appointments compounds public distrust in court decisions and creates further opportunities for political interference.

Concerns were also reported by civil society organisations in some countries about a lack of access to legal advice and assistance for detained asylum seekers.

For all these reasons, this year's recommendations aim at fostering the proactive role of the Council of Europe in order to stimulate legal reforms and – above all – concrete action to effectively respond, at the domestic level, to the current challenges to the independence and impartiality of judges and prosecutors in the member states.

Increased vigilance is required, not only with regard to conformity with formal standards of the Council of Europe, but even more so with regard to the proper functioning of checks and balances between the judiciary and the other branches of government. There is a sharp need to broaden access to justice for vulnerable groups by actively developing e-justice solutions. Encouraging a wide and open discussion on standards of independence and on the way they must be applied should contribute to strengthening the judiciaries in the member states.

# JUDICIAL INDEPENDENCE

## Chapter 1 – Efficient, impartial and independent judiciary

**T**he independence and impartiality of the judiciary are indispensable for the balanced separation of powers and for public confidence in the justice system as a whole. Article 6 of the European Convention on Human Rights (“the Convention”) requires that member states guarantee to everyone a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judicial independence must be guaranteed at both institutional and individual levels.

### Institutional independence

■ Institutional independence plays a fundamental role for judicial systems, in particular with regard to other branches of government (“external” institutional independence) and with regard to other organs within the institution, such as higher courts or court presidents (“internal” institutional independence). Judicial councils are important in this context as they contribute to strengthening the judiciary’s institutional independence. They should be independent decision-making bodies, drawn in substantial part from the judiciary, and authorised to make recommendations or express opinions which, in the case of judicial appointments, the relevant authority is required to follow in practice.

### Individual independence

■ Judges must take decisions fairly and free from internal and external pressure. To be protected against undue pressure, judges should be independent, impartial and able to act without any restriction, improper influence, pressure, threat or interference, whether direct or indirect.

■ The CCJE has highlighted that, as public trust in the judiciary is determined mainly by the behaviour of judges, it is “important to regulate this behaviour in a clear and transparent way”.<sup>1</sup> To ensure ethical

behaviour, principles of professional conduct should be established and laid down in codes of judicial ethics.

## MEASUREMENT CRITERIA

### Institutional independence

#### Legal criteria

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

#### Institutional criteria

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

### Individual independence

#### Legal criteria

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

#### Institutional criteria

- ▶ Decisions on judges’ careers are taken independently of the executive and legislative powers.

## FINDINGS

■ Some 27 member states have satisfactory levels of judicial independence. In the rest, the independence of the judiciary is rated as unsatisfactory, be it stable or deteriorating, due to a variety of reasons ranging from inadequate funding, political interference or corruption.

1. CCJE, “Situation report on the judiciary and judges in the Council of Europe member States” (2015). Source: [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE\(2015\)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CCJE(2015)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true).

■ A large majority of member states have undertaken legal reforms that should at least formally strengthen independence of the judiciary. However, conformity with formal standards is not a guaranteed deterrent against attempts to undermine judicial independence for political purposes and often these problems persist despite efforts made to address them through legislative measures. This is notably due to the lack of or improperly working checks and balances between the judiciary and the other branches of power.

■ Armenia, for example, introduced broad reforms, criminalising attempts to influence a judge and introducing the obligation on judges to report all such attempts. However reports persist regarding the lack of independence of the judiciary in practice. The report of the Commissioner for Human Rights following his visit to Armenia refers to examples of “interference by senior judicial instances in the work of lower-court judges”, as well as “from external actors such as the executive power at central and local levels (including law enforcement agencies)”.<sup>2</sup>

■ Lack of transparency in judicial appointments compounds public distrust in the fairness of court decisions and creates further opportunities for political interference. Where appointments of judges are perceived as having been made for reasons of influence rather than suitability for judicial appointment, such as in Malta where there is no formal appointment process for judges and their appointment remains the sole prerogative of the government, public trust in the judiciary is severely undermined.<sup>3</sup>

■ Similar concerns have been raised with regard to the appointment procedure in Switzerland, where in most cantons, on every level as well as for the federal courts, the electing body for judges is the parliament. In general, the main *de facto* criterion for the election of judges is the affiliation of a candidate to a political party.<sup>4</sup>

■ Only a fundamental shift in the practice of democratic and civic values will bring about any significant improvement. Countries which undertook concerted reforms to punish professional misconduct recorded an increase in public trust in the judiciary and, more generally, in institutions tackling high-level corruption.

■ In the states where judiciary independence is deteriorating, problems generally emanate from increasingly overbearing executive branches of

government. Even where there has been substantial, positive judicial reform, wider political events have caused setbacks to judicial independence. In these states, appointment and removal processes for judges are increasingly politicised. Disciplinary proceedings in some countries are used as a tool to censor judges. There are also examples of excessive legislative interference in the judiciary, for instance in Hungary where legislation on the reorganisation of the judiciary led to the premature termination of the mandate of a court president who had been openly critical of the judicial reform of the new political majority.<sup>5</sup>

■ In some states, judicial councils, while potentially very effective bulwarks against interference, have been shown to be vulnerable to co-optation. The situation in Turkey illustrates this problem, where the judicial council reshuffled the judiciary by reassigning hundreds of judges and prosecutors.<sup>6</sup> Experience also shows that unclear institutional arrangements relating to judicial self-governance can create spaces where judicial independence can be infringed.

■ Processes that are, *prima facie*, intended to improve standards and integrity within the judiciary must be carefully calibrated to avoid unacceptably interfering with judicial independence. For example, lustration processes (that is, mandatorily examining members of the judiciary in accordance with standards adopted since their appointment) are only appropriate in very limited circumstances, namely where the transition from totalitarian rule to democracy necessitates the exclusion of those in whom the public do not have faith. The “security reliability clearance”, introduced in Slovakia in 2014, requires judges to show that they still possess the necessary competences to properly fulfil their duties by undergoing a mandatory exam, is an example of a *de facto* lustration process that offends against the principle of permanent judicial tenure (this process has been put on hold due to complaints, but has not been abolished).<sup>7</sup> Similar concerns were raised in connection with the adoption in Ukraine of laws relating to lustration in the judiciary.<sup>8</sup> The Venice Commission observed that lustration has to be complemented by other means of ensuring justice and

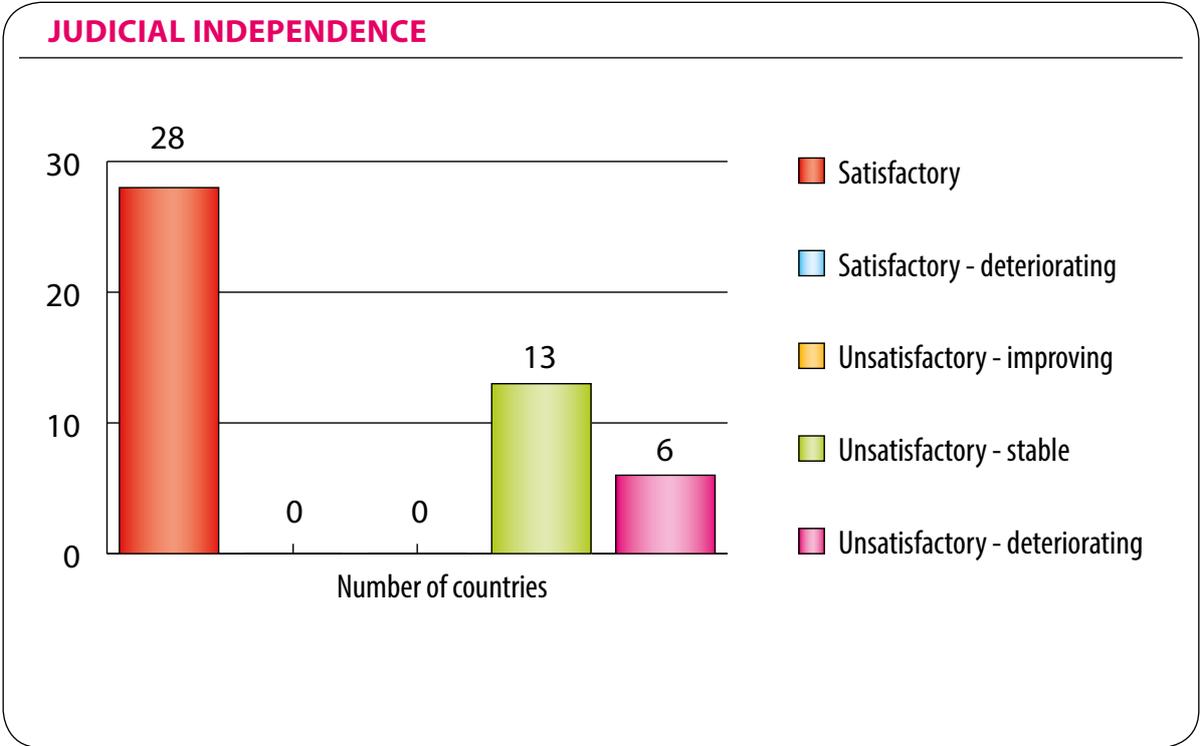
2. Council of Europe Commissioner for Human Rights, Report on Armenia, 10 March 2015, CommDH(2015)2, p.10.  
3. GRECO, “Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report Malta”, GRECO Eval IV Rep(2014) 4E, p. 22.  
4. European Committee on Legal Co-operation, “Follow-up to Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities”.

5. European Court of Human Rights, *Baka v. Hungary*, No. 20261/12, §§ 93-95, 27 May 2014.  
6. PACE Doc. 13824 on judicial corruption: urgent need to implement the Assembly’s proposals, 19 June 2015, available at: <http://assembly.coe.int/>.  
7. CCJE, “Situation report on the judiciary and judges in the Council of Europe member States” (2015), op. cit., p.29.  
8. “Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine adopted by the Venice Commission at its 101st Plenary Session”, CDL-AD(2014)044. See also “Comments on the Draft Law on the Restoration of Trust in the Judiciary in Ukraine and the subsequent comments on the Consolidated Draft Law”, prepared within the framework of the Council of Europe project “Strengthening the independence, efficiency and professionalism of the judiciary in Ukraine”.

fostering good governance and the rule of law, such as criminal prosecutions of individuals responsible for serious crimes, including crimes against humanity, and structural reforms aimed at strengthening the rule of law, combating corruption and eradicating nepotism. Lustration might serve as a complement to these other means in extreme situations, but it should never replace them, and lustration measures are not the most appropriate means to combat corruption.<sup>9</sup>

Possible models for the systemic renewal of the judicial corps in Ukraine have been explored in connection with the drafting of constitutional amendments and a number of Council of Europe comments have been taken on board to counter the risks that any such exercises inevitably entail.<sup>10</sup>

Even if problems of integrity have taken root at a systemic level among the judiciary, individual disciplinary responsibility, established through procedures that respect the necessary due-process safeguards, is a necessary condition for any dismissal of a judge or, in some cases, a transfer.



9. Venice Commission Opinion, CDL-AD(2014)044, op. cit., paragraph 34.

10. "Secretariat Memorandum on the compatibility of the Draft Law of Ukraine on amending the Constitution of Ukraine as to Justice as submitted by the President to the Verkhovna Rada on 25 November 2015 (CDL-REF(2015)047) with the Venice Commission's Opinion on the proposed amendments to the Constitution of Ukraine regarding the Judiciary", CDL-AD(2015)043 of 21 December 2015.

# EFFICIENCY OF COURT PROCEEDINGS

## Chapter 1 – Efficient, impartial and independent judiciary

**E**fficiency of court proceedings is vital for timely access to justice. Costly and lengthy proceedings will deter people from seeking legal redress in the courts. States must organise their legal systems so as to allow the courts to comply with the requirements of Article 6.1 of the Convention, including that of trial within a “reasonable time”. The European Court of Human Rights has regularly affirmed that the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to its complexity, the conduct of the parties and of the authorities, and the importance of what is at stake for the applicant in the litigation. States are under the obligation to allocate sufficient resources to their justice systems to ensure that unacceptable delays do not occur.

Recommendation CM/Rec(2010)12 of the Committee of Ministers on judges: independence, efficiency and responsibilities states that the “efficiency of judges and of judicial systems is a necessary condition for the protection of every person’s rights, compliance with the requirements of Article 6 of the Convention, legal certainty and public confidence in the rule of law”. It defines “efficiency” as “the delivery of quality decisions within a reasonable time following fair consideration of the issues”. Efficiency should be achieved “while protecting and respecting judges’ independence and impartiality”. It reiterates that, “each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently”.

### MEASUREMENT CRITERIA

#### Legal criteria

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

#### Institutional criteria

- ▶ The state allocates adequate resources, facilities and equipment to the courts to enable them to function efficiently.

- ▶ Objectives of agencies are co-ordinated in the broader framework of ensuring accelerated justice.
- ▶ Regular monitoring activities are implemented to evaluate efficiency.
- ▶ Discretionary prosecution is encouraged where appropriate.
- ▶ Offences that are inherently minor are not dealt with by court hearing.
- ▶ Simplified procedures are in place in respect of all types of legal proceedings.
- ▶ Civil and administrative courts are sufficient in number and geographically distributed to provide easy access for litigants.

### FINDINGS

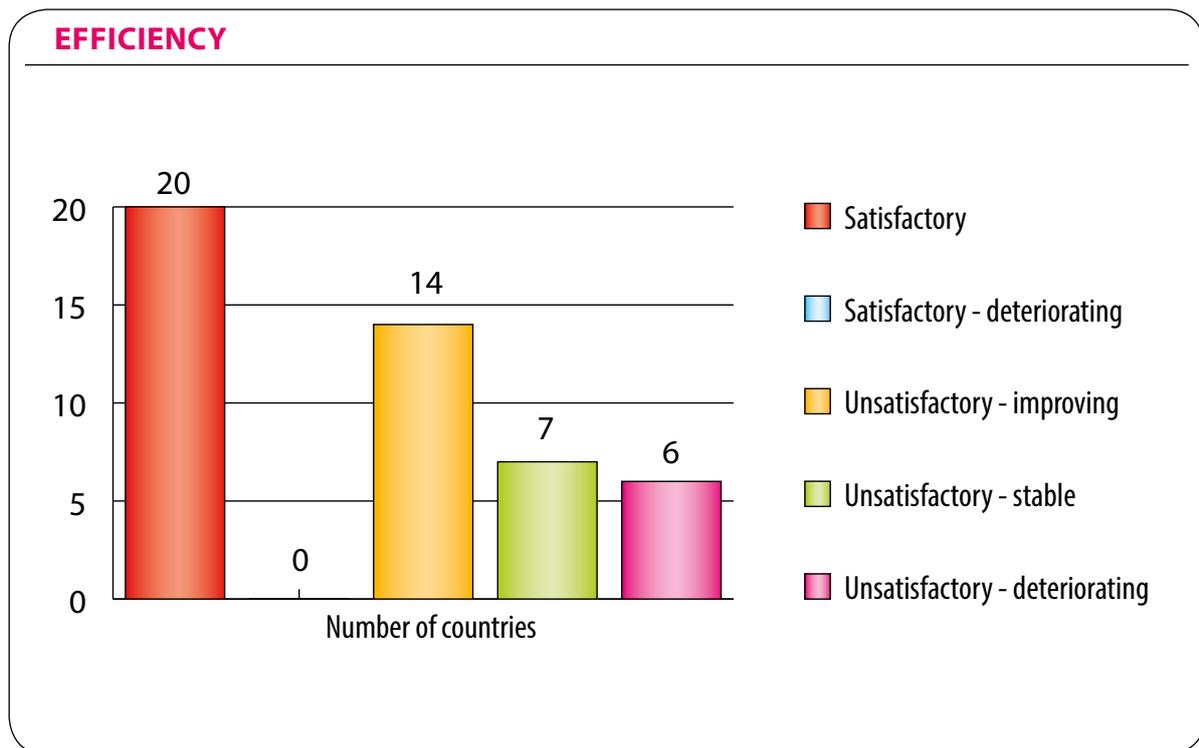
Member states are investing significantly in improving the efficiency of court procedures as the majority of them face challenges in this area.<sup>11</sup> As a result, the situation is improving in a significant number of states notwithstanding their unsatisfactory rating. Positive steps taken in these states include the implementation of backlog reduction plans and suggested quotas for the work of judges, the introduction of new digital tools and performance assessments for judges, and the development of more reliable registration systems that generate higher quality data allowing for a better understanding of the problems and consequently more effectively targeted remedies. For instance, a working group has been set up in Albania under the Ministry of Justice to improve the process of producing and collecting statistical court data. Croatian judicial authorities are also working on applying a methodology for better time management and quality of judicial efficiency.<sup>12</sup>

11. European Commission for the Efficiency of Justice (CEPEJ), “Report on European Judicial Systems”, Edition 2014 (2012 data), available at [www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport\\_2014\\_en.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf).

12. CEPEJ, EEA/Norway Grants Co-operation Programme between the Council of Europe and the Ministry of Justice of the Republic of Croatia, “Improving the quality and efficiency of the judicial system through infrastructure development and better management”, Programme Area 31.

Delays and the failure to tackle growing backlogs and, generally, to process cases within a reasonable time still remain a chronic problem for a small number of states. In a 2015 pilot judgment the Court concluded that Poland had to take further steps to tackle the problem of lengthy court proceedings due to a range of factors including overly complex procedures, poor case management and budgetary constraints.<sup>13</sup> Hungary is another example of a legal system without effective domestic remedies to prevent excessively long court proceedings. A pilot judgment of 2015 requires Hungary to introduce without delay appropriate reforms in order to bring it into line with the Convention.<sup>14</sup> In this context the Court expressed its regret in 2015 that it “is continually forced to act as a substitute for national courts and handle hundreds of repetitive cases where its only task is to award compensation which should have been obtained

by using a domestic remedy”.<sup>15</sup> In these states, often insufficient financial and human resources lie at the root of the problem, combined with inefficient court management, lack of modern electronic systems for case handling and archiving, and limited use of alternative dispute resolution. According to data collected by the European Commission for the Efficiency of Justice (CEPEJ), only the courts in Austria, Estonia, Malta and Portugal had fully introduced computer facilities across the board in respect of the three categories: direct assistance to judges and court clerks, administration and management, and communication between courts and parties. In respect of the first category (direct assistance to judges and court clerks), electronic case files did not exist in Albania and Cyprus.<sup>16</sup> The excessive length of time taken to decide cases, caused by such factors, can also be a contributing factor to low levels of legal certainty.

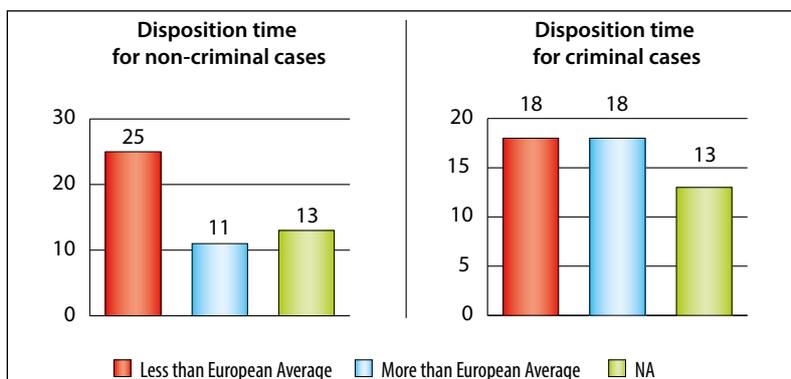
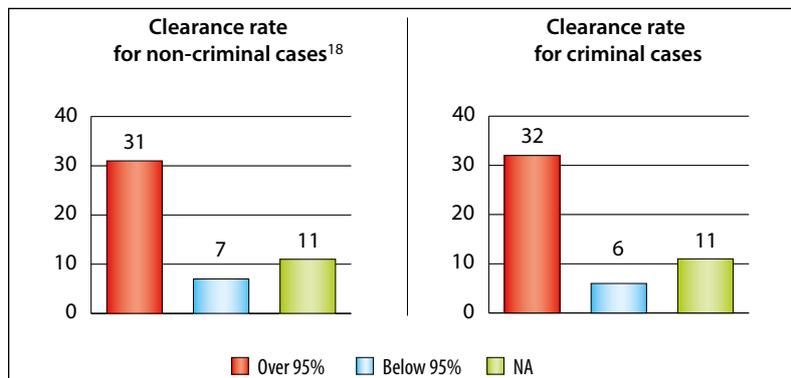
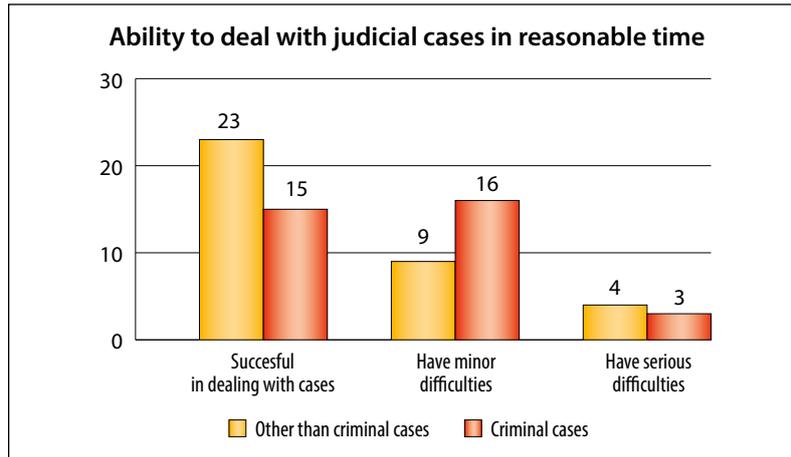


13. European Court of Human Rights, *Rutkowski and Others v. Poland*, No. 72287/10, 7 July 2015, § 207.  
 14. *Gazsó v. Hungary*, No. 48322/12, 16 July 2015, § 39.

15. *Rutkowski and Others v. Poland*, op. cit., § 219.  
 16. CEPEJ, “Report on European Judicial Systems”, op. cit., p. 125.

## Case clearance rates and case disposition times

Key indicators used by CEPEJ are case clearance rates and case disposition times. Clearance rates show a judicial system's case turnover ratio expressed as a percentage between resolved and incoming cases within one year. Disposition times indicate the number of days required for a system to solve a pending case in light of its existing rate of case processing. Combining these two indicators gives a complete picture of the ability of a state's judicial system to deal with court cases within a reasonable time, as shown in the chart which is based on data for 2012. It can be noted that a large majority of states are able to deal with incoming and pending cases in first instance courts without increasing their backlogs. These are states with clearance rates of close to 100%.<sup>17</sup>



17. CEPEJ Report on "European Judicial Systems", Chapter 9 on Court efficiency, p.188-264. (Source: [www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport\\_2014\\_en.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf)).

18. The total of 49 in the graphs is due to the fact that the results for the United Kingdom are presented separately for England and Wales, Scotland and Northern Ireland, as the three judicial systems are organised differently and operate independently from each other.

# ENFORCEMENT OF COURT JUDGMENTS

## Chapter 1 – Efficient, impartial and independent judiciary

**T**he execution of judgments handed down by courts is an integral part of “the right to a fair trial” for the purposes of Article 6 of the Convention. Article 13, “the right to an effective remedy”, is also relevant to enforcement of judgments, as it provides that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority”.

■ The Committee of Ministers Recommendation Rec(2003)17 on enforcement defines “enforcement” as “the putting into effect of judicial decisions, and also other judicial or non-judicial enforceable titles in compliance with the law which compels the defendant to do, to refrain from doing or to pay what has been adjudged”. All enforcement must be carried out within a “clear legal framework”, detailed enough to provide legal certainty. It further states that “all persons who receive a final and binding court judgment have the right to its enforcement. The non-enforcement of such a judgment, or a delay in it taking effect, could render this right inoperative and illusory to the detriment of one party”.

■ Clarity is the most important element of enforcement procedures, whether in defining enforceable titles or the rights, duties and entitlements of defendants, claimants and third parties. The law should provide for the postponement of the enforcement process, which parties may request in order to protect their rights and interests; where appropriate, a right of review of judicial and non-judicial decisions made during the enforcement process may also be provided for. The role of enforcement agents must be prescribed by law and these agents must be appropriately trained in law and procedure and subject to scrutiny and monitoring.

### MEASUREMENT CRITERIA

#### Legal criteria

- ▶ Enforcement is carried out within a “clear legal framework”, which is detailed enough to provide legal certainty.

- ▶ The law provides for a right for parties to request suspension of the enforcement process in order to protect their rights and interests and, where appropriate, a right to the review of judicial and non-judicial decisions during the enforcement process.

#### Institutional criteria

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

#### FINDINGS

■ Issues with enforcement are found in all member states. The states facing the biggest challenges in this area are generally those where decisions have been made against state bodies.

■ Detailed legal frameworks on enforcement are not useful unless they themselves are enforced. Indeed, in some contexts the complexity of procedures detailed within the legal framework can be a barrier to efficient enforcement. Simple and clear regulations help counter the risk of public distrust in the judicial system, which chronic failure of enforcement inevitably creates. Non-enforcement of domestic judicial decisions continues to be a major problem in the Russian Federation and Ukraine.<sup>19</sup> In Ukraine, while a law guaranteeing the execution of court decisions<sup>20</sup> entered into force in 2013 (nine years after the European Court of Human Rights pilot judgment in *Zhovner v. Ukraine*<sup>21</sup> on non-enforcement was delivered), it is unlikely to have any real impact on the enforcement of court judgments until the state authorities can increase expenditure in the state budget for these purposes. Despite the generally unsatisfactory situation in the Russian Federation, improvements have been recorded, for example in legislative amendments aimed at addressing the failure to enforce court decisions in relation to obligations in kind.<sup>22</sup>

■ Having laws guaranteeing compensation for those whose judgments have been delayed or not enforced can be a positive step. However, the promise of compensation that the state cannot afford or has not budgeted for only creates another non-enforcement issue, without solving the first. The payment of small

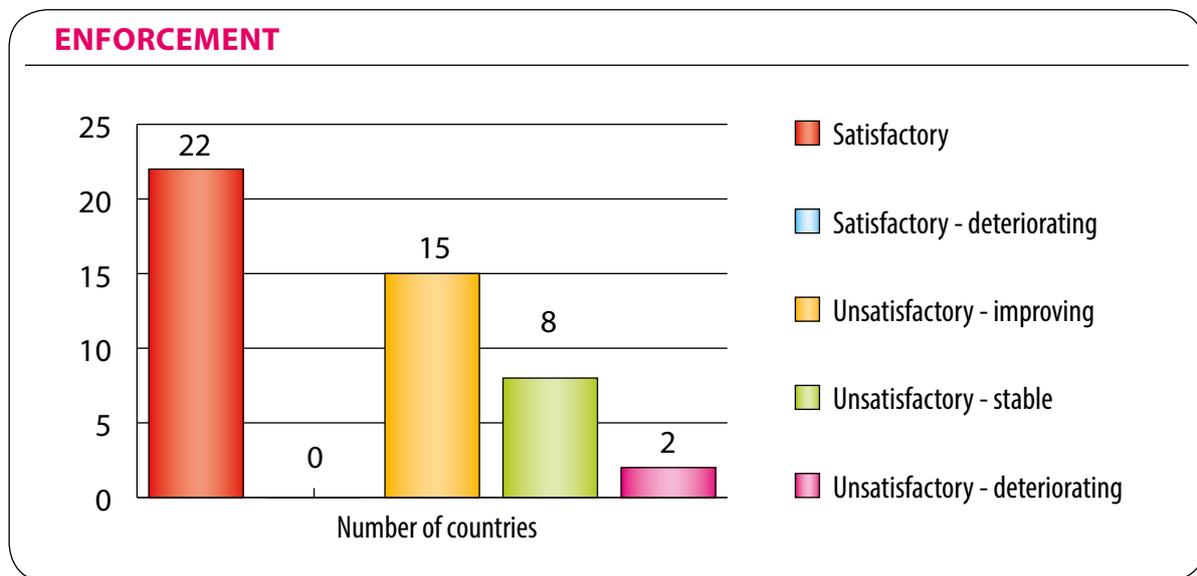
amounts of compensation is also not a substitute or remedy for the non-enforcement of the initial decision.

■ Enforcement cannot be considered as a process in isolation. Inefficient judicial systems tend to lead to inefficient enforcement systems. States where the power and independence of the judiciary have been intentionally or inadvertently diminished will find it difficult to enforce decisions made by courts.<sup>23</sup>

■ Many enforcement challenges stem from systems of social benefits that are outdated and unsustainable. These states must either properly fund their social benefit systems, or modify them so they can pay the obligations they incur on behalf of the state.<sup>24</sup>

■ States should also set a good example with the efficient enforcement of decisions against state or municipal institutions.

■ Overall, in many of the states where enforcement is unsatisfactory, there is evidence of improvement, with only two states experiencing a deteriorating situation. In conjunction with similar figures on improvements in judicial efficiency, these results demonstrate a general trend of incremental improvement across Europe. These improvements in the area of enforcement appear sometimes to be the result of the reconfiguration or capacity building of bailiff systems, or the simplification of legal frameworks.<sup>25</sup>



19. PACE Report 13864 on the implementation of judgments of the European Court of Human Rights, 9 September 2015. See also the European Court of Human Rights judgments in respect of the Russian Federation: *Burdov v. Russia* (No. 2), No. 33509/04, ECHR 2009, and *Gerasimov and Others v. Russia*, No. 29920/05 1 July 2014 and related cases.

20. Law of Ukraine No. 4901-VI on "Guarantees of the State Concerning Execution of Court Decisions".

21. *Zhovner v. Ukraine*, No. 56848/00, 29 June 2004.

22. PACE Report 13864, op. cit., p. 35.

23. See, for example, the concern of the Venice Commission over the lack of enforcement of judicial decisions in Turkey, "Venice Commission's Declaration on Interference with Judicial Independence in Turkey", 20 June 2015.

24. PACE Report 13864 on the implementation of judgments of the European Court of Human Rights, 9 September 2015, op. cit.

25. CEPEJ, "Report on European Judicial Systems", op. cit.

# LEGALITY AND LEGAL CERTAINTY

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Chapter 1 – Efficient, impartial and independent judiciary

**L**egality and legal certainty are interdependent values which form the bedrock of the rule of law.

■ The concept of legality is enshrined in the European Convention on Human Rights: Article 5 (the right to liberty and security) and Article 7 (no punishment without law).

■ Legal certainty is what allows individuals to regulate their own conduct within the law and to assess where state power has been applied arbitrarily.

■ The European Commission for Democracy through Law (Venice Commission) has broken down the concepts of legality and legal certainty into the key components below.

## MEASUREMENT CRITERIA

### Legality

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#### Legal criteria

- ▶ The process for enacting law is transparent, accountable and democratic.
- ▶ The exercise of state power is authorised by law.

#### Institutional criteria

- ▶ The state acts on the basis of, and in accordance with, the law.
- ▶ The law is applied and enforced.
- ▶ Penalties are not applied unless a law has been violated.
- ▶ Exception clauses in state law are only used in very narrow circumstances.

### Legal certainty

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#### Legal criteria

- ▶ Laws and decisions are clear and precise, and formulated with sufficient clarity to allow an individual to regulate his or her conduct.
- ▶ The retroactivity of laws is prohibited.
- ▶ Legal discretion granted to the executive branch is limited by law.
- ▶ Laws do not contradict each other.
- ▶ Legislation is generally implementable and implemented.
- ▶ Judicial decisions are binding at the last instance.

#### Institutional criteria

- ▶ Laws are publicly and easily accessible for an ordinary individual.
- ▶ Similar cases are treated in a similar manner.
- ▶ Final judgments by domestic courts are not called into question.
- ▶ Court case law is generally consistent and coherent.
- ▶ Legislative evaluation is practised on a regular basis.

## FINDINGS

■ The majority of Council of Europe member states are considered to be in compliance with this parameter.

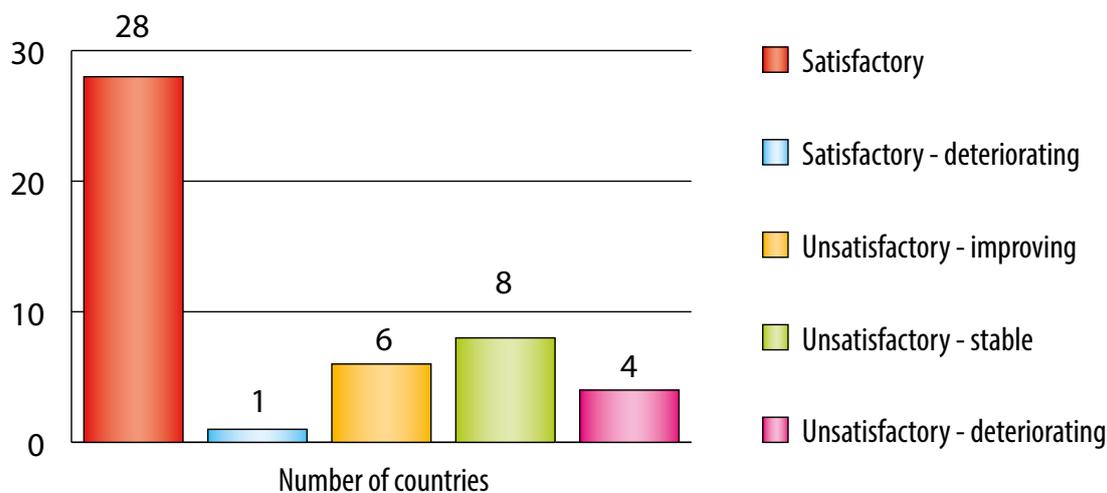
■ In some member states, improvements in legality and legal certainty have been achieved through increased access to laws and court decisions, and the more consistent adjudication by different judges on the same issues of law. In Romania, this has been achieved through the creation of a portal to consolidate existing legislation and recent initiatives to publish case law.

■ However, there were also cases of deterioration in legality and legal certainty due to misuse of parliamentary majorities, or as a consequence of hastily passed laws, and increasing interference with the judiciary by the executive branch of government.

■ Unsatisfactory levels of legal certainty can also be attributed to such factors as overly complex laws and their frequent and numerous amendments, lack of consistency and coherence in court decisions – due in one case to the fragmentation of the judiciary – and poor drafting skills within the judiciary.

■ For example, in Bosnia and Herzegovina conflicts and discrepancies between the various legal orders lead to similar issues being treated differently in different parts of the country, causing practical difficulties for individuals.<sup>26</sup> Inefficient court proceedings resulting in long delays in the resolution of litigation is also a source of legal uncertainty.

### LEGALITY AND LEGAL CERTAINTY



26. Venice Commission, "Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina", 91st Plenary Session, CDL-AD(2012)014, p.9. See also the Council of Europe Action Plan for Bosnia and Herzegovina 2015-2017, p 9.

# ACCESS TO LEGAL AID

## Chapter 1 – Efficient, impartial and independent judiciary

**A**ccess to justice is an essential democratic right. According to Article 6 of the Convention, governments have the obligation to provide legal aid where it is needed, taking into consideration the importance of the case to the applicant, the complexity of the case, the capacity of individuals to represent themselves, the costs involved and the individual's ability to bear them.

■ The Council of Europe has addressed this matter in detail in a number of different resolutions and recommendations adopted by the Committee of Ministers. Resolution (78) 8 on legal aid and advice requires states to set up an appropriate legal aid system and stipulates that legal aid should not be treated as “a charity to indigent persons but as an obligation of the community as a whole”. Extra-judicial legal-advice services should also be provided, as they may serve a preventive function by avoiding unnecessary litigation. Court costs should also be considered, with an effective legal aid system providing possibilities for waiver, payment or reduction of any fees. Public funding must be adequate, varied and efficiently used. National authorities should take active steps to ensure the public has access to information on what types of legal aid and assistance are available and appropriate and how to benefit from this right.

### MEASUREMENT CRITERIA

#### Legal criteria

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

#### Institutional criteria

- ▶ The state offers an appropriate system of legal aid to provide effective access to justice to everyone in its jurisdiction.
- ▶ Extra-judicial legal-advice services are provided.
- ▶ Where appropriate, procedures are simplified for individuals to conduct cases themselves.
- ▶ An effective system is in place to reduce or waive court and other fees if they prevent access to justice.

- ▶ The legal aid system co-ordinates and includes organisations that wish to contribute to it.
- ▶ Legal aid is accessible, easy and timely for those who need it.
- ▶ Clear information is available on what types of legal aid and assistance are available and appropriate and on how to benefit from this right.
- ▶ Public expenditure on legal aid is adequate, varied and efficiently used.

### FINDINGS

■ It is challenging to assess and compare the provision of legal aid in member states, because of the absence of available data for many states. However, certain trends can be seen.<sup>27</sup> The majority of member states provide a satisfactory level of legal aid, although recent financial crises and corresponding cuts in budgets have sometimes hit legal aid budgets hard, affecting provision even in high income per capita member states. In Hungary, for example, concerns were reported by civil society organisations regarding the lack of access to legal advice and assistance for detained asylum seekers.<sup>28</sup> States whose performance in this area was unsatisfactory have, by and large, made positive steps to improve the provision of legal aid in the past decade. These steps have often included the passing of specific laws guaranteeing legal aid, or the establishment of legal aid authorities or bureaus to oversee its provision. As a result of these efforts, access to legal aid in a number of states is improving. In Romania, a law on legal aid in civil matters brought national legislation into line with European standards<sup>29</sup> and the national authorities are now working on improving access to justice for Roma and other vulnerable groups with plans for the setting up of five pilot legal aid offices to provide counselling and information tailored to their

27. CEPEJ, “Report on European Judicial Systems”, op. cit. See also, for example the “European Commission against Racism and Intolerance (ECRI) report on Romania” (4th monitoring cycle), 2014; reports published by ECRI in 2015 on Albania, the Czech Republic and Poland.

28. “European Commission against Racism and Intolerance (ECRI) report on Hungary” (5th monitoring cycle), 2015.

29. Act No. 193 of 21 October 2008 approving the Government Emergency Ordinance No. 51/2008 on legal aid in civil matters.

needs.<sup>30</sup> In the Russian Federation, a federal law in 2011 launched an ambitious reform that aims to promote access to justice for vulnerable and disadvantaged persons in relation to a wide range of defined civil-law rights. The national authorities are currently working on improving the effective implementation of this civil legal aid scheme at regional level by examining ways of improving the take-up of legal services by the target population.<sup>31</sup>

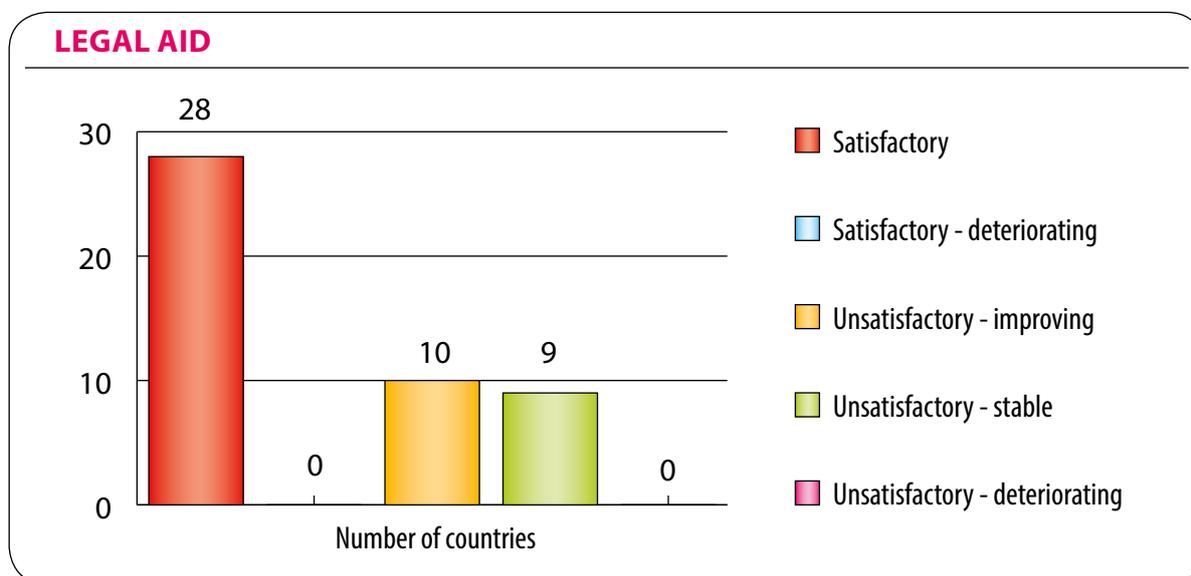
However, common issues are the extremely low budgets allocated to legal aid and little or no monitoring of quality or data collection. Some states still have to pass legal aid laws. In relation to criminal cases specifically, states across Europe have made some efforts to implement the *Salduz* judgment<sup>32</sup> concerning access to a lawyer, but lack of representation at the vital early stages of proceedings is a continuing problem. Meanwhile, civil legal aid continues to be primarily offered by NGOs in a large number of member states, with insufficient state funding and support. This is the case in Albania where, for example, despite the existence of the State Legal Aid Commission and the setting-up of six local offices in 2014, lack of access to a legal aid lawyer is compounded by lack of awareness of these services among the population. Outside the capital, it is very difficult to find information on legal aid and there is no opportunity to secure legal aid through local bar associations. This can only be done

by visiting the State Legal Aid Commission office in the Ministry of Justice in Tirana.<sup>33</sup>

Adopting a sufficient and detailed legal framework is an important first step to ensuring legal aid provision, but some states that have done so have also failed to implement their laws to any meaningful extent. This is linked to the fact that legal aid in general, and legal aid for criminal cases in particular, is still not a high priority for many countries. Low expenditure added to the absence of a dedicated and unified system of administration, a separate budget or managing body, create fragmented and inconsistent provision systems. States appear to be aware of these challenges, with Poland, for example, adopting a new law on legal aid and access to legal information in August 2015, which entered into force on 1 January 2016. The law establishes a unified legal system, provides detailed rules on legal aid and introduces a network of service providers.<sup>34</sup>

Too often quality assurance simply does not exist, or where it does it is not effective. Countries often manage to ensure representation by a lawyer, but fail to take the necessary proactive steps to ensure the assistance is effective and of sufficient quality to meet Council of Europe standards.

Remedying challenges with legal aid begins with collecting consistent data that can inform policy and budgeting. Effective legal aid is not possible without a state-level system of management.



30. EEA Grants and Norway Grants, "Judicial capacity building and cooperation", in the project "Improving access to justice. An integrated approach with a focus on Roma and other vulnerable groups".

31. Federal Law No. 324-FZ on "Free Legal Aid in the Russian Federation" (entered into force on 15 January 2012). See also Council of Europe Project 2014/DG1VC/3302.

32. *Salduz v. Turkey*, No. 36391/02, ECHR 2008.

33. Council of Europe Commissioner for Human Rights, Report on Albania, 16 January 2014, CommDH (2014)1, p 16.

34. Law of 5 August 2015 on free legal assistance and legal education.

# LAWYER PROFESSIONALISM

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Chapter 1 – Efficient, impartial and independent judiciary

**T**he professionalism of lawyers is essential to securing fair trial rights under Article 6 of the Convention, which provides that everyone charged with a criminal offence is entitled to defend him- or herself in person or through legal assistance of his or her own choosing. Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer states that lawyers should be able to discharge their professional duties “without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason”. It also identifies “a high standard of legal training and morality” as a prerequisite for entry into the profession, and argues in favour of continuing education for lawyers.

## MEASUREMENT CRITERIA

### Institutional criteria

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- ▶ Lawyers can discharge their duties without improper interference.

- ▶ Entrants to the legal profession have appropriate education and training.
- ▶ The lawyer licensing body/professional association is self-governing and independent from state and public pressure.
- ▶ Decisions on entry into the profession are made transparently, are based on merit and objective criteria and are subject to review on request by an independent and impartial judicial authority.
- ▶ A code of conduct for lawyers exists. Disciplinary measures for violation of its provisions are proportional, respect the principles and rules of the European Court of Human Rights and are subject to judicial review.

## FINDINGS

- A lack of available and usable data on lawyer professionalism has prevented the formulation of comparative findings across member states.

# PROPOSED ACTIONS AND RECOMMENDATIONS

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Chapter 1 – Efficient, impartial and independent judiciary

## JUDICIAL INDEPENDENCE

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- ▶ ensure the effective follow-up of the Council of Europe's Action Plan on the Independence and Impartiality of the Judiciary;
- ▶ ensure that relevant parts of the action plan are reflected in all bilateral co-operation efforts;
- ▶ develop the methodology and establish a regular in-house evaluation mechanism on the independence and impartiality of the judiciaries of the Council of Europe's member states, by the end of 2016.

## ACCESS TO JUSTICE FOR VULNERABLE GROUPS

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- ▶ encourage member states to review their legal aid schemes with a view to ensuring their continuing effectiveness in giving access to justice for vulnerable groups.

## EFFICIENCY THROUGH E-JUSTICE

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- ▶ encourage member states to actively develop e-justice solutions as a means of improving efficiency and broadening access to justice.



## CHAPTER 2

# FREEDOM OF EXPRESSION



# INTRODUCTION

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## Chapter 2 – Freedom of expression

**T**he right to freedom of expression, enshrined in Article 10 of the European Convention on Human Rights, is a fundamental precondition for democracy. Without genuine freedom of expression and without genuinely free and independent media, there can be no effective safeguards against incompetence and misuse or abuse of power. Freedom of expression is also a necessary condition for tolerance, cultural diversity and living together.

■ According to the jurisprudence of the European Court of Human Rights and other Council of Europe standards, an enabling environment for freedom of expression requires a number of elements which collectively provide the conditions under which freedom of expression can flourish and society's right to be informed is guaranteed. These are: 1) safety of journalists and others performing public watchdog functions; 2) protection from arbitrary application of the law; 3) media independence; 4) media pluralism and diversity and 5) protection of freedom of expression on the Internet.

■ As a follow-up to the recommendations in the 2015 report, the Council of Europe organised the conference on "Freedom of expression: still a precondition for democracy?" in October 2015. The recommendation by the Committee of Ministers to member states on the protection of journalism and safety of journalists and other media actors promotes regular and independent reviews of relevant legislative frameworks by independent bodies.

■ A comparative study on blocking, filtering and removal of Internet content in the 47 member states was prepared for the Council of Europe by the Swiss Institute of Comparative Law. The study examines the regulations which provide for restrictive measures, such as in the fields of protection of copyright, the fight against child pornography, anti-terrorism, defamation and others, taking account of procedural aspects and safeguards for the freedom of expression.

■ This chapter assesses each of the indicators listed above, including trends across all or parts of Europe. Key findings are provided for the states for which data are available. In 2015 more data on legal frameworks

and practices of blocking, filtering and removal of Internet content in the 47 member states have become available compared to that used for the preparation of the 2015 report. Therefore, the measurement criteria of the parameter on the protection of freedom of expression on the Internet were adapted in order to reflect this new information.

■ Over the last year, there has been a decline in media freedom in some member states, with threats to put the media under state control. There has been a new trend in many other member states of introducing new laws and regulations concerning the fight against terrorism that affect the enjoyment of freedom of expression and media freedoms. This has coincided with a time when many media outlets are struggling to survive economically. Almost half of member states are failing to guarantee the safety of journalists from violence and threats, an enabling legal environment for their work and access to information held by public authorities.

■ The main cause of this regression as regards the safety of journalists is an increase in violence, including killings, beatings, the torching of cars and destruction of cameras and journalistic property.

■ A rising problem in a number of European countries is the pressure on journalistic sources, both directly and as a result of targeted surveillance of journalists.

■ In the majority of member states, the legal framework on blocking, filtering and removal of Internet content meets the requirements of being prescribed by law, pursuing legitimate aims and being necessary in a democratic society, in accordance with Article 10 of the Convention. Exceptions remain however, notably with regard to laws regulating hate speech and counter-terrorism.

■ Against this background, the recommendations in this report concern the freedom of expression online, including the impact on mass surveillance legislation, safety of journalists during protests, access to information and standards on the independence of media regulatory authorities, the remit of public service broadcasters and media concentration.

# SAFETY OF JOURNALISTS AND OTHERS PERFORMING PUBLIC WATCHDOG FUNCTIONS

## Chapter 2 – Freedom of expression

**T**he public has a right to be informed on all matters of public interest. In practice, this right is fulfilled through a free and vibrant media, which can exist only when journalists<sup>35</sup> are able to scrutinise power free from interference and without fear of violence, threats, arbitrary detention and imprisonment.

— The physical safety of journalists, of members of their family and of others performing public watchdog functions (for example, whistle-blowers) is of paramount importance. States have the obligation to ensure the safety of journalists, create an environment within which issues of public interest are reported from different points of view and to promptly investigate any incidents of violence, including threats of violence. States must refrain from violence and from verbal threats and abuse. There should not be criminal or civil-law proceedings against journalists or the media for political reasons or as a way of silencing them. Pre-trial detention should be used exceptionally, only when duly justified in a democratic society.

— Journalists depend on others to provide the information they report to the public. Their right to gather information and the protection of their sources are therefore essential to the exercise of their profession and guaranteed as part of the right to freedom of expression. The right to access information is of particular importance and obstacles or restrictions to this right must be prescribed by law and be narrowly restricted to what is necessary in a democratic society in accordance with Article 10 of the Convention. Sources must be able to provide news confidentially, and the confidentiality of communications between journalists and their sources should not be undermined by surveillance. Any sources that speak out regarding threats or harm to the public interest should not face reprisals for doing so and must be protected in law and in practice.

— States should take appropriate steps to safeguard the lives of journalists and of the others performing public watchdog functions within their jurisdiction. This involves a primary duty on the state to secure their right to life by putting in place effective criminal-law provisions to deter the commission of offences against them, backed up by law-enforcement mechanisms for the prevention, suppression and punishment of breaches of such provisions. It also extends, in appropriate circumstances, to a positive obligation on the authorities to take preventive operational measures to protect journalists whose lives are at risk.

### MEASUREMENT CRITERIA

- ▶ There is no violence against journalists or others who perform a public watchdog function.
- ▶ An effective criminal-law system is in place to protect them against threats and attacks.
- ▶ There is no impunity for crimes against journalists. There are independent, prompt and effective investigations of unlawful killings, torture or ill-treatment of journalists committed either by state or non-state actors.
- ▶ Prosecutors and courts deal adequately and in a timely manner with cases of threats or attacks on journalists.
- ▶ Journalists are not arrested, detained or imprisoned and media outlets are not closed because of critical comment. There are no politically motivated prosecutions.

<sup>35</sup>. All references to journalists in this report are understood to include both journalists and others working in the media.

- ▶ Journalists are not subjected to verbal intimidation led or condoned by authorities, or negative verbal rhetoric.
- ▶ The confidentiality of journalists' sources is protected in law and in practice subject to clear and narrowly defined exceptions.
- ▶ A normative, institutional and judicial framework is in place to protect whistle-blowers.

## FINDINGS

Almost half the Organisation's member states do not satisfactorily guarantee the protection of journalists from violence and threats. In 27 states, the situation is getting worse. In only one member state where the situation was "unsatisfactory" is the situation improving. In a continent that is home to the oldest international human rights system, these statistics are disturbing.

The main cause of this regression as regards the safety of journalists is an increase in violence, including beatings, torching of cars, destruction of cameras and journalistic property, and even killings. The newly launched "Platform to promote the protection of journalism and safety of journalists", a Council of Europe initiative which monitors threats to journalists' safety as well as states' responses to these threats, recorded 152 threats in 26 countries across Council of Europe territory.<sup>36</sup>

Violence is a serious threat in itself; but the lax or non-existent prosecution of perpetrators, verbal abuse of journalists and widespread politically motivated imprisonments adds to this and creates a culture of impunity where journalists fear reporting on controversial topics.<sup>37</sup> This has been underscored by the Council of Europe Commissioner for Human Rights, who stated that, in relation to unsolved crimes against journalists in Serbia, it "breeds an atmosphere of passive acceptance of these attacks".<sup>38</sup> Combined with the growing verbal abuse against journalists, this has created a climate within which critical and independent journalism is stifled.

With regard to Azerbaijan, the Council of Europe Secretary General expressed concern about the conviction of the investigative journalist Khadija Ismayilova.<sup>39</sup> Judgments from the Court have highlighted an arbitrary application of the law in Azerbaijan, notably to silence critical voices and limit freedom of speech. On 16 December 2015 the Secretary General launched an inquiry into respect for human rights in Azerbaijan, under Article 52 of the Convention.<sup>40</sup>

The Council of Europe Commissioner for Human Rights described the situation in Azerbaijan as "a serious and systemic human rights problem, which, in spite of numerous efforts by the Commissioner and other international stakeholders, remains unaddressed to date".<sup>41</sup> The Committee of Ministers issued a strongly worded statement in December 2015:

[exhorting the authorities] to adopt without further delay measures demonstrating their determination to solve the problems revealed, in particular that of the arbitrary application of criminal legislation to limit freedom of expression.<sup>42</sup>

In November 2015 two Turkish journalists from "Cumhuriyet", Can Dündar and Erdem Gül were detained on charges of "gathering secret state documents for the purposes of political and military espionage", "attempting to topple the government", and "deliberate support for a terrorist organisation without being a member". In February 2016, Turkey's Constitutional Court ruled that the rights of the two journalists have been violated, leading to their release from prison pending trial.

Worrying incidents of prosecutions and criminal investigations of journalists exist even in countries that have long been regarded as established democracies with exemplary human rights protection.

36. Data as of 4 April 2016 (available on the platform website: [www.coe.int/fom](http://www.coe.int/fom)).

37. See the explanatory memorandum to Parliamentary Assembly Resolution 2035 (2015) on the protection of media freedom in Europe, in Doc. 13664, and in particular Part 2.6 "Issues of pressing concern in Ukraine, Russia, Turkey and Azerbaijan". Available at: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21350&lang=en>.

38. Council of Europe Commissioner for Human Rights, Report on Serbia, 8 July 2015, CommDH(2015)14: <https://wcd.coe.int/ViewDoc.jsp?id=2331051&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>.

39. Statement by the Spokesperson of Secretary General Jagland on the verdict in the case of Khadija Ismayilova in Azerbaijan.

40. Secretary General launches inquiry into respect for human rights in Azerbaijan, news of 16 December 2015.

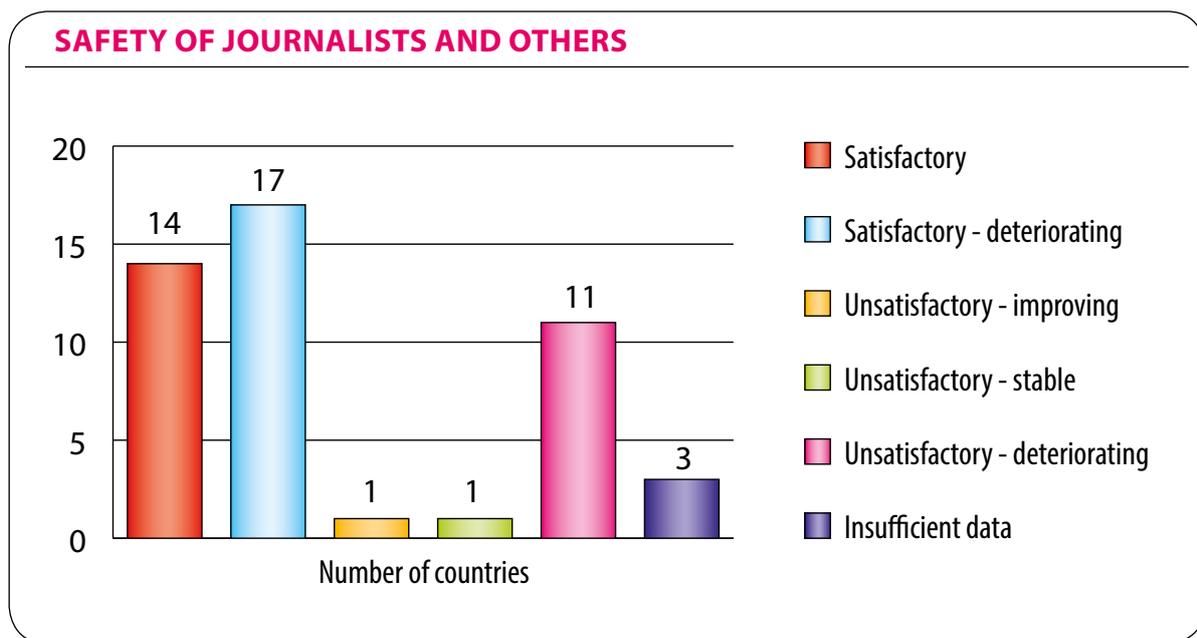
41. Third-party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights, available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2838436&SecMode=1&DocId=2245940&Usage=2>.

42. Interim Resolution CM/ResDH(2015)250, Execution of the judgments of the European Court of Human Rights. *Mahmudov and Agazade against Azerbaijan, Fatullayev against Azerbaijan*, adopted at 1243rd meeting – 8-9 December 2015: <https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec%282015%291243/H46-3&Language=lanEnglish&Ver=original&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>.

■ A rising problem in a number of European countries is the pressure on journalistic sources, both directly and as a result of targeted surveillance of journalists.<sup>43</sup> The Commissioner for Human Rights has expressed concern at “the allegations of mass and unauthorised surveillance of journalists and citizens in ‘the former Yugoslav Republic of Macedonia’”.<sup>44</sup> In the United Kingdom and in the Netherlands, shortcomings in the protection of journalistic sources and proposed legislation undermining source protection have been criticised by the Court and the Human Rights Commissioner.<sup>45</sup> A case concerning the impact of alleged surveillance conducted by the UK authorities on the protection of sources has been fast-tracked at the Court.<sup>46</sup>

■ On 21 December 2015, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 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 made a submission to the UK Joint Committee of the draft Investigatory Powers Bill. The confidentiality of journalistic sources was among the other freedom of expression issues raised in this submission. The UN Special Rapporteurs considered that the provisions of the bill regarding authorisation of warrants for journalists’ communications data may stifle the right to freedom of expression, while also resulting in a chilling effect on its legitimate exercise.

■ The Council of Europe’s Commissioner for Human Rights has expressed concern about recent amendments to surveillance legislation in Poland that expand the powers of police and special services without establishing corresponding safeguards for the protection of journalistic sources and information covered by professional secrecy.<sup>47</sup>



43. See PACE Resolution 2045 (2015), Mass surveillance, 21 April 2015: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21692&lang=en>.

44. Statement released on the Commissioner’s Facebook page, 26 February 2015: [www.facebook.com/permalink.php?story\\_fbid=414755112033738&id=118705514972034&comment\\_id=428668077309108&offset=0&total\\_comments=2&comment\\_tracking={%22tn%22%3A%22R%22}](http://www.facebook.com/permalink.php?story_fbid=414755112033738&id=118705514972034&comment_id=428668077309108&offset=0&total_comments=2&comment_tracking={%22tn%22%3A%22R%22}).

45. See the cases of *Voskuil v. Netherlands* (64752/01), *Sanoma Uitgevers B.V. v. Netherlands* (38224/03), and *Telegraaf Media Nederland Landelijke Media B.V. and Others v. Netherlands* (39315/06). The Netherlands submitted a “group action ‘plan’ on how to address what amounts to a systemic violation of the right to freedom of expression on 21 August 2013, but has not provided information on its implementation. See also “French Draft law seriously infringes human rights”, joint editorial by the Council of Europe Commissioner for Human Rights, United Nations Special Rapporteur on the situation of human rights defenders and the United Nations Special Rapporteur on human rights and counter-terrorism, *Le Monde*, 13 April 2015: [www.coe.int/en/web/commissioner/-/renseignement-le-projet-de-loi-porte-gravement-atteinte-aux-libertes-](http://www.coe.int/en/web/commissioner/-/renseignement-le-projet-de-loi-porte-gravement-atteinte-aux-libertes-).

46. *Bureau of Investigative Journalism and Alice Ross v. UK*, Application no. 62322/14, Communicated 5 January 2015.

47. Council of Europe Commissioner for Human Rights, 12 February 2016: [www.coe.int/en/web/commissioner/-/poland-slow-down-and-consult-on-legislation-to-avoid-human-rights-backsliding](http://www.coe.int/en/web/commissioner/-/poland-slow-down-and-consult-on-legislation-to-avoid-human-rights-backsliding).

## Platform for the protection of journalism and the safety of journalists

### The platform in brief

The platform<sup>59</sup> records and disseminates alerts related to media freedom threats in the Council of Europe member states as well as the actions taken by the member states and the Council of Europe bodies in response to these alerts.

It aims to better address threats to media and improve response capacity within the Council of Europe. It enables the Council of Europe institutions to be alerted in a more systematic way and to take timely and co-ordinated action and helps to identify trends and propose adequate policy responses in the field of media freedom.

In November 2014, the Committee of Ministers approved the text of the Memorandum of Understanding setting up the platform and authorised the Secretary General to sign it. Eight European media organisations and Associations of Journalists (Reporters Without Borders, Article 19, the Association of European Journalists, the International Federation of Journalists, the European Federation of Journalists, the Committee for the Protection of Journalism, Index on Censorship and the International Press Institute) signed the memorandum, becoming partners of the Council of Europe and contributing to the platform. These organisations have direct access to its dedicated website hosted by the Council of Europe, posting in alerts on threats to media freedom, based on their own verification mechanisms. These alerts, together with the follow-up action and the responses of the governments, are made public and disseminated without any interference from the Council of Europe.

### How the platform works

The partner organisations send the platform alerts on media threats in the Council of Europe member states. The Council of Europe does not modify the content of the alert and each partner is responsible for the information it posts. When submitting an alert, the partner organisation decides whether, from its point of view, the information provided fulfils the following criteria: a) is it a serious concern with regard to media freedom? b) does the alleged threat or violation occur in one of the 47 Council of Europe member states? c) is the information reliable and based on facts?

The threats fall within one of the following areas: threats to the physical integrity and security of journalists; harassment and intimidation of journalists; detention and imprisonment of journalists; impunity; other acts having chilling effects on media freedom. Subsequently, the responses of the member states and the follow-up action taken by the different Council of Europe institutions are posted to the platform.

### Alerts

The platform went online in April 2015 and, as of 2 April 2016, it has recorded 151 alerts from 26 member states of what the partner organisations perceived as serious media threats in the Council of Europe member states. Out of 151 alerts, 99 alerts are considered to be level 1 (the most severe and damaging violations of media freedom).

The alerts judged as the most severe threats against journalism, where the partners and media freedom organisations expect clear and swift action from the Council of Europe, are the ones related to alleged politically motivated detentions (37 cases in total), physical attacks on journalists (46 alerts, including 13 killed journalists) and impunity (8 cases presented on the platform).

48. The platform is public and can be accessed at [www.coe.int/fom](http://www.coe.int/fom).

## Platform for the protection of journalism and the safety of journalists

As alerts are added to the platform, thematic issues and trends are already emerging, referring to more than one country, providing the basis for a possible thematic follow-up by the Council of Europe institutions and the member states.

▶ The impact of the mass surveillance and anti-terrorism legislation

A number of alerts highlight the need to review existing and forthcoming national mass surveillance and anti-terrorism legislation and practices to ascertain whether they are likely to infringe the right to freedom of expression and to ensure that such laws define clear limits to authorities' interference and contain sufficient procedural safeguards to prevent potential abuses.

▶ Blocking and filtering of Internet sites and social media, either administratively or based on a decision of the judiciary

A second group of alerts refer to orders blocking and filtering Internet sites and social media, which appear to be either unnecessary or disproportionate, lacking reasoning, clarity to their scope, specific time limits or periodic review, and are likely to prevent dissemination of information on specific matters of public interest. There is therefore the need to assess domestic legislation and practices with regard to the Internet to ensure compliance with the relevant standards set by the Convention.

▶ Independence and financing of the public broadcasters and the functioning of the regulatory bodies

The issues identified refer notably to the legislation and practices with regard to the appointment, composition and dismissal of the regulatory bodies or of the management of the public broadcasters, jeopardising their independence against political bias. Several alerts highlight the lack of sufficient safeguards in the legislation against political bias, which might raise an issue under Article 10 of the Convention since, in addition to its duty of non-interference, member states have also the positive obligation to put in place legislative and administrative frameworks to guarantee effective pluralism. Some alerts on the platform highlight the issue of the lack of appropriate funding to guarantee the independence of the public broadcasters and provide for the necessary means to accomplish their public service mission.

▶ Media coverage of protests and demonstrations

Another group of alerts raises the issue of inappropriate, unnecessary or disproportionate use of force against journalists covering demonstrations or protests. This prevents the press from performing its watchdog role and highlights the need to prepare and adopt preventive mechanisms in order to avoid violence against journalists, e.g. by having specific regulations on the status of journalists during demonstrations.

# PROTECTION FROM ARBITRARY APPLICATION OF LAW

## Chapter 2 – Freedom of expression

**L**aws which restrict the right to freedom of expression must pursue a legitimate aim and be limited to what is necessary in a democratic society in full compliance with Article 10 of the Convention. Laws, judicial proceedings and other restrictive measures cannot be justified if their purpose is to prevent free and open public debate, legitimate criticism of public officials or the exposure of official wrongdoing and corruption. Such use of the law is considered “arbitrary”, has a damaging effect on the exercise of the right to impart information and ideas and leads to self-censorship.

Historically, laws on defamation and insult have been frequently invoked to limit critical reporting, and the Court has developed, through its case law, detailed guidance on how to balance freedom of expression and reputational interests. Defamation laws should be applied with restraint, both offline and online, and should have adequate safeguards for freedom of expression. The Court has consistently applied a high threshold of tolerance for criticism where politicians, members of the government or heads of state are concerned. Furthermore, the Parliamentary Assembly and the Commissioner for Human Rights have called for the decriminalisation of defamation; the threat of criminal proceedings can have a significant chilling effect on freedom of expression.

The Venice Commission and the Parliamentary Assembly have taken the view that pluralism, tolerance and broad-mindedness in a democratic society should be protected through the defence of the right to hold specific beliefs or opinions, rather than by protecting belief systems from criticism. Laws which criminalise the spreading, incitement, promotion or justification of hatred and intolerance (including religious intolerance) must be clear as to their application and the restrictions they impose must be proportionate. Laws on public safety and national security, including those on anti-hooliganism, anti-extremism and anti-terrorism, may restrict the right to receive and impart information both offline and online. It is therefore important that such laws are both accessible and unambiguous, drafted in narrow and precise terms, and that they contain safeguards against abuse.

### MEASUREMENT CRITERIA

- ▶ Defamation laws allow for legitimate criticism and are not abused to influence the debate on issues of public interest.
- ▶ There are no criminal sanctions in defamation cases except where the rights of others have been seriously impaired.
- ▶ Awards of damages or legal costs in defamation proceedings are proportionate to the injury to reputation.
- ▶ Political or public officials do not enjoy a higher level of protection against criticism and insult than other people.
- ▶ Blasphemy is not a criminal offence. Religious insult is not a criminal offence except when there is an element of incitement to hatred as an essential component.
- ▶ Criminal laws on incitement to hatred and hate speech are clear and precise so as to enable individuals to regulate their conduct. These laws have adequate safeguards for freedom of expression.
- ▶ Laws restricting the right to information on grounds of public order or national security are accessible, clear and precise so as to enable individuals to regulate their conduct. These laws have adequate safeguards for freedom of expression.
- ▶ Journalists are not subjected to surveillance by the state.
- ▶ Journalists are not subjected to undue requirements by the state before they can work. Foreign journalists are not refused entry or work visas because of their potentially critical reports.

## FINDINGS

■ In 31 member states, there is sufficient protection for journalists against arbitrary use of the law. Nevertheless, in 16 member states, this was found not to be the case, particularly because of a harsh use of anti-terrorism and defamation laws. The overall trend in this regard has been stable, but it should also be noted that the situation is deteriorating in more countries than it is improving (16 v. 7 states).

■ The use of defamation laws remains problematic. In many countries, the law still affords enhanced protection to politicians and public officials, in direct contradiction of well-established Court case law. Also, prison sentences are still imposed in some member states.

■ Abuse of defamation laws leading to the imprisonment of journalists has been reported in a number of countries. Such abuses of defamation laws have a chilling effect on the ability of the media to criticise those in power and are detrimental to the public's right to be informed on issues of public interest.

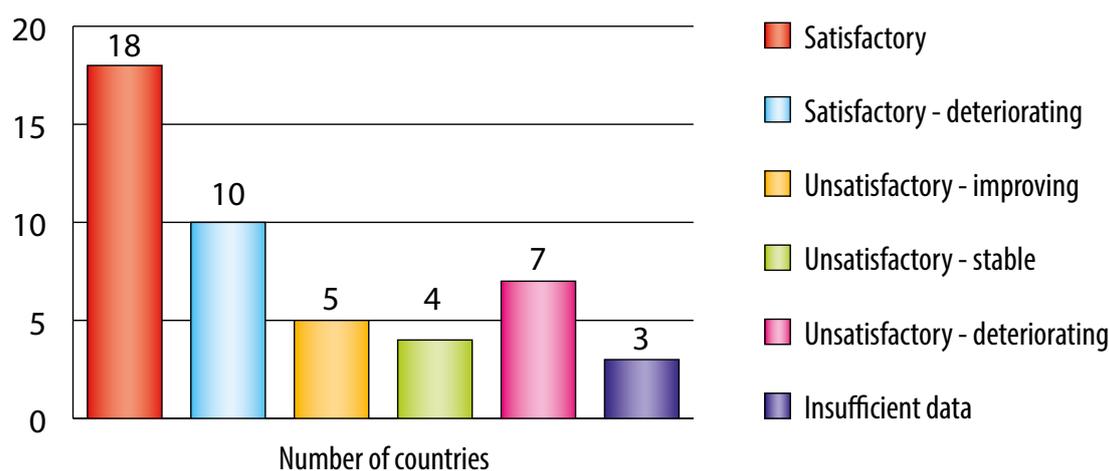
■ In some countries, decriminalisation of defamation has been rolled back through attempts to re-introduce imprisonment as a sanction for defamation or to "recriminalise" defamation.<sup>49</sup> In Turkey, the frequent use of criminal-law provisions protecting the president against risks of "insults" undermines freedom of expression.<sup>50</sup>

■ In a number of other countries, there has been a marked increase in the use against journalists of laws designed to tackle terrorism or violent forms of "extremism". A case challenging the use of the UK's anti-terror laws to seize part of the material "leaked" by Edward Snowden is being challenged in that country's Court of Appeal.

■ A statement urging France to protect fundamental freedoms while countering terrorism was issued by a group of UN human rights experts: the UN Special Rapporteur on freedom of opinion and expression; the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association; the UN Special Rapporteur on the situation of human rights defenders; the UN Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism; and the UN Special Rapporteur on the right to privacy. In particular the law on surveillance of international communications, adopted on 30 November 2015, was considered as posing risks to freedom of expression and privacy.

■ There were some positive developments as well. In particular, fewer instances were reported of the use of hate speech and blasphemy laws in contravention of European human rights standards, and some countries abolished their blasphemy laws, such as Iceland and Norway.

### PROTECTION FROM ARBITRARY APPLICATION OF LAW



49. See Albania: PACE rapporteur expresses deep concern over proposal for criminalisation of defamation, 12 November 2015: <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5872&lang=2&cat=3>.

50. See <http://www.coe.int/en/web/portal/-/turkey-security-trumping-human-rights-free-expression-under-threat>.

# MEDIA INDEPENDENCE

## Chapter 2 – Freedom of expression

**T**he government, regulatory bodies and those with commercial interests should respect the editorial independence of the media and refrain from attempting to influence editorial decisions and the content of the press, broadcast or Internet-based media. The media should be free to cover contentious issues such as corruption and their news coverage should not be subjected to overly restricted guidelines or directives from state authorities. Media owners should not exercise censorship over or excessively interfere with the reporting of their journalists.

■ The state has the duty to guarantee the independence of the media by ensuring a regulatory system that takes into account the specific nature of broadcasters, press and Internet-based media, and which promotes self-regulation in the journalistic profession. In the broadcasting sector, it is essential to have an independent regulatory system guaranteed by a legal or other policy framework. The regulatory standards should be accessible, clear and precise; the regulatory body itself should be protected against interference.

■ The independence of public service broadcasters, which in most Council of Europe countries are publicly financed and historically linked to the state, should be strongly guaranteed. States should provide the legal, financial, technical and other means necessary to ensure their genuine institutional autonomy and respect their editorial independence. All risk of political or economic interference should be removed. Public service broadcasters should have an independent and transparent system of governance, including a supervisory or decision-making authority whose autonomy is legally guaranteed.

■ Journalists themselves should report in a professional manner and act in the public interest. They should have the freedom to develop their own professional codes of ethics, including a right of reply and

correction or voluntary apologies by journalists. Media should also set up their own self-regulatory bodies, such as complaint commissions and ombudspersons.

### MEASUREMENT CRITERIA

- ▶ The editorial independence of the media from government, media owners, political or commercial interests is guaranteed in law and in practice.
- ▶ The press, broadcast programmes and content of Internet-based media are not subject to censorship. There is no self-censorship in either private or state-owned media.
- ▶ Broadcasters are subject to licensing procedures which are open, transparent and impartial and decisions are made public. The press and Internet-based media are not required to hold a licence which goes beyond business or tax registration.
- ▶ Broadcasters, the press and Internet-based media are not subject to arbitrary sanctions.
- ▶ The independence of the broadcasting regulatory system is guaranteed in law and in practice.
- ▶ Public service broadcasting has editorial independence, institutional autonomy, secure funding and adequate technical resources to be protected from political or economic interference.
- ▶ Media self-regulation is encouraged as a means of balancing media rights and responsibilities.
- ▶ Journalists have adequate working contracts with sufficient social protection so as not to compromise their impartiality and independence.

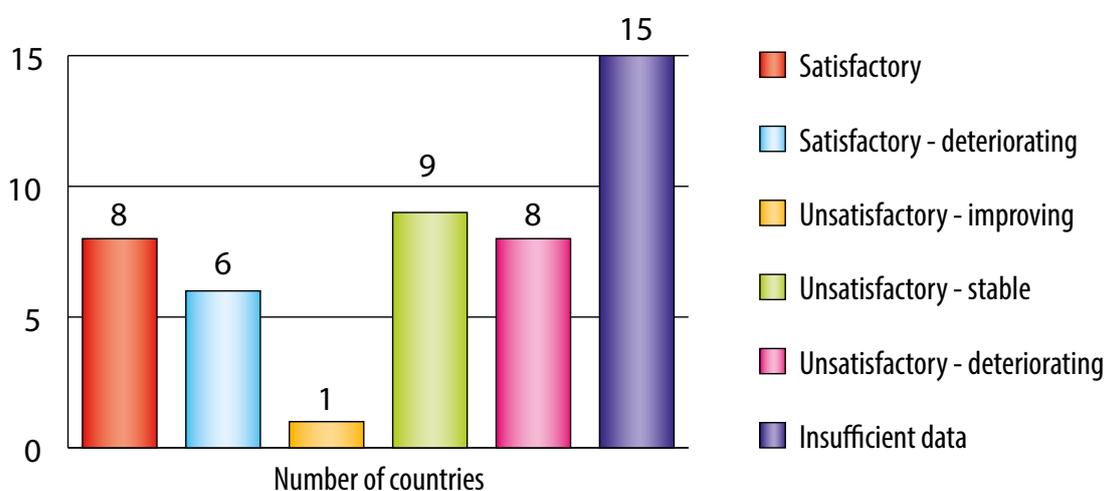
## FINDINGS

While more data on media independence were available for this report than for the last, there was still a lack of data for 15 member states. Of the countries for which data were available, the situation is unsatisfactory in 27 member states.

The main problems that were reported concerned increased interference by owners in media content, often imposing political bias; political interference in media regulators; diminished availability of funding for public broadcasting; and an increase in self-censorship, linked to both political interference as well as the poor economic position of journalists in many countries – they are often paid a significantly below-average wage and sometimes have several jobs.

In some instances media outlets have been brought under governmental control.<sup>51</sup> In the significant group of countries rated as “unsatisfactory – deteriorating”, the independence of the media has been undermined by poor economic conditions and the shrinking of the advertising market. This has made the media vulnerable to high fines and politicisation, both by media owners and through media regulators. For example, following a visit to Bulgaria, the Commissioner for Human Rights issued a report in which he was concerned that “in a context already characterised by limited space for free reporting in the public interest, these [high] fines clearly induce further self-censorship”.<sup>52</sup> The Commissioner was also critical of the use of advertising and other financial pressures to influence editorial coverage of politics, stating that this has been said to lead to “self-censorship and biased media reports to please the provider of funds”.<sup>53</sup> This was also problematic with regard to the public broadcaster, which was financially dependent on the state, potentially influenced its editorial line.<sup>54</sup> The use of government funding and government advertising as a tool to influence media is a concern in a number of other South-East European countries.

### MEDIA INDEPENDENCE



51. Statement by Council of Europe Secretary General Thorbjørn Jagland on Zaman Media group; see news of 5 March 2016 at: [www.coe.int/en/web/portal/full-news](http://www.coe.int/en/web/portal/full-news).

52. Council of Europe Commissioner for Human Rights, Report on Bulgaria, 22 June 2015, CommDH(2015)12. Available at: [www.coe.int/en/web/commissioner/-/progress-on-human-rights-protection-remains-slow-in-bulgaria](http://www.coe.int/en/web/commissioner/-/progress-on-human-rights-protection-remains-slow-in-bulgaria).

53. Ibid.

54. Ibid.

Interference with media regulators and the governing bodies of public broadcasters was reported in several countries. In respect of Hungary, the Council of Europe Commissioner for Human Rights criticised the fact that “all members of the Media Council are in fact designated by the ruling party”, which “does not allow for political diversity in the Council’s composition”, and expressed his concern at “reports of self-censorship and the apparent narrowing of the space in which media can operate freely and fully perform their watchdog function”.<sup>55</sup>

The Secretary General wrote to the Polish President, inviting the Polish authorities to submit the draft law on public service broadcasting for assessment by the Council of Europe before the new act is signed, to ensure the provisions of the law are in line with the European Convention on Human Rights.<sup>56</sup> The Commissioner criticised transitional legislation

introduced in Poland at the end of 2015 giving the government the power to appoint members of the supervisory and management boards of the public service broadcaster.<sup>57</sup>

Alerts on the Platform for the Safety of Journalists highlighted the issue of independence of the public broadcaster in several countries.

In many countries, the financial position of journalists remains weak, with some journalists earning below-average salaries, thus making them vulnerable to pressure to influence their reporting.

Finally, in a small but significant number of member states the state controls most media outlets and censors content both offline and online. Council of Europe bodies have repeatedly called on the authorities of Azerbaijan to improve respect for freedom of expression.<sup>58</sup>

55. Council of Europe Commissioner for Human Rights, Report on Hungary, 16 December 2014, CommDH(2014)21. Available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH\(2014\)21&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH(2014)21&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).

56. Letter from the Secretary General, 5 January 2016: [www.coe.int/en/web/portal/full-news/-/asset\\_publisher/rfs6RdVHzAWb/content/poland-jagland-offers-expertise-on-media-law](http://www.coe.int/en/web/portal/full-news/-/asset_publisher/rfs6RdVHzAWb/content/poland-jagland-offers-expertise-on-media-law).

57. Council of Europe Commissioner for Human Rights, 12 February 2016: [www.coe.int/en/web/commissioner/-/poland-slow-down-and-consult-on-legislation-to-avoid-human-rights-backsliding](http://www.coe.int/en/web/commissioner/-/poland-slow-down-and-consult-on-legislation-to-avoid-human-rights-backsliding).

58. Observations on the human rights situation in Azerbaijan: an update on freedom of expression, freedom of association, freedom of assembly and the right to property, CommDH(2014)10, 23 April 2014: [www.coe.int/en/web/commissioner/-/freedom-of-expression-assembly-and-association-deteriorating-in-azerbaijan](http://www.coe.int/en/web/commissioner/-/freedom-of-expression-assembly-and-association-deteriorating-in-azerbaijan).

# MEDIA PLURALISM AND DIVERSITY

## Chapter 2 – Freedom of expression

**M**edia pluralism contributes to the development of informed societies where different voices can be heard. The state is the ultimate guarantor of pluralism. Different societal groups, including cultural, linguistic, ethnic, religious or other minorities, should have the opportunity to receive and impart information, express themselves and exchange ideas. Yet this important principle is under threat in numerous European countries, through monopolies that threaten diversity as well as through a narrowing space for independent journalism.

■ The public has a right to receive news and information on issues of public interest from diverse sources of information.

■ The state, as the guarantor of pluralism, should take several measures to safeguard and promote a pluralist media landscape. This includes regulation to prevent or counteract excessive concentration of media ownership and to ensure that a sufficient variety of media outlets are available to the public. Media should not be overly dependent on the state, political parties, big business or other influential political actors for funding. The state should put in place rules on fair, transparent and non-discriminatory access to any funding that is available, including state advertising, as well as to satellites and other technical infrastructure. In particular during election campaigns, the state should facilitate the pluralistic expression of opinions through the media.

■ In realising pluralism, public service media are of particular importance. Their mandate should be to contribute to pluralistic public discussion, democratic participation and social cohesion and integration of all individuals, groups and communities. They should offer a wide range of programmes and services to all sectors of the public, and their institutional and financial independence should be guaranteed in law as well as in practice.

■ To guarantee pluralism, it is not enough that there are several media outlets: these different outlets should also reflect a variety of different viewpoints.

Media ownership should be transparent, so the public is aware which companies and individuals are associated with different publications.

### MEASUREMENT CRITERIA

- ▶ The public has access to a sufficient variety of print, broadcast and Internet-based media that represent a wide range of political, social and cultural viewpoints, including foreign or international resources.
- ▶ Media concentration is addressed through effective regulation and monitored by state authorities vested with powers to act against concentration. The public has access to information about media ownership and economic influence over media.
- ▶ Public service media play an active role in promoting social cohesion and integrating communities, all social groups, minorities, disabled persons and age groups.
- ▶ Media outlets represent diverse interests and groups within society, notably local communities and minorities.
- ▶ A pluralist media has fair and equal access to technical and commercial distribution channels and content providers have fair access to electronic communications networks.
- ▶ The media provide the public with diverse content capable of promoting a critical debate, with the participation of persons belonging to all communities and generations.
- ▶ The media, including public service media, have fair and equal access to state advertising or subsidies.
- ▶ Political parties and candidates have fair and equal access to the media. Coverage of elections by the broadcast media is fair, balanced and impartial.

## FINDINGS

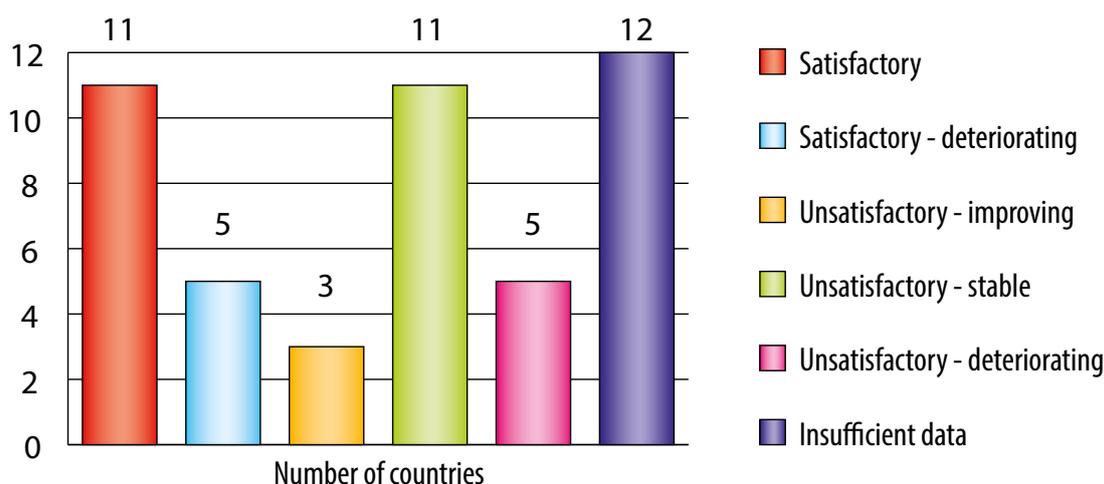
■ The situation is unsatisfactory in 26 member states. Country-specific findings on this parameter are similar to findings on the media independence parameter, indicating that in countries where pluralism is lacking, media independence is often lacking too. Data are missing for 12 member states.

■ The Commissioner for Human Rights has been critical of the lack of pluralism in Hungary<sup>59</sup> and Bulgaria.<sup>60</sup> Election observation missions of the Parliamentary Assembly have been critical of the lack of media pluralism in relation to the elections in Bosnia and Herzegovina<sup>61</sup> and the Republic of Moldova.<sup>62</sup> In relation to the latter, the mission stated that “transparency of media ownership remains a problem and cast a shadow on the ability of the media to provide balanced information.”<sup>63</sup>

■ In Turkey, the targeting of some media outlets and denial of access to satellite infrastructure of outlets aligned with the political opposition, in particular in the run-up to the May and November 2015 general elections, was criticised by the Council of Europe Secretary General and Commissioner for Human Rights.<sup>64</sup> Similar criticism had been voiced in 2014,<sup>65</sup> pointing to a systemic problem. In November 2015, the Parliamentary Assembly observer mission noted that:

previous recommendations, dating back to 2011, by the OSCE Office for Democratic Institutions and Human Rights and by the Council of Europe to address gaps and ambiguities have generally not been addressed.<sup>66</sup>

### MEDIA PLURALISM AND DIVERSITY



59. Council of Europe Commissioner for Human Rights, Report on Hungary, 16 December 2014, CommDH(2014)21. Available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH\(2014\)21&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH(2014)21&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).

60. Council of Europe Commissioner for Human Rights, Report on Bulgaria, 22 June 2015, CommDH(2015)12. Available at: [www.coe.int/en/web/commissioner/-/progress-on-human-rights-protection-remains-slow-in-bulgaria](http://www.coe.int/en/web/commissioner/-/progress-on-human-rights-protection-remains-slow-in-bulgaria).

61. Observations of the general elections in Bosnia and Herzegovina, 17 November 2014, Doc. 13640: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21310&lang=en>.

62. Honouring of obligations and commitments by the Republic of Moldova, AS/Mon(2014)21 rev, 20 November 2014: [www.assembly.coe.int/CommitteeDocs/2014/amondoc21-2014.pdf](http://www.assembly.coe.int/CommitteeDocs/2014/amondoc21-2014.pdf).

63. Ibid.

64. Council of Europe Commissioner for Human Rights, Statement, 28 October 2015: [https://www.facebook.com/permalink.php?story\\_fbid=515032855339296&id=118705514972034](https://www.facebook.com/permalink.php?story_fbid=515032855339296&id=118705514972034).

65. Parliamentary Assembly Doc. 13611, “Observation of the presidential election in Turkey (10 August 2014)”, 29 September 2014. Available at: [www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21140&lang=en](http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21140&lang=en).

66. Turkey: voters offered a variety of choices, 2 November 2015: <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5857&cat=31>.

■ The Parliamentary Assembly voiced its concern over restrictions on foreign investment in the media, which “represents a severe restriction on the possibilities for independent media to operate in Russia’s media environment and thus an impoverishment of media plurality”. The Assembly voiced concern that this would be likely to “exacerbate the narrow concentration of media ownership and control in the hands of a small group of owners allied with, or beholden to, the State authorities”<sup>67</sup> In Georgia, an ownership dispute over the country’s most popular independent broadcaster ended with a court ordering the wholesale replacement of management and appointment of temporary managers.

■ Media concentrations are also considered as threatening independent regional media and thereby limiting citizen participation, a crucial element of pluralist democracy.<sup>68</sup> In some cases, the representation of minority groups in the media continues to be weak. There have been, however, some positive developments. In Ukraine for example, legislation was adopted which will reform state-owned media, ensuring their editorial independence vis-à-vis public authorities.

■ In some countries where the situation is rated as “unsatisfactory”, it is striking that there are a large number of media outlets. The problem here is that most are politically polarised and rely on financial support from their owners, who themselves often have political interests as well. In severe and deteriorating cases, the entire media sector is under tight government control, which in turn limits the availability of diverse media content to the public.

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67. Media Freedom in Europe: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21350&lang=en>.

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68. Congress Recommendation 364 (2014) on the role of regional media as a tool for building participatory democracy.

# PROTECTION OF FREEDOM OF EXPRESSION ON THE INTERNET

## Chapter 2 – Freedom of expression

**T**he Internet enables individuals to seek, receive and impart information across national borders in a way no other media can. The Court has observed that access to the Internet is intrinsic to the right to access information and, as a result, a right to unhindered Internet access should also be recognised. The state should take measures to ensure that the Internet is accessible, affordable, secure, reliable and ongoing. Everyone should benefit from the public service value of the Internet, irrespective of age, gender, ethnic or social origin, including those on a low income, those in rural and geographically remote areas, and those with special needs, for example people with disabilities.

Restrictions on Internet content must meet the requirements of Article 10 of the Convention in respect of legitimacy, necessity and proportionality. If such measures are applied, it should be done on the basis of a decision by a judicial or independent authority.

Internet intermediaries that provide access, hosting, search or other services play a key role in the free flow of information and ideas on the Internet. Legal frameworks for intermediaries should recognise this role and contain safeguards for freedom of expression.

A number of effective guarantees must be in place against abuse of the collection of information on the Internet and monitoring and surveillance of Internet users.

### MEASUREMENT CRITERIA

- ▶ The restrictive measures of blocking, filtering and removal of Internet content are applied only when they comply with Article 10 of the Convention, namely they are prescribed by law, pursue a legitimate aim foreseen in Article 10 and are necessary in a democratic society. The legal framework authorising these restrictive measures is foreseeable, accessible, precise and clear, and provides for sufficient safeguards for freedom of expression; in particular it:
  - is sufficiently clear and precise with regard to the legitimate aim pursued by the restrictive measures and their scope of application;

- is sufficiently clear on the scope of discretion conferred on public authorities to implement restrictive measures and the manner of its exercise;
- provides for a determination of the scope of restrictive measures by a judicial authority or an independent body;
- provides for an effective judicial review of the restrictive measure to prevent any abuse of power, notably of its proportionality, including an assessment of whether it is the least far-reaching measure to achieve the legitimate aim.

- ▶ The state does not deny access by the public to information and other communication on the Internet through general blocking or filtering measures (e.g. usage of social media or other Internet platforms during specific events or on a permanent basis); the state may take specific measures to protect certain categories of users (e.g. minors), in particular in certain contexts (e.g. schools or libraries).
- ▶ The state does not exercise surveillance over Internet users' communications and activity on the Internet except when this is strictly in compliance with Articles 8 and 10 of the Convention.
- ▶ Internet intermediaries are not held responsible for the information disseminated via the technology they supply, except when they have knowledge of illegal content or activity and do not act expeditiously to remove it.
- ▶ Internet intermediaries do not filter or censor content generated or transmitted by Internet users. Prior restraint or blocking and restricting distribution of data or content by market-dominant intermediaries are subject to appropriate transparency, due process and appeals procedures.
- ▶ Internet intermediaries do not carry out monitoring or surveillance of communications by their users, whether for commercial, political or any other purposes.

## FINDINGS<sup>69</sup>

At the end of 2015, the Swiss Institute of Comparative Law prepared for the Council of Europe a comparative study on blocking, filtering and removal of Internet content. The study examines the regulations which provide for restrictive measures, such as in the fields of protection of copyright, the fight against child pornography, anti-terrorism, defamation and others, having a particular regard to procedural aspects and safeguards for freedom of expression.

In the majority of member states, the legal framework meets the requirements of being prescribed by law, pursuing legitimate aims and being necessary in a democratic society in accordance with Article 10 of the Convention. Exceptions remain, notably with regard to laws regulating hate speech and counter-terrorism efforts.

Overall, some of the most serious concerns are raised by cases in which the blocking, filtering and taking down of Internet content lacks any legal basis, is arbitrary or is not grounded in any form of law or regulation. The great majority of member states do not have specific comprehensive laws regulating these issues. As a result, these measures are often not governed by legislation specific to the Internet.

Some member states have put in place specific legislation relating to the Internet, which contributes to improving legal certainty and predictability. The following grounds for blocking or filtering the Internet are often listed: protection of national security, territorial integrity or public safety (for example, in the face of a terrorist threat); the prevention of disorder or crimes such as child pornography; the protection of health or morals; the protection of the reputation or rights of others (from, for example, defamation, invasion of privacy or abuse of intellectual property rights); the prevention of the disclosure of information received in confidence; the prevention of illegal gambling practices.

In the majority of member states the legal framework authorising restrictive measures is accessible, foreseeable, precise and clear with regard to their application. In some cases, the legal frameworks allow for restrictive measures on online content on the basis of vague, imprecise or overly broad terms, such as “humiliation of national honour”, “blasphemy” or, in the counter-terrorism area, terms such as “extremism”, “terrorist propaganda” or “condoning terrorism”.

The majority of cases involving the removal of Internet content result from self-regulation, which may not be subject to the strict requirements of Article 10

and may raise even greater concerns for limitations on freedom of expression carried out by non-state actors. This is the case for example of the United Kingdom, Norway and Sweden, where blocking, filtering and removal-of-content measures are mainly based on contractual terms and conditions and voluntary co-operation mechanisms between the police/national authorities and private-sector actors.

The procedural guarantees vary greatly among different countries. Measures for blocking, filtering or taking down content are imposed mainly by “traditional” law-enforcement authorities (police, prosecutors, independent authorities) and are subject to judicial review. Many countries are developing separate areas of regulation related to the online environment and establishing new bodies taking a leading role in blocking and removing Internet content. This is the case in France, the Russian Federation, the Republic of Moldova and Lithuania. The structure and the political dependence of these bodies vary greatly.

Most member states provide for the possibility of judicial review, including an assessment of whether the restrictive measures are proportionate to the legitimate aim. However, the lack of case law often makes it difficult to assess their effectiveness and to identify relevant principles to guide the proportionality assessments. Concerns have been raised about the administrative blocking of websites in the absence of judicial control.

Laws regulating states of emergency may result in undue restrictions. While limitations on freedom of expression may be lawful during states of emergency, these too should meet the requirements of Article 10 of the Convention. The requirements of foreseeability and legal certainty were not always met in some member states’ national legislation, which in a few cases was not sufficiently clear, resulting in unfettered executive power to limit freedom of expression. In this regard it is worth mentioning the recent judgment of the Court, in *Cengiz and Others v. Turkey*. The Court unanimously held that there had been violation of Article 10 of the Convention in a case concerning blocking access to YouTube for a long period.

Most member states do not provide for any kind of general *ex ante* filtering and blocking regulations. General *ex ante* blocking and filtering are considered helpful only for the safeguards of certain interests, such as the protection of minors. In practice, alternative means of regulating the filtering of illegal (mostly child pornography) content on the web are put in place. These take the form of voluntary or co-operation arrangements between Internet service providers and state authorities.

While these arrangements are in line with an approach to minimising the interference with the free flow of information, in some cases they risk not

69. These findings are based on the comparative study on blocking, filtering and the taking down of illegal Internet content in the 47 member states published by the Swiss Institute of Comparative Law.

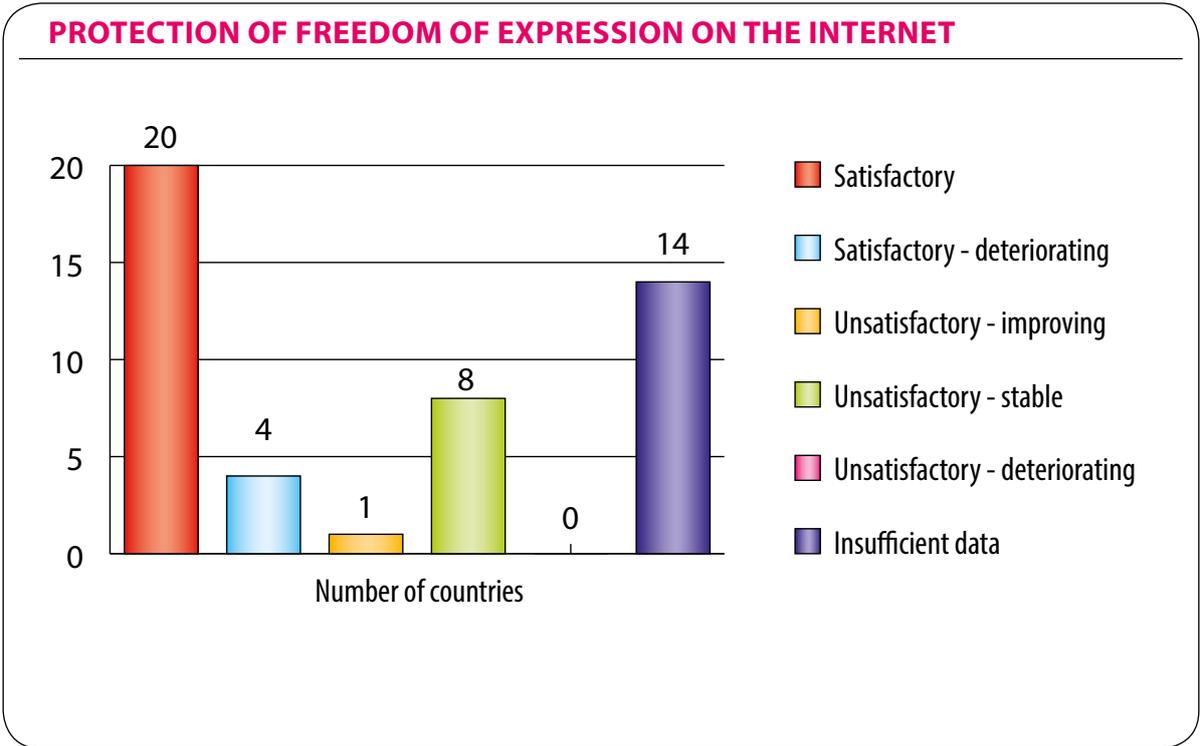
being proportionate when limiting the diffusion of illegal content. On the other hand, the threats to freedom of expression can even be accidental and cause over-filtering when not properly applied. For example, blocking the use of the word “drug” as a search term in one country also led to the filtering of anti-drug sites.

■ The majority of Council of Europe member states do not provide any specific regulations on general monitoring of users’ activities on the Internet. Some countries have adopted policies that aim to strengthen control over online content, in order to prevent the dissemination of prohibited material (for example, Armenia, Azerbaijan, Republic of Moldova, Russian Federation, Turkey). In some cases specific administrative bodies are given the task, among many others involving the management of Internet resources (for example, managing the country-code top-level domain in Moldova) or general monitoring of the Internet (for example in the Russian Federation).

■ The fact that Internet intermediaries fear being held liable for the content they transmit may have a

chilling effect on the freedom of expression online. The large majority of member states limit the liability of intermediaries to the cases in which the intermediaries were aware of the illegal content they were transmitting and did not act accordingly. Overall, in a number of member states there are no reports of general content filtering and censoring by Internet intermediaries and when it takes place it is done in a way that is transparent and subject to appeal. However, there is concern about a number of cases where there appears to be arbitrary intervention by Internet intermediaries. When this happens, it is mainly done on the basis of self-regulation or at their own discretion.

■ Finally, concerning general monitoring or surveillance by Internet intermediaries, whether for commercial, political or any other reasons, the situation is fragmented. Although there is a large number of member states in which it seems that such a practice does not exist, there are countries where there is evidence of Internet intermediaries that follow a general monitoring or surveillance policy which does not seem to be very clear and transparent.



## Mass surveillance in the framework of the Council of Europe instruments

As a consequence of the threats posed by present-day terrorism, governments resort to cutting-edge technologies in pre-empting attacks, including the massive monitoring of communications. Unlike targeted surveillance, mass surveillance does not necessarily start with a suspicion against a particular person or group. It has a proactive element, aimed at identifying a danger rather than investigating a known threat. Herein lie both the value it can have for security operations and the risks it can pose to the fundamental rights to privacy and to freedom of expression enshrined in the Convention.

Member states must therefore ensure that mass surveillance measures are accompanied by the simultaneous development of legal safeguards for human rights and abide by the minimum standards set by the case law of the Court and the non-binding instruments of the Council of Europe. This will minimise the risks which the indiscriminate collection of vast amounts of information enables. Substituting the terrorist threat with a perceived threat of unfettered executive power intruding into private lives would go against efforts to keep terrorism at bay.

### Minimum requirements with regard to legislation

Surveillance measures must be authorised by domestic legislation, which should be accessible to the public and applied in a predictable manner. Legislation should give sufficiently clear and adequate indications as to the circumstances in which public authorities are empowered to resort to strategic monitoring of communications and the conditions under which they may do so. It must clearly set out the procedures to be followed for ordering and executing strategic monitoring of communications, for selecting, sharing, storing and destroying the intercepted material and for redressing the potential harmful consequences for the persons concerned.<sup>70</sup>

### Review and supervision of mass surveillance measures

- a) **Prior authorisation** – Security services must obtain authorisation from an independent body before conducting mass surveillance operations, using selectors or key words to extract data from information collected through mass surveillance or the collection of communications/metadata either directly or through requests made to third parties, including private companies. In emergency situations in which the mandatory authorisation from an independent body is not feasible or could be counterproductive, exceptional powers may be granted to security services or to a non-independent authority to carry out secret surveillance, provided that they are subject to a *post factum* review by a judicial or an independent body.<sup>71</sup>
- b) **Review and supervision** – If the body issuing authorisation is not independent – in law or in practice – from the security services and the executive, a judge or other independent body must exercise control over its decisions and activities.<sup>72</sup>
- c) **The “strict necessity” test** – The procedures for supervising the ordering and implementing of restrictive measures should be such as to confine the interference with individual rights to what is “necessary in a democratic society”.<sup>73</sup>
- d) **Scope of external oversight** – All aspects and phases of the collection, processing, storage, sharing and deletion of personal data by security services should be subject to oversight by at least one institution that is external to the security services and the executive. Oversight bodies should also be mandated to scrutinise the compliance with human rights of any co-operation between security services and foreign bodies through exchanges of information and joint operations.<sup>74</sup>

70. *Association for European Integration and Human Rights and Ekimdzhiiev v. Bulgaria*, No. 62540/00, 28 June 2007, §§ 16 and 82; *Szabó and Vissy v. Hungary*, No. 37138/14, 12 January 2016, § 81.

71. See the cases *Szabó and Vissy*, op. cit., §§ 77-79; *Klass and Others v. Germany*, No. 5029/71, 6 September 1978, § 51; *Weber and Saravia v. Germany* (dec.), No. 54934/00, 29 June 2006, § 115; *Kennedy v. United Kingdom*, No. 26839/05, Judgment 18 May 2010, § 31, and *Dumitru Popescu v. Romania* (No. 2), No. 71525/01, 26 April 2007, § 71.

72. See the cases *Szabó and Vissy*, op. cit., § 73; *Klass and Others*, op. cit., §§ 49, 50 and 59; *Weber and Saravia*, op. cit., § 106; and *Kennedy*, op. cit., §§ 153 and 154.

73. *Liberty and others v. United Kingdom*, (dec.), No. 58243/00, 1 July 2008, §§ 68-69; see also Venice Commission (2007), “Report on the democratic oversight of the security services”, Study No. 388/2006, CDL-AD(2007)016-e, §§ 177-189.

74. Commissioner for Human Rights (2015), *Democratic and effective oversight of national security services*, CommDH/IssuePaper(2015)2, Council of Europe, Strasbourg.

## Mass surveillance in the framework of the Council of Europe instruments

- e) **Effectiveness of external oversight** – Security services should be bound by a duty to be open and co-operative with their oversight bodies. Oversight bodies with access to classified information must put in place measures to ensure that information is used or disclosed exclusively in compliance with their mandate.
- f) **Transparency and engagement with the public** – Bodies responsible for scrutinising security services should issue public versions of their periodic reports.
- g) **Reviewing oversight bodies and systems** – Member states should evaluate and periodically review the legal and institutional frameworks, procedures and practices for the oversight of security services.<sup>75</sup>

### Special safeguards to protect the freedom of the press

Because strategic surveillance may undermine the vital public watchdog role of the press, efficient safeguards should ensure the non-disclosure of journalistic sources, or at least that such disclosure is kept to an unavoidable minimum.<sup>76</sup>

### Complaints mechanisms

Member states must create or designate an external independent body to investigate complaints relating to all aspects of the security services' activity. Where such bodies are only empowered to issue non-binding recommendations, member states must ensure that the complainants have an additional recourse to an institution that can provide effective remedies both in law and in practice.<sup>77</sup>

### Fairness of proceedings

Member states should ensure that the proceedings related to secret surveillance measures opened on individual complaints comply with the guarantees of a fair trial enshrined in Article 6 of the Convention. Although the need to keep sensitive and confidential information secret might justify restrictions on the right to a fully adversarial procedure or to a public hearing, such restrictions should not be disproportionate or impair the very essence of the complainant's right to a fair trial.<sup>78</sup>

75. *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*, No. 39315/06, 23 October 2012, §§ 94102; *Weber and Saravia*, op. cit., § 152.

76. Venice Commission (2007), op. cit., § 241250.

77. See, among others, Kennedy, op. cit., §§ 184-188.

78. Council of Europe (2011), *Local Government in Critical Times: Policies for Crisis, Recovery and a Sustainable Future*, Council of Europe, Strasbourg.

# PROPOSED ACTIONS AND RECOMMENDATIONS

## Chapter 2 – Freedom of expression

### FREEDOM OF EXPRESSION ONLINE

- ▶ draft a set of common standards for all member states on blocking and filtering of Internet sites, using, *inter alia*, the findings of the 2015 study on blocking and filtering of Internet sites, to be presented to the Committee of Ministers by the end of 2016;
- ▶ establish a platform for governments, major Internet companies and representatives' associations on their respect for human rights online, including on measures to protect them, and remedy challenges and violations.

### MASS SURVEILLANCE

- ▶ launch, before the end of 2016, a process to codify international standards, good practices and guidance relating to mass surveillance, in the context of the right to privacy and freedom of expression.

### SAFETY OF JOURNALISTS DURING PROTESTS

- ▶ request the Venice Commission to update its 2010 Opinion on the freedom of assembly, including the guidelines on securing status for journalists during protests.

### REGULATORY AUTHORITIES, PUBLIC SERVICE BROADCASTING AND MEDIA CONCENTRATION

- ▶ encourage all member states to implement the Council of Europe standards on the independence of media regulatory authorities, the remit of public service broadcasters and media concentration.

## CHAPTER 3

# FREEDOM OF ASSEMBLY AND FREEDOM OF ASSOCIATION



# INTRODUCTION

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

Countries with a high level of security generally benefit from a vibrant civil society and political freedoms, and are the site of unimpeded public events and demonstrations, including on human rights issues. Democracy provides the natural environment for the protection and effective realisation of these political rights.

■ The importance of the principles underlying the freedoms of assembly and association is unanimously recognised throughout Europe. These freedoms are protected under Article 11 of the European Convention on Human Rights and have been enshrined in all the constitutions of Council of Europe member states.

■ Having the right laws, however, is not enough. Their practical implementation largely depends on an enabling domestic legal, institutional and social environment. Security reasons are often used as a pretext to dispense with human rights and to enforce emergency laws. During security crises, restrictions on political freedoms may appear to provide a short-term guarantee of public order and security. However, disproportionate restrictions on political rights usually contribute to building up security threats in the long term.

■ The recommendations in last year's report addressed to Council of Europe member states related to the preparation of new guidelines "to ensure meaningful civil participation in political decision making", give civil society a greater voice within the Organisation and revise the guidelines on the participatory status for INGOs.

■ Several important steps have been taken to implement these recommendations. The guidelines have been included in the work and the terms of reference of the European Committee on Democracy and Governance. The review of existing practice and standards in the member states regarding civil participation in political decision making is currently underway. Regular hearings of the President of the Conference of INGOs by the Committee of Ministers and periodic exchanges of the Conference of INGOs with the member states should contribute to enhanced dialogue and interaction.

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

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

■ The Council of Europe institutions have been signalling a growing number of cases where the freedoms of assembly and association have been violated. In some states, the exercise of freedom of association has become more difficult. Non-governmental organisations have been targeted by legislative interventions and their activities have been curtailed through excessive requirements, reporting obligations or arbitrary sanctions. A restrictive approach to NGOs, particularly those pursuing a public watchdog function, is incompatible with pluralist democracy. NGOs should be free to solicit and receive funding from a variety of sources, including from foreign sources or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange, money laundering and those on the funding of elections and political parties.

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

■ Similarly, states have the duty to put in place adequate mechanisms and procedures to ensure that the right to freedom of assembly is enjoyed in practice by everyone, without discrimination. State authorities can impose reasonable and lawful limits on public events and when rules are deliberately circumvented, it is reasonable to expect the authorities to react. However, the enforcement of these limits cannot become an end in itself, they are still restricted by the proportionality requirement of Article 11 of the Convention. The authorities should always choose the least intrusive means of achieving the legitimate aims listed in Article 11.

■ In some member states, the system of “advance notifications”, with cumbersome administrative requirements imposed on organisers, has been transformed into *de facto* prior authorisations, with undue and disproportionate restrictions on time, place or manner of the assembly, depriving of all substance the right to freedom of assembly. Harsh sentences, notably disproportionate pecuniary sanctions and administrative detentions, continue to be imposed on peaceful demonstrators.

■ Reports in a number of countries have indicated excessive use of force by law-enforcement authorities during protests, including excessive force used against journalists or medical personnel. Other member states have failed in their obligation to protect demonstrators from violence.

■ Lack of effective remedy for violations of the right to freedom of assembly by law-enforcement officials remains an issue, and investigations into misconduct by law-enforcement personnel in the context of assembly lack effectiveness.

■ For all these reasons, this year’s recommendations aim at obtaining a firm, public and unequivocal commitment from state authorities towards the free exercise of freedom of assembly and freedom of association. A more proactive role of the Council of Europe in stimulating both legal reforms, where necessary, and above all concrete action to improve the implementation of the law and regulations are called for.

# FREEDOM OF ASSEMBLY

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

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

■ Limits on the right to freedom of assembly must meet the requirements set out in Article 11 of the European Convention on Human Rights as well as in most national constitutions. As the Court, the Venice Commission and the OSCE/ODIHR have repeatedly stated, peaceful assemblies may serve many purposes, including the expression of diverse, unpopular, shocking or minority opinions. States have a duty not only to refrain from interfering unduly with the exercise of the right to freedom of assembly, but also to put in place adequate mechanisms and procedures to ensure that it is enjoyed in practice and by all, without discrimination.

■ State authorities may require that reasonable and lawful regulations on public events, such as a system of advance notification, be respected and may impose sanctions for failure to do so. When rules are deliberately circumvented, it is reasonable to expect the authorities to react. However, the Court and the Venice Commission have emphasised that the enforcement of these regulations cannot become an end in itself. The absence of prior authorisation and the ensuing “unlawfulness” of the action do not give “carte blanche” to the authorities; they are still restricted by the proportionality requirement of Article 11. The authorities should always choose the least intrusive means of achieving the legitimate aims listed in Article 11 of the Convention. Content-based restrictions (visual or audible content of any message) should only be permissible in extreme cases, for example if there is an imminent threat of violence. Restrictions on time, place or manner of the assembly should not interfere with the message communicated, and the alternatives offered by the authorities should be reasonable and respect the principle that the assembly should take place “within sight and sound” of the target audience.

■ Freedom of assembly laws which allow for disproportionate sanctions (both pecuniary and

non-pecuniary) for administrative offences – in which there has been no use of violence – have a strong chilling effect on potential organisers and participants in peaceful public events.

### MEASUREMENT CRITERIA

- ▶ There is an appropriate legal basis for the exercise of freedom of assembly, subordinating the possibility to limit it to respect for proportionality and appropriate procedures.
- ▶ The implementation of the legislation on freedom of assembly is guided by a presumption in favour of holding assemblies.
- ▶ The administrative authorities are not given excessive discretionary powers, nor do they assume such powers.
- ▶ The procedure is carried out in accordance with the standards of good administration.
- ▶ Legislation provides for pecuniary and non-pecuniary sanctions for non-respect of the legislation on freedom of assembly that are proportionate and non-discriminatory.
- ▶ Effective judicial review mechanisms are available.
- ▶ There are no or few judgments of the European Court of Human Rights that have found a violation of Article 11 of the Convention in respect of freedom of assembly.

### FINDINGS

■ In most Council of Europe member states, legislation regulating freedom of assembly is in compliance with the Convention standards, but in some states, it is more restrictive than necessary in a democratic society, and legal reform is still needed.

■ In Ukraine, in the absence of a law on freedom of assembly, local authorities and courts have diverging views as regards the applicability of a 1988 Decree, which is itself not in line with the 1996 constitution.<sup>79</sup> As regards the Russian Federation, the Venice Commission expressed the view that the amendments introduced in the Federal Law No. 65-FZ of 8 June 2012 of the Russian Federation amending Federal Law No. 54-FZ of 19 June 2004 on Assemblies, Meetings, Demonstrations, Marches and Picketing and the Code of Administrative Offences<sup>80</sup> raise a number of serious concerns and represent a step backward for the protection of freedom of assembly in the Russian Federation. Concerns were also raised with regard to the Turkish Internal Security Act adopted on 27 March 2015, which could in practice restrict freedom of assembly,<sup>81</sup> and to Georgian legislation which did not allow “spontaneous” assemblies.<sup>82</sup>

■ According to the data available on a limited number of Council of Europe member states, the main issues lie primarily with the implementation of laws and regulations on freedom of assembly. There is an inclination towards a so-called “command-and-control” approach, and public assemblies are not always seen as a normal component of a pluralist democracy, including, as observed in recent years, in countries with long-standing democratic traditions. The references made below to specific countries are given as examples of deficiencies that have been documented in various Council of Europe reports and may also be observed to some extent in other Council of Europe member states.

■ Firstly, there is the problem of a notification procedure foreseen by law not being applied in accordance with Convention standards, resulting in a *de facto* authorisation requirement for the holding of public demonstrations. Cumbersome administrative requirements are imposed on organisers of assemblies, turning notification procedures into a system for granting permission, rather than just requiring notification.

■ In the case *Oya Ataman v. Turkey*,<sup>83</sup> the Court observed for instance that in Turkey “no authorisation is required for the holding of public demonstrations; at the material time, however, notification was required seventy-two hours prior to the event”. The Court noted

that “regulations of this nature should not represent a hidden obstacle to the freedom of peaceful assembly as it is protected by the Convention”.

■ In a report on his visit to Azerbaijan, the Commissioner for Human Rights also stated that the system of notification should be applied in accordance with European standards and that he remained “concerned by the way the Law on Freedom of Assembly is currently being implemented in Azerbaijan”.<sup>84</sup>

■ The Court held that:

where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance.<sup>85</sup>

■ The Turkish law on assembly and marches does not require the authorities to take into consideration whether or not a demonstration is peaceful or represents a danger to public order. Similar concerns have been voiced with regard to Azerbaijan.

■ Another set of problems is connected to the way the legislation is applied or the manner in which it is interpreted and enforced, by not upholding a presumption in favour of holding assemblies. The unlawful character of a public gathering resulting from its non-compliance with notification procedures is viewed as entailing an obligation for public authorities to automatically intervene and disperse it.

■ In March 2015, the Ministers’ Deputies:

urged the Turkish authorities to intensify their efforts to amend the relevant legislation, in particular the “Meetings and Demonstrations Marches Act” (No. 2911), so that Turkish legislation requires an assessment of the necessity of interfering with the right to freedom of assembly, in particular in situations where demonstrations are held peacefully and do not represent a danger to the public order.<sup>86</sup>

■ In the case of *Navalnyy and Yashin v. Russia*, the Court held that the police had “intercepted the applicants for the sole reason that the march as such had not been authorised” and that subsequently the courts had “made no attempt ... to verify whether it had been necessary to stop them”. The Court therefore considered that “the police’s forceful intervention was disproportionate and was not necessary for the prevention of disorder”.<sup>87</sup>

79. In the case of *Vyerentsov group v. Ukraine*, No. 20372/11, the Court pointed out a structural problem: a “legislative lacuna concerning freedom of assembly, which has remained in Ukraine since the end of the Soviet Union”.

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

81. Information note by the rapporteur on her fact-finding visit to Istanbul from 30 April to 4 May 2015, AS/MON(2015)18Rev, No. 43, p.10.

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

83. *Oya Ataman v. Turkey*, No. 74552/01, judgment of 5 December 2006.

84. Council of Europe Commissioner for Human Rights, Report on Azerbaijan, 6 August 2013, CommDH (2013)14.

85. *Oya Ataman v. Turkey*, No. 74552/01, judgment of 5 December 2006 (final on 5 March 2007).

86. See Committee of Ministers’ 1222nd meeting on 12 March 2015. The Deputies’ decision relates to 46 cases concerning the excessive use of force to break up unlawful but peaceful demonstrations (see 1222nd meeting (March 2015), *Oya Ataman Group against Turkey/Decy*).

87. *Navalnyy and Yashin v. Russia*, No. 76204/11, 4 December 2014.

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

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

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

■ It found that “the provision ... of specially designated places as the venues to be used as a rule for all public events will hinder rather than facilitate the exercise of the right to freedom of assembly and is therefore incompatible with international standards.”<sup>88</sup>

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

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

■ The Commissioner reiterated that “the authorities should seek to facilitate and protect public assemblies at the organisers’ preferred location”<sup>89</sup>

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

■ At their 1230th meeting in June 2015, in connection with the execution of the judgment delivered by the European Court of Human Rights in the case *Alekseyev v. Russia*, the Ministers’ Deputies expressed serious concern:

that the local authorities in the Russian Federation continue to reject most of the requests made to hold public events similar to those in the present judgment, including on the basis of the Federal Law prohibiting “propaganda of non-traditional sexual relations”, and therefore urged the authorities to take concrete measures to ensure that such requests are accepted

unless there are well-grounded reasons justifying their rejection in compliance with Convention standards.<sup>90</sup>

■ In its 8th report on the implementation of European Court of Human Rights judgments, the PACE Committee on Legal Affairs and Human Rights noted the lack of progress in the implementation of a significant number of Court judgments, including *Alekseyev v. Russia*. The Committee of Ministers, at its 1179th meeting (DH) in September 2013, expressed its concerns, noting that this situation “could undermine the effective exercise of the freedom of assembly”.<sup>91</sup>

■ The domestic legislation provides for disproportionate pecuniary and non-pecuniary sanctions for non-compliance with the provisions of the law on freedom of assembly. Harsh sentences continue to be requested or imposed on peaceful demonstrators. The Venice Commission, in its Opinion No. 686/2012, recommends “to revise and lower drastically the penalties applicable in case of violation of the Assembly Act”.<sup>92</sup> The Commissioner for Human Rights, in his report following his visit to Azerbaijan, expressed concern about the “harshening of the fines and the use of administrative detention against those who organise or participate in ‘unauthorised’ public gatherings”.<sup>93</sup>

■ There are a number of cases where judicial review mechanisms are not effective and fair trial standards are not respected. In the case *Navalnyy and Yashin v. Russia*, the Court ruled that the administrative proceedings against the applicants, taken as a whole, were conducted in violation of their right to a fair hearing under Article 6.1 of the Convention.<sup>94</sup> In his report following his visit to Azerbaijan, the Commissioner for Human Rights expressed his concerns regarding

90. 1230th meeting of the Committee of Ministers, CM/Del/Dec(2015)1230/15. See also *Alekseyev v. Russia*, Nos. 4916/07, 25924/08 and 14599/09, 21 October 2010, where the Court found that the ban on events organised by LGBT groups “did not correspond to a pressing social need and was thus not necessary in a democratic society”. See also the Venice Commission Opinion 707/2012 (CDL-AD(2013)22, 18 June 2013) on the issue of the prohibition of so-called “propaganda of homosexuality” in the light of recent legislation in some member states of the Council of Europe. See also the case of *Identoba and Others v. Georgia* (No. 73235/12, 12 May 2015) where the European Court held that “the authorities had failed to ensure that the march of 17 May 2012 [International Day against Homophobia] ... could take place peacefully by sufficiently containing homophobic and violent counter-demonstrators”, and therefore there had been a violation of Article 11.

91. PACE Committee on Legal Affairs and Human Rights, AS/Jur (2015) 17, 23 June 2015; CM/Del/Dec(2013)1179.

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

93. See CommDH(2013)14, op. cit. See also CommDH(2014)10, op. cit., where the Commissioner expressed concerns over the fact that on 17 March 2014, 8 of the 18 persons arrested in relation to protests which took place in January 2013, were sentenced to 2-and-a-half to 8 years’ imprisonment, while another 8 persons received suspended sentences and were released from custody.

94. See the Commissioner’s report on his visit to Azerbaijan (6 August 2013, CommDH(2013)14).

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

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

the “reported non-implementation of due process standards in proceedings brought against participants in ‘unauthorised’ demonstrations.”<sup>95</sup>

## 2. Proper conduct of authorities during public events

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

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

■ As the Commissioner for Human Rights has stated, misconduct by law-enforcement officials poses a direct threat to the rule of law. If the force used is illegal or disproportionate, civil and/or criminal liability should ensue. Effective, independent and prompt investigation must be carried out when participants in a demonstration are physically injured or killed by law-enforcement officers.

■ Arbitrary arrests of peaceful demonstrators are in breach of the requirements of Article 11 of the Convention. The imposition of arbitrary and unreasonably harsh sanctions has a chilling effect on public protests.

### MEASUREMENT CRITERIA

- ▶ The state ensures effective public security management at demonstrations.
- ▶ Excessive use of force is avoided.
- ▶ Law-enforcement officials are held accountable for abuses.
- ▶ Media professionals are guaranteed access to assemblies.

<sup>95</sup>. Ibid.

- ▶ There are no or few judgments of the Court finding a violation of Article 11 of the Convention in respect to freedom of assembly.

### FINDINGS

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

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

#### Excessive force

■ Cases of the use of excessive force to disperse demonstrations and arrests of peaceful demonstrators continue to occur. The Commissioner for Human Rights noted:

that, in three judgments against Azerbaijan, the Court found violations of Article 3 of the Convention (prohibition of inhuman or degrading treatment) ... due to excessive use of force against the applicants by law enforcement officials during demonstrations.<sup>96</sup>

■ In March 2015, the Ministers’ Deputies requested the Turkish authorities “to consolidate the diverse legislation which regulates the conduct of law enforcement officers and fixes the standards as regard the use of force during demonstrations” and “to ensure that the relevant legislation requires that any force used by law enforcement officers during demonstrations is proportionate and includes provisions for an adequate *ex post facto* review of the necessity, proportionality and reasonableness of any such use of force.”<sup>97</sup>

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

reports indicating excessive use of force by law enforcement authorities in the course of anti-austerity demonstrations in 2011 and 2012 brought to light a number of long-standing, serious human rights issues concerning the actions of Spanish law enforcement agencies.<sup>98</sup>

■ Similar concerns have been voiced with regard to Greece.<sup>99</sup>

<sup>96</sup>. Ibid.

<sup>97</sup>. 1222nd meeting of the Committee of Ministers, CM/Del/Dec(2015)1222/20. See also PACE Doc. 13864 on the implementation of judgments of the European Court of Human Rights.

<sup>98</sup>. See the Commissioner’s Report following his visit to Spain from 3 to 7 June 2013 (CommDH(2013)18).

<sup>99</sup>. See PACE Doc. 13864, *op. cit.*, Appendix 1, Part II.6 on Greece. Reference was made to incidents at demonstrations in Athens in May in June 2011, as well as in April 2012 and November 2014.

Journalists or medical personnel – the latter clearly identifiable by their clothing – have also been victims of excessive force used against them during assignments in some countries (Azerbaijan,<sup>100</sup> Turkey and Ukraine<sup>101</sup>). The Commissioner for Human Rights noted that in the *Najafli v. Azerbaijan* judgment of 2 October 2012, the European Court of Human Rights held that Azerbaijan had violated Article 10 of the European Convention on Human Rights in a case concerning a journalist who had been beaten by the police while covering an unauthorised demonstration in Baku. Some state authorities have not fulfilled their positive obligation to protect demonstrators from violence. In the case *Identoba and Others v. Georgia*,<sup>102</sup> the European Court of Human Rights found that the law-enforcement authorities had failed to provide adequate protection to the applicants from the attacks of private individuals during a march organised by an association promoting LGBT rights.

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

the crucial role of the media in providing information on the authorities' handling of public demonstrations and the containment of disorder must be underlined. ... their presence is a guarantee that the authorities can be held to account for their conduct vis-à-vis the demonstrators and the public at large when it comes to the policing of large gatherings, including the methods used to control or disperse protesters or to preserve public order. Any attempt to remove journalists from the scene of demonstrations must therefore be subject to strict scrutiny.<sup>103</sup>

Citing a comparative law survey, the Court indicates that none of the 34 Council of Europe member states examined has granted journalists covering public events a special status regarding arrest, detention and conviction. In 12 member states, journalists are encouraged to identify themselves as such in order to be distinguished from participants so that their journalistic activity is enabled and facilitated, but they are not given any sort of immunity.<sup>104</sup>

### Lack of effective remedy

In some member states, there is still no effective remedy for violations of the right to freedom of assembly by law-enforcement officials, and investigations into misconduct by law-enforcement personnel in

the context of assemblies are not common practice or are ineffective. The Parliamentary Assembly of the Council of Europe (PACE) called on “the Armenian authorities ... to transparently investigate any allegations of excessive use of force by the police during recent demonstrations”.<sup>105</sup>

Also, in March 2015, the Ministers Deputies:

reiterated their call on the Turkish authorities to take the necessary measures to ensure that the authorities and courts act promptly and diligently in carrying out investigations into allegations of ill-treatment and in conducting criminal proceedings initiated against law enforcement officers in compliance with Convention standards and in such a way as to ensure the accountability of all, including senior law enforcement officers.<sup>106</sup>

Similar concerns have been voiced with regard to Georgia, Spain,<sup>107</sup> Poland, Azerbaijan<sup>108</sup> and Russia.<sup>109</sup> In *Identoba and Others v. Georgia*, the Court ruled that the domestic authorities had failed to launch a comprehensive and meaningful inquiry into the circumstances surrounding the incident with respect to all of the applicants. The Commissioner, in his report following his visit to Spain, expressed concerns over “the granting of pardons by the government, including in cases related to serious human rights violations” and regretted that “human rights violations – in particular, ill-treatment – in the context of incommunicado detention by the Guardia Civil continue to occur, despite long-standing recommendations by several international human rights institutions”.<sup>110</sup>

Also in his report on Greece, the Commissioner noted with concern that:

allegations of torture and other forms of ill-treatment by law enforcement officials do not seem to be thoroughly investigated by courts and that instances of such misconduct have as a rule remained unpunished or led to excessively mild penalties, both at administrative (disciplinary) and especially criminal law levels.<sup>111</sup>

100. See CommDH(2013)14, op. cit., paragraph 14.

101. See the Commissioner's Comment on “Police Abuse – a serious threat to the rule of law”, op. cit.: “In both Ukraine and Turkey, police repeatedly targeted both journalists and medical personnel, who could be clearly identified by their clothing.”

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

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

104. *Ibid.*, §§ 57-59.

105. PACE Resolution 2078 (2015) on the progress of the Assembly's monitoring procedure (October 2014-August 2015), § 12.2.

106. CM/Del/Dec(2015)1222/20, op. cit. See also the Commissioner's Report following his visit to Turkey from 1 to 5 July 2013 (CommDH(2013)24, 26 November 2013), where he considered “that impunity of law enforcement officials committing human rights violations is an entrenched problem in Turkey, which seriously limits the country's capacity to tackle the root causes of such violations”. See also AS/Mon(2014)18rev, Post-monitoring dialogue with Turkey, Information note by the rapporteur on her fact-finding visit to Istanbul, Ankara and Eskişehir (26-29 May 2014).

107. See CommDH(2013)18.

108. CommDH(2014)10, op. cit.

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

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

111. Council of Europe Commissioner for Human Rights, Report following his visit to Greece, from 28 January to 1 February 2013 (CommDH(2013)6, § 109).

# FREEDOM OF ASSOCIATION

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

**T**he role of non-governmental organisations (NGOs) is central in a democratic society. The participation of citizens in the democratic process is to a large extent achieved through belonging to NGOs. Civil society organisations, notably those involved in human rights advocacy, play an important role in public monitoring of state action and in exposing human rights abuses. Therefore, the way in which national legislation enshrines the freedom of association and its practical application by the authorities reveal the state of democracy in a country. A restrictive approach to NGOs, particularly those pursuing a public watchdog function, is incompatible with a pluralist democracy, which instead should guarantee the work of all NGOs without undue interference in their internal functioning, unless there are objective reasons for doing so. For instance, an NGO may campaign for a change in the legal and constitutional structures of the state so long as the means used to that end are in every respect legal and democratic and if the change proposed is itself compatible with fundamental democratic principles. In order to carry out their activities, NGOs should be free to solicit and receive funding:

not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties.<sup>112</sup>

Also, the Court noted in the case of *Tebieti Mühafize and Israfilov* that the Law on Non-Governmental Organisations concerning the Dissolution of Associations was worded in rather general terms and could give rise to extensive interpretation.<sup>113</sup> In the case of *Seyidzade v. Azerbaijan*, the Court further noted that the legislation did not give any definition of what constituted a “professional religious activity”.<sup>114</sup> In the case of *Islam-Ittihad Association and Others*, the Court held that the legislation did not provide any definition of what constituted a “religious activity”, which gave

public authorities unlimited discretionary power to order an association’s dissolution.<sup>115</sup>

Furthermore, the Commissioner for Human Rights expressed concerns over the amendments to several laws adopted in December 2013 affecting NGOs and which afforded excessive discretion to law-enforcement bodies in applying the new provisions owing in particular to the very broad and vague wording of the majority of the provisions (e.g. the validity, after an initial period of 90 days, of the certificate that NGOs receive upon registration).<sup>116</sup>

Unduly restrictive laws and practices produce a dangerous chilling effect on the exercise of rights and have a strong adverse effect on freedom of association and democracy itself. Legitimate concerns such as protecting public order or preventing extremism, terrorism and money laundering cannot justify controlling NGOs or restricting their ability to carry out their legitimate watchdog work, including human rights advocacy. It is therefore essential that states first put in place a legal framework to enable the unimpeded exercise of freedom of association, and subsequently implement it and create an enabling environment based on a presumption in favour of the freedom to form and run an association. This includes a favourable legal framework for the registration and functioning of NGOs and sustainable mechanisms for dialogue and consultation between civil society and public authorities.

### MEASUREMENT CRITERIA

- ▶ The free exercise of freedom of association does not depend on registration.
- ▶ There is an appropriate legal basis for registration of NGOs, restricting any limitations on such registration in order to respect the principle of proportionality and appropriate procedures.
- ▶ The legislation is precise and specific, and the outcomes of its application are foreseeable.
- ▶ Prohibition or dissolution of associations is a measure of last resort.
- ▶ Sanctions for non-respect of the legislation are foreseeable and proportionate and are not applied in an arbitrary and discriminatory manner.

112. Committee of Ministers Recommendation CM/Rec(2007)14 on the legal status of non-governmental organisations in Europe. See also the OSCE/ODIHR-Venice Commission *Guidelines on Freedom of Association*, Principle 7 ([www.osce.org/odihr/132371](http://www.osce.org/odihr/132371)).

113. *Tebieti Mühafize and Israfilov*, No. 37083/03, 8 October 2009.

114. *Seyidzade v. Azerbaijan*, No. 37700/05, §§ 31-40, 3 December 2009.

115. *Islam-Ittihad Association and Others*, No. 5548/05, 13 November 2014.

116. CommDH(2014)10, op. cit.

- ▶ The implementation of the legislation on freedom of association is guided by a presumption in favour of the lawfulness of associations' creation, objectives and activities.
- ▶ The administrative authorities do not have excessive discretion and procedures are carried out in accordance with the standards of good administration.
- ▶ Effective judicial review mechanisms are available.
- ▶ NGOs are free to express their opinions through their objectives and activities, without hindrance or adverse consequences resulting from the content of such opinions.
- ▶ NGOs have the right to participate in matters of political and public debate, irrespective of whether their views are in accordance with those of the government.
- ▶ NGOs have the right to peacefully advocate changes in legislation.
- ▶ Associations are free to seek, receive and use financial, material and human resources, whether domestic, foreign or international, for the pursuit of their activities, subject to respect for legal requirements which are in compliance with international standards.
- ▶ Public funding is available and is provided in a non-discriminatory manner.

## FINDINGS

■ The legislation of the vast majority of member states meets the international legal standards for the registration and functioning of NGOs. However, there is a trend among an increasing number of member states towards a more restrictive approach to freedom of association as a result of either the manner in which the existing legislation is implemented or changes to the legislation that reverse progress achieved decades ago. In these countries, NGOs encounter various impediments to their creation, activities and funding. Emphasis is placed on a control-and-command approach reflected in cumbersome and lengthy registration procedures, additional administrative requirements and obstacles to accessing financial resources, particularly foreign funding. More and more frequently, this goes along with a deterioration of the environment in which NGOs operate, through stigmatisation, smear campaigns and judicial, administrative or fiscal harassment. The NGOs targeted are those active in the field of human rights protection and promotion.

■ The main problem areas that can be identified lie primarily with the implementation of the legal framework governing the registration and functioning of NGOs. The references made below to specific countries are given as examples of deficiencies that

have been documented in various Council of Europe reports and may also be observed, at least to some extent, in other Council of Europe member states.

■ Legal provisions concerning associations are worded in general terms, giving rise to diverging interpretations by courts and law-enforcement bodies and affording unlimited discretionary power to public authorities. The Parliamentary Assembly of the Council of Europe called on the authorities of Azerbaijan to:

review the law on non-governmental organisations (NGOs) with a view to addressing the concerns formulated by the Venice Commission and creating an environment conducive to the work of civil society.<sup>117</sup>

■ It stated that it was "indeed worrying that the shortcomings in the country's NGO legislation have negatively affected NGOs' ability to operate".

■ In December 2014, the Expert Council on NGO Law issued an opinion on the draft federal law on introducing amendments to certain legislative acts of the Russian Federation, where it observed that:

the various offences imposed for organising and participating in the activities of an organisation designated on the above basis (as "undesirable") lack the precision in their definition that will enable anyone accused of committing them to foresee that conviction would be a necessary consequence of their conduct.<sup>118</sup>

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

■ In the case *House of Macedonian Civilisation and Others v. Greece*, the Court held that there has been a violation of Article 11 of the Convention, considering that the refusal by the authorities to register an association was not proportionate to the legitimate goal pursued.<sup>119</sup>

■ In the case *Association of Victims of Romanian Judges and Others v. Romania*, the Court held that the reasons invoked by the Romanian authorities for refusing registration of the applicant association were not determined by any "pressing social need", and that such a radical measure as the refusal of registration, taken even before the association started operating, was disproportionate to the aim pursued.<sup>120</sup>

117. PACE Resolution 2062 (2015) on the functioning of democratic institutions in Azerbaijan, 23 June 2015.

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

119. No. 1295/10, 9 July 2015. See also PACE Doc. 13864 on the implementation of judgments of the European Court of Human Rights, §§ 168-173, concerning the Greek authorities' refusal to register associations, and the dissolution of an association promoting the idea that a Turkish ethnic minority exists in Greece.

120. No. 47732/06, 14 January 2014, § 34.

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

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

■ He called on the authorities:

to ensure full respect of the right to freedom of association, in particular by alleviating the registration requirements and making the whole process, as well as the functioning of NGOs, less bureaucratic.<sup>121</sup>

■ Some national legislation provides for the blanket deregistration of NGOs, their dissolution or their qualification as “undesirable” on grounds that are not admissible.<sup>122</sup> In *Magyar Keresztény Mennonita Egyház and Others v. Hungary*,<sup>123</sup> the Court found that the blanket deregistration process and the political nature of the registration process violated the churches’ rights as an association.

■ Others introduce overly restrictive administrative requirements with regard to the registration of NGOs as legal entities. In some cases, additional administrative requirements are imposed on a selected number of NGOs, solely based on their supposed or actual activity (Hungary,<sup>124</sup> Azerbaijan and Turkey<sup>125</sup>). Referring to Azerbaijan, the Parliamentary Assembly expressed its concerns over the fact that “the shortcomings in the country’s NGO legislation have negatively affected NGOs’ ability to operate.”<sup>126</sup> The Commissioner for Human Rights noted that the 2013 amendments introduced “additional administrative requirements with regard to the registration of NGOs as legal entities, the receipt and use of grants by these NGOs and their reporting obligations to the government.”<sup>127</sup>

■ NGOs face obstacles in their operation, such as legislation which foresees offences punishable by heavy fines, suspension of NGOs’ tax numbers or freezing of their bank accounts and assets, notably in case of failure to submit the necessary information for the state registry of legal entities, or for operating without registration (Azerbaijan). The Commissioner for Human Rights noted that the 2013 amendments introduced new offences punishable by fines, notably in case of failure to submit the necessary information for the state registry of legal entities, or for operating without registration.<sup>128</sup>

■ NGOs are subject to financial reporting obligations, limits on foreign funding and/or other requirements that impede the operation of NGOs (Hungary,<sup>129</sup> Russian Federation,<sup>130</sup> Turkey<sup>131</sup>).

■ In the report following his visit to Azerbaijan,<sup>132</sup> the Commissioner for Human Rights referred to the Venice Commission Opinion No. 636/2011,<sup>133</sup> where it found the requirement for international NGOs to establish and register local branches and representatives, introduced by amendments in 2009, to be problematic.

■ An overly broad definition of “political activity” in legislation<sup>134</sup> limits the ability of NGOs to engage in activities aimed at voicing opinions, shaping policies or influencing policy-making processes (Russian Federation<sup>135</sup>).

121. See CommDH(2013)14, op. cit., Regarding the registration issue, the Venice Commission noted in its Opinion No. 636/2011 on the compatibility with human rights standards of the legislation on non-governmental organisations of the republic of Azerbaijan (CDL-AD(2011)035) that changes to the system had further complicated an already complex and lengthy procedure. See also the Expert Council on NGO Law, Opinion on the NGO Law of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1.

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

123. *Magyar Keresztény Mennonita Egyház and Others v. Hungary* (No. 70945/11 and 8 more).

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

125. PACE Doc. 13940, op. cit., §§ 48-51.

126. PACE Resolution 2062 (2015), op. cit.

127. CommDH(2014)10, op. cit. See also the Council on NGO Law, OING Conf/Exp (2014) 1, op. cit.

128. CommDH(2014)10, op. cit.

129. CommDH(2014)16, op. cit.

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

131. *Ibid.*, §§ 48-51.

132. CommDH(2013)14, op. cit. See also the Expert Council on NGO Law, OING Conf/Exp (2014) 1, op. cit., Expert Council on NGO Law, Opinion on amendments in 2009 to the NGO law in Azerbaijan and their application, OING Conf/Exp (2011) 2, § 137 and 140, and PACE Doc. 13940, op. cit., §10.

133. CDL-AD(2011)035, op. cit.

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

135. Venice Commission CDL-AD(2014)025, op. cit. See also the Commissioner for Human Rights’ Opinion on the legislation of the Russian Federation on non-commercial organisations in light of Council of Europe standards, CommDH(2013)15, 15 July 2013, in particular on the Federal Law No. 121-FZ “On Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of the Activities of the Non-Commercial Organisations Performing the Functions of Foreign Agents”. See also the Commissioner for Human Rights Opinion on the legislation and practice in the Russian Federation on non-commercial organisations in light of Council of Europe standards: an update”, CommDH(2015)17, 20 July 2015.

Specific measures in the Russian Federation<sup>136</sup> and Azerbaijan<sup>137</sup> distinguish unjustifiably between national and foreign/international NGOs. An absolute ban on joining an association is imposed on active police and military. In the case *Matelly v. France*, the Court held that an absolute prohibition may not be imposed on trade unions in the armed forces. Although restrictions may be placed on the exercise of freedom of association by military personnel, those restrictions must not deprive service personnel of the general right of association in defence of their occupational and non-pecuniary interests: these restrictions may concern the methods of action and expression used by an occupational association, but not the essence of the right itself, which includes the right to form and join such an association.<sup>138</sup> Nineteen out of 42 Council of Europe member states with armed forces do not guarantee the right of association for their military personnel, and 35 do not guarantee the right to collective bargaining.<sup>139</sup>

NGOs face difficulties in performing activities that are viewed as politically biased or politicised, and suffer stigmatisation by public authorities.

In his report following his visit to Azerbaijan, the Commissioner expressed his concerns as regards “the political discourse which often accompanies the adoption of restrictive legislation” such as the 2013 amendments to the law on NGOs, the law on grants and the Code of Administrative Offences, which further restricted the operations of NGOs.<sup>140</sup>

NGOs are labelled in a negative manner merely on account of their receiving foreign funds and subsequently face adverse consequences. In its opinion on several Federal Laws of the Russian Federation, the Venice Commission noted that:

being labelled as a “foreign agent” signifies that a NCO [non-commercial organisation] would not be able to function properly, since other people and – in particular – representatives of the state institutions will very likely be reluctant to co-operate with them, in particular in discussions on possible changes to legislation or public policy.<sup>141</sup>

136. Expert Council on NGO Law, OING Conf/Exp (2015) 1, op. cit., and OING Conf/Exp (2014) 3, op. cit.

137. Expert Council on NGO Law, OING Conf/Exp (2011) 2, op. cit. See also OING Conf/Exp (2014) 1, op. cit. and Commissioner for Human Rights, CommDH(2015)17, op. cit.

138. *Matelly v. France*, No. 10609/10, 2 October 2014. See also *Adefdromil v. France*, No. 32191/09, 2 October 2014.

139. *Matelly v. France*, op. cit., § 35.

140. See CommDH(2013)14, op. cit. See also Second and Third Opinions of the Advisory Committee on the Framework Convention on the Protection of National Minorities on Azerbaijan (respectively adopted on 9 November 2007, ACFC/OP/II(2007)007, §§ 68 and 69, on 10 October 2012, ACFC/OP/III(2012)005, §§ 66 and 67). See also OING Conf/Exp (2014) 1, op. cit. See also PACE Doc. 13940, op. cit.

141. Venice Commission, CDL-AD(2014)025, op. cit. See also PACE Doc. 13940, op. cit., § 10.

There are instances of stigmatisation or intimidation against those organisations, expressing dissent or criticism of the authorities (overly restrictive legislation, use of pre-trial detention to silence those expressing dissenting opinions, criminal prosecutions, reprisals against those providing information to international human rights bodies, etc.).

In its Resolution 2062 (2015), the Parliamentary Assembly:

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

It was also:

alarmed by reports by human rights defenders and international NGOs, confirmed by the Council of Europe Commissioner for Human Rights, concerning the increase in criminal prosecutions against NGO leaders, journalists, lawyers and others who express critical opinions.<sup>142</sup>

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

to cease the harassment and prosecution of civil society organisations or their activists and journalists; to abrogate the law on undesirable foreign organisations; to bring the legal framework for non-governmental organisations into line with Council of Europe standards.<sup>143</sup>

142. PACE Resolution 2062 (2015), op. cit. See also CommDH(2014)10, op. cit., CommDH(2013)14, op. cit., ACFC/OP/II(2007)007, op. cit., §§ 68 and 69, ACFC/OP/III(2012)005, op. cit., §§ 66 and 67. See also *Ilgar Mammadov v. Azerbaijan*, No. 15172/13, judgment of 22 May 2014, and the third party intervention by the Commissioner for Human Rights in *Hilal Mammadov v. Azerbaijan*, No. 81553/12. See also CommDH(2014)10, op. cit., OING Conf/Exp (2014) 1, op. cit., and the Expert Council on NGO Law, OING Conf/Exp (2011) 2, op. cit., §§ 140 and 141. See also PACE Doc. 13940, op. cit.

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

## Strengthening protection for human rights defenders in the Council of Europe

Human rights defenders play a vital role in democratic societies, helping to advance, promote and protect civil, political, economic and social rights in member states. Due to the nature of their work, defenders face specific risks and obstacles and are often targets for abuse, including threats to their personal safety. Their effective protection is a prerequisite for the fulfilment of their mission to defend human rights.

Support for the work of human rights defenders lies at the core of the mandate of the Commissioner for Human Rights. Human rights defenders are also important interlocutors and partners for many Council of Europe institutions, notably the Parliamentary Assembly and the monitoring mechanisms.

The protection of human rights defenders is high on the Council of Europe's agenda, owing to signs of deterioration in the situation of human rights defenders and to serious attacks against them. The Committee of Ministers and the Parliamentary Assembly asked for a mechanism to strengthen their protection against acts of reprisals and intimidation from state and non-state actors.

Such a mechanism should strengthen the capacity of the Council of Europe to respond to cases of reprisals against human rights defenders and better co-ordinate the remedial and preventive actions of the Organisation.

As a matter of priority, it should focus on reprisals against defenders' actions related to their interaction with the Council of Europe, its representatives and bodies. From the Council of Europe's perspective, these reprisals are clearly of the highest gravity and also require the highest level of vigilance.

The objective is to bring a smaller number of incidents to public awareness, thus focusing attention on individual cases, increasing their visibility and improving the chances of effective remedial and preventive action being taken as a result.

Moreover, a limited number of incident reports will facilitate the process of verification and consequently reinforce the authority, credibility and effectiveness of the new mechanism.

Reports on alleged reprisals will be filtered on the basis of objective criteria – the existence of interaction with the Council of Europe (application before the European Court of Human Rights, participation in a Council of Europe event, etc.), information about the incident constituting an alleged reprisal, and a time limit between the two (for example, two years).

Reported reprisals will be processed in a simple, structured procedure, with individual steps and time-frames being defined and known in advance. Reported incidents will be communicated to the member states concerned for response and ultimately reported by the Secretary General to the Committee of Ministers with, if necessary, recommendations for further action.

This mechanism will not require significant resources or the creation of new bodies. It will suffice to have a focal point within the Secretariat to receive, filter and process the reports on the basis of the predetermined, objective criteria.

A tighter focus on a limited number of cases should not, however, lead to negligence or indifference with regard to other incidents of reprisal and intimidation of human rights defenders. This is why it would be essential to reinforce intra- and interinstitutional dialogue on these issues, based on the reports of the Commissioner for Human Rights, as also recommended by the Parliamentary Assembly, and to strengthen the capacity of the Court to address swiftly the most urgent cases.

# PROPOSED ACTIONS AND RECOMMENDATIONS

Chapter 3 – Freedom of assembly and freedom of association

## FREEDOM OF ASSEMBLY

- ▶ **focus the bilateral work with member states, including through action plans and co-operation projects, to:**
  - ensure that notification requirements for peaceful assemblies are not interpreted and applied by the authorities as authorisation requirements; offer assistance, including through training, in order to promote the right to exercise the freedom of assembly and association; disseminate information on best practices in the Council of Europe member states;
  - ensure that the use of force to disperse public events remains an exceptional measure; offer assistance, including through training, to countries where problems have occurred in order to ensure that law-enforcement agencies receive proper instructions and apply them correctly.

## FREEDOM OF ASSOCIATION AND CIVIL SOCIETY

- ▶ **commission by the end of 2016 a review on the standards applying to foreign funding of NGOs in the member states; based on the findings, consider the need for new Committee of Ministers guidelines;**
- ▶ **focus the bilateral work with member states, including through action plans and co-operation projects to:**
  - align legislation, regulations and practice concerning the exercise of freedom of association (notably registration requirements) with the Council of Europe standards;
  - ensure that NGOs do not face unnecessary hurdles (disproportionate sanctions, excessive reporting obligations, discrimination) in their functioning;
  - ensure that effective appeals and complaint mechanisms are available.

## PROTECTION OF HUMAN RIGHTS DEFENDERS

- ▶ **establish, under the authority of the Secretary General, a mechanism strengthening the protection of human rights defenders. The new mechanism will focus on reprisals against human rights defenders related to their interaction with the Council of Europe;**
- ▶ **reinforce interinstitutional dialogue on the issue of human rights defenders and strengthen the capacity of the Court to swiftly address the most urgent cases.**



## CHAPTER 4

# DEMOCRATIC INSTITUTIONS



# INTRODUCTION

## Chapter 4 – Democratic institutions

**T**here is no “one-size-fits-all” model for democratic political systems, but the fundamental principles which regulate the functioning of – and the relationships between – institutions of a democratic state are well known. They have been spelled out and codified in the work of the Council of Europe bodies, notably in the recommendations and opinions of the Venice Commission. Whenever doubts appear on how fundamental principles governing democratic states in specific situations in their countries are applied, the governments of the Council of Europe member states are strongly encouraged to seek, uphold and implement the opinions of the Venice Commission.

Democracy also requires democratic skills not only among the political class, but also within administrations, civil society, media, the business community and others. It also requires the capacity to understand and actively participate in democracy by the members of the electorate and citizens in general, including those who are still too young to vote. These are the issues which will be addressed in the Chapter 5 – Inclusive societies.

Finally, democracy requires political will. It does not come out of the blue and it cannot be imposed from the outside. It requires the will of the people and a political system which enables them to ensure their will is respected by political leaders. Political will and political culture are necessary to ensure the proper functioning of democratic institutions and to prevent them from being misused, misinterpreted or subverted to attain objectives incompatible with a genuine, functioning democracy. The key concerns in this respect, also observed in a number of member states in the Council of Europe over the last year, are related to the respect of the separation between the three branches of power, as well as risks of misuse of majorities in parliament in order to rewrite constitutional and legislative rules in ways which raise serious questions with regard to their compliance with Council of Europe standards.

This year, the chapter on democratic institutions defines more clearly the measurement criteria that are based on Council of Europe standards and monitoring mechanisms such as free and fair elections, vertical separation of powers and good governance, and the “functioning of democratic institutions” criterion. The latter is more difficult to measure in a quantitative

way as no comprehensive standards or monitoring mechanisms can be used to this effect.

The “functioning of democratic institutions” parameter has been enriched with new measurement criteria, such as inclusive political processes and new forms of political participation, in order to encourage national authorities to take the dynamic and changing nature of European democracies and their forms of expression into account.

While measuring member states’ performance in these areas remains a serious challenge in the absence of a codified and comprehensive definition of democracy and of monitoring mechanisms thereof, some trends are emerging and are included in this report.

Findings of election observation reports show that elections held in 2015 in the Council of Europe area can be generally assessed as competitive and respectful of democratic processes, yet there were many reported cases regarding impartial access to media by the political parties, lack of independence of journalists, cases of intimidation of journalists, transparency of media ownership and unbalanced media coverage.

In some member states, the effectiveness of parliaments is impaired by a lack of pluralist representation. This is reflected in the lack of genuine debate in the passage of critical legislation, which is then adopted with unanimous or nearly unanimous parliamentary backing.

In some countries, parliamentary majorities are undertaking a number of changes in key areas at an extremely rapid pace, without allowing for a meaningful political discussion with opposition parties.

The key recommendation in this chapter calls on member states to seek, uphold and implement Council of Europe recommendations on issues affecting the separation of powers and the functioning of democratic institutions, and in particular on questions related to constitutional justice, laws on the judiciary, electoral legislation or legislation on specific human rights issues and the rights of minorities. In most of these cases, adequate solutions compliant with Council of Europe standards can be found quickly, provided that there is a sufficient level of political will and political culture on all sides.

# FREE AND FAIR ELECTIONS

## Chapter 4 – Democratic institutions

**F**ree and fair elections are the mechanism for appointing legitimate governments. Not only do they represent the culmination of a participative political process, elections also drive democratic debate, giving political parties the opportunity to present alternative visions for their society in a genuine competition of ideas.

Under Article 3 of the Protocol to the European Convention on Human Rights, the member states of the Council of Europe have undertaken to hold free elections at reasonable intervals by secret ballot, under conditions which ensure the free expression of the opinion of all people in the choice of the legislature.

### MEASUREMENT CRITERIA

- ▶ Universal suffrage: all nationals have the right to vote and to stand for election; electoral registers are public, permanent and updated at least once a year; the registration process is guided by an administrative or judicial procedure; and candidate registration is governed by clear rules and does not impose excessive requirements.
- ▶ Equal suffrage: each voter has the same number of votes, seats are evenly distributed between constituencies and equality of opportunity is guaranteed for parties and candidates alike through the election campaign, media coverage and the public funding of parties and campaigns.
- ▶ Free suffrage: voters can freely form an opinion, they are offered a genuine choice at the ballot box and they can vote freely; in particular, they are not threatened with violence at the polls; the counting takes place in a transparent way and the announced result corresponds to the votes cast.
- ▶ Secret suffrage: voting is individual; no link can be established between the content of a vote and the identity of the voter who cast it.

- ▶ Direct suffrage: at least one chamber of the national legislature, subnational legislative bodies – if any – and local councils are elected directly.
- ▶ Regular intervals: elections are held regularly.
- ▶ Electoral law: rules governing elections have at least the rank of a statute, and the fundamental elements of electoral law are not open to amendment less than one year before an election.
- ▶ Electoral bodies: an impartial body is in charge of organising elections and central electoral commissions are independent.

### FINDINGS

Findings of election observation reports issued by the main international election observation missions of organisations and institutions such as OSCE/ODIHR, PACE, the Congress of Local and Regional Authorities and the European Parliament show that elections held in 2015 in the Council of Europe area can be generally assessed as competitive and respectful of democratic processes. Some improvements have been observed notably with regard to the professionalism of electoral administration, competitiveness of the campaign environment, increased voter turnout, a slight increase in the number of women elected in the legislative and local authorities in Albania<sup>144</sup> and in the Republic of Moldova,<sup>145</sup> and the enhanced role of domestic observers in the Republic of Moldova.

144. Committee of Ministers Rapporteur Group on Democracy (GR-DEM), Report on the implementation of the programme for pre-electoral assistance to support the 2015 Local Elections in Albania, presented to the Committee of Ministers on 6 November 2015.

145. GR-DEM, Activity Report on the Republic of Moldova “pre-electoral assistance programme in preparation for the 2015 local elections” presented to the Committee of Ministers on 6 November 2015.

■ In Azerbaijan, the OSCE/ODIHR decided to cancel its observation mission due to restrictions imposed by the authorities; this, in turn, limited the scope of the PACE election observation mission, in particular as regards its assessment of the pre-electoral period.<sup>146</sup> The violation of election observation regulations raises concerns as to the fairness of the election process in this country. Obstacles persisted in Turkey due to the unclear status of domestic observers, an unnecessarily difficult accreditation process and impeded access to information with regard to all stages of the electoral process and to polling stations.<sup>147</sup>

■ Impartial access to media by the political parties, lack of independence of journalists, cases of intimidation of journalists, transparency of media ownership and unbalanced media coverage undermined the principle of equality of suffrage and remained issues of concern in Albania,<sup>148</sup> Azerbaijan,<sup>149</sup> Republic of Moldova,<sup>150</sup> Ukraine<sup>151</sup> and Turkey.<sup>152</sup> Political violence including violent rhetoric and physical violence against candidates and political parties has been observed in Turkey<sup>153</sup> and Ukraine.<sup>154</sup>

■ Changes to the electoral law less than one year prior to elections and a complicated legal framework have undermined a confidence in the electoral process in Ukraine.<sup>155</sup>

146. PACE Doc. 13923 on the observation of the parliamentary elections in Azerbaijan (1 November 2015), <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-FR.asp?file-id=22269&lang=EN&search=MWVylG5vdmVtYnJlIDlwMTU=>

147. OSCE/ODIHR–OSCE/PA–PACE International Election Observation Mission (IEOM), Statement of preliminary findings and conclusions on the early parliamentary elections in Turkey, 2 November 2015, available at: <http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=5857&lang=2>.

148. Congress of Local and Regional Authorities of the Council of Europe, Observation of local elections in Albania, CPL/2015(29)2Final, 21 October 2015, available at: [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CPL/2015\(29\)2FINAL&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CPL/2015(29)2FINAL&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true).

149. PACE Doc. 13923, *op. cit.*

150. Congress of Local and Regional Authorities of the Council of Europe, Observation of local elections in Moldova, CPL/2015(29)3Final, 21 October 2015, available at: <https://wcd.coe.int/ViewDoc.jsp?p=&id=2364065&direct=true>.

151. OSCE/ODIHR–Congress of Local and Regional Authorities of the Council of Europe–European Parliament IEOM, Statement of preliminary findings and conclusions on local elections in Ukraine, 26 October 2015.

152. OSCE/ODIHR–OSCE/PA–PACE IEOM, Statement of preliminary findings and conclusions on the early parliamentary elections in Turkey, *op. cit.*

153. *Ibid.*

154. OSCE/ODIHR–Congress–EP IEOM, Statement of preliminary findings and conclusions on the local elections in Ukraine, *op. cit.*

155. *Ibid.*

# FUNCTIONING OF DEMOCRATIC INSTITUTIONS

## Chapter 4 – Democratic institutions

**D**emocratic security requires well-functioning, corruption-free institutions enshrined in countries' basic law or constitutions and which are respectful of international principles and standards.

■ The first principle – the separation of powers – is a key feature of democratic government. It prevents the concentration of power in the executive branch. A crucial requirement of this criterion is the independence of the judiciary from the executive and legislative powers. The application of the principle of separation of powers therefore depends on the political system, making it difficult to draw meaningful comparisons. The most common problem is the excessive use of legislative power by the executive. The norm-giving powers of the executive should be limited to duly justified urgent cases or based on a specific authorisation by the legislature as provided for in the constitution.

■ When it comes to the principle of the parliamentary role of the opposition, there is no common European model, nor is one needed. What is essential is that the basic legal requirements for an effective parliamentary opposition are protected in such a way that they cannot be overruled or set aside by a simple majority. The opposition's rights to ensure the oversight of government, scrutinise the work of other key institutions, initiate and participate in the legislative process and participate in the functioning of parliament must be protected.

■ Enjoying a large majority does not absolve a ruling party or coalition from the obligation to strive towards an inclusive political process, particularly when tackling fundamental reforms. In addition, such a majority should resist the temptation to change the "rules of the game" simply to preserve or strengthen its position. Governments should respect the rule of law, and not rule by law.

■ To enjoy full participation in the political process, different forms of participation, like online consultation, petitioning, liquid parties and other forms of online political participation need to be considered, alongside traditional party politics.

■ While all member states' constitutions provide for well-defined democratic institutions and their checks and balances, their functioning can be at odds with the basic assumptions of modern constitutional law principles and with international standards, putting democratic security in danger.

■ This section seeks to explore such shortcomings by looking at a number of measurement criteria. Although most of these measurement criteria are crucial to identifying such threats, they are very difficult to define quantitatively.

### MEASUREMENT CRITERIA

- ▶ The principle of separation of powers is applied.
- ▶ The parliamentary role of the opposition is regulated.
- ▶ The inclusive political process is applied.
- ▶ The rule of law is respected.
- ▶ Different forms of political participation are in place.

### FINDINGS

■ The interaction between the majority and the opposition in parliament continues to be an important indicator of the healthy functioning of democratic institutions in Europe. In this regard, the situation in the majority of Council of Europe member states is generally satisfactory and stable. However, in the past few years such interaction has raised concerns in some member states and their number has increased during the reporting period.

■ The effectiveness of parliaments as democratic institutions depends on their ability to serve as a platform for dialogue between different political forces. In some member states, this function is impaired by a lack of pluralist representation, which is then reflected in the lack of genuine debate in the passage of critical legislation, which may then be adopted with unanimous or nearly unanimous parliamentary backing. This has been the case, for instance, in Azerbaijan and the Russian Federation.<sup>156</sup>

■ A situation of concern has emerged in Poland, where the parliamentary majority is undertaking a number of changes in key areas at an extremely rapid pace, without allowing for meaningful political discussion with opposition parties. Changes to the functioning of the Constitutional Court, in particular, have raised concerns about the upholding of the rule of law.<sup>157</sup> In Hungary, a number of constitutional and other reforms backed by a two-thirds majority in parliament have led to a weakening of the system of checks and balances.<sup>158</sup>

■ When it comes to the rights and responsibilities of the opposition, there have been positive developments. Constructive steps have been taken in a number of countries to put an end to political deadlocks which affected parliamentary work over the past few years. This has been the case, for instance, in Albania where, in December 2014, the majority and the opposition reached an agreement, brokered by the European Parliament, which resulted in the opposition resuming its participation in parliamentary work.<sup>159</sup> In “the former Yugoslav Republic of Macedonia” as well, an agreement between the main political parties was reached on 15 July 2015 with a view to overcoming the political crisis in the country and leading to new elections in 2016.<sup>160</sup>

■ In Armenia, the changes in the constitutional set-up introduced following the referendum of December 2015 will increase the role of parliament and may lead to a more inclusive political process.<sup>161</sup> However, democratic culture and dialogue with civil society were still considered weak throughout this crucial reform process.

■ In Ukraine, the polarisation of the political climate prevented the majority and the opposition from finding an agreement on constitutional amendments which are essential to move the country forward.<sup>162</sup>

156. PACE Resolution 2078 (2015) on the progress of the Assembly’s monitoring procedure (October 2014–August 2015).

157. PACE Presidency press release, “The year may be reaching an end but the human rights challenges continue”, 14 December 2015, available at [www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5947&lang=2&cat=15](http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5947&lang=2&cat=15).

158. PACE Doc. 13806 on the situation in Hungary following the adoption of Assembly Resolution 1941 (2013), 8 June 2015.

159. See the agreement at: [www.zgjedhje.al/uploads/File/2014-2015/CDO-InterimMonitoringReport-I-LocalElections2015-30March2015.pdf](http://www.zgjedhje.al/uploads/File/2014-2015/CDO-InterimMonitoringReport-I-LocalElections2015-30March2015.pdf).

160. Skopje Agreement, 15 July 2015, available at: [http://europa.eu/rapid/press-release\\_STATEMENT-15-5372\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-15-5372_en.htm).

161. PACE Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Honouring of obligations and commitments by Armenia, AS/Mon(2015)28rev., 15 September 2015; European Commission for Democracy through Law (Venice Commission), Opinion No. 812/2015 on the draft amendments to the Law on the Human Rights Defender of the Republic of Armenia, CDL-AD(2015)035-e, 26 October 2015.

162. PACE Monitoring Committee, Honouring of obligations and commitments by Ukraine, AS/Mon(2015)21, 18 June 2015.

# VERTICAL SEPARATION OF POWERS

## Chapter 4 – Democratic institutions

**A** balanced distribution of powers throughout all levels of government is of paramount importance for democratic societies. Such a distribution of powers represents an essential component of the necessary checks and balances and is likely to reduce corruption and engage more citizens in public life. Strong local and regional government brings democracy closer to the people, thereby enhancing democratic security.

### MEASUREMENT CRITERIA

— The Council of Europe has the only international treaty in the field of local government, the European Charter on Local Self-Government (the Charter). The main obligations that states enter into when ratifying the Charter form a set of indicators in this area.

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

- ▶ Local authorities can form consortia and associate for tasks of common interest.
- ▶ Local authorities have the right of recourse to judicial remedy.

### FINDINGS

— The situation of local and regional government has undoubtedly improved in recent decades. Many countries have conducted or are currently conducting broad-ranging decentralisation reforms. This trend continued in 2015, in particular in central and eastern Europe. However, in some countries, in particular in the aftermath of the financial and economic crises, steps were taken to limit the autonomy, in particular financial, of local and regional authorities.

— Several states have either implemented or are considering implementing territorial consolidation reforms of various tiers of government. They may consist either of amalgamation into larger communities or, in the case of local authorities, of arrangements for intermunicipal co-operation. In 2015, Albania and France accomplished amalgamation reforms respectively of local and regional authorities (it should be noted that communities concerned in both countries challenged these government initiatives in the highest courts, based on Article 5 of the Charter referring to consultation by the government). Armenia and Ukraine started reforms aimed both at amalgamating and encouraging co-operation among municipalities.

— Regional government has an important place in many Council of Europe member states, in particular the larger ones. Calls for further regionalisation should be dealt with in line with the principles of good democratic governance (see the next section). Open dialogue with the regions and representatives of the communities concerned should be a first step towards finding an acceptable solution. Further transfer of competences and resources to regional authorities, possibly on an asymmetric model, can be a solution to problems appearing in some countries (for example, Ukraine).

■ In reaction to the financial and economic crises, several European countries have taken steps backward and have limited to a certain extent the autonomy (in particular financial) of local (and sometimes regional) authorities. Many countries have diminished the transfers to local authorities (Greece, Ireland, Portugal, Spain, the United Kingdom), some have replaced own local taxes with transfers (for example, France for the *taxe professionnelle*), cut the local part of some shared taxes (Romania), created obligations for local authorities to

run surpluses (Bulgaria), cut local staff salaries significantly (Estonia and Latvia by 15%, Romania by 25%), froze hiring or established ceilings on the number of local employees (Romania and Serbia), or diminished remuneration and compensation of local elected representatives (Hungary and Slovak Republic). While financial discipline is part of good governance at all levels, the crises should not serve as a pretext to curb the very useful reform trend of bringing decision making and services closer to citizens.

# GOOD GOVERNANCE

## Chapter 4 – Democratic institutions

**A** democratically secure society relies on “well-governed” institutions. Good governance criteria measure how structures operate with respect to the principles of openness and transparency, innovativeness, accountability, efficiency and effectiveness, ethics and control of conflict of interests, and responsiveness in serving citizens’ rights and needs. In 2008, the Council of Europe adopted the 12 principles for good governance at local level that provide the basis for measuring public institutions’ performance.<sup>163</sup> In 2015, based on these principles and available information, the Hertie School of Governance prepared a “Council of Europe Good Governance Index”.

### MEASUREMENT CRITERIA

— The 12 good governance principles provide for:

- ▶ Fair representation and participation: citizens are at the centre of public activity and have a voice in decision making; there is always a genuine attempt to mediate between various legitimate interests; decisions are taken according to the will of the many while the rights and legitimate interests of the few are respected.
- ▶ Openness and transparency: decisions are taken and enforced in accordance with rules and regulations; the public has access to all information which is not classified for well-specified reasons; information on decisions, policies, implementation and results is made public.
- ▶ Innovation and openness to change: new, efficient solutions to problems and improved results are sought; modern methods of service delivery are tested and applied; and a climate favourable to change is created.

- ▶ Accountability: all decision makers take responsibility for their decisions; decisions are reasoned, subject of scrutiny and remedies exist for maladministration or wrongful decisions.
- ▶ Ethical conduct: public good takes precedence over individual interests; effective measures exist to prevent and combat corruption.
- ▶ Responsiveness: objectives, rules, structures and procedures seek to meet citizens’ legitimate needs and expectations; public services are delivered; requests and complaints are dealt with in a reasonable timeframe.
- ▶ Efficiency and effectiveness: results meet agreed objectives making the best possible use of resources; performance-management systems and evaluation methods are in place; audits are carried out regularly.
- ▶ Sound financial management: charges meet the cost of service provided; budget plans are prepared in consultation with the general public or civil society; consolidated accounts are published.
- ▶ Sustainability and long-term orientation: long-term effects and objectives are duly taken into account in policy making, thereby aiming to ensure sustainability of policies in the long run.
- ▶ Competence and capacity: public officials are encouraged to improve their professional skills and performance; practical measures and procedures seek to transform skills into capacity and improved results.

### FINDINGS

— The performance of Council of Europe member states on good governance criteria differs considerably, in particular as regards ethics, transparency and accountability. This divergence indicates that there is room for the Council of Europe to promote good practice among its member states.

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

■ Important reform trends have been observed in most European states, striving to engage civil society through better and innovative means and to improve transparency and public ethics, especially in local government. Many interesting experiments and reforms have been conducted in Nordic countries with a view to countering citizens' declining trust in public authorities. The introduction of participatory budgeting, neighbourhood councils, online consultation techniques, regulation of declarations of interest and conflict of interest, publication of documents in accessible formats, adoption of codes of ethics and the creation of ethics committees are all reforms which belong to this trend.

■ In many member states, efforts are ongoing to improve procedures for public consultation and participation of citizens and civil society through the use of information technology, and to simplify the processing and responding to spontaneous initiatives. Baltic countries, in particular Estonia, look like leaders of this trend. Many of these efforts also seek to reach the younger generations. Engaging youth in the political process is another area where some countries are achieving very promising results, for example by lowering the voting age and the age at which people can stand for election.

■ Another important reform trend, linked to the current situation of public finances in European countries, can be seen in measures taken to improve value for money in local government by introducing new and efficient human resource mechanisms and modern performance-management schemes for public services. Nordic countries, the United Kingdom and the Netherlands, for example, have substantial experience which the Council of Europe makes use of in its co-operation projects.

■ Progress has been recorded in a number of countries, in particular in central and eastern Europe, as regards the quality and performance of human resources. This was made possible by the adoption of more transparent recruitment procedures, the stabilisation of the civil service, the introduction of merit-based careers and the benchmarking of performance.

■ One area where efforts need to be pursued is the fight against corruption in public administration, including at local level. This need also figures in the Council of Europe "Good Governance Index". In some countries, the legal framework for public officials has been expanded to include avoidance and management of conflicts of interest, declarations of assets, creation of independent oversight bodies, strict compliance with codes of conduct and the protection of whistle-blowers.

■ Several member states' governments also provide increased access to information and have adopted open data initiatives and policies, making information publicly available on recruitment, contracts and grants to private companies or individuals. Such measures can only promote greater transparency and contribute to democratic legitimacy in governance.

■ In a number of member states, the implementation of major reforms and/or investments, notably the launching of infrastructure projects, has given rise to significant tension in the face of persistent or underestimated popular opposition. Greece has had to address the situation left by decades of public policies ignoring the principles of "sound financial management" and "sustainability and long-term orientation". Such reforms are difficult for both the population and the governments, but need to continue in the future.

# PROPOSED ACTIONS AND RECOMMENDATIONS

## Chapter 4 – Democratic institutions

### SEPARATION OF POWERS AND FUNCTIONING OF DEMOCRATIC INSTITUTIONS

- ▶ call on the member states to seek, uphold and implement opinions of the Venice Commission on issues affecting the separation of powers and functioning of democratic institutions, and in particular on questions related to constitutional justice, laws on the judiciary, electoral legislation or legislation on specific human rights issues and the rights of minorities.

### POLITICAL PROCESS

- ▶ develop Council of Europe guidelines concerning the role and the responsibility of the political majority and its interaction with the opposition.

### FREE AND FAIR ELECTIONS

- ▶ focus the bilateral work with member states, including through action plans and co-operation projects to:
  - ensure the accuracy and regular update of the voters registers;
  - take further legal and practical measures to ensure fair and equal conditions for the political contestants, notably through regulations concerning funding of political parties and electoral campaign financing, with a view to have transparency of funding, ceilings for expenditures, as well as clear reporting rules and comprehensive oversight;
  - enhance the capacity of domestic election observation.

## CHAPTER 5

# INCLUSIVE SOCIETIES



# INTRODUCTION

## Chapter 5 – Inclusive societies

**D**eveloping inclusive societies requires multifaceted and co-ordinated approaches. This objective can be achieved if all members of society have equal access to fundamental rights, including social and economic rights. A democratically secure Europe is only possible in societies where this is guaranteed and where citizens, regardless of their background and no matter where they live, enjoy these rights. This concept was already outlined in the last report. However, events that marked European societies in 2015, from terrorist attacks to the dramatic increase in the number of migrants and refugees trying to reach Europe, confirm that a long-term response aimed at building inclusive societies is the only way to preserve democratic security.

■ This chapter looks at the requirements in the specific areas of social rights (as protected by the revised European Social Charter), non-discrimination, integration of migrants, youth policies, education and culture for democracy.

■ The events of the last 12 months require us to look afresh at the parameters and measurement criteria used in previous reports. A new parameter looks specifically at the integration of migrants.

■ The implementation of recommendations contained in previous reports is also advancing. An instrument to codify existing international standards for the conditions under which migrants are held in administrative detention centres by all member states will be prepared in 2016. An analysis of the legal and practical aspects of specific migration-related human rights issues, in particular effective alternatives to detention, is also in preparation.

■ ECRI has adopted a new general policy recommendation on safeguarding irregular migrants from discrimination. In the context of the new Council of Europe Strategy on the Rights of the Child, the Council of Europe will support member states in adopting a co-ordinated child-rights-based approach. Special attention will be paid to the situation of unaccompanied migrant children and to the link between migration and trafficking of children.<sup>164</sup>

<sup>164</sup>. ECRI Report on Greece, 10 December 2014, “Provide legal, administrative and practical safeguards that enable irregular migrants to exercise basic rights without risking expulsion and protect those providing humanitarian aid from the risk of criminal sanctions”.

■ The Action Plan on Building Inclusive Societies has been launched, with action in member states in three areas: education, anti-discrimination and effective integration.<sup>165</sup>

■ Our societies continue to face growing pressure due to the long-term impact of austerity measures, the emergence of radicalisation and the mass arrival of migrants and refugees. Some 232 million international migrants are living in the world today and, if children born in the destination countries are included (the so-called second generation), the figure would double, according to OECD-UN estimates. The number of refugees worldwide has reached 60 million people. As international flows of migrants and refugees expand, so do challenges for governments.

■ The last three decades have witnessed a remarkable rise in xenophobic, deeply conservative, and even extreme right-wing parties across much of Europe and the world. Whereas 30 years ago most xenophobic parties failed to pass the 5% minimum voter threshold that is typically required to participate in government, extreme right-wing populist movements now constitute a considerable percentage of the vote in some European countries.

■ Another major challenge confronting European states today is the security threat posed by violent radicalisation, extremism and terrorism. It is in times such as these that people tend to feel threatened and become overly protective of their well-being, to the extent of putting human rights aside.

■ In the light of these preoccupying developments, it is logical that Chapter 5 contains the largest and most ambitious set of recommendations. They build on the work achieved, and – in the light of recent experience – propose and introduce several new initiatives in order to reinforce our collective strength and resilience against challenges and threats that aim to cause divisions, tensions and conflicts within our societies.

<sup>165</sup>. Ibid., “Codify European immigration detention rules”.

# SOCIAL RIGHTS

## Chapter 5 – Inclusive societies

**R**espect for human dignity is the foundation of human rights, and it is through the implementation of social rights that this dignity is protected. Respect for social rights contributes to peaceful and stable societies. The effective enjoyment of social rights such as housing, education and health, non-discrimination, employment, decent working conditions and legal, social and economic protection provides the basis for respect for human dignity.

■ Together with the European Convention on Human Rights, the European Social Charter embodies the core of the European democratic and social model. The Charter is the social constitution for Europe and is an essential component of our human rights architecture. The Charter guarantees the necessary level of social and economic rights to ensure human dignity and equality for all. Specific emphasis is placed on the protection of vulnerable groups such as children, the elderly, people with disabilities and migrants and their families. The Charter requires that enjoyment of these rights be guaranteed without discrimination.

■ The European Committee of Social Rights adopted, in October 2015, a Statement of Interpretation on the Rights of Refugees under the European Social Charter. It highlights the responsibilities undertaken by States Parties to the Charter to provide protection to refugees in Europe, to treat them with dignity and to guarantee their fundamental rights.

■ In 2014, the Council of Europe reassessed its strategy and priorities for the promotion and protection of social and economic rights enshrined in the European Social Charter. The “Turin Process” was launched to bring the Charter back to the centre of the European political debate. Being conscious of the significant negative impact of the financial and economic crises on the enjoyment of social rights throughout Europe, the EU and Council of Europe decided to ensure the consistent protection of these rights. The existing plurality of legal instruments should not lower the level of protection but rather should mutually strengthen the guarantee of social rights.

■ The Turin Process turns the declarations of principle at national and European levels into targeted political actions. The specific priorities include:

- ▶ the ratification of the revised European Social Charter by all member states;
- ▶ the enhancement of the collective complaints procedure, which directly involves social partners

and civil society in monitoring activities regarding the application of the Charter;

- ▶ the reinforcement of the Charter treaty system within the Council of Europe and in its relationship with European Union law.

■ The aim is to increase the co-ordination of different European systems, whether they are established within the Council of Europe or within the European Union, and to promote more cohesive, integrated and open democratic societies.

■ Both, the Council of Europe and the European Union are committed to protecting fundamental rights and the rule of law in Europe. The Turin Process fosters their closer co-operation and reinforces dialogue and exchanges between their competent bodies in view of the full consideration of the Charter and the decisions of the European Committee of Social Rights within European Union law.

■ Activities were organised to promote the ratification of all the provisions of the revised European Social Charter and Collective Complaints Protocol, as well as to support the reinforcement of the national framework (at national and local levels) for ensuring the implementation of the Charter. Exchanges and training on the Charter were also organised for judges, legal professionals and other relevant actors, including the media, social partners and civil society. Additional initiatives improved the visibility of the Charter and the collective complaints procedure at national level.

■ Within the 2016-2017 Programme of Activities, the Committee of Ministers established a European Social Cohesion Platform to reinforce the intergovernmental component of its strategy to ensure equal and effective access to social rights. The platform will mainstream a social cohesion perspective in the activities of all relevant committees and bodies of the Council of Europe, through the sharing of good practices and by examining new trends and challenges. Particular attention will be paid to ensuring that everyone can enjoy their social rights, as guaranteed by the Charter and other relevant instruments, in practice and without any discrimination, with a special emphasis on vulnerable groups and young people, taking into account the findings of the relevant monitoring mechanisms. For this purpose, the platform will support co-operation activities carried out upon the request of member states.

## MEASUREMENT CRITERIA

- ▶ The ratification of the revised European Social Charter, the number of adopted (key) provisions of the Charter, the acceptance of the collective complaints procedure.
- ▶ The number of findings of non-conformity relating to articles of the revised Charter from the thematic group “children, families and migrants”:
  - the right of children and young persons to protection (Article 7);
  - the right of employed women to protection of maternity (Article 8);
  - the right of the family to legal, economic and social protection (Article 16);
  - the right of children and young persons to legal, economic and social protection (Article 17);
  - the right of migrant workers and their families to protection and assistance (Article 19);
  - the right of workers with family responsibilities to equal opportunities and equal treatment (Article 27);
  - the right to housing (Article 31).

## FINDINGS

■ The economic crisis in Europe and the austerity measures adopted in response to it have had a negative impact on the effective respect for human rights, and especially for social and economic rights. In this situation, the rights of vulnerable groups of people such as the elderly, children, migrants and their families may be undermined and need to be

monitored with particular attention to avoiding dangerous repercussions on the social cohesion and democratic security of our societies.

■ In 2015, the committee adopted 762 conclusions in respect of 31 states, including some 239 findings of non-conformity to the Charter (31%). There were 432 conclusions of conformity (57%), whereas the number of “deferrals” (cases where the committee was unable to assess the situation due to lack of information) amounted to 91 cases (12%). An outstanding positive result is the fact that the proportion of cases in conformity with the Charter provisions has reached its highest level since 2005.<sup>166</sup>

■ Serbia and the Russian Federation were the countries with the highest number of cases requiring further information before they can be assessed. The highest number of conclusions of non-conformity concerned Armenia, Georgia and Turkey. Albania, Croatia and Iceland did not submit their reports on the implementation of the Charter. Luxembourg submitted its report late and therefore conclusions will be adopted in the course of 2016.<sup>167</sup>

■ In substance, the conclusions covered a very wide spectrum of rights relating to children, families and migrants. A third of all conclusions concerned the right of children and young persons to protection, about a quarter related to the right of migrant workers and their families to protection and about a sixth concerned the right of employed women to protection of maternity. The proportion of conclusions of non-conformity was particularly high as regards the right of the family to social, legal and economic protection, and the right of children and young persons to social, legal and economic protection and the right to housing.

166. 277 violations related to children, families and migrants in 31 countries, 27 January 2016: <https://go.coe.int/DN2bg>.

167. CM(2016)12 and CM(2016)13, Government Committee of the European Social Charter and the European Code of Social Security.

# NON-DISCRIMINATION

## Chapter 5 – Inclusive societies

**T**he right to non-discrimination is well established in international human rights law. Indeed, the very first article of the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights. The principles of equality and non-discrimination go hand in hand; they are important in order for everyone to have equal opportunities in all areas of life, including education, employment, housing, health care and access to goods and services. These fundamental principles are at the heart of inclusive societies and an essential component of democratic citizenship.

Discrimination on grounds of race, ethnic origin, colour, citizenship, language, religion, sexual orientation and gender identity is a matter of particular concern and it is essential to focus again on the quality and effectiveness of anti-discrimination measures.

As highlighted in the 2015 report, the quality of anti-discrimination measures depends on effective national legislation prohibiting and punishing discriminatory acts and on the existence of well-functioning mechanisms, such as independent specialised bodies, to promote and enforce the right to non-discrimination.

National legislation on equality and non-discrimination cannot be complete without the ratification and effective implementation of Protocol No. 12 to the Convention. This provides for a general prohibition of discrimination on any ground and subjects contracting parties to the scrutiny of the Court.

Other minimum standards for national legislation to combat racism and racial discrimination are set out in ECRI General Policy Recommendation No. 7. This covers provisions in all branches of the law – constitutional, civil, administrative and criminal. This integrated approach allows the problems to be addressed in an exhaustive, consistent and complementary manner.

Democratic citizenship depends on everyone being free, in law and in practice, to participate in and contribute to society. Non-discrimination on grounds of sexual orientation and gender identity has become a major focus of the Council of Europe in recent years.<sup>168</sup>

### MEASUREMENT CRITERIA

#### Legal criteria

- ▶ Ratification of Protocol No. 12 to the European Convention on Human Rights and of the Additional Protocol to the Convention on Cybercrime on the criminalisation of acts of a racist or xenophobic nature committed through computer systems.
- ▶ Full execution of the relevant judgments of the European Court of Human Rights.
- ▶ National criminal law punishes public incitement to violence, hatred or discrimination on the grounds of race, colour, language, citizenship, ethnic origin, sexual orientation and gender identity.
- ▶ Civil and administrative law prohibits direct and indirect racial and homophobic or transphobic discrimination, as well as segregation, harassment, discrimination by association, announced intention to discriminate, instructing, inciting and aiding another to discriminate; it provides for the sharing of the burden of proof in discrimination cases.

168. See Committee of Ministers Recommendation CM/Rec(2010)5 to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

## INSTITUTIONAL CRITERIA

- ▶ National specialised bodies' powers include assistance to victims of discrimination, the ability to investigate, the right to initiate and participate in court proceedings, monitoring legislation and advice to legislative and executive authorities and awareness raising.
- ▶ National specialised bodies are independent and have the freedom to appoint their own staff and to manage their resources.

## FINDINGS<sup>169</sup>

■ A general rise in racism and intolerance has been observed in our member states.<sup>170</sup> ECRI has noted that while many member states have comprehensive anti-discrimination legislation, significant gaps continue to exist.<sup>171</sup> A number of countries, including Andorra,<sup>172</sup> Armenia,<sup>173</sup> Azerbaijan,<sup>174</sup> Bosnia and Herzegovina,<sup>175</sup> Greece,<sup>176</sup> Iceland,<sup>177</sup> Italy,<sup>178</sup> Liechtenstein,<sup>179</sup> Poland,<sup>180</sup> San Marino,<sup>181</sup> Slovenia,<sup>182</sup> the Russian Federation<sup>183</sup> and Turkey,<sup>184</sup> lack an independent body with competence to deal with discrimination in both the public and the private sectors. Moreover, where there is a specialised body to combat discrimination, it is often dysfunctional or lacks independence, authority, sufficient resources or even a clear mandate.

169. These are based on ECRI's fifth cycle country monitoring reports; when such a report is not yet available, the results of the fourth cycle have been taken into account.

170. Annual report on ECRI's activities, covering the period from 1 January to 31 December 2014.

171. ECRI General Policy Recommendation No. 14, 22 June 2012, "Bringing anti-discrimination measures in line with relevant Council of Europe standards, notably through the establishment of independent specialised bodies to combat racism and discrimination and the development of comprehensive integration policies".

172. ECRI's fourth report on Andorra, published on 22 May 2012, § 58.

173. ECRI's third report on Armenia, published on 8 February 2011.

174. ECRI's third report on Azerbaijan, published on 31 May 2011, § 48.

175. ECRI's second report on Bosnia and Herzegovina, published on 8 February 2011.

176. ECRI's fifth report on Greece, published on 24 February 2015, § 30.

177. ECRI's fourth report on Iceland, published on 21 February 2012, § 31.

178. ECRI's fourth report on Italy, published on 21 February 2012.

179. ECRI's fourth report on Liechtenstein, published on 19 February 2013.

180. ECRI's fifth report on Poland, published on 9 June 2015, § 25.

181. ECRI's fourth report on San Marino, published on 9 July 2013, § 45.

182. ECRI's fourth report on Slovenia, published on 16 September 2014, § 33.

183. ECRI's fourth report on the Russian Federation, published on 15 October 2013, § 55.

184. ECRI's fourth report on Turkey, published on 8 February 2011, § 53.

■ The 2015 report recommended the ratification and implementation of Protocol No. 12 to the European Convention on Human Rights. Despite ECRI's systematic reminders in its country reports to member states which have not done so to ratify this treaty, Protocol No. 12 has still only been ratified by 19 member states. Malta's ratification on 8 December 2015 was the first since 2010.

■ In criminal law, most member states now have legislation against incitement to hatred, violence or discrimination (hate speech). However, such provisions are rarely invoked in practice, often because they are difficult to apply or prosecutors and judges lack expertise. Similarly, even where specific provisions punishing racially motivated violence exist, or specific aggravating circumstances relating to racist motivation are in place, there is a tendency by prosecuting authorities to try perpetrators for lesser offences which do not require proving motivation and which carry lighter penalties. As a result, the message that racist offences are unacceptable is lost.

■ LGBT people are particularly vulnerable in many member states and access to their human rights is frequently hindered by discriminatory treatment, stereotyping and intolerant attitudes. Homophobic and transphobic attitudes have been identified in many member states,<sup>185</sup> although attitudes vary significantly among and within countries. Existing anti-discrimination legislation in civil and administrative law usually includes sexual orientation as a prohibited ground, but not always gender identity. Both grounds are explicitly mentioned in the relevant legislation in Albania,<sup>186</sup> Georgia<sup>187</sup> and Hungary.<sup>188</sup> While hate speech and violence towards LGBT people are increasing, not all countries have specific criminal legislation in place punishing offences motivated by hatred on account of the victim's sexual orientation, and even fewer on account of the victim's gender identity. A number of countries are, however, drawing up national action plans on the rights of LGBT people, including with the support of the Council of Europe.

■ In some member states the discrimination of Roma remains a serious issue. The most recent ECRI reports on Hungary<sup>189</sup> and Albania<sup>190</sup> provide ample evidence that exclusion of, and prejudice against,

185. ECRI only started examining discrimination and intolerance towards LGBT people in its fifth cycle of country monitoring.

186. ECRI's fifth report on Albania, published on 9 June 2015, § 100.

187. ECRI's fifth report on Georgia, published on 1 March 2016, § 8.

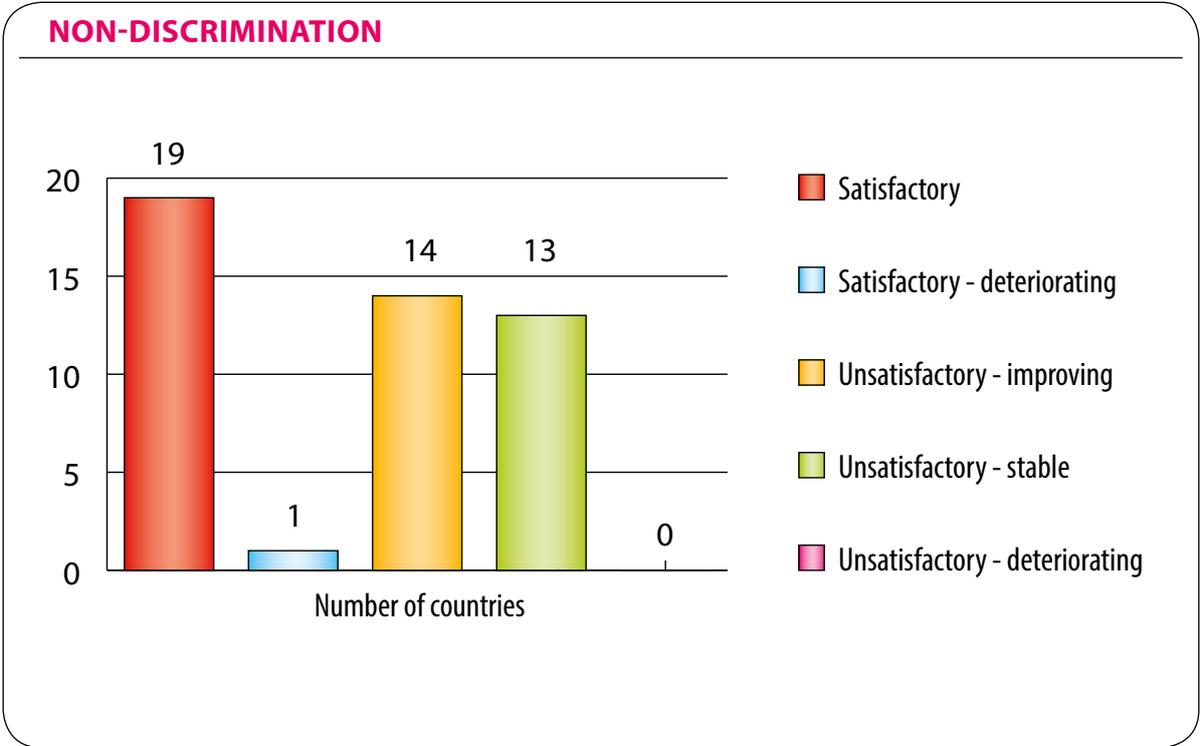
188. ECRI's fifth report on Hungary, published on 9 June 2015, § 122.

189. ECRI's fifth report on Hungary, op. cit., § 30 seq. and § 70 seq. Similar data are found in CAHROM "Thematic report on combating anti-Gypsyism, hate speech and hate crime against Roma", 9 December 2013.

190. ECRI's fifth report on Albania, op. cit., §§ 58-85.

Roma are often not systematically addressed by the authorities and may even be proliferating instead of diminishing. In Hungary, 54% of the victims of racist offences reported in recent years were Roma; the attacks took nine lives and left dozens injured.<sup>191</sup> In Albania, concerns remain particularly in the areas of education, housing and civil registration.

The often low school attendance rate of Roma in some member states has been documented not only by the Council of Europe monitoring bodies<sup>192</sup> but also by other international organisations working in this area, including the OSCE and the EU Fundamental Rights Agency, as access to quality education by this population group in general remains fragmentary.<sup>193</sup>



191. ECRI's fifth report on Hungary, op. cit., §§ 53-54.

192. ECRI's fifth report on Albania, op. cit., §§ 60-68.

193. See CAHROM "Thematic report on school attendance of Roma children, in particular Roma girls", 22 April 2013.

## Gender equality

Achieving equality between women and men is at the very heart of human rights and the Council of Europe's values. In recent years, the European Convention on Human Rights and other texts have helped to improve the legal protection of women. Gender gaps persist in too many areas, however.

Women can face intersectional forms of discrimination and the experience of female refugees or asylum seekers is just one example. As women flee their homes in search of safety or a better life, they are at greater risk of exposure to human rights violations and abuses, including violence, extortion and sexual assault. In many countries, the status of residence has become more important than any other aspect of one's identity, making it difficult for these women to access justice and effectively exercise their claim to their human rights.

Three major challenges stand out in the efforts towards achieving greater gender equality, highlighting the need to keep women's human rights high on the political agenda:

1. the gap between standards and their implementation;
2. new threats to women's human rights (e.g. sexist hate speech, online and offline) and persistent opposition to gender equality;
3. the weakening of and threats to the very existence of institutions and mechanisms promoting gender equality.

### The Council of Europe's Gender Equality Strategy

The **Council of Europe Strategy on Gender Equality** (2014-2017) provides a framework for action in the area of gender equality, around the following areas:

1. combating gender stereotypes and sexism;
2. preventing and combating violence against women;
3. guaranteeing equal access of women to justice;
4. achieving balanced participation of women and men in political and public decision making;
5. achieving gender mainstreaming in all policies and measures.

The five objectives of the strategy are intrinsically linked: violence against women is linked to sexism and gender stereotypes, and victims of violence are entitled to appropriate redress and support in accessing and obtaining justice. A stronger presence of women in decision making and positions of power would also contribute to reducing stereotyped beliefs about women's role in society.

Incorporating a gender perspective in all policies and at all levels, throughout the work and activities of the Organisation, as well as in member states, is critical to achieving *de facto* gender equality.

### Standards in the areas of gender equality and combating violence against women

**The Court** issued several judgments dealing with preventing and combating **violence against women**<sup>194</sup> and **domestic violence**,<sup>195</sup> and promoting **gender equality**.<sup>196</sup> The Court has clearly stated that gender-based violence is a form of discrimination under the Convention. The Court has also issued other judgments focusing on sex-based discrimination (Article 14) in conjunction, for instance, with the respect for private and family life (e.g. in relation to children of unmarried women, women's names, social security benefits for widowers, parental leave), the right to a fair trial (e.g. in relation to negative gender stereotypes, paternity challenge, part-time work) and the protection of property (e.g. in relation to pensions, child support, etc.).

194. See [www.echr.coe.int/Documents/FS\\_Violence\\_Woman\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf).

195. See [www.echr.coe.int/Documents/FS\\_Domestic\\_violence\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Domestic_violence_ENG.pdf).

196. See [www.coe.int/t/dghl/standardsetting/equality/03themes/access\\_to\\_justice/rev\\_Case%20LawECHR\\_compilation\\_Feb%202016%20version.pdf](http://www.coe.int/t/dghl/standardsetting/equality/03themes/access_to_justice/rev_Case%20LawECHR_compilation_Feb%202016%20version.pdf).

## Gender equality

**Violence against women** is both a human rights violation and a major obstacle to gender equality. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (**the Istanbul Convention**)<sup>197</sup> offers a broad set of policies and legislative measures to effectively respond to violence that women experience merely because they are women. Addressing violence against women as gender-based violence makes it a gender equality issue. It requires states parties to address gender stereotyping, to combat sexist attitudes and to remove discriminatory provisions from the legislative framework – all of which are the cause of the many forms of violence against women.

The Istanbul Convention is widely considered to be the most far-reaching international treaty in this field. Effective implementation by states parties is the next important step to ensuring real change. The Group of Experts on Action against Violence against Women and Domestic Violence monitors action taken on the ground to prevent all forms of violence against women, protect women victims, prosecute perpetrators and adopt and implement co-ordinated policies.

Other Council of Europe gender equality standards<sup>198</sup> include:

- ▶ **Prohibition of discrimination.** The European Convention on Human Rights and the European Social Charter clearly state the principle of non-discrimination on any grounds, including gender.
- ▶ **Asylum-seeking and refugee women.** National legislation and regulations concerning women migrants should be fully adapted to international standards. In particular, member states must (i) consider granting women who are victims of gender-based violence an independent residence status; (ii) recognise gender-based violence as a form of persecution within the meaning of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection; (iii) ensure that a gender-sensitive approach is followed when establishing women's refugee status; (iv) introduce gender-sensitive procedures, guidelines and support services in the asylum process; (v) take whatever steps are necessary to ensure full respect for the principle of *non-refoulement*.<sup>199</sup>
- ▶ **Sexism and sexist hate speech.** As a form of violence against women and girls that feeds into gender-based discrimination, sexist hate speech is a human rights violation and a serious obstacle to real gender equality. Measures must be taken to eradicate prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on "stereotyped roles" for women and men, because these roles are at the core of sexism and sexist hate speech.
- ▶ **Gender mainstreaming, gender equality standards and mechanisms.** Measures must be taken to facilitate conditions for the implementation of gender mainstreaming in all sectors. This should be pursued through the implementation of specific gender equality standards in private and family life, education, culture, economic sectors, social protection, health, including sexual and reproductive matters, violence against women, trafficking in human beings, conflict and post-conflict situations and specific situation of vulnerable groups exposed to multiple discrimination.
- ▶ **Balanced participation in political and public decision making.** Balanced participation of women and men is defined in Council of Europe standards as a minimum 40% representation of each sex in any decision-making body in political and public life. Legislative, administrative and supportive measures should be taken to achieve this target. This year, the Gender Equality Commission is monitoring the implementation of the relevant Council of Europe recommendation in this area.
- ▶ **Gender stereotyping in the media.** Measures should be taken (by both states and media outlets) to combat gender stereotyping in the media, covering issues such as the review and evaluation of gender equality policy and legislation; adoption and implementation of national indicators for gender equality in the media, promotion of good practices; accountability channels, etc.

197. See [www.coe.int/en/web/istanbul-convention](http://www.coe.int/en/web/istanbul-convention).

198. See [www.coe.int/t/dghl/standardsetting/equality/01ataglance/standards-mechanisms/Fachsheet%20Key%20standards.pdf](http://www.coe.int/t/dghl/standardsetting/equality/01ataglance/standards-mechanisms/Fachsheet%20Key%20standards.pdf).

199. See Chapter VII of the Istanbul Convention and, notably, Articles 59-61.

# INTEGRATION OF MIGRANTS

## Chapter 5 – Inclusive societies

**T**he increasing scope and speed of global migration flows is a central element of the rapid societal changes facing all member states. Integration requires efforts from the newcomers, but also from the receiving population, as they all need to be able to live together in increasingly diverse societies. In European societies facing a financial crisis and unemployment, migrants are often inaccurately portrayed as not contributing to prosperity. In societies where the economic situation is better, anti-immigrant rhetoric can still be strong and migration is portrayed as a threat to social order. In a climate of growing insecurity and fear, the association of terrorism with migrants, asylum seekers and refugees in populist propaganda, as well as more generally the rise of intolerance, hate crime and hate speech, are of increasing concern. Such challenges require a comprehensive, strategic approach to the integration and inclusion of migrants.

■ In terms of legal protection, once migrants are within the jurisdiction of a member state, their human rights need to be upheld regardless of their legal status. They enjoy the protection of the European Convention on Human Rights, the European Social Charter and, where relevant, other conventions to which the member state may be party. Of course, notwithstanding the increasingly European dimension of the issue, member states have a legitimate interest in controlling their borders. But while all migrants may not have the right to stay, they all have human rights which must be respected by all member states, including in immigration control and enforcement procedures. Once migrants arrive within the jurisdiction of a member state they are bound to respect applicable laws, which is why they need to have full access to information about their rights and obligations.

■ For those staying in the long term, coherent integration policies need to be put in place as swiftly as possible with adequate dedicated resources. These policies can only be successful if they guarantee equal and non-discriminatory access to rights and opportunities, offer a real chance for positive interaction and encourage active participation in the host society.

Local authorities are at the forefront. They need to be assisted in managing diversity through policy reviews and recommendations, peer and expert advice and examples of good practices, so that they are able to defend sensitive issues and decisions on migration and diversity and resist anti-migration pressure.

### MEASUREMENT CRITERIA

- ▶ Compliance with relevant obligations deriving from the European Convention on Human Rights as interpreted by the Court, the European Social Charter as interpreted by the European Committee of Social Rights and the relevant standards of the European Committee for the Prevention of Torture.
- ▶ States ratify and fully implement the relevant provisions of the Convention on Action against Trafficking in Human Beings, the Convention on Preventing and Combating Violence against Women and Domestic Violence, the Convention on the Legal Status of Migrant Workers and the Convention on the Recognition of Qualifications concerning Higher Education in the European Region (Lisbon Recognition Convention).
- ▶ Comprehensive integration policies are developed, with strategic and operational objectives, target values and integration indicators, and are subject to regular evaluation; relevant international bodies and the concerned persons themselves are consulted in the definition of such policies.
- ▶ Education policy promotes practical and feasible opportunities for learning the language, the culture and history of the receiving country, and supports the simultaneous preservation of migrants' mother tongues and ensures access to education for migrant children. Positive measures are implemented and assessed with regard to the linguistic integration of children, adolescents and adults from migrant backgrounds.

- ▶ Practical and legal obstacles to the recognition of academic and professional qualifications of migrants are reduced including through the full implementation of the Lisbon Recognition Convention;<sup>200</sup> legislation and employers' practices facilitate migrant workers' integration in the workplace.
- ▶ Language tests do not exclude those who would otherwise be eligible for entry, residence, work or citizenship; adult language courses are of consistent quality and are tailored to migrants' needs, including through the provision of easy-to-use teaching materials; migrants' existing language skills are valued as a basis for learning the new language; realistic and flexible levels of language proficiency are defined.
- ▶ Reception conditions are gender and child-sensitive, and ensure the human rights and dignity of all migrants, while simultaneously facilitating better prospects for integration of those who have the right to stay including through access to education.
- ▶ Media present a balanced coverage of information concerning migrants, asylum seekers and refugees, and refrain from creating or maintaining one-sided, destructive stereotypes.
- ▶ Local authorities put in place effective integration strategies, involving migrants in their elaboration and assessment.

## FINDINGS

■ In 2015, the European Committee of Social Rights examined reports from 25 states on the application of all or part of Article 19 on the rights of migrant workers and their families to protection and assistance. The committee found that in almost a third of the cases the situation was not in conformity with the Charter. This may reflect a general tightening of immigration rules in many states in recent years. The main grounds of non-conformity are discrimination in respect of remuneration and other working conditions and in respect of access to housing (nine states parties);<sup>201</sup> excessively restrictive conditions for family reunion (13 states parties);<sup>202</sup> expulsion of migrant workers on grounds that go beyond those permitted by the Charter, or with insufficient safeguards (six states

parties);<sup>203</sup> and some countries had not demonstrated that the measures taken were adequate to combat misleading propaganda in relation to emigration and immigration.<sup>204</sup> The committee also found breaches of the rights of foreigners/migrants under other provisions of the Charter, notably Article 16 (Right of the family to social, legal and economic protection), Article 17 (Right of children and young persons to social, legal and economic protection) and Article 31 (Right to housing). Few if any breaches of the Charter were found with respect to issues such as measures to facilitate the departure, journey and reception of migrant workers; co-operation between emigration and immigration countries; equal treatment of migrant workers in taxation, contributions and legal proceedings; transfer of earning and savings and mother tongue teaching. In these matters the situation in the states parties with respect to migrant workers was on the whole – with some exceptions – deemed to be satisfactory.

■ ECRI's country monitoring reports highlight difficulties for migrants in various areas of everyday life, such as reduced access to education, inadequate housing, exploitation in the labour market and limited access to and discrimination in health care. ECRI has also observed that intolerant speech by public figures and media frequently targets migrants, and that the legitimate discussion on migration and the challenges it poses is often appropriated in populist politics and election campaigning.<sup>205</sup> Migrants are wrongly blamed for taking jobs away from nationals, for overusing welfare benefits and services and for security and health threats.<sup>206</sup> ECRI's reports also show that migrants are prone to racially or religiously motivated physical attacks, and highlight the particularly vulnerable situation of irregular migrants due to their precarious status.<sup>207</sup>

■ Through the Council of Europe/UNESCO Lisbon Recognition Convention, 53 countries have committed to facilitating the recognition of refugees' qualifications, but the most recent survey shows that 70% of the states parties have taken no steps towards implementation.<sup>208</sup> Many refugees have academic and vocational education qualifications, yet many will, inevitably, carry no documentary evidence and

200. The Lisbon Recognition Convention: [www.coe.int/t/dg4/highereducation/recognition/lrc\\_EN.asp](http://www.coe.int/t/dg4/highereducation/recognition/lrc_EN.asp).

201. Conclusions 2015 and XX-4 (2015), Article 19§4: Armenia, Cyprus, Georgia, Germany, the Netherlands, Norway, Slovenia, Sweden and Turkey.

202. Conclusions 2015 and XX-4 (2015), Article 19§6: Armenia, Austria, Cyprus, Estonia, Georgia, Latvia, the Netherlands, Serbia, "the former Yugoslav Republic of Macedonia", Turkey, Germany, Spain and the United Kingdom.

203. Conclusions 2015 and XX-4 (2015), Article 19§8: Armenia, Germany, Moldova, Serbia, Slovenia and Turkey.

204. Conclusions 2015 and XX-4 (2015), Article 19§1: Andorra, Georgia, Turkey, Spain and the United Kingdom.

205. See, for example, ECRI's fifth reports on the Czech Republic (§§ 29-30), Greece (§§ 34, 38, 40-41) and Norway (§ 22).

206. See ECRI's fifth report on Hungary (§ 29).

207. See ECRI's fifth report on Greece (§§ 62, 65-66 and 135-137).

208. Council of Europe/UNESCO Committee of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region, "Monitoring the Implementation of the Lisbon Recognition Convention – Preliminary Draft Report", document DGII/EDU/HE (2016) 03, 18 December 2015, page 76.

are unable to secure such evidence from the awarding institution. Integration can be accelerated by a refugee being able to use an existing qualification for employment or other activity, providing motivation, a potential source of income, and a sense of belonging to society – paths that lead away from radicalisation, towards integration and towards being of benefit to the host country and ultimately their country of origin.

■ Developing language skills is central to integration. However, few current programmes or policies recognise, and therefore address, the specific and wide-ranging needs of migrants. Indeed, some current policies hamper integration – for example, in 23 Council of Europe member states, migrants must pass a language test to obtain a residence permit; in 26 member states they must reach a set level of language proficiency to be eligible for citizenship.<sup>209</sup> The ability to communicate is paramount, but success in a test does not guarantee competence. One-size-fits-all courses and tests, and inappropriate use of the Council of Europe’s language proficiency scales, may exclude migrants unfairly and contravene international standards.

■ Asylum-seeking children, whether accompanied or not, are entitled under international and Council of Europe law<sup>210</sup> to access primary and secondary education. The Council of Europe and other international organisations have repeatedly stated that non-discrimination applies equally to migrants and that education should be seen not only as a right but also as a means to the full and effective realisation of human rights.<sup>211</sup> But children often face difficulties in practice, especially when nearing the age of majority or otherwise transitioning to adulthood. Many also face legal barriers.

■ Hate speech against members of these groups fuels racist and extremist sentiments which violate human rights in general, and supports and encourages populist and extreme political responses. Priorities for the Council of Europe’s No Hate Speech Movement

2016-17 campaign include combating hate speech against refugees. The Council of Europe’s youth stakeholders are already re-orienting the programme towards this priority with the goal of securing political support to reclaim this issue as central to human rights and citizenship. It is also developing counter-narratives across several hate speech “themes” tailored specifically to young people, with a special section covering hate speech targeting refugees and migrants.

■ In the context of the new Council of Europe Strategy on the Rights of the Child, the Council of Europe will support member states in taking a co-ordinated child-rights-based approach, bearing also in mind the Committee of Ministers’ recommendations on life projects for unaccompanied migrant minors,<sup>212</sup> on strengthening the integration of children of migrants and of immigrant background<sup>213</sup> and on the nationality of children.<sup>214</sup> Special attention will be paid to the situation of unaccompanied migrant children and the link between migration and the trafficking of children.

209. See the report by C. Extramiana and P. Van Avermaet on “Language requirements for adult migrants in Council of Europe member states: Report on a survey”, Council of Europe Language Policy Division (available on [www.coe.int](http://www.coe.int)).

210. Including, but not limited to Article 26 of the Universal Declaration of Human Rights; Article 2 of the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 17 of the revised European Social Charter; Article 29 of the UN Convention on the Rights of the Child; Article 22 (1) of the Refugee Convention.

211. See the report of the UNHCR consultative meeting on “Challenges faced by young refugees and asylum seekers in accessing their social rights and their integration, while in transition to adulthood”, held in Strasbourg, 17-18 November 2011, DJS/CM Refugees (2011)7, available at: [https://www.coe.int/t/dg4/youth/Source/Resources/Documents/2011\\_Report\\_CM\\_Young\\_Refugees\\_Asymylum\\_Seekers\\_en.pdf](https://www.coe.int/t/dg4/youth/Source/Resources/Documents/2011_Report_CM_Young_Refugees_Asymylum_Seekers_en.pdf). See also the report on “Protecting children affected by the refugee crisis: A shared responsibility – Secretary General’s proposals for priority actions”, SG/Inf(2016)9 final, p.9.

212. Recommendation CM/Rec(2007)9.

213. Recommendation CM/Rec(2008)4.

214. Recommendation CM/Rec(2009)13.

## Protection of migrants and asylum seekers: states' main legal obligations under Council of Europe conventions<sup>216</sup>

Migrants and asylum seekers enjoy the protection offered by the Council of Europe's relevant instruments while in the states parties' jurisdiction, regardless of their nationality or legal status. The European Convention on Human Rights as interpreted by the European Court of Human Rights, the European Social Charter as interpreted by the European Committee of Social Rights, and the European Committee for the Prevention of Torture impose legal obligations on member states in the following areas.

**1. Access to territory and reception** – In exercising control of their borders, member states must ensure that the principle of *non-refoulement* is effectively respected. They shall not expose the person concerned to a real risk of the death penalty, torture or inhuman or degrading treatment or punishment and should refrain from returning a person to a transit country that does not offer sufficient guarantees against *refoulement*. Collective expulsions are not allowed. In reception centres, refugees should be guaranteed adequate conditions, access to health care and food.<sup>217</sup>

**2. Deprivation of liberty** – The detention of migrants is only lawful if used as an exceptional measure and if it is decided and carried out in accordance with procedures prescribed by precise and accessible legislation.

- ▶ The people concerned have the right to be informed promptly, in a language they understand, of the nature of their detention, the reasons for it and the process for reviewing the legal decision for their detention.
- ▶ They should be provided with legal advice and have access to a doctor from the very beginning, and throughout, their detention.<sup>218</sup>
- ▶ They should be able to challenge both the lawfulness and the conditions of their detention. Judicial review should be carried out speedily by an independent and impartial judicial body.<sup>219</sup>
- ▶ The facilities used for immigration detention should be suited to migrants' specific situations.<sup>220</sup>
- ▶ The detention of families with children should be limited as far as possible and all the necessary steps should be taken to effectively preserve their right to family life.<sup>221</sup>

**3. Living conditions** – Member states should ensure minimum decent living conditions for migrants. They should be granted a safe and clean shelter, food, clothing and emergency medical assistance.<sup>222</sup>

215. This section is a summary of the Secretary General's guidelines to member states. For the full text, see <http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046e355>.

216. See, for instance, the CPT standards, CPT/Inf(2002)1 rev. 2015, *M.S.S. v. Belgium and Greece*, No. 30696/09, ECHR, 21 January 2011 and *Hirsi Jamaa and Others v. Italy*, No. 27765/09, ECHR, 23 February 2012.

217. See *Rusu v. Austria*, No. 34082/02, ECHR, 2 October 2008; *Gebremedhin v. France*, No. 25389/05, ECHR, 26 April 2007; *Mouisel v. France*, No. 67263/01, ECHR, 21 May 2003; *D.B. v. Turkey*, No. 33526/08, ECHR, 13 October 2010. See also CPT standards, op. cit., §§ 30-31, 81-82 and 87.

218. See *Suso Musa v. Malta*, No. 42337/12, ECHR, 23 July 2013. See also the Committee of Ministers "Twenty Guidelines on Forced Return" (2005) (Guideline 9, "Judicial remedy against detention").

219. See *Saadi v. Italy*, No. 37201/06, ECHR, 28 February 2008; *Lutanyuk v. Greece*, No. 60362/13, ECHR, 25 June 2015; *M.S.S.*, op. cit. See also CPT standards, op. cit., § 29 and §§ 87-100.

220. See *Popov v. France*, No. 39472/07 and 39474/07, §147, ECHR, 19 January 2012; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, ECHR, 12 January 2007.

221. See *M.S.S.*, op. cit., as well as decisions of the European Committee of Social Rights (ECSR), notably *Conference of European Churches (CEC) v. the Netherlands*, No. 90/2013, Resolution CM/ResChS(2015)5 on 15 April 2015; *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, No. 86/2012, Resolution CM/ResChS(2015)4 on 15 April 2015; *Defence for Children International (DCI) v. Belgium*, No. 69/2011, ECSR, 7 December 2011; *International Federation of Human Rights Leagues (FIDH) v. France*, No. 14/2003, ECSR, 3 November 2004.

## Protection of migrants and asylum seekers: states' main legal obligations under Council of Europe conventions

**4. Access to procedures** – Persons seeking asylum must have access to fair procedures.

- ▶ They have the right to be informed, in a language they understand, about the procedural steps to be followed and their entitlements, as well as the right to have interviews carried out by qualified staff.
- ▶ Individual applications must be examined objectively and decisions should be taken on a case-by-case basis.
- ▶ The expulsion or extradition of asylum seekers who face the potential risk of torture or ill-treatment if returned to their country of origin is prohibited as long as such a risk exists. Expulsions are also prohibited where they would constitute a disproportionate interference with the applicant's family life.
- ▶ Asylum seekers whose applications are rejected shall have the right to have the decision reviewed.
- ▶ When there are substantial grounds for believing that a removal decision could lead to a real risk of the death penalty, torture or ill-treatment, the remedy against the removal decision shall have a suspensive effect.<sup>223</sup>

**5. Additional safeguards for vulnerable groups** – The particular needs of vulnerable groups of people such as children; victims of torture, sexual violence or human trafficking; those with mental or physical disabilities, and other individuals at particular risk, shall be duly taken into account at all stages. Unaccompanied minors applying for asylum shall be protected from all forms of violence, abuse and exploitation and shall not be held in centres that are ill-adapted to the presence of children. Special safeguards – including the need to appoint a guardian or legal representative – should be ensured for them.<sup>224</sup>

**6. Forced return** – People subject to a deportation order shall not be physically forced to board a means of transport or assaulted as a punishment for refusing to do so. Any unlawful act of that kind shall be properly investigated or otherwise remedied by the authorities. The use of force shall only be necessary and reasonable.<sup>225</sup>

222. See *De Souza Ribeiro v. France*, No. 22689/07, ECHR, 13 December 2012; *Alim v. Russia*, No. 39417/07, ECHR, 27 September 2011; *Abdolkhani and Karimnia v. Turkey*, No. 30471/08, ECHR, 22 September 2009; *Mikolenko v. Estonia*, No. 10664/05, ECHR, 8 October 2009 and M.S.S., op. cit.

223. See *Mubilanzila Mayeka and Kaniki Mitunga*, op. cit.; *Rahimi v. Greece*, No. 8687/08, ECHR, 5 April 2011; *Aden Ahmet v. Malta*, No. 55352/12, ECHR, 23 July 2013; *Popov v. France*, op. cit. See also CPT standards, op. cit., §97.

224. See for example M.S.S., op. cit. and *Savridin Dzhurayev v. Russia*, No. 71386/10, ECHR, 25 April 2013.

# EDUCATION AND CULTURE FOR DEMOCRACY

## Chapter 5 – Inclusive societies

**T**here is robust evidence which demonstrates that the formal education system can be used to address the challenges currently facing European societies. Formal education has several purposes, including preparation for life as active citizens in democratic societies; personal development; preparation for sustainable employment; and the development and maintenance, through teaching, learning and research, of a broad, advanced knowledge base within society.<sup>225</sup> These four purposes are not independent of one another. Equipping pupils and students with the competences that are needed for life as active democratic citizens (analytical and critical thinking skills, communication skills, co-operation skills, flexibility, respect for others, responsibility, etc.) also contributes to their personal development and provides them with competences that are highly valued by employers in the workforce.

■ But the role of education needs to be seen in the larger context of increasing globalisation and prevailing and forecast socio-economic conditions. As noted in the 2015 report, “the pace and scale of intolerance, radicalisation and violence in Europe today demands an urgent response, and education has an important role to play in this respect”.<sup>226</sup> Despite the challenges, education systems need to continue to be developed as a public good with access to quality education for all students, adapted to their needs as appropriate, and ensuring that public responsibility extends to guaranteeing that students can fully participate in education for democracy.

225. Council of Europe Committee of Ministers Recommendation CM/Rec(2007)6 to member states on the public responsibility for higher education and research.

226. Council of Europe (2015), “State of democracy, human rights and the rule of law in Europe, Report by the Secretary General of the Council of Europe”, (2015 report), Council of Europe, Strasbourg.

### Education for democratic citizenship/ human rights education: competences for a democratic culture

■ One of the main purposes of education is to prepare individuals for life as active citizens in democratic societies.<sup>227</sup> One way in which citizens’ commitment to and engagement with democratic processes and institutions may be enhanced is through the formal education system. Appropriate educational input and practices can boost democratic engagement. Likewise, there is evidence that educational interventions can be used to counter prejudice and intolerance towards other national, ethnic and religious groups, and to reduce support for violent extremism in the name of religion (especially when that education is delivered in collaboration with local partners and community organisations).

■ Democratic citizenship and human rights education are therefore increasingly important in addressing discrimination, prejudice and intolerance, and thus preventing and combating violent extremism and radicalisation in a sustainable and proactive way. They also make an essential contribution towards building inclusive societies, within the framework that is provided by democratic institutions and the respect for human rights. This recognition is not new: it builds on the conclusion drawn in the 2014 report that low investment in democratic culture and education is among the main challenges to democracy.<sup>228</sup>

■ However, if education is to be used to reverse the current declines in voter turnout and political trust, to reduce levels of hate speech, intolerance

227. Recommendation CM/Rec(2007)6 on the public responsibility for higher education and research.

228. “State of democracy, human rights and the rule of law in Europe, Report by the Secretary General of the Council of Europe” (2014 report).

and prejudice, and to reduce levels of support for violent extremism and terrorism, co-ordinated action is required at both national and European levels. Action is needed at the national level because national ministries of education and national legislatures are responsible for setting the frameworks within which the contents of national curricula are determined and for making available the financial, material and human resources required by educational institutions for delivering these curricula. Action at the European level also has a role to play by bringing together resources and expertise at an international level, facilitating the exchange of good practices between member states, creating synergies beyond those that individual member states operating in isolation can achieve, and offering members states a range of materials and resources that can be used to augment their national curricula. The Council of Europe is especially well placed to fulfil this role through its long history of work and expertise in education for democratic citizenship and human rights education, and its role in co-ordinating member states' activities within these areas.

## Culture

■ Culture can have a strong effect on democratic security at different levels. Culture allows people to recognise the importance of diversity, thereby increasing their openness towards other groups in society, and is an essential vehicle for freedom of expression. Creating shared narratives through culture, such as cinema, literature or music, can be a powerful means of reinforcing cohesion in society, notably in the current climate of fear.

■ Contemporary societies are becoming increasingly more pluralistic and heterogeneous, in which diverse identities, ethnicities, cultures and religions must live together. Cultural diversity is an asset within a society, as acknowledged by the UNESCO Universal Declaration on Cultural Diversity, but it is simultaneously an educational, social and political challenge. Therefore, a society's model of integration and social cohesion needs to be constructed with an intercultural perspective.

## MEASUREMENT CRITERIA

- ▶ Measures have been taken to guarantee equal opportunities for access to education at all levels while paying particular attention to vulnerable groups.
- ▶ There is mandatory provision of education for democratic citizenship and human rights education, both offline and online.

- ▶ Curricula identify tacit elements related to democracy, human rights and respect for diversity, especially in the subjects of history and religion.
- ▶ Implementation of the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education,<sup>229</sup> specific measures have been taken to increase the level of priority of education for democratic citizenship and human rights in education policies, with the appropriate status given at the national level to ensure its place within the curriculum, and a systematic formal national assessment for the effective implementation of policies in the framework of education for democratic citizenship using appropriate evaluation tools and instruments to ensure that citizenship education, like other subject areas, is adequately assessed.
- ▶ Skills for promoting social inclusion, valuing diversity and handling differences and conflict are part of teachers' training as well as of the teaching and learning process in schools.
- ▶ Appropriate infrastructure (for example, museums, cinemas or live performance venues) and institutions are supported to encourage active cultural participation.
- ▶ Cultural policy promotes diversity in cultural institutions and industries.

## FINDINGS

■ The number of countries where education for democratic citizenship is not an obligatory subject at any age remained unchanged in recent years, and the quality of education for democratic citizenship and human rights education varies greatly between and within countries.

■ Only 20% of member states have a cultural environment that can be considered very vibrant in terms of cultural participation, the existence of a cultural economy/programme and cultural diversity. Few countries show strong performances across all three components, whereas most states exhibit active cultural participation but often lack cultural diversity.<sup>230</sup>

■ It is recognised that one of the most difficult issues in attempting to explain the European agenda, or the international agenda in global citizenship education is the evaluation and assessment of the competences of learners. However, the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education suggests that member states should develop criteria for the evaluation of

229. Recommendation CM/Rec(2010)7.

230. Based on analysis of the data from The Indicator Framework for Culture and Democracy created by the Hertie School of Governance for the Council of Europe, 2015.

the effectiveness of programmes on education for democratic citizenship and human rights education. Furthermore, feedback from learners should form an integral part of all such evaluations.<sup>231</sup>

■ Even though most European countries recognise the importance of the policy of integrating citizenship education into their education systems, considerable progress is needed in order to meet the current challenges in this area. For instance, citizenship education appears to be less implemented in school-based vocational training as compared to general education tracks. Additionally, political prioritisation is often given to “education for employability”, as a result of high unemployment rates in many European countries. However, it is necessary that a balance is maintained between education for employability and education on democratic citizenship to avoid promoting a concept of students as a labour force, rather than as active citizens.<sup>232</sup>

■ Co-operation among member states in this field can be instrumental in addressing the common challenges Europe is facing, by:

- ▶ providing concrete evidence and data in the area of education for democratic citizenship and human rights on which to base policy recommendations;
- ▶ exchanging innovative practices both in terms of the content of programmes and the training and guidelines provided;
- ▶ facilitating peer-to-peer learning and educational exchanges among the member states;
- ▶ developing synergies.

■ While taking stock of the present situation, it seems highly desirable to maintain the political momentum by making this a long-term commitment. In the framework of our changing societies and the new requirements arising therein, the charter could be revisited with the aim of updating this instrument to make it stronger and binding, in the form of a framework convention on education for democracy.

### **The Reference Framework of Competences for Democratic Culture (CDC)**

■ While democracy cannot exist without democratic institutions and laws, such institutions and laws cannot work in practice unless they are grounded in a culture of democracy, in other words in democratic values, attitudes and practices. Developing skills, or competences, for democratic culture must

be at the heart of any education policy and practice. Competences that underpin a democratic culture include a commitment to the rule of law and human rights and to the public sphere, a conviction that conflicts must be resolved peacefully, acknowledgement of and respect for diversity, a willingness to express one’s own opinions as well as to listen to the opinions of others, a commitment to decisions being made by majorities, a commitment to the protection of minorities and their rights, and a willingness to engage in dialogue across cultural divides. This is useful in itself, but especially relevant as societies adapt to the arrival of migrants, refugees and asylum seekers.

■ The culture of democracy is based on the values of human rights and democracy that need to be promoted through education in a more systematic and sustainable way. Teaching methodologies must be relevant to learners and rooted in daily life. With violent conflicts infringing on our everyday reality teachers need to be prepared to engage their students in exploring, analysing and debating emotive and controversial issues in a constructive way.

■ For this reason, the Council of Europe initiated a project on competences for democratic culture (CDC) in 2014. This project was designed to provide guidance and advice to educational policy makers and practitioners on how to use formal education systems for the purposes of enhancing the democratic competences of children and young people. The project has subsequently been incorporated into the Council of Europe’s Action Plan on The Fight against Violent Extremism and Radicalisation Leading to Terrorism in 2015.

■ The CDC project has developed a new reference framework that can be used by formal education systems at all levels (preschool, primary, secondary and higher education) to equip pupils and students with the competences (the values, attitudes, skills, knowledge and critical understanding) which they need to participate effectively and appropriately in democratic culture – in other words, the competences that enable individuals to participate in democratic discussions and debates; to participate in respectful intercultural dialogue with others; to oppose hate speech, intolerance, prejudice and discrimination; to comprehend the intended purposes of propaganda (whether encountered on the Internet or through other sources) and to withstand its effects; and to respect the fundamental values of democracy, human rights and the rule of law.

■ The CDC project has developed a model of 20 core competences which need to be acquired by children and young people. It has also developed sets of descriptors for translating all 20 competences into concrete educational outcomes. These will be supported by documents explaining how the CDC

231. CM/Rec(2010)7, § 11.

232. Council of Europe (2014), “State of democracy, human rights and the rule of law in Europe, Report by the Secretary General of the Council of Europe”, (2014 report).

framework (the model and the descriptors) can be used to inform curriculum development, the design of programmes and methods of teaching and learning, and the development of appropriate forms of assessment. These materials can be used by member states to review, revise or renew their national curricula, to enable them to tackle more effectively challenges to democracy and social cohesion.

■ The CDC framework has relevance not only to formal education but also to non-formal and informal education. However, formal education has the most critical role to play in addressing the current challenges as it alone has a public responsibility to reach out to every pupil and student within a country to ensure that they all acquire the competences that are required for life as active citizens in democratic societies.

■ If implemented in national education systems by national ministries of education, the CDC framework can help to address all of the current pressing political challenges. The benefits of integrating the CDC

framework into a national education system will be that pupils and students will acquire the appropriate competences (*inter alia*, values, attitudes, skills, knowledge and critical understanding) that enable them to appreciate democratic processes. Pupils and students will be integrated into a culture of democracy and will be empowered as active and responsible citizens to oppose hate speech, intolerance, prejudice and discrimination within society. They will appreciate and value human dignity, human rights, cultural diversity, democratic processes and the peaceful resolution of conflicts. Pupils and students will be empowered to participate in respectful intercultural dialogue with others who have national, ethnic and religious affiliations that differ from their own.

■ In addition, young people will possess precisely the values, attitudes, skills, knowledge and understanding that are welcomed and valued by employers. It is important to note that the CDC framework has widespread utility, is flexible and can be readily adapted for use in different contexts.

# ENGAGING YOUNG PEOPLE

## Chapter 5 – Inclusive societies

In the current economic and social context, the lack of perspectives and opportunities is an obstacle for young people in reaching the autonomy and independence necessary for a self-determined life. In order to counter disengagement and extremist reactions, youth policy must support young people in accessing their rights and help them to realise their full potential as autonomous members of society. Particular attention should in this context be paid to vulnerable youth groups, notably those affected by armed conflicts, young refugees (including unaccompanied minors), asylum seekers and internally displaced young persons.

Young people have the right to be properly included in, and have a real impact on, society, including by contributing to decision making, for instance through youth organisations and in national youth councils. National youth councils, in particular, can actively contribute and provide added value to the development of public youth policy.<sup>233</sup> Their development – or their creation where they do not exist – should be facilitated. Effective youth policies are also a means to ensure better implementation of the provisions of the European Social Charter that are particularly relevant to young people, such as health, education, employment, housing, free movement and mobility and non-discrimination. Youth policy should actively prevent the discrimination of young people based on their age or any other grounds, and ensure the full inclusion of youth in society.

### MEASUREMENT CRITERIA

- ▶ Appropriate structures and mechanisms are established and supported at local, regional and national levels to enable active participation of young people.
- ▶ Preventing and counteracting all forms of racism and discrimination on any ground constitute a clear priority of youth policy.
- ▶ Youth policy supports initiatives of young people and their organisations with regard to conflict prevention and management, as well as post-conflict reconciliation.

233. See Recommendation Rec(2006)1 of the Committee of Ministers to member states on the role of national youth councils in youth policy development.

- ▶ Instances of hate speech are regularly and systematically reported.
- ▶ Young human rights activists are trained to sustainably promote action against hate speech.
- ▶ Youth policy has a special focus on supporting the integration of excluded young people.
- ▶ Youth policies facilitate access to information and counselling services.
- ▶ Youth policy seeks to support young people's autonomy, as well as their access to decent living conditions.
- ▶ Practical measures and tools are established in order to enable as many young people as possible to have access to non-formal education and youth work, as a means of facilitating their autonomy and transition from education to employment.

### FINDINGS

No monitoring mechanisms are available to thoroughly assess the implementation of national youth policies or the enforcement of relevant legal instruments, but international reviews of national youth policies, youth advisory missions and peer coaching take place regularly and systematically. In addition, a survey of the situation relating to national youth councils, in line with the implementation of Recommendation Rec(2006)1 of the Committee of Ministers to member states on the role of national youth councils in youth policy development, showed that a great majority of member states have established an autonomous, democratic and independent body representing youth organisations, but there are still countries in which such structures do not exist. As it stands, no member state recognises youth structures as equal partners in decision making.

The challenges identified in the setting up or operation of national youth councils include: lack of a national youth policy; lack of funding and resources for youth issues; lack of co-operation between the youth branches of political parties and youth platforms; and the internal political situation (including ethnic conflicts).<sup>234</sup>

234. Study on the situation of National Youth councils in Europe, document CMJ(2016)1, 13 January 2016.

# PROPOSED ACTIONS AND RECOMMENDATIONS

Chapter 5 – Inclusive societies

## TREATMENT, RIGHTS AND INTEGRATION OF MIGRANTS

- ▶ strengthen co-operation between Council of Europe monitoring bodies with a view to following more closely the honouring of commitments and obligations by member states with respect to the rights of migrants, asylum seekers and refugees;
- ▶ promote exchanges of good practice on the reception of migrants, asylum seekers and refugees and the integration of newcomers at national, regional and local level;
- ▶ train civil servants, police and other officers on the human rights of migrants, including irregular migrants, and reinforce measures aimed at the prevention of trafficking in human beings and the protection of victims in this particular context;
- ▶ ensure that special measures and safeguards are in place for asylum-seeking and refugee, including unaccompanied, children;
- ▶ aim at early integration measures for newcomers, design comprehensive policies and develop strategies for their rapid implementation; pay particular attention to the situation of migrant women and children, and take steps to prevent migrants from falling victim to trafficking;
- ▶ encourage all member states to ratify and effectively implement the Council of Europe's Istanbul, Lanzarote and anti-trafficking conventions;
- ▶ call on the states parties to implement fully Article VII of the Lisbon Recognition Convention and send clear supporting signals to national recognition authorities and education institutions that refugees' qualifications should be recognised as fairly and flexibly as possible; lay out, by the end of 2016, a road map, identifying solutions to the convention's non-implementation drawing on existing good practice, with the goal of submitting a recommendation to states parties; encourage states that are not parties to sign and ratify the convention;
- ▶ develop a targeted reference instrument to serve as a template for volunteers and NGOs which can be adapted for use in different linguistic settings and social contexts, as part of wider linguistic integration programmes to ensure that they address the specific needs of migrants and refugees.

## NON-DISCRIMINATION

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- ▶ secure the efficient implementation of the Council of Europe Action Plan on Building Inclusive Societies (2016-2019) and the Thematic Action Plan on the Inclusion of Roma and Travellers (2016-2019).

## SOCIAL RIGHTS

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- ▶ encourage effective follow-up by the member states of the conclusions of the European Committee of Social Rights, as provided in the 2014 “Turin Process” Action Plan;
- ▶ encourage further ratifications by member states of the revised European Social Charter, including the acceptance of the collective complaints procedure.

## HATE SPEECH

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- ▶ promote national campaigns in all member states;
- ▶ update the definition of hate speech and develop and disseminate tools and mechanisms for reporting hate speech;
- ▶ develop and co-ordinate initiatives to combat hate speech among and by political forces in co-operation with the No Hate Parliamentary Alliance.

## DEMOCRATIC CITIZENSHIP EDUCATION

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- ▶ review the Council of Europe’s activities on Democratic Citizenship Education and Human Rights Education (DCE/HRE), evaluate progress and identify and share best practice, as well as assess the need for turning the current Charter on DCE/HRE into a binding legal instrument;
- ▶ improve the visibility for DCE/HRE in school curricula, by supporting national co-ordination mechanisms for DCE/HRE and by promoting comprehensive and sustainable national approaches;
- ▶ endorse the Council of Europe Reference Framework of Competences for Democratic Citizenship, as a key part of any government’s response to the challenges facing our societies; invite member states to make full use of the Reference Framework by piloting and integrating it into the national education systems.

## SAFE SPACES

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- ▶ develop a “safe spaces” project around teaching controversial issues, with a view to drawing up guidelines for use in schools and other formal and non-formal education settings that allow teachers and pupils to address difficult and controversial issues relating to faith, culture and foreign affairs, while respecting each other’s rights and upholding freedom of expression.



The past 12 months have seen a gear shift in Europe's security concerns. Recent terrorist attacks have sent a shockwave through our societies. Unco-ordinated responses to the migrant crisis have sustained chaos at our borders. Combined with economic uncertainty, this is creating fertile ground for nationalists and xenophobes who seek to exploit public anxiety. Such developments are posing serious problems for our shared security.

This is the third annual report of the Secretary General on the state of democracy, human rights and the rule of law. The report assesses the extent to which the Council of Europe's member states are able to make the building blocks of democratic security a reality and exposes Europe's democratic shortcomings, which require immediate attention. The report also highlights pan-European trends and areas for joint action, where key recommendations have been made.

[www.coe.int](http://www.coe.int)

The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.