

A RESPONSE TO THE EUROPEAN COMMISSION CONSULTATION ON RULE OF LAW IN THE EU

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About our contribution

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

Liberties, together with its members, has been carrying out advocacy, campaigning and public education activities to explain what the rule of law is, what the EU and national governments are doing to protect or harm it and to gather public support to press leaders at EU and national level to fully respect, promote and protect our basic rights and values. We assist our members to alert EU-decision makers on challenges to the rule of law at national level as well as contributing policy papers to help EU and national policy makers strengthen the rule of law, democracy and fundamental rights in the EU. Among others, we [contributed](#) to the Commission's reflection process initiated by the Communication 'Further strengthening the rule of law within the Union'.

This contribution is a response to the European Commission's [consultation](#) feed into its first Annual Rule of Law Report. It builds on submissions provided by Liberties' members in:

- Bulgaria (Bulgarian Helsinki Committee)
- Croatia (Centre for Peace Studies)
- Hungary (Hungarian Civil Liberties Union)
- Italy (Italian Coalition for Civil Liberties and Rights and Associazione Antigone)
- Poland (Polish Helsinki Foundation for Human Rights)
- Romania (The Association for the Defence of Human Rights in Romania – the Helsinki Committee)
- Spain (Rights International Spain)
- the Netherlands (Netherlands Committee of Jurists for Human Rights).

This contribution offers an overview of key challenges and trends identified by Liberties on the basis of our contributing members' submissions. Full country submissions are included as received from our respective members for Bulgaria, Croatia, Italy, the Netherlands, Romania and Spain, as an annex to this document. Our members in Poland and Hungary are submitting their contribution to the con-

sultation separately – the latter as a joint submission together with other national NGOs.

Liberties promotes a broad understanding of the rule of law, as a principle which encompasses all values enshrined in Article 2 of the Treaty on the European Union. In this respect, we welcome the Commission’s invitation to stakeholders to report, in the framework of this consultation, on challenges to democratic pluralism – including media freedom and civic space. We also believe that the rule of law further requires that authorities fulfil their duty to respect and protect fundamental rights. The rule of law is not merely about defending individuals from abuse. Its purpose is to allow all members of society to develop to their full potential and participate actively in social,

economic and democratic life. We therefore encouraged our members to also report on other systemic fundamental rights issues they identified in their country.

With a view to matching consultation requirements and ensure coherence, members were invited to structure their submissions in line with the Commission’s [consultation questionnaire](#). Members were left free to identify recent developments they deemed relevant that fall within the focus of their organisation’s work. The information provided, as well as the positions and opinions expressed in connection to the issues reported on, build on our members’ autonomous monitoring and reporting work at national and international level.

Overview of trends: what emerges from our members' submissions

Justice systems: independence, quality and efficiency on the line

All our contributing members raised serious issues around the independence, quality and efficiency of the justice system in their submissions.

Submissions report abundant evidence showing that the dismantling of **judicial independence** is close to complete in **Poland** and that far-reaching retrogressive measures, which would further subject the judiciary to the political influence of the ruling party, is on its way in **Hungary**.

Our members in **Bulgaria**, **Romania** and **Spain** raise serious concerns over the **independence and autonomy of the prosecution service** – in particular over the way the prosecutor general is appointed in Bulgaria and Spain and the ineffective subordination of prosecutors to their hierarchical superiors in Romania. In these countries, our members also report concerns over **judiciary councils** – the bodies supposed to ensure the independent delivery of justice. Issues reported by our members in **Bulgaria** and **Spain** relate to the **appointment and composition of the body**, while our member in **Romania** refers to **abusive practices by the members of the judiciary council** aimed at obstructing the body's work. Our Spanish member further points to

systemic issues raised by international monitoring bodies on the appointment of **higher ranks of the judiciary**.

Our members also point to issues concerning the system for the **allocation of cases in courts**, described as problematic and non-transparent in **Bulgaria** and **Poland** and as ineffective in **Romania**. On this point, our Dutch member reports a good practice recently introduced in **the Netherlands**.

In **Bulgaria** and **Romania**, our members report a number of public scandals and protests undermining the **perception of the independence of the judiciary**, while **smear campaigns against the judiciary** continue in **Poland**.

Our member in **Romania** also raises concerns over magistrates' accountability and financial treatment, questioning the **inefficient regime of liability of magistrates** for errors committed during service and the existing **special pension regime**.

As regards the **quality of justice**, the **inefficiency and lack of sustainability of legal aid schemes** is seen as concerning in most of our contributing members' submissions. Our members in **Croatia**, **Italy** and **Spain** highlighted persistent issues regarding the conditions to be granted legal aid, as well as,

together with our member in **Romania**, the **inadequacy of financial resources** meant to cover free legal assistance – and the impact this has on participating lawyers and, in turn, on the quality of the service. Our Dutch member raises concerns about discussions on reform of the legal aid system in **the Netherlands**, as part of a broader pilot system that may allow for significant changes to the judicial system with little parliamentary oversight. In **Bulgaria** – where the flawed legal aid system is coupled with the **increases in court fees** – this reportedly results in restrictions on access to justice including for victims of discrimination and in obstacles to NGOs wishing to carry out litigation. In **Poland**, too, our member raises serious concern over changes in the court fees regime, in particular for conciliatory proceedings.

Our members in **Bulgaria, Italy, Poland, Romania** and **Spain** also point to an **endemic lack of resources** affecting the quality of the justice system. This is a particular concern for our Spanish member in the context of the COVID-19 emergency, because the latter exposes the courts to an even greater backlog once judicial activities will be resumed. In **Poland**, our member reports of almost 800 unfulfilled judicial positions due to a decision by the Justice Ministry to suspend competitions – leading to chronic shortages in judicial staff. Our Dutch member shares a promising practice from **the Netherlands** where a system of burden sharing for hearings has been introduced to avoid overloading particular courts.

Other issues are highlighted by our contributing members as significantly affecting the

quality of justice in particular in **criminal proceedings** – one being the **alarming use of pre-trial detention**, including its impact on the right to a remedy on decisions to deprive individuals of liberty (reported in **Bulgaria** and in **Poland**) and its disproportionate application to marginalised minorities such as Roma (reported in **Spain**); and the other being the poor implementation of human rights and EU law standards on **procedural rights** for persons suspected or accused of a crime pointed out by our members in **Italy** and **Spain**.

Our members in **Italy, Poland** and **Spain** alert that **excessive length of proceedings** continues to seriously affect the **efficiency of the justice system**, also due to the lack of resources as mentioned above. Our member in **Romania** also reports persisting delays in delivering justice in certain types of proceedings as well as **delays in delivering the motivation of judgements** which seriously affect the enforcement of judgements. Our member in **Bulgaria** reports severe delays in serving justice in particular in cases of serious allegations of human rights violations.

No real steps forward on eradicating corruption

The introduction of **EU rules on the protection of whistle-blowers** is broadly seen as a positive push for the fight against corruption. In **Italy**, our members welcome the national transposition law. Other countries seem however to fall short of implementing new standards, such as **Croatia, Poland** and **Romania**.

But more generally the situation does not seem to be improving. **Hungary** and **Romania** were found by Transparency International to be the first and second most corrupt countries in the EU in their latest report – with our member in **Romania** pointing in particular at corruption risks in the **health sector** and in connection to **political campaigning**. Our members equally point to persisting **obstacles to investigation and prosecution of high-level corruption cases**, also due to immunity regimes for government members (**Romania**), reported lack of independence and accountability of the prosecutor general (in particular in **Bulgaria**) and allegations of a lack of impartiality of the adjudicating courts (in **Spain**).

Still a long way to go for media pluralism and freedom of expression

Attacks on media pluralism and freedom come out as a particularly worrying issue in most of our contributing members' submissions.

Our members in **Bulgaria, Croatia, Hungary** and **Poland** report widespread **government interference** (including through non-transparent allocation of funding and interference in ownership), **harassment** (including legal), **obstructive practices** to hamper investigations and reporting as well as **negative statements on independent media and journalists** by public authorities or public controlled media. There is general impunity for these practices in particular in Bulgaria, Hungary and Poland.

Recent **legislative developments threaten independent journalism** in **Hungary**. A new criminal law in effect allows for the imprisonment of any critics of government action during the (indefinite) state of emergency declared amidst the COVID-19 pandemic. In **the Netherlands**, a legislative proposal is on the table that might target journalists by criminalising their stays in geographical areas controlled by terrorist groups.

Attacks on journalists, and lack of adequate protection, also continue to be an issue as reported by our members in **Bulgaria, Croatia, Italy** and **Poland**. In contrast, **the Netherlands** offers a promising practice, with the government taking steps to ensure better protection and safety of journalists from attacks.

At the same time, **media authorities** are described as ineffective in protecting media from government interference (in **Bulgaria** and **Poland**) and as the subject of a number of scandals concerning procurement contracts and conflicts of interest (in **the Netherlands**).

Serious restrictions on the **right to information** also seem to be a common issue. In **Hungary** our member reports **systemic practices** aimed at generally preventing or obstructing access to public interest information in general. This is also reported as a problem by our members in **Italy, Spain** and **Croatia** – the latter making reference in particular to the exercise of the right to information by NGOs. Our member in **the Netherlands** also reports about the government's attempts to hinder access to information on a prominent case of suspected corruption; similarly, in **Poland**, our

member reports of a debated case where public authorities refused disclosure of public interest documents despite a court's binding decision requesting them to do so.

Challenges to **freedom of expression** complete the picture. Research conducted by our member paints a very grim picture on the state of freedom of expression in **Hungary**, which is deteriorating even further following the new criminal provision, noted above. In **Poland**, the number of convictions against media for defamation almost doubled between 2014 and 2018 – many of these lawsuits being filed by state institutions or state-controlled companies. In other countries, laws on hate speech (in **Croatia**) and security and counterterrorism (in **Spain** – this refers to the so-called Gag Law and the criminal provisions on the glorification of terrorism) have been misused to limit freedom of expression.

Besides the courts, other checks and balances are under pressure

As our members' submissions point out, governments in power in **Hungary** and **Poland** have almost completed their authoritarian plans to **dismantle the democratic system of checks and balances as a whole** – including attacking their core: free and fair elections, constitutional control and independent watchdogs such as independent media and civil society.

But concerns over checks and balances are also reported in other countries.

Our members in **Bulgaria** and **Spain** criticise a **generally unfair process of enacting laws**, where consultation is almost totally lacking, and the transparency and quality of texts and debates is far from ideal. Our member in **Poland** also points to drastically **reduced space for public consultations** and **accelerated procedures** in drafting and debating laws, in particular before the lower parliamentary chamber. **Attempts to abuse the emergency situation** caused by the COVID-19 outbreak to put forward problematic legislative proposals through accelerated procedures are also reported in **Croatia** (concerning a proposal on mass surveillance of cell phones).

Our member in **Poland** also points with concern to the **lack of independence and impartiality of the system for the constitutional review of laws** and provides several examples of **politically motivated lack of enforcement of judgements**. Our member in **Bulgaria** also refers to various cases of **lack of implementation by State authorities of final court decisions**.

Our members' submissions also raise concern over **independent State bodies mandated to promote and protect rights and freedoms**: because such an authority does not exist insofar as human rights are concerned (in **Italy**), because of them not being in fact independent (in **Hungary** but also in **Spain** as regards the Council for the Elimination of Racial and Ethnic Discrimination), or because of the challenges they face in carrying out their role (in **Croatia**).

Last but not least, a worrying trend emerges from our contributing members' submissions concerning **civic space**.

In **Poland**, our member reports with great concern the impact on **freedom of assembly** of systemic changes made to the law on public assemblies, under which protesters have to face the risk of criminal proceedings – with an estimation of 740 of such criminal cases initiated in the past three years. Our Polish member also alerts about **difficulties faced by certain organizations**, in particular those working on women's rights, migrants' rights and the rights of LGBTQI persons, in terms of access to public funding, freedom of assembly, attacks and smear campaigns. Similar issues are reported by our member in **Croatia**, in particular concerning restrictions on freedom of assembly as well as interferences in the work of organisations working on migrants' rights. **Discriminatory practices as regards registration** of organizations representing the interests of ethnic minorities are also reported by our member in **Bulgaria**.

Restrictions to NGOs' **access to information** are also raised as an issue by our members in **Italy** and **Croatia**, who also report, together with our member in **Spain**, challenges and restrictions on **freedom of association** including due to administrative requirements on registration and/or funding.

The **abuse of rules on preventing terrorist financing**, in particular EU provisions on anti-money laundering, is also a particular concern for NGOs in **Romania** and **Spain**.

Opportunities for effective **participation** of NGOs in decision making remains very low, due to lack of consultation – as reported in particular by our members in **Croatia, Poland** and **Spain**. Our Spanish member also highlights the severe impact on **freedom of assembly** of the so-called Gag Law, while pointing out **threats and attacks** against NGOs and activists.

Other systemic fundamental rights issues continue to affect the rule of law

Some of our contributing members' submissions reveal other patterns of widespread human rights violations by state authorities and/or of their failure to fulfil their duty to protect, which has an impact on the rule of law.

Our member in **Bulgaria** reports a case of a **massive data breach**, while also drawing attention to the persisting failure by the state to ensure timely and effective **execution of judgments of the European Court of Human Rights**, including many cases concerning torture and ill-treatment by law enforcement authorities including of people in custody or detained.

In **Poland**, our member voices concern over **essentially unlimited surveillance powers** granted to police, security services and intelligence agencies – with basically no access to information being granted to concerned individuals. Our member also refers, among others, to various cases in which Poland was

recently condemned by the European Court of Human Rights for the violation of the **prohibition of torture and ill-treatment** and the lack of an effective protection framework, the violation of the **right to a fair trial** and the violation of **the right to freedom of expression** – with many judgements still pending implementation.

Our member in **Croatia** gives accounts of **widespread violations by state authorities of migrants' rights at borders**.

In **Spain**, our member points at **racial profiling** by law enforcement authorities, as well as the **failure to properly investigate cases of torture and ill-treatment by state authorities** as critical human right issues, together with allegations of the **lack of legality and proportionality of sanctions imposed for the breach of confinement measures** adopted in the context of the COVID-19 outbreak.

Conclusion and recommendations

The trends emerging from Liberties contributing members' submissions show that **serious concerns persist** over the respect for the rule of law and fundamental rights standards in all the areas covered by the Commission's consultation, as well as in relation to the fulfilment by states of their duty to respect and protect fundamental rights.

Liberties believes that the Commission could **make further use of its competences** to prompt concrete progress on a number of identified shortcomings. For example:

- it could use its competence on cross-border judicial cooperation to **propose EU legislation in critical areas** such as EU standards on **legal aid** (other than in criminal matters), EU **anti-Strategic Lawsuit Against Public Participation (SLAPP)** law and EU-wide **detention standards**, including as regards the use of pre-trial detention and alternatives to detention;
 - it could **provide formal guidance** to prompt member states to better prevent and swiftly remedy abusive practices affecting the rule of law that are linked to the **effective implementation of EU rules**. The following seem particularly relevant having regard to the rule of law deficiencies identified in this contribution: rules **on whistle-blower protection**, to prevent arbitrary restrictions on the right to information, obstruction of anti-corruption investigations or limitations on free speech; rules **on terrorist financ-**
- ing** to prevent disproportionate reporting requirements on NGOs; and rules on **incitement to terrorism and hate speech** to prevent arbitrary restrictions to freedom of expression;
- it could make a **strategic use of its enforcement powers** to systematically tackle abusive practices affecting the rule of law which violate EU rules. For example, **rules on competition** could be enforced in cases of **media concentration; internal market freedoms or rules on audio-visual media** could be used to tackle **interferences with freedom of expression; rules on public procurement** could serve to sanction the **failure to investigate corruption cases; data protection standards** could be used to stop **abusive surveillance systems** and prevent **major risks of data breaches**.

Our findings also underline the **urgency to reinforce EU action to more effectively prevent and better respond to breaches of Article 2 TEU values** (democracy, the rule of law and fundamental rights). In particular, Liberties recommends that:

- the Commission include in the Rule of Law Report **recommendations to member states** to address the shortcoming identified. The Commission should then ensure transparent and effective follow-up through existing tools, including the rule of law framework, infringement proceedings and the Article 7 TEU procedure. In this context, the

Commission should **deepen engagement with regional and international bodies** such as the Venice Commission, GRECO, OSCE ODIHR and the Committee on the Prevention of Torture to support monitoring and response measures. Actions taken by member states and/or by the EU should be **set out in the following year's report**;

- the Commission ensure the **systematic and regular involvement of NGOs and rights groups at all stages of the review cycle**, including in follow-up country visits and consistency checks on information provided by the authorities, as well as debates on the Rule of Law Report at EU and national level. The Commission should provide NGOs and rights groups with **financial support** to allow them to effectively contribute to this process;
- the Commission organise **regular inter-institutional debates on the Rule of Law Reports**. These should: lead to joint conclusions on findings, recommendations and EU follow-up action needed; allow for a monitoring of Member States' implementation of recommendations and of EU follow-up action; and inform the preparation of next review cycles, including as regards the choice of focus areas;
- the Council replace its rule of law dialogue with a meaningful **peer review system**, using as a basis the Commission's Rule of Law Reports. The Council should create a **rule of law working party** to support this process;

- the European Parliament organise a regular **interparliamentary dialogue** on rule of law with national parliaments based on the Commission's Rule of Law Report;
- the Council and the European Parliament promptly adopt the Commission **proposal on funding conditionality for serious rule of law deficiencies**, ensuring safeguards to allow for EU funding to continue to flow to innocent beneficiaries where measures to protect the EU budget have been taken.

Finally, Liberties is of the opinion that the EU must invest more in **growing grassroots support for the values protected by Article 2 TEU**. In this respect, Liberties calls on the Commission to:

- **provide adequate funding for NGOs active in these areas** within the framework of the future Rights and Values Programme in line with the **proposal** of the European Parliament, in particular as regards the budget envelope. In disbursing funds, the Commission should ensure that targeted funding priorities for national and local organisations (e.g. for litigation, public education and training) take into account the country specific findings of the Rule of Law reports;
- **devise concrete follow-up actions** to the address the findings of the Centre for Media Pluralism and Media Freedom, including an **EU-wide sustainable financial model** to support balanced, informed and high-quality private media in EU member states;

- prioritise, including within the Rule of Law review cycle, the **monitoring of civil society freedoms and civic space**, with a view to **address targeted recommendations** to member states and devise **appropriate action at EU level** (including legislative and enforcement action) to quickly and effectively address identified issues.

Annex - Country submissions

Bulgaria – Bulgarian Helsinki Committee

Justice system

Independence

Appointment and selection of judges and prosecutors

In 2019, a procedure for selecting a new Prosecutor General was held. No one may apply for the office of a Prosecutor General – people can only be nominated. The only two institutions with the power to nominate individuals for the office of a Prosecutor General are (1) at least three members of the Prosecutorial College in the Supreme Judicial Council (SJC) and (2) the Minister of Justice (see the Judiciary Branch Act, JBA, Article 173 (3)). In the 2019 procedure, there were two issues with the selection process: the aspiration for the nominee to be only one so that there is no real choice between competing nominees; and the aspiration of the procedure to be presented as transparent and without interference from the executive branch. As regards the former, this meant that the Prosecutorial College decided by unanimity to nominate only one person, Mr. Ivan Geshev, and that the Justice Minister decided not to use its right to nominate. As a means to present the procedure as transparent, procedures set in both the law and the internal rules of the SJC were followed

strictly. Although this revealed many flaws in the existing rules, they were not recognised as such neither from the Prosecutorial Chamber of the Council nor by the minister.

Furthermore, the procedure was marked with curious occurrences. Many position statements for support for the nominee were filed in the SJC by entities who are not empowered to provide such statements including from the executive branch (see further on independence and autonomy of the prosecution service).

At the public hearing of Mr. Geshev, while defending the nominee and while lashing out at the nominee's critics in the SJC, the former Prosecutor General, Mr. Tsatsarov, said he knew that the decision to elect the President of the Supreme Court of Cassation – one of the critically-tuned members of the SJC – was not made by the SJC but “in two other buildings.” Subsequently, Tsatsarov refused to explain his statement to the media.

The president vetoed the SJC's decision to propose Mr. Geshev for the office of a Prosecutor General but without a debate. The council then voted on the appointment for the second time leaving the president with no options other than appointing the nominee.

Allocation of cases in courts

On 3 April 2020 the Prosecutor General appeared in a televised interview where, among other things, he commented on a crime report that he received from several members of the SJC regarding an audit report by a private digital security company that examined the SJC's software system for random case assignment in the courts. According to the Prosecutor General, the report—that is not made public to this day—allegedly reveals severe vulnerabilities in the software allowing everyone with an electronic signature to access the system and “to do absolutely everything,” i.e. to modify data, to assign cases, to create courts, etc. These allegations were contested by people within the judicial branch. In this interview the Prosecutor General connected the name of the President of the Supreme Court of Cassation (SCC) with the vulnerabilities in the software, claiming that Mr. Panov had opposed an IT audit of the software. The SCC issued a statement contesting these allegations and calling for the audit report to be published and shared with all members of the SJC given that apparently only selected few have seen it.¹ The audit report is not yet published by the SJC. Besides the name of the President of the Supreme Judicial Council, the Prosecutor General mentioned also the name of Hristo Ivanov, a former Justice Minister (currently a leader of an extra-parliamentary opposition party and who was a vocal defender of judicial independence during his mandate), as the one who introduced the new software for random

court case assignment after the previous one was found heavily plagued with vulnerabilities.

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

The composition of the Supreme Judicial Council (SJC) remains problematic after the partial reform in the judiciary from 2015. The SJC is divided into two chambers - judicial and prosecutorial, which may decide on certain matters. The SJC may also seat in its plenum. The judicial chamber consists of 14 judges total - the presidents of the Supreme Court of Cassation and the Supreme Administrative Court, 6 judges elected by other judges and 6 judges elected by the Parliament; the prosecutorial chamber consists of 11 prosecutors - the Prosecutor General, 1 prosecutor elected by investigators; 4 prosecutors elected by other prosecutors and 5 prosecutors elected by the Parliament. Both chambers participate in the plenum of the SJC.

This division of the votes within the SJC is not equal because it does not provide for sufficient degree of self-governance of the judiciary. The 6 judges elected by other judges are a minority both in the judicial chamber and in the plenum. The current composition of the SJC has clearly shown that the only independent members are within those 6 judges, which was particularly evident in the election process of the current Prosecutor General.

1 <http://www.vks.bg/novini/vks-priziv-odit.html>

Another problematic issue is that the plenum of the SJC has the power to decide on many matters concerning the judiciary (article 130a of the Constitution) and these decisions are taken by prosecutors as well, which taken together with the judges elected by the Parliament, form a majority. Thus, the voice of the judges is rarely heard.

Accountability of judges and prosecutors, including disciplinary regime and ethical rules

Dismissal is possible for a serious disciplinary offence, by a decision of the respective chamber of the Supreme Judicial Council (SJC), or, in the case of the Prosecutor General and the two chief judges – by 17 votes out of 25 in the Plenary of the SJC (see Article 320 § 4 and § 6 of the Judiciary Branch Act, JBA, Article 33 § 3 of the JBA and Article 129 § 2 and § 3 of the Constitution). In reality this mechanism is effective to all but the Prosecutor General. This is so because the majority of SJC members are politically appointed by the parliament (and it has been well demonstrated in the past that there are never real debates on the person nominated for a Prosecutor General within the parliament) and prosecutors who are subordinate to the Prosecutor General himself.

Independence and autonomy of the prosecution service

In 2019 a procedure for selection of a new Prosecutor General was held. The details of the events around the procedure are symptomatic in regard to a blurred division line

between the Prosecutor's Office and a majority within the Supreme Judicial Council (SJC) on the one side and the executive branch on the other side. Another issue is the poor individual independence of prosecutors, as shown by various happenings during 2019.

Article 173 (8) of the JBA allows for position statements as well as questions addressed to the nominees to be filed in the SJC. The Council then is required to ask the nominees those questions at their hearing. Just 11 days after the announcement of Mr. Geshev's nomination and only a day after a protest against this nomination held on 25 June (organised by an extra-parliamentary political party), the SJC was flooded with dozens of statements of support for the sole nominee which were sent by district, regional, and appellate prosecutor's offices. Most of these were apparently using the same template text and contained, among other things, condemnation of the protest of 25 June. In at least one case – the city of Vidin's Prosecutor's Offices – the statement of support, finding Mr. Geshev to be in "most appropriate and complete level of compliance with the statutory, professional, and moral requirements for the office" was also signed by the cleaner and the driver of the prosecutor's office.

Statements were filed also from structures in the Ministry of Interior and from the State Agency for National Security that is subordinated to the Council of Ministers.

All these statements were admitted and published by the SJC.

Another worrisome circumstance was the decision of the Minister of Justice to not use his right to nominate a candidate for the office of a Prosecutor General. As counterintuitive as this might seem, had he done that it would have ensured that the nominee would not be only one and that an actual option for competition and selection process exists. The minister explained he doesn't want to interfere in the judicial branch despite later turning into a vocal defender of the sole nominee for the next Prosecutor General.

After the Prosecutor General's assuming office, it became apparent he has a warm relationship with the executive branch. At the end of 2019 and beginning of 2020 several special operations were held that were broadly advertised in the media. All of those were joint operations of the Prosecutor's Office and the police and despite being announced as directed against 'conventional crime' they were predominantly targeted at alleged criminal operations in segregated neighbourhoods of the Roma ethnic community.

Significant developments affecting public perception of the independence of the judiciary

In September 2019 Sofia Appellate Court released conditionally the Australian national Jock Palfreeman, sentenced to 20 years imprisonment, after 12 years of effective service.

This sparked massive public unease, which led to the questioning of the morale and integrity of the three judges, who took the decision. The chairman of the court composition took the worst part of the criticism, followed by one of the members of the composition. Their impartial and independent judgment was questioned by members of the Supreme Judicial Council, the Minister of Justice, the Prosecutor General, and politicians. This resulted in a declaration of 292 judges in support of the three judges from Sofia Appellate Court and following this - the Supreme Judicial Council also changed their statement.

In early 2020, the European Centre for Law and Justice—a French based conservative lobby group—published a report, which pays special attention on the procedure for electing judges for the European Court of Human Rights and the links of some of the judges with civil society organisations that receive funding from the socially liberal foundations of the American philanthropist George Soros. The names of Zdravka Kalaydjieva (also a member of the Bulgarian Lawyers for Human Rights foundation) and Yonko Grozev (currently a judge from Bulgaria in the European Court of Human Rights and formerly a lawyer with private practice and legal director of the BHC) were mentioned in this report as judges in the Court that are “in conflict of interest” due to the funding of their organisations.² Bulgarian media used this information to redistribute it

2 It needs to be noted that under the criteria of the authors of the report only civil society organisations funded by George Soros were considered as conducting “undue influence” over judges in the ECtHR. For example, funding from sources identical to those of the European Centre for Law and Justice itself were not examined.

claiming that the two were in serious “conflict of interests” and the Justice Minister Kirilov added to the denigration of the two Bulgarian judges specifically noting before members of the press that they both were engaged in the Kolevi case—one of them as a judge and the other one as representative of the applicants—and now the Bulgarian state is obliged to follow the Courts’ recommendations³ thus implicitly questioning the validity of the Court’s judgment in this case.

On 3 April 2020 the Prosecutor General appeared in a televised interview where, among other things, he commented on a crime report that he received from several members of the SJC regarding an audit report by a private digital security company that examined the SJC’s software system for random case assignment in the courts.⁴ According to the PG, the report—that is not made public to this day—allegedly reveals severe vulnerabilities in the software allowing everyone with an electronic signature to access the system and “to do absolutely everything,” i.e. to modify data, to assign cases, to create courts, etc. In this interview the PG connected the name of the President of Supreme Court of Cassation

with the vulnerabilities in the software, claiming that Mr. Panov was opposing an IT audit of the software. The Prosecutor General went even further and publicly claimed that there hardly was any justice during the last five years and labelled the random case distribution system as the coronavirus in the judiciary.

Corruption of the judiciary

In February 2020 the USA Secretary of State, Michael Pompeo, released a press statement designating Bulgarian Specialized Criminal Court Judge Andon Mitalov ‘due to his involvement in significant corruption’. According to the statement, Mitalov was involved in corrupt acts that undermined the rule of law and severely compromised the independence of democratic institutions in Bulgaria. As a response to that and by request of the Bulgarian Minister of Justice, the Supreme Judicial Council opened disciplinary proceedings against Judge Mitalov. The outcome of the proceedings is still unknown.⁵

3 See “Danail Kirilov regarding the scandal with Yonko Grozev: We’ve got to the point where our French colleagues need to tell us what is the situation domestically” (in Bulgarian) retrieved from <http://legalworld.bg/85443.do-tam-stignahme-che-frenskite-kolegi-da-ni-kajat-kakvo-e-polojenieto-u-nas.html>.

4 See a video “Exclusive interview with the Prosecutor General Ivan Geshev” (in Bulgarian) retrieved from <https://www.bnt.bg/bg/a/265558-ekskluzivno-intervyu-s-glavniya-prokuror-ivan-geshev>.

5 See <https://www.state.gov/public-designation-due-to-involvement-in-significant-corruption-of-bulgarian-judge-andon-mitalov/>

Quality of justice

Accessibility of courts

Amendments to the Administrative Procedure Code came into force in 2019, and the amount of fees in cassation proceedings was increased. By this time the fee for filing a cassation appeal in the Supreme Administrative Court was BGN 5 for citizens and non-governmental organizations and BGN 25 for companies. After the changes in 2019, this fee increased to BGN 70 for citizens and BGN 370 for non-governmental organizations and companies. The question about the lawfulness of the amendments was brought before the Constitutional Court and in its opinion the Plenum of the Supreme Administrative Court argued that the amount of the citizens' fee was not excessive because it "corresponds in proportion" to the minimum monthly salary (BGN 560 for 2019) and therefore it was not contrary to the European Convention on Human Rights. However, with increasing the court fees in administrative cases, the state virtually deprived citizens of their ability to file such complaints, because only a few have the financial opportunity to pay high court fees. Citizens' access to the courts in order to seek protection of their violated rights arguably became unbearable, due to the economic conditions in Bulgaria of stagnation, unemployment and universal poverty. In this way, the authorities try to preserve access to justice only for the rich and deprive the poor of their fundamental right to oppose the actions of the state or municipal administration and to

ask the court for protection when their rights have been violated or restricted.

In the last year, there has been an alarming trend in the practice of the Bulgarian courts concerning the conviction of claimants and complainants in proceedings for protection against discrimination with fees and costs. In accordance with the provision of Art. 75, para. 2 of the Law on Protection against Discrimination "for proceedings before a court under this law no state fees are collected, but the costs are at the expense of the court's budget". According to this provision the parties shall be released unconditionally from the payment of fees and expenses in discrimination cases. "Expenses" within the meaning of Art. 75 includes all expenses, without exception. The phrase "for proceedings" applies as much to the costs of state fees, witnesses and expertise as to litigation, because it pursues the same purpose - to ensure that persons affected by discrimination are able to make their claims regardless of their financial situation because undoubtedly burdening them with the costs of these cases would have a deterrent effect. This would lead to an ineffective prosecution of discrimination in public life, contrary to the legal goal. However, in many anti-discrimination cases, the parties are ordered to pay the costs according to the outcome of the case.

It is another vicious practice for the courts to refuse, despite the successful outcome of the case, to award costs incurred by NGOs in cases in which they represent persons who have no financial capacity to pursue the case. Usually clients of NGOs are persons from vulnerable social groups who are not able to

pay the relevant state fees for the filing of cases and to pay a lawyer to represent them in court. Nevertheless, a contract is concluded between the NGO and the client under which, if the case is successful and the defendant is ordered to pay the costs incurred to the client, the client is obliged to reimburse the amount on the account of the NGO. In these cases, the court rejects the applicant's claim for lawyer's fee, finding that it was not paid by them, but by a "person not involved in the trial". In this way, in practice, NGOs are deprived of the opportunity to recover their costs in court proceedings when the claims made in court are upheld. Viewed in the context of the increase of state fees in administrative cases in force since 01.01.2019, there is a serious barrier for NGOs to assist disadvantaged persons by providing them with legal assistance.

Resources of the judiciary

The rebalancing of workload between and within courts is a long-standing issue in Bulgaria, with in particular the main courts in the major cities experiencing a heavy workload. Though efforts have been made to address this in different ways, including legislative changes to reallocate responsibilities between jurisdictions as well as limited transfers of posts between courts, further steps to ensure a balanced workload in the future are still needed. The statistical reports for 2018 and 2019 do not differ much in numbers, especially when it comes to the District courts where usually the workload is the heaviest, yet the long-discussed reform of the judicial map is still not a fact.

Rules on pre-trial detention and their application in practice

The alarming practices of pre-trial detention for more than 72 hours are still ongoing. According to the Bulgarian laws, If the police find evidence suggesting that a person has committed a crime, the police can arrest and hold that person, but for not more than 24 hours. The purpose of the police detention is to establish whether a person should be accused. In case charges are pressed, the prosecutor can decide to extend the detention, but for not more than 72 hours. Otherwise, the detained person should be released. The prosecution detention is to ensure the first court appearance of the accused person. Measures to prevent evasion of prosecution can be taken, including house arrest or detention, but these measures can be taken only by the court. Both pre-trial detentions cannot exceed 72 hours, but it is a common practice of the authorities to detain the accused for a total of 96 hours. Poor transposition of the Directives regarding the procedural rights of suspected or accused persons in criminal proceedings is also observed.

The above-mentioned pre-trial detentions can both be appealed but still the following issue arises:

When it comes to the police detention for up to 24 hours, even though it can be subject to appeal according to art. 74 para.2-6-a of the Ministry of Internal Affairs Act, in case the matter is taken to court, it takes a longer period of time for the court to judge on it and the resolution is issued long after the detention period has expired. Thus, the question whether

the possibility for appeal can be viewed as an effective remedy emerges.

Regarding the 72 hours detention imposed by the prosecution office, the following should be stated:

The Criminal Procedure Code (CPC) which regulates the detention does not provide specific procedural rules for appeal thus a lack of legal certainty exists. Some national courts see Article 5 of the ECHR as a valid ground of appeal disregarding the fact that the national law does not provide a specific provision for it. Others see the appeal of the detention before court on the grounds of Art. 5 of the ECHR as inadmissible. The interpretations of the law as well as the case-law on the matter, is diverse. Still, even if the court sees Article 5 as a valid ground of appeal, the resolution most probably will be issued after the expiration of the detention period.

A second option for reviewing the legal basis for the detention exists: since the detention is imposed with a prosecution act of indictment, the act itself can be reviewed by a higher-ranking prosecutor after a signal has been filed, according to the general rules of the CPC for control and review of the acts of the prosecution - the provision of article 46, para.3 of the CPC allows a higher-ranking prosecutor to repeal ex officio the decree of a lower ranking prosecutor. However, this procedure is not bound by time limits and depends solely on the discretionary powers of the higher-ranking prosecutor, hence once again a legal uncertainty whether the detention would be reviewed

exists. Furthermore, this provision does not ensure a judicial review of the detention.

As for the measures for preventing evasion of prosecution taken by court after charges have been pressed, they can be a subject to a single-instance appeal. The resolution of the higher-ranking court is final.

Efficiency of the justice system

Length of proceedings

On 5 November 2009, the European Court of Human Rights delivered a judgment in the case of Kolevi v. Bulgaria. The case concerns, inter alia, the ineffective investigation of the death of the initial applicant in the case, Mr. Kolev, who was a prosecutor in the Supreme Administrative Prosecutor's Office. Before his death, Mr. Kolev made allegations before the ECtHR that he was framed for drug possession by high ranking prosecutors due to his personal conflict with the Prosecutor General and that the Prosecutor General himself is plotting Mr. Kolev's murder together with certain servants in a police special squad. Subsequently, Mr. Kolev was indeed shot in Sofia. Despite ECtHR's judgment, the investigation is officially ongoing despite the lack of any energetic activity on it. In December 2019, the Council of Europe's Council of Ministers adopted an Interim Resolution CM/ResDH(2019)367.

2020 will mark the 10th anniversary of the start of the criminal proceedings for a brutal politically motivated beating of political activists in Sofia's public transport on 6 June

2010 - a case known as the beating in tram no. 20. Two indictment bills in the case have been returned by the court due to defects of the acts. Subsequently, the prosecutor leading the case was promoted and in December 2019 a new indictment bill was filed in the court by the new prosecutor. For unknown reasons as of today, there are no further proceedings in the case.

2020 will also mark 7 years from the start of an investigation into the alleged beating of a Roma man by policemen and civilians during the man's apprehension for a theft of a clock from the civilians' house. In 2019 the Prosecutor's Office once again attempted to discontinue the investigation despite clear medical evidence that the victim – a man of Roma origin – suffered injuries in a time when he was supposedly in the hands of the authorities (pre-trial investigation No. 205/2018 of the National Investigative Service).

In May 2020, it will be marked 5 years since the rape of a teenage girl in the town of Botevgrad. The victim, a Roma girl, was 13 years old at the time of the crime. Sexual contact with a person under the age of 14 in Bulgaria is a subject of mandatory prosecution. At the moment, the Prosecutor's Office refuses to indict the persons that were recognised by the victim. The prosecutor's argument is that the child was participating voluntarily in the sexual act – something that if true would be irrelevant and something that the victim never claimed (pre-trial investigation No. 269/2015 of the Botevgrad's police station).

Anti-corruption framework

Repressive measures

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

Prosecution of high-level corruption cases is in the hands of the Prosecutor's Office – a centralised institution under the supervision of the Prosecutor General. Despite serious issues with the procedure for nomination and election of a new Prosecutor General, all procedures for the election of persons for this office after 1989 underwent without any substantial debate in the parliament. On the other side, all cases of high-level corruption prosecuted in the past years have been of members of minority parties within the government coalition or parties that are not in that coalition at all. Calls (and the actions) towards reform in the judicial branch have always been most vocal among the extra-parliamentary opposition and the civil society sector. This raises the issue of independence and accountability of the Prosecutor General. Current mechanisms in that regard are quite insufficient. They are reviewed in detail in two opinions adopted by the Venice Commission in 2016 (opinion 855/2016, CDL-AD(2017)018) and in 2019 (opinion 968/2019, CDL-AD(2019)031).

Media pluralism and freedom of expression and of information

Media regulatory authorities and bodies

Independence, enforcement powers and adequacy of resources of media authorities and bodies

No institution in Bulgaria is tasked with protecting media outlets from political interference.

Framework for the protection of journalists and other media activists

Rules and practices guaranteeing journalist's independence and safety and protecting journalistic and other media activity from interference by state authorities

In its latest ranking and survey, the NGO Reporters Without Borders (RWB) found that media freedom in Bulgaria has not improved in 2019, despite increasing international pressure. Our country was ranked 111 out of 180 surveyed countries. This is also the lowest ranking of any EU member country.

In September 2019, the management at *Bulgarian National Radio* (BNR) tried to suspend the prominent journalist Silvia Velikova. Again in 2019, Bulgaria's two most popular media groups - *NOVA Broadcasting Group* and *BTV Media Group* changed ownership. Soon

after the deal for Nova investigative reporters, Miroluba Benatova and Genka Shikerova were forced to leave. RWB noted that editorial policy of the *Bulgarian National Television* changed from rather neutral to pro-governmental after the appointment of new director general and corruption and collusion between media, politicians and oligarchs is widespread in Bulgaria. Their findings also state that 'the most notorious embodiment of this aberrant state of affairs is Delyan Peevski, who ostensibly owns two newspapers (*Telegraph* and *Monitor*) but also controls a TV channel (*Kanal 3*), news websites and a large portion of print media distribution. The government continues to allocate EU and public funding to media outlets with a complete lack of transparency, with the effect of encouraging recipients to go easy on the government in their reporting, or to refrain from covering certain problematic stories altogether. At the same time judicial harassment of independent media, such as the *Economedia group* and *Bivol* continued to increase'.⁶

Frequency of negative public statements from the government directed at journalists, bloggers or other media activists

Since the beginning of 2020 the country's journalists have been subjected to a series of verbal attacks and threats by very senior officials.

6 <https://rsf.org/en/bulgaria>

For example, the Prime Minister Boyko Borisov likened journalists, especially women journalists, to turkeys during a press conference in Sofia on 4 February and then, in a surreal attempt to mock them, tried to imitate the gobbling of a turkey for several seconds, ignoring the protests of the journalists present. This caused the reaction of the European Journalists Association – Bulgaria, which issued a statement on the matter claiming the Prime Minister’s behavior as disrespectful and insulting.

At a press conference in Brussels on 5 February, prosecutor-general Ivan Geshev turned on Atanas Tchobanov, the editor of the investigative news website *Bivol*. Instead of responding to Tchobanov’s questions, Geshev started putting questions to Tchobanov that showed he had information about his private life. Articles published by *Bivol* have suggested that Geshev has been involved in questionable transactions. Tchobanov was described as a “little provocateur” by Bulgarian MEP Alexander Yordanov when Tchobanov asked him about a case of corruption in which one of his colleagues was allegedly involved. It was the Bulgarian prosecutor’s office that posted these verbal exchanges on YouTube.

On 11 February, Bulgarian national assembly deputy speaker Valery Simeonov accused two journalists with the commercial TV channel *bTV*, Venelin Petkov and Anton Hekimyan, of being “corrupt” and asked the prosecutor’s office to investigate them for failing to report alleged links between the online casino Efbet’s owner and Vasil Bozhkov, a businessmen recently arrested on 11 charges. Defending

its two journalists, the *bTV Media Group* responded that “the journalist’s role is to report the truth after verifying and investigating.”

Overall personal and offensive attacks against journalists by the most senior officials in Bulgaria are not isolated and keep occurring.

Checks and balances

Process for preparing and enacting laws

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

The drafting of legal acts without public consultations;

In accordance with the Bulgarian Constitution the bills shall be read and voted in two readings in the Parliament, during different sessions, but many amendments are initiated for a first time just before the first vote.

The National Assembly often amend, supplement, and repeal the laws via transitional and final provisions of other laws governing completely different legal issues. The reasons which require additional adoption often stay unjustified.

Amendments, especially concerning criminal law issues and the length of deprivation of liberty as a specific punishment, are often ad-

opted with only formal reasons after concrete crime with a wide public response.

Formal character and poor quality of the motives, the report and the ex ante impact assessment, including reasons which require amendments, the objectives of the act; the financial and other means necessary for the adoption or change of a regulation; the expected results from its application, including the financial ones, analysis regarding the compatibility with the European Union law.

The lack of legal experts involved in the legislative process: in early 2019, the chairman of the Legislative Council, including a number of prominent law experts, insisted on closing the body due to the inactivity of this body. The functioning of the Council has been suspended de facto since late 2017.

Accessibility and judicial review of administrative decisions

Implementation by the public administration and State institutions of final court decisions

In 2018 the State Agency in National Security (SANS) lost in an administrative court case for the second refusal to provide information under a Freedom of Information Request filed in 2014 by the Bulgarian Helsinki Committee. After the first refusal to provide information on special investigative means the BHC brought court actions, which was won, and the court provided explicitly that SANS is obliged to provide the requested information. Despite this ruling the SANS refused after the second

request for the same information was filed. This led to a second set of court proceedings that ended in 2018.

Another example is the refusal of Sofia regional mayors who govern commissions on municipal housing to fulfil court decisions (three decisions from 2018-2019) relating to the lists of people in need of municipal housing and the order of the waiting lists. These commissions were obliged to change the criteria for placing individuals based on the degree of their need of housing and to provide motivation for the decision to place an individual in certain order. Instead of fulfilling their obligation in accordance with the court decisions the commissions issued refusals to enlist these individuals.

Enabling framework for civil society

A large group of ECtHR judgments that remain not implemented is related to the unjustified refusals of the courts, in 1998-99, 2002-04, 2010-2013 and 2014-2015, to register an association the aim of which is to achieve “the recognition of the Macedonian minority in Bulgaria”. In October and November 2019, the Bulgarian authorities provided information on the registration by the Registration Agency of “Civil Association for the Protection of Fundamental Individual Rights” which aims at “protecting the human rights of the Macedonians and other ethnic minorities in Bulgaria”, as well as of another association - “Ancient Macedonians”. In November 2019 the deputy prime-minister and Minister of the Defence sent a letter to the Bulgarian

Prosecutor's Office, requesting the dissolution of the above associations.

Other systemic fundamental rights issues

Widespread violations or protection failures

In 2019 Bulgaria suffered a massive data breach - five million of the country's seven million citizens had their personal data exposed in a hack of the country's national tax agency. The information leaked in the attack includes social security information and income in addition to full names, birthdates and addresses dating back as far as 2007. The hacker released half of the database to reporters, and then posted the other half to several public forums. Bulgaria's National Revenue Agency was breached sometime in June, but the exact attack window is unclear. It appears that the agency was not aware of it until the attacker sent a taunting email to various news outlets on July 15. Bulgarian police arrested a 20-year-old computer programmer and resident of the capital city of Sofia on July 17 in connection with the massive data breach. The National Revenue Agency was fined 5.1 million leva. Bulgarian citizens brought action against the Agency for the leakage of their personal data seeking monetary compensation. The administrative court suspended the cases but after appealing the court's acts, in February 2020 the Supreme Administrative Court found that there is indeed legal ground for actions against the National Revenue Agency and the cases were renewed. The legal proceedings before

the Court of First Instance are yet to be concluded.

Poor execution of ECtHR judgements

48 % of the key ECtHR judgements on applications brought against Bulgaria since 2009 remain not implemented. These are 79 cases, which identify serious systemic and structural problems in the Bulgarian legislation and practice, against which there are no measures taken. All these cases are placed under enhanced supervision by the Committee of Ministers of the Council of Europe due to the seriousness of the violations. These violations require the Bulgarian state to adopt legislative amendments and all other requirements posed by the ECtHR in order to discontinue ongoing violations of human rights.

Since 2002 the ECtHR has issued over 30 judgments finding abuse carried out by Bulgarian state officials - or a failure to investigate allegations of such abuse. The majority of the cases concern deaths, torture and other ill-treatment, excessive use of force and lack of medical assistance during arrest and in custody, as well as inadequate investigations.

The second largest group of not implemented judgments is related to the inhuman and degrading treatment of prisoners in Bulgarian penitentiary institutions.

Croatia – Centre for Peace Studies

Justice system

Quality of justice

Accessibility of courts

When it comes to provision of free legal aid, Law on Free Legal Aid regulates this area and provision of free legal aid is accessible, in theory. However, there are multiple issues in practice. Firstly, financing of free legal aid remains the problem. According to the Human Rights House Zagreb, a multi-annual funding for legal aid providers has not been secured.¹ Funding for providing primary legal aid has increased, but the maximum amounts of financial support for free legal aid providers (CSOs, legal clinics of the universities) have not been increased, which negatively affects the sustainability, quality and accessibility of the provision of primary free legal aid - it is practically impossible to cover one annual salary of a lawyer providing free legal aid through amounts given by the Ministry of Justice, and other funds for this purpose are rarely accessible. Another issue with financing is that the Ministry of Justice is often late with the calls for grants, and the funds sometimes come late.

For example, a decision on the results of the call for funding of free legal aid providers in 2019 was published only in May 2019, although providers provide free legal aid throughout the year. Also, territorial coverage of free legal aid remains a problem - according to the Registry of CSOs and legal clinics accredited for free legal aid provision, there are 54 providers in Croatia, out of which 24 are in Zagreb, 4 in Osijek, 2 in Slavonski Brod, 4 in Vukovar, 2 in Rijeka, 2 in Knin, 5 in Split,² while others are in other towns. In 12 counties, there are no CSOs or legal clinics free legal aid providers, or provision of free legal aid is only occasional.

When it comes to secondary free legal aid, according to Human Rights House Zagreb³, “access to secondary legal aid is made difficult due to the fact that individual offices that bring decisions granting free legal aid do not designate a lawyer, but rather instruct the parties to do so themselves by selecting a lawyer from the list of secondary legal aid providers. The problem arises when lawyers from the list are unable to provide service due to business overload. In these cases, citizens are forced to search for lawyers on the list from major cities and then bear the travel expenses for a lawyer to attend the hearing, since the travel expenses are not reimbursed to the parties.”

1 https://www.kucaljudskihprava.hr/wp-content/uploads/2020/04/KLJP_godisnjeIzvjesce2019_web.pdf

2 <https://pravosudje.gov.hr/istaknute-teme/besplatna-pravna-pomoc/ovlastene-udruge-i-pravne-klinike-za-pruzanje-primarne-pravne-pomoci/6190>

3 https://www.kucaljudskihprava.hr/wp-content/uploads/2020/04/KLJP_godisnjeIzvjesce2019_web.pdf

Additional information can be found in the report “Human rights in Croatia: overview of 2019” of the NGO Human Rights House Zagreb⁴:

“73. Amendments to the Criminal Procedure Act from the end of 2019 transposed into the Croatian legislation the Free Legal Aid Directive, which introduced a number of positive changes in relation to the suspect’s and the defendant’s right to free legal aid. However, omissions have been identified that can lead to discrimination against citizens with lower economic status.

Namely, the new amendments to the Criminal Procedure Act have expanded the right to a lawyer financed by the state. So far, this right has only been applied to suspects under investigation. The amendments extended this right to those suspects against whom the simplified investigation was being conducted. Also, a new institute of ‘temporary legal assistance funded by the state’ was introduced, which enables the right to free legal aid to every arrested person, regardless of the criminal offense for which he/she was arrested. However, those suspects who have not been arrested can exercise this right only if they are suspected of a criminal offense for which imprisonment of more than 5 years is prescribed. Thus, the current legal framework is not satisfactory since it leads to discrimination against citizens of poor financial status and inequality of citizens before the law, and consequently to violation of the right of access to court, since the criterion for tem-

porary legal aid is conditioned by the amount of the prescribed sentence. Such proposed legal framework is contrary to the requirements of the Free Legal Aid Directive, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Constitution of the Republic of Croatia, including other international instruments proclaiming equality before the law.”

Resources of the judiciary

The report of the President of the Supreme Court on the State of Judiciary for the year 2019 has not yet been published, so there are no available data for 2019.

Anti-corruption framework

Prevention

Measures in place to ensure whistle-blower protection and encourage reporting of corruption

In 2019, Law on Protection of Reporters of Irregularities was brought. While this law is a positive change towards protection of whistle-blowers, it has some deficiencies. Firstly, the Law does not envisage provision of psychosocial support to whistle-blowers. We believe that omitting this provision substantially weakens the whistle-blower protection system and there is a concern that the law will not ful-

⁴ https://www.kucaljudskihprava.hr/wp-content/uploads/2020/04/KLJP_godisnjeIzvjesce2019_web.pdf

fil its fundamental role, namely the protection and support of whistle-blowers, as assistance to whistle-blowers is an essential prerequisite for encouraging whistle-blowers to report anomalies, as indicated by the Council of Europe Recommendation CM/Rec(2014)7 on the protection of whistle-blowers. Furthermore, according to this Law, the Ombudswoman Office is the institution for external reporting of reporting irregularities. Although this solution seems good in principle, its implementation in practice still requires significant investment efforts to ensure sufficient capacities of the Ombudswoman Office.

Furthermore, according to the Human Rights House Zagreb⁵, to ensure systematic and adequate implementation of the Law, it would certainly be useful to adopt a separate strategic document/public policy that would include measures for its implementation or to include such measures to into a new Anti-corruption strategy in order to ensure effective protection for whistle-blowers.

In June 2019, the Ombudswoman gave an opinion on Action plan of the Anticorruption Strategy, stating:

“The new mandate of the body for external reporting of irregularities, which will be obtained by the Ombudsman from 1 July, also requires special knowledge and skills, which

practically means additional material and human resources. However, as we have already pointed out, only 200,000 HRK are envisaged for the implementation of the Law for each of the first three years of implementation, and only for the education and promotion of the Law, which sends a message that the protection of whistleblowers and fight against corruption in general will not be given serious attention.”⁶

Media pluralism and freedom of expression and of information

Framework for the protection of journalists and other media activists

Rules and practices guaranteeing journalist's independence and safety and protecting journalistic and other media activity from interference by state authorities

According to Human Rights House Zagreb, “in the context of a large number of lawsuits against journalists for insults, defamation and public shaming (more than 1000 in 2018) and their extremely negative impact on freedom of speech and media freedom, a protest of journalists was held in March 2019, which among other things sought an urgent amendment of the penal legislation to prevent misuse of lawsuits as means of pressure on journal-

5 https://www.kucaljudskihprava.hr/wp-content/uploads/2019/02/KLJP_TematskiIzvjestajZvizardaci.pdf

6 <https://www.ombudsman.hr/hr/o-zastiti-zvizardaca-treba-educirati-ne-samo-suce-nego-i-radnike-poslodavce-i-ovlastene-tuzitelje/>

ists.”⁷ It is especially worrisome that Croatian Radio-Television (HRT), a public TV broadcaster filed a large number of lawsuits against other media and journalists (including their own employees). In January 2019, Croatian Journalists’ Association stated that “according to the data available so far, the HRT leadership has filed six lawsuits against the portal Index.hr, five lawsuits against Slobodna Dalmacija, three lawsuits against 24sata, two lawsuits against Jutarnji list, one each against Večernji list, Tportal, Novi list and Novosti and the most recent, seven lawsuits against Nacional. When the amount of these lawsuits and those against the Glas Istre are added to the sum of all lawsuits against journalists, the media and its former employees, but also against the Croatian Journalists’ Association and its two representatives, the amount claimed by HRT goes up to almost two million HRK.”⁸

When it comes to legislative changes in 2019, the positive development is that the criminal offense of “serious shaming” was erased from the Criminal Code in 2019, while criminal offense of “insult” was defined more precisely. However, Human Rights House Zagreb stated that “the amendments to the Criminal

Code did not decriminalize all crimes against honour and reputation, that is, the following provisions were not deleted: Article 149 ‘Defamation’, Article 349 ‘Violation of the reputation of the Republic of Croatia’ and Article 356 ‘Violation of the reputation of a foreign state and international organization’.”⁹

Especially worrying example of pressure on the journalists was the case of Đurđica Klancir, journalist of Net.hr, The police came to her newsroom to verify her identity and check her address because of the private lawsuit Ivan Žinić, prefect of Sisak-Moslavina county filed against her. This might be considered political pressure, as this is not a standard police procedure and there are other ways to check personal data of individuals.¹⁰

Law enforcement capacity to ensure journalists’ safety and to investigate attacks on journalists: frequency of attacks against journalists, bloggers or other media activists

According to Human Rights House Zagreb, there were cases of attacks, threats and intimidation of journalists in 2019:

7 https://www.kucaljudskihprava.hr/wp-content/uploads/2020/04/KLJP_godisnjeIzvjesce2019_web.pdf

8 <https://www.hnd.hr/nova-runda-tuzbi-hrt-a-protiv-medija>

9 https://www.kucaljudskihprava.hr/wp-content/uploads/2020/04/KLJP_godisnjeIzvjesce2019_web.pdf

10 <https://www.telegram.hr/politika-kriminal/policija-doznajemo-ne-govori-istinu-ime-durdice-klancir-i-slikanalaze-se-u-njihovom-sustavu/>

“death threats, public verbal assaults and insults directed against journalists, attempts to disable recording and reporting, bomb threat to the newsroom, threatening messages on the Croatian Journalists’ Association building, and threatening graffiti on buildings and in the vicinity of newsrooms. The absence of public condemnation of these incidents by officials and institutions is worrying, as well as the lack of effective and prompt investigation, prosecution and punishment of perpetrators in cases of intimidation and threats against journalists.”¹¹

According to the Croatian Journalists’ Association, these attacks and/or threats included:

threats addressed to Domagoj Zovak, a satirist and editor of News Bar Prime Time, a satirical show broadcasted on N1 television¹²

physical and verbal attack by a dozen persons on Frankfurt Rundschau journalist Daniel

Majić, that took place on Saturday, May 18, 2019, at a gathering in Bleiburg (Austria)¹³

bomb threat to newspaper Slobodna Dalmacija¹⁴

assaults in front of a church in the suburb of Sirobuja in Split on Živana Šusak Živkovic, a journalist for the Dalmatinski portal, and Ivana Sivro, a N1 television camerawoman¹⁵

When it comes to court judgments in the cases of assaults against journalists, Human Rights House Zagreb stated that “the first-instance judgement in the case of physical assault with serious injuries suffered by the journalist Hrvoje Bajlo is worrying, and the perpetrator was sentenced to a suspended sentence of imprisonment. The imposition of lenient penalties for offenses involving serious physical harm against journalists does not contribute to the safety of journalists in the performance of their job.”¹⁶ Croatian Journalists’ Society holds the same view, stating that this judgement is “a dangerous message that poses a serious threat

11 https://www.kucaljudskihprava.hr/wp-content/uploads/2020/04/KLJP_godisnjeIzvjesce2019_web.pdf

12 <https://www.hnd.hr/novinarima-se-neprestano-prijeti-a-celni-ljudi-drzave-o-tome-upadljivo-sute>

13 <https://www.hnd.hr/hnd-najostrije-osuduje-fizicki-i-verbalni-napad-na-novinara-danijela-majica1>

14 <https://www.hnd.hr/hnd-najostrije-osuduje-prijetnje-slobodnoj-dalmaciji1>

15 <https://www.hnd.hr/hnd-trazimo-da-drzavni-vrh-osudi-napade-u-splitu-ovo-je-linc1>

16 https://www.kucaljudskihprava.hr/wp-content/uploads/2020/04/KLJP_godisnjeIzvjesce2019_web.pdf

to the safety of journalists and the freedom of the media as a whole.”¹⁷

When it comes to negative public statements from the government directed at journalists, bloggers or other media activists, there were several such examples, according to the Croatian Journalists’ Association:

a series of gross and sexist insults to the assembled journalists by the mayor of Zagreb Milan Bandić¹⁸

severe verbal attack by the parliamentary party Živi zid on Jutarnji List journalist Željka Godeč, published on that party’s Facebook page¹⁹

verbal attack by Zagreb mayor Milan Bandić on Zagreb Radio Sljeme host Ivan Hlupić²⁰

sexist and inappropriate verbal attack of Nivio Stojnić, mayor of Tar - Vabriga municipality

directed towards the journalist of the Glas Istre Chiara Bilic²¹

Human Rights House Zagreb also stated that “the frequency of insulting and depreciation of journalists by officials, as well as failure to hold press conferences and avoiding answering to journalistic questions are of concern.”²²

Enabling regulatory environment for the effective exercise of the right to freedom of expression and of information

The Ministry of Justice announced adoption of the Law on Prevention of Misconduct on Social Networks, directed against hate speech and violence, and fake news on social networks in 2019. According to the Human Rights House Zagreb, “such act could have serious consequences to the freedom of expression and lead to censorship and excessive removal of content, especially given the existing challenges and human rights violations that have been

17 <https://www.hnd.hr/hnd-preblagom-kaznom-za-napadaca-na-novinara-bajlu-poslana-vrlo-opasna-poruka>

18 <https://www.hnd.hr/hnd-ostro-osuduje-seksisticki-ispad-zagrebackog-gradonacelnika>

19 <https://www.hnd.hr/hnd-najostrije-osuduje-teski-verbalni-napad-zivog-zida-na-novinarku-zeljku-godec1>

20 <https://www.hnd.hr/hnd-i-snh-na-hrt-u-osudujemo-verbalni-napad-milana-bandica-na-novinara-radio-sljeme-na-i-slusateljice1>

21 <https://www.hnd.hr/hnd-ostro-osudujemo-degutantan-verbalni-nasrtaj-na-kolegicu-chiaru-bilic1>

22 https://www.kucaljudskihprava.hr/wp-content/uploads/2020/04/KLJP_godisnjeIzvjescje2019_web.pdf

reported in this area in the previous years.”²³
In 2020, there are no news on this legislation.

In 2019., there were several cases of state interference in freedom of expression directed against journalists or activists. In September 2019, journalist Gordan Duhaček was informed by police while coming to Croatia from Bosnia and Herzegovina that the police were looking for him. He went to the police station himself to discuss the details with them, as he was planning an official trip outside Croatia. However, officers met him at a Zagreb airport and arrested him. Duhaček was eventually released and found guilty of insulting police with a symbolic fine, due to a satirical rhyme he posted on his personal Twitter account.²⁴

Another case of state interference of freedom of expression happened in 2018, but the non-final judgement came in 2019. In December 2018 war veteran Zoran Erceg came to the opening of the monument of Franjo Tuđman (first president of Croatia) and shouted that the Prime-minister should be ashamed and that Franjo Tuđman is a war criminal. In 2019, he was sentenced for disruption of public peace and order, fined with 500 HRK, with a conditional 15 days prison sentence.²⁵

Checks and balances

Guarantees of legality and transparency in enacting laws

When it comes to legality and transparency of enacting laws, there were problematic moves by the Government in the context of COVID-19 epidemic. In March 2020, Government’s brought a proposal to amend the Electronic Communications Act, which provides for the possibility of monitoring the location of each cellphone in Croatia (not only those with the self-isolation order by authorities) and which thus goes beyond the purpose of protecting public health. In a press release signed by 44 NGOs, Centre for Peace Studies stated the following:

“In addition, this measure is inefficient because it is easy to trick it by leaving your cell phone at home. Also, there are no provisions on the length of the monitoring measure, nor is there a prescribed way of handling the collected data, storing and destroying them, as well as controlling the collection of data. These measures provided are not effective or appropriate and open up the possibility of misuse for the unauthorized collection, processing and sharing of citizens’ private data. Furthermore, it is obvious that we are in a state of emergency due

23 https://www.kucaljudskihprava.hr/wp-content/uploads/2020/04/KLJP_godisnjeIzvjescje2019_web.pdf

24 <https://www.hnd.hr/gordan-duhacek-priveden-pusten-i-kaznjen-zbog-pjesmice-na-twitteru>

25 <https://www.jutarnji.hr/vijesti/crna-kronika/objavljena-presuda-bivsem-branitelju-koji-je-izazvao-incident-na-otkrivanju-spomenika-tudmanu-u-zagrebu-on-je-ratni-zlocinac/8374187/>

to the virus pandemic and that the proposed measures limit constitutional rights. In such cases, the Constitution stipulates in Article 17 that temporary restrictions on constitutional rights must be enacted by a two-thirds majority, not the ordinary way that the ruling coalition wanted to do. In such emergencies, when space and time for widespread democratic debate are reduced, it is necessary to bring about temporary restrictions on human rights by a broad consensus of parliamentarians. To introduce such and similar restrictions on human rights in accordance with the Government's proposal would open up the possibility of their duration even after this great natural disaster. It is unacceptable that this emergency be used to increase the powers of the executive and as a justification for introducing excessive and unnecessary measures of surveillance of citizens as regular measures and when the state of emergency ceases to exist."²⁶

Due to reactions by CSOs²⁷, opposition parties, media and constitutional law scholars, it seems that the Government gave up this legislation.

Independent authorities

Independence, capacity and powers of national human rights institutions, ombudsman institutions and equality bodies, including as regards their cooperation with civil society

Croatia has four ombuds institutions: Ombudswoman of the Republic of Croatia; Ombudswoman for Gender Equality, Ombudswoman for Persons with Disabilities and Ombudswoman for Children.

When it comes to powers and independence of the Ombudswoman Offices, there have been worrisome practices by the Government in the past several years, connected to the practice of violent push-back of migrants in Croatian territory and the borders. In July 2019, Ombudswoman, who has the mandate of National preventive mechanism (NPM), issued a press release stating the following:

“Since during the visit to Tovarnik Border Police Station the National Preventive Mechanism (NPM) was denied access to all data on treatment towards the irregular migrants, the Ombudswoman Lora Vidović warned the Minister of Interior,(MI) Davor Božinović, to order his policemen to organise their work in compliance with the accepted

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

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

international and Croatian legal obligations for efficient prevention of torture and other cruel and inhumane and degrading treatment and punishment. This was not the first case of denial access to the data on behalf of the MI; it has begun even in the middle of the last year and it concerns exclusively the treatment of irregular migrants. During this NPM visit to Tovarnik Border Police Station in the beginning of June 2019 however, for the first time the access to all requested data was denied, including the IT system and individual cases thus the visit was interrupted since it was not possible to carry it out efficiently. As in previous data access denial the explanation was that the NPM members were not allowed to get the password which was not even asked. Regarding the access to individual cases it was said that the policeman, who deals with the case, is on a leave and that „all cases are locked up in a cupboard“, hence, that the authorisation for opening it was not in possession neither of the Deputy Head of the Unit nor the Head of the migration department. However, un-announced visits of detention institutions and free access to the data regarding the persons deprived of liberty are the key tools at the NPM disposal according to the national and international legal duty accepted by the Republic of Croatia.”²⁸

Enabling framework for civil society

Enabling regulatory environment including as regards access to funding

Civil society organizations have, in recent years, been constantly confronted with the narrowing of their space of work and obstacles to their work and development. In addition, there are worrying tendencies that negatively affect the functioning of the institutional and policy framework for civil society development in Croatia, that has been for years a good practice example.

The National Strategy for Creating an Enabling Environment for Civil Society Development was not adopted, although the competent institutions (primarily the Government Office for Cooperation with NGOs) repeatedly announced that it would be adopted in 2019. This is of particular concern given that the previous National Strategy expired in 2016, that the Working Group drafted the draft at the beginning of 2017 and that an e-consultation was held in mid-2017 on the Draft National Strategy. The strategy drafting process was stopped at the stage of the competent authorities' opinions, as the Ministry of Labour and the Pension System waited for a year and a half, which casts doubt on the deliberate obstruction of this process by the said Ministry. It is important to note that the adoption of the strategy is a precondition for the planning and

28 <https://www.ombudsman.hr/en/ombudswoman-warned-the-mi-to-grant-npm-access-to-data-on-irregular-migrants-treatment/>

programming of European Social Fund calls worth EUR 100 million.

An additional problem is the continued marginalization of the Civil Society Development Council as an advisory body to the Government of the Republic of Croatia. For example, Council President Emina Bužinkić said in a January 2019 interview that “(...) neither this year’s Lottery Regulation Regulation was discussed nor voted on in the Council, regardless of the clearly established principles of participatory and partnership.”²⁹ In addition, during the work of this term of the Council for Civil Society Development (from 2016), there was a repeated lack of participation of representatives of individual Council members from the state administration bodies, which further hampered the work of the Council.

An additional problem for civil society organizations was the delay in announcing and contracting certain funding tenders, especially those from the European Social Fund, along with changes and lack of following of the Annual Plan of ESF calls. This has a negative impact on the work of civil society organizations, because the prolonged time of waiting for project decisions and contracting compromises financial sustainability as well as the ability to plan the activities of civil society organizations. It should be noted that the Republic of Croatia is at the bottom of the EU countries in withdrawing funds from EU funds.

In addition, civil society organizations are often overburdened with administrative requirements in terms of project administration, which do not contribute to transparency of spending but restrict the work of civil society organizations and jeopardize the results of the *per se*.

Access to information

In 2019, Centre for Peace Studies experienced troubles in obtaining information from the Ministry of Internal Affairs. Often times, there were no answers to our inquiries regarding allegations of police violence and irregular conduct at the borders, as well as to our EU-funded projects related inquiries. Furthermore, the inquiries sent in accordance with the Act on the Right of Access to Information were answered with delay over the statutory deadline or only partially.

Freedom of assembly

When it comes to equality of enjoyment of freedom of assembly, there was one event that raised concern. In June 2019, a protest called “I Want a Normal Life” was held in Čakovec and it was directed against the Roma national minority in that county, that is, it brought the Roma national minority in connection to the harm to security of citizens, generalizing and encouraging discrimination, involving representatives of relevant institutions, such as rep-

29 <https://www.kulturpunkt.hr/content/sistem-operira-kocnicama-i-crvenim-zastavama>

representatives of municipalities. In this connection, it is particularly worrying that the City of Čakovec did not approve the use of public space for the counter-protest organized by the Roma Association of the Republic of Croatia “KALI SARA” RRH “KALI SARA”, warning of the inappropriateness and falsehood of such generalizations. Although SRRH “KALI SARA” first offered to hold the protest in a different place, and then in different time, that is, the day after, such protest was not legally allowed. We believe that there are no prerequisites for such treatment provided for by the Law on Public Assembly, and that it is contrary to the Constitution of the Republic of Croatia and to a number of norms governing the right of public assembly in international and European law. The actions of the City of Čakovec may be seen as discrimination on the basis of ethnicity.

Interference on activities by civil society organizations active on migrants' rights

In the past several years (2017 - 2019), organizations dealing with refugees', asylum seekers' and migrants' rights have been facing difficulties in Croatia and were targeted by the Ministry of Interior, mainly NGOs called Centre for Peace Studies and Are You Serious?. MoI began to put pressure on actors that speak publicly about the abovementioned violations, namely: human rights lawyers, civil society organizations and the Croatian Ombudsperson. We see a continuation of the systematic disabling of the work of organizations, activists and institutions protecting refugees' human rights. This negative trend of pressure on civil

society organizations that is present in some parts of the EU is a direct endangerment of the freedom of speech and the vocation of human rights protection.

Having said that, the following practices have been implemented from 2017 to day:

- Threats by the police officer to NGO employees or volunteers monitoring and escorting and supporting refugees' right to seek asylum at the police stations that the next time legal procedures would be initiated against them and against the organisation.
- Extremely dubious and illogical actions of the police towards organizations and the attorneys with whom NGOs are collaborating with on one particular case, when the police denied the lawyer access to her clients. The police engaged the Police National Office for the Suppression of Corruption and Organized Crime (PN USKOK) to take investigative actions against the law office about the circumstances of signature of the power of attorney. A year later, no criminal procedures were started, but the harm done to the reputation of this lawyer's office is huge.
- An event (2018) in which NGOs announced a press conference on pressures and intimidation by the police, the same police sent calls the activists to attend a police interview right at the time of the press conference. We interpret this procedure as a direct attempt to limit the freedom of expression of human rights defenders.

- The Minister of the Interior Mr. Božinović publicly stated that two NGOs dealing with these issues have been handing out to migrants in Serbia telephone numbers, instructions, money and direction as to how to enter Croatia, thus publicly alleging conduct of illegal activities without due process, which is completely unfounded and a blatant defamation of NGOs work.
- The Ministry of the Interior sought to ban the work of one of those NGOs by initiating misdemeanor proceeding against their volunteer for allegedly assisting one family in the illegal crossing of the border, although he acted in accordance with Article 43 of the Foreigners Act. Later, the volunteer was sentenced for “unconscious negligence” when helping the family to cross the border illegally. The court determined he did not communicate directly with the family but through official NGO communication channels; all geolocations that were sent to the NGOs by the family were from Croatian territory, and that there was no intention in helping in illegal border crossing. It is also interesting to note that while the verdict was pending (meaning it was not publicly available) it was published by a state-owned news agency.
- In 2018, the Ministry of the Interior denied one of the NGOs access to the Reception Centres for asylum seekers, refusing to extend the cooperation agreement to an organization that has provided support to refugees and asylum seekers for 15 years. The MoI’s explanation for such a decision is the alleged lack of physical space in which activ-

ities could be carried out, moreover claiming that there are enough other engaged organizations in the Reception Centres. The Ministry of the Interior’s argument that there are currently sufficient activities being organized by other NGOs in Reception Centres is inadequate, as many activities are not available to all refugees, especially those in the Reception Centre Kutina. Refugee needs were analyzed for the development of the National Action Plan for Integration currently in force. Many organizations and institutions participated in the drafting of the National Action Plan, whose measures were not altered, and include measures for which CPS is co-responsible. Ironically, although this latest move of the MoI jeopardizes the implementation of the Action Plan, the Ministry of the Interior itself is responsible for the execution of some of the measures outlined in the Plan. This brings to question who benefits from this latest decision of the Ministry of the Interior, as it is not beneficial for Croatian society, institutions, nor the refugees themselves.

These examples provide a clear picture of the practices that are being used to undermine and impede NGOs everyday work, their rights and duties. Public attacks without foundation, space restrictions, the ban on monitoring and investigation tasks, and criminalization of solidarity are posing a serious threat to democracy and the rule of law in Croatia.

Other than the organizations advocating for the human right of refugees, some other NGOs were also under the attack of the Government. For example, NGO Gong asked MEP and

then-candidate for position of vice-president of the European Commission to answer 6 questions, including origins of her property. Gong was publicly accused by the prime minister of Croatia that it is a quasi-independent organization and an asset of opposition party SDP, which was one of the main topics of national media for several days.³⁰

Other systemic fundamental rights issues

Widespread violations or protection failures

From the press release of NGOs related to EC green light for Croatian membership in Schengen area³¹:

“For the past three years, civil society organisations and activists from Croatia (Welcome Initiative, Are You Syrious, Centre for Peace Studies), institutions such as the Ombudsperson’s Office together with many international governmental and non-governmental actors ([UN Special Rapporteur on the human rights of migrants](#), [Council for Europe Commissioner for Human Rights](#), [Human Rights Watch](#), [Amnesty International](#), [Medecins Sans Frontieres](#)) have been warning about the illegal and violent police practices towards refugees and migrants trying to

enter Croatia from the borders with Serbia and Bosnia and Herzegovina. Activists and volunteers of [Border Violence Monitoring Network](#) present in the border areas in Serbia and Bosnia and Herzegovina are collecting testimonies from refugees and migrants, and publishing reports - which describe these illegal actions and define trends. These are planned, structural and intentional actions of the police who is denying people entry to the territory of the Republic of Croatia and is pushing them back to neighbouring countries outside of any established procedures or access to international protection system, often using force and violence. There are no monitoring mechanisms of police conduct in place, there exists a total lack of official supervision of officer behavior and the [National Preventive Mechanism](#) has been essentially disabled. The police practice remains unsanctioned by the responsible bodies, even after [published letter](#) of anonymous police officers that have, from their own experience, confirmed illegal practice. Such practice at the soon-to become Schengen border not only directly violates provisions of the Schengen Border Code, but represents a violation of international and EU law, including the Geneva Convention on the Status of Refugees. However, mentioned practice has been taken into consideration within a more international context - an administrative court in Switzerland has [suspended](#) a Dublin transfer to Croatia due to the current practices

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

31 <https://www.cms.hr/en/azil-i-integracijske-politike/hrvatska-ne-smije-uci-u-schengen-dok-krsi-ljudska-prava>

of summary returns. Also an important case, *M.H. and others v Croatia* concerning an Afghan family - whose child was hit by a train and died while the family was being pushed back from Croatia to Serbia, is pending before the European Court of Human Rights. These should be taken into consideration upon reaching the decision whether Croatia has fulfilled all conditions to join the Schengen area. As a country candidate, one must undergo the Schengen evaluation which includes all parts of the Schengen acquis. Croatia is not respecting nor applying relevant international law standards and the Schengen Border Code (SBC). In particular, Croatia is violating Article 13 of the SBC which provisions: “A person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC”. Procedures of the mentioned Directive ensure a fair and efficient asylum system is in place, which fully respects the principle of non-refoulement; and placement in specialised detention facilities in a humane and dignified manner with respect for fundamental rights and in compliance with international and national law. International and national legislations are not violated only on the borders, but also across the breadth of the Croatian territory. Testimonies of refugees and migrants regarding detention facilities in Korenica and Zagreb, along with the systematized techniques used in pushback procedures, show that Croatia is still not ready to maintain its borders while observing international legal standards and the Schengen aquis - and therefore should not have the approval to join

the Schengen area until the above mentioned practice is stopped and sanctioned.”

Concerns raised by regional and international human rights monitoring bodies

In October 2019, the UN Special Rapporteur on the human rights of migrants, Felipe González Morales stated the following:

“As most of the migrants in BiH have attempted to cross the border to Croatia, I have received reliable information about violent pushbacks of migrants and asylum seekers by Croatian border police into the territory of BiH. According to the testimonies that I received, many migrants were forcibly escorted back to BiH without going through any official procedure. The concrete tactics vary; however, common patterns include the capture of people on the move, confiscation of their properties, especially communication equipment, beating with batons and chasing by dogs with the purpose of physically exhausting them and prevent them from attempting another crossing. A number of male migrants were reportedly stripped, beaten and forced to walk back to BiH barefoot. The abusive actions by the Croatian border police clearly violate the human rights of these individuals. In reality, this pushback approach has not deterred people on the move from advancing towards the European Union territory. Instead, it has led to a flourishing network of smugglers and organised criminal activities, which require immediate attention and action by all countries in the region. I had an opportunity to address my concerns with the Ambassador of Croatia in Sarajevo.

I understood that these concerns will be communicated to relevant authorities. During the meeting, I also learned that Croatian border police are receiving human rights trainings. I will continue the dialogue with the Croatian authorities and look forward to receiving soon information on positive improvement in this regard.”³²

32 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25088&LangID=E>

Italy - Italian Coalition for Civil Liberties and Rights (CILD) and Associazione Antigone

Justice system

Quality of justice

Accessibility of courts

The Italian judicial system includes the possibility, for people with an annual income lower than € 11.493,82 (along with other criteria), to file a request for legal aid. The request to benefit from legal aid has to be granted by the judge, who decides also considering the income of the requesting person. In the past year, lawyers have noticed¹ that judges are more often denying the request of free legal aid because they evaluate that the income of the requesting person would be too low to ensure his/her survival, and this might be an indicator of illicit activities and illicit revenues. However, according to lawyers, judges don't always verify whether the allegations are true and simply proceed with the denial of the request. This way of acting clashes with a 2017 sentence in which the Court of Cassation stated that the simple statement of having no income is not in itself a potential deception and that judges must always use their "power of investigation" to carry out a check on the requesting person. On a positive note, this year, the Court of Cassation upheld the appeal of a woman to whom the legal aid was revoked

due to her change of income. The sentence n. 12191/2020 accepted the claim and stated that once the legal aid request has been accepted, the beneficiary doesn't need to submit any declaration regarding income changes.

Lawyers who are in the legal aid lists lamented several problems with the functioning of the legal aid framework. Lawyers who find themselves defending people who meet the requirements for free legal aid at the expense of the State, complain of a low remuneration and of being paid after a long period of time. The payment by the State usually is even made two years after the end of the trial. This means that the lawyer receives the compensation due for the trial at first instance two years after the conclusion of that trial phase. And the same happens for the other phases of the proceedings (appeal and Court of Cassation). Also, lawyers have underlined that when they file their bill to the legal aid office, the remuneration that they will receive will only partially cover the expenses they had. This condition of low remuneration and delay in payment ends up creating a lack of homogeneity in the defence offered because it undermines motivation and also reduces the means by which to carry out a strong defensive strategy (for example by preventing the use of expert opinions or translations / interpretation of good quality). It also encourages bad practices. In fact, cases have been reported of lawyers asking for payments to their clients even if they have filed a request for legal aid; other cases involve clients who are aware of the dysfunction of the

1 https://www.agi.it/cronaca/gratuito_patrocinio_giustizia_tribunali-5370388/news/2019-04-22/

legal aid framework and who offer money to their lawyers as an incentive. In the past year, the National Lawyers' Council (Consiglio Nazionale Forense - CNF) with disciplinary proceeding sentence 136/2019, has recalled² that it is illegal for lawyers to ask fees to clients who have been admitted to legal aid. That would be a violation of article 11 of the code of ethics (duty of defence).

Last year a new draft bill on legal aid³ that is still under consideration by the Justice Commission of the Chamber of Deputies was presented by Minister of Justice Alfonso Bonafede. This decree aims at enlarging the scope of legal aid by allowing the recourse to legal aid also in case of assisted negotiation procedures⁴, in cases where an agreement has been reached. This measure foresees that the court in which the agreement was concluded shall pay the liquidation in cases with positive results. The draft bill also introduces the possibility for the victim of the crime to benefit from free legal aid even without meeting the income requirements in cases that concern the following crimes: breach of family care obligations when the violation is against minor or a family member unable to work (art 570.2

penal code), breach of family care obligations during the divorce that damages minor or a family member unable to work (art 570 bis p.c.), and the crime of torture (art 613 bis p.c.).

Other issues related to the quality of the justice system: legal guarantees of fair trial standards and their application in practice

A research⁵ carried out by Antigone has highlighted other problems linked with the procedural rights of arrested people and the application of European Directives of the Stockholm Roadmap. The research was based on information collected by interviewing 111 arrested people and 64 criminal lawyers coming from four different cities: Bologna, Florence, Rome and Palermo. From the data analysis it was found that depending on the location where people are arrested, they endure a different treatment.

A common trait is the impossibility to use police holding cells because they don't comply with the standards of detention. This means that people are often put in home arrest (such is the trend in Bologna) or taken to the closest

2 <https://consumatori.org/37827-avvocati-illecito-chiedere-compensi-al-cliente-ammesso-al-gratuito-patrocinio-asp/>

3 <https://www.altalex.com/documents/news/2019/09/25/gratuito-patrocinio-riforma-in-tempi-brevi#news>

4 <https://www.altalex.com/documents/news/2019/05/22/gratuito-patrocinio-esteso-anche-alla-negoziatore-assistita>

5 http://www.antigone.it/upload2/uploads/docs/IPC_ITA.pdf

prison (such as in Palermo). Prison should only be an extrema ratio, since each entry into the penitentiary system means activating a burdensome protocol for arrests that in most cases last a few hours.

Also, the study has highlighted that only the 62% of prisoners interviewed has received a copy of the Letter of Rights, which according to the 2012/2013 European directive has to be given to all arrested people.

Moreover, as it often happens, suspects/accused who don't speak Italian are at disadvantage because in most cases they don't get translated documents, neither qualified interpreters who can communicate them their rights and help during the communications with the lawyer and during the trial. The lack of a registry for qualified translators and interpreters is a cause of great concern because it renders very difficult for the Court which employs their services to check their credentials and the quality of their work.

Another problem is represented by the access to a lawyer and, in particular, the very limited time that the attorney has to speak with his client during their first meeting before the validation hearing, which can be so short as to last only five minutes. In fact, when a person is arrested in flagrante delicto, the crime committed can be judged with a fast-track trial (*giudizio direttissimo*) that will likely take place in the morning after the arrest (that in most cases takes place at night). The lawyer

(often an *ex-officio* lawyer) is notified about the validation hearing and the trial usually right after the arrest. These circumstances often lead to a situation where the attorney and his client meet for the first time in the morning after the arrest and right before the start of the validation hearing and the fast-track trial. Furthermore, since in the courts there are usually no spaces dedicated to a private consultation between lawyer and client, those consultations take place in corridors and their privacy is put in jeopardy by the presence of police officers.

In addition, with the entry into force of Law 3/2019 of 9 January 2019 the statute of limitation of crimes has been modified. In particular, the modification of the statute of limitation has entered into force for all crimes committed after 1 January 2020. With the new law, a crime will become statute-barred after the issue of the sentence (either condemning or acquitting the accused) by the tribunal of first instance. This means that during the appeal and when the proceeding is brought before the Court of Cassation, the crime cannot become statute barred.

Two of the reasons behind the modification of the law are to the excessive length of proceedings (see below) and the data on the proceedings (that refer to 2017) that reach the statute of limitation⁶: 9.4% of the criminal cases that are divided as follows: 75% of them became statute-barred before the end of the first instance, 24% during the appeal trial and

6 <https://www.altalex.com/documents/news/2020/01/08/riforma-prescrizione-eterno-processo>

1% during the proceeding before the Court of Cassation.

This reform has been widely criticized⁷ by several justice actors (lawyers⁸, prosecutors⁹, judges, and professors of criminal procedure) because they fear that the absence of the statute of limitation after the first degree will undermine (among others) the principle of reasonable length of the proceedings (i.e. proceedings will get even longer than they are now) and the principle of a penalty to be served in a timely manner instead of years after the crime committed. According to some of them, this reform could be unconstitutional.

On 13 February 2020, the government has approved a draft delegating law that aims at modifying the criminal procedure to increase its efficiency and speed. Because of the critics to Law 3/2019, the government decided to include in the draft delegating law a further modification of the statute of limitation¹⁰ that will be different depending on the outcome of the sentence. In the case of a first instance

guilty verdict, the statute of limitation will be suspended, in the case of an acquittal, the statute of limitation will remain in place. If the appeal trial ends with the acquittal of the suspect that had been found guilty by the tribunal of first instance, the statute of limitation will be once again put in place by calculating the time elapsed between the guilty sentence of first instance and the acquittal by the Appeal Court.

Efficiency of the justice system

Length of proceedings

The length of proceedings is one of the major problems of the Italian justice system. According to the 2019 Justice Scoreboard¹¹, in Italy in 2017 the average length of proceedings was of 584 days for the first instance, numbers grew higher for the appeal (843 days) for the third degree (1,299 days). The website of the Ministry of Justice monitors the number of

7 <https://www.ilsole24ore.com/art/prescrizione-pg-milano-riforma-e-incostituzionale-ACXwEKGB>

8 http://images.go.wolterskluwer.com/Web/WoltersKluwer/%7Bac7bfb24-6ce5-41b0-82e4-d6f2429c7ad6%7D_unione-camere-penali-delibera-6-novembre-2019.pdf

9 https://milano.repubblica.it/cronaca/2020/02/01/news/inaugurazione_anno_giudiziario_milano_bonafede_davigo_avvocati-247309466/

10 <https://www.altalex.com/documents/news/2020/04/01/la-riforma-della-prescrizione>

11 https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf

proceedings that are at risk of breaching the principle of reasonable duration.¹²

For civil and criminal proceedings reasonable duration is calculated as follows:

- three years for a first degree judgement
- two years for a second degree judgement
- one year for a Court of Cassation judgement

The number of civil proceedings at risk seems to be diminishing between 2013 and 2018 also thanks to some reforms¹³ that took place between 2011 and 2014 that from one side discouraged the recourse to civil litigation and from another sped up some proceedings. For 2019 data are not complete, but show an increase in the Court of Cassation while could be either slightly diminishing or increasing in the case of first and second degree judgements.

Criminal proceedings are also affected by this problem. According to an investigative report¹⁴, the average number of days needed to

reach the first judgement is 392, an appeal can last 840 days while proceedings at the Court of Cassation can on average last 170 day. The most recent data¹⁵ on the numbers of penal proceedings that are at risk of breaching the principle of reasonable duration date back to 2017. The reasons behind such an outdated data collection can be found in the fact that, differently from the civil sector, it hasn't been possible yet to develop a modern data collection technology.

According to those data, in 2017, 19% of the cases awaiting a first judgement were beyond the three-year threshold, the situation of the Appeal Courts was of 39.4% of cases beyond the two-year threshold, while the Court of Cassation had only 1.3% of cases beyond the one-year threshold. The Tribunal for Minors also had a three-year threshold and 14.9% of the cases were lasting longer.

It is known that in 2001, the Pinto law introduced the possibility to receive a compensation for the excessive length of judicial proceedings. According to the latest report on Justice¹⁶ pub-

12 https://www.giustizia.it/giustizia/it/mg_1_14_1.page?facetNode_1=0_10_37&contentId=SST1287132&previousPage=mg_1_14

13 <https://www.diritto.it/giustizia-e-fattore-tempo/>

14 <https://espresso.repubblica.it/plus/articoli/2020/02/13/news/prescrizione-molto-rumore-per-quasi-nulla-1.344352>

15 https://www.giustizia.it/giustizia/it/mg_1_14_1.page?facetNode_1=0_10_36&contentId=SST1288006&previousPage=mg_1_14

16 https://www.giustizia.it/resources/cms/documents/anno_giudiziario_2020_dag.pdf

lished by the Ministry of Justice, the offices that elaborate the payments are also falling behind in the payments due to the high number of sentences in favour to the applicant, the limited budget allocated to these payments, and chronic understaffing. This further delay of payments caused in 2019 an increase of the number of litigation cases against the administration.

According to the Justice Scoreboard, the number of judges per 100,000 inhabitants is among the lowest in Europe and could play a role in the excessive length of proceedings. The abovementioned draft delegating law¹⁷ also tackles this issue by giving the disposition to hire 500 more honorary judges for Courts of Appeal and 1,000 people for the administrative personnel in the hope that this would speed up proceedings at the appeal level.

In order to shorten the length of proceedings, among several other provisions, the draft delegating law¹⁸ also introduced stricter deadlines for each step of the criminal proceeding. In particular, it shortens the deadline for the prosecution to carry out the preliminary investigations setting it to:

- six months for lesser crimes,

- one year for ordinary crimes,
- eighteen months for the gravest crimes,

The extension of the deadline can be granted only for six months and only once. The prosecutor has the either 3, 6 or 12 months (depending on the type of crime) to close the case and ask either for the indictment or the acquittal.

Deadlines have been introduced also for the following phases of the criminal trial.¹⁹ Depending on the gravity of the crime, the deadlines are the following:

1) for grave crimes against the public administration:

- three years for a first degree judgement
- two years for a second degree judgement
- one year for a Court of Cassation judgement

2) for crimes that are judged by a single judge (as opposed to a collegial tribunal) ex art 33-ter of the code of criminal procedure (c.c.p.) (non grave drug-related crimes and

17 <https://www.diritto.it/la-riforma-del-processo-penale-proposta-dal-governo-una-prima-disamina-dei-suoi-profilii-applicativi/>

18 <https://www.altalex.com/documents/news/2020/02/14/riforma-processo-penale>

19 <https://www.diritto.it/la-riforma-del-processo-penale-proposta-dal-governo-una-prima-disamina-dei-suoi-profilii-applicativi/>

crimes with a detention sentence lower than 10 years):

- one year for a first degree judgement
- two years for a second degree judgement one year for a Court of Cassation judgement

3) for crimes judged by the collegial tribunal ex art 33-bis of the c.c.p.:

- two years for a first degree judgement
- two years for a second degree judgement
- one year for a Court of Cassation judgement

For mafia-related crimes, crimes related to criminal associations, terrorism, grave crimes against the democratic order and other grave crimes that entail a complex investigation and complex trials, no limitation is set.

The draft delegating law also extends the possibility to resort to the plea bargain for crimes with a maximum detention sentence of 8 years instead of a maximum of 5 years, as it is now foreseen by the law. Some crimes will be excluded from the possibility of the plea bargain. Also, the use of the abbreviated judgement is encouraged.

Media pluralism and freedom of expression and of information

Framework for the protection of journalists and other media activists

Rules and practices guaranteeing journalist's independence and safety and protecting journalistic and other media activity from interference by state authorities: rules on whistleblowers' protection

In 2017 Italy introduced a key piece of legislation at the end of 2017, which for the first time, specifically broaches the topic of whistleblowing and applies not only to the public sector. The new legislation establishes that public and private sector employees must be protected if they report illegal practices within their company/organisations. Before the entry into force of the above mentioned Law, in Italy a regulation of whistleblowing existed only with reference to the public sector (article 54-bis of Legislative Decree no. 165/2001 as amended by Law no. 190/2012), banking and finance sector (Legislative Decree no. 72/2015) and for listed companies (art. 7 of the Corporate Governance Code).

Law no. 179 of November 30, 2017 – entitled “*Provisions for the protection of whistleblowers who report offences or irregularities which have come to their attention in the context of a public or private employment relationship*” – set forth protective measures also for workers belonging to the private sector who report offences or irregularities which have come to their attention in the context of the employment relationship.

This law applies to workers in general, thus it is not specifically related to journalists.

Workers are protected by the law and the applicable collective bargaining agreement. It is automatically unfair to dismiss or victimise an employee because he/she made a disclosure if in doing so he/she did not breach the law or contract.

There is no statutory requirement that employers put in place a whistleblowing policy or whistleblowing arrangements. There is, however, an increasing awareness that doing so means that concerns can be dealt with efficiently and transparently. There is also the added benefit that having an internal policy in place means that concerns can be raised and managed internally, not externally mitigating the risk of reputational damage/repercussions.

Law enforcement capacity to ensure journalists' safety and to investigate attacks on journalists: frequency of attacks against journalists, bloggers or other media activists

According to Ossigeno per l'informazione, 134 have been attacked in 2019. Episodes included, for example, threats, lawsuits and damage to journalists' belongings.²⁰ However, there is a considerable difference (from 6 to 12

times) between the number of intimidation of journalists in Italy reported by the official statistics of the Ministry of the Interior and the number published by specialised civil society organisations.²¹

About 20 Italian journalists are currently receiving round-the-clock police protection because of serious threats or murder attempts by the mafia. The level of violence against reporters keeps on growing, especially in Rome and the surrounding region, and in the south. In Campania, the editor of *Campanianotize.com* narrowly escaped a murder attempt in November 2019 by a local mafia family in reprisal for his newspaper's investigative reporting. In Rome, reporters were verbally and physically attacked in the course of their work by members of neo-fascist groups and the Five Star Movement (M5S), which is part of the coalition government. On the whole, Italian politicians are less virulent towards journalists than in the past, but journalism risks being undermined by certain recent government decisions, such as a possible reduction in state subsidies for the media.²²

Access to information and public documents

Public authorities (PAs) in Italy are obliged to publish certain information and can make

20 <https://www.ossigeno.info/la-tabella-dei-nomi/>

21 <https://www.ossigeno.info/perche-viminale-segnala-12-volte-meno-intimidazioni-di-ossigeno/>

22 <https://rsf.org/en/italy>

available to the public additional categories of information upon request. The latter way of accessing information is available since 2016, when Italy adopted a Freedom of Information Act (FOIA) with Legislative Decree no. 97/2016. These measures is aimed at allowing any individual to access public information and has proven particularly relevant for journalists' enquiries. While Italy improved its right to information rating with this measure, the law still has several shortcomings, including the lack of sanctions for public bodies that illegitimately refuse to disclose documents; the absence, in many Italian regions, of an ombudsman that can safeguard the right to access to information; and the limited duties on proactive transparency for PAs. In addition, although the Italian National Anti-Corruption Authority has adopted guidelines for public bodies handling access to information requests, these seem to be disregarded or unknown by civil servants. The Italian FOIA still falls far behind international standards, as it forces requesters to go through the infamously slow Italian court system in order to challenge non-disclosure of information, making it difficult to hold public officials accountable and nearly impossible for citizens to participate in decision-making processes. The actual implementation of the FOIA is not yet satisfactory. The monitoring of several access

to information requests conducted both in 2017²³ and 2018²⁴ showed that around 75% of the requests were not answered at all by public bodies; one third of the denial by PAs to disclose information was illegitimate; and, in most cases, the responses received from PAs could be considered totally inappropriate or deprived of any sound legal basis.

Checks and balances

Independent authorities

Independence, capacity and powers of national human rights institutions, ombudsman institutions and equality bodies, including as regards their cooperation with civil society

Italy lacks a National Human Rights Institution. Equality bodies include the National Office against Racial Discrimination (UNAR), which however lacks independence from the government and therefore has limited capacity.

23 Diritto di Sapere, *Ignoranza di Stato*, 2017, available at: <https://blog.dirittodisapere.it/wp-content/uploads/2017/04/ignoranza-di-stato.pdf>.

24 Cittadinanzattiva, monitoring of 8000 requests of access to information sent to local, regional and national entities conducted between March 2017 and September 2018.

Enabling framework for civil society

Freedom of association

Italian law gives anyone the opportunity to form an association or a foundation. Article 18 of the Constitution protects this right. Associations and foundations are the most common legal form of NGOs and are regulated by the Civil Code (Part I “Of people and the family”, Title II “Of legal persons”, in articles 14 – 42). In addition to the classical forms of non-profit organizations, Italian law distinguishes between recognized and unrecognized associations or committees. Associations recognized as legal persons are those to which the competent authority (prefecture of the province where the entity is headquartered) has granted recognition, which is obtained by registration in the register of legal persons. Articles 14 - 35 of the Civil Code define associations and foundations: associations when the personal aspect prevails (the associates) or foundations when the patrimonial aspect prevails. In addition, Articles 36 – 42 of the Civil Code defines unrecognized associations (without legal status) and committees (citizens’ organizations that pursue a single purpose for a limited duration).

A reform aiming to provide general principles for a harmonization of the third sector started in 2016. Law No. 106 of 6 June 2016 gave “Mandate to the Italian Government for the reform of the Third Sector, of Social enterprises and of the universal civil service” (*Legge 6*

giugno 2016, n. 106 “Delega al Governo per la riforma del Terzo settore, dell’impresa sociale e per la disciplina del servizio civile universale”)⁵. According to this Law, the “third sector” includes all private subjects and bodies engaged in the promotion of solidarity and socially useful activities through voluntary actions and the exchange of goods and services. Trade unions, political parties, professional associations and banking foundations are consequently excluded from this definition. We are witnessing delays in the implementation of this law due to lengthy administrative updates from the authorities, which may cause uncertainty in existing associations and groups of individuals who would like to formalise their legal status.

The Council of Europe’s Conference of INGOs in 2019 recommended public authorities to ensure a safe space for the exercise of freedom of association, in accordance to international standards, and to guarantee this right, both in law and in practice, regardless of the domain in which they operate and irrespective of whether the mission of the NGO aligns with the politics of the day. This implies the urgent need to reject and repeal some laws, provisions, policies and practices which impede NGOs from carrying out their legitimate work.²⁵

Right to participation

The guidelines on public consultation in Italy provide the general principles in order to allow that public consultation processes can lead

²⁵ <https://rm.coe.int/report-visit-of-the-conference-of-ingos-to-italy-2019/1680981493>, p. 18.

to informed and quality decisions and are as inclusive, transparent and effective as possible. The document was produced through a participatory process that involved the Open Government Forum. The Guidelines were under public consultation from 5 December 2016 to 12 February 2017. Since 12 May 2017, the permanent collection of consultation initiatives aims to collect all relevant data relating to public consultations and will allow for analysis of the evolution of the consultation processes and the quality of participation in the Italian public administration (in line with the principles set out in the Guidelines). However, the consultation activities by Italian central and local public administrations are carried out only sporadically and with different quality levels. The Public Administration Ministry intends to establish an online platform for consultation, which should be launched soon as an open source process (inspired by Madrid + Barcelona model). It is aimed to be a user-friendly space for consultation with citizens, and to provide external actors with easy access to decision-making on behalf of the Italian government. In time, this platform is intended to be extended to all levels of administration.

With respect to accessing public information, In 2016, Italy adopted Legislative Decree n°97/2016 allowing individuals to implement their rights to access information (freedom of information act, or FOIA) held by the public administration. However, the law does not impose any sanction on those public bodies which, contrary to the law, refuse to disclose information. The monitoring exercise conducted on the basis of 8,000 requests shows that between 2017 and 2018, around 75% of

the requests were not answered at all by public bodies, 1/3 of the instances in which the public administration refused to disclose information were deemed to be illegitimate and in most cases, the responses received could be considered as devoid of any legal basis. There appears to be a need to simplify the management of information disclosure obligations in order to facilitate citizens and stakeholders' access to information: two years after the adoption of the FOIA, the need emerges to further encourage the use of generalized civic access developing mechanisms to facilitate its use by citizens and help administrations manage requests more effectively and efficiently.

The Netherlands - Netherlands Committee of Jurists for Human Rights (NJCM)

Justice system

Independence

Appointment and selection of judges and prosecutors

The appointment and selection of judges and public prosecutors is regulated in the Dutch Constitution and by the Judicial Officers (Legal Status) Act (Dutch: *Wet rechtspositie rechterlijke ambtenaren*) and the Judiciary (Organisation) Act (Dutch: *Wet op de rechterlijke organisatie*). Members of the Supreme Court (Dutch: *Hoge Raad*) are selected from a list of three candidates put forward by the House of Representatives. In codified practice a shortlist of six candidates is provided by the Supreme Court itself, and the House of Representatives forwards the first half of the list to the government, who appoints the first person on the list. Judges and justices (including substitutes) are appointed for life by Royal Decree on the recommendation of the minister of Justice and Security (hereinafter:

the minister). High-level public prosecutors are appointed by Royal Decree on the recommendation of the minister, whereas lower level public prosecutors are appointed by the minister.¹

Substitute judges and justices are appointed for life, but are only assigned to a court for a maximum period of three years, which can be renewed after a pause of six months. Substitute judges and justices can conduct activities for the court when required. Substitutes must have six to ten years of legal experience depending on the specific court.²

In a report on backlogs in the judiciary³, a commission appointed by the Council for the Judiciary recommends to introduce a more flexible arrangements to assign substitute judges for a limited period to reduce the backlogs. The report mentions no minimum of legal experience for the appointment of these substitute judges (See also under 16).

Allocation of cases in courts

Code for assigning court cases

On 27 January 2020, the Council for the Judiciary and the Presidents of the Courts

1 [Section 117 and 118 of the Constitution](#)

2 [Werken bij de Rechtspraak](#)

3 [Eindrapport 'Doorlooptijden in beweging, October 2019: p. 52](#)

agreed upon a Code for assigning court cases.⁴ This Code aims to ensure that cases are assigned to judges on the basis of objective criteria. The boards of the Courts lay down further rules in their own internal regulations. The principles laid down in the Code form the basis for the allocation of cases. These regulations will be published as soon as they are available.

This Code incorporates the ECHR rulings regarding clarity, transparency, judicial independence and impartiality of assigning court cases. It is important to note that the Code is a principle-based instrument, and does not constitute legislation.

Flexibilization of hearing capacity

On 22 January 2020, the Minister for Legal Protection submitted a bill to Parliament to amend the Judiciary (Organisation) Act. The aim of the bill is to remove obstacles for courts in providing mutual assistance in the event of a lack of sufficient hearing capacity. In the bill, the Minister for Legal Protection has the competence to assign one or more categories of cases to another court due to lack of sufficient hearing capacity.⁵

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

The members of the Council for the Judiciary (hereafter: Council) are nominated by the Minister for Legal Protection and appointed by Royal Decree. Prior to the nomination, the Minister shall, in agreement with the Council, draw up a list of a maximum of six candidates who appear to be eligible for the vacancy that has arisen. The judges or the (boards of the) Courts are not involved in the process of nominating the members of the Council.

Each Court has a board that consists of three members. The board members are appointed by Royal Decree on the recommendation of the Minister for Legal Protection for a period of six years. They may be reappointed as members of the board of the same court once for a period of three years. The Council for the Judiciary draws up a recommendation for the appointment of a board member. Before formulating a recommendation, the Council hears the Work Council. The judges or the (boards of the) Courts are not involved in the appointment of the board members of the Courts.

The Minister for Legal Protection assigns the budget to the Council and the courts together. The budget of the courts requires the approval

4 Code zaakstoedeling

5 Wijziging van de Wet op rechterlijke organisatie in verband met het wegnemen van belemmeringen voor gerechten bij het verlenen van onderlinge bijstand in geval van gebrek aan voldoende zittingscapaciteit

of the Council. The budget is determined by the number of cases handled by the judiciary.⁶

In recent years, judges have expressed their dissatisfaction (through letters, action groups and reports) about the management of the Council for the Judiciary. They stated that the Council for the Judiciary would be focused too much on efficiency gains and on lowering the costs of the judiciary and that it would run the judiciary too much like a business instead of putting the core values of the judiciary first. The judges and the courts are also of the opinion that they are not involved enough in the policymaking within the judiciary. Large budget deficits in the judiciary, due to, in part, the failed implementation of an IT system, have only fuelled this dissatisfaction. Judges are opposed to the proposal to provide more powers to the Council for the Judiciary at the expense of the independence of the judiciary.⁷

In the beginning of 2020, an Executive Appointments Working Group drafted a new proposal for the appointment of board members of the Courts. The Dutch Association for the Judiciary (Nederlandse Vereniging voor Rechtspraak) has withdrawn itself from the

Working Group in March 2020 because it is of the opinion that insufficient progress has been made in the proposal. The Association states that the proposed appointment procedure of board members of the Courts does not sufficiently meet the European standard of board members to be “elected by their peers”. The Association deems it essential that judges themselves play an important role in the appointment of their board members. This is also in line with the recommendations of the recent Visitation Committee.⁸ The Association has drafted a new proposal.⁹

Remuneration/bonuses for judges and prosecutors

A new system of job profiles and salary scales have been introduced within the judiciary. This system is used for all the national government bodies.¹⁰

6 [Judiciary \(Organisation\) Act](#)

7 [Rapport visitatie gerechten 2018 / NRC](#)

8 [Rapport visitatie gerechten 2018](#)

9 [NVVR](#)

10 [Functiegebouw Rijk](#)

Independence and autonomy of the prosecution service

The prosecution service is led by the Board of Procurators General (Dutch: *College van procureurs-generaal*). The Board consists of at least three and at most five members. Members are appointed by Royal Decree on the recommendation of the Minister.¹¹

Significant developments capable of affecting the perception that the general public has of the independence of the judiciary

Several political parties, including their Parliamentary groups, have criticised the judiciary in recent years for its alleged activism and interference with the political process. After several rulings from the Supreme Court, Council of State and the district courts on e.g. climate and environmental issues, and social security, the critical voices have become louder. To date, there is an ongoing debate about the role of the judiciary and about its boundaries. The debate is not limited to Parliamentary discussions but also takes place in op-ed articles in various newspapers and in legal journals.

Other issues related to the independence of the justice system

Protocols and guidelines

The judiciary has several internal codes and guidelines, such as the guidelines on impartiality and ancillary positions¹² and the right of substitution¹³.

Constitutional court

In the Netherlands, judges are prohibited from reviewing the constitutionality of Acts of Parliament and treaties.¹⁴ However, judges may review whether national law conforms to international norms such as those enshrined in the European Convention on Human Rights and Fundamental Freedoms.

At the end of 2018, the State Committee on the Parliamentary System advised to establish a constitutional court, which would entail partially overturning the constitutional ban on the judicial review of legislation. In the Committee's plan, Acts of Parliament can be challenged in a constitutional court on the basis of alleged contravention of a number of fundamental rights. The State Committee

11 [Section 130 of the Judiciary \(Organisation\) Act](#)

12 [Leidraad onpartijdigheid en nevenfuncties](#)

13 www.rechtspraak.nl

14 [Section 120 of the Constitution](#)

follows the outline of an earlier bill on judicial review.¹⁵

Quality of justice

Accessibility of courts

Fees¹⁶

The guidelines for exemption from court fees are based on article 6 ECHR and article 47 of the Charter of Fundamental rights (CRvB 13 februari 2015, Ecli 2015:282). Yet, the lack of a low cost procedure for small (monetary) claims does incidentally form an obstacle for small and medium sized businesses. Also, the rule that the court fees of winning parties must be reimbursed by the losing party, may pose a significant burden for people with problematic debt.

Legal aid

The Netherlands has a long standing and strong system of legal aid, which is overseen by the Legal Aid Board (Raad voor de Rechtsbijstand). People in need of legal aid, but whose annual income is below €27.900 for singles and €39.400,-- for couples¹⁷, are

entitled to legal representation by independent lawyers (in certain fields of law). The independent lawyers are under strict duty to conform to quality standards (e.g. training, a limitation to a certain field of law, carrying out a minimum number of cases per year...).

The annual costs for legal aid have risen between 2002 and 2013. Since then the costs have stabilised and even slightly decreased. A striking fact is that 60% of the overall cases are against the Dutch government or entities thereof. This accounts for a substantial part of the increase in cases and is congruent with policies to aggressively police social security benefits.

Current reform plans aim at a complete change of the system, whereby the number of cases in which individuals are represented by independent lawyers is decreased. Instead the plans entail a system of triage by means of a government official, who will decide whether an individual is entitled to representation by a lawyer. It is unclear whether the official would be sufficiently trained to assess the merits of each case or whether these officials would be independent.

The plans also entail the use of insurance companies to cover the costs of legal aid. Bulks

15 This proposed bill has been withdrawn in 2018: [Wetsvoorstel Halsema/van Tongeren](#). See [Rapport staatscommissie parlementair stelsel 'Lage drempels, hoge dijken' 2018](#)

16 www.rechtspraak.nl

17 <https://tinyurl.com/y8nuq5an>

of cases would then be tendered by the Dutch government. It is unclear whether there would be sufficient safeguards in place to guarantee the independence of legal aid from conflicts of interest (e.g. arising from financial interests of the insurer).

The Dutch Parliament, the Netherlands bar association and others have voiced concerns about the reform plans, as they may jeopardise access to justice. In addition, the workload and quality requirements for lawyers have steadily been increased leading to effective hourly rates that are completely unsustainable which has brought the well-developed Dutch system of legal aid to the verge of collapse.

It would be welcomed if the current system of highly professional and independent legal aid is strengthened and any reform fully safeguards access to justice, as well as professionalism and independence. Furthermore, we recommend that any reform is first tested in small and implemented thereafter under full control of parliament.

Other issues related to the quality of the justice system

Experimentenwet rechtspleging

On 11 February 2020 the “Tijdelijke experimentenwet rechtspleging” (Temporary law concerning experiments in the justice system) was adopted. This law regulates innovations and pilot projects that deviate from the regular laws regulating judicial procedures. The law specifically allows for these innovations and

pilots to be based on Orders of Council that remain, for a large part, outside the regular control of parliament.

While a uniform procedure for small scale pilots and innovations in the justice system is to be welcomed, the legislative proposal was criticised by the Council of State (Raad van State) as being too vague about the scope and time frame of a pilot, as well as the number of laws, that can possibly (temporarily) be changed by an order. In this respect, many organisations voiced their concern, as the Minister of Justice announced to introduce the change of the entire legal aid system by order of council, which would in effect bring about the irreversible change of the system and does not constitute a small-scale pilot or experiment.

The law, that was finally adopted, has been amended with a number of additional safeguards. However, it remains to be seen whether the use of the law will be restricted to small scale pilots that precede changes to the legal system, or whether irreversible changes in the legal system will be effectively brought about by orders of council under this law without full parliamentary control. The latter would be highly problematic from a rule of law perspective.

Efficiency of the justice system

Length of proceedings

Over the past 5 years, the lead times remained rather stable. Courts reported a lead time of 12 weeks in 2019 (compared to 13 weeks in 2015).

Higher courts however report a lead time of 41 weeks in 2019 (compared to 36 weeks in 2015). Nevertheless, both the government and the judiciary acknowledged that there was, and still is, room for improvement and a Commission was established to conduct research on this and to provide both initiating parties (government and judiciary) with their recommendations. Apart from their recommendations vis-a-vis lead times, the Commission will delve into the enormous backlog as, to date, courts are confronted with a backlog of approximately 100.000 cases.

In October 2019, the commission published its final report on lead times and backlogs.¹⁸ In the spirit of this report, both the judiciary and the government consider important steps to reduce lead times. Nevertheless, reducing the backlog is their first priority. Plans which will be initiated entail, among others, the establishment of a so-called “flexpool” of jurists and improved collaboration between the courts in order to exchange innovative working procedures.

The enormous backlog and the necessity to reduce lead times captured the attention of the Minister of Justice as well. The latter announced (September 2019) to invest € 95 million in the judiciary. An important part thereof

will be reserved for the improvement of lead times (e.g. shorter lead times) and the reduction of the enormous backlog. Apart from the actions outlined above, the minister intends to facilitate the exchange of cases between lower courts and to streamline the work.¹⁹

In addition, it is important to note that, in accordance with settled case law of the highest Administrative Court (Raad van State), administrative procedures should be settled within four years. Otherwise it would result in an undue delay and, hence, constitute a violation of Article 6 of the European Convention on Human Rights (for example: [ECLI:NL:RVS:2016:750](#)). A violation of Article 6 ECHR leads, in administrative matters, to a compensation of € 500,- per 6 months.

The reasonable period in criminal matters commences, when an act has been carried out on the part of the State against the person concerned, from which he can reasonably derive the expectation that prosecution will be brought against him in respect of a certain criminal offense he committed. Several factors, among which the complexity of the case, are of utmost importance as to whether or not a reasonable period in accordance with Article 6

18 [Eindrapport ‘Doorlooptijden in beweging’](#)

19 [Government to invest 95 million euros in judiciary | News item.](#)

ECHR has been exceeded. A violation thereof leads to a reduction of the fine or penalty.²⁰

Different from criminal and administrative matters, there is no case law on the exceeding of a reasonable period in civil matters.

Enforcement of judgements

Different from criminal matters, the enforcement of judgements in civil matters is conceived as the parties' own responsibility. Enforcement in administrative matters falls under the responsibility of administrative bodies (often the college of Mayor and Alderperson (College van B&W)). Recently, the enforcements of judgements in criminal matters changed after the entering into force of a new law. This will be discussed below.

As regards legal and/or policy changes in the enforcement of judgments, attention has to be drawn to a major change in the enforcement of criminal cases: on 1 January 2020 a new law entered into force transferring the responsibility of the enforcement of criminal penalties from the public prosecutor to the minister of legal protection.²¹ The rationale behind this new law is that the transfer will strengthen

the position of victims and their relatives and improve the enforcement of these sanctions.

No legal or policy changes have been reported in administrative and civil matters.

Media pluralism and freedom of expression and of information

Media regulatory authorities and bodies

Independence, enforcement powers and adequacy of resources of media authorities and bodies

The Dutch Media Act (Mediawet, Chapter 7) ascribes regulatory powers to the Dutch Media Authority (Commissariaat voor de Media). The Media Authority is an administrative body, established by law, to monitor compliance of media institutions with the Media Act (Mediawet) and with the Fixed Book Award Act (Wet op de vaste boekenprijs). It has a range of supervisory and enforcement instruments to ensure compliance with the Media Act. Appropriate measures are considered on a case-by-case basis.²²

The media institutions under the supervision of the Media Authority involve Dutch public

20 See for example: [ECLI:NL:HR:2018:558](#). Source: [rechtsbescherming-tegen-bestraffing-in-het-strafrecht-en-bestuursrecht-1012-afdoening-binnen-een-redelijke-termijn-en-de-gevolgen-van-overschrijding-daarvan?](#)

21 [507 Staatsblad van het Koninkrijk der Nederlanden](#)

22 Source: [Commissariaat voor de Media](#)

television and radio broadcasters on national, regional and local levels, as well as Dutch commercial channels and online audiovisual video services on demand.

The Media authority is an independent body, that works independently from political and media institutions. It also takes its decisions independently from the Ministry of Education, Culture and Science, by which its college of commissioners are appointed.

The Media Authority protects the independence, accessibility and plurality of the audiovisual media content in the Netherlands. The Media authority also works according to three core principles: legality, transparency and integrity. The legitimacy of the public system is strongly linked to public and political confidence in the way public resources are spent. This is why the Media Commission has the task of supervising the lawfulness of the expenditure of public media institutions. Furthermore, transparent accountability is an essential precondition for the supervision of the independence of the media supply and the lawful spending of media funds by public media institutions. This applies to both the accounting for expenditure and the origin of income. Moreover, supervisory boards of public media institutions are expected to behave with integrity.²³ The Media Authority thereby supports the freedom of information. Namely, television, radio and online platforms play an

important role in informing society. Legal protection of the freedom of information, through the Media Act (Mediawet) and the Media Decree (Media Besluit), is meant to ensure the independence, quality and plurality of this information provision. The Media Authority is in charge with the supervision of media institutions to ensure compliance with these regulations. One way to do that is by upholding fair relations between public and commercial media institutions and enabling transparent property relations in the media sector.

In January 2020, it was reported that the Media Authority had violated procurement rules for a number of years, by issuing assignments above €50,000 without asking for multiple offers.²⁴

Conditions and procedures for the appointment and dismissal of the head/members of the collegiate body of media authorities and bodies

The Media Authority is headed by a board of commissioners, appointed for a period of five years by Royal Decree, following the recommendation of the Minister of Education, Culture and Science. The board normally consists of three Commissioners: a chairman and two members. Currently, the board consists of Jan Buné, who has been a member since 2013, and Renate Litjens, who was appointed

23 Source: [Commissariaat voor de Media](#)

24 Source: [NRC Handelsblad](#)

in November 2019 as interim chairman.²⁵ The third commissioner post is vacant.

After the five-year period, reappointment for the same period is possible. The commissioners are supported by a team of employees. Pursuant to the Media Act all members of the Board of Commissioners are responsible for all decisions, regardless of which portfolio the individual commissioners relate to.

It is indispensable for the commissioners to have a high degree of independence. In that line, the Media Act describes relations, memberships and functions which are incompatible with membership of the Media Authority. However, in recent years, several incidents have occurred.

One of the incidents related to commissioner Eric Eljon, who was suspended in April 2019, due to a breach of trust after the publication of his novel about the Dutch television world, exposing alleged cases of hatred and envy in the workplace and selfishness of TV presenters. Colleagues with the Media Authority publicly distanced themselves from the contents of the book, the publication of which caused the Media Authority to suspend Mr. Eljon.²⁶

Another incident came to light after a publication on the 16th of July 2019 in the Dutch newspaper NRC Handelsblad, which reported internal disorder within the Dutch Media Authority. During his reappointment by Minister Arie Slob, Jan Buné had concealed that he had been reprimanded by a disciplinary judge in early 2018 for negligent and incompetent acting as an accountant. Furthermore, Buné carried out other functions that are at odds with his work as a commissioner. Buné was suspended pending the investigation.²⁷

Moreover, general manager Suzanne Teijgeler took a controversial step by accepting a new position at Discovery Benelux, while the Media Authority supervises that media company. Combining her new position at Discovery Benelux with her role as commissioner with the Media Authority amounts to a potential conflict of interest.²⁸

Chair Madeleine de Cock Buning resigned in 2019 due to the completion of the maximum statutory appointment term. After her departure, it appeared she was still entitled to a total of 6.5 tons in redundancy pay following from a regulation dating back from 2001. The generous arrangement has led to a great deal

25 Source: [Commissariaat voor de Media](#)

26 Source: [NOS](#)

27 Source: [NRC Handelsblad](#)

28 Source: [Broadcast Magazine](#)

of unrest in the workplace.²⁹ As of December 2019, De Cock Buning works as head of public policy at Netflix.

Transparency of media ownership and government interference

The transparent allocation of state advertising

Although some media owners traditionally have political ties, there is no political control over the management or content provided by these media owners.

Where sponsorship of public service broadcasting is allowed, when it comes to content relating to culture, education, sports or events of idealistic nature, no such sponsorship is permitted with regard to news, current affairs or political information (Media Act, article 2.106).

The Media Authority allocates a number of hours per year on the general channels of the national public media service for government information and to political parties that have acquired one or more seats in the last election of the members of the House of Representatives (Media Act, Chapter 6).

Rules governing transparency of media ownership

The Netherlands has a relatively large degree of transparency of media ownership. Dutch national law provides for rules regarding transparency and disclosure, obliging media firms to publicly disclose their ownership structures. More stringent rules apply to public service media firms (Media Act, Chapter 2).

When it comes to concentration of media ownership in the Netherlands, it has been reported that (horizontal) media ownership concentration is relatively high. One possible reason for this is the fact that no new media legislation has been passed since 2011 that specifically provides attention to thresholds or limitations on the basis of objective criteria such as licences, audience shares and revenue.³⁰

It appears that joint audience shares of the four largest companies lie between 69% and 91%, when it comes to ownership of radio, television and newspaper markets, which is quite high. Rules on merger control, could prevent the occurrence of a high degree of (horizontal, vertical and/or cross-media) concentration. Within most media companies, self-regulatory instruments are in place providing protection to journalists from changes in ownership.

29 Source: [NRC Handelsblad](#)

30 Source: [Centre for Media Pluralism and Media Freedom](#)

Furthermore, editorial and commercial interest and responsibilities are strictly separated.³¹

Framework for journalists' protection

Rules and practices guaranteeing journalist's independence and safety and protecting journalistic and other media activity from interference by state authorities

The Dutch media remained, in general, stoutly independent and the government publicly stressed the importance of press freedom both within and beyond its borders several times. The past year marks both positive developments (i.e. initiating projects) as well as developments, to which attention has to be paid (legislative initiatives).

As regards negative developments, although celebrating press freedom and the independence of journalists, attention has to be paid to the draft proposal "Criminalising stay in a terrorist territory" (*Wetsvoorstel "Strafbaarstelling verblijf in een door terroristische organisatie gecontroleerd gebied"*).³² This draft proposal aims to change the Dutch Criminal Law by criminalising the stay of Dutch citizens – and those who have a permanent residence in the Netherlands – in an area which has been

indicated as an area under the control of a terrorist organisation. Although exceptions apply to those, who are commissioned by an International Law Organization, or the State or those who received the prior consent of the Minister of Justice, both the WODC (Scientific Research and Documentation Center)³³ and journalists' organizations have been very critical, as this proposal constitutes a threat to journalist independence. More specific, it limits their freedom to travel to and work in these areas. Moreover, it allows the Dutch government to detect journalists and may prevent them from speaking with and consulting important anonymous sources who might become at risk if their identity is known.

Last September (2019), the House of Representatives accepted the draft proposal. It is currently under discussion in the Senate.

Apart from the draft proposal outlined above, 2019 marks also a year of positive developments and best practices. In this regard, attention can be drawn to the efforts taken by both the Ministry of Interior and the Ministry of Foreign Affairs. The former, although celebrating the existence of strong and pluriform news outlets, acknowledged that investigative journalism is still an area of concern as it is rather weak. In order to strengthen this field

31 Source: [Centre for Media Pluralism and Media Freedom](#)

32 Source: [Tweede Kamer der Staten-Generaal](#)

33 'FOREIGN TERRORIST FIGHTERS: STRAFBAARSTELLING VAN VERBLIJF OP EEN TERRORISTISCH GRONDGEBIED?'

of journalism, it announced to invest €5 million in the field of investigative journalism. Moreover a sum of €15 million has been provided to facilitate the collaboration between regional and national broadcasters.³⁴ The latter, the Ministry of Foreign Affairs, became one of the main supporters of the “Justice and Safety Programme” – a project initiated by Free Press Unlimited.³⁵ This project aims to protect and support journalists as they will receive both training and legal aid. Insurance will be provided for as well.

Law enforcement capacity to ensure journalists' safety and to investigate attacks on journalists

In terms of law enforcement to ensure journalists' safety and to investigate attacks on journalists, it is important to note that, in general, the Netherlands has a low rate of the report of crime against journalists. In general, the latter experiences a burden to report an incident. In this connection, research shows that mostly female journalists experience violence and aggression, while conducting their work (50%). Hence, the government, in collaboration with journalists' organisations, took some steps in order to lower this mental threshold. In addition, the Public Prosecutor announced

important changes in its internal procedures as regards the punishment of aggression and violence against journalists.

The recently adopted project “*PersVeilig*” (April 2019) perfectly illustrates the efforts taken by the government, in collaboration with the police and two journalists' organisations (VNJ and het Genootschap van Hoofdredacteuren).³⁶ *PersVeilig* aims to strengthen the position of journalists in their fight against aggression and violence in public spaces, on the street, at online (social) media platforms, and/or judicial claims. The project has an online platform to report an incident. In this vein, it aims to lower the mental threshold, experienced by journalists to undertake action against an incident.

In order to ensure the safety of journalists, the Public Prosecutor took some important steps as well. In April 2019 it changed its internal regulations (directive) by doubling the punishment for aggression against journalists.

Access to information and public documents

In order to get access to information and public documents, journalists have to follow the same procedure as any other citizen. This means that they have to request access to the

34 Source: [Vaststelling begroting Binnenlandse Zaken en Koninkrijksrelaties 2020 - 35300 VII 88 BRIEF VAN DE MINISTER VAN BINNENLANDSE ZAKEN EN KONINKRIJKSRELATIES](#)

35 Source: [Free Press Unlimited start Justice and Safety programma voor journalisten](#)

36 <https://www.persveilig.nl/>

relevant information and public documents, by following the so called “WOB-procedure” – journalists have to request access from the ministry, province, municipality or any other public. The rationale behind this procedure is to allow citizen’s participation in democracy and government decision making. It applies to everyone, thus not only to those who should be considered as “stakeholders”- e.g. also those who do not have a Dutch nationality or do not have a stake in the matters concerned may profit from this procedure.

In general, a request should be submitted at the (government) organization/agency concerned. The request should be as precise as possible as regards the information requested. A four-week period applies after the request has been submitted - this period might be extended with another four weeks if, for example, a lot of information has been requested or the case is quite complicated. If so, it should inform the requesting party thereof.

It is settled case law of the highest Administrative Court (Raad van State) that, in accordance with Article 10 ECHR, the publication of the requested documents in certain circumstances, may be refused.³⁷

Although no legal or policy changes took place over the past year, it is nevertheless important to shed some light on a specific request, which got a lot of media attention and which led to

some challenges and parliamentary questions in the House of Representatives as well. This case has been referred to as the “Shell Papers”. Several media outlets decided to investigate the collaboration between the Dutch State and Shell. In April 2019, they requested all the documents (including WhatsApp messages, Faxes, Emails, Videos, et cetera) from nine ministries, three provinces and five municipalities. Although the procedure is still ongoing, several aspects captured our attention: the many enormous delays with an average of 32.5 weeks (1); the rejection of many requests (2); the fact that this case led to parliamentary questions, as the Ministry of Economics and Climate requested the applicants to provide for a more concrete application, as their request appeared to be too comprehensive (3) (update: in 2020 the request of the applicants was rejected by this ministry). The media outlets consider taking further judicial steps.

Checks and balances

Independent authorities

Independence, capacity and powers of national human rights institutions, ombudsman institutions and equality bodies

To date, there is a great presence of human rights (related) organizations in the Netherlands that contribute on a national, regional and

37 See: [NL:RVS:2017:2883](#), para 12.2 and [ECLI:NL:RVS:2019:100](#), para. 13. Source: [Is het Nederlandse recht op toegang tot overheidsinformatie EVRM-proof? De houdbaarheid van de Wob en de Woo in het licht van artikel 10 EVRM](#)

international level to the human rights framework such as Amnesty International, Human Rights Watch, the Netherlands Institute for Human Rights and our organization NJCM. These organizations report to e.g. the United Nations on the basis of independent research. Moreover, the National Ombudsman is an independent and impartial institution that assesses complaints about all aspects of public administration, defends the interests of the citizen and monitors the quality of public services in the Netherlands. It also has the capacity to deal with human rights related issues.

The Netherlands Institute for Human Rights reported in June 2019 (Human Rights Report To the 126th session of the Human Rights Committee) that the government should be making more systematic changes in ensuring that local authorities adhere to their responsibilities with regards to the human rights of citizens. ‘Given its own ICCPR obligations and responsibilities the central government should monitor and intervene if local authorities do not comply.’ In 2014, the Netherlands Institute for Human Rights was accredited with a so-called A-status by the United Nations. It has the capacity to contribute and participate to meetings within the UN-human rights council and other supervisory organs of the UN. The Institute ensures that it performs its research and work independently from the government and parliament and independent from civil society organizations. The process of its research projects are open to the public and in communication with civil society as it tries to operate as transparent as possible.

There seems to be a consistent contribution of human rights organizations to regional (European) and international treaty body’ reports. What we also see is an increasing critical perspective from these organizations in terms of government (in)action. However, there is a certain lack of practical clarity with regards to the process of information gathering of these organizations and their internal organizational power structures. The extent to which certain human rights organizations are 100% independent requires further research.

Enabling framework for civil society

In late 2019, the Dutch government introduced a policy regarding the framework for civil society organizations in which it introduces partnerships (e.g. Power of Voices and Women, Peace and Security). It emphasizes how important it is to support these organizations in the context of the Sustainable Development Goals (SDGs). The measures aim to strengthen the scope of policy framework of civil society organizations. It also seeks to broaden the ‘civil scope’ in which these organizations operate in order for them to fulfil their goals and contribute to the (SDGs). To financially support organizations, the government will make funds available. The measures are set to take effect from January 2021 to December 2025. (See ‘Beleidskader Versterking Maatschappelijk Middenveld’)

Furthermore, in a letter to the government in June 2019, Minister Kaag of Foreign Trade and Development expressed the importance of supporting civil society organizations and that

the government strives to create an equal level playing field for these organizations to cooperate with the government as well as other local, regional and international organizations.³⁸

38 <https://www.partos.nl/actueel/nieuws/artikel/news/de-kaderbrief-maatschappelijke-middenveld-is-verschenen/>

Romania - The Association for the Defence of Human Rights – the Helsinki Committee (APADOR-CH)

Justice system

Independence

Allocation of cases in courts

In Romania, cases are randomly allotted through an **online informatics system**, named ECRIS. Each judge or panel of judges is randomly allotted a certain number of cases by matching the object of the file with the specialization of the judge/panel of judges. Other criteria for the allotment are the degree of difficulty of the court session and the number of cases allotted per session.

By combining the two criteria, the degree of difficulty of the court session and the number of cases allotted per session, the result is that in some cases one judge/panel of judges is allotted few cases which are deemed by the system to be more difficult, while in other cases, a judge/panel of judges are allotted an excessive number of lower-difficulty cases.

The solution to prevent such inadequate situations is to implement hourly intervals within each court session, to increase the overall number of judges and to create more locative facilities for court sessions, since the main obstacle in establishing a court session is the **lack of proper available room** in which a session may be duly held.

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

Although the independence and the powers of the Romanian Council for the Judiciary do not seem affected from the 2019 legal developments, it is relevant to mention that current legislation (Law no. 317/2004 regarding the Council for the Judiciary) provides that plenary board meetings of the Council must be held in the presence of 15 of its members, so that **quorum requirements** are met for legally passing resolutions. This provision might and was used by certain members of the Council in contradiction with its purpose, by **refraining to participate to board meetings** so that certain points on the Council's agenda could not be duly voted and passed. An example in this respect is the recurrent postponement in July 2019 of the Council meetings whose agenda was to appoint the chief prosecutor of the Special Section for the investigation of offences committed by magistrates.

The solution to prevent such cases of **unjustifiable postponements of Council's plenary meetings** is to amend the legislative framework for participating in the Council's Board meeting either by eliminating the mandatory character of such a high presence of the members or by instituting effective sanctions against Board members who in ill-faith and without objective ground refrained from participating to a Board meeting, thus blocking the possibility of discussing the agenda by the rest of the members present.

Accountability of judges and prosecutors, including disciplinary regime and ethical rules

While a judge's independence is a necessary element for the stability of the justice system, it is not a sufficient requirement for the correct and fair solution of particular cases.

Romania has suffered from several ECHR convictions for breaching the obligation to ensure the right to a fair trial. The breaches emerged from **material errors committed by Romanian judges**, and a legal framework sanctioning their conduct through a direct obligation to repay damages has yet to be implemented. Nevertheless, the Romanian State is the one who must initially pay these damages to its citizens, without having an effective possibility to recover the damages from the magistrate in default.

As such, in present, judges are not directly liable from a material point of view for judicial errors. However, in compliance with Law no. 303/2004 regulating the status of judges and prosecutors ("Law no. 303/2004"), the Romanian state is obliged to pay the damages. The Romanian Ministry of Public Finances shall alert the Judicial Inspection which shall investigate whether the judicial error is committed as a result of gross negligence or ill-faith. Based on the report issued by the Judicial Inspection, the Romanian State through the Ministry of Public Finances, may pursue the erroneous magistrate requesting the recovery of material damages in 6 months as of the report of the Judicial Inspection. In practice, the Judicial Inspection's findings are not sufficient

to support the Romanian State's action against the magistrate.

A solution to limit and prevent as extensively as possible potential judicial errors would be to introduce material accountability directly for the magistrate proven in default.

If such an accountability is not a preferred instrument, other solutions may be the extension of the statute of limitation of Romanian State claims for damages against magistrates, since at present, the Romanian State may request damages only after it is obliged in its turn by the ECHR to pay these damages and ECHR trials are known to be lengthy. Also, a potential solution may be the regulation of the possibility for the Romanian Ministry of Finances to pursue magistrates for the repair of material damages, without the necessity of the Judicial Inspection's prior disciplinary sanctioning decision or without a criminal ruling attesting the default and the prejudice.

Remuneration/bonuses for judges and prosecutors

Law no. 303/2004 establishes the right for judges and prosecutors to be granted a **special pension for their service as magistrates**. The value of the magistrate's pension is roughly 80% of the gross wage plus bonuses received in the month prior to retiring from activity. This value is supported partly from the social insurance budget, based on the magistrate's contribution to the social system. The largest part of the special pension is supported from the state budget.

In practice, the value of the service pensions computed as described above reaches extremely high amounts (e.g. 3,750 EUR for the medium magistrates' pension, as per public sources) and can turn out to be even higher than the magistrates' salary.

This situation may lead to a disruption in the public perception of judges and prosecutors, whose special pensions may not be perceived as meritorious due to their extremely high value. In the first 3 months of 2020, judges and prosecutors in Romania have protested against a legislative initiative aimed to annul their service pensions.

A solution to this situation would be to gradually reduce the percentage or the basis on which the service pension is computed, similar to cases of other categories of Romanian citizens who receive a service pension (e.g. policemen).

Independence/autonomy of the prosecution service

Law no. 303/2004 provides that prosecutors are impartial but also establishes hierarchical control and subordination between prosecutors.

In practice, there are cases when the prosecutor's conduct is not effectively controlled by its superior hierarchical prosecutor or the control is aimed to pressure the hierarchical inferior prosecutor. For example, the indictment (the act by which a criminal case is sent by the prosecutor to the court for the trial) must be confirmed by the hierarchically superior

prosecutor who drafted the indictment. To be confirmed, the indictment is examined by the hierarchically superior prosecutor both in terms of legality and in terms of soundness. If the hierarchically superior prosecutor does not confirm the indictment, the file cannot go to court. The possibility of the hierarchical prosecutor to affirm the indictment act may lead to political pressure on the latter, and this concern should be properly addressed within the legal framework.

A solution to prevent **ineffective subordination of prosecutors to their hierarchical bodies** would be the implementation of an active mechanism for magistrates' accountability.

Significant developments capable of affecting the perception that the general public has of the independence of the judiciary

In 2019, several events could be interpreted as affecting the perception of the general public with respect to the independence of the judiciary:

- Emergency Ordinances No.7/2019 of 20 February 2019 and No.12/2019 of 5 March 2019 modifying the justice laws, which were criticized by magistrates due to alleged speed of adoption, lack of consultation and unclear rationale behind these emergency ordinances affected the legal certainty and predictability of the judicial process,
- Due to these frequent amendments of the justice laws, in February - March 2019, magistrates united and protested against the

manner in which these laws were passed, by suspending the judgement of trial, by publicly protesting on the steps of courts of law or by wearing a distinctive white armband.

- The operation of the Special Section for the investigation of offences committed by magistrates continued to raise questions regarding the legality of its creation, since the Special Section launched investigations against judges and prosecutors who had opposed the current changes to the judicial system, as well as abrupt changes in the approach followed in pending cases, such as the withdrawal of appeals previously lodged by the DNA in high-level corruption cases. In December 2019, the Ministry of Justice submitted a proposal for the revocation of the Special Section, which was received positively by the Government. However, in lack of a legal initiative detailing the consequences of the envisaged revocation of the Section and considering that the Constitutional Court declared its existence to be in line with the Constitution, it is still unclear whether the Section shall cease to exist entirely, or its attributions shall be amended.
- On 14.10.2019, EU Council confirms Laura Codruța Kövesi as first European chief prosecutor, after the application of Mrs. Kövesi raised divergent opinions in Romanian justice and political system. Controversies stemmed from her dismissal by President Klaus Iohannis following a decision of the Constitutional Court stating that he can only verify the legality of the Ministry of Justice's proposal for the dismissal, not the

arguments that lead to the proposal. Also, in 2019, prior to the appointment as European chief prosecutor, the Special Section for the investigation of offences committed by magistrates publicly announced that Mrs. Kovesi is currently investigated in several criminal files.

Positive aspects were also registered within the public mindset, through the results of the Referendum in May 2019, called by the President of Romania, in which an overwhelming majority of Romanian citizens supported propositions to strengthen the safeguards against corruption and the arbitrary use of emergency ordinances.

Quality of justice

Accessibility of courts

With respect to **court fees**, the amounts and the procedures established for requesting facilities for the payment of these court fees do not raise any issues of accessibility.

However, the **legal fees for the court appointed attorney** are derisory and this circumstance may affect the quality of legal assistance provided by the public defender and subsequently, the accessibility to effective legal representation by the attorney.

A Protocol between the Ministry of Justice, the Public Ministry and the National Association of the Romanian Bar establishing public attorney fees has been adopted in February 2019. Although the adoption of this instrument was

welcomed, in practice the matter of the low public defender fees is yet to be resolved, since the courts do not take into consideration the fees mentioned in the Protocol. Procedural laws allow judges to censor the court appointed attorney's fees, without having to observe the minimal fees set out through the Protocol, since such Protocol is not binding and opposable to magistrates as a law would be.

Another matter related to the legal fees is the fact that the latter are usually paid with a certain **delay**, which can also lead disruptions in the quality of the legal representation.

Solutions for these matters would be to enforce mandatory legal provisions establishing minimum attorney fees for public defenders, which are paid within 30 days as of the date when the legal services were performed.

Resources of the judiciary

Considering the potential threat perceived by magistrates with respect to the abrogation of their service pensions, a large number of magistrates files requests for **early retirement**. In the near future, this circumstance determines a **reduced number of magistrates per court**, while the number of cases remains the same, thus leading to an overload of cases per magistrate. In December 2019, Romanian Parliament voted that the anticipated retirement is postponed until January 2022, in order to prevent judicial system to be overwhelmed due to the lack of magistrates.

This measure alone does not suffice and it is recommendable use this period of time to organize several competitions for the occupancy of positions as judges and prosecutors so that human resources at the court's level are ensured once the magistrates are allowed to enter early retirement.

Use of assessment tools and standards

With respect to ICT systems, Romanian courts have recently adopted certain **digitalization** measures, including the implementation of the digital file at higher courts, by independently creating the software for the digital file where the court documents are stored. The digital file is considered to be a success, but the downside is that it can only function for newly registered claims, since the scanning capacity of physical documents is extremely limited. As such, financial resources should be increased so that the progress of Romanian court through technology is higher and allows courts to address current needs of citizens and even of magistrates. Romanian courts receive funding from the Ministry of Justice so a solution would be the increase of these funds and the implementation of a national technology scheme which would allow all courts to benefit from modern scanning equipment, from modern computers and would also provide that each judge has its own electronic signature (at present, there is only one electronic signature per court).

In Romania there is **no method of monitoring and evaluating the quality of justice** and assessing the results of the act of justice. A solution to create such a tool would be that

the Council of the Judiciary carries out an annual report assessing the quality of justice in Romania, based on accurate feedback provided by citizens benefiting from the justice system.

Other issues related to the quality of justice

A proposal for the increase of the quality of the act of justice is to adopt mandatory rules obliging law offices with more than 50 attorneys to perform pro-bono legal services for a limited number of hours per year. This could lead to a higher involvement of attorneys in corporate responsibility programs and would increase the overall quality of legal services, considering the vast experience, skills and know-how which attorneys may provide for free to those in need.

Efficiency of the justice system

Length of proceedings

Through the adoption of the New Romanian Civil Procedure Code in February 2013 and through the adoption of the New Romanian Criminal Procedural Code in February 2014, the length of proceedings has been substantially reduced and should be, at least in theory, somewhat predictable.

However, in practice, **the length of proceedings in certain types of trials is more than excessive**. For example, in April 2020 the High Court of Cassation and Justice established a first hearing in a recourse against a public administration's decision in March

2022, approximately 2 years after the date of submission of the recourse.

The extensive length of these proceedings is explained by magistrates as being caused by insufficient personal, a high burden of cases per magistrate and scarce court resources, such as rooms for trials and for hearings. Therefore, a solution for limiting the situations when the length of proceedings is excessive is to increase the number of judges and to allocate proper locative resource to courts, including ICT equipment for long distance hearings.

Enforcement of judgements

In practice, citizens face the problem of the **extensive time for motivating the court's decision**. The delay in motivating and communicating the ruling impacts the enforcement of judgements, especially if the defendant enters insolvency proceedings until the final decision is drafted, since a ruling can only be enforced once its motivation is drafted and duly communicated to the trial parties.

A solution would be for the legislator to adopt sanctions for the judge's non-observance of the obligation to draft the motivated ruling within a limited period of time.

Anti-corruption framework

Prevention

Integrity framework

Lawyers' situation

Pursuant to Anti Money-Laundering Law no. 129/2019, attorneys are obliged to **inform the national body established by law** with respect to any potential information related to money laundering activities.

However, point. 39 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing states that “Member States should have the possibility to designate an appropriate self-regulatory body as the authority to be informed in the first instance instead of the FIU. In accordance with the case-law of the European Court of Human Rights, a system of first instance reporting to a self-regulatory body constitutes an important safeguard for upholding the protection of fundamental rights as concerns the reporting obligations applicable to lawyers. Member States should provide for the means and manner by which to achieve the protection of professional secrecy, confidentiality and privacy”.

Considering that lawyers have professional secrecy obligations (imposed by law and enshrined by the ECHR case-law -Michaud, req. n°12323/11) with respect to disclosing suspicious transactions and that they are part of a

self-regulatory body, **lawyers should address their suspicions to the President of the Bar who acts as a filter.** Consequently, the provisions of Law no. 129/2019 may be interpreted as conflicting with the European acquis and it is recommendable to amend them, so that lawyers may disclose the information provided by Law no. 129/2019 to their self-regulatory body.

NGOs' situation

Law no. 129/2019 also raises difficulties for NGOs, given its unclear provision regarding whether associations must also provide information regarding the real beneficiary, even though they are not administering and distributing funds. Also, Law no. 129/2019 contains ambiguous provisions regarding the concept of real beneficiary, applied particularly to associations which do not administer funds.

In particular, Law no. 129/2019 **places NGOs in the same category of financial risk and under the same due diligence obligations towards partners or individuals as providers of gambling services or banking institutions without any previous risk assessment.** Under Law no. 129/2019, NGOs are required to communicate to the Government the personal data of their beneficiaries, which could include the personal data of abuse victims, journalists or other vulnerable individuals. In case of non-compliance, the organization may be dissolved.

A solution for the above is to amend Law no. 129/2019, so that the legislator clarifies if the

category of entities obliged to provide information regarding the real beneficiary includes NGOs who do not administer funds. Also, Law no. 129/2019 should comprise an accurate definition of the real beneficiary which applies in the case of NGOs who do not administer funds.

Measures in place to ensure whistle-blower protection and encourage reporting of corruption

In 2004, Romania became the first European country to adopt a Whistle-blowers Law (Law no. 571/2004) as part of national anti-corruption measures in public administration. 15 years after the adoption of the law, the general conclusions of the monitoring of the implementation of the National Anticorruption Strategy 2016-2020 indicate that whistle-blowers are a vulnerable category to abuses by the authorities because there is **no effective national protection system**.

Romania was convicted at the ECHR for such a practice in 2013. ECHR found the lack of effective protection of whistle-blowers in the case of APADOR-CH Bucur and Toma v. Romania. In essence, the Court held that the applicant had been unjustifiably convicted of disclosing the information, considering that there was a public disclosing of law breaching based on good faith. The Court notes that the general interest in disclosing illicit acts committed within the institution is more important than the interest in maintaining public confidence in the institution. The Court also notes that the domestic courts convicted the

applicant following an unfair trial in which they rejected essential evidence in his defense.

However, this case did not produce significant systemic improvements, on the contrary. The press constantly reports cases of sanctioned warnings in various fields: health, justice, environmental protection, water industry, public transport, mass media, culture. Several breaches that have been discovered in practice in publicly administered institutions, such as hospitals and public press institutions, included disciplinary sanctions for whistle-blowers so that the latter would be discouraged to come forward publicly with their information.

A potential solution to this issue would be to regulate stronger material and disciplinary sanctions for individuals and legal entities who actively create obstacles and determine the discouragement of whistle-blowers.

APADOR-CH has repeatedly pointed out that the internal regulations of certain public institutions contain illegal provisions (contrary to Law no. 571/2004), because they provide sanctions for warnings in the public interest and / or prevent Whistle-blowers from addressing to the media directly. These regulations had to be modified, in the sense of providing for Whistle-blowers all the rights and facilities provided by Law no. 571/2004.

As a consequence of the adoption of the European Directive on the protection of persons reporting breaches of EU law in 2019 by the European Council and the European Parliament, Romania, similar to other Member States, has two years to transpose the

provisions of the Directive into national law, the deadline being December 17, 2021.

Sectors with high-risks of corruption in a Member State and relevant measures taken/envisaged for preventing corruption in these sectors

With respect to **healthcare**, as per Law no. 95/2006, hospital managers are appointed in Romania through order of the Ministry of Health, of the Ministry of Transport or order of the mayor of the city/commune where the hospital is located. Considering that the appointment can be performed also by a mayor, who a representative of a political party with usually high influence in the city/commune, **the decision to appoint a hospital manager can be subjective and performed in the interest of the political party and affiliation of the mayor**. In such cases, hospitals are at risk of being managed by an inefficient manager, whose acts are subject to political interests. A solution for the prevention of such cases would be the elimination of the legal provision allowing mayors to appoint hospital managers and adopting new provisions for the appointment of hospital managers after a proper competition and examination of their performances/abilities.

With respect to other sectors with high - risks of corruption, mention should be made that in Romania, **political campaign costs** are reimbursed from the public budget, pursuant to Law no. 334/2006 for financing political parties and campaigns (“Law no. 334/2006”), within limits which reach up to 20,000 min-

imum gross salaries. The reimbursement of expenses is granted provided that the candidate obtains a minimum 3% of the total votes expressed. This provision determines political candidates who do not have objective chances to win elections to enroll in political campaigns for the purpose of increasing their own image capital, for the purpose of political games or for the purpose of contracting their relatives’ firms for consultation services, in order to benefit from the reimbursement of these expenses from the public budget.

A solution against this practice is to increase the level of votes which grant the right to reimbursement, which currently is of a mere 3% of the total votes expressed.

Repressive measures

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

The members of the Romanian Government have **immunity**, meaning that only the Chamber of Deputies, the Senate and the President of Romania are entitled to request the criminal investigation of the members of Government for the acts performed while in function, in compliance with art. 109 of the Romanian Constitution.

Since this type of immunity is singular in Romanian legal framework and prohibits any investigation with respect to the members of Government, even after serving office, without the approval of the Chamber of Deputies,

of the Senate or of the President, it would be recommendable to consider its amendment and to limit the cases or the period of time for which immunity is granted to Government members.

Spain – Rights International Spain (RIS)

The right-wing Popular Party in government from 2011 to 2016, introduced numerous reforms that seriously weakened the rule of law. General elections were held in December 2015 where the PP won again but the government was not formed until the swearing in of Rajoy in November 2016. An important difference with the previous term in office was that the second Rajoy government did not have absolute majority in Congress and the political landscape changed thus requiring negotiating in order to pass laws. In fact, legislative activity in 2017 was minimal.

The judgment (May 2018) in a PP corruption case (*Gürtel case*) led to a non-confidence motion in Congress against Rajoy, ultimately forcing PP out of the government (June 2018). The new socialist government vowed to present reforms, however, the impossibility to get the approval of the socialist government's budget determined early general elections in April 2019. Despite the fact that the socialist party one, the candidate (Sánchez) did not obtain the support to be sworn into office thus forcing another general election in November 2019. Finally, Sánchez was sworn in as President in January 2020 of the first coalition government in Spain (socialist party, Unidas Podemos and other minority groups). It has thus been a year of legislative standstill.

Justice system

Independence

Appointment and selection of judges and prosecutors

GRECO has recommended reviewing the appointment of higher ranks of the judiciary; that objective criteria and evaluation requirements be laid down in law for the appointment of the higher ranks of the judiciary.¹

According to the GRECO 2019 report “The authorities of Spain explain that the new Organic Law 4/2018 on the Judiciary introduces substantial novelties aimed at infusing greater transparency and accountability vis-à-vis top ranks (Article 326(2) of Organic Law 4/2018)” and “in order to comply with the provisions of Article 326 (2) of the Organic Law 4/2018 on the Judiciary, on 31 January 2019, the CGPJ’s [*General Council of the Judiciary*] plenary adopted an agreement to set up a working group, which would analyse and formulate recommendations on the content of future calls for candidatures. At its meeting on 9 May 2019, the plenary took note of the conclusions of that working group, which set out the criteria for drawing up the relevant selection rules, including both the merits to consider and the weighting of each of the merits in the overall assessment of each candidate”.

1 Fourth Evaluation Round. Second interim compliance report. Spain. Adopted by Greco June 2019, published November 2019. Pages 7-8, para 37-44. <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/168098c67d>

However, GRECO concluded it was “not fully convinced as to the procedure that the CGPJ has now followed to define criteria and evaluation requirements for the highest functions of the judiciary. Firstly, they are being fixed for each individual call for applications, rather than - on a more general basis - per type of court (i.e. Supreme Court, National Court, Provincial Court, and High Court of Justice). In theory (since practice with the new system is yet to be developed), this could entail the risk that requirements for each call be tailored with a specific outcome (candidate) in mind. Secondly, GRECO’s recommendation specifically expressed a preference for objective criteria to be laid down in law/regulation. This would presuppose (in accordance with Article 560(2) of the Law on the Judiciary) that judicial associations are consulted in such a process; GRECO has further been made aware of the discomfort felt by the profession in this connection. It is recalled that, while seniority is the main criterion for promotion or transfer of all other posts in the judiciary, this is not the case for the highest functions of the judiciary where other factors play a role. For GRECO, when promotions are not based on seniority, but on qualities and merits, it is pivotal that they are clearly defined and objectively assessed. GRECO notes that, in the Spanish case, experience with these key appointments has triggered criticism, not only from the pub-

lic, but also from the profession itself, because of the alleged opacity and discretion of the relevant procedures and decisions of the CGPJ.”²

In June 2017, one of the judicial associations issued a statement denouncing the outrageous management by the General Council of the Judiciary of the appointment policy. The judicial association accused the General Council of the Judiciary of making a common cause with the government and its party in order to appoint judges of their choice in order to control judicial activity in numerous corruption cases involving the Popular Party, thus compromising the ability of the courts to perform their functions. This was not an isolated case and has been the trend during the term of the current General Council of the Judiciary.³

Irremovability of judges, including transfers of judges and dismissal

The lack of adequate resources of the justice system has resulted in a practice of transferring judges between different jurisdictions to relieve their colleagues. For example, in March 2018, the UN Committee on the Rights of the Child criticised Spain for allowing judges specialised in juvenile justice to be transferred to the ordinary courts which prevents these

2 Idem.

3 <http://www.juecesdemocracia.es/2017/06/08/acuerdo-la-escandalosa-gestion-del-actual-cgpj-presidente-carlos-lesmes/> cited in “A portrait of Justice in Spain” 2018 <https://www.liberties.eu/en/news/a-portrait-justice-spain/14920>

specialised judges being available for their original purpose.⁴

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

According to the statement of the four judicial associations “there does not seem to be a clear majority in favour of reforming the Governing Body of the judiciary.” The Current acting Council for the Judiciary should have been renewed in 2018-2019. Thus, the Council remains the same since 2013.

The GRECO 2019 report highlights failure to address the need “to remove the selection of the judicial shift from politicians. GRECO considers that this has been a missed opportunity to remedy what has proven to become, in citizens’ eyes, the Achilles’ heel of the Spanish judiciary: its alleged politicisation. Public outcry about the latter weakness was particularly acute in November 2018 as the new CGPJ was being formed. On that occasion, information leaked out about political parties horse-trading for appointment to key judicial positions. The 2019 EU Justice Scoreboard shows that the independence of justice among both the general public and companies is perceived

more severely than in previous years. Judicial associations are also markedly critical in this regard. GRECO can only recall its view that the establishment of judicial councils is generally aimed at better safeguarding the independence of the judiciary – in appearance and in practice. The result in Spain continues to be, unfortunately, the opposite, as already highlighted in the Fourth Round Evaluation Report and confirmed by recent events in the country. This is not to say that the independence of individual judges is questioned; GRECO has repeatedly been clear in this respect and wishes to do so again: there is no doubt about the independence and impartiality of judges on the bench (see also paragraph 3, Fourth Round Evaluation Report on Spain; paragraph 78, Interim Compliance Report on Spain). At the time of the evaluation visit, in 2013, GRECO stressed that when the governing structures of the judiciary are not perceived to be impartial and independent, this has an immediate and negative impact on the prevention of corruption and on public confidence in the fairness and effectiveness of the country’s legal system. Six years later the situation is the same and, therefore, recommendation v cannot be considered implemented. GRECO reiterates its view that political authorities shall not be involved, at any stage, in the selection process of the judicial shift.

4 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fESP%2fCO%2f5-6&Lang=en

GRECO concludes that recommendation v has not been implemented.”⁵

Accountability of judges and prosecutors, including disciplinary regime and ethical rules

“GRECO wishes to stress the importance to establish a code of ethics particularly devoted to prosecutors and urges the authorities to take more resolute action in finalising this process. While GRECO values positively the consultation process upon which the prosecution service has embarked, it also considers that, five years after the adoption of the Fourth Round Evaluation Report on Spain, concrete outcomes are overdue”.⁶

“GRECO recalls that the disciplinary regime of prosecutors is due for a profound overhaul, as also recognised by the Spanish authorities during the evaluation/compliance process. GRECO regrets that the plans to reform the regulatory framework of the prosecution

service have not yet yielded tangible results. The consultation process at the Prosecution Council is on-going and a draft text is not available. GRECO expects both coordinated and resolute action in this field”.⁷

Independence and autonomy of the prosecution service

Dolores Delgado was appointed as Prosecutor General in 2020. She had acted as Minister of Justice in the socialist government from 2018-2019. This appointment has been criticized by a number of judicial and prosecutor’s associations.

The Organic Statute of the Public Prosecution Service has not been modified yet.⁸

GRECO 2019 report highlights the following: “GRECO takes note of the draft amendments to the Regulation on the Prosecution Service. The reported developments shed more light on

5 Fourth Evaluation Round. Second interim compliance report. Spain. Adopted by Greco June 2019, published November 2019. Pages 6-7, para 32-36. <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/168098c67d>

6 Fourth Evaluation Round. Second interim compliance report. Spain. Adopted by Greco June 2019, published November 2019. Pages 11, para 66.

7 Fourth Evaluation Round. Second interim compliance report. Spain. Adopted by Greco June 2019, published November 2019. Pages 12, para 72.

8 <https://www.fiscal.es/documents/20142/147455/Spanish+Law+on+Prosecutors.pdf/d9362d59-1d2f-9659-349b-a4fc61ef5b7c?version=1.1>

how communication in the service is to take place, but they do not specifically tackle the issue of communication between the Prosecutor General and the Government. While GRECO welcomes the practice developed by the Government of putting all its communications with the Prosecutor General in writing and making them available online, this needs to be further formalised. The authorities are therefore yet to galvanise this good practice into clear requirements and procedures in law, as recommended. Thus, the second component of recommendation ix cannot be considered fulfilled. With regard to the third component of recommendation ix, GRECO welcomes the measures taken to provide for greater autonomy in the management of the means of the prosecution services. Two outstanding matters highlighted in the Fourth Round Evaluation Report have now been addressed, i.e. a separate budgetary heading for the prosecution service and control of the latter over its training planning. However, GRECO expressed criticism concerning the fact that the Ministry of Justice decides on staff allocation in the different prosecutor's office, including that specialised in the fight against corruption and organised crime, since autonomy of management is a key guarantee of the independence and efficiency of the prosecution service. No new details have been provided in this respect and, hence, this third part of recommendation ix cannot be assessed as fully met.”⁹

Significant developments capable of affecting the perception that the general public has of the independence of the judiciary

See GRECO above, answer to question 5 above. GRECO Conclusion “In spite of some of the positive features introduced by the law (which effective implementation is to be tested in practice), the public debate on the perceived politicisation of justice remains topical; critically it revolves around the appointment system of the General Council of the Judiciary (CGPJ) and top ranks of the judiciary. Further improvements are still required in this regard and practice is yet to prove the effectiveness of the newly introduced rules and procedures” (para 78, page 12).

According to the EU Justice Scoreboard 2019, the perception of independence of courts and judges among the general public continues to be fairly bad and very bad (around 60%).¹⁰ The main reasons among the general public for the perceived lack of independence: around 45% say Interference or pressure from government and politicians and around 40% refer to Interference or pressure from economic or other specific interests (page 45).

Judicial associations in the past have accused the General Council of the Judiciary of making a common cause with the government and its party in order to appoint judges of their

9 Fourth Evaluation Round. Second interim compliance report. Spain. Adopted by Greco June 2019, published November 2019. Pages 10, para 57-58.

10 Page 44 https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf

choice in order to control judicial activity in numerous corruption cases against the PP, thus compromising the ability of the courts to perform their functions.¹¹

The current CGPJ (of which, 50% of its members were nominated by PP without needing the agreement of other parties), has so far appointed: almost a quarter of the Third Chamber of the Supreme Court (Administrative-Contentious jurisdiction) and over 40% of the Second Chamber of the Supreme Court (Criminal jurisdiction). Two of these appointments in 2018 were particularly controversial as the appointees held political positions in the PP. The appointment of the president of the Third Chamber of the Supreme Court in 2015 was also considered controversial because the CGPJ chose to appoint a candidate with ties to the PP, who had fewer qualifications and less experience than the former court president, whose tenure it decided not to renew. The CGPJ has also made senior appointments to several other national and regional courts that have been characterised as attempts to influence the outcome of corruption trials against PP politicians.¹²

Other issues related to independence of the justice system

Impartiality of courts

During the past years the National Audience of Spain (Audiencia Nacional) has heard a series of sensitive corruption cases involving different members of the political party that was in the government at that time (Partido Popular). The first judgement was issued in May 8th, 2018 (Gürtel case), finding -among others- Luis Bárcenas, treasurer of the party, guilty for receiving bribes, money laundering and tax crimes. The PP was found liable as well. The case centred on a secret campaign to fund the conservative party which ran from 1999 until 2005. The court bench was formed by three Judges: Ángel Hurtado, Julio de Diego and Jose Ricardo de Prada.

Later on, another case concerning the same corruption affair (Caso los Papeles de Bárcenas) was allocated to Judge de Prada, and two other judges of the National Audience. In 2019, the defence of Luis Bárcenas and of the Partido Popular presented an incident of recusal on Judge de Prada arguing, among other things, that he had already issued a legal opinion on some aspects related to the new trial (the existence of a hidden financial account in the

11 <https://www.liberties.eu/en/news/a-portrait-justice-spain/14920>

12 “Here’s how Spain judges could rescue their courts”, Israel Butler (this piece is based on an article published in Jueces Para la Democracia (judicial association) bulletin (2018) <https://www.liberties.eu/en/news/sindical-dos-juizes-portugueses-spain-court-reforms/16024>

Partido Popular) therefore incurring in a prejudice against the core events of this new trial.

In the National Audience, when an incident of recusal is presented against any given judge, the internal rule is to review the motives of disqualification by all the criminal judges composing the court, acting as a collegiate body and adopting the decision -after presenting the case and discussing the motives- by simple majority.

The decision that came out of the plenary session -attained by a very short margin and counting with the dissident opinion of several judges- established that Judge de Prada had to be disqualified for that case as he had made in the former judgement pronouncements that were “not absolutely necessary” regarding evidences that “were not the strict object of trial” and that affected the object of the case pending trial. This decision was highly controversial as it goes against all the previous criteria regarding macro affairs and the comments contained in the disqualification decision directly discredited the first instance judgment while pending revision and expressed opinions on the judicial behaviour of Judge de Prada.

Corruption of the judiciary

See GRECO 2019 report.

Quality of justice

Accessibility of courts

The Spanish Constitution states in article 119 that, “justice shall be free of charge when so established by law and, in any event, for those persons who show they have insufficient resources to litigate”.¹³ The implementation of this constitutional provision, including the conditions for its access, can be found in the Legal Aid Act (*Ley de Asistencia Jurídica Gratuita 1/1996*)¹⁴.

The law regulating free legal assistance or legal aid has been modified several times over the past 5 year. Initially, Law 42/2015, modifying Law 1/2000 of Civil Proceedings, included a Final Provision reforming Law 1/1996 on free legal assistance. The preamble of the law refers to Directive on Access to a lawyer and the Directive on victims of trafficking. The legislative procedure followed was certainly questionable since it was introduced by way of amendment to a different law (Law Civil Proceedings) when the latter was already being debated in Congress. Participation and

13 Likewise, articles 118.1e) and 520.2.j) LECrim.

14 The Legal Aid Act (*Ley 1/1996, de 10 de enero, de Asistencia Jurídica Gratuita*), amended by Act 2/2017, of 21 June and implemented by the Legal Aid Regulations, approved by Royal Decree 996/2003, of 25 July.

dialogue with the legal profession and CSO was hampered.¹⁵

An second law -Law 2/2017, modified Law 1/1996, on free legal assistance - although the law does not mention anywhere the EU Directive on legal aid (and it focused more on tax/fiscal related issues)A year later, Law 3/2018, amending Law 23/2014 of November, on the mutual recognition of criminal decisions in the EU in order to regulate the European Investigation Order, included a Final Provision that modified Law 1/1996, on free legal assistance to adequate and complete transposition of the Directive on legal aid. We have not analysed these laws to see if they transpose correctly and fully the Directive.

The right to legal aid is recognised in favour of those who can demonstrate that their financial resources fall below certain thresholds¹⁶. This right is also recognised in favour of victims of gender violence, terrorism, human trafficking,

minors and persons with a mental disability who are the victims of abuse or mistreatment, regardless of their financial resources¹⁷. The law does not contemplate the concept of “interest of justice” (i.e the recognition of free legal aid regardless of the person’s means, when the interests of justice so require) and only includes the criterion of insufficiency of resources (lack of means being determined by purely economic criteria, without taking into account additional circumstances). The changes introduced into the thresholds entail fewer people will benefit from this right.

Legal aid is a public service, the management of which is entrusted to the bar associations which, via their system of duty lawyers, organise the designation of lawyers for persons who apply for legal aid. In order to become a duty lawyer, it is necessary to have been a member of the bar association for at least three years and have successfully completed any courses and tests for access for the specific system the law-

15 See RIS communication to the Special Rapporteur on judicial independence (2017) <http://www.rightsinternationalspain.org/uploads/publicacion/0d0ba63227c739f2c7b1741984af52d377ee4a6f.pdf>

16 Article 3: the following are entitled to legal aid: (i) persons who do not belong to a family unit, whose annual income is less than approximately 13,000 euros; (ii) persons belonging to family units of less than four members, if the annual income of the family unit is less than approximately 16,000 euros; (iii) persons belonging to family units of four or more members, if the annual income of the family unit is less than approximately 19,000 euros. These amounts are calculated by reference to the Multiple Effect Public Income Indicator (Indicador Público de Renta de Efectos Múltiples, IPREM) which is updated annually.

17 Reform implemented by Act 42/2015, of 5 October, reforming the Civil Procedure Act (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, LEC).

yer wishes to join¹⁸. Becoming a duty lawyer is a voluntary decision. The system of aid for arrested persons offered by the system of duty lawyers is based on a system of twenty-four hour on-call periods, during which a certain number of lawyers will be available. There are lawyers on-call 365 days a year. The number of lawyers available varies from one town to the next and is determined by the corresponding bar association. When they receive the call to go to the police station to assist someone, the lawyers have a maximum term of three hours to arrive and, if they fail to do so, the police officers will ask the competent bar association to designate a new lawyer. Lawyers included in the system of duty lawyers cannot refuse to go to the police station to assist someone. Neither can they refuse to defend a specific client, unless they can demonstrate that a conflict of interest exists.

As for the arrested persons, when they ask for a duty lawyer, they are immediately designated one who is on-call and who will go to the police station to assist them. This is a guarantee of their fundamental right of defence and, as such, financial resources are not involved in the

exercise of this right. Their income is assessed subsequently, and if it is below the thresholds established by law, their entitlement to legal aid will be recognised. If, on the other hand, their financial resources exceed the thresholds, they will have to pay for the services provided by the lawyer designated under the duty lawyer system. However, this has been criticized by associations of lawyer arguing that (if authorities do not pay and the client does not pay, it amounts to duty lawyers financing the duty service.¹⁹

There are concerns linked to the legal aid system due to insufficient resources and late payment. Legal aid lawyers suffer from long delays before they get paid (in some cases, even more than six months) and the fees -the average per case- is €142.²⁰

Resources of the judiciary

In 2017, the four judicial associations filed a joint complaint against the General Council of the Judiciary Council and the Ministry of Justice for failure to comply with the obliga-

18 Order from the Ministry of Justice, dated 3 June 1997, establishing the general minimum training and specialisation requirements to provide legal aid. The Bar Associations can add additional requirements.

19 ALA statement December 2019: <https://ala.org.es/comunicado-de-ala-en-relacion-a-la-decision-del-ministerio-de-justicia-pago-turno-oficio/>

20 The investment in legal aid in 2018 reached 269 millions (it was 226,9 million in 2014 and 223 in 2013) <https://web.icam.es/bucket/XIII%20OBSERVATORIO%20DE%20JUSTICIA%20GRATUITA.pdf>

tion to set the workload of judges. The associations²¹ hold their governing body responsible for the excessive workload and not regulating the maximum limits. The complaint has not been yet decided upon and is moving between the social and administrative jurisdictions to determine which has jurisdiction to decide.

One of the “14 basic proposals for improving the justice system” agreed upon in 2017²² by the judicial associations includes “increasing the number of judges to be in line with the European average, by calling for 250 new positions each year for the next four years”.

According to the EU Justice Board (2019), Spain is among the EU countries that has least number of judges per inhabitant (position 22 out of 28, who provided information).²³

The General Council of the Judiciary and the Ministry of Justice adopted in 2017 an Urgent Plan to create 54 courts in the provincial capitals to deal exclusively with “floor clause” cases (that is, abusive and unfair terms

in mortgage loan agreements) as a response to the judgment of the Grand Chamber of Court of Justice of the EU in the joined cases C-154/15, C-307/15 and C-308/15. This decision was highly criticized and opposed by Bar Associations as well as by judges. The creation of these courts was described as “chaotic” and could lead to the overload of the courts due to the lack of adequate and sufficient human and material resources for their correct functioning and therefore putting at risk the right to effective judicial protection.²⁴

The justice budget in 2018 was 1.928 million euros. It must be noted that the state budget approved by Congress in 2018 continues to be applicable in 2020 as there has been no consensus to pass a new budget since (in between elections, as well). The amount allocated for salaries of judges and court staff was 1.382,8 million euros.²⁵ The associations of judges expressed their discontent with this budget as they considered it insufficient given the needs of the administration of justice.

21 <http://www.ajfv.es/la-responsabilidad-del-exceso-carga-trabajo-los-jueces-del-cgpj-afirman-las-asociaciones-judiciales-juicio/>

22 <http://www.ajfv.es/las-4-asociaciones-jueces-plantean-las-14-propuestas-basicas-mejorar-la-justicia/>

23 Page 41 https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf

24 “A portrait of Justice in Spain” 2018 <https://www.liberties.eu/en/news/a-portrait-justice-spain/14920>

25 <https://www.abogacia.es/actualidad/noticias/el-estado-destina-a-justicia-un-total-de-1-926-millones-de-euros-en-2018-un-31-mas-que-el-ano-anterior/> for example in 2014, the justice budget was 1.473 millions, out of which 1.218 were for salaries of judges and court staff.

Concerns over the judicial independence of Spain persist to such an extent that four associations of judges and three associations of prosecutors in Spain agreed on a mobilization calendar for April 2018, leading to a strike on 22 May, if the authorities did not put forward serious and meaningful proposals, among other issues, to modernize the justice system, including adequate and sufficient material and human resources.²⁶ 65% of judges went on strike on May 22, and 51% of prosecutors. As explained above, Spain is among the EU countries that has least number of judges per inhabitant (EU Justice Scoreboard 2019, page 41).

Use of assessment tools and standards

Since LEXNET (the online communications system of legal professionals with courts) started operating, security as well as separation of powers issues have been continuously raised and criticized by numerous legal professionals and judge associations.²⁷ The management of the online system does not correspond to the Judiciary Council but falls under the Ministry of Justice, meaning that the executive power

could have access to all judicial notifications and information included in court cases.

Other issue related to the quality of the justice system

Legal guarantees of fair trial standards and their application in practice

In 2015, important legislative reforms were approved designed to transpose the European Directives on the right to interpretation and translation in criminal proceedings (2010/64/EU), the right to information in criminal proceedings (2012/13/EU), and the right of access to a lawyer in criminal proceedings and in EAW proceedings (2013/48/EU) into the domestic regulatory framework. The successive reforms of the Criminal Procedure Act were introduced consecutively and in a very short period of time by Organic Laws 5/2015, 13/2015 and Act 41/2015, which supplements and implements the foregoing. In particular, Organic Law 5/2015, of 27 April, transposed the Directives on interpretation and translation (almost two years past the deadline) as well as on the right to information (over a year behind schedule) . The transposition of the

26 “A portrait of Justice in Spain” 2018 <https://www.liberties.eu/en/news/a-portrait-justice-spain/14920>

27 RIS 2017 submission to the UN Special Rapporteur on judicial independence <http://rightsinternationalspain.org/uploads/publicacion/82f6c32cd8d04bdb3a95e3e705de2d3cf693e211.pdf> see also “Serious security gap identified in Spain’s Judicial communications systems” 2017 <https://www.liberties.eu/en/news/serious-security-hole-spain/12716> In 2016, Javier de la Cueva, a Madrid lawyer, sent a complaint to the EC concerning the LExnet system: <http://denuncialexnet.es/2016/05/13/>

Directive on access to a lawyer was addressed initially by Organic Law 5/2015 and subsequently amended by Organic Law 13/2015, of 5 October.²⁸ [NB bear in mind in relation to legislative procedure, below, and impact in legal certainty]

Articles 123, 124, 125 and 126 Criminal Procedure Act envisage the essential aspects of the rights to interpretation and translation in a similar manner to that set out in the 2010 Directive. The main problems have to do with the lack of interpreters specialising in minority languages, the quality of the service and the lack of quality control processes to verify the reliability of the interpretations and translations,²⁹ as well as the absence of a registry of duly qualified independent translators and interpreters. All of this can hinder the effective application of this right in practice. A deficient interpretation or the failure to translate certain documents can have a genuine impact on the life of foreigners who are suspected or accused in criminal proceedings and in EAW

procedures, if they are not able to understand their rights and defend themselves effectively. Traditionally, Spanish courts have interpreted that the right to translation and interpretation must be recognised not just in the case of foreigners, but also with regard to Spaniards who do not understand Spanish, or the official regional language in which the judicial act is taking place.³⁰

In sum, the fact that the Criminal Procedural Act (LECrim) envisages that interpreters will be designated from those appearing on “lists prepared by the competent Administration”; the fact is that the functions of translation and interpretation, both at police stations and in court, are partially externalised. Moreover, the 2015 reform envisioned the creation of an Official Registry of Legal Translators and Interpreters which would feature those professionals with the proper authorisation and qualifications, in order to draw up lists of translators and interpreters, with the prior inclusion in that registry being a requirement

28 Organic Law 5/2015 , although designed to transpose the 2010 and 2012 Directives, also took advantage to introduce some amendments that affected the Directive on access to a lawyer that was subsequently addressed by the reform of Organic Law 13/2015.

29 In the context of the “PRO JUS Procedural rights of children suspected or accused in criminal proceedings in the EU” research project, carried out by Rights International Spain in Spain, we were able to verify that the greatest difficulty that prevents the full enjoyment of this right is the lack of professionalism among the collective of professionals provided by the private companies contracted by the Ministries of Justice and the Interior who “lack the necessary qualifications and quality”. Available at <http://rightsinternationalspain.org/uploads/publicacion/e020506ec6f312da10eccf77f7483998f624cf0.pdf>

30 “RIS: Beyond Surrender. National report 2018” available at: <http://www.rightsinternationalspain.org/uploads/publicacion/bad908d20dc786c51fb1269cd776dee572e50d10.pdf>

in order to be able to act in court or at police stations; this registry has still not been created. This means that, in practice, access to interpretation and translation is not guaranteed when arrested persons are informed, for the first time, upon arrival at the police stations, of their rights and of the reasons for their arrest³¹.

With regard to the right to information, it is worth highlighting the following relevant changes introduced in the Criminal Procedure Act as a result of Directive 2012/13/EU: (i) the right of the investigated or accused person, and his/her lawyer, to have access to the essential elements in order to be able to challenge the lawfulness of the arrest (Articles 118.1.a and 520.2.d Criminal Procedure Act). However, the rule does not define what kind of documents or materials should be considered essential in terms of safeguarding the fairness of the trial and the preparation of the defence. (ii) The new wording of Article 118 Criminal Procedure Act includes an exhaustive list of the rights that any person to whom a punishable act is attributed has (whether arrested or not) and of which he/she must be informed as of when notified of the proceedings against him/her. Meanwhile, Article 520.2, which regulates the rights of arrested persons, has been amended to include the right to be informed in writing, in simple and accessible language, both of the acts attributed to them and the reasons that have led to their arrest as well as their rights. However, in practice, the information on rights is not supplied in

simple or accessible language, but in the form of a quick and formal reading in excessively technical language that, together with the circumstances of stress and tension, do not favour effective understanding of the rights by the arrested person. Moreover, although the Criminal Procedure Act envisages that the arrested person may keep the written letter of rights in his/her possession throughout the detention, in practice this is not the case.

31 (2018) Inside Police Custody 2. Rights International Spain, Available at: <http://www.rightsinternationalspain.org/uploads/publicacion/ea908f217ae869eb46aafaba182dd73f7ae6bea5.pdf> , p. 29.

According to RIS “Implementation of Directive 2012/13/EU on the right to information in criminal proceedings” report, the practical implementation of this Directive is low.³² In another RIS 2018 report, concludes that the letters of rights contain what is essentially a literal reproduction of the text of article 520.2 LECrim, which is not drafted in clear and accessible language, as the Directive requires. Thus, the content of these official letters of rights should be adapted so that they are clearer and more understandable³³. As for the standard form of the letter of rights, there is not a common form to all the police forces of the State, nor even one that is common to all courts. Each police force uses its own letter of rights, although they all follow common guidelines issued by the National Commission for Judicial Police Coordination³⁴.

Finally, and with regard to the right of access to a lawyer, the transposition of Directive

2013/48/EU has made it possible to introduce the following relevant changes to the Criminal Procedure Act: (i) in the catalogue of rights of which the investigated (Article 118.1) and arrested (Article 520.2) person must be informed, in a simple language and without undue delay, so that they can be exercised, the right to appoint⁴¹ a lawyer and the application for legal aid have been included; (ii) the obligation to respect the confidential nature of the communications between the investigated or arrested person and his/her lawyer (Articles 118.4 and 520.7); (iii) the right to communicate and hold a private interview with the lawyer before the interview with the police, the prosecutor or the judge and for the lawyer to be present whenever his/her client is interviewed (Articles 118.2 and 520.6.d); and the (iv) waiver of access to a lawyer (Article 520.8) for road safety offences.³⁵ In general, any arrested person is entitled to appoint a lawyer of his choice (article 520.2.c. LECrim) and,

32 Available here: <http://www.rightsinternationalspain.org/uploads/publicacion/6d7538f31e32b6daca53aa5f52d23c-b4ab7ed9b0.pdf>

33 “Inside police custody 2”, p. 36. These conclusions are supported by an RIS report from 2017. In it, RIS proposes an accessible letter of rights in line with the standards of the directive. See: RIS (2017). Accessible letter of rights in Europe: national report on Spain, p.42. Available online: <http://www.rightsinternationalspain.org/uploads/publicacion/e68d42597589ccbae2eacea5fe4a5282a966c80.pdf>

34 Inside Police Custody 2. Rights International Spain, p. 33.

35 For practical implementation of the Directive on access to lawyer see: “RIS. Measure C: Report on the implementation of Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings” 2018, available at: <http://www.rightsinternationalspain.org/uploads/publicacion/f1e97351b-d031e952d3a24956ea251e7df2c8bbd.pdf>

if he fails to do so, one will be appointed for him (article 520.5 LECrim)³⁶. In those cases in which a judge has declared incommunicado detention, the arrested person may be deprived of his right to appoint a lawyer of his choice (article 527 LECrim). But, in any event, a duty lawyer will be appointed to assist him while detained.

Presumption of innocence is one of the pillars of the accusatory criminal process. It enables a person to maintain their status as innocent and to be treated as such, until they are judicially declared responsible³⁷. Likewise, the public authorities have the duty to avoid making public declarations referring to persons under investigation as guilty. Neither should the persons under investigation be presented before the court or in public in a manner in

which they appear guilty (for example, handcuffed or in glass boxes, except where strictly necessary)³⁸.

Media exposure can also have a major impact on the presumption of innocence. “Media arrests”, with spectacular operations designed to show the effectiveness of the police, can jeopardise the presumption of innocence³⁹. Likewise, the manner in which the police communicate with the media can have an incriminatory effect, and in many cases the arrested person is assumed to be guilty, using the word “presumed” as a symbolic add-on that lacks any real content. Meanwhile, tabloid, unprofessional journalism can also have a negative effect on the presumption of innocence.

36 As an exception, and only in those cases in which the person has been arrested for acts liable to be categorised as road safety offences, the arrested person will be entitled to waive mandatory legal assistance (article 520.8 LECrim). We are referring to the offences envisaged in articles 379 to 385ter CC (dangerous driving, at particularly high speeds, under the influence of alcohol or drugs, without a licence or where the licence has been withdrawn, refusing to be tested for alcohol or drug consumption, etc.).

37 Constitutional Court Judgment 128/1995, of 26 July, on pre-trial detention, establishes that the presumption of innocence: “operates within the proceedings as a rule of judgement; but it constitutes at the same time a rule of treatment, by virtue of which the accused person is entitled to receive the consideration and treatment corresponding to someone who has neither committed nor participated in acts of a criminal nature”.

38 Articles 4 and 5 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

39 RIS (2019) “Suspects in Restraints: the importance of appearances: how suspects and accused persons are presented in the courtroom, in public and in the media – SIR”. Available online: <http://www.rightsinternationalspain.org/uploads/publicacion/eca5be7ba0dab99f85e605b4d73988d13a2077bb.pdf>

Rules on pre-trial detention and their application in practice

Pre-trial detention (articles 502 et seq. *LECrim Criminal Procedure Act*) is an interim measure that can be adopted on the suspicion that a crime has been committed, in order to: (a) ensure the presence of the accused person at the trial when there is believed to be a flight risk; (b) avoid evidence being concealed or destroyed; (c) prevent them taking action against the victim's legal interests; (d) or prevent the commission of further criminal acts. Application thereof is subsidiary when there are no other less onerous measures (article 503. 3 *LECrim*). In order to adopt them, the judge must take into account the repercussions it may have for the accused person in view of: (1) his personal circumstances; (2) the circumstances surrounding the facts; (3) the severity of the punishment that may be imposed (article 502.3 *LECrim*). The duration of pre-trial detention will be limited to the time necessary to achieve some of the purposes explained and for as long as the reasons justifying adoption thereof exist (article 504 *LECrim*). When pre-trial detention is ordered for reasons (a) or

(c) above, the duration will not exceed a year, if the offence entails a sentence of deprivation of liberty of 3 years or less, or two years if the sentence is of more than 3 years. If ordered because of reason (b) the term will not exceed 6 months (article 504 *LECrim*).

While it is true that it is necessary to duly justify the adoption of this interim measure, because it is a measure that impinges on the fundamental right to freedom, there is a wide margin of discretion for prosecutors when applying for it and/or for investigating judges when ordering it. And although it should only be adopted exceptionally, it is very widely used in Spain.

The report from the Spanish Pro Human Rights Association (APDHE) from 2015⁴⁰ on the practice of pre-trial detention in Spain contains a detailed analysis of how this interim measure is applied. First of all, the most commonly used criterion to justify the need for pre-trial detention is to prevent flight risk⁴¹, when the offences being investigated have a degree of seriousness⁴². For the purpose of justifying the flight risk, criteria such as a

40 APDHE (2015) *La práctica de la Prisión Provisional en España* (research report). Available online: https://www.fairtrials.org/wp-content/uploads/INFORME_LA-PRACTICA-DE-LA-PRISION-PROVISIONAL.pdf

41 According to data contained in the APDHE report: prosecutors applied for pre-trial detention in 75-80% of cases, with the argument most commonly used being the seriousness of the offence and of the sentence, as elements linked to the flight risk, and the judges granted it in 66-86% of cases, with flight risk being the most commonly used argument (p. 40).

42 *Ibid.*, p. 39.

lack of roots in the community and a foreign nationality are usually cited⁴³. This could run contrary to the case law of the European Court of Human Rights (ECtHR) which establishes that the lack of a fixed abode does not constitute grounds for ordering pre-trial detention, and that the judges in these cases have to consider the imposition of alternative measures⁴⁴.

Second, in relation to the risk of reoffending, certain characteristics of the arrested persons can favour pre-trial detention being ordered. The replies of several of the participants in the APDHE report said it followed discriminatory lines based on group stereotypes, referring to when the arrested persons are drug addicts, marginalised people or Roma, re-offending is assumed.

Third, even if social outcry is no longer a criterion envisaged by law, social outcry is still used in some cases, as the APDHE report shows. Fourth, as for the reasoning for pre-trial detention, the report concludes that it tends to be ordered without sufficient explanation of the reasons why it is being imposed, with the judicial decisions lacking proper reasoning that is sufficient and reasonable with regard to the person circumstances⁴⁵. In this regard, the posture of the ECtHR is clear as it considers that the arguments must be sufficiently reasoned and not “general and abstract”, and that commission of an offence is insufficient for ordering pre-trial detention, regardless of the seriousness of the crime. As for flight risk, it has specified that the lack of a fixed abode is not sufficient for ordering pre-trial detention⁴⁶. The risk of re-offending is only justified if there is actual evidence of the defined risk⁴⁷. Any financial guarantee set as a condition for

43 “The analysis of case files has shown that the lack of roots [in the community] is an element invoked in many of the judicial decisions ordered pre-trial detention, with coincides in part with the comments of 3 lawyers who said that if the arrested person is a foreigner, there is assumed to be a flight risk and it becomes a fundamental reason for ordering detention” (APDHE, 2015, p. 41).

44 Ibid., p. 41. See ECtHR Judgments: Sulaoja v. Estonia, App 55939/00, 15 February 2005, para 64; Tomasi v. France, App 12850/87, 27 August 1992, para 87; Wemhoff v. Germany, App 2122/64, 27 June 1968, para 5.

45 Ibid., p. 37.

46 ECtHR Judgment, Sulaoja v. Estonia, 15 February 2005, app. No. 55939/00, para 64

47 ECtHR Judgment, Clooth v. Belgium, 12 December 1991, app. No. 12718/87

obtaining provisional release must take into account the financial means of the accused person⁴⁸. It has also stated that the prosecutor bears the burden of proving that an alternative less onerous measure would not serve the same purpose as pre-trial detention⁴⁹. Finally, pre-trial detention cannot be extended just because the judge expects a conviction to be handed down⁵⁰.

RIS is currently finalizing an EC co-funded project “*Fighting unconscious bias and discrimination of Roma people in the criminal justice system*”⁵¹. In the course of the investigation, we were able to confirm that the perception of the lawyers and the majority of judges interviewed was that Roma were more likely to be subjected to pre-trial detention due to their ethnic origin. Meanwhile, the majority of prosecutors did not believe that there was any kind of inequality on this point, although it is possible that there may be a factor that affects them

unfairly or disproportionately when it comes to adopting this interim measure.

Efficiency of the justice system

Length of proceedings

Spain’s Ombudsperson noted in 2015 that unacceptable delays in judicial proceedings are endemic in Spain due to a lack of resources.⁵² A further example of excessively slow legal proceedings caused by a lack of resources can be found in the operation of the courts established to deal with the ‘floor clause’ complaints - which itself is intended to implement an existing Court of Justice ruling. The creation of these courts has led to the overload of the courts due to the lack of adequate and sufficient human and material resources for their correct functioning.

48 ECtHR Judgments, *Gafà v. Malta*, 22 mayo 2008, app. No 54335/14; *Hristova v. Bulgaria*, 7 December 2006, app. No. 60859/00.

49 ECtHR Judgment, *Gran Sala, Bykov v. Russia*, 10 March 2009, app. No. 4378/02, para 64.

50 ECtHR Judgment, *Tase v. Romania*, 10 June 2008, app. No. 29761/02.

51 The report will be available in the following in June 2020: <http://www.rightsinternationalspain.org/en/campanias/23/roma-y-el-sistema-de-justicia-penal>.

52 <https://confilegal.com/20160225-el-defensor-del-pueblo-denuncia-los-retrasos-en-la-justicia/>

The Inspection Service of the Judiciary Council published a report in 2014⁵³, finding that more than 40 percent of tribunals in Spain were functioning at 150 percent of their maximum recommended workload and almost 75 percent were functioning at over 100 percent of the maximum recommended workload. This report evidenced structural deficiencies clearly and some judges point to this fact as a reason why the Judiciary Council has not published updated information on this matter again.

According to information by an association of judges, the volume of works in 60% of courts continues to significantly increase.⁵⁴ The courts of first instance, investigative, administrative or social litigation, which represent 83% of unipersonal judicial bodies in Spain, the average rise of workload being 20,9%. They highlight the civil jurisdiction: the increase has been 47,9% in first instance courts, 32,5% in family courts, 18,8% in commercial courts or a 29,7% in the civil jurisdiction of the mixed courts.

According to the EU Justice Scoreboard (2019 – data of 2017): Spain ranks 16 (pending litigious civil and commercial cases), 18 (number of pending administrative cases); 20 (time

needed to resolve administrative cases at all court instances) 24 (Time needed to resolve litigious civil and commercial cases at all court instances) – and ranking 10 in incoming civil, commercial and administrative cases.⁵⁵

Media pluralism and freedom of expression and of information

Framework for the protection of journalists and other media activists

Law enforcement capacity to ensure journalists' safety and to investigate attacks on journalists: frequency of negative public statements from the government directed at journalists, bloggers or other media activists

“Spanish political party VOX informed on 7 November 2019 that it denies the accreditation of Grupo Prisa media outlets - some of the most followed media in the country - ahead of the general elections of 10 November. In a statement, the media were informed that “from this moment on, it will not grant accreditations for any journalist linked to PRISA or for access to its headquarters or for any other

53 <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Consejo-General-del-Poder-Judicial/Actividad-del-CGPJ/Estudios/Informe-organos-que-sobrepasan-el-150--de-la-carga-de-trabajo--Datos-a-31-12-2013>

54 Foro Judicial Independiente <https://www.forojudicialindependiente.es/2019/01/22/informe-de-carga-de-trabajo-de-los-organos-judiciales/>

55 https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf

event that the political party organises in private spaces”.⁵⁶

RSF warns Spanish far-right party to stop violating press freedom.⁵⁷

Access to information and public documents

Law 19/2013, of December 9 on Transparency, Access to Public Information and Corporate Governance.

“Law for all public administrations and all applicable state sector, as well as other institutions such as the House of His Majesty the King, the General Council of the Judiciary, the Constitutional Court Congress of Deputies, the Senate, the Bank of Eng; to the Ombudsman, the Court of Auditors, the Economic and Social Council and the regional institutions similar in relation to the activities subject to administrative law. The Act establishes the publication obligations affecting public bodies to ensure transparency in its activity and regulates the right of access of citizens to public information.”⁵⁸

The transparency website-portal was created end of Dec 2014-2015 <https://transparencia.gob.es/>

A group of NGOs, among others Access Info sent information to the UPR process on Spain, with the following: ”(i) Simplify the process of requesting information, eliminating the requirements for identifying the requester, such as a digital certificate or self-signature; Give sanctioning capacity to the Transparency Council and provide it with more resources in order to optimize its control capacity; Expand the Right of Access to Information so that it also applies to the Legislative and Judicial Branches; Reform Article 18 of the Transparency Law to eliminate the limitations established on the Right of Access to Information by considering a request for access to documents of an “internal” or “auxiliary” nature as grounds for inadmissibility; Increase the training of public officials in transparency as an essential value of a democratic government and to ensure the effective application of the law.”⁵⁹

56 https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-4&p_p_col_count=1&_sojdashboard_WAR_coesojportlet_alertId=54453791

57 <https://rsf.org/en/news/rsf-warns-spanish-far-right-party-stop-violating-press-freedom>

58 https://transparencia.gob.es/transparencia/en/transparencia_Home/index/MasInformacion/Ley-de-Transparencia.html

59 <https://www.access-info.org/blog/2019/12/10/access-info-denuncia-las-violaciones-del-derecho-de-acceso-a-la-informacion-en-espana-ante-el-consejo-de-derechos-humanos-de-la-onu/>

In 2015, Civio Foundation filed a lawsuit against the Ministry of Defence to obtain the names of those who accompany high ranking public officials on official trips. In 2017, the National Court considered that the ministry should release the names, but with one major exception: a public institution was **only required to provide information issued after the enactment of the Transparency Law**, in December 2014. Finally, **the Spanish Supreme Court has upheld Civio** and overturned the National Court's ruling that limited citizens' right to information.⁶⁰

It must be noted, that currently under Covid-19 measures, the deadlines and terms for processing information requests are suspended/interrupted by virtue of the third additional provision of Royal Decree 463/2020 for the management of the health crisis situation caused by Covid-19 (State of Alarm Decree).⁶¹

Enabling regulatory environment for the effective exercise of the right to freedom of expression and of information

Rules on protection of freedom of speech and challenges to their enforcement in practice

Freedom of expression is a fundamental right. The Spanish Constitutional Court has recognised that freedom of expression is “one of the pillars of a free and democratic society”⁶² which is necessary “for the exercise of other rights inherent to the functioning of a democratic system”.⁶³

Article 16.1 of the Spanish Constitution makes clear that the right to free expression includes “[f]reedom of ideology, religion and worship of individuals and communities . . . with no other restriction on their expression than may be necessary to maintain public order as protected by law”. Article 20.1 of the Constitution also “recognises and protects” the right to “freely express and spread thoughts, ideas and opinions through words, in writing or by any other means of reproduction”, “literary, artistic, scientific and technical production and creation”, “academic freedom”, and “freely communicate

60 <https://civio.es/novedades/2020/03/05/civio-wins-the-first-major-battle-for-transparency-in-spain/>

61 https://transparencia.gob.es/transparencia/transparencia_Home/index/Derecho-de-acceso-a-la-informacion-publica/Solicite-informacion.html

62 Constitutional Court Judgments (CCJ) 6/1981, of 16 March, and 12/1982, of 31 March, Point of Law 3.

63 CCJ 112/16, of 20 June Point of Law 2.

or receive truthful information via any means of dissemination”.

There is an unconstitutional appeal against Laws and regulatory provisions that violate the rights set forth in art. 20 of the Constitution (art. 53.1 and 161.1.a) of the Constitution.

Any citizen can file and appeal before the Constitutional Court (*recurso de amparo*) for the protection of the rights set forth in art. 20 of the Constitution.

The exercise of the rights set forth in art. 20 of the Constitution can only be regulated by law (art. 53.1 of the Constitution).

Abuse of criminalisation of speech

The Organic Law 4/2015, on the Protection of Citizen Security (hereinafter, Law 4/2015) in force is a problematic legislation, which has been harshly criticized by both civil society and international organizations. In February 2015, four United Nations Special Rapporteurs (on the right to peaceful assembly, on the promotion and protection of the right to freedom of expression, on the promotion and protection of human rights and fundamental freedoms while

countering terrorism, and on the situation of human rights defenders) made a joint statement against the approval of Law 4/2015.⁶⁴ They stated that “The so-called ‘gag law’ violates the very essence of the right to assembly since it penalizes a wide range of actions and behaviours that are essential for the exercise of this fundamental right, thus sharply limiting its exercise”. They also criticized the fact that “this project of reform unnecessarily and disproportionately restricts basic freedoms such as the collective exercise of the right to freedom of opinion and expression in Spain”. In June 2015, the UN Special Rapporteur on the right to peaceful assembly said, “he lamented that despite his joint action with other independent UN experts urging Spain to reject” the Citizen Security Draft Bill, “the country has adopted very limited amendments”. In the same report, he insisted that “he is seriously concerned about the broad and imprecise definitions which may lead to self-censorship, one of the most regressive social practices for effective enjoyment of fundamental rights and freedoms”.⁶⁵ In 2018, the CoE Commissioner for Human Rights has also urged Spain to ensure that the Law on Citizen’s Security upholds the rights to freedom of expression and freedom of peaceful assembly.⁶⁶

64 <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597&LangID=S>

65 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/29/25/Add.3, June 10, 2015, para. 451.

66 <https://www.coe.int/en/web/commissioner/-/commissioner-urges-spain-to-ensure-that-the-law-on-citizens-safety-upholds-the-rights-to-freedom-of-expression-and-freedom-of-peaceful-assembly>

Rights International Spain was very critical of the Draft Bill.⁶⁷ During the legislative process, we requested the reform not to be approved⁶⁸ and, since then, we have maintained that Law 4/2015 should be repealed.⁶⁹

The following provisions of Law 4/2015 constitute unjustified, disproportionate and unnecessary restrictions on the right to freedom of expression in a democratic society.

Art. 16.1⁷⁰: The sole fact of wearing a garment, even if it partially or completely conceals the face, is not, in the absence of other factors, a reason for police identity checks. Dress is a legitimate form of exercising freedom of expression. Certainly, it cannot be interpreted as an indication of the commission of an offence, nor is it a valid reason for preventive identity checks.

According to new article 36.26 of the Citizen Security and Public Safety Act, the “unautho-

rized use of images or personal data personal of professional authorities or members of State security forces that may endanger the personal safety or that of agents’ families, the protected premises or put at risk the success of an operation, respecting the fundamental right to information” shall be a serious infraction. This provision conflicts with legal certainty insofar as the Spanish legal system already provides sufficient and solid legal basis (in fact, two different laws) for the protection of law enforcement officials in such cases. According to article 504(2) of the Criminal Code “those who seriously insult or threaten members of the army or security forces shall be punished with a fine of 12 to 18 months”. Furthermore, a civil case is available pursuant to the Organic Law 1/1982 for the protection of civil right to honour, personal and family privacy and image. Therefore, the new provision of the Citizen Security and Public Safety Act constitutes the third and different law to regulate this matter. Moreover, it will not be a court but rather the

67 <http://rightsinternationalspain.org/uploads/publicacion/1615e270a19ef72e4fddced6a1d2810ec54ed1f5.pdf>

68 <http://www.rightsinternationalspain.org/en/campanias/15/no-a-la-ley-mordaza/42/comunicaciones-con-las-autoridades-espanolas>

69 <http://www.rightsinternationalspain.org/uploads/publicacion/7b493756650ce2f34f7c9610ddac79de1417b522.pdf> See also, the joint communication to the Ombudsperson signed by various organizations, including Rights International Spain, requesting the lodging of a constitutional appeal against Law 4/2015: <http://www.rightsinternationalspain.org/uploads/publicacion/4a6f9256b874041725955e2c1ca1e7fa71f75493.pdf>

70 “In these cases, officers may carry out the necessary searches on the public space or at the place where the request was made, including the identification of people whose faces may not be entirely visible due to the use of any type of garment or object that covers them, preventing or hindering identification, when necessary for the purposes indicated”.

Administration (through an administrative proceeding) that will determine whether the security of an agent, premises or operation is at risk. This is a matter that in any case should be resolved by the courts.

Article 37.4⁷¹. This provision is unnecessary and could lead to disproportionate restrictions of the right to freedom of expression. Any opinion, disagreement or expression of repulsion voiced by an individual may be subject to a fine. In a democratic society, the State and its agents must prove special tolerance towards criticism, even if it is expressed in insulting terms, as ruled by the European Court of Human Rights.⁷²

In 2015 the chapter of the Criminal Code on terrorism was amended again, including articles 578 and 579. The reform deepened the vagueness and inaccuracy of these provisions, disproportionately and unjustifiably

increasing the punishments.⁷³ According to the Preamble, “articles 578 and 579 punish the public glorification or justification of terrorism, acts of discredit, disregard or humiliation of the victims, as well as the dissemination of messages or slogans designed to incite others to commit terrorist offences. The categorisation of this conduct places particular emphasis on scenarios in which acts are committed by means of services or content accessible to the public via the communications media, internet, or electronic communications services or the use of information technologies”. It makes no mention of intent or causation of any danger of violence. This latter legislative amendment was immediately criticised by legal scholars as violating the fundamental right to freedom of ideology and expression.⁷⁴

Changes to articles 578(2) and 579(1) also include punishing the distribution or diffusion of messages or slogans through any media or

71 “The lack of respect and consideration towards law enforcement officers while carrying out their duties, when these conducts do not constitute a criminal offence”.

72 Judgment of the European Court of Human Rights in the case *Thorgeir Thorgeirsson v. Iceland*, Application no. 13778/88, June 25, 1992; para. 66, in which the Court concluded that insults towards the police officers constituted a perfectly legitimate exercise of the right to freedom of expression.

73 Rights International Spain, Specific observations for the Senate on the reform of the Criminal Code in relation to terrorism, February 2015 <http://www.rightsinternationalspain.org/uploads/publicacion/4958abf734404761f1ca43aca613334f1001ee5e.pdf>

74 Directors Alberto Alonso Rimo, Antonio Fernández Hernández, María Luisa Cuerda Arnau, “Terrorismo, sistema penal y derechos fundamentales”, Editorial Tirant Lo Blanch, 2018. This group of legal scholars considers that the Spanish legislator has gone further than what was required by Resolution 2178/2014 of 24 September and EU Directive 2017/541 of the European Parliament and of the Council of 15 March 2017.

procedure “if their content is suitable to incite others to commit” terrorism crimes. These provisions are excessively vague and could lead to arbitrary interpretations. Individuals will not be able to regulate their conduct in accordance with the law. Therefore, they do not comply with the requirements of precision and certainty of the law, as inherent in the rule of law.

According to art. 5 of Directive 2017/541 on combatting terrorism, there are two requirements for the conduct of glorification to be punishable: (i) the intention to incite, directly or indirectly, the commission of a terrorist offence and (ii) the danger that such offence may be committed. Although the Spanish Criminal Code does not include these two elements, they have been introduced by the Courts in their interpretation of art. 578.⁷⁵

Since 2015, Spain has seen a sharp rise in the number of prosecutions for the crime of “glorification or justification” of terrorism under Article 578 of the Spanish Criminal Code. A large number of twitter users, rappers, journalists and lawyers have been targeted under this provision. RIS is finalizing a research analysing jurisprudence of Spanish courts, where it finds that a significant proportion of Spanish court decisions are inconsistent with international human rights law governing the right to

free expression. However, a few Spanish court decisions that do conform to human rights standards suggest avenues for reform. Having said the above, we can conclude that case law is so erratic, with such contradictory and unpredictable case law, that it generates great legal uncertainty in violation of the principle of legality.

In fact in a 2018 Human Rights Comment by the CoE Commissioner on mis-use of anti-terror legislation and its impact on freedom of expression: “The conviction for glorifying terrorism of several twitter users and rappers following provocative statements or lyrics have recently sparked controversy. Sentences were based among others on Article 578 of the Spanish Criminal Code which foresees penalties for “glorifying terrorism” or “humiliating the victims of terrorism or their relatives.” This provision was broadened in 2015, with a view to increasing sanctions when such conducts occur via the internet. At that time, five UN experts⁷⁶ had raised concerns about these amendments to the Criminal Code as they “could criminalise behaviours that would not otherwise constitute terrorism and could result in disproportionate restrictions on the exercise of freedom of expression, amongst other limitations”, noting that the definition of terrorist offenses were too broad and vague. Article 578 has increasingly been used since 2015, with a

75 It is towards mid-2017 that we find decisions that, following the criteria set by Constitutional Court judgement 112/2016, introduce the two elements necessary to establish the conviction, namely: the need to objectively evaluate the existence of a situation of risk and the intention of the perpetrator to incite violence.

76 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597>

reported chilling effect on freedom of expression.”⁷⁷

State interference with media outlets, civil society organizations, academics or activists' right to freely express themselves

See above Citizen security Law and criminal code.

The Royal Decree-Law 14/2019 of 31 October could limit online freedoms in Spain and is another regulation approved in reaction to a very specific situation, without a comprehensive analysis of all the areas it will affect. Just like in the ongoing debate on encryption and the fight against crime, the Spanish government is justifying new powers to control cyberspace by emphasizing new threats such as data and information theft, hacking, and cyber-attacks against critical. The vague statement citing “recent and serious events that have occurred in part of the Spanish territory” is being used to justify the state assuming a wide range of powers, which affect both public and private spheres.⁷⁸

During the Covid state of alarm, police (Guardia Civil) tracked internet for false news

raising concerns with regard to freedom of expression.⁷⁹

Unjustified restrictions on freedom of expression on the internet and social media

See above, as well, Gag law and Criminal Code (glorification)

⁷⁷ <https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression>

⁷⁸ Digital Censorship in Spain: Closing Websites by Decree <https://www.liberties.eu/en/news/digital-censorship-website-closed-spain/18814>

⁷⁹ https://www.eldiario.es/politica/ciberseguridad-concebida-responsable-terminologia-Santiago_0_1019099281.html

Checks and balances

Process for preparing and enacting laws and separation of powers

Stakeholders'/public consultations

NGOs in Spain also report that the government has used a variety of techniques to minimise the opportunities for NGOs to participate in consultation, or flatly refused to consult at all.⁸⁰

The process through which the package of reform proposals was adopted in 2015 conflicts with a basic value inherent in the rule of law: that is, “a transparent, accountable, democratic and pluralistic legislative process”. Despite the depth of reforms, and given the absolute majority in Congress, there was no engagement in adequate consultation with stakeholders including civil society organizations, constitutional and human rights experts, nor given due consideration to the views of the judiciary, public prosecutors and the legal profession, which have voiced serious concerns with the proposals.⁸¹

Transparency of the legislative process

The Law on the Judiciary was reformed nine times between 2011 to 2015 through bills put forward by the government or the parliamentary group of the governing party in Congress and supported primarily by it. It is currently being reformed yet again.

In 2018 it was reformed again. Although the scope of the reform was initially limited to re-introducing measures to facilitate reconciling the work and family life of judges, the Popular parliamentary group in Congress, taking advantage of its majority, introduced significant amendments involving a “full-fledged disguised reform” affecting the functioning of the justice system. Furthermore, in doing so, the legislative process is flouted insofar as the duty to request mandatory reports from a number of bodies is not fulfilled.⁸²

See above, on legal aid: The legislative procedure followed in many cases is questionable since reforms are introduced by way of amendment to a different law and when they are already being debated in Congress. Thus,

80 “Participatory democracy under threat: Growing restrictions on the freedoms of NGOs in the EU”, Civil Liberties Union for Europe, Page 10, citing, RIS joint letter to the EC expressing grave concern in relation to serious threats to the rule of law in Spain (2015), pages 18-19 <http://rightsinternationalspain.org/uploads/publicacion/1c70185a35a3e80b850e122a0c9ad2cd381adc52.pdf>

81 RIS joint letter to the EC expressing grave concern in relation to serious threats to the rule of law in Spain (2015), pages 18-19.

82 A portrait of Justice in Spain (2018) <https://www.liberties.eu/en/news/a-portrait-justice-spain/14920>

hampering participation of relevant stakeholders.

Use of the state of emergency and the challenges it entails in terms of checks and balances and separation of powers

On March 14, 2020 the Council of Ministers approved the Royal Decree 463/2020 by which the state of alarm in the context of Covid-19 was declared⁸³.

When the government declares a state of alarm, it will immediately send the President of Congress a communication that will be accompanied by the Decree agreed upon by the Council of Ministers. The communication will be forwarded to the competent commission which may collect the information and documentation it deems appropriate. Extensions of the 15day period referred to in article 116,2 of the Constitution, must be requested to and authorized by Congress before the expiration of the term.

This state of alarm decree regulates a series of logistical issues, such as the closing of shops, the prohibition of going out onto the street

without a justified reason and the mobilization of the army, among other things. The Second Additional Provision of Royal Decree establishes: “Terms are suspended and the time limits provided for the procedural laws for all jurisdictional orders are suspended and interrupted”. In other words, all judicial activity is completely paralyzed although the Decree clearly states that duty services must be maintained. The Decree also stipulates that “in the investigation phase, the judge or court may agree to conduct proceedings which, due to their urgent nature, cannot be postponed”. Therefore, both the duty services and the freedom given to the judge to carry out urgent investigation proceedings, safeguard the right of defence. The Covid-19 related guidelines issued by the Judiciary Council include the possibility to hold a number of judicial actions/procedures online⁸⁴.

However, practical obstacles to the exercise of an adequate defence have been raised. The paralysis of the courts is having undeniable consequences on the right to defence.⁸⁵ Most of the court officials who are supposed to be working from home, are not doing so in practice as they lack the means, equipment and/or knowledge to do so.

83 <https://www.boe.es/buscar/pdf/2020/BOE-A-2020-3692-consolidado.pdf>

84 We have not obtained input on whether this is happening in practice and how. <http://www.poderjudicial.es/stfIs/SALA%20DE%20PRENSA/DOCUMENTOS%20DE%20INTERES/INSTRUCCI%C3%93N%20COVID-19.pdf>

85 Coronavirus in Spain: Police Going Too Far and Judicial Protections Being Eroded <https://www.liberties.eu/en/news/coronavirus-in-spain-police-going-too-far-and-judicial-protections-being-eroded/19025>

Certainly, the accumulation of cases in the post-COVID recovery phase will cause a greater delay than that which, unfortunately, the judicial system is already suffering.

Independent authorities

Independence, capacity and powers of national human rights institutions, ombudsman institutions and equality bodies, including as regards their cooperation with civil society

In 2003 the *Council for the Elimination for Racial and Ethnic Discrimination*⁸⁶ (CEDRE) was created, although its mission, composition and functions were not established until

2007⁸⁷, subsequently being modified in 2009⁸⁸, the moment at which it actually began functioning. It currently reports to the Ministry of the Presidency, Relations with Parliament and Equality, and in October 2018 held its first plenary session since December 2013 (during which the 2013-2015 Action Plan was approved⁸⁹). Its four main functions are: (1) provide victims of discrimination with independent advice when processing their complaints⁹⁰; (2) publish studies, research, reports with autonomy and independence⁹¹; (3) promote measures that contribute to equal treatment and the elimination of discrimination preparing the appropriate recommendations and proposals; and (4) draft and approve the

86 Act 62/2003, of 30 December, on Fiscal, Administrative and Labour Measures, carried out the transposition of Directive 2000/43/EC and, specifically, in relation to the provision contained in article 13 of the Directive, establishes the creation of the Council in article 33 for promoting equal treatment and non-discrimination of persons due to racial or ethnic origin (original name of the Council).

87 Royal Decree 1262/2007, of 21 September: regulates the composition, powers and system of operation of the Council for the Promotion of Equal Treatment and Non-Discrimination of Persons due to Racial or Ethnic Origin.

88 Royal Decree 1044/2009, of 29 June, which modifies Royal Decree 1262/2007, of 21 September: in September 2009, some aspects of the Royal Decree creating the Council were amended.

89 The 2013-2015 Action Plan has not been followed-up, meaning that for almost 5 years now there has not been a unified policy on the fight against racial discrimination.

90 The CEDRE created a service for assistance for victims of racial discrimination which functions via a network of specialised non-governmental organisations (ACCEM, CEAR, Cruz Roja Española, Fundación Cepaim, Fundación Secretariado Gitano, Movimiento Contra la Intolerancia, MPDL, Red Acoge) which provide assistance directly, with offices offering a face-to-face service in all autonomous regions.

91 Since 2012, the CEDRE has not published an annual report.

annual Report on the activities of the Council and send it to the Ministry for Equality.

The CEDRE has been harshly criticised by several human rights bodies at European and international level⁹², whose concerns can be summarised as follows⁹³: (i) the lack of independence from the government; (ii) lack of financial resources for the proper discharge of its functions and; (iii) it lacks the capacity to be able to litigate or take specific cases to court.

Enabling framework for civil society

Freedom of assembly

“Some countries have also imposed undue limitations on the freedom of assembly. While limitations on public protest are not necessarily directed overtly at NGOs, public protests are a key tool used by NGOs and civic movements more broadly to make the views of the public known to political leaders. Such limitations can be found in Spain’s ‘gag’ law, which severely restricts public protest”.⁹⁴

The first to speak out against the approval of Law 4/2015 Citizen Security Law (gag law) was the former United Nations Special

92 The European Commission against Racism and Intolerance (ECRI) stated in its 2011 report on Spain that “the Council lacks some of the elements necessary for a specialised body, according to ECRI’s General Policy Recommendation No. 7, in particular, investigation powers and the right to initiate and participate in court proceedings”. Moreover, it would not be classed as “independent” either according to ECRI’s General Policy Recommendation No. 2 as it lacks “adequate safeguards against interference from the State” (para 30). These comments were reiterated in the report on Spain in 2018 (para 23 to 27). To see the full ECRI reports (available online) go to: <https://www.refworld.org/docid/584ea2424.html> <https://rm.coe.int/fifth-report-on-spain/16808b56c9> Meanwhile, the United Nations Committee on the Elimination of Racial Discrimination (CERD) affirmed in its final observations that the Council continues to suffer the “the shortcomings previously highlighted by the Committee, including a lack of independence and resources, which in turn hinders the effective implementation of the Council’s mandate”. To consult the full CERD report, (available online) go to: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fESP%2fCO%2f21-23&Lang=en

93 See also: Rights International Spain (2019) *Lagunas en la protección de los derechos civiles y políticos en España, aportaciones para la lista de cuestiones previas a la presentación del VII informe periódico al Comité de Derechos Humanos*. Available online: <http://www.rightsinternationalspain.org/uploads/publicacion/70975000875e-37fe0a76ab5b77e91fa260f7d27a.pdf>

94 “Participatory democracy under threat: Growing restrictions on the freedoms of NGOs in the EU”, Civil Liberties Union for Europe, Page 10.

Rapporteur on the rights to freedom of peaceful assembly and of association in his 2013 report,⁹⁵ in which he stated that he was “deeply concerned about the disproportionate and excessive restrictions on the right to peaceful assembly” that the draft Law on the Protection of Citizen Security involved. In his most recent report (2018) the new Special Rapporteur on the right to assembly has also expressed concern on “legislative amendments or reforms that were adopted to increase fines and criminalize breaches of the regulations regarding the organization of and participation in peaceful assemblies”, referring specifically to the Spanish Law on Citizen Security.⁹⁶

Art. 35.1⁹⁷: Spontaneous demonstrations and assemblies and the requirement of prior notification. Several international bodies have stressed the fundamental nature of the presumption in favour of holding peaceful assemblies, insisting that it must be “clearly and explicitly established in law”. This favourable presumption, and the correlative duty of the State and its agents to protect should apply to those assemblies or demonstrations that have not complied with the requirement of prior notification. With respect to spontaneous assemblies, the United Nations Special Rapporteur

on the right to assembly recommends that they should explicitly be “recognized in law”.

Art. 30.3: The concept of “organizer” of an un-notified assembly or demonstration provided in Article 30.3 is too broad. To determine who is or are the organizer(s) or promoter(s) of an assembly or demonstration by taking for reference imprecise and ambiguous factors such as “the oral or written statements propagated therein, slogans, flags or other signs displayed or any other facts or circumstances” is totally unjustified and ungrounded. This excessively broad definition of the figure of organizer of an assembly may result in disproportionate and undue restrictions of the right to freedom of assembly, as it allows mere participants to be considered as organizers.

Art. 37.1: It should be noted that, as the Special Rapporteur on the right to assembly points out in his recommendations to States: “should the organizers fail to notify the authorities (...) it should not be subject to criminal sanctions, or administrative sanctions resulting in fines or imprisonment”

Art. 36.2: This provision lacks any kind of legitimate justification. There is no reason that justifies a specific penalization of a conduct

95 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/26/29/Add.1, June 10, 2013, para. 419.

96 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/38/34, June 13, 2018, para. 38 and footnote no. 21.

97 <http://www.rightsinternationalspain.org/uploads/publicacion/7b493756650ce2f34f7c9610ddac79de1417b522.pdf>

exclusively because it takes place in front of the Congress, Senate or autonomous assembly, or because it happens, specifically “on the occasion of an assembly or demonstration”. It should be noted that, given the symbolic value of parliaments and other public buildings, States should particularly protect the exercise of the right to assembly in front of or in the immediate vicinity of these buildings.

Art. 36.4: “acts of obstruction” may cover a wide range of conducts; from negotiation, to mediation or a completely peaceful assembly. It is not clear what is the legal value it is intended to protect, but it is clear that its application can result in sanctions for perfectly peaceful and legitimate conducts in a democratic society.

Article 37.3 : “Minor disturbances” during a demonstration, assembly or public event may in no case constitute sufficient justification for the limitation of the fundamental right to freedom of peaceful assembly. A minor disturbance does not pose a serious danger to people or property that can render the sanction proportionate.

Article 37.7: The term “occupation” is not defined, so it is not clear if the mere simultaneous and completely peaceful presence of several people is sufficient. No reason is given to indicate the dangers to people or property that the occupation of such places may pose; or if there are risks that could ground a legitimate objective for the provision. The reference to the

“holder of another right” over any of the spaces listed (properties, houses, buildings, public space) is excessively vague for the purpose of determining conflicting interests.

The Citizen Security and Public Safety Act runs in parallel to a new reform of the Criminal Code, which introduces new, and modifies existing, “crimes against public order”. There are a number of vaguely worded provisions in the newly passed Criminal Code reform, which are likely to lead to arbitrary use of power, which is against legal certainty.⁹⁸ The most problematic provisions are the following:

The new text of article 550(1) of the Criminal Code reads: “Conviction for assault shall befall those who assault or, with serious intimidation or violence, resist the authority, its agents or civil servants, or attack them, when they are carrying out their duties of office, or on occasion thereof”. A key change is the omission of the adjective “active” linked to “resistance”. The new wording thus leaves wide discretionary powers, enabling a broad interpretation, to include passive resistance (such as sit-ins, or the formation of human chains) within the scope of the offence. The new text of article 557(1) reads as follows: “Those who, acting as a group, or individually but sheltered in the group, disturb public peace, perform acts of violence on persons or things, or threaten others with doing so, shall be punished with a sentence of imprisonment of six to three years”. This provision includes vague and

98 For further analysis, see Rights International Spain (legal brief), available here: http://rightsinternationalspain.org/uploads/publicacion/eeacc6f70f85b809b5b3041cd1506b889_2ef7d8b.pdf

ambiguous expressions (such as “acts of violence” or “sheltered in a group”), which are not defined at all. People would not be able to foresee the consequences of their actions and authorities would have broad discretionary powers, leaving too much room for arbitrary decisions. In addition, the fact that the new provision would not require specific results (injuries or damages), compounds the difficulty of foreseeing what conducts amount to “acts of violence”. Finally, the provision criminalizes “threats” (equating threats to the actual commission of dangerous or damaging acts). This wording is extremely imprecise. There is a risk that the use of provocative slogans could be considered a crime. The restrictions on the rights to freedom of assembly and expression would be too broad and thus could interfere with these fundamental rights. The new article 557(2) is equally drafted in vague and imprecise expressions, such as “influence the group or its members, inciting them to carry out acts of violence or reinforcing them in their intention to do so”. This clearly conflicts with the principle of legal certainty. The Criminal Code introduces an aggravated offence (article 557bis (3)) if the disorder is committed during or within a demonstration. This provision is

worded so vaguely that citizens participating in demonstrations will no longer be able to determine if their actions or slogans will fall within the scope of this offence. This leaves a broad discretion for the authorities, enabling excessively wide interpretations.⁹⁹

Funding landscape for civil society organizations

“In Spain, there is evidence to suggest a fall in government funding for much of the NGO sector, but an increase in funding in favour of organisations advancing discriminatory interpretations of Christian doctrine.”¹⁰⁰

In recent years (2017-2018) concerns have been raised around both the granting and revoking by the government of the status of public utility to certain associations, which enables them to access tax benefits. On the one hand, public utility declarations have been granted to religious conservative organizations, including linked to anti-abortion and anti-LGBTI groups; while support groups working in certain health care areas with vulnerable com-

99 Pages 16-17. <http://rightsinternationalspain.org/uploads/publicacion/1c70185a35a3e80b850e122a0c9ad2c-d381adc52.pdf> Pages 18-19 <http://www.rightsinternationalspain.org/uploads/publicacion/5f352a60ae10d3651b-c20a7aae51576df5a50ac2.pdf>

100 “Participatory democracy under threat: Growing restrictions on the freedoms of NGOs in the EU”, Civil Liberties Union for Europe, Page 7 https://drive.google.com/file/d/0B_W-Vna2eVNVOfk5VXUzeE9CdGM/view

munities (immigrants, family planning) have been revoked.¹⁰¹

“NGOs in Germany and Spain also report increased bureaucratic pressures. (...) There is evidence that the increase in administrative bureaucratic burdens (such as internal monitoring requirements, submission to audits and extra reporting obligations) is directly due to the way that international standards designed to prevent financing for terrorist activities have been interpreted and applied by governments – for example in Croatia, Poland, Slovakia and Spain.”¹⁰²

Concern must be raised concerning a series of practices carried out by representatives of the far-right party VOX, since they gained access to local, regional and national parliaments. VOX representatives have made information requests intended to point to, stigmatize and coerce certain social groups that are contrary to the party’s ideology. In particular, they have asked for the names of all the persons working in Gender Violence Units in the Regional government of Andalucía, the names of the those who give LGBTI talks in schools in the Community of Madrid. Vox has also requested that all institutional support for these groups stops.¹⁰⁵

Safe space and state duty to protect

Death threats and insults to anti-racism activist¹⁰³ as well as public statements and criminal investigations targeting human rights defenders working with migrants.¹⁰⁴

101 RIS report: List of Issues prior to reporting to the Human Rights Committee 2019 available <http://www.rightsinternationalspain.org/uploads/publicacion/5f352a60ae10d3651bc20a7aae51576df5a50ac2.pdf>

102 “Participatory democracy under threat: Growing restrictions on the freedoms of NGOs in the EU”, Civil Liberties Union for Europe, Page 9 citing “REGULATION OF THE NON-PROFIT SECTOR” http://fatfplatform.org/wp-content/uploads/2015/10/FATF_GOV_DONTS_13_08.pdf

103 “Participatory democracy under threat: Growing restrictions on the freedoms of NGOs in the EU”, Civil Liberties Union for Europe, Page 6 https://drive.google.com/file/d/0B_W-Vna2eVNVOFk5VXUzeE9CdGM/view

104 <https://www.omct.org/human-rights-defenders/statements/spain/2019/02/d25231/> as well as <https://www.fidh.org/en/issues/human-rights-defenders/statement-the-spanish-state-must-urgently-uphold-helena-maleno-s-and> See also RIS report: List of Issues prior to reporting to the Human Rights Committee 2019, page 14.

105 RIS report: List of Issues prior to reporting to the Human Rights Committee 2019, page 22.

Other systemic fundamental rights issues

Widespread violations or protection failures

- The existence of a systemic failure by the Spanish judiciary to carry out effective and thorough investigations into complaints of torture and ill-treatment.¹⁰⁶
- The culture of excessive/disproportionate use of force and ill-treatment (exacerbated during covid-19).¹⁰⁷
- The Working Group of Experts on People of African Descent has concluded that racial profiling of people of African descent is endemic. There exist major gaps between law and practice in protecting people of African descent from racism, racial discrimination, xenophobia, Afrophobia and related intolerance.¹⁰⁸

Concerns raised by regional and international human rights monitoring bodies

See above concerns raised by CoE Commissioner and UN bodies concerning the Gag law and Criminal Code and restrictions on Freedom of Expression and Assembly.¹⁰⁹

Concerns related to measures adopted in response to the COVID-19 emergency

The national law enforcement bodies, as well as regional and local forces, are imposing administrative sanctions/fines on people who are in the streets and whose explanations do not seem sufficient to the police. Police is applying the Law on Citizen Security (gag law). Arrests/detentions are also taking place for alleged crimes of resistance to authority and serious disobedience to authority (art. 556 of the Criminal Code). According to numbers from the Ministry of Interior, since the beginning of the state of alarm there have been 5.374 arrests and 613.780 proposed penalties/fines. Numbers are updated regularly.

106 Third Party Intervention RIS In the case López Martínez v Spain <http://www.rightsinternationalspain.org/uploads/noticia/c0b5f4bcf64421837cda1b59532d40f56f35d62f.pdf> Pages 7-11

107 See El estado de alarma no justifica limitaciones de los derechos de las personas detenidas <https://www.abogacia.es/actualidad/opinion-y-analisis/el-estado-de-alarma-no-justifica-limitaciones-de-los-derechos-de-las-personas-detenidas/> and <https://www.liberties.eu/en/news/coronavirus-in-spain-police-going-too-far-and-judicial-protections-being-eroded/19025>

108 Report after mission to Spain (2018) https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/39/69/Add.2

109 See ECRI report on Spain 2017-2018 <https://rm.coe.int/fifth-report-on-spain/16808b56c9>

During these arrests and imposition of administrative sanctions, there are numerous instances of arbitrariness and extensive interpretation of the sanctions. For example, the imposition of a 600 euros fine to an individual who returned from the supermarket, as he had purchased sausages, chocolate, and coke the police considered these were not essential goods. No law or internal order allows police to determine or interpret what is an essential good or not. Thus, in this case, the fine was for disobedience because the police considered it was not justified for the person to be in the street.¹¹⁰

The State Attorney's office (*Abogacía del Estado*) issued an opinion saying that the mere fact of being on the street, even without a justification, cannot be considered an infraction of disobedience (in the same way not complying with Decree of Alarm is not disobedience). Disobedience can only take place when agents give a direct, specific and individual order to a person, and this order is clearly disobeyed by that person. However, a general rule such as a Royal Decree cannot be considered to constitute an order in these terms. This interpretation is in accordance with the jurisprudence of our courts.

However, the Ministry of Interior has issued guidelines to government delegates that are contrary to this interpretation and which intends to establish homogeneous criteria for the

interpretation of the administrative sanction of disobedience.¹¹¹

The content of these guidelines is extremely worrying for the following reasons:

- 1) Contrary to the opinion of the State Attorney and the case law, the Ministry maintains that disobeying the provisions of the Royal Decree shall be considered an infraction of disobedience, without requiring a specific order by the police officers to a given individual.
- 2) It includes a list of "facts, circumstances and sanctions" in Annex III, which creates a *de facto* list of new administrative sanctions, not included in the Citizen Security Law, constituting an extensive interpretation of a sanctioning norm, which is unacceptable.
- 3) Among the guidelines to police officers on how they should complete the complaints (Annex III) it indicates that in the description of the facts and circumstances "the attitude of resigned acceptance of the complaint will not be reflected. On the contrary, it must be recorded if the offender reacted with contempt, boastfulness, or rudeness or if he has expressed insults or threats against the agent (not amounting to crimes)".... the wording of this paragraph is very bad but the objective and lack of justification is quite clear.

110 <https://www.levante-emv.com/safor/2020/04/02/coca-cola-chocolate-salchichas-compra/1997307.html>

111 <https://es.scribd.com/embeds/456689172/content>

- 4) Furthermore, the timeframes in administrative procedures have not been suspended as in the case of other procedures according to the Royal Decree. This means that the person who has been fined and has the right to present allegations to challenge the fines, given the situation of lockdown and limitations to movement, it may be very difficult to do so (challenge the fine) as allegations have to be made in writing and presented in an official administrative body or at a post office. Thus access to an effective remedy is hampered.

The attitude of the Ministry of Interior and these guidelines breach the principle of legality and proportionality which are essential. The guidelines do not satisfy the Syracuse test for limitations of rights. Furthermore, the Minister is exceeding his functions, claiming powers that only correspond to the legislative power; he is promoting an arbitrary application of sanctioning norms which should be narrow and strict.

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting and protecting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of national civil liberties NGOs from across the EU. Unless otherwise indicated, the opinions expressed by Liberties do not necessarily constitute the views of our member organisations.

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