



FUNDAMENTAL RIGHTS
AND THE RULE OF LAW

National developments from a civil society perspective, 2018-2019

Interim Report, November 2019



European Economic and Social Committee

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Foreword

by EESC president Luca Jahier

We are living in challenging times for Europe – challenging times for the future of the European project and for our collective capacity to attain the Union’s aim: **“to promote peace, its values and the well-being of its peoples”** and a sustainable future for all.

Europe is facing democratic challenges linked to increasing the polarisation of our societies, nationalistic and populist trends, shrinking civic space and the abuse of electoral majorities with attempts, among other things, to dismantle check and balances and independent judiciaries. The challenges are great, but as the German poet Friedrich Hölderlin wrote: “where the danger is, also grows the saving power”.

The EU needs a comprehensive mechanism to assess Member States on a regular basis in order to verify compliance with the EU’s fundamental values and avoid a breakdown of mutual trust. The EESC has been calling for such a mechanism since 2016, and has stressed the need for a **strong civil society component**¹. The Committee is pleased that the European Commission has taken on board this view and, as stated in its July 2019 Communication **Strengthening the rule of law within the Union – A blueprint for action**, is planning to follow up on the idea of an annual rule of law event open to national stakeholders and civil society organisations.

As the European Commission further develops its “Rule of Law Review Cycle”, and with the Member States also possibly coming up with a “peer review” mechanism, there is a space where the **EESC can play a key role: that of facilitating cooperation and dialogue** in order to prevent problems from reaching the point where a formal response is required.

The EESC is in a privileged position to play such a role because it represents the voice of organised civil society in Europe and because it has more than half a century of experience in reaching dynamic compromises at European level between many diverse interests. The Committee has taken many initiatives in the area of participative democracy over the past years, for example by supporting the European Citizens’ Initiative.

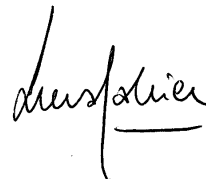
A recent Eurobarometer survey² shows that 89% of European citizens believe that it is important for all EU Member States to respect the core values of the EU, including fundamental rights, the rule of law and democracy. Practical actions in this field will bring the Union closer to its citizens. Fostering participatory democracy in the area of fundamental rights and the rule of law includes creating an open, transparent and regular dialogue between civil society, the EU institutions and the Member States on

1 Opinion: European control mechanism on the rule of law and fundamental rights.

2 <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/special/surveyky/2235>

these topics. This is the idea behind all EESC activities in the area, including the present report, which gives an account of the first country visits carried out by EESC members. The report seeks to highlight trends on the European continent as a basis for discussion and as part of the search for solutions to support the universal values on which the EU is founded, values which are common to all the Member States: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

I hope that this report and the increased efforts of the EESC can play their part in **strengthening the culture of fundamental rights, the rule of law and democracy in Europe**, especially in the year in which we celebrate the tenth anniversary of the entry into force of the **Charter of Fundamental Rights of the European Union**.

A handwritten signature in black ink, appearing to read 'Luca Jahier', with a horizontal line underneath the name.

Luca Jahier,
EESC President

Introduction

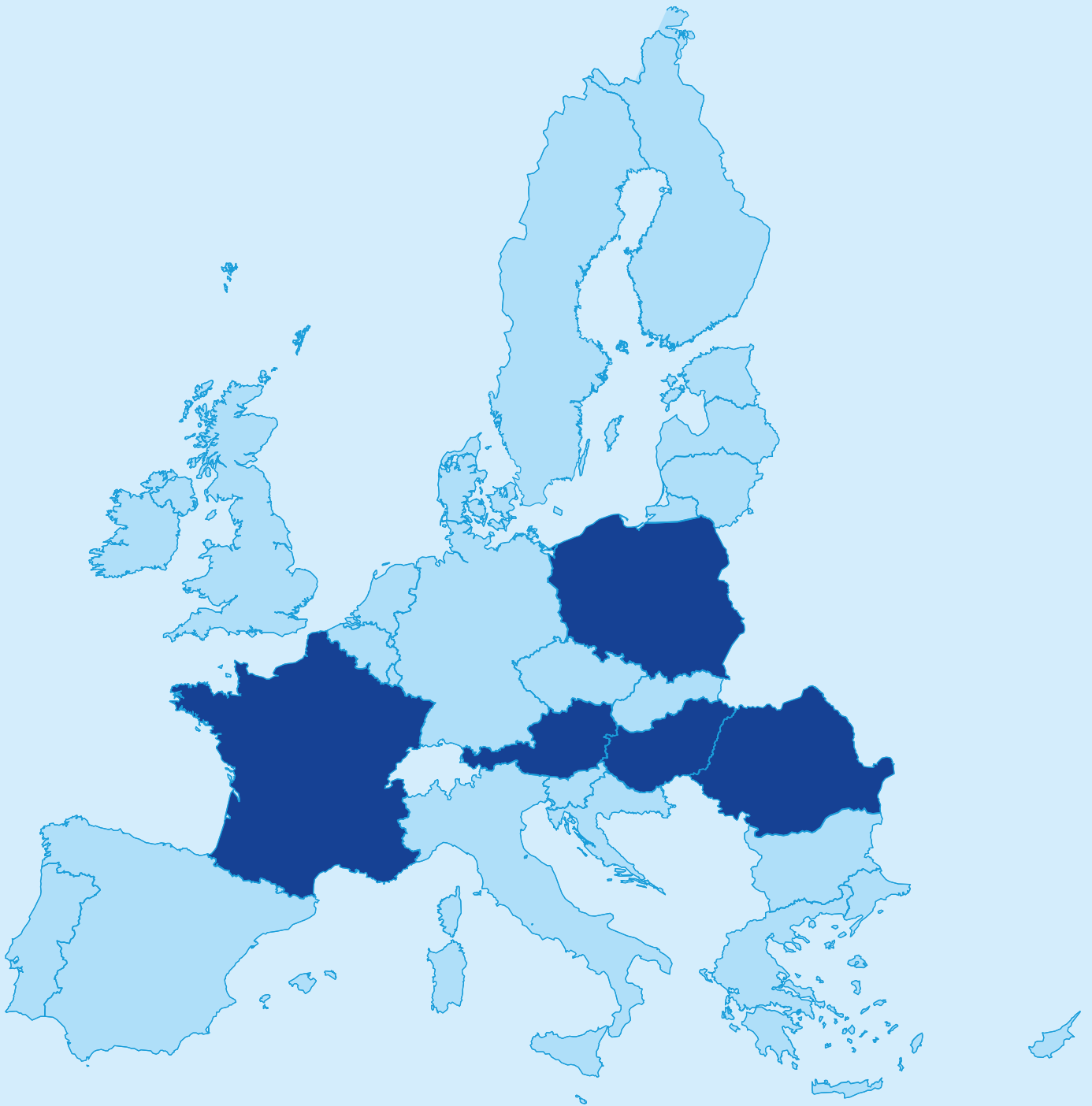
The Fundamental Rights and Rule of Law (FRRL) Group was created as a horizontal body within the European Economic and Social Committee in 2018, and was tasked with enhancing the contribution of organised civil society in strengthening fundamental rights, democracy and the rule of law and responding to the shrinking civic space for civil society organisation.

An essential concern for the FRRL Group has been to get as close as possible to the reality on the ground in order to **relay the voice of grassroots civil society organisations**. Like other EU institutions, the EESC considers it essential to monitor the development of fundamental rights and the rule of law in Europe in a comprehensive way. For this reason the FRRL Group decided from the very outset to visit *all* the EU Member States.

Five country visits took place in Romania, Poland, Hungary, Austria and France. The five countries examined do not present the same level and severity of challenges.

The country visits lasted two days and were carried out by a delegation of six members of the FRRL Group. They met with various representatives of civil society organisations (CSOs), the social partners, the media and the authorities. The EESC met with the Permanent Representations to the EU of the countries concerned prior to the missions and has invited these authorities to present their written observations on the individual country reports.

Both the country visit reports and the Member States observations are included in this interim report. Following the 5 November 2019 conference on 'Fundamental rights and the rule of law – Trends in the EU from a civil society perspective', the report will be completed with an analysis including the contributions made during the conference.



Country reports of the visits to:

Romania

(19-20 November 2018)

Poland

(3-5 December 2018)

Hungary

(29-30 April 2019)

France

(28-29 May 2019)

Austria

(3-4 June 2019)

Report on the Mission to Romania

19-20 November 2018

The country visit to Romania involved six members. The delegation met with several representatives of Civil Society Organisations (CSOs), social partners, media, representatives of the legal profession, and the Romanian authorities.

Freedom of association and assembly – CSOs

CSOs reported a shrinking civil space and a negative image being propagated against CSOs performing watchdog activities or criticising the government, which are presented as being political opponents. CSOs now have an obligation to report every year, and if they do not so, they risk being dissolved. The same reporting obligations apply to very large CSOs performing public services (for example building hospitals) and small CSOs with much smaller budgets and which rely on voluntary work. Most CSOs can de facto not meet these reporting obligations, and are therefore dependent on the goodwill of the government, which can choose to close them at any time for non-compliance.

According to CSOs, the government only responded to popular demand after lots of pressure, and was in turn applying a lot of pressure on CSOs. This pressure on CSOs took the form of stigmatisation and creating obstacles to their access to funding. This has even affected CSOs which provide social services to compensate the absence of public services. Some organisations reported that threats had been made against them. Legislation was used to burden CSOs with disproportionate administrative requirements. For example, the money laundering legislation was used to require excessive reporting obligations on funding.

According to CSO representatives, negative developments in other EU Member States have not helped improve the situation in Romania. They felt that the authorities were testing the limits in the absence of a proper response at EU level, including by using methods such as manipulation and propaganda. Participants also mentioned the weakness of the opposition as part of this systematic lack of maturity in the democratic culture.

The CSOs complained about the government's planned transposition of the 5th Anti-Money Laundering Directive, as it was planning to include CSOs as "beneficial owners", increasing reporting requirements for CSOs. The CSOs felt that the EU should look into this. The CSOs also thought that it would be helpful if the EESC were to establish an annual platform/forum, where CSOs could meet and provide information at European level.

CSOs also mentioned the lack of proper consultation. Despite the existence of the so-called "Sunshine Law" (*Law 52/2003 regarding Transparency of Decision-making in Public Administration*) most public consultations were done on a website, which was not easy to find. Furthermore, the government and public authorities did not respond to suggestions made and were extremely reluctant to meet face-to-face. When meetings were organised, documentation was not made available or was provided at extremely short notice. Consultations generally took place in spaces that were inappropriate for a proper consultation exercise, preventing real interaction and contribution by the audience. Many misgivings were also expressed with regard to the government's recourse to urgency procedures, leaving little or no time for consultations with civil society, but others felt that it was less problematic. However, there was a consensus that consultation could be improved, notably to improve trust.

A deadly fire in a nightclub in November 2015 led people to understand that corruption – in this instance the issuing of an operating license without a fire safety permit – could literally kill people. This event propelled massive grassroots demonstrations mobilising tens of thousands of citizens, which led to the fall of the government.

Freedom of association and assembly – social partners

The social partners mentioned challenges concerning labour market legislation adopted under urgency procedures that did not leave time for proper consultation. The five laws governing the labour market were all changed within a month. The coverage of collective agreements was very low. There were also concerns that the justice system was slow in settling cases.

Trade unions mentioned violations of International Labour Organisation (ILO) Conventions C087 on Freedom of Association and Protection of the Right to Organise Convention and C098 on the Right to Organise and Collective Bargaining Convention. Indeed, unions needed written permission from the employer to form, had to meet outdated requirements for representativeness in a changed labour market, and were not allowed to strike while collective agreements were in place – even if they were not respected –, which meant that unions were reluctant to enter into collective agreements.

The business community was interested in the rule of law, as an important factor to improve the business climate and help ensure that business could be done smoothly. This was also an important parameter for attracting investment. They expressed their expectations of greater transparency, accountability and consultation with stakeholders. Some felt that the European Commission's evaluations in the 2018 Report on Progress in Romania under the Cooperation and Verification Mechanism raised important challenges. The business community felt a need for better dialogue with authorities in the consultation phase on new legislation, as well as more time to adapt to new legislative requirements. They specifically mentioned the legal introduction of minimum wages.

On 18 October 2018, the Romanian Economic and Social Council replaced 13 Council representatives of civil society organisations in the middle of their term. The official reason for their removal was unjustified absences, however all of these organisation representatives had been removed regardless of their attendance record. The organisation representatives removed believed that the removal was more linked to negative opinions given on a number occasions on legislative proposals, including when proper consultation had not been carried out, and were considering legal action to be reinstated. They had not been given the opportunity to respond to the criticism made.

Some also found it important to underline positive developments and not to focus only on corruption in Romania, when corruption was an issue in many other countries. They also asserted that foreign companies from reputable countries were also responsible for bringing corruption to Romania.

Non-discrimination

CSOs were not asked about anti-discrimination, however, the Romanian authorities informed the EESC delegation about the **Romanian Presidency** (first semester of 2019), whose **priorities** include the defence of a "Europe of common values". The government also explained their wish to counter the anti-system discourse that had gained ground across Europe. The Romanian government shared the objectives of the EESC in promoting European values, in particular the fight against racism, discrimination and exclusion.

Rule of law

CSO representatives met during the visit and explained that transparency was not the only issue affecting the country, but that it was part of a more systemic problem, namely the lack of maturity in democratic institutions. They described how Romania had only lived through 30 years of democracy, which could explain a resurgence of autocratic practices in the form of a lack of transparency, the adoption of legislation without consultation, and pressure on the judiciary.

Although diverging positions were expressed, many representatives of the CSOs and of the legal profession felt that the authorities had embarked upon a worrying trend towards interference in the judiciary. Examples mentioned were the incentives offered to judges to retire, the additional qualification requirements for judges, and the increased number of judges required to hear a case, promotion no longer being based on objective criteria, and insufficient time allowed to conclude cases, which were all slowing down the judiciary or rendering it ineffective.

According to representatives of the governing party, who had helped introduce the reforms, and some CSO representatives, the changes had been proposed to address earlier shortcomings and mostly to respond to rulings of the Constitutional Court. According to them, the reform proposals had been debated widely, and the authorities did not violate any rules during the reform, although they could have explained it better. The representatives of the governing party indicated that the Constitutional Court always checked compliance with international obligations, and therefore the new laws fulfilled all the requirements made by the Venice Commission, the Group of States against Corruption (GRECO) of the Council of Europe, etc. They contended that the European Commission's evaluations in the 2018 Report on Progress in Romania under the Cooperation and Verification Mechanism were politically motivated.

Report on the Mission to Poland

3-4 December 2018

The country visit to Poland involved six members. The delegation met with several representatives of Civil Society Organisations (CSOs), social partners, media, representatives of the legal profession, and the Polish authorities.

Freedom of association

According to the Civil Society Organisation (CSO) representatives with whom the delegation met, there were no legal barriers to setting up an organisation, although they felt administrative procedures could be improved. However, a majority expressed concerns that the overall environment for democracy, rule of law and fundamental rights risked negatively affecting them.

There were concerns that the recent creation of a new institute responsible for awarding all public funds could lead to interference or self-censorship by CSOs. The National Institute of Freedom – Centre for Civil Society Development (*Narodowy Instytut Wolności - Centrum Rozwoju Społeczeństwa Obywatelskiego*³) is a new central body under the Prime Minister's Office charged with administering public funding to CSOs. According to the latter, rules introduced for the awarding of funding were unclear. A watchdog reported several cases where CSOs selected during the awarding process did not receive any funds, and vice versa.

Some contended that CSOs that steered clear of criticising government policies were likely to maintain access to funding and CSOs working on unpopular issues such as gender equality, LGBTI rights, and migration experienced cuts in funding. Other CSOs felt that it was within the government's right to choose its priorities, and maintained that this was a positive development that allowed many funds to be distributed to small local organisations with no "political agenda". They also pointed out that the amount of available funds had tripled.

The new institute would also act as an advisory body for drafting legislation; however, it was unclear how this would function. Members of the institute's opinion-issuing body, the Council of the National Freedom Institute⁴, were most often appointed by the government. Because of this, some CSOs had raised questions regarding representation and the criteria for appointment. They were disappointed that the institute had accepted that decisions regarding control of CSOs could be taken within a period of 24 hours, meaning that raids could take place at any time.

In addition, there had been campaigns to discredit CSOs in the media, such as accusations of financial impropriety against some organisations. As a result, some CSOs had lost the support of local authorities and others had received threats. CSOs and some judges and prosecutors' associations were accused of being partisan. Some participants believed that the threat to freedom of association came from political polarisation, stating that some CSOs promoted a liberal "ideology" and criticised the government for issues that already existed previously. Others disagreed and felt that the threat to civil rights had reached an unprecedented critical level that justified stronger criticism. For the latter, it was alarming that the Ombudsman's funding had been severely cut following interventions to promote civil rights.

3 <https://www.niw.gov.pl>

4 <https://www.niw.gov.pl/authorities/the-council-of-the-national-freedom-institute/?lang=en>

All CSOs agreed that there was a need to consult CSOs more on legislation and make space for more peaceful dialogue. Plans had reportedly been made to change the law on the non-profit sector without informing CSOs about the content or timing of the proposal. CSOs may be consulted on the final proposal with short deadlines to provide their feedback, but they were unable to provide meaningful input on the scope of the proposal.

According to the Polish officials with whom the EESC delegation met, the authorities did not interfere in freedom of association. They could only refuse to acknowledge registration if forms were incomplete. Organisations were required to provide annual reports to supervisory mechanisms. Such reports did not amount to excessive questioning about CSOs' finances, and ministry representatives insisted that they only asked for additional information concerning financial settlement issues.

Freedom of assembly

The CSOs explained that it sometimes took months to approve assemblies, and that the new "Law on Public Assemblies" favoured "cyclical assemblies" (regular events), such as marches for Independence Day. The restrictions on holding multiple protests within a certain distance of each other at the same time made it difficult to schedule spontaneous counter-protests. They also complained about the recent limits introduced on access to the Polish parliament, which seek to prevent protests. More than one hundred individuals had been banned from accessing parliament despite the fact that access to parliament was a constitutional right. In addition, a law was adopted specifically to prevent spontaneous protests in relation to the 24th Conference of the Parties (COP 24) of the United Nations Climate Change Conference in Katowice in 2018.

According to the CSOs, it was difficult to obtain permission to march in favour of politically controversial issues. In one case, an equality march had been banned due to the risk of violence by counter-protestors, but was allowed after appeal. The CSOs had also noted inconsistencies in the policing of assemblies. During Independence Day marches, there was almost no police presence, but in equality marches, police officers often outnumbered protesters. Police officers targeted several protesters for using fireworks during equality marches, but not during the independence marches.

According to the CSOs, many court cases had been brought against protesters – an estimated 1000 were pending. People had been taken to court for misdemeanours and, for example, charged with obstruction of legal assemblies. Although the court quickly dismissed such charges, the CSOs consider that they represented a form of intimidation. An example was given of a small group of women who were beaten up during a peaceful counter-protest, at which point the police did not intervene to protect them. Afterwards, the women were charged with disturbing a legal assembly, whereas their attackers were not charged.

The Polish authorities with whom the EESC delegation met, explained that public order personnel protected demonstrators, and ensured their right to freedom of assembly. They did not discriminate between different types of demonstrations and their staffing levels were consistent. Assembly bans could be appealed and may last up to 15 days. Counter-demonstrations could not take place within 100 metres of a legal assembly. The authorities would not comment on the reasons for the various pieces of legislation, nor would they comment on individual cases.

Freedom of association and assembly – social partners

The delegation was informed that there was a longstanding tradition of social dialogue in Poland. The Tripartite Commission for Socio-Economic Affairs (Trójstronna Komisja ds. Społeczno-Gospodarczych⁵) was established in 1994, and extended to include the Provincial Social Dialogue Commissions (Wojewódzkie Rady Dialogu Społecznego⁶) in 2001. Despite initial successes, the three main trade unions left the Tripartite Commission and Provincial Social Dialogue Committees in June 2013.

Following negotiations between representative organisations of trade unions and employers, a new form of social dialogue was proposed to the government. This led to the creation of the Social Dialogue Council (Rada Dialogu Społecznego⁷) in 2015, which must be consulted on legislative initiatives. However, according to the CSOs, this new body was often ignored by the government and important pieces of legislation were often adopted without holding meaningful discussions, either because of shortened deadlines or because legislation proposed by individual Members of Parliament (MPs) was exempt from consultation requirements.

Some CSOs complained about different treatment received by certain trade unions from the authorities. Trade unions in Poland had called for the implementation of the European Pillar of Social Rights, and for social rights to be guaranteed at European level. Trade union representatives were disappointed by limits imposed on the right to assembly, for example through injunctions by the court to prevent strikes.

Freedom of expression and freedom of the media

All participants agreed that freedom of expression was protected in Poland, but some believed that further action was needed to protect this right. Some contended that prosecutors and judges had been harassed after exercising their right to freedom of expression in support of an independent judiciary, and now needed to seek a supervisor's approval before publishing documents. Disciplinary procedures had been initiated against prosecutors who had spoken to the press about participating in protests, or carrying out educational activities and applying the rule of law. This had created a rather chilling effect.

Most commercial advertising commissioned by either media houses or companies with a public ownership stake was for pro-government magazines, despite these not having the biggest circulation. Representatives from some of the principal and most popular newspapers, which were viewed as supporting the opposition, had presented figures on the difference in revenue from commercial adverts before 2014 compared to now. They asserted that this revenue had been used to put pressure on them in recent years. Some claimed the main distributing company discouraged the distribution of releases that were critical of the government. Others denied this and highlighted that outlets which were critical of the present government were previously favoured and received more advertising money under the former government.

There were an estimated 20 pending lawsuits against news outlets. Politicians used harsh language against journalists, calling them traitors, and called for the "re-polonisation" of foreign-owned media outlets, which were depicted as foreign stooges.

5 <http://www.dialog.gov.pl/archiwum/trojstronna-komisja-ds-spoleczno-gospodarczych>

6 <http://www.dialog.gov.pl/dialog-krajowy/wojewodzkie-rady-dialogu-spolecznego>

7 <http://www.dialog.gov.pl/dialog-krajowy/rada-dialogu-spolecznego/rada-dialogu-spolecznego>

Another key problem raised was that many public authorities refused to grant access to information. Some media outlets were not informed about, or allowed to ask questions at press conferences, and ministers would refuse to give interviews to them. Allegedly, one journalist was fined for refusing to reveal their sources, although this had been denied by others.

Another problem raised was access to government buildings and parliament and the physical or verbal attacks against journalists that had taken place even in front of parliament. Although trade unions for journalists existed, they were not well organised, so most joint actions were carried out in conjunction with journalists' associations or clubs. Some felt that fake news and disinformation was rife, and that this was the case across Europe. Others felt that the system worked and that there were no major issues in Poland, and viewed the alternation of advertising revenue between different media positively.

Non-discrimination

CSOs were not asked about non-discrimination directly; however, the fact that CSOs dealing with vulnerable groups faced more difficulties in obtaining funding came up during other discussions. Notably, CSOs dealing with gender equality, LGBTBI rights, and migration had experienced funding cuts. These groups were also faced with challenges in obtaining permission to assemble, and they felt that they received unequal treatment with regard to the policing of assemblies, with police often outnumbering protestors in equality marches.

Rule of law

The changes to legislation affecting the judiciary were frequently brought up during discussions. These changes were seen as an attempt to dismantle the justice system and enable the adoption of legislation without restraints from judicial control. Legal professionals (mainly judges) who were political allies of the current government supported the changes being implemented in the judicial system. They had reportedly been appointed to a newly created public affairs chamber in the courts. Rules for the submission of applications and the decision-making process had been widely criticised by the opposition. There were street protests against the reforms, but these only led to slight modifications.

Some claim that making it possible to review any judgment dating back twenty years without the possibility for an appeal undermined legal certainty. Only the Prosecutor General and the Ombudsman were able to file such an extraordinary procedure, and there were several restrictions concerning time limits and the nature of the case under consideration. Reportedly, only a very limited number of complaints had been filed so far.

Concerns were also expressed about the expanded possibilities for disciplinary procedures against judges and prosecutors, which could be initiated based on the content of judgments. Some contended that critics of the government were not being objective, as pre-existing problems with the judiciary had not previously been criticised under the former government.

Report on the Mission to Hungary

29-30 April 2019

The country visit to Hungary involved six members. The delegation met with several representatives of Civil Society Organisations (CSOs), social partners, media, and the Hungarian authorities.

Freedom of association

CSO participants explained to the EESC delegation how, in practice, civic space has been shrinking in recent years. CSOs now have significantly fewer possibilities to carry out their advocacy activities. Several participants mentioned how CSO freedoms had been systematically dismantled and an 'atmosphere of uncertainty' had been created. Some remarked that limitations on freedoms also affected both the media and the academic world.

The 2017 law relating to the 'Transparency of Organisations Supported from Abroad' and the 2018 so-called "Stop Soros" legal package have had a negative impact on CSOs and were, according to them, accompanied by a campaign aimed at tarnishing their public image. Legislation requiring relevant organisations to register as "foreign agents" and to pay 25% tax on foreign funds have created uncertainty. To date, about 130 organisations have registered as "foreign agents"; however, some organisations indicated that they had decided to boycott registration and had not as yet encountered any negative consequences. Although the general legal framework for freedom of association is in line with international standards, they believe that the legislation has had a chilling effect on their activities.

CSOs in Hungary do not constitute a homogeneous group and, according to participants, the government favours CSOs that for instance offer healthcare services while, at the same time, stigmatising CSOs that carry out advocacy and watchdog activities or that grant funding. Some CSOs have been called "Soros knights" in the media, which subjects them to constant stigmatisation. This situation has had a negative effect on their daily functioning. Citizens have grown suspicious of them, resulting, on the one hand, in an increasingly negative public perception of the activities of all NGOs, and, on the other hand, preventing them from getting funding from municipalities. However, micro-CSOs or CSOs that are close to the government have been granted increased funding. According to participants, the government has created "fake CSOs". They described how, with no previous track record of civic work, these new actors had begun to spring up, implementing their activities in accordance with the government's agenda. Very often, this means that they exclude topics such as women rights and LGBTI rights. Additionally, concerns were expressed about the campaign against immigrants, which has also been targeted at CSOs that work with migrants.

CSOs explained that they had experienced difficulties in accessing EU money, because of the requirement for applicants to prove that they work with State institutions, local authorities, or the church. This is particularly concerning as EU funding is the only source of funding still available to CSOs that are not directly aligned with the government. Some CSOs explained how they had never received any State funding, despite having regularly applied each year. Others pointed out that funding could be accessed, although only through cumbersome and bureaucratic procedures. Some pointed out that certain State funding previously available to CSOs had since been redirected to churches.

Most agreed that the political environment in Hungary was deeply polarised and that there was a need for better dialogue. Several participants highlighted efforts made by CSOs to establish a dialogue with the government, however they expressed regret at the absence of a formal consultation platform and the lack of genuine willingness on the part of the authorities to engage with them. They also mentioned the pressure put on those who speak out, notably by restricting the ability of civil servants to gain public promotion, give lectures and receive training.

According to the authorities, they valued the importance of CSOs (of which there are more than 6000) and held regular consultations with them. The majority of these are active in the fields of culture, sports, leisure and education. Only 0.9% are active in the area of human rights. The government explained that it had increased funding to CSOs.

Freedom of association and assembly – social partners

The social partners indicated that while some social dialogue existed they would welcome improvements. The first Hungarian Conciliation Council was established in 1990 and a national economic and social council was created in 2011. The government does not have members on this Council, although members are appointed by the government. The Council comments on new pieces of legislation and can make proposals, but it does not take any decisions.

According to the social partners, both the legislation relating to the minimum wage and to overtime were not submitted to the Council for consultation. Despite an agreement reached between workers and employers, the government decided to push forward legislation allowing 300 hours of overtime, which prompted a wave of demonstrations. While the legislation has not been withdrawn, it has not yet been applied. According to the government, the legislation would not give rise to serious problems, but would instead provide employers with more flexibility while respecting the EU working time directive.

According to the social partners, freedom of assembly was respected. Trade unions gave examples of successful strikes that led to improved working conditions. Social partners in general did not feel that their actions were being restricted, nor did they feel affected by any problems relating to fundamental rights and the rule of law. Some however mentioned that their access to the media in order to raise issues relevant to them was limited.

Freedom of expression and freedom of the media

Serious concerns were expressed about the establishment of the “Central European Press and Media Foundation” media conglomerate. Although this conglomerate was legally independent, CSOs were concerned about the extent to which it was genuinely independent. Questions were also raised about the lack of independent legal scrutiny regarding the setting-up of such a large conglomerate through transfer of ownership.

The organisations interviewed shared their concerns about how the organisation of media outlets is being centralised by the government, which particularly affects the local level. CSOs explained the difficulties they have encountered in trying to have their voices heard in the media and how they have had to resort to using the internet (blogs or websites) as an alternative. In absolute terms, the readership of critical media is higher than that of the pro-government media. However, the influence of the government is strong because of its dominant position in the media market, both in terms of financing and market share.

Several participants mentioned that the media was a “propaganda machine” aimed at controlling public discourse. They talked about a snowball effect whereby news taken from marginal websites is then copied by other media. CSOs suggested that the government was using fake news and social media as a means of influencing the population. According to these CSOs, the government has left a newspaper, with critical views on the government, continue as a way of showing that it allows critical media to exist. In reality, however, it does so only because the readership of this newspaper is limited.

Several participants raised the point that the bulk of advertisements, which constitute an essential source of funding, go to media outlets close to the government. This means that State advertisement money is not connected to a newspaper’s performance but rather is used as a means of financing particular media outlets. Participants also felt that private companies were reluctant to advertise in media outlets that were critical of the government. Some of the media that are critical of the government have had to look for funding directly from their audience to compensate for the lack of advertising revenue. In the view of some CSOs, the manner in which authorities interfere with academic freedoms follows a similar pattern of control but through funding in this case, including through EU funds intended for innovation.

The delegation was informed that those who are critical of the government face negative treatment in the media. The authorities use their influence in the media to discredit CSOs and their attempts to raise sensitive topics in the public sphere. CSOs and academics are often labelled as enemies in pro-government media, which has a negative influence on the general image the public has of them. A list of organisations that were said to be financed by George Soros was published in a pro-government daily newspaper. According to participants, this general climate of stigmatisation increased the level of fear, for example a negative portrayal in the media could lead the individual involved to receive an increased number of death threats. They argued that the government had created a polarised narrative between the good, namely those who “defend” Hungary, and the bad, namely any critical voice.

The authorities felt that the situation in Hungary was often misrepresented abroad and that the situation there was not worse than in other Member States.

Non-discrimination

CSOs raised concerns about the general decrease in support for human rights protection and non-discrimination, including in relation to Roma, disability, gender and transgender issues. The phenomenon of shrinking space for CSOs particularly affected CSOs working on these issues and have led to a fall in the number of organisations and professionals in the field and in the amount of research carried out in these areas. According to CSOs, the authorities no longer see them as partners.

Several organisations mentioned that the anti-Soros campaign was anti-Semitic in nature, which further triggered anti-Semitic hate speech, in the context of a climate already conducive to racist, xenophobic and Islamophobic speech. Some CSOs indicated that, unlike other areas, the government is cooperating well with CSOs in the area of hate speech and hate crime, but that hate crimes are often insufficiently investigated.

Regarding the situation of the Roma population, participants mentioned discrimination in the child protection system, in housing, work and education, and discrimination by law enforcement authorities (including ethnic profiling) and by local governments.

Women's rights organisations stressed a deterioration in gender equality and women's and girls' rights. Public narratives presented an image of women as mere agents of the family, thus reinforcing gender stereotypes and drawing on the concept of 'familism' instead of feminism. According to participants, gender inequality gives rise to violence against women. They expressed their regret at the absence of a comprehensive political response to this phenomenon. Instead, professionals in the public and private sectors adopt a victim-blaming attitude, which serves to highlight the inadequate gender-sensitive training that they have had. Although an infrastructure for victims of gender-based violence exists, it is not sufficiently promoted and its activities are unclear. As far as academic issues are concerned, participants lamented the fact that the State had cancelled the accreditation for a Master of Arts in gender studies. Women's rights organisations also explained how they had been the target of a negative media campaign.

The situation of transgender people was also discussed, notably the fact that they cannot benefit from any legal gender recognition.

Rule of law

Many CSOs expressed serious concerns about the creation of a new parallel public administrative Court system and a new national judicial office. These changes are part of a step-by-step reform of the judiciary which has been taking place since 2011-2012. The consultation period relating to these changes lasted only three days. As CSOs emphasised in many other cases, the consultation process for proposals relating to legal acts is very short and does not allow for any meaningful input, nor does it take into account the submitted comments.

According to some CSOs, the current judiciary retains a high level of independence, but the ongoing reform of the Court system is a cause for concern as no accompanying needs assessment has been carried out. The EU Justice Scoreboard showed in 2018 that Hungarian Courts were the second most efficient court system in the EU. Therefore, it is unclear to CSOs why the current system needs to be reformed.

The competence of new administrative Courts include economic and social rights, including politically sensitive cases such as asylum. Concern was expressed about the independence of individual judges and the jurisdiction of the administrative Courts. Participants described a politicised process whereby new administrative Courts judges could be elected without the support of peers. In general, participants complained that this new structure lacked clear checks and balances.

Another key issue was the lack of cooperation between the National Judicial Council of Hungary (*Országos Bírósági Tanács*, OBT) and the National Office for the Judiciary (*Országos Bírói Hivatal*, OBH) appointed by the government. The President of the OBH has widespread powers over the whole judiciary, in the areas of budget and appointment of judges and Court Presidents. By comparison, the OBT does not have the necessary financial means and human resources to counterbalance the changes introduced by the OBH – and is the target of stigmatisation in some media, which have represented the OBT as "Soros agents".

Although the Courts have shown their independence in the past with the State often losing in cases brought by CSOs, cases related to corruption were rarely prosecuted.

Participants indicated that there was a need to control the use of EU funds better to ensure that such funding did not end up abetting corruption rather than helping to strengthen the rule of law.

Report on the Mission to France

28-29 May 2019

The country visit to France involved six members. The delegation met with several representatives of Civil Society Organisations (CSOs), social partners, the media, the legal profession, independent human rights institutions, and the French authorities.

Freedom of association

From a legal point of view, freedom of association is well protected in France⁸. However, according to the CSOs met during the visit, the full and unhindered enjoyment of this freedom is currently facing challenges from two sides. On the one hand, in a context of scarce resources, public and private financing available for CSOs has decreased. Associations are particularly badly affected by this situation. According to the representatives met during the mission, they are seen only as easy budgetary adjustment variables, while their civic, democratic, social and economic functions are forgotten or even challenged.

On the other hand, CSOs – and particularly those that provide assistance to migrants – report increasing attempts to stop or hinder their activities through threats of legal proceedings or detention of their volunteers and workers. According to representatives met during the mission, a process is underway in France of criminalising organisations whose sole purpose is to save human lives. Some also mentioned smear campaigns against CSOs by private actors. Trade union representatives met during the mission felt that they were being subjected to increasing obstacles and discrimination in the conduct of their activities.

Freedom of assembly

According to representatives met during the mission, the entry into force of the law on “the maintenance and reinforcement of public order during demonstrations” in April 2019 has led to a deterioration⁹ in the otherwise solid legal protection of the right to demonstrate in France. Before this law was published, the Constitutional Council removed a provision that would have allowed Prefects to issue preventive administrative bans on demonstrating (*interdiction administrative de manifester*).

CSOs criticised of the fact that the right to demonstrate was being curtailed through a large number of disproportionate and unjustified arrests, and through the use of excessive force by security forces. CSOs also mentioned the abuse of custody (*garde à vue*) as a means of neutralising activists – notably environmental activists – and preventing them from taking part in protests. They lamented that complaints brought against the police had not led to consequences.

These legal developments have taken place in the context of an evolution in the social dynamic of demonstrations in France, through the waves of “yellow vests” protests. These demonstrations have been spontaneously convened through social media by a number of loosely coordinated organisers,

8 In a 1971 Decision, the French Constitutional Council (*Conseil Constitutionnel*) gave freedom of association the status of “fundamental principle recognised by the laws of the Republic”, i.e. a Constitutional-level value.

9 https://www.cndh.fr/sites/default/files/2019_03_21_observations_loi_anti-casseurs_vf.pdf

in multiple places at the same time and on a recurring – weekly – basis over several months. Participants explained that these originally peaceful demonstrations had been infiltrated by well-organised rioters who had systematically sought to give the protests a violent turn. Some participants mentioned that disproportionate use of force by the police predated the “yellow vests” demonstrations and that it had been used during authorised events that had been well supervised by their organisers.

The police has had to face an increasingly challenging environment in a situation of shortages of staff, resources and training, which has strongly affected staff morale. The representatives from the police trade union met during the mission claimed that the use of LBD-40s (*Lanceur de Balle de Défense/ Defensive Ball Launchers*) – an intermediate force non-lethal weapon – was the only way they had of protecting themselves during demonstrations marked by a radicalisation of the yellow vests movement and infiltration by violent fringes (“black blocs”). Numerous stakeholders at national¹⁰ and international¹¹ level have demanded that the use of LBD-40s be suspended. CSOs met during the mission denounced the fact that their use has resulted in a high number of people being injured and mutilated. The French authorities have however so far refused to suspend their use of LBD-40s, remaining the only EU country to do so.

The French authorities denied the existence of genuine abuses by the police forces, attributing the high number of detentions, accidents and injured people to the unprecedented number of demonstrations that have taken place since November 2018, as well as to the presence of rioters among the demonstrators. The authorities also assured the delegation that the police used force only in the event of violence by or between demonstrators, and that its use was progressive and proportionate, as stated by the State Council¹² (*Conseil d’Etat*) consulted on this matter. The authorities are looking into other ways to keep demonstrations safe and secure, if possible avoiding direct contact between police and demonstrators.

Freedom of expression and freedom of the media

According to the organisations met during the mission, freedom of the media is guaranteed by law and in practice, but there are some challenges in France. Journalists and the profession in general are increasingly facing systematic discrediting (“media bashing”) by many politicians. Some recent laws, like the French Act on combating the manipulation of information, aimed at combating the propagation of fake news and anti-cyber hate speech, could have limiting effects on media freedom.

The media representatives met during the mission expressed their deep concerns about the severe and numerous cases of police violence against journalists during the “yellow vests” demonstrations. They informed the mission about journalists being prevented from passing roadblocks, being intimidated or injured, and being detained in police custody while their material and press cards were confiscated by the police or deliberately damaged.

10 https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=18403

11 https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=24166&LangID=F&fbclid=IwAR25CwiValXPFJj8Glp5iEr2ECmfq_f3gtkMEuKdtMQJqnqy3gGotdOrq74

12 <https://www.conseil-etat.fr/actualites/actualites/usage-des-lanceurs-de-balles-de-defense>

Non-discrimination

According to CSOs and independent human rights organisations met during the mission, discrimination seems to be on the rise in France, in particular in the areas of employment, access to justice, housing and healthcare. The groups most vulnerable to discrimination are said to be persons of Arab and African descent (who are also subject to ethnic profiling during police controls), LGBTI people, homeless people, and Roma people. Despite advanced legislation, women still face discrimination, even more so if they are of Muslim origin. The situation of migrants – including asylum seekers – and especially child migrants, is particularly worrying in terms of the increasing violation of their human rights. Participants also mentioned the phenomenon of social discrimination and worrying developments in the area of online hate speech and violence.

Rule of law

Representatives met during the mission expressed their concerns about a general trend that had followed the terrorist attacks, which had seen the authorities introducing state of emergency provisions into ordinary law. They considered that this had tipped the institutional balance towards security, at the expense of other rights and freedoms, and had led to a weakening of the role of the Judiciary in favour of that of the administrative authorities. In their view, the extension of the state of emergency has progressively blurred the distinction between administrative police, who deal with prevention, and judicial police who are oriented towards enforcement.

The 2017 Law on strengthening internal security and the fight against terrorism permanently incorporated a number of state of emergency provisions into ordinary law. This was criticised¹³ by many of the organisations met during the mission, who were worried by the suspension of certain rights that this law entailed and by the tip in the balance of powers granting the administrative authorities some powers that were normally assigned to the judicial authorities.

The mission heard some concerns from the legal profession over the proposed reform of the French judiciary. Although it aims to make justice simpler and more efficient for the public, it is taking place against the backdrop of increasing constraints on the public financing of the judicial sector. Participants drew attention to the risk¹⁴ that the reform could affect fundamental rights, in particular with regard to the penal procedural code. According to these representatives, the rights of the defence are being excessively diminished, causing an imbalance in relation to those of the prosecution.

According to the representatives met, the aforementioned Law on the maintenance and reinforcement of public order during demonstrations also presents worrying developments concerning the judiciary¹⁵. Generally, participants expressed concerns about a shift towards preventive justice, which could endanger the independence of the judiciary and fundamental rights in the long term.

13 https://www.cncdh.fr/sites/default/files/170706_avis_sur_le_pjl_securite_interieure_terrorisme.pdf

14 https://www.cncdh.fr/sites/default/files/181120_avis_sur_la_lutte_sur_la_reforme_de_la_justice_penal_pour_mail.pdf

15 A circular sent by the Ministry of Justice to Prosecutors, encouraging them to call for “complementary penalty” (*peines complémentaires*) that can entail individual interdictions to take part in demonstrations.

Report on the Mission to Austria

3-4 June 2019

The country visit to Austria involved six members. The delegation met with several representatives of Civil Society Organisations (CSOs), social partners, the media, the legal profession, and the Austrian authorities.

Freedom of association

The most serious concern, mentioned by many CSOs, was the May 2019 law on the creation of a Federal Agency for Supervision and Support Services (*Bundesagentur für Betreuungs- und Unterstützungsleistungen, BBU GmbH*) under the Ministry of the Interior, which was to take over the task of legal counselling for asylum seekers – a task previously performed by civil society organisations. As the Federal Agency was financed by the Ministry of the Interior, it raised serious questions regarding its independence. CSOs saw the creation of this agency as an attempt to marginalise civil society, which had until then played a major role in legal counselling for asylum seekers. A representative of the relevant public authority noted that asylum seekers could also consult lawyers, and that the Ministry of the Interior did not have a monopoly in this area.

Furthermore, civil society representatives reported severe cuts in funding over the past few years, especially for smaller CSOs. It was noted that some cuts had affected CSOs financed by the Ministry for Women's Affairs and Equality in 2016 and 2017 (for example, a leading women's movement had seen the funding it had been receiving since 1969 drastically reduced in 2018). However, the authorities indicated that the budget cuts concerned subsidies and projects that did not focus on direct help for women.

The CSOs also said that this loss of public funding had been sudden, especially for organisations that were critical of the government. However, it was impossible to determine the exact number of CSOs affected, as there was no law on the right to information in Austria (it was claimed that Austria was the only EU country not to have this right enshrined in law).

According to civil society representatives, this feature was part of a wider tendency to strongly restrict the civic space in Austria. The public authorities stressed that there had, however, been no cuts for CSOs working in the development and cooperation area.

Regarding the consultation of CSOs in drafting legislation, CSOs said that their contributions were now being largely ignored, which had not previously been the case. CSO representatives did not feel that the consultation process could be regarded as a real partnership and said that they were not being taken seriously as experts.

Freedom of association and assembly – the social partners

The Austrian social partners noted that social legislation was being properly implemented: 98 % of all employees were covered by trade union agreements and minimum wages were in place; 99 % of Austrian companies honoured minimum wage agreements.

Regarding freedom of assembly, the social partners reported that the law had been changed in 2017 and had become more restrictive towards third-country nationals (the so-called Lex Erdogan bans foreign political campaigns and rallies in Austria.)

The social partners noted that the 2018 Working Time Act (*Arbeitszeitgesetz*), which increased working hours to 12 per day and 60 hours per week, legalised a formerly illegal practice in certain companies, weakening the rights of trade unions and employees. The law had been adopted without consulting the social partners. The representative of the relevant public authority explained that discussions on this proposal had been ongoing since 2013, without any solution being reached, and this had eventually led to it being adopted without proper consultation.

Freedom of expression and freedom of the media

Media representatives noted with concern that 2018 was the first time that Austria's ranking in the World Press Freedom Index¹⁶ of Reporters without Borders had fallen; it had dropped from 11th to 16th place. They said that the last government had been very harsh on the media, with the authorities trying to "correct" journalists and lacking respect for press freedom. The representative of the relevant public authority disagreed, noting that the authorities had been very inclusive when it came to the media, and gave examples of the former Chancellor speaking to journalists before and after each weekly Council of Ministers meeting and taking journalists on trips abroad.

Regarding the media landscape, it was noted that the mass media were very concentrated and politicised in Austria. Access to some printed media in rural areas was limited. A worrying aspect mentioned by media representatives concerned the newspapers that were available for free (for example, in metro stations): it was reported that one of them in particular featured almost daily articles with content that bordered on racism. Another aspect mentioned related to online media portals, many of which were funded or sponsored by players with a regressive agenda. These were very active and had considerable outreach and a huge impact on the Austrians who made use of them.

It was noted that the biggest media outlet in Austria, especially in rural areas, was the public broadcasting corporation (*Österreichischer Rundfunk*, ORF). One important issue at present was the upcoming ORF reform. ORF was already exposed to political influence, as its Board of Trustees was appointed by politicians. From the point of view of journalists, how public broadcasting laws would be set up in the future was crucial. They stressed the need for an independent system of financing, which would enable innovation by the public broadcaster and a strong role for it in promoting media literacy.

Another concern raised by journalists was the bribing of media outlets and journalists. It was reported that Austria had a serious transparency problem. Moreover, journalists were very much affected by the lack of right to information in Austria. The relevant public authority representative's response was that several drafts had been put to Parliament over the past years, but had not yet been adopted.

The media representatives stated that journalists were often cut off from information and suffered direct attacks either in interviews or via organised online harassment campaigns. They deplored the fact that there had been occasions when sensitive information was not shared with "critical" media, a point which the representative of the relevant public authority denied.

Journalists reported that hate crime and hate speech needed to be better documented in Austria; levels of documentation were extremely low (392 reported cases in 2018 in Austria compared to 60 000 in the UK).

16 <https://rsf.org/en/ranking>

Non-discrimination

The Austrian CSOs mentioned several issues relating to discrimination against members of vulnerable groups in the country, at the same time acknowledging the high level of the social and welfare system in Austria. However, it was noted that the situation had worsened in the past two years.

Regarding discrimination on religious grounds, it was said that there had been significant reductions in the human rights of Muslims in Austria in the past few years, compared to other religious groups. The most recent example was a law adopted in May 2019 by the Austrian Parliament which banned “ideologically or religiously influenced clothing (...) associated with the covering of the head” in primary schools. The law was labelled the ‘*hijab* ban’ because it only affected Muslim girls up to the age of 11, whereas it provided exemptions for male Sikh and Jewish headwear. The CSOs working in this area underlined that this legislation was discriminatory, as it focused on only one specific religious group. In addition, CSOs criticised the 2017 law banning full-face covering in public, which banned women wearing a niqab from working in the public sphere. CSOs’ criticism was based on the assumption that all religious symbols should be equally prohibited, not only Muslim head covering.

Regarding asylum seekers, it was noted that they experienced discrimination in several aspects in Austria. Legislation on asylum had been changed 15 times in the past 10 years, which had had the effect of complicating the situation. Instead of improving access to rights, it actually reduced the freedom of CSOs active in support of asylum seekers. CSOs deplored the absence of German courses as part of the reception procedure, as mastering German was indispensable for access to the job market. According to the Reception directive, asylum seekers were entitled to labour market access after nine months if there had been no first instance decision on their status. However, the relevant CSOs reported that, in reality, no matter how long the asylum procedure took, asylum seekers did not get access to the labour market, because the labour market test nearly always led to the selection of a better-integrated person than asylum seekers.

Another problem mentioned was the exploitation of undocumented workers, mainly migrants and asylum seekers, who were almost completely denied access to the formal labour market except for seasonal work, and therefore ended up working on informal labour markets with excessively long working hours, wages far below the level of collective agreements, no social security, violence, blackmail, sexual harassment etc. It was reported that the legal framework was inadequate and did not allow undocumented workers to take any legal steps against such exploitation because they faced the threat of being deported if they did not receive a residence permit during their lawsuit.

Regarding people with disabilities, the relevant CSO reported that Austria had ratified the UN Convention on the Rights of People with Disabilities in 2008 and there was also a legal framework in place in national legislation. However, on closer examination, many examples of discrimination could be identified. For example, it was noted that it was very hard for children with disabilities to receive the same education as children without disabilities. It was mentioned that there had been attempts to start more inclusive schooling, but, especially in the last two years, inclusive schooling had been reduced in importance. This had had a huge impact on the chances of people with disabilities of accessing the labour market, resulting in a rate of unemployment which was a lot higher among this group. It was acknowledged that Austria had some very good measures that helped people with disabilities to work, such as subsidies for technological and human assistance. However, when it came to leisure time activities, assistance was not harmonised among the federal states. It was also noted that women with disabilities suffered even greater disadvantages compared to men.

Austrian CSOs also mentioned some discrimination with regards to LGBTI rights, notably, after the introduction of the partnership law in 2010, the term “family” was not allowed for same sex couples, and only a “last name” could be used in official documents. However, this was abolished when the Constitutional court decided on opening marriage to all as of 1 January 2019. Furthermore, LGBTI refugees experienced discrimination as well, being stereotyped and suffering homophobia from asylum officers, *inter alia* lacking training in non-offensive approaches to credibility checks.

Regarding the gender pay gap, the social partners noted that Austria ranked second last in the EU. They indicated that this was partly due to part-time work, which was being particularly promoted for women. Nevertheless, statistics showed that the gender pay gap remained even when the part-time work was not taken into account.

Rule of law

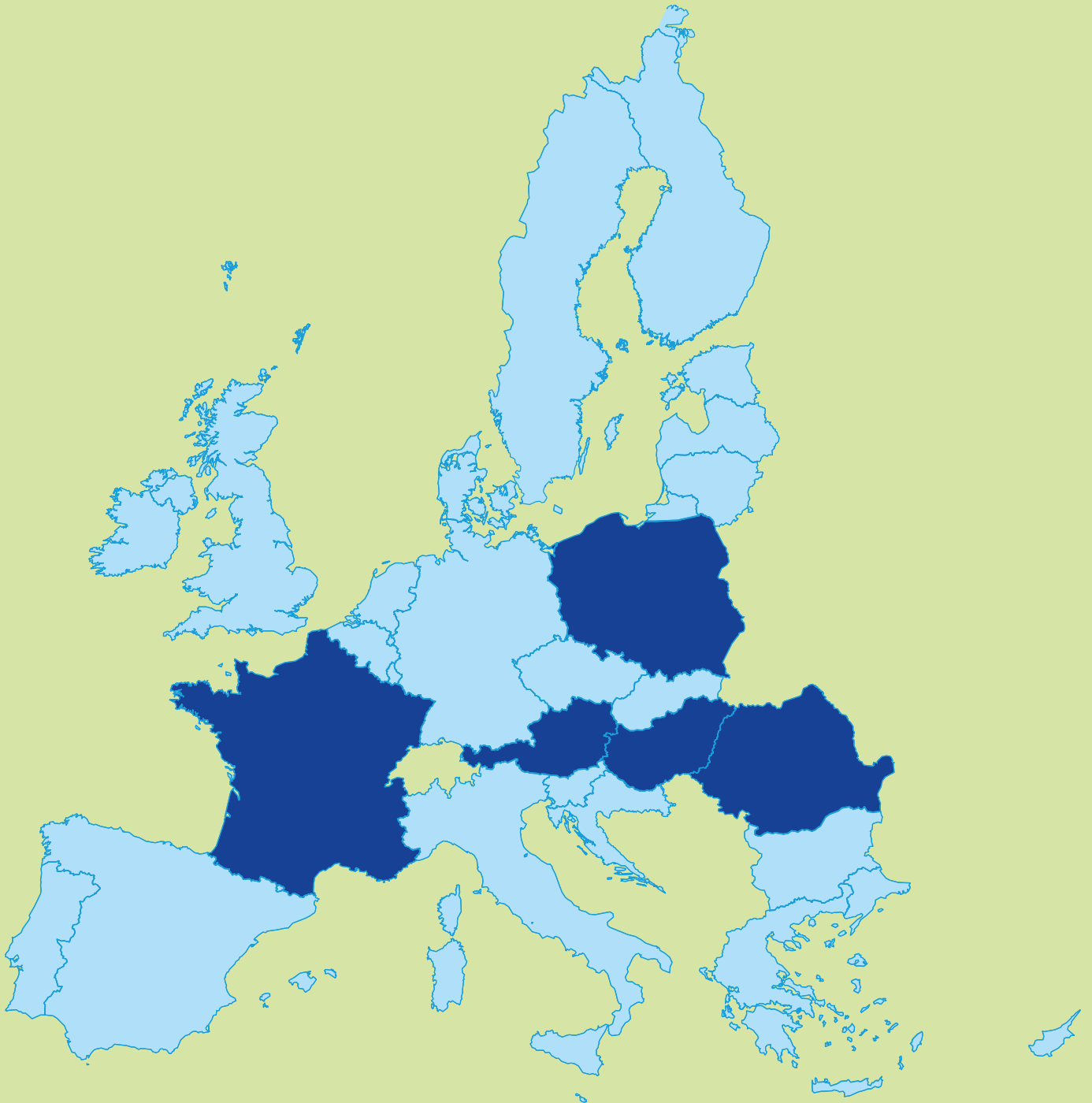
CSOs noted that, although there had been no interference by the executive in the judiciary, reductions in budget and staff were an indirect way of weakening it. By contrast, security issues, which had been very high on the political agenda in Austria, had benefitted from budgetary trade-offs between the administrative, civil and criminal courts. This was having a significant impact on the length of time entailed in processing asylum applications.

Civil society representatives were of the opinion that the judicial system in Austria generally worked well. It was noted that every positive change in the human rights situation in Austria had come either from the judiciary (as a court decision) or from the EU. For example, the same-sex marriage and gender identity verdicts were positive human rights developments coming from the judiciary. However, it was noted that the independence of judges in administrative courts was different from that of judges in civil and criminal courts. Funding was sufficient in civil and criminal courts but not in administrative courts.

Regarding security and counter-terrorism measures, civil society representatives noted that, while the security situation was improving in Austria, the Austrian people’s perception was that it had deteriorated. It was reported that since July 2018 police officers were carrying military rifles in police cars, and wore armoured vests and helmets. The police had experienced shortages in personnel, leading to an increase in night shifts and double shifts, which had resulted in exhaustion. Another concern was police reporting in Austria: a report¹⁷ by the European Fundamental Rights Agency (FRA) showed that, compared to seven other countries, Austria had the highest prevalence of racial profiling.

The authorities described 2015 as a very challenging year, marked by a very large amount of requests for asylum. This had created a bottleneck in the second instance administrative court due to a very heavy caseload and lack of budget. The duration of asylum procedures would then take up to 5-10 years, due to a lack of judges in the second instance administrative courts. It was reported that the first instance federal administrative courts had seen an increase in staff.

17 https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-being-black-in-the-eu_en.pdf



Governments observations

Romania

Poland

Hungary

France

Austria

Right of reply to the Report on Mission to Romania, 19-20 November 2018

Point 2: Freedom of association and assembly - social partners

The content is debatable in the absence of any specification related to the consulted groups (members of the Economic and Social Council, trade unions, business organizations), and the speculative character of some opinions raises doubts about the usefulness of the Report in achieving the stated purpose.

Observations on specific issues:

Consultation: Legislative changes of an emergency nature generally concerned reform measures set out in advance in the Government Programme and/or measures to ensure compliance with the European jurisprudence. These were debated at the level of the line ministries and had the opinion of the Economic and Social Council or, as the case may be, of the Group for the Assessment of the Economic Impact of the Legislative Acts on small and medium enterprises (in abbreviated Romanian form GEIEAN) in which the social partners are members, while the proposals of the parties involved were taken into consideration within the limits of political commitment. The Labour Inspectorate carried out information and awareness campaigns on law matters and on the process to transfer responsibility for social security contributions, and CNSLR-Frăția (EN: The National Confederation of Free Trade Unions of Romania – Brotherhood) agreed to participate in the monitoring of the initiation of the collective negotiation for the transfer of contributions.

Discouraging the negotiation: Art. 153 of the Law on social dialogue established the criterion for mutual recognition of the parties in support of the motivation of the union affiliation and of the involvement in the committed and mutually advantageous voluntary negotiation, at all interest levels. At present, the collective agreements coverage at company level is approx. 30%, not to mention that employment relations are fully regulated by labour law.

Violation of ILO Conventions no. 87 and no. 98: freedom of association and union affiliation, the right to collective bargaining and the right to strike are guaranteed by the Constitution of Romania (art. 9, art. 40-41, art. 43), labour law and social dialogue law.

The law on social dialogue guarantees the autonomous organisation of trade unions and prohibits any intervention of the authorities and employers to limit or prevent the exercise of trade union rights (art. 7) by means of imposing dissuasive sanctions (art. 217). Lodging complaints and the available remedies and redress are done through the Labour Inspectorate, the National Council for Combating Discrimination (issues enforceable decisions) and the Court.

The right to trigger collective labour conflicts and strikes in relation to the interests of collective bargaining and respect for the principle of social peace during the collective contract are guaranteed according to the recommendations and standards of the ILO, as well as the competence given to the Court in resolving conflicts of rights triggered by the non-application of the collective contracts clauses which are assimilated to laws and are a source of law.

Economic and Social Council composition: Law 248/2013 on the organization and functioning of the Economic and Social Council, revised with the direct participation and the agreement of the social partners, establishes the exclusive competence of the Government to appoint representatives of the associative structures of civil society (art. 11 paragraph (2) letter c)).

**Polish remarks on the Report on Mission to Poland, 3-4 December 2018
by the EESC Fundamental Rights and Rule of Law (FRRL) Group**

1) Freedom of association

claims concerning the governmental program for cooperation with NGOs and the regulatory provisions on granting funds to NGOs by the National Institute of Freedom – Centre for Civil Society Development

As regards the system of control over the financing of associations, the associations indicate a supervisory body and the competent minister. Each association submits an annual report to the supervisory body, but the body has no power to control it - it can only ask for missing information. Similarly, as far as public collections are concerned, they are subject to registration in the Ministry of Interior and Administration, however there are no restrictions as to their purpose (only a report is required). Any plans regarding possible introduction of control mechanisms invariably meet with protests. It is pointed out that natural persons may perform such activities legally, e.g. through dedicated websites.

2) Freedom of assembly

Claims concerning imbalances and discrimination in securing public gatherings /marches based on their theme, problems with obtaining permissions

The applicable provisions do not make any distinction on grounds of views of the organizers and all signals concerning possible violations are analysed on an ongoing basis. The police protects the life and health of protesters as well as of random observers of all public gatherings. It carries out these statutory tasks regardless of political views, ethnicity or religion of protesters. Depending on the number of participants in a given public assembly, its character and the nature of envisaged threats, the Police ensure an appropriate and adequate number of officers, as well as selects reasonable and proportional means of direct coercion, if needed. When protecting the life and health of participants of public gatherings, the right proportion between the priorities and the orders issued is a guarantee of safe and peaceful realisation of the freedom of assembly.

Criticism associated with the organization of the COP 20 summit in Katowice

Security and public order are constitutionally protected values in Poland, just like the freedom to organize and participate in peaceful gatherings. The rank of the climate summit and the public security considerations justified the extraordinary security measures adopted, including the ban on public gatherings during that period. The primary objective was to protect the life and health of the participants of the event. In such situations, the forces, means and tactics used should always be adequate to the potential threats. The rules for issuing bans on public gatherings, as well as a detailed list of cases in which this type of prohibition may occur, are contained in the Act of July 24, 2015 on the Law on Assemblies (Journal of Laws of 2019, item 631, jt), as well as in the Act of 10

June 2016 on anti-terrorist activities (Journal of Laws of 2019, item 796, ct). These regulations allow for the prohibition of public gatherings in the event of the introduction of one of the two highest alert levels (the threat of a terrorist attack or an actual attack). In such a case, the decision to introduce a ban on public gatherings is taken by the Ministry of the Interior Affairs and Administration on its own initiative or at the request of the Head of the Internal Security Agency or the Police Commander in Chief.

The ban on public gatherings or mass events applies in such a case to the area or the facility covered by the alert for the time of the alert's duration (and not for the duration of the event causing the introduction of the alert), if it is necessary to protect the life and health of participants or the public safety. The alleged possibility of imposing such a ban for "*up to 15 days*" (as indicated in the FRRL report) is not reflected in the Polish law.

The issue of cyclical public gatherings (authorizations and refusals of authorization)

The rules for organizing public gatherings are governed by the Acts of July 24, 2015 on the Law on Assemblies (Journal of Laws of 2019, item 631, as amended). In accordance with applicable regulations, the voivode's consent is required to organize such gatherings. It should be noted that pursuant to art. 14 of the Act, the municipal authority may prohibit the organization of a given gathering, no later than 96 hours before its planned date, if one of the following conditions is met:

- if its purpose violates the freedom of peaceful assembly, the rules for organizing public gatherings or if the purpose of the meeting or its conduct violates the criminal law;
- if it may endanger the lives or health of people or endanger property of considerable size;
- if the meeting is to take place at the time and place where cyclical public gatherings take place.

The issue of the Independence March and controversies related to it

During public gatherings, the police are guided in its actions primarily by the need to ensure the protection of health, life and freedom of assembly. The same considerations apply when they have to interrupt illegal manifestations. On April 2, 2017, the amendment to the Act on Assemblies entered into force, introducing the rule of maintaining a 100 m distance between opposing public gatherings. It should be clarified that such a solution reduces the risk of threats to the safety of participants in public gatherings. In addition, there is an obligation to notify the intention of holding a gathering six days before it is to take place. Regrettably organizers of public gatherings usually wait until the last moment, which makes the preparation of security forces and ensuring adequate security conditions more difficult.

The tactics used by the Police in conflict situations during public gatherings do not always result in direct interventions. The police does however always strive to secure evidence and identify the persons who violate the law, in order to bring them to justice if they are suspected of committing a crime or an offence. Public gatherings often have a dynamic course and require flexible reactions from the Police. The power to make decisions in this respect, deprived of any influence of institutions, third persons or interest groups, is vested solely with the commanding officer. If threats occur during a public gathering, the Police are obliged to take adequate actions to eliminate them

and prevent their escalation. It should be emphasized that police officers take action only against people who violate legal order, first of all seeking to separate them from the participants of the public gathering who demonstrate their views in a peaceful manner.

The separation of two potentially antagonized groups/participants is aimed at enabling both to exercise their constitutional right to manifest their views. In a democratic state of law, freedom is one of the supreme and fundamental values. Its basic attribute is the freedom of public, unrestricted expression of views and beliefs, as well as gathering for this purpose.

3) Freedom of expression and media freedom

We are glad that all participants agreed that freedom of expression is protected in Poland. When it comes to the alleged plans for „re-polonisation” of foreign-owned media, the Government did not carry out any work aimed at reaching such an aim. Analyses of entrepreneurs operating on the media market and of concentration in its particular segments were carried out. The possibility of the introduction into the Polish legal order of regulations aimed at limiting possible excessive concentration and ensuring greater pluralism of the market was being considered.

Legal solutions sharing these aims are in force in the vast majority of EU Member States. The goal of this type of solutions is to provide the public with access to as many sources of information as possible. Such legal regulations, based on European law, are not intended to stigmatize any media or limit the possibility of participation of entrepreneurs from other EU countries in the Polish media market.

4) Rule of Law

First of all, the report does not always indicate whose opinions constituted the basis for the statements it contains, and the statements are mostly general in nature (e.g.: *these changes were seen as an attempt to dismantle the justice system..., according to some..., concerns were expressed..., etc.*) .

Secondly, we suggest deleting the term "*political allies*" used in the following sentence: "*Legal professionals (mainly judges) who were political allies of the current government....* ". All judges in Poland are independent and cannot be considered politically involved.

Thirdly, the term "*slight modifications*" used to describe the legislative changes introduced by the Government in response to the voiced concerns is a general and subjective assessment, lacking an author and explanation why the amendments introduced should be considered as such.

Fourthly, the statement that the new disciplinary regime allows for institution of disciplinary proceedings against a judge for the content of their judgment has no basis in applicable law. If it is an opinion, its author should be indicated.

Regarding the disciplinary proceedings against judges on the grounds of their jurisprudence, it should be stated that there is no such legal liability in the Polish legal system, with the exception of

the obvious and blatant insult of legal provisions, also in the course of settling cases. It should be emphasized that art. 107 § 1 (of the Act of 27 July 2001 - Law on the structure of common courts) on the disciplinary offense, remains unchanged since October 1, 2001 (the date of entry into force of this Act).

The rich jurisprudence of the Supreme Court illustrates the well-established interpretation of Art. 107 § 1 (e.g.: "a judge adjudicating in a case may not remain convinced that any violation of the law - even those which have at its disposal premises of an evaluative nature - will result in his disciplinary liability").

At the same time, "the insult to the law is obvious when the judge's error is easy to find, it was made in relation to a specific provision, even though the meaning of this provision should not raise doubts even for a person with average legal qualifications, and its application does not require a deeper analysis"

(The Supreme Court judgments of March 8, 2012 SNO 4/12, of December 11, 2014 SNO 61/14.). The above clearly demonstrates that the subject matter of the disciplinary tort of the judge, which is well-established in the Polish legal order, is not only not questioned in the national jurisprudence of the Supreme Court (as potentially violating the judicial independence), but also remains limited in the scope and manner of its understanding, in particular as regards responsibility for an obvious and blatant offense against the law in connection with judicial activity.

Fifthly and finally, regarding the critical assessment of the extraordinary complaint introduced against final judgments in civil matters, it seems that the only reason for such a criticism is its supposed undermining of legal certainty. There are however strong counterarguments. The introduction of a review mechanism, the goal of which is to restore legal order by eliminating judgments violating the Constitution, grossly violating the law, and obviously contradicting the evidence collected in the case, is the sovereign's right and protects the public order.

Reply of the Hungarian Government on the report of the Fundamental Rights and Rule of Law Group on its Mission to Hungary on 29-30 April 2019

During the country visit to Hungary, the Fundamental Rights and Rule of Law (FFRL) Group and the Hungarian authorities had a constructive dialogue on important topics covered by the report. In these meetings Mr. President Moreno Díaz assured the Hungarian authorities that the aim of the mission was not to formulate a judgemental opinion on Hungary but to examine the situation concerning the rule of law and fundamental rights from the perspective of civil society in several European countries.

The Hungarian authorities regret to see that the report on Hungary to be published by FRRL is clearly not in line with the above mission statement. In fact, the report contains legally and factually unjustified, subjective statements and allegations. It merely echoes the slogans of a few Civil Society Organisations (CSOs) whose mission consists in criticizing the government. Although these CSOs represent less than 1% of all 60 000 CSOs active in several different domains of Hungarian society, the report apparently reflects their unsubstantiated arguments without the slightest attempt at verifying them or confronting them with the opinion of other actors.

We also stress that, although the representatives of the Hungarian Government presented their position extensively, the report does not even refer to most of these arguments and does not provide a balanced evaluation.

The report also contains some evident factual errors *inter alia*:

- Contrary to point 1 of the report, the Act of LXXVI of 2017 does not contain the term „foreign agent” and does not require any civil society organisation to be registered as such.
- Also, the Hungarian legislation does not provide for a 25% tax on foreign funds but a special tax is imposed on the financial support related to illegal immigration-supporting activity itself.
- The report fails to mention that the funding based on the decision of taxpayers is an important source of independent funding for CSOs.
- Nor does the report state that the media legislation in force explicitly contains provisions for the prevention of media concentration.
- The zero tolerance policy of the Hungarian government in the case of any form of racism enshrined in Hungarian law is not referred to and the Government’s numerous social inclusion, health and family measures have also been omitted.
- Contrary to point 5 of the report, the President of the National Office for the Judiciary (NOJ) is not appointed by the Government but is elected by Parliament on the recommendation of the Head of State from among the judges by a two-third majority of votes of Members of Parliament.

The errors, the non-justified statements and allegations depict a negative, unbalanced and distorted picture of the implementation of the freedom of association and assembly, the freedom of expression and the media, the equal treatment and the rule of law through the point of view of certain CSOs.

In order to set the facts correctly, the Hungarian Government has prepared a detailed reply below which contains suggestions for corrections to the EESC document entitled ***“Report on Mission to Hungary, 29-30 April 2019”*** (hereinafter referred to as the Report). Corrections refer only to clear errors of fact and law and provide further information or clarifying statements based on a more thorough analysis of the normative legal environment. This in no way implies that the Hungarian Government endorses perceptions or opinions of some CSOs not explicitly referred to in this document.

Statement in the Report (p. 1. par 4): *“Legislation to register as “foreign agents” and to pay 25% tax on foreign funds had created uncertainty.”*

The truth, however, is the following: The Act LXXVI of 2017 on the Transparency of Organisations Receiving Support from Abroad does not contain the term “foreign agent” at all; therefore, it does not require any civil society organisation to be registered as such. This approach has been endorsed both by the Venice Commission¹ and the Parliamentary Assembly of the Council of Europe.²

The Hungarian legislation in force does not provide for a 25% tax on foreign funds. A special immigration tax of 25% is imposed on the financial support related to immigration-supporting activity. In general, it must be emphasized that in Hungary there are more than 60 000 NGOs operating without any difficulties and less than 1% of them seek to play a political role without any democratic mandate or accountability. NGOs are important in shaping public opinion and perception. This is well reflected in the Preamble of the Act on the Transparency of Organisations Receiving Support from Abroad where their role in contributing to societal self-organisation is acknowledged. There is a substantial public interest for the entire society to see what interests they represent. For this very reason the transparency of NGOs funded from abroad is an essential requirement from the aspect of rule of law. It must be highlighted that the Act does not prohibit the operation of NGOs or funding from abroad; it merely makes their funding transparent, in conformity with the established principles of democracy. Also, the Act does not render more difficult for NGOs to receive financial assistance from abroad; they simply have to inform the public of contributions over a certain threshold sum. Hence the Act on the Transparency of Organisations Receiving Support from Abroad does not adversely affect the freedom of association.

The aim of the introduction of the special immigration tax is to oblige non-governmental organisations conducting activities in the field of migration, to bear the costs that have arisen as a result of their associative activities, which contribute to the growth of immigration and the growth of related public tasks and expenditure. Therefore, the special immigration tax is a tool of “burden sharing”, being an acknowledged principle of taxing systems in order to maintain the balance of the budget.

Statement in the Report (p. 1. par 4): *“Although the general legal framework on freedom of association is in line with international standards, they considered that the legislation has had a chilling effect on their activities”.*

The truth, however, is the following: While all consider the legal framework to be in line with international standards, CSOs usually fail to explain what the concrete examples of such a perceived chilling effect were; the current report does not contain such reference either. In Hungary, CSOs

¹ “the highly stigmatizing term “foreign agent” is not, and wisely so, used by the Hungarian legislator (...)” Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad; CDL- AD(2017)015-e; para 24.

² PACE, Resolution 2162 (2017)

may carry out their activities freely without governmental interference.

Statement in the Report (p. 1. par 5): *“(...) the government is favouring CSOs performing service functions in health care, while on the other hand stigmatising CSOs performing advocacy and watchdog activities or granting funding.”*

The truth, however, is the following: The National Cooperation Fund (NCF) is a form of funding created by the Act on civil society organisations (Act CLXXV of 2011, hereinafter: NGO Act) to support the operation and professional activities of NGOs; in addition to having an opportunity to submit grant applications to cover their costs and fund their professional programmes, NGOs are entitled to government funding to supplement private funds they have raised.

In order to ensure the independence of the grant-funding system, 85% of NCF grants is distributed through applications under the NGO Act. Five colleges, each of which is composed of nine members in part selected by NGOs, are responsible for drafting NCF calls for grant applications, appraising incoming applications, and verifying the achievement of supported goals. The range of activities that can be supported by the five colleges covers the entire NGO sector. NCF's colleges are:

- Community Environment College
- Mobility and Adaptation College
- National Cohesion College
- Social Responsibility College
- College for the Future of New Generations

It follows from the above that the statement on favouring CSOs performing service functions in health care is an obvious mistake.

As far as the stigmatization of certain NGOs is concerned, it shall be stressed that there are no legislative acts in relation to civil society organizations that would contain any discriminatory measure or reference to NGOs which defend human rights, carry out advocacy and watchdog activities.

Statement in the Report (p. 2. par 1): *“This is particularly concerning as EU funding is the only funding which remain [sic!] available for CSOs that are not directly aligned with the government.”*

The truth, however, is the following: Hungary was the first Central European country that introduced in 1996 a specific mechanism to support the activity of NGOs. Individual taxpayers - natural persons - may designate one percent of their income taxes paid to a qualified non-profit organisation and another one percent to a church. Experience shows that this is an important source of financing for many NGOs: in 2018, 8.3 billion HUF was offered to 27 000 NGOs by 1.79 million Hungarian taxpayers. The amount of the donations exceeded the sum of the previous year's 7.8 billion HUF. This funding is based on the decision of taxpayers and therefore, ensures an independent funding for CSOs.

Statement in the Report (p. 2. par 2): *“Several underlined efforts by CSOs to establish a dialogue with the government, however they regretted the absence of a formal consultation platform and of a genuine will to consult by the authorities.”*

The truth, however, is the following: The Government established the Human Rights Working Group in 2012 with the main purpose of monitoring the implementation of human rights in Hungary, conducting consultations with civil society organisations, representative associations and other professional and constitutional bodies, as well as, of promoting professional communication on the implementation of human rights in Hungary. The Working Group monitors the implementation of

the fully or partially accepted recommendations in relation to Hungary of the United Nations, Human Rights Council, Universal Periodic Review (UPR) Working Group. Due to the modification of the Government Resolution, the Working Group also reviews and monitors the enforcement of human rights conventions and agreements - of which Hungary is a signatory - adopted in the framework of the UN, the Council of Europe, the OSCE, and the obligations arising from Hungary's EU membership. It makes recommendations to the Government and other central administration bodies involved in legislation and application of the law, and oversees the implementation of these regulations to allow for a wider representation of a human rights perspective.

The forum for dialogue with civil society is the Human Rights Roundtable, which currently operates with 73 civil organisation members and further 40 organisations take part in the activities of the thematic working groups with consultative status. The Roundtable holds its meetings in 11 thematic working groups; each of them is intended to deal separately with legal and practical problems of and sectoral political proposals for vulnerable groups of society (such as women's rights, children's rights, integration of Roma people, national minorities, etc.).

Statement in the Report (p. 3. par 1 and 4): *“The organisations met shared their concerns about the centralisation of the organisation of media outlets by the government, which particularly affects the local level. (...) [T]he influence of the government is strong because of its dominant position on the media market, both in terms of financing and in market shares. (...) The delegation was informed that those who are critical of the government face negative treatment in the media”*

The truth, however, is the following: The allegations with regard to the freedom of expression and media freedom in Hungary are completely unfounded or based on subjective perceptions. The Fundamental Law stipulates that everyone shall have the right to freedom of expression and that Hungary recognizes and protects the freedom and diversity of the press. The diversity and the balanced functioning of the media market are also safeguarded. The Hungarian Government is committed to ensure these rights.

The media legislation in force explicitly contains provisions for the prevention of media concentration, and promotes the creation of a diverse media market by preventing the emergence of information monopolies. The prevention of media concentration is also regulated on a constitutional level; it follows from Article IX of the Fundamental Law. Act CLXXXV of 2010 on Media Services and on the Mass Media contains provisions aiming at preventing market concentration and regulates media service providers with significant powers of influence as envisaged by the Audio-visual Media Services Directive and it further protects the diversity of broadcasting.

As far as media coverage is concerned, the Media Act foresees a separate body, the Public Service Board for guaranteeing the social control over the public service media. The members of this body are appointed by churches, municipalities, national and ethnic minorities to represent wide a range of social values.

The Government of Hungary is committed to ensure freedom of expression and editorial freedom. The ownership structure and managerial decisions of privately owned media outlets largely fall outside of the competences of the Hungarian Government.

Statement in the Report (p. 4. par 1): *“Several organisations mentioned that the anti-Soros campaign was an anti-Semitic one, which further triggered anti-Semitic hate speech (...)”*

The truth, however, is the following: The Hungarian Government has declared a zero-tolerance policy against anti-Semitism and the Jewish community can always rely on the Government's support and protection. According to a recent report of the European Union Fundamental Rights Agency (FRA), Hungary is amongst the countries with lower risk of anti-Semitism.

The campaign responded to a growing concern among Hungarian voters, and citizens throughout Europe, that security, both internal and external, must be a top priority and a firm position must be taken against illegal migration. The campaign did not target the person of Mr Soros, rather his political objectives and methods.

Statement in the Report (p. 4. par 2): *“Regarding the situation of Roma people, participants mentioned discriminations in the child protection system, in housing, work and education, and discrimination by law enforcement authorities (including ethnic profiling) and by local governments”*

The truth, however, is the following: Hungary is strongly committed to combat racism, anti-Gypsyism and any incitement to hatred. Zero tolerance against any form of racism is provided for by the Hungarian legislation and is confirmed by statements from the highest political level. Every Hungarian citizen belonging to a nationality shall have the right to freely express and preserve his or her identity. All 13 nationalities - including Roma - living in Hungary shall have the right to use their mother tongue, to use names in their own languages individually and collectively, to nurture their own cultures, and to receive education in their mother tongues. All nationalities can form self-governments at both local and national level.

The Hungarian Government is deeply committed to achieve the integration of Roma people. This issue was put on the political agenda of the European Union as the initiative of the Hungarian Presidency of the Council of the European Union in the first half of 2011, by the adoption of the EU Framework Strategy on Roma inclusion, which was followed by the channelling of the Framework Strategy into the EU policies (e.g. the European Semester, and the use of the cohesion funds). The initiative dealt with the issue not merely based on a human rights approach but also from the aspects of poverty and social inclusion, recognising thereby that a complex approach is required in order to find a genuine solution for the problems. In order to implement the EU Roma Framework the Government adopted the Hungarian National Social Inclusion Strategy in 2011 and then updated in 2014. Three-year action plans were prepared for its implementation by designating responsible ministers, deadlines and available funds.

Since 2010 the Government has implemented several social, social inclusion, family policy, health policy and educational measures. We have achieved a great number of positive results, all of which prove that we are on the right path: in addition to the improvement of economic indicators, almost all of our indicators related to fight against poverty and unemployment have been constantly improving since 2013.

The employment rate among the Roma minority has risen by 20% since 2013, in parallel the unemployment rate has decreased by 20%. In 2018, the employment rate in the 15-64 aged Roma population was 43.6%, which means a 10%-point increase since 2014. Another example for our outstanding results is that in Hungary 91% of Roma children attend kindergarten, which is around the participation rate of non-Roma children.

Statement in the Report (p. 4. par 3): *“Public narratives presented an image of women as mere agents of the family, they reinforce gender stereotypes and use the concept of 'familism' instead of feminism.”*

The truth, however, is the following: The Government rejects the artificial dichotomy between families and women's rights. We are implementing several programs to support employees in striking the balance between work and family life. The Government spends 4.7% of the GDP (EUR 3 billion) on financial support for families, compared to an EU average of 2.5%. In 2019 this allocation will be increased to EUR 6.2 billion. The Government has taken a number of important and effective measures to create the proper balance between family and work in recent years. Hungarian law also provides strong protection for women against violence; the Criminal Code now punishes these

actions more severely. As regards the working conditions for pregnant workers, the safety of pregnant and nursing workers, equal treatment also in the world of employment is one of the top priorities of the Hungarian Government's employment policies. For example, the Extra Child Care Allowance Programme (GYED Extra) provides a choice for women with dependent children and supports both those who decide to stay at home with their children and those who wish to work besides raising their children. As of 2016, when the child reaches the age of 6 months, the parent may seek employment while remaining eligible for benefits. The expansion of parttime employment opportunities is also of paramount importance. If a mother with a dependent child requests part-time employment then her employer shall ensure this opportunity for her up to the age of 3 of her child, or up to the age of 5 of the youngest child in case of a large family.

Statement in the Report (p. 4. par 5): *“Many CSOs expressed serious concerns about the creation of a new parallel public administrative Court system and a new national judicial office. These changes are part of a step-by-step reform of the judiciary taking place since 2011-2012.”*

The truth, however, is the following: The allegation of the “creation of a new national judicial office” is incomprehensible. The National Office for the Judiciary was established by the Fundamental Law. Its current competences - with special regard to the role of the President - have been elaborated after a long dialogue with the European Commission and the Venice Commission in the period 2012-2014. The main characteristics of this system have remained unchanged since then.

As far as the establishment of administrative courts is concerned, it shall be stressed that the administrative court system has a longstanding historical precedent in the Hungarian legal system.

International examples, especially the well-functioning systems in neighbouring countries prove us that independent administrative judiciary ensures the self-restraint of the executive power better and provides more efficient control over actions of the administration.

The outcome of the constitutional dialogue with the Venice Commission, initiated by the Government confirmed that the establishment of a new system of administrative courts was in line with European standards and practices. The bill on further guarantees of the independence of administrative courts adopted by the National Assembly amended the legislation on administrative courts taking into account all recommendations of the Venice Commission.

With the adoption of Act LXI of 2019, the entry into force of the act on Administrative Courts has been indefinitely postponed.

Statement in the Report (p. 4. par 6): *“According to some CSOs, the current judiciary has a high level of independence, but the ongoing Court reform is a cause for concern as no needs assessment was done in connection with the reform.”*

The truth, however, is the following: After the change of political regime, only cautious and minor steps have been taken in order to re-establish an organisationally independent administrative judiciary, although the idea of a separate system of administrative courts has been supported by broad agreement among legal scholars in the past 30 years. These efforts can be demonstrated by a number of scientific conferences and publications by internationally acknowledged scholars. By adopting the 7th Amendment to the Fundamental Law in 2018, the National Assembly established the basis for a separate system of administrative courts.

The preparation of the legislation on administrative courts was commenced in a completely transparent working process. The Acts have been elaborated after a thorough examination of international standards and national laws of the EU Member States. To assist the preparatory works, the Minister of Justice has established an expert committee with the participation of judges,

delegates of the President of the Curia and of the National Office for the Judiciary, the President of the Association of Hungarian Administrative Judges, and acclaimed legal scholars, among them professors of administrative and constitutional law. Background talks have been organised with the Ambassadors of EU Member States in Hungary on two occasions, international conference took place with the participation of legal scholars and administrative court judges from several EU Member States.

In accordance with the Hungarian legal requirements, the Ministry of Justice submitted the draft laws to public consultation prior to their submission to the National Assembly. Each political party represented in Parliament has been invited to a consultation on the draft laws before their submission. Some of their proposals voiced at this meeting have been included in the draft laws submitted to the National Assembly or taken on board by the governing parties in the course of parliamentary discussions. These data demonstrate that adequate and broad consultation was carried out on all elements of the reform.

Statement in the Report (p. 4. par 7): *“Participants described a politicised process whereby new administrative Courts judges could be elected without the support of peers”*

The truth, however, is the following: In the appointment procedure of administrative court judges the act on administrative courts establishes a balanced model: the court presidents, the judicial councils of the given courts (composed exclusively of judges), the National Administrative Judicial Council and the minister all have their respective roles. In line with the recommendations of the Venice Commission, the act on further guarantees of the independence of administrative courts reinforced the judicial majority of the personnel council as part of the National Administrative Judicial Council by adding two additional judge members. Therefore, the body, having the central role in the application procedure - by establishing the ranking based on the objective and subjective scores achieved by all the applicants - is composed mainly of judges. Furthermore, also in line with the recommendations of the Venice Commission, the act outlines more detailed criteria that the minister shall take into consideration in the appointment procedures of judges and introduces a legal remedy allowing candidates to challenge the ministerial decision in front of the disciplinary court. The procedure contains all necessary safeguards required by the Venice Commission; therefore it cannot be considered as politicized.

Statement in the Report (p. 4. par 8): *“Another key issue was the lack of cooperation between the National Judicial Council of Hungary (Országos Bírósági Tanács, OBT) and the National Office for the Judiciary (Országos Bírói Hivatal, OBH) appointed by the government.”*

The truth, however, is the following: Firstly, the President of the National Office for the Judiciary (NOJ, the correct Hungarian name of the institution is: Országos Bírósági Hivatal) is not appointed by the Government, but he/she is elected by Parliament on the recommendation of the Head of State from among the judges by a two-thirds majority of votes of Members of Parliament.³

Secondly, the Fundamental Law stipulates that the President of the NOJ shares competences with the National Judicial Council (NJC, the correct Hungarian name of the institution is: Országos Bírói Tanács), a body of judicial self-government. The President of the NOJ and the NJC are constitutional institutions and central actors in the administration of the judiciary.

³ Pursuant to Section 25 Paragraph (6) of the Fundamental Law: "The President of the National Office for the Judiciary shall be elected from among the judges by the National Assembly for nine years on the proposal of the President of the Republic. The President of the National Office for the Judiciary shall be elected with the votes of two thirds of the Members of the National Assembly. The President of the Curia shall be a member of the National Judicial Council, further members of which shall be elected by judges, as laid down in a cardinal Act."

The sharing of competence between them has been established as part of the judicial reform that began in 2011. During this reform, the Hungarian Government has successfully conducted discussions with the Venice Commission and the European Commission and settled all contentious issues in a satisfactory manner. Institutional tensions between the constitutional organs responsible for the administration of courts are not a sign of crisis but of effective checks and balances, and - in accordance with the principle of separation of powers - fall outside the competence of the executive power.

Observations des autorités françaises sur le rapport du groupe sur les droits fondamentaux et l'État de droit du CESE, à la suite de la mission organisée en France les 28 et 29 mai 2019

À titre liminaire, les autorités françaises notent que le rapport n'a pas été adopté par le CESE selon ses procédures internes, mais constitue la compilation d'observations recueillies par le groupe sur les droits fondamentaux et l'État de droit après des visites dans cinq États membres. Elles en déduisent qu'il ne prétend ni à la représentativité – bien que son objectif affiché soit de présenter les tendances dans l'ensemble de l'Union européenne du point de vue de la société civile –, ni à l'objectivité – puisqu'il se veut la voix des organisations de la société civile (OSC) – et apprécie à cet égard l'opportunité qui leur a été donnée de dresser un tableau plus complet de la situation en formulant les observations ci-après. Elles s'interrogent également sur la conformité de cette démarche avec le mandat du groupe, créé en 2018 dans l'objectif de promouvoir le respect des valeurs européennes, en se concentrant sur des thèmes, plus que sur des États membres en particulier.

1. Liberté d'association

Les autorités françaises souhaitent porter à la connaissance du CESE ces éléments complémentaires :

S'agissant du financement des OSC dans la société et des moyens dont disposent ces dernières :

La part des financements publics et privés a cru en réalité ces dernières années. Si la part des financements publics n'a pas augmenté autant que les besoins de financement des associations, ces derniers sont cependant passés de 30 milliards d'euros à près de 50 milliards d'euros ces 12 dernières années. La vie associative en France demeure toujours aussi dynamique et l'exercice de la liberté d'association n'est nullement menacé par ce désengagement public qui reste très relatif.

Quelques chiffres permettent de démontrer cette réalité :

On dénombre ainsi 1,6 million d'associations actives, 21 millions d'adhérents et un budget de 113 milliards d'euros en 2017 (+1,6% par an en moyenne entre 2011 et 2017).

Plus de 70 400 nouvelles associations sont créées chaque année et 135 000 associations, qui représentent 159 370 établissements, sont employeuses. On dénombre 1,8 million de salariés dans les associations (+ 0,5% par an entre 2011 et 2017) pour une masse salariale de 39,95 milliards d'euros en 2018 (entre 2008 et 2017, la masse salariale brute des associations augmente de 2,3% par an et le salaire annuel moyen brut de 1,6%). L'emploi associatif est plus dynamique que le reste de l'emploi privé en général et représente en France autant de salariés que les secteurs de la construction et bancaire réunis.

Près d'un français sur quatre donne du temps gratuitement à une association, ce qui représente environ 12,5 millions de personnes. Et parmi elles, un peu plus d'un Français sur dix, soit entre 5,2 et 5,4 millions de personnes, agissent en 2019 sur un mode hebdomadaire et forment la colonne vertébrale des associations.

Le Gouvernement développe une politique volontariste en faveur de la vie associative, que ce soit en matière de financement ou en matière d'emploi et de bénévolat car les associations, outre leur poids économique important, sont aussi le creuset d'une citoyenneté active favorisant le lien social en France. À ce titre, le service civique et, prochainement, le service national universel sont des dispositifs favorisant l'engagement dès le plus jeune âge dans les associations.

S'agissant des OSC procurant une assistance aux migrants :

Le Gouvernement français entend **contester fermement les affirmations de certaines associations**, en particulier celles qui procurent une assistance aux migrants, qui font état « *de tentatives de plus en plus fréquentes d'entraver ou de faire cesser leurs activités au moyen de menaces de procédures judiciaires à leur encontre, voire d'arrestations de certains de leurs bénévoles et employés* ».

À titre liminaire, il convient de rappeler que les autorités françaises sont attachées au respect de l'État de droit : l'action des pouvoirs publics s'exerce dans le cadre des lois et des règlements, et peut faire l'objet de nombreux recours devant les juridictions ou les organes compétents en matière d'atteinte aux droits fondamentaux.

S'il est concevable que les actions de police opérées puissent parfois être ressenties comme des actes « *d'intimidation* » par des personnes ne connaissant pas le cadre légal national, tel ne saurait être le cas des associations, qui connaissent le cadre légal dans lequel l'autorité de police administrative agit, aux côtés de l'autorité judiciaire, sous le contrôle du juge. Par ailleurs, si la grande majorité des associations de défense des droits de l'homme exercent leurs missions de manière irréprochable, certains acteurs, au nom de la défense des droits des migrants, ont parfois agi en dehors du cadre légal, en encourageant des personnes en situation objective de détresse à s'installer dans l'illégalité ou à passer clandestinement les frontières, ce qu'a notamment souligné par le Président de la République, dans son discours du 16 janvier 2018 à Calais, devant les forces de sécurité :

« J'appelle ici toutes les associations à la responsabilité, lorsque des associations encouragent ces femmes et ces hommes à rester là, à s'installer dans l'illégalité, voire à passer clandestinement de l'autre côté de la frontière, elles prennent une responsabilité immense.

Jamais, jamais, elles n'auront l'État à leurs côtés. Toujours, nous défendrons les associations qui, travaillant en partenariat avec l'État et les collectivités territoriales, vont au contact, apportent les services élémentaires, expliquent [...] »

De ce point de vue, la constatation d'infractions, et notamment de contraventions, ne saurait être considérée comme un acte « *d'intimidation* », mais relève simplement de l'application des lois et règlements s'imposant à toute personne se trouvant sur le territoire national. Il peut être utilement rappelé que la constatation des infractions repose sur la réunion des éléments constitutifs de l'infraction, tels que définis par le législateur et contrôlés par le juge, y compris le cas échéant par le Conseil constitutionnel, comme ce fut récemment le cas

s'agissant du « délit de solidarité ». Ainsi, dans sa décision 2018-717/718 QPC du 6 juillet 2018, le Conseil constitutionnel a considéré que l'exemption pénale définie à l'article L. 622-4 du code de l'entrée et du séjour des étrangers et du droit d'asile (ci-après « CESEDA ») ne pouvait être limitée, comme le législateur l'avait initialement prévu, aux cas d'aide au séjour irrégulier mais devait également être étendue aux cas d'aide à la circulation, lorsqu'elle constitue l'accessoire de l'aide au séjour apportée à l'étranger (considérant 13 de sa décision). Cette exemption pénale ne s'étend toutefois pas à l'aide à l'entrée irrégulière, « *même si celle-ci est apportée dans un but humanitaire* ». La loi du 10 septembre 2018 pour une immigration maîtrisée, un droit d'asile effectif et une intégration réussie, a pris en compte cette décision et modifié l'article L. 622-4 du CESEDA.

Enfin, les autorités françaises souhaitent souligner que, si l'objectif de contrôle de la régularité de l'entrée et du séjour des étrangers en situation irrégulière constitue un objectif de valeur constitutionnelle, l'État français exerce l'ensemble de ses actions dans le strict respect du droit de l'Union européenne et du cadre législatif fixé par le CESEDA, en respectant un équilibre entre l'accueil des migrants et la préservation de l'ordre public républicain, dont le respect de la dignité humaine est l'une des composantes, et la lutte contre les zones de non-droit (insécurité, réseaux de passeurs, filières de prostitution, filières d'immigration clandestine).

En conclusion, les autorités françaises contestent les allégations d'intimidation, de harcèlement ou d'entraves à l'action de certains défenseurs des migrants relatées par certaines OSC interrogées, l'action des forces de l'ordre s'inscrivant dans un cadre légal et réglementaire. C'est pourquoi lorsque des manquements sont constatés, des recours juridictionnels sont toujours possibles pour en faire état devant les tribunaux français. À cet égard, il importe de relever que le parquet général de Douai, qui exerce sa compétence sur Calais, n'a pas eu connaissance de cas d'entrave aux activités des associations et des ONG venant en aide aux migrants et le procureur de la République de Dunkerque n'a pas eu connaissance de violences de menaces ou d'actes d'intimidation à l'encontre des bénévoles de la part des services de police.

Les autorités françaises se sont d'ailleurs engagées à enquêter sur chaque allégation de mauvais traitements, ainsi que l'a rappelé le Président de la République dans son discours précité du 16 janvier 2018 : « *J'ai demandé au Ministre de l'Intérieur d'examiner systématiquement et de rétablir la vérité des faits, soit pour défendre les agents lorsque ceux-ci justement n'ont pas commis de tels faits, y compris devant les juridictions, soit pour prendre toutes les mesures et sanctions qui s'imposent.* »

2. Liberté de réunion

Les autorités françaises souhaitent préciser, sur l'usage de la force, que lors de l'audition, les autorités françaises ont indiqué que « *le recours à la force a été strictement nécessaire, gradué et proportionné, comme cela a été jugé par le Conseil d'État, à l'occasion des contentieux qui se sont noués sur ce point* ». En outre, les autorités françaises souhaitent porter à la connaissance du CESE ces éléments complémentaires :

1. Sur l'absence de détérioration de la protection juridique du droit de manifester par la [Loi n° 2019-290 du 10 avril 2019 visant à renforcer et garantir le maintien de l'ordre public lors des manifestations](#)

Cette allégation paraît contestable à plusieurs égards pour les autorités françaises.

À titre liminaire, la France tient à rappeler qu'elle attache une importance toute particulière à la protection des droits de l'homme et des libertés fondamentales. La France a une longue tradition de liberté d'expression et de réunion pacifique, qui sont garanties par la Constitution de 1958 comme par la Convention européenne des droits de l'homme. La France cultive une pratique ancrée de manifestations permettant la libre expression dans l'espace public des revendications et opinions les plus diverses, le plus souvent en opposition aux décisions prises par les pouvoirs exécutif et législatif en place et parfois au soutien de ces dernières. Le principe de liberté de réunion résulte de la loi du 30 juin 1881 sur la liberté de réunion et est garanti par l'État français. Un arrêt important du Conseil d'État du 19 mai 1933 (arrêt *Benjamin*) impose que la liberté de réunion prévale sur les pouvoirs de police, en l'absence de trouble à l'ordre public présentant un certain degré de gravité. Le droit de manifester est par ailleurs reconnu dans la jurisprudence.

En France, le droit de manifester s'accompagne de l'obligation de déclaration préalable de toute manifestation sur la voie publique, qui permet d'assurer la sécurité des manifestants. À cet égard, le Comité des droits de l'Homme des Nations Unies a considéré que l'obligation d'avertir la police six heures avant l'organisation d'une manifestation dans un endroit public peut faire partie des restrictions tolérées par l'article 21 du Pacte international relatif aux droits civils et politiques (PIDCP) relatif au droit de réunion pacifique (Comité des droits de l'Homme (CDH), *Kivenmaa c. Finlande*, 1994, communication n°412/1190).

Il y a toutefois lieu de distinguer entre manifestation, déclarée ou non, et attroupement.

Si la première consiste en un rassemblement, statique ou mobile, visant à exprimer ses idées ou formuler des revendications, le second, revêt d'un point de vue légal une nature délictuelle et consiste en un rassemblement susceptible de troubler l'ordre public, au sens de l'article 431-3 du code pénal. Plus simplement, l'attroupement est une manifestation qui a dégénéré dans la violence (voir les explications détaillées *infra*).

Or, si la liberté d'expression et celle de réunion, auxquelles concourent la liberté de manifestation, sont garanties par notre droit, à la fois constitutionnel et conventionnel, cette garantie ne s'attache qu'à la liberté de réunion ou de manifestation pacifiques (Cour EDH

Grande chambre du 15 octobre 2015, Kudevicius et autres c. Lituanie, req. n°37553/05 et 15 novembre 2018 Navlanyy c. Russie, req. n°29580/12).

Compte tenu de la spécificité et des risques propres aux réunions publiques et aux manifestations, la Cour européenne considère, en outre, que les autorités **ont le devoir** de prendre les mesures nécessaires pour garantir le bon déroulement de toute manifestation légale et la sécurité de tous les citoyens (voir notamment, Cour EDH, 20 févr. 2003, Djavit An c. Turquie, req. n°20652/92, § 56-57 ; Cour EDH, 1^{er} déc. 2011, Schwabe et M. G. c. Allemagne, req. n°8080/08 et 8577/08, § 110-113 ; Cour EDH, 15 nov. 2012, Celik c. Turquie, req. n°34487/07, § 88).

À cette fin, le législateur a introduit dans l'ordonnancement juridique des dispositions qui ont été validées par le Conseil constitutionnel (décision n°2019-780 DC du 4 avril 2019) qui les a jugées nécessaires, adaptées et proportionnées, afin de lutter contre certaines formes de violences extrêmes au cours des manifestations : il s'agit des dispositions permettant en cas de manifestations certains contrôles et fouilles sur réquisition judiciaire (article 2), ainsi que la répression pénale de la dissimulation volontaire du visage (article 6) lorsque celle-ci s'effectue sans motif légitime au sein ou aux abords immédiats d'une manifestation sur la voie publique, au cours de laquelle ou à l'issue de laquelle des troubles à l'ordre public sont commis ou risquent d'être commis.

Ces dispositions ont notamment pour objectif de favoriser la mise en œuvre du droit de manifester en permettant aux forces de l'ordre d'assurer la sécurité des manifestants contre les éventuels émeutiers qui profitent du contexte pour commettre des violences contre les personnes et les biens.

Le législateur a souhaité également doter l'autorité de police de la possibilité de prononcer une interdiction administrative individuelle de manifester à l'égard de personnes dont les agissements à l'occasion de manifestations sur la voie publique ont donné lieu à des atteintes graves à l'intégrité physique des personnes, ainsi qu'à des dommages importants aux biens ou par la commission d'un acte violent. Cette mesure a cependant été censurée, non au regard de son caractère nécessaire mais de l'insuffisance des garanties prévues, ce qui démontre l'effectivité du contrôle exercé par le Conseil constitutionnel.

2. Sur le recours à la force à l'occasion des manifestations des « gilets jaunes ».

En dépit des violences auxquelles elles ont donné lieu chaque samedi, les manifestations liées au mouvement « des gilets jaunes » ont le plus souvent été encadrées par un dispositif de sécurité visant à assurer la sécurité des manifestants et le cantonnement des troubles à l'ordre public plutôt qu'interdites, l'interdiction n'ayant été envisagée qu'en dernier recours, en lorsque les moyens dont disposait l'autorité administrative ne lui permettaient pas de garantir l'ordre public, en particulier du fait de la multiplicité des lieux de rassemblement et de leur imprévisibilité liée au refus systématique de certains manifestants de s'inscrire dans le cadre du régime déclaratif. Les conditions d'intervention des forces de l'ordre ont été

particulièrement difficiles. Ces manifestations ont été marquées par des violences graves commises par certains manifestants, à l'encontre des forces de l'ordre, des journalistes présents ou d'autres personnes, ainsi que contre les commerces, les bâtiments et équipements publics. Il faut également souligner que des propos, inscriptions et agressions à caractère raciste, antisémite ou homophobe ont été constatés au cours ou en marge des mobilisations.

Dans ce contexte, l'usage de la force publique par les forces de l'ordre, bien qu'ayant parfois donné lieu à des images spectaculaires, avait pour objet répondre à ces situations de violences graves et illicites de façon nécessaire et strictement proportionnée comme le prévoit la loi, et conformément aux engagements internationaux pris par la France. Si certains cas de mésusages ou d'usage disproportionné ont été signalés, des inspections administratives et des instructions pénales sont actuellement en cours, lesquelles permettront de faire toute la lumière sur ces événements et d'en tirer les conséquences disciplinaires, sans préjudice d'éventuelles condamnations pénales.

Au 14 octobre 2019, le ministère de la Justice (Direction des affaires criminelles et des grâces) a été informé du dépôt de 409 plaintes à l'encontre des forces de l'ordre depuis le début du mouvement dit des « gilets jaunes ». Pour les rapporter à l'ampleur des manifestations, il convient de rappeler que depuis le début du mouvement en novembre 2018, plus de 50 000 manifestations ont été organisées dans de nombreuses villes, rassemblant au total plus de 2,3 millions de manifestants. Si aucune condamnation n'a été prononcée à ce jour, de nombreuses procédures sont toujours en cours de traitement par les autorités judiciaires. 291 procédures ont fait l'objet d'une saisine de l'inspection générale de la police nationale par les parquets, dont 193 procédures au tribunal de grande instance de Paris. Parmi ces dernières, 9 ont fait l'objet d'une ouverture d'information judiciaire et 28 ont donné lieu à un classement sans suite. D'autres services d'enquête ont été saisis, tels que l'inspection générale de la gendarmerie nationale ou les sûretés départementales.

L'existence de ces procédures, diligentées par l'autorité judiciaire dont l'indépendance est, en application de l'article 64 de la Constitution, garantie par le Président de la République, et qui est la gardienne de la liberté individuelle, illustre l'effectivité des garanties attachées à l'État de droit en France.

a) S'agissant des allégations concernant le maintien de l'ordre et de l'usage des armes :

En premier lieu, il y a lieu de distinguer entre manifestation, déclarée ou non, et attroupement.

Si la première consiste en un rassemblement, statique ou mobile, visant à exprimer ses idées ou formuler des revendications, le second, est quant à lui de nature délictuelle et consiste en un rassemblement susceptible de troubler l'ordre public, au sens de l'article 431-3 du code pénal. Plus simplement, l'attroupement est une manifestation qui a dégénéré dans la violence ou dont la bascule dans la violence est imminente.

En application de l'article R. 211-21 du code de la sécurité intérieure, c'est à l'autorité civile, qui doit être présente sur les lieux, qu'il appartient d'apprécier le moment de la bascule de la manifestation en attroupement, en d'autres termes de caractériser l'attroupement, en vue le cas échéant de décider de l'emploi de la force après sommation.

Cet article liste les autorités civiles responsables de l'emploi de la force : le préfet du département ou le sous-préfet, le maire ou l'un de ses adjoints, le commissaire de police, le commandant de groupement de gendarmerie départementale ou, mandaté par l'autorité préfectorale, un commissaire de police ou l'officier de police chef de circonscription ou le commandant de compagnie de gendarmerie départementale.

Lorsqu'il est décidé de recourir à la force, et si l'autorité civile n'effectue pas elle-même les sommations, elle peut désigner tout officier de police judiciaire responsable de la sécurité publique, ou tout autre officier de police judiciaire. Ce dernier ne doit pas appartenir à la force publique chargée de disperser l'attroupement.

L'instruction du 21 avril 2017 relative au maintien de l'ordre public par la police nationale (NOR : INTC1712157J) rappelle le cadre juridique d'engagement de la force pour rétablir l'ordre public et précise le rôle des différents acteurs dans la chaîne de décision.

En deuxième lieu, les forces de l'ordre déployées lors d'une manifestation le sont, avant tout, pour protéger la sécurité des manifestants. À ce titre, il faut rappeler que le lanceur de balles de défense (LBD) n'est pas utilisé en cas de manifestation, mais uniquement en cas d'attroupement, c'est-à-dire en cas de manifestation ayant dégénéré (aux termes du premier alinéa de l'article 431-3 du code pénal : « *Constitue un attroupement tout rassemblement de personnes sur la voie publique ou dans un lieu public susceptible de troubler l'ordre public* »). À aucun moment le LBD ne doit être utilisé à l'encontre de manifestants, même véhéments, si ces derniers ne commettent pas de violences physiques, notamment dirigées contre les forces de l'ordre, ou de graves dégradations. Dans ce dernier cas en effet, il ne s'agit plus de manifestants, mais de participants à un attroupement violent et illégal.

Le LBD étant une arme destinée à réagir instantanément à des violences ou voies de fait commises à l'encontre des forces de l'ordre ou si elles ne peuvent défendre autrement le terrain qu'elles occupent, c'est-à-dire une arme destinée à interrompre un individu dangereux en train de se rendre coupable d'un acte d'agression, et non une arme destinée à disperser un attroupement, son utilisation est à l'appréciation du policier qui en est doté et intervient sans sommation, dans le cadre législatif et réglementaire applicable.

En troisième lieu, dans un État de droit, l'usage de la force par l'État est strictement encadré et obéit aux principes de stricte nécessité et de proportionnalité, tels que rappelés par le code de la sécurité intérieure, à l'article L. 435-1.

- Les unités chargées de recourir à la force doivent le faire de manière graduée, en faisant d'abord usage de la force physique, possiblement accompagnée d'équipements ne constituant pas des armes à feu⁴, avant, si le trouble persiste ou

⁴ Tels que des bâtons de défense, boucliers, engins lanceurs d'eau, containers lacrymogènes à main et certaines grenades lacrymogènes.

s'aggrave et après une nouvelle sommation, de pouvoir utiliser des armes de force intermédiaire – parmi lesquelles figurent notamment les grenades lacrymogènes instantanées et les grenades à main de désencerclement.

- Le code de la sécurité intérieure prévoit toutefois que si des violences ou voies de fait sont exercées contre les représentants de la force publique appelés en vue de dissiper un attroupement ou si ceux-ci ne peuvent défendre autrement le terrain qu'ils occupent, il peut être fait usage de la force directement, sans sommation, en recourant aux armes prévues dans l'hypothèse précédente, ainsi qu'au lanceur de balles de défense de calibre 40 dit « LBD 40 x 46 » avec des projectiles non métalliques.

La législation française impose donc un usage proportionné et graduel de la force, qui doit être adapté aux circonstances de chaque manifestation.

Dans ce contexte, et notamment durant l'épisode dit des « gilets jaunes », confrontées à de nombreuses manifestations ayant dégénéré en attroupement ou ayant donné lieu à des attroupements, les forces de l'ordre ont dû faire usage de la force en utilisant des armes de force intermédiaire dans le respect de ce cadre juridique. Les armes de force intermédiaire permettent ainsi de faire face de manière moins vulnérante à la grande violence de nombreux individus. Le nombre de fois où ces armes ont été utilisées est également à rapporter au nombre d'attroupements et à leur intensité.

S'il a pu être rapporté par exemple l'usage de milliers de grenades lacrymogène pour la manifestation du 1^{er} décembre 2018, il est ainsi nécessaire de resituer le contexte ayant nécessité l'emploi de ces armes intermédiaires. Il en est ainsi notamment de scènes de grandes violences urbaines auxquelles ces attroupements ont donné lieu : Arc de Triomphe saccagé, voitures incendiées, magasins évacués, vitrines cassées, montées de barricades, échauffourées avec les forces de l'ordre. À Paris, les dégâts ont été considérables pour les personnes et les biens, y compris privés.

Les forces de l'ordre ont été prises à partie par des individus très violents. Elles ont reçu des pavés, du mobilier urbain, des bombes agricoles, des jets d'acide mettant directement en jeu la vie des agents. Des témoignages font état de ce que certains individus ont démonté les grilles de certains monuments, en ont scié les flèches de façon à pouvoir les lancer sur les forces de l'ordre. Le bilan s'élève à quelque 1 900 blessés parmi les forces de l'ordre (police et gendarmerie) et les sapeurs-pompiers (intervenant pour soigner les blessés et éteindre les incendies déclenchés par les manifestants et les casseurs), sans compter de nombreuses autres victimes collatérales.

L'usage des armes de force intermédiaire, auquel les forces de l'ordre ont pu être contraintes dans certaines situations exceptionnelles, a permis de contenir cette violence sans retenue et d'éviter des morts tant dans les rangs des forces de l'ordre que dans les rangs des émeutiers. Ces armes de force intermédiaire ont ainsi pour objectif de permettre, dans le respect des lois et des règlements, une réponse graduée et proportionnée à une situation de danger lorsque l'emploi légitime de la force s'avère nécessaire. Tel a d'ailleurs été le sens des décisions du

Conseil d'État, appelé à statuer sur la légalité de l'usage du LBD (Conseil d'État, référé, 1^{er} février 2019, n°427390 et n°427386 ; Conseil d'État, 24 juillet 2019, n°427638) et de la grenade GLI-F4 lors des opérations de maintien de l'ordre en cause (Conseil d'État, 24 juillet 2019, n°429741).

En quatrième lieu, si des cas de mésusage du LBD sont toujours malheureusement possibles, malgré le rappel systématique des consignes avant chaque intervention, de tels mésusages, qui font l'objet de toute la réponse disciplinaire et judiciaire qui s'impose, ne sauraient à eux seuls remettre en cause l'utilisation régulière de cette arme en cas d'extrême nécessité, c'est-à-dire en cas de légitime défense ou lorsque les forces de l'ordre n'ont pas d'autres moyens pour défendre le terrain qu'elles occupent.

En tout état de cause, et tant que les enquêtes judiciaires n'auront pas abouti, il n'est pas possible de déterminer, à ce jour, si les personnes blessées par des tirs de LBD l'ont été dans une situation justifiant le recours à cette arme, avec les conséquences malheureuses qui s'y attachent, ou bien dans une situation d'usage abusif, évidemment condamnable.

Il est donc en l'état difficile de déduire du seul nombre de personnes se présentant comme victimes d'un tir de LBD que les précautions d'utilisation de cette arme ne pourraient jamais être efficacement respectées, étant précisé qu'au 1^{er} février 2019, plus de 9 000 tirs de LBD avaient été réalisés partout en France depuis le 17 novembre 2018.

À cet égard, l'utilisation de caméras par les forces de l'ordre depuis les manifestations du 26 janvier dernier doit, d'une part, permettre de mieux établir les responsabilités et, d'autre part, de responsabiliser encore davantage, les utilisateurs de cette arme.

S'agissant des allégations de certaines OSC selon lesquelles le recours disproportionné de la police à la force était antérieur aux manifestations des « gilets jaunes » et qu'elle avait été utilisée lors d'événements autorisés qui avaient été bien supervisés par leurs organisateurs, l'absence de précision quant aux circonstances des faits allégués ne permet pas d'y répondre avec précision et d'en apprécier le bienfondé. En tout état de cause, et quelle que soit l'objet de la manifestation, les principes du maintien de l'ordre applicables sont identiques et le recours à la force ne doit intervenir, dans les conditions prévues par les lois et règlements applicables, qu'en cas d'attroupement et jamais à l'encontre de manifestants pacifistes.

b) S'agissant, plus particulièrement, de l'usage des lanceurs de balles de défense :

L'usage des armes autorisées dans le cadre de la dissipation d'un attroupement est expressément et limitativement prévu aux articles R. 211-16 et suivants du code de la sécurité intérieure (CSI), le LBD de calibre 40 mm étant expressément autorisé par l'article D. 211-19 du CSI dans le cadre d'opérations de maintien de l'ordre.

Les conditions juridiques (et instructions particulières) du recours à la force et aux armes sont détaillées au sein de l'instruction commune Police nationale / Gendarmerie nationale du 2 août 2017 relative à l'usage et l'emploi des armes de force intermédiaire (AFI) dans les services de la police nationale et les unités de la gendarmerie nationale. Son annexe II traite

spécifiquement de l'emploi du LBD de 40 mm (40x46). Les cadres juridiques dans lesquels cette AFI peut être utilisée sont déclinés par les articles L435-1 et L211-9 du CSI (MO), 122-5 et 122-7 du code pénal (légitime défense et état de nécessité). Les précautions d'emploi de l'arme figurent au paragraphe 3.3 (zone privilégiée de visée, contexte, etc.).

Ainsi, conformément aux principes énoncés à L. 435-1 du code de la sécurité intérieure régissant l'usage des armes par les policiers et les gendarmes, également applicable aux cas de dissipation des attroupements prévus à l'article L. 211-9 du même code, les forces de l'ordre doivent agir dans un cadre légal précis et demeurer guidées par les principes d'absolue nécessité et de stricte proportionnalité de l'emploi de la force, que ce soit en matière de légitime défense ou pour disperser un attroupement. Il s'agit ainsi de contenir les individus les plus agressifs et de les disperser, en évitant d'attiser la violence et en préservant également la liberté d'expressions de ceux qui veulent porter leurs revendications pacifiquement.

Le LBD a vocation à permettre de garantir un usage gradué de la force.

Faisant application de ces principes, l'article R. 431-3 du code pénal rappelle le principe de gradation dans l'emploi de la force qui doit guider l'action quotidienne des forces de l'ordre. Il dispose que « *l'emploi de la force par les représentants de la force publique n'est possible que si les circonstances le rendent absolument nécessaire au maintien de l'ordre public [...]. La force déployée doit être proportionnée au trouble à faire cesser et doit prendre fin lorsque celui-ci a cessé* ». D'application stricte, cet article fonde l'adéquation nécessaire devant exister entre la force déployée et le trouble à faire cesser.

Cet impératif est au cœur des doctrines d'emploi de la force, la nécessité de pouvoir disposer d'armes de force intermédiaire ayant été entérinée par l'ONU lors de son 8^{ème} Congrès pour la prévention du crime et le traitement des délinquants, lequel a adopté une délibération en septembre 1990 intitulée « *principes de base sur le recours à la force et l'utilisation des armes de feu par les responsables de l'application des lois* », demandant aux législateurs nationaux de prendre des dispositions juridiques afin de doter les services de « *divers types d'armes et de munitions qui permettront un usage différencié de la force et des armes à feu* ».

À noter que la Turquie a été condamnée par la Cour européenne des droits de l'Homme (Cour EDH) pour ne pas avoir doté ses forces de police d'autres armes que des armes à feu et, par conséquent, pour ne pas avoir laissé aux policiers d'autre choix que de tirer lors d'une manifestation au cours de laquelle ils avaient subi des violences (Cour EDH, Gülec c. Turquie, 27 juillet 1998, req. n°21593/93, § 71).

Ainsi, les conditions d'emploi du LBD par les forces de l'ordre, notamment pendant les manifestations dites de « gilets jaunes », ont été validées dans leur principe par le Conseil d'État, notamment dans sa décision du 1^{er} février 2019 (CE, 1^{er} février 2019, n°427390) qui a considéré que les conditions d'usage du LBD de 40 mm, principalement destiné à la sauvegarde de l'ordre public, étaient strictement encadrées (articles L. 435-1 et R. 211-13 du Code de la sécurité intérieure) par les principes de nécessité et de proportionnalité. En outre, depuis le 23 janvier 2019, ces conditions se sont accompagnées de l'obligation de filmer, dans

la mesure du possible, l'usage fait du LBD au cours des manifestations. Le Conseil d'État a également jugé que si l'usage de ce matériel avait pu provoquer des blessures au cours des manifestations, il ne résultait pas de l'instruction que dans le cas d'espèce l'intention des autorités concernées était de ne pas respecter les conditions d'usage. Enfin et surtout, le Conseil d'État a rappelé que « *les très nombreuses manifestations qui se sont répétées semaine après semaine depuis le mois de novembre 2018 sur l'ensemble du territoire national, sans que des parcours soient toujours clairement déclarés ou respectés, ont été très fréquemment l'occasion de violences volontaires, de voies de fait, d'atteintes aux biens et de destructions. L'impossibilité d'exclure la reproduction de tels incidents au cours des prochaines manifestations rend nécessaire de permettre aux forces de l'ordre de recourir à ces armes, qui demeurent particulièrement appropriées pour faire face à ce type de situations, sous réserve du strict respect des conditions d'usage s'imposant à leur utilisation* »⁵.

3. Sur le lien évoqué entre recours à la garde à vue et la réduction du droit de manifester

Les conditions de la garde à vue sont strictement posées par l'article 62-2 du code de procédure pénale :

- la garde à vue doit être **décidée par un officier de police judiciaire**, sous le **contrôle de l'autorité judiciaire** ;
- il doit exister plusieurs **raisons plausibles de soupçonner que la personne a commis ou tenté de commettre un crime ou un délit** ;
- le crime ou le délit doit être **puni d'une peine d'emprisonnement** ;
- la garde à vue doit être le **seul moyen de parvenir à l'un des six objectifs fixés par l'article 62-2** (permettre l'exécution des investigations impliquant la présence ou la participation de la personne ; garantir la présentation de la personne devant le procureur de la République afin que ce magistrat puisse apprécier la suite à donner à l'enquête ; empêcher que la personne ne modifie les preuves ou indices matériels ; empêcher que la personne ne fasse pression sur les témoins ou les victimes ainsi que sur leur famille ou leurs proches ; empêcher que la personne ne se concertent avec d'autres personnes susceptibles d'être ses coauteurs ou complices ; garantir la mise en œuvre des mesures destinées à faire cesser le crime ou le délit).

Ainsi, les conditions précitées doivent nécessairement être caractérisées afin d'avoir recours à la mesure de garde à vue, notamment s'agissant de l'existence de raisons plausibles de soupçonner que la personne a commis ou tenté de commettre un crime ou un délit puni d'emprisonnement. L'utilisation de cette mesure ne peut donc pas avoir pour seul objet d'empêcher les militants de prendre part à des manifestations.

⁵<https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000038135470&fastReqId=1975368748&fastPos=2>

3. Liberté d'expression et liberté des médias

Les autorités françaises souhaitent porter à la connaissance du CESE ces éléments complémentaires :

Le Président de la République et le Gouvernement français rappellent régulièrement le rôle de vigie de la démocratie que jouent les journalistes et sont régulièrement amenés à condamner les actes de violence commis à leur encontre, en France ou à l'étranger. Ainsi, par exemple, **le ministre de la Culture**, M. Franck Riester, s'est exprimé sur le sujet dès les premiers jours qui ont suivi sa prise de fonctions dans le cadre d'un discours prononcé lors du centenaire du Syndicat national des journalistes, le 18 octobre 2018. Il a également renouvelé le soutien inconditionnel du Gouvernement à la profession lors des Assises du journalisme, le 15 mars 2019, condamnant à nouveau les actes de violences commis à l'encontre de ses représentants, notamment dans le cadre des manifestations des « gilets jaunes ». En outre, qu'ils soient issus des rangs de la majorité ou de l'opposition, **la quasi-unanimité des représentants de la classe politique française dénonce publiquement et avec la plus grande fermeté les actes de violence commis envers les journalistes** et le fait généralement de manière systématique. D'une manière générale, tous les actes de violence commis à l'encontre de journalistes suscitent une réaction de la part des autorités publiques et des représentants de la classe politique. Cette démarche, étayée par de nombreuses prises de position d'élus locaux ou nationaux, ainsi que des principales organisations politiques permet de redimensionner, bien que certains responsables politiques se prêtent à de telles pratiques, les allégations « *media bashing* ».

La loi n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information a vocation en outre à mieux lutter contre la circulation en ligne des fausses informations, en particulier en période électorale, ce au profit de la liberté des médias. Elle a fait suite au scandale « *Cambridge Analytica* » révélé par un lanceur d'alerte, Christopher Wylie, qui a fait prendre conscience à tous du risque que pouvaient constituer pour les démocraties des campagnes de désinformation en ligne financées indirectement par des mouvements politiques. Cette loi impose ainsi un devoir de coopération à la charge des opérateurs de plateformes numériques. Cette démarche doit permettre de responsabiliser les opérateurs de ces plateformes, d'encourager les bonnes pratiques et de faire en sorte que les efforts déployés par les acteurs privés pour lutter contre les fausses informations reposent sur des règles transparentes et discutées collectivement. De plus, la loi crée une obligation de transparence renforcée en période électorale, également à la charge des opérateurs de plateformes, sur les contenus d'information sponsorisés. Enfin, la loi institue une nouvelle voie de droit permettant à toute personne ayant intérêt à agir de saisir, en période électorale, le juge judiciaire dans le cadre d'une action en référé, en cas de diffusion « délibérée, artificielle ou automatisée, et massive » d'une information fautive et susceptible d'altérer la sincérité du scrutin, par le biais d'un service de communication au public en ligne. Au vu de ces éléments, la loi a ainsi pour objectif une meilleure protection du public sans pour autant que soit limitée la liberté des médias.

Il importe de relever que pour protéger la liberté d'expression et des médias avant l'adoption de la loi précitée, **l'article 27 de la loi du 29 juillet 1881 sur la liberté de la presse** définissait déjà la diffusion de « *nouvelles fausses* » et la réprimait à hauteur de 45 000 euros. De même, **le code électoral, à son article L. 97**, punissait déjà d'un an d'emprisonnement et de 15 000 euros d'amende « *ceux qui, à l'aide de fausses nouvelles, bruits calomnieux ou autres manœuvres frauduleuses, auront surpris ou détourné des suffrages* » et enfin, **la loi du 21 juin 2004 pour la confiance dans l'économie numérique** permettait déjà, y compris en référé, d'ordonner aux acteurs du Web de « *faire cesser un dommage occasionné par le contenu d'un service de communication au public en ligne* ». La loi du 22 décembre 2018 innove en éclaircissant la notion de « *fake news* » ; il la définit pour la première fois en droit interne comme « *des allégations ou imputations inexactes ou trompeuses d'un fait de nature à altérer la sincérité du scrutin* ».

Cette loi n'a en revanche par contre pas vocation à lutter contre les discours de haine. Cette lutte, nécessaire dans un univers démocratique, est abordée dans le cadre de la **proposition de loi visant à lutter contre les contenus haineux sur internet**, qui est actuellement discutée au Parlement français.

Enfin, la mise en place en France d'un conseil de la déontologie de l'information pourrait participer de la nécessaire réconciliation des médias avec leur public. Une telle instance existe déjà dans un certain nombre de pays européens. Sa création est recommandée par plusieurs organisations internationales, comme l'UNESCO ou l'OSCE.

Une mission d'expertise indépendante visant à proposer un cadre pour la création éventuelle d'une telle instance a été confiée en octobre 2018 par le ministre de la Culture à M. Emmanuel Hoog, ancien président de l'Agence France-Presse. Dans son rapport intitulé « Vers la création d'une instance d'autorégulation et de médiation de l'information », qu'il a rendu le 27 mars 2019, M. Hoog invite la profession à s'organiser elle-même pour mettre en place une instance d'autorégulation et de médiation de l'information, adossée à une structure associative et indépendante des pouvoirs publics. À la suite de la remise des conclusions de ce rapport, plusieurs acteurs du secteur se sont réunis à l'initiative de l'Observatoire de la déontologie de l'information (ODI) pour préfigurer une telle instance.

Le Gouvernement français encourage la mise en place d'une telle instance, pour autant que soit garantie son indépendance vis-à-vis des pouvoirs publics.

S'agissant des supposées « violences policières » commises à l'encontre de journalistes :

À titre liminaire, il convient de rappeler que les autorités françaises sont régulièrement saisies par le biais des alertes de la Plateforme journalistes du Conseil de l'Europe et que leurs réponses sont consultables en ligne. Elles ont notamment répondu dans ce cadre à plusieurs alertes déposées par des journalistes au moment du mouvement des gilets jaunes.

Dans le cadre des rassemblements des « gilets jaunes » des dizaines de milliers de policiers et de gendarmes, mais aussi de sapeurs-pompiers, ont été mobilisés à plusieurs reprises, à Paris et partout en France, pour assurer, dans un contexte souvent extrêmement difficile, la sécurité des biens et des personnes : manifestants, commerçants, population, etc.

S'agissant de la presse, après une rencontre avec les représentants des organisations syndicales le 30 novembre 2018, proposée à la suite des violences commises par des manifestants contre les journalistes, le ministre de l'Intérieur a demandé aux forces mobilisées dans les manifestations de prévoir l'accueil systématique des journalistes le souhaitant à l'arrière des dispositifs, afin de les protéger, dès lors que ceux-ci pouvaient dûment justifier de leur profession et être suffisamment identifiables lors d'événements présentant des risques de troubles à l'ordre public.

Les forces de l'ordre, qui sont fréquemment et tout au long de l'année, victimes de violences, parfois extrêmes, dans le cadre de débordements qui surviennent en marge de certaines manifestations, et tel a notamment été le cas lors de plusieurs mobilisations des « gilets jaunes », disposent dans ce domaine d'une certaine expérience qui n'exclut pas certains manquements, devant être sévèrement sanctionnés. Si des journalistes ont eu à souffrir de l'emploi de la force par des unités de police ou de gendarmerie, il ont à ce titre la faculté de **déposer plainte ou de procéder à un signalement sur la plateforme internet de l'inspection générale de la police nationale prévue à cet effet.**

Par ailleurs, les forces de l'ordre reçoivent systématiquement pour instruction de faciliter autant que possible le travail des journalistes.

Sur les moyens de protection utilisés lors de manifestations, leur transport, leur port et leur usage n'est pas interdit par la loi française. Toutefois, l'autorité réglementaire peut prendre un arrêté interdisant leur transport, leur port et/ou leur usage dans certaines circonstances et certains lieux précis. Comme toute mesure de police administrative, cette interdiction doit être strictement nécessaire et proportionnée et elle est soumise au plein contrôle des juridictions administratives.

Une telle interdiction, lorsqu'elle est prononcée dans les conditions légales et réglementaires applicables, s'explique par le fait que l'utilisation de ces équipements de protection facilite le passage à l'acte des personnes décidées à commettre des violences ou des dégradations lors de manifestations et leur permet de résister aux moyens mis en œuvre par les forces de l'ordre pour mettre fin à leurs exactions.

En cas de découverte d'un objet interdit pour le seul temps de la manifestation et dans les seuls lieux ciblés par l'arrêté, tel qu'un matériel de protection, il était prévu que cet objet soit confisqué.

4. Non-discrimination

Les autorités françaises souhaitent porter à la connaissance du CESE ces éléments complémentaires :

Les autorités françaises souhaitent souligner que **la lutte contre la haine et les discriminations**, constitue **une priorité de politique pénale** en France.

La législation française a progressivement évolué dans le sens d'un renforcement de cette lutte en **réprimant toujours plus sévèrement tous les comportements discriminants** et, soucieux de garantir l'efficacité de ce dispositif législatif, le ministère de la Justice soutient la

mise en œuvre d'une politique pénale ferme et réactive, laquelle fait régulièrement l'objet d'une évaluation. Le nombre de condamnations chaque année est constant en la matière.

Cette politique pénale en ce domaine s'appuie, au plan local, sur le **développement d'une organisation spécifique des parquets** qui a pour objectif d'assurer la visibilité de la politique pénale et d'inscrire l'action du ministère public dans une dynamique partenariale. Elle repose **sur la désignation au sein de chaque parquet et parquet général d'un magistrat référent et sur l'institutionnalisation des relations partenariales** (notamment avec des associations locales de lutte contre les discriminations sous la forme des pôles anti-discriminations, ou encore de cellules de veille).

De la même manière, les parquets ont été sollicités aux fins de désigner des **référents en matière de droit pénal du travail**. Interlocuteur privilégié de l'inspection du travail, le magistrat référent peut être notamment amené à connaître des procédures initiées par cette dernière dans le domaine plus spécifique des discriminations à l'embauche, syndicales ou sur le lieu de travail.

La question de la haine en ligne fait enfin l'objet d'un traitement prioritaire par le ministère de la Justice qui a diffusé une nouvelle **circulaire de lutte contre les discriminations, les discours et comportements haineux le 4 avril 2019** pour rappeler aux parquets la nécessité d'apporter une attention particulière à ces faits, ainsi qu'une réponse pénale adaptée. En outre, **la loi de programmation 2018-2022 et de réforme pour la justice du 23 mars 2019** a généralisé la plainte en ligne à l'article 15-3-1 du code de procédure pénale pour tout type de faits, dont les comportements et discours haineux. Enfin, une proposition de loi sur la lutte contre la haine sur l'internet (dite proposition de loi Avia, du nom de la députée auteure de la proposition de loi) visant à responsabiliser les acteurs d'internet en cas de diffusion de contenus haineux par leur biais a en outre été adoptée par l'Assemblée nationale en première lecture et sera examinée par le Sénat dans le courant de l'automne. Elle impose aux opérateurs de plateforme en ligne de retirer ou de rendre inaccessible dans un délai maximal de 24 heures après notification tout contenu comportant manifestement une incitation à la haine ou une injure discriminatoire à raison de la race, de la religion, du sexe, de l'orientation sexuelle ou du handicap.

En outre, les autorités françaises ont mis en place un **plan national de lutte contre le racisme et l'antisémitisme pour 2018-2020**, porté par le Premier ministre et sorti en mars 2018 qui met notamment l'accent contre la haine en ligne. De plus, un appel à projets locaux, portant sur l'ensemble des compétences de la **Délégation Interministérielle à la Lutte Contre le Racisme, l'Antisémitisme et la Haine anti-LGBT** (ci-après « DILCRAH »), à savoir le racisme, l'antisémitisme et les LGBT, a été développé depuis l'an dernier pour financer les actions des associations dans de nombreux départements pour lutter contre la haine et les discriminations. Enfin, la DILCRAH organise des formations pour les policiers, gendarmes, magistrats et à présent les agents de l'administration pénitentiaire, sur la lutte contre les discours de haine afin d'améliorer leur signalement et leur traitement judiciaire.

5. État de droit

Les autorités françaises souhaitent porter à la connaissance du CESE ces éléments complémentaires :

1) S'agissant de la loi du 30 octobre renforçant la sécurité intérieure et la lutte contre le terrorisme :

La loi n°2017-1510 du 30 octobre 2017 [renforçant la sécurité intérieure et la lutte contre le terrorisme](#) (SILT) n'a nullement introduit, dans le droit commun, les dispositions figurant dans le régime de l'état d'urgence, mais s'est inspirée des mesures de police administrative permettant de prévenir efficacement le risque d'un passage à l'acte à caractère terroriste, en les accompagnant de garanties significativement rehaussées par rapport aux mesures de l'état d'urgence.

Ainsi, ces mesures ne sont instaurées que pour une finalité de lutte contre le terrorisme, alors que celles de l'état d'urgence pouvaient être adoptées pour mettre fin à tout risque de trouble à l'ordre public, y compris sans lien avec la menace ayant justifié la déclaration de l'état d'urgence. Elles sont soumises au contrôle régulier du Parlement, destinataire de chacune des mesures et à même d'en demander des précisions.

De même, les mesures sont sensiblement plus encadrées, dans leur durée limitée, les critères permettant de les mettre en œuvre durcis ; ainsi, les visites domiciliaires doivent être autorisées par le juge des libertés et de la détention. Par ailleurs, le législateur a souhaité limiter leur validité, celles-ci ne pouvant aller au-delà du 31 décembre 2020 et leur pérennité étant conditionnée à un rapport d'évaluation présenté au Parlement. À l'exception de quelques dispositions de procédure, censurées et depuis corrigées, la plupart de ces dispositions ont été jugées conformes à la Constitution par le Conseil constitutionnel en tant qu'opérant une conciliation qui n'est manifestement pas déséquilibrée entre prévention du terrorisme et droits et libertés garanties par la Constitution.

2) S'agissant de la réforme de la justice résultant de la loi du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice :

Le Gouvernement a souhaité simplifier plusieurs points du déroulement de la procédure pénale pour la rendre plus efficace, tout en veillant au respect des droits fondamentaux. La quasi-totalité des dispositions de procédure pénale de cette loi ont été déclarées conformes à la Constitution par le Conseil constitutionnel dans sa décision n° 2019-778 DC du 21 mars 2019. 40 dispositions ont ainsi été validées par le Conseil constitutionnel, notamment celles concernant la limitation de l'information de l'avocat en cas de transport d'un gardé à vue, le régime de garde à vue des majeurs protégés, la possibilité pour le juge (juge des libertés et de la détention) d'autoriser une perquisition en enquête préliminaire pour les délits d'au moins 3 ans, au lieu de 5 ans, l'expérimentation de la notification orale des droits au gardé à vue, les dispositions sur l'assignation à résidence permettant dans certains cas l'absence de débat

contradictoire et prévoyant une durée de 2 ans après le règlement de l'information, etc. Le Conseil a ainsi considéré que ces mesures comprenaient des garanties et qu'elles étaient nécessaires et proportionnées.

Les quelques dispositions considérées comme non conformes à la Constitution ont été censurées et ne sont donc pas entrées en vigueur, ce qui confirme l'effectivité des contrôles juridictionnels garants de la conformité des lois aux principes de l'État de droit.

Austrian opinion

on the EESC-report on fundamental rights and the rule of law

General remarks

- The preservation of the fundamental values of the European Union, as laid down in Article 2 TEU, is central to Austria. Austria is fully committed to further developing instruments at European level to strengthen the rule of law.
- Austria would like to emphasize that the role and opinions of NGOs, social partners and the media are important in a vibrant democracy.
- However, a report representing only the content of consultations has limited added value for strengthening the rule of law and fundamental rights. From the Austrian point of view, a meaningful contribution must follow a systematic approach. For example in matters of the rule of law, we would like to point to the rule of law checklist of the Venice Commission, which contains clear parameter for a rule of law review.
- The EESC report also contains legal and factual errors.
- Overall, it is therefore difficult to draw reliable conclusions from the report.

The Austrian constitutional system guarantees the highest standards of the rule of law and human rights protection. The rule of law is a fundamental construction principle of the Austrian Federal Constitution. Laws may be reviewed for their compliance with the constitution by the Constitutional Court. All administrative acts may be reviewed by supreme courts (Constitutional Court and Supreme Administrative Court) for compliance with the constitution, laws and regulations. The entire administration is bound by laws. The Austrian Federal Constitution provides comprehensive guarantees of fundamental rights and freedoms. The most important catalogue of fundamental rights is **the European Convention on Human Rights** (including additional protocols), **which is in Austria part of the constitution since 1964**. These guarantees can be individually enforced before the Constitutional Court. The Austrian Constitutional Court largely follows the jurisprudence of the ECtHR. Austria has also acceded to all major international human rights conventions.

Comments on the individual sections of the report

Freedom of association

With regard to concerns raised as to the **independence of the Federal Agency** for Supervision and Support Services (hereinafter referred to as the "Agency"), Austria wishes to point out that the **Federal Act** on the Establishment of the Federal Agency for Supervision and Support Services, of 19 June 2019, **provides for a variety of safeguards that guarantee the independence of the legal counsellors** working at the Agency in accordance with both European Union law and International Human Rights Law:

- The Federal Act expressly stipulates that legal counsellors working at the Agency shall be independent as regards the provision of legal counselling services to asylum-seekers and certain other categories of foreigners. They must not be issued any instructions, either from the Agency's management board or from the Federal Ministry of the Interior, pertaining to how they are to provide their services in individual cases. Moreover, it is foreseen that legal

counsellors shall render their services objectively and to the best of their knowledge, which assures that they are able to act free from any external influence.

- An asylum-seeker must not receive legal counselling and return assistance from one and the same employee of the Agency. This requirement assures that they will not be affected by conflicts of interest that may arise within the Agency regarding the different tasks it was established to fulfil.
- The independence of the legal counsellors is further strengthened through the Agency's organisational structure, since the head of the department responsible for the provision of legal counselling services to asylum-seekers will not be selected and appointed by the Federal Minister of the Interior, but by the Federal Minister of Constitutional Affairs, Reforms, Deregulation and Justice.
- As regards an alleged marginalisation of civil society it must be stressed that the Federal Ministry of the Interior and the Agency will not be granted a monopoly in this area since the Agency will only cover legal counselling and representation services that are indispensably required under European Union law (in particular, Arts. 1 *et seq.* of Directive 2013/32/EU of 26 June 2013). Therefore, asylum-seekers will remain free to procure legal advice and/or representation from outside the Agency, in particular from attorneys licensed to practise in Austria.
- According to Art. 21 para. 1 of Directive 2013/32/EU EU Member States are expressly authorized to provide legal services to asylum-seekers through state authorities or from specialized services of the state. Several other EU Member States have already established such agencies (including, among others, Finland, France, and Ireland).

Regarding the funding of projects, Austria would like to underline that the budget of the Directorate for **Women's Affairs and Equality** (i.e. "the Ministry") amounts to **10,150,000 € per year** and remained unchanged since 2011. Against this background, Austria cannot understand the mentioned figure of cuts amounting 200 million €. **All financial resources are used for women ('s rights)/ equality/ prevention of violence.** A budgetary focus was put on violence prevention and protection. Some co-financed projects could no longer be funded or received less funding than previously. This has not affected the Austrian-wide counselling services or shelters for women and girls.

Freedom of expression and media freedom

Some statements in this section are very non-specific. For example it remains unclear, on which facts the statement „*mass media were very concentrated and politicised*” would be based as it seems to refer to all forms and services of mass media (TV, TV On Demand, Radio, Print, Websites etc) available in Austria. Concerning the phrase „*access to some printed media in rural areas was limited*”, a specification on the concerned printed media and areas is missing. Austria also rejects the generalized reproach that one special newspaper would contain „*daily articles with content that bordered on racism*”. Furthermore, it is not possible to retrace what the wording about funding and sponsoring „*by players with a regressive agenda*” might be directed at.

Regarding the **appointment of „Board of Trustees” of the ORF** it has to be pointed out that there is a **clear legal basis**. The appointment of the Board of Trustees is regulated in §20 of the ORF-Act (see also the incompatibility rules in §20 (3)).

Regarding the independence of the ORF, the report is lacking a reference to the legal fact, that the independence of broadcasting in Austria (apart from Art. 10 ECHR, which is part of the constitution in Austria as explained in the beginning) is guaranteed in a special constitutional provision in the Federal Constitutional Act of 10 July 1974 on **Guaranteeing the Independence of Broadcasting**.

Austria contradicts the statement about a „*lack of right to information in Austria*“. It gives the impression that there is no regulation at all, which is wrong: The statement does not take into account the constitutional provision in Art. 20 para 4 of the Austrian Federal Constitution.⁶ It is also lacking a reference to the „Duty to grant Information Act“. Furthermore, the Supreme Administrative Court ruled recently⁷ that exemptions to the basic obligation to provide information (especially with regard to media) have to be interpreted narrowly.

Discrimination

Regarding the criticism on the "*law adopted in May 2019 by the Austrian Parliament which banned "ideologically or religiously influenced clothing (...) associated with the covering of the head" in primary schools*" Austria would like to underline that this initiative was discussed thoroughly in parliament. There was also a hearing with experts on this matter. Basically this provision it is not about religious freedom but about **integration into Austrian society**. The purpose of the provision in §43a SchUG is to ensure the best possible development of all students. The amendment is based on an assessment of the relevant fundamental rights: the aim is to protect the rights of the individual child in the implementation of the Convention on the Rights of the Child (UN Convention on the Rights of the Child). Articles 28 and 29 of the UN Convention on the Rights of the Child guarantee the rights to education and personal development. Furthermore, fundamental values of educational institutions are defined in the Federal Constitution⁸.

The aim of the **Anti-Face-Covering Act** is to promote integration by strengthening participation and social coexistence of people of different origins and religions in a pluralistic society. One of the essential preconditions for peaceful coexistence in a democratic constitutional state is the facilitation of interpersonal communication, which necessitates the recognition of others and their faces. In this context, the ECtHR ruled that the French ban on face covering did not violate the ECHR provisions of the right to privacy or freedom of religion. One of the key findings of the Court was that "in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one's religion or beliefs in order to reconcile the interests of the

⁶ Art. 20 para 4 "All organs entrusted with Federation, provinces and municipal administrative duties as well as the executive officers of other public law corporate bodies shall impart information about matters pertaining to their sphere of competence in so far as this does not conflict with a legal obligation to maintain confidentiality; [...]The detailed regulations are, as regards the federal authorities and the self-administration to be settled by federal law in respect of legislation and execution, the business of the Federation; as regards the provinces and municipal authorities and the self-administration to be settled by provincial legislation in respect of framework legislation, they are the business of the Federation while the implemental legislation and execution are provincial business."

⁷ See Judgement 29. Mai 2018, Zl. Ra 2017/03/0083

⁸Art. 14 (5a) B-VG: Democracy, humanity, solidarity, peace and justice as well as openness and tolerance towards the people.

various groups and ensure that everyone's beliefs are respected".

Asylum seekers who are admitted to the asylum procedure and who have a high probability of being granted international protection have access to **German courses** (see §68 Asylum Act).

Regarding **employment** the **Equal Treatment Act** ("Gleichbehandlungsgesetz") prohibits inter alia any discrimination on grounds of religion or belief. In case of violation of the prohibition of discrimination, the Equal Treatment Act provides for a claim on the establishment of the non-discriminatory status or compensation for damages. The affected person can also - exclusively or additionally - contact the Equal Treatment Commission at the Federal Chancellery. The Commission can prepare expert opinions. The procedure is easily accessible and free of charge. Persons who wish to receive advice and support on the subject of equal treatment can also contact the Ombudsman of Equal Treatment at the Federal Chancellery. This service is free and - if desired - also anonymous. The bodies representing employees (Chambers of Labor, Unions) also provide legal advice to their members.

Regarding the exploitation of **undocumented workers**, Austria would like to point out that persons who are employed without a work permit have the same entitlements as legally employed persons. According to the Federal Act on the Employment of Foreigners (Ausländerbeschäftigungsgesetz §28), such workers have the possibility to claim their entitlements.

Rule of Law

In the second paragraph it is stated that " the independence of judges in administrative courts was different from that of judges in civil courts and criminal courts ". This has to be refuted as the independence of judges is equal in all areas of law and also protected by exactly the same constitutional safeguards. While the issue of funding is an important one for all courts, be them civil, criminal or administrative, this is not to be confounded with the independence of the judiciary as such.

As for **numbers mentioned** in the last paragraph, the assumption that by the end of 2019 50 000 asylum cases could be seen pending has **no solid base**. By the end of June 2019 (according to public statistics of the Federal Ministry of the Interior) about 27 000 asylum-cases were pending at all relevant courts (i.e. the Federal Administrative Court, the Supreme Administrative Court and the Constitutional Court) and numbers are gradually decreasing further at the moment. Also the projection made in the text of procedures taking up to 5 to 10 years in the future is not realistic⁹.

Furthermore, the various levels of administrative jurisdiction are not correctly described¹⁰.

⁹ More information can be found in the Tätigkeitsbericht (activity report) 2018 of the Federal Administrative Court, also available in the public domain.

¹⁰ Instances in Asylum Affairs are tripartite. In the first Instance, an administrative authority decides. Against this decision, a full appeal to the Federal Administrative Court is possible. Finally, a restricted legal remedy (for illegality and / or procedural errors) may be brought before the Supreme Administrative Court.

Right of reply to the Report on Mission to Romania, 19-20 November 2018

Point 2: Freedom of association and assembly - social partners

The content is debatable in the absence of any specification related to the consulted groups (members of the Economic and Social Council, trade unions, business organizations), and the speculative character of some opinions raises doubts about the usefulness of the Report in achieving the stated purpose.

Observations on specific issues:

Consultation: Legislative changes of an emergency nature generally concerned reform measures set out in advance in the Government Programme and/or measures to ensure compliance with the European jurisprudence. These were debated at the level of the line ministries and had the opinion of the Economic and Social Council or, as the case may be, of the Group for the Assessment of the Economic Impact of the Legislative Acts on small and medium enterprises (in abbreviated Romanian form GEIEAN) in which the social partners are members, while the proposals of the parties involved were taken into consideration within the limits of political commitment. The Labour Inspectorate carried out information and awareness campaigns on law matters and on the process to transfer responsibility for social security contributions, and CNSLR-Frăția (EN: The National Confederation of Free Trade Unions of Romania – Brotherhood) agreed to participate in the monitoring of the initiation of the collective negotiation for the transfer of contributions.

Discouraging the negotiation: Art. 153 of the Law on social dialogue established the criterion for mutual recognition of the parties in support of the motivation of the union affiliation and of the involvement in the committed and mutually advantageous voluntary negotiation, at all interest levels. At present, the collective agreements coverage at company level is approx. 30%, not to mention that employment relations are fully regulated by labour law.

Violation of ILO Conventions no. 87 and no. 98: freedom of association and union affiliation, the right to collective bargaining and the right to strike are guaranteed by the Constitution of Romania (art. 9, art. 40-41, art. 43), labour law and social dialogue law.

The law on social dialogue guarantees the autonomous organisation of trade unions and prohibits any intervention of the authorities and employers to limit or prevent the exercise of trade union rights (art. 7) by means of imposing dissuasive sanctions (art. 217). Lodging complaints and the available remedies and redress are done through the Labour Inspectorate, the National Council for Combating Discrimination (issues enforceable decisions) and the Court.

The right to trigger collective labour conflicts and strikes in relation to the interests of collective bargaining and respect for the principle of social peace during the collective contract are guaranteed according to the recommendations and standards of the ILO, as well as the competence given to the Court in resolving conflicts of rights triggered by the non-application of the collective contracts clauses which are assimilated to laws and are a source of law.

Economic and Social Council composition: Law 248/2013 on the organization and functioning of the Economic and Social Council, revised with the direct participation and the agreement of the social partners, establishes the exclusive competence of the Government to appoint representatives of the associative structures of civil society (art. 11 paragraph (2) letter c)).



European Economic and Social Committee

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