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STATE OF DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW IN EUROPE

A shared responsibility for democratic security in Europe

Report by the Secretary General
of the Council of Europe

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

Thorbjørn Jagland
125th Session of the
Committee of Ministers
Brussels, 19 May 2015

2015



STATE OF DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW IN EUROPE

A shared responsibility for
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*Report by the Secretary General
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CONTENTS

FOREWORD	6
EXECUTIVE SUMMARY	9
CHAPTER I – EFFICIENT AND INDEPENDENT JUDICIARY	15
Introduction	17
Legality and legal certainty	18
Judicial independence	20
Legal aid	22
Efficiency	24
Enforcement	26
Lawyer professionalism	28
CHAPTER II – FREEDOM OF EXPRESSION	31
Introduction	33
Safety of journalists and others performing public watchdog functions	34
Protection from arbitrary application of the law	36
Media independence	38
Media pluralism and diversity	40
Protection of freedom of expression on the Internet	42
CHAPTER III – FREEDOM OF ASSEMBLY AND FREEDOM OF ASSOCIATION	47
Introduction	49
Legal guarantees and favourable implementation of the law	50
Proper conduct of authorities during public events	52
Enabling civil society	53
Ensuring legal guarantee for NGO foundation and existence	54
CHAPTER IV – FUNCTIONING OF DEMOCRATIC INSTITUTIONS	57
Introduction	59
Free and fair elections	60
The role of the opposition	62
Separation of powers	64
Vertical distribution of powers	66
Good governance	68
CHAPTER V – INCLUSIVE SOCIETIES AND DEMOCRATIC CITIZENSHIP	73
Introduction	75
Legal protection of social rights	76
Effective social rights enforcement	78
Quality of anti-discrimination measures	80
Integration policies: standards and mechanisms	82
Access to rights for young people	84
Education for democratic citizenship	86

FOREWORD

Thorbjørn Jagland

Secretary General of the Council of Europe

Few things unite political scientists. Almost all agree, however, that democracies rarely go to war with each other.

History teaches that denying people their rights is a recipe for upheaval. Societies which empower citizens, safeguard freedoms and keep proper checks on power are much more likely to enjoy lasting peace.

This is why I talk about the need for democratic security – and it is underlined by the two biggest threats facing Europe today.

One is the surge in extremist violence. The recent terrorist shootings in Paris and Copenhagen were devastating but they were not the first. An atmosphere of hate and intolerance – of “us versus them” – now simmers within many of our communities. Xenophobia, populism and chauvinism are on the march and governments need to act.

This means tough new sanctions for individuals who wish to cause harm. So the Council of Europe is developing the first international treaty to help states prosecute foreign terrorist fighters. Alone, however, new laws will not be enough. In the fight against radicalisation and extremism we also need political practices which foster tolerance and spread hope. We must teach our young people to live as enlightened citizens, at ease with diversity. In other words, we need a democratic response.

The crisis in Ukraine is another case in point. Changing borders unilaterally and through force – as happened in Crimea – is never justified: it always leads to crisis and often war. Yet, recognising this should not prevent us from understanding that Ukraine’s problems did not begin or end with this act. Widespread corruption, a lack of independent institutions and the mismanagement of power weakened the country too.

Kyiv sees this and has, rightly, acknowledged that a new political settlement must underpin lasting stability. A revised constitution will be needed to decentralise power, reform the judiciary and safeguard human rights. The Council of Europe will spare no effort in supporting this process: what happens next in Ukraine will have consequences well beyond its borders and across Europe. Stable nations need good neighbours. It is in the interest of all states to give these reforms their full support.

Above all, this idea – of the need for successful, democratic neighbours – lies at the heart of my second report. In Europe we are only ever as secure as the states which surround us. Democratic security is a responsibility which all nations share.

This report therefore assesses the degree to which Council of Europe members are delivering democratic security, broken down into its five pillars: efficient and independent judiciary; free media; vibrant, influential civil society; legitimate democratic institutions; and inclusive societies. The picture varies from country to country but, taking Europe as a whole, the gaps are significant. Within each pillar key shortcomings have been identified, along with actions to resolve them. I believe that two priority areas for the Council of Europe’s work have emerged.

■ The first is widespread weaknesses within our judiciaries. This is now apparent in over a third of member states. In many cases only poor safeguards against corruption are in place and public trust in the system is weak. We must address this without delay. Honest and decent courts are the bedrock of any healthy democracy. Without them executives cannot be restrained, faith in state authorities plummets, tension ensues and stability cannot be guaranteed.

■ Second are the worsening conditions for free media. Our findings show that this problem is bigger, deeper and geographically wider than was previously understood. In many places the safety of journalists is deteriorating, with disproportionate tactics employed to suppress dissent. Even where the media landscape tends to be more open, overconcentration of ownership and arrangements which give incumbent politicians an unfair advantage are serious issues to contend with. In more and more places we see the media struggling to hold power to account.

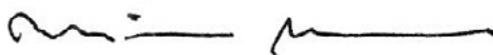
■ On both these fronts I am determined to see the Council of Europe redouble its efforts. This will include stepping up the training of judges and legal professionals in appropriate conduct, and expediting a pan-European action plan – only the second ever of its kind – to bring all member states together and put independent judiciaries at the forefront of our work. We will also develop a three-year programme to improve protection provided to journalists, helping ensure that their safety receives the attention it deserves. Protecting the freedom of the media will be given a new, priority status in all of our co-operation programmes with our members.

■ For these endeavours to work, however, they must be driven by real political will. I call on Europe's leaders to now take the lead: addressing their specific challenges while working together to advance democratic security across the continent.

■ We already have the laws and practices needed to guide us: they are embodied in the European Convention on Human Rights and expressed through the decisions of our Court. Europe's leaders will do their people a great service if they now recommit to both.

■ Any states deliberately flouting their obligations under the Convention must stop. The same applies to mainstream political parties who publically denounce international human rights protections for their own partisan gain, giving succour to populists who do the same. Instead, we must seize the opportunity to head off new and dangerous threats by uniting behind the values and co-operation that have long been Europe's great strength.

■ In all this the Council of Europe will continue to be a faithful and active partner. Let us work together to guarantee stability across our continent, grounded in liberty and law.



Thorbjørn Jagland

Secretary General of the Council of Europe

EXECUTIVE SUMMARY

EFFICIENT AND INDEPENDENT JUDICIARY

■ Judiciaries are the cornerstone of any system of checks and balances. Yet our findings show that over a third of our member states are not guaranteeing sufficient standards of impartiality and independence. Given the importance of independent and impartial judiciaries as a prerequisite for virtually all elements of democratic security, these shortcomings have a multiplying effect and are therefore a matter of great concern.

■ In reality, the situation may be even more problematic. Given the data currently available, comparative assessments such as this one must measure judiciaries against purely legal and institutional criteria. However, other factors such as public perception, political culture and safeguards against corruption have a clear impact on the ability of courts and judges to command legitimacy and do their job. Until this information is available it is difficult to understand the full scale and nature of the problem. Widespread weaknesses are evident and an incomplete picture is limiting our ability to respond.

Proposed actions and recommendations

Europe-wide

- ▶ The Secretary General will request that the Consultative Council of European Judges and the Consultative Council of European Prosecutors urgently draft a comprehensive review of the main challenges for judicial impartiality and independence in member states.
- ▶ The Secretary General will contact – by written procedure – all 47 member states in order to take stock of action taken to improve the independence, efficiency and responsibilities of judges, as set out in the appendix to the Recommendation CM/Rec(2010)12 of the Committee of Ministers.
- ▶ A thematic Council of Europe action plan on judicial independence and impartiality will thereafter be devised and – upon its adoption by the Committee of Ministers – expeditiously implemented.

Regional

- ▶ Regional programs to increase the independence, efficiency and professionalism of judicial systems in member states will be developed, strengthened and/or prolonged, such as the current joint Council of Europe–EU program on enhancing judicial reform in Eastern partnership countries (2013-15).

National

The Council of Europe's bilateral work with member states, including through action plans, will focus on:

- ▶ providing guidance and expertise to support independent and efficient judiciaries;
- ▶ assessing the training needs of legal professionals with regard to independence, efficiency, transparency and quality;
- ▶ training on relevant legislation and practice for judges and prosecutors, representatives of the ministry of justice, judicial-legal councils or other similar bodies and the public prosecutor's office;
- ▶ implementing lessons and standards contained in a new Council of Europe handbook on the ethical conduct of judges.

FREEDOM OF EXPRESSION

Despite gaps in systematic and comparable data, it is clear that the threats to freedom of expression are greater, deeper and geographically more widespread than has been previously understood.

Over a third of member states are witnessing a deterioration in the safety of journalists and others performing public watchdog functions. The misuse of anti-terror and defamation laws resulting in restrictions to freedom of expression has been observed, as well as disproportionate punishments handed out to journalists, including long prison sentences. A number of governments are now imposing or considering new powers to interfere with online content or to restrict access to it for reasons of national security, but without a clear assessment of the expected impact on freedom of expression.

Available data indicate that satisfactory levels of media independence are only achieved in a minority of states. Of the 29 for which data exists, media pluralism and diversity of content is unsatisfactory and deteriorating in a third. Even in countries where the media landscape is generally pluralistic, there are problems of concentration of ownership and a lack of transparency; insufficient funding for public broadcasting; interference with editorial independence by media owners and politicians; and arrangements which unduly favour incumbent politicians.

Proposed actions and recommendations

Europe-wide

- ▶ Drawing on existing initiatives – notably the work of the Commissioner for Human Rights, PACE, DG1 and the safety of journalists platform – the Council of Europe will develop a three-year Europe-wide programme to support national mechanisms to protect journalists, such as ombudsman institutions, press commissioners and non-governmental organisations. The goal of the programme will be to strengthen the capacities of such mechanisms, to promote networking and exchanges of experience in the area of safety of journalists and to raise the visibility of the issue in the member states.
- ▶ Accurate and up-to-date data on media ownership is an essential component of media pluralism and a safeguard against corruption. All member states should ensure they collect and make public sufficient information to identify the financial beneficiaries and ultimate owners of any media licensed to operate within their borders.
- ▶ Member states should implement effective regulation and monitor media concentration in order to encourage pluralism and independence. The Council of Europe will provide expertise on national legal and regulatory frameworks based on the case law of the Court (Article 10 ECHR) and Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content.
- ▶ The Council of Europe will publish a review of states' practices with regard to blocking, filtering and removing Internet content, identifying key trends, best practices and areas in need of action. Based on the case law of the Court and standards developed by the Committee of Ministers, the Council of Europe will offer assistance to member states to uphold freedom of expression online while guaranteeing the safety of citizens.
- ▶ The Council of Europe will improve its capacity to collect and process media-related information through existing activities and co-operation programmes.

National

The Council of Europe's bilateral work with member states, including through action plans, will now make the promotion of free media and freedom of expression a priority, focusing on:

- ▶ practical steps to improve the safety of journalists and to raise the visibility of the issue in the member states;
- ▶ actions to address impunity for those responsible of crimes against journalists;
- ▶ co-operation with member states in preparing, assessing, reviewing and bringing in line with the European Convention on Human Rights any laws which place restrictions on freedom of expression. This includes legislation relating to defamation, hate speech and blasphemy, as well as laws aimed at protecting public order, morals or national security. They should duly take into account the requirements of Article 10 of the ECHR and the case-law of the Court. In particular, all laws limiting freedom of expression must respond to a pressing social need, be clearly and narrowly defined and be proportionate in scope and sanctions. Special attention will be given to the drafting and application of anti-terror laws, as well as legislation regulating access to official documents;

- ▶ implementing Council of Europe standards on the independence of media regulatory authorities, the remit of public service broadcasters and media concentration;
- ▶ ensuring that legislation governing the use of the Internet adequately reflects state obligations under the European Convention on Human Rights and the case law of the European Court of Human Rights.

FREEDOM OF ASSEMBLY AND FREEDOM OF ASSOCIATION

There is a lack of systematic information on the state of freedom of assembly and freedom of association across member states. However, it would appear that most member states have adopted legislation complying with Council of Europe standards to guarantee these rights.

Despite having appropriate legislation on the freedom of assembly, some states impose undue restrictions in practice. Moreover, in some instances, excessive force has been used to disperse demonstrations and to arrest demonstrators.

With regard to the freedom of association, there have been recent examples of legislative changes or proposals undermining or threatening the normal functioning and active engagement of non-governmental organisations. In a number of states, the formal mechanisms by which civil society groups are consulted are superficial and ineffective. In the worst cases, governments have attempted to control legitimate citizen initiatives.

Proposed actions and recommendations

Europe-wide

- ▶ The Council of Europe should prepare new guidelines to ensure meaningful civil participation in political decision making, based on best practice and shared standards.
- ▶ Building on the work begun by the Committee of Ministers – following the thematic debate on the “role and functioning of NGOs in the Council of Europe” – our own practices should be updated to ensure a greater voice for civil society within the Organisation through regular and formal opportunities to engage with the Committee of Ministers. This should also help to provide a clearer picture of the state of civil society, freedom of assembly and freedom of association across member states in order to identify appropriate policy responses.
- ▶ In consultation with the INGO Conference, the Secretary General will revise the guidelines on the participatory status for INGOs within the Council of Europe and propose any necessary amendments to the rules.

National

The Council of Europe’s bilateral work with member states, including through action plans, will aim to:

- ▶ align legislation, regulations and practice relating to peaceful assemblies and public events with the Council of Europe standards and requirements as set out in Article 11 of the ECHR and the case law of the Court;
- ▶ ensure active civil participation in decision-making processes, with formal safeguards in place in line with Council of Europe standards;
- ▶ ensure that NGOs enjoy clear and consistent legal status allowing them to carry out their democratic functions.

FUNCTIONING OF DEMOCRATIC INSTITUTIONS

The majority of Council of Europe member states conducts elections in line with international standards. However, in a number of cases we have witnessed restrictive media environments, voter intimidation and limits on the freedoms of expression, assembly and association. In some states we have also noted a lack of effective opposition in the parliament, with opposition parties being either deliberately excluded or engaged in a prolonged boycott.

Even in states where the electoral administration proves to be professional and there is a high level of trust in the integrity of the electoral process, overall turnout in elections is decreasing. This is particularly relevant for certain categories of voters, such as women, national minorities and young people. More generally, a lack of clear rules has led to widespread concerns as to the arrangements and practices which unfairly favour incumbent politicians.

Proposed actions and recommendations

Europe-wide

- ▶ In order to level the playing field between candidates and prevent the misuse of administrative resources by incumbents, the Council of Europe should provide common guidelines on media coverage and the financing of election campaigns. These will allow for greater scrutiny by civil society and raise awareness of the problem among all electoral stakeholders.

National

The Council of Europe's bilateral work with member states, including through action plans, will aim to:

- ▶ review existing regulations and practice with regard to financing and running election campaigns, as well as the rules governing fair and impartial media coverage;
- ▶ improve the regulatory framework for election observation and enhance the capacity for the monitoring of domestic elections;
- ▶ introduce measures to encourage the participation of women, minorities and young people in the electoral process.

INCLUSIVE SOCIETIES AND DEMOCRATIC CITIZENSHIP

Against the backdrop of prolonged austerity and in the climate of rising populism and intolerance, all states need to intensify their efforts to prevent divisions from forming or deepening in our societies. The conclusions and recommendations contained in the report "Living Together – Combining diversity and freedom in the 21st-century Europe" (May 2011) are highly relevant for our joint efforts in building inclusive societies.

Given the complexity of these issues, there is no "one-size-fits-all" solution. However, there are three fronts on which sustained action will enhance the resilience of all member states: effective protection against discrimination, the promotion of diversity in education and inclusive policies which will uphold social rights.

Less than half the member states have sufficient frameworks and effective policies to combat discrimination. In addition, some lack non-discrimination legislation of any kind in the field of civil and administrative law. In some member states, minority groups are denied full access to public services. This problem is particularly acute within the Roma community. While the right policies are often in place, a common problem is the lack of support or resources for their proper implementation.

Across many member states the skills required for democratic citizenship are not sufficiently reflected in formal curricula and there is a need to improve training among the teaching profession in this regard.

The Council of Europe Action Plan to combat terrorism contains a range of measures covering education and youth activities precisely because in the long term these will be our most effective tools against radicalisation.

The picture with regard to social rights is mixed across member states, but no state can afford to be complacent, particularly as vulnerable groups continue to shoulder the burden of austerity packages. Not all states have yet ratified the revised text of the European Social Charter; 33 member states have ratified the revised text of the European Social Charter and 15 member states have accepted the "collective complaints procedure" of the Charter.

Proposed actions and recommendations

Europe-wide

- ▶ Implement the Council of Europe Action Plan to combat terrorism and radicalisation leading to terrorism (2015-2017).
- ▶ Implement the Council of Europe agenda on Roma inclusion (2015-2019), with its three priority lines of action: tackling anti-Roma discrimination, introducing innovative models for inclusive policies for the most vulnerable and introduce best-practices for local-level solutions for the social inclusion of Roma.
- ▶ Reinforce the follow up of the decisions and conclusions of the European Committee of Social Rights, as provided in the 2014 "Turin Process" Action Plan.
- ▶ Develop, within the Council of Europe, modalities for the systematic assessment of how national youth policies facilitate young people's access to rights.

National

The Council of Europe's bilateral work with member states, including through action plans, will aim to:

- ▶ bring anti-discrimination and integration measures and policies in line with relevant Council of Europe standards, notably through the establishment of national specialised bodies to combat racism and discrimination and the development of comprehensive integration policies;
- ▶ review and update curricula in line with provisions of the Charter for Education for Democratic Citizenship and Human Rights and support initiatives for the acquisition of competences for democratic culture by all;
- ▶ ensure implementation of the European Social Charter and a better follow-up of the conclusions and decisions of the European Committee of Social Rights;
- ▶ facilitate the ratification of Protocol No. 12 to the European Convention on Human Rights and the revised Charter.

COMMITMENT TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS

None of the recommendations above will be effective without a clear and unequivocal commitment to and respect for the European Convention on Human Rights and the Strasbourg Court.

The Convention remains the only Europe-wide legal instrument setting commonly agreed standards and offering objective judicial review of compliance in all key areas of democratic security. It provides guidance for action at national level and subsidiary remedial action at European level.

At a time of ever lower levels of confidence between countries and the re-emergence of dividing lines across the continent, the importance of the Convention and the Court is greater than ever before. They provide the only universally applicable and commonly agreed framework for dialogue and co-operation on human rights, fundamental freedoms and democracy at a pan-European level.

The Convention system's legal nature is a deterrent against emotional, politicised or populist actions and reactions.

For the system to work, it requires commitment from all parties. This commitment must be reflected not only in language, attitude and action but, first and foremost, in the execution of the decisions of the European Court of Human Rights.

CHAPTER 1

EFFICIENT AND INDEPENDENT JUDICIARY

INTRODUCTION

Chapter 1 – Efficient and independent judiciary

The rule of law depends on an independent and efficient legal system. The six key parameters for such a system are: legality and legal certainty, judicial independence, legal aid, efficiency, enforcement and lawyer professionalism.

— This chapter sets out the minimum criteria for each, based on Council of Europe standards. Member states have been assessed according to Council of Europe official statistics, commentaries, reports and judgments.

LEGALITY AND LEGAL CERTAINTY

Chapter 1 – Efficient and independent judiciary

Legality and legal certainty are interdependent values which form the bedrock of rule of law.

■ Legality is based on Articles 5 and 7 of the European Convention on Human Rights (ECHR): the rights to liberty and security and no punishment without law.

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

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

MEASUREMENT CRITERIA

Legality

Legal criteria

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

Institutional criteria

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

Legal certainty

Legal criteria

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

Institutional criteria

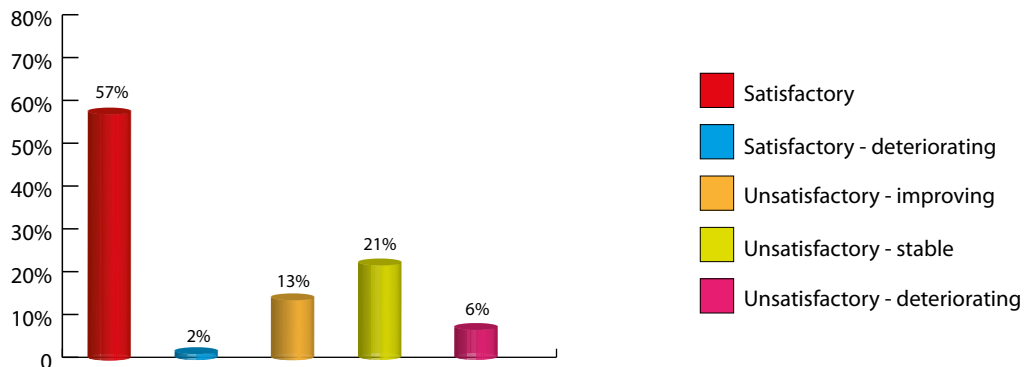
- ▶ Laws are publicly and easily accessible to ordinary individuals.
- ▶ Like cases are treated alike.
- ▶ Final judgments by domestic courts are not called into question.
- ▶ Court case law is generally consistent and coherent.
- ▶ Legislative evaluation is practiced on a regular basis.

FINDINGS

Legalty and legal certainty are ensured legally and institutionally in a satisfactory way in a majority of member states. Taking into account a small group of states improving via recent significant reforms, a slightly positive overall trend can be observed. However, in one in four member states neither of these values is applied to a satisfactory manner and no trend towards significant improvements can be detected. Further deterioration – mostly due to a lack of regulation or rapidly changing legislation – is also apparent in a small minority of states, which also stand out as the source of an overload of applications to the European Court of Human Rights.

The biggest outstanding problems related to legality and legal certainty concern the weak enforcement of Court decisions, legislation leaving (or deliberately allowing) sizeable scope for executive discretion, inconsistent or contradictory legal regulations and a lack of predictable jurisprudence.

LEGALITY & LEGAL CERTAINTY



JUDICIAL INDEPENDENCE

Chapter 1 – Efficient and independent judiciary

The independence and impartiality of the judiciary and judges are fundamental to the rule of law; they are necessary for the separation of powers and for confidence in the justice system as a whole. This requirement for member states is enshrined in Article 6 of the ECHR. Judicial independence must be guaranteed at both institutional and individual level.

Institutional independence

■ Institutional independence plays a fundamental role for judicial systems, in particular with regard to other branches of government (“external” institutional independence) and with regard to other organs within the institution, such as higher courts (“internal” institutional independence). In addition, judicial decisions taken by a state power other than the judiciary, require an independent and impartial authority drawn in substantial part from the judiciary, authorised to make recommendations or express opinions which the relevant appointing authority follows in practice.

Individual independence

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

■ The Consultative Council of European Judges (CCJE) has highlighted that, as public trust in the judiciary is determined mainly by the behaviour of judges, it is “important to regulate this behaviour in a clear and transparent way.” To ensure ethical behaviour, principles of professional conduct should be established and laid down in judicial codes of ethics.

MEASUREMENT CRITERIA

Institutional independence

Legal criteria

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

Institutional criteria

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

Individual independence

Legal criteria

- ▶ The length of judges’ terms of office is secured by law.
- ▶ Judges’ remuneration is set by law.

Institutional criteria

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

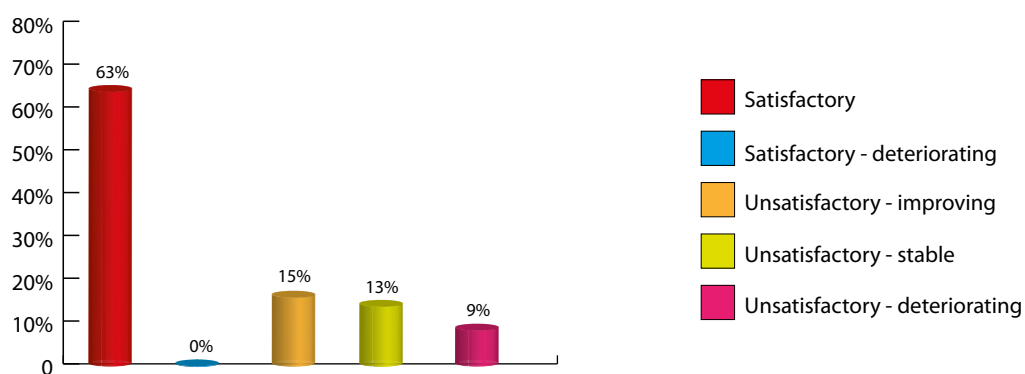
- ▶ Where law prescribes that another state power makes such decisions, an independent and impartial authority, drawn in large part from the judiciary, makes recommendations, which are generally followed.
- ▶ Judges are adequately remunerated.
- ▶ Superior courts do not give instructions to lower courts.
- ▶ Judges are free to decide cases without interference.
- ▶ Decisions on the selection and promotion of judges are made on merits, transparently, based on objective criteria and are subject to review.
- ▶ Ethical principles of professional conduct are established for judges.
- ▶ Removal offences are precisely defined.
- ▶ Disciplinary proceedings respect the principle of judicial independence and are conducted under the responsibility of a self-governing body.

FINDINGS

— The independence of the judiciary and judges is not being guaranteed in over a third of member states. Within this group, it is important to note that some states are making important improvements, for example regarding systemic changes to appointment procedures for judges, greater transparency in these procedures and judicial professionalism.¹ Yet, in others, the situation is clearly deteriorating, including as a result of the judiciary being manipulated for political ends.²

— Given the importance of independent and impartial judiciaries as a prerequisite for virtually all elements of democratic security, these shortcomings have a multiplying effect and are therefore a matter of great concern. Among the most concerning shortcomings are: lack of independence and autonomy of judicial councils; varying degrees of executive pressure on the judiciary; opaque recruitment, nomination and promotion criteria for judges; and corruption.³

JUDICIAL INDEPENDENCE



LEGAL AID

Chapter 1 – Efficient and independent judiciary

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

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

MEASUREMENT CRITERIA

Legal criteria

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

Institutional criteria

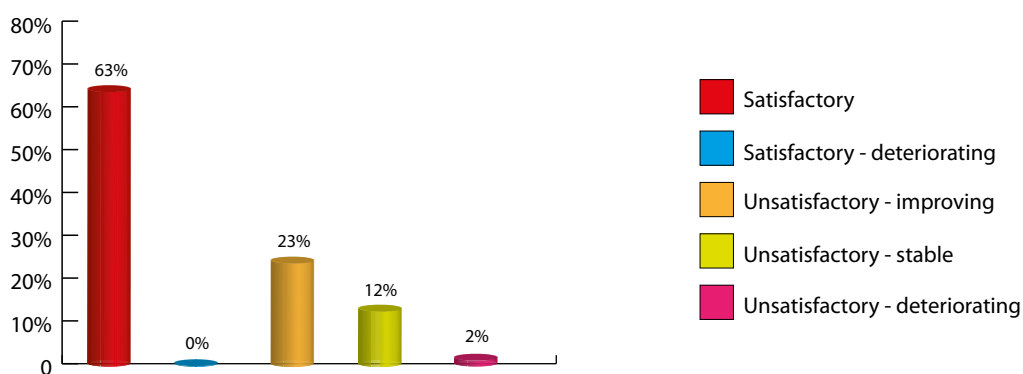
- ▶ The state offers an appropriate system of legal aid to provide effective access to justice to everyone in its jurisdiction.
- ▶ Extra-judicial legal-advice services are provided.
- ▶ Where appropriate, procedures are simplified for persons to conduct cases themselves.
- ▶ An effective system is in place to reduce or waive court and other fees if they prevent access to justice.
- ▶ The legal aid system co-ordinates and includes organisations that wish to contribute to it.
- ▶ Legal aid is accessible, easy and fast for those who need it.
- ▶ Clear information is available on what legal aid and assistance is available and appropriate and on how to benefit from this right.
- ▶ Public expenditure on legal aid is adequate, diversified and efficiently used.

FINDINGS

— The provision of legal aid, both in its legal and institutional dimensions, is ensured satisfactorily in a majority of Council of Europe member states. There is also a positive trend in most of the countries where improvements are still needed. In particular, reforms in these countries have focused on more efficient legal aid laws, improvements in access to justice, the establishment of functioning legal aid agencies and on the increase of budgets. In a comparably small group of countries, a stable and unsatisfactory situation obtains. Some countries do not provide any effective legal aid whatsoever.

— Despite an overall positive picture, there are a number of key impediments to the provision of legal aid which require immediate attention. In a number of member states, legal provisions and systems for providing legal aid are either still pending implementation or in need of major revisions; in some countries legal aid is discriminatory, with effective access denied to ethnic minorities or disabled people. In some cases, legal aid structures are underfunded or cumbersome bureaucratic procedures deter citizens from effective access to aid.⁴ In general, public awareness of the availability of legal aid needs to be improved.

LEGAL AID



EFFICIENCY

Chapter 1 – Efficient and independent judiciary

Efficiency of justice systems is vital for timely access to justice. States must “organise their legal systems so as to allow the courts to comply with the requirements of Article 6 § 1 including that of trial within a ‘reasonable time’”⁵ The European Court of Human Rights has regularly affirmed that “the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the complexity of the case, the conduct of the parties and of the authorities, and the importance of what is at stake for the applicant in the litigation”⁶ States are under the obligation to allocate sufficient resources to their justice systems to ensure that unacceptable delays do not occur.

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

MEASUREMENT CRITERIA

Legal criteria

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

Institutional criteria

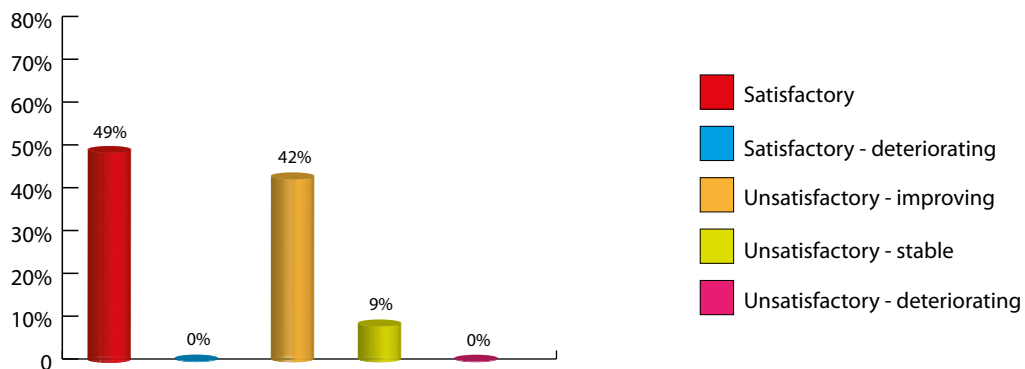
- ▶ State allocates adequate resources, facilities and equipment to the courts to enable them to function efficiently.
- ▶ Objectives of agencies are co-ordinated in the broader framework of ensuring accelerated justice.
- ▶ Regular monitoring activities are implemented to evaluate efficiency.
- ▶ Discretionary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

FINDINGS

— The overall efficiency of justice systems is still insufficient in just over half of the member states. However, in most of these countries improvements have been observed. For example, most member states have managed to speed up the processing of cases and significantly reduce the number of cases pending, while many have also developed the legal and institutional basis for improved efficiency via backlog-reduction plans or legislation on alternative dispute-settlement procedures. A small group of member states with stable and unsatisfactory levels of efficiency exists, however, where court proceedings are excessively long, with significant numbers of cases pending, often exacerbated by an underfunded judicial system.

— Long case timelines lead to an ever-greater number of applications to the European Court of Human Rights from some countries, due notably to the lack of resources, insufficient investment in professional education of judges and court clerks and outdated electronic and statistical court management.

EFFICIENCY



ENFORCEMENT

Chapter 1 – Efficient and independent judiciary

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

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

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

MEASUREMENT CRITERIA

Legal criteria

- ▶ Enforcement is carried out within a “clear legal framework”, detailed enough to provide legal certainty.
- ▶ The law provides for a right for parties to request suspension of the enforcement process in order to protect their rights and interests and, where appropriate, a right of review of judicial and non-judicial decisions during the enforcement process.

Institutional criteria

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

- ▶ Potential parties are provided with information on the efficiency of enforcement services and procedures, with performance indicators, specified targets and likely time frames.
- ▶ An appropriate procedure, such as injunctions or fines, exists to seek execution of a decision in the event of non-implementation.
- ▶ Officials and other persons responsible for enforcement are properly trained and enforcement procedures are regularly monitored.

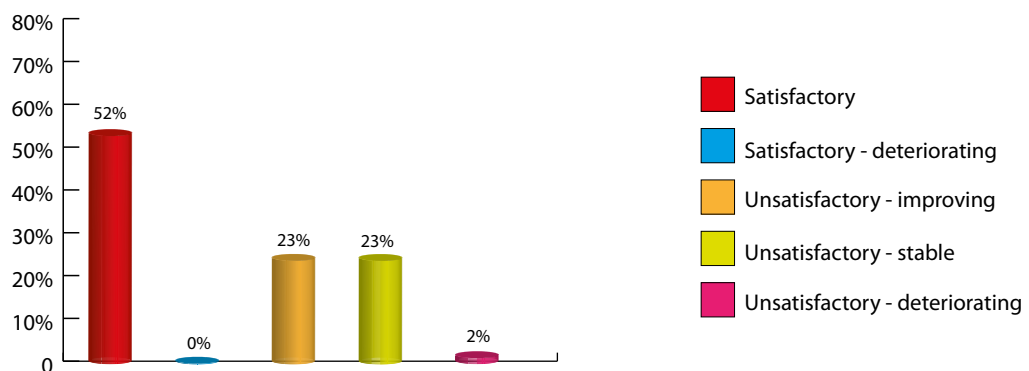
FINDINGS

■ The enforcement of judicial decisions is unsatisfactory in just under half of the member states of the Council of Europe. A positive trend to improvement can be observed in about half of this group, where, for example, funding has been increased for the introduction of bailiffs and other measures to ensure effective enforcement have been taken. However, a significant number of countries have made no progress in ensuring enforcement, and a very small number exhibit systemic problems with high non-enforcement rates nearly rendering jurisdiction inoperative.⁷

■ Numerous problems require attention across many member states: the inefficiency of bailiffs, the lack of necessary funds for training enforcement officers or ensuring an equal number of them throughout the territory of a member state, the lack of effective remedy systems for cases of non-execution and non-enforcement in special fields of jurisdiction (for example, restitution of property).

■ Regarding judgements of the European Court of Human Rights in particular, recent efforts to reduce the number of non-executed Court judgments have been successful. However, a significant number are still not being executed. In a few cases, domestic agendas and electoral rhetoric have politicised Court judgments, weakening the effort to jointly uphold commonly agreed standards for human rights across the continent.

ENFORCEMENT



LAWYER PROFESSIONALISM

Chapter 1 – Efficient and independent judiciary

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

MEASUREMENT CRITERIA

Institutional criteria

- ▶ Lawyers can discharge their duties without improper interference.
- ▶ Entrants to the legal profession have appropriate education and training.

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

FINDINGS

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

PROPOSED ACTIONS AND RECOMMENDATIONS

Chapter 1 – Efficient and independent judiciary

EUROPE-WIDE

- ▶ The Secretary General will request that the Consultative Council of European Judges and the Consultative Council of European Prosecutors urgently draft a comprehensive review of the main challenges for judicial impartiality and independence in member states.
- ▶ The Secretary General will contact – by written procedure – all 47 member states in order to take stock of action taken to improve the independence, efficiency and responsibilities of judges, as set out in the appendix to the Recommendation CM/Rec(2010)12 of the Committee of Ministers.
- ▶ A thematic Council of Europe action plan on judicial independence and impartiality will thereafter be devised and – upon its adoption by the Committee of Ministers – expeditiously implemented.

REGIONAL

- ▶ Regional programmes to increase the independence, efficiency and professionalism of judicial systems in member states will be developed, strengthened and/or prolonged, such as the current joint Council of Europe–EU programme on enhancing judicial reform in Eastern partnership countries (2013-15).

NATIONAL

The Council of Europe's bilateral work with member states, including through action plans, will focus on:

- ▶ providing guidance and expertise to support independent and efficient judiciaries;
- ▶ assessing the training needs of legal professionals with regard to independence, efficiency, transparency and quality;
- ▶ training on relevant legislation and practice for judges and prosecutors, representatives of the ministry of justice, judicial-legal councils or other similar bodies and the public prosecutor's office;
- ▶ implementing lessons and standards contained in a new Council of Europe handbook on the ethical conduct of judges.

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CHAPTER 2

FREEDOM OF EXPRESSION

INTRODUCTION

Chapter 2 – Freedom of expression

The right to freedom of expression enshrined in Article 10 of the ECHR is not only a fundamental right on its own, but is also necessary for the realisation of other human rights, including the right to freedom of thought, conscience and religion, the right to freedom of assembly and association, the right to vote and the right to education. It is a central means by which power is held to account and a necessary condition for tolerance, cultural diversity and living together. In these ways freedom of expression is essential for democratic security.

■ The European Court of Human Rights has held that states should create an environment which allows for full participation in open debates, enabling everyone to express their opinions and ideas without fear, even if these are contrary to those defended by the authorities or by an important share of public opinion, or even if they shock or offend.

■ According to the jurisprudence of the Court and other Council of Europe standards, an enabling environment for freedom of expression is understood to contain a number of essential features which collectively ensure the conditions for the protection and promotion of freedom of expression and public debate. These are (1) safety of journalists and others performing public watchdog functions; (2) protection from arbitrary application of the law; (3) media independence; (4) media pluralism and diversity, and (5) protection of freedom of expression on the Internet. Where assessments of these parameters have been limited by a lack of information, this has been clearly indicated. Key findings are provided for the states for which data is available.

SAFETY OF JOURNALISTS AND OTHERS PERFORMING PUBLIC WATCHDOG FUNCTIONS

Chapter 2 – Freedom of expression

A free and vibrant media depends on journalists¹ being able to scrutinise power free from interference or intimidation and without fear of violence, threats, arbitrary detention and imprisonment.²

Primarily, the state has a duty to protect journalists' right to life.³ Criminal-law systems must contain legislation to deter offences against journalists and law-enforcement measures to prevent, suppress and punish them. The state also has a duty to carry out effective investigations into alleged unlawful killings of journalists, to prevent and investigate torture and ill-treatment of journalists and to provide for an effective domestic remedy. The instigation of criminal or civil law proceedings against journalists or media must meet the requirements of Article 10 of the ECHR and must not be based on political motives.⁴

Protection of journalists' sources and their right to gather news are essential for the exercise of their profession. The right to access information is of particular importance and obstacles or restrictions to this right must be prescribed by law and be narrowly restricted to what is necessary in a democratic society. Finally, the disclosure of information regarding threats or harm to the public interest contributes to transparency, democratic accountability and the safety and well-being of citizens. Individuals who report on or disclose such information (whistle-blowers) must be protected in law and in practice.⁵

MEASUREMENT CRITERIA

- ▶ There is no violence against journalists or others who perform a public watchdog function.
- ▶ An effective criminal-law system is in place to protect them against threats and attacks.
- ▶ There are independent, prompt and effective investigations of alleged unlawful killings, torture or ill-treatment of journalists committed either by state or non-state actors.
- ▶ Prosecutors and courts deal adequately and in a timely manner with cases of threats or attacks on journalists.
- ▶ Journalists are not imprisoned and media outlets are not closed because of critical comment. There are no politically motivated prosecutions.
- ▶ Journalists are not subjected to verbal intimidation led or condoned by authorities, or negative verbal rhetoric.
- ▶ The confidentiality of journalists' sources is protected in law and in practice subject to clear and narrowly defined exceptions. Journalists are not subjected to surveillance by the state.
- ▶ Access to information and documents held by public authorities is guaranteed in law and in practice.

- ▶ Journalists are not subjected to undue requirements by the state before they can work. Foreign journalists are not refused entry or work visas because of their potentially critical reports.
- ▶ A normative, institutional and judicial framework is in place to protect whistle-blowers.

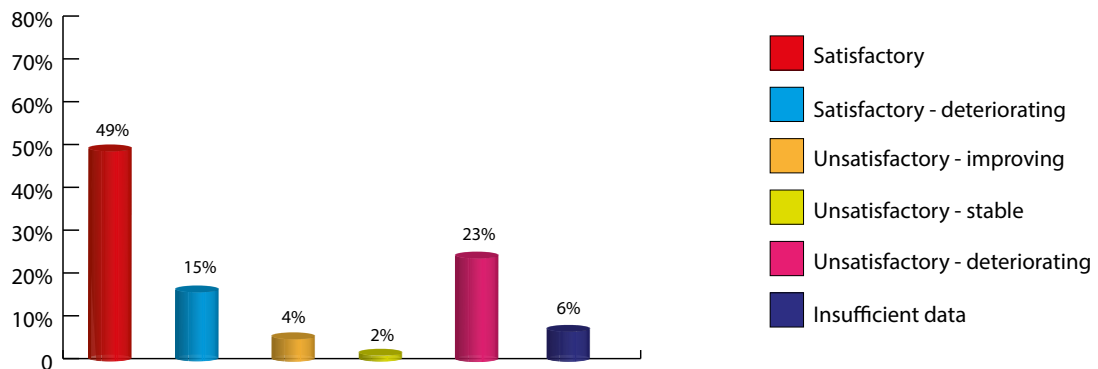
Among the countries with environments which satisfy our criteria, this deterioration can in part be explained by a lack of proper implementation of existing legal frameworks, increased surveillance on journalists and mounting pressure to reveal confidential sources.

Among the member states with an unsatisfactory rating, the negative trend is primarily due to violence against journalists,⁶ lax or non-existent prosecution of perpetrators and widespread politically motivated imprisonments.⁷

FINDINGS

The safety of journalists from violence and threats, an enabling legal environment for their work and access to information held by public authorities are not satisfactorily guaranteed in almost half of member states. Even where the situation is satisfactory, a significant number are regressing and over a third of states are experiencing a deterioration in protection for journalists.

SAFETY OF JOURNALISTS AND OTHERS



PROTECTION FROM ARBITRARY APPLICATION OF THE LAW

Chapter 2 – Freedom of expression

Laws, judicial proceedings and other state measures which restrict the right to freedom of expression must meet the standards of Article 10, paragraph 2, of the ECHR. They cannot be justified if their purpose is to prevent free and open public debates, legitimate criticism of public officials or the exposure of official wrongdoing and corruption. An arbitrary application of the law has a damaging effect on the exercise of the right to impart information and ideas and leads to self-censorship.

Defamation laws should be applied with restraint, both offline and online, and should have adequate safeguards for freedom of expression. The Court has consistently applied a high threshold of tolerance for criticism where politicians, members of the government or heads of state are concerned. Furthermore, the Parliamentary Assembly and the Commissioner for Human Rights have called for the decriminalisation of defamation.⁸

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

MEASUREMENT CRITERIA

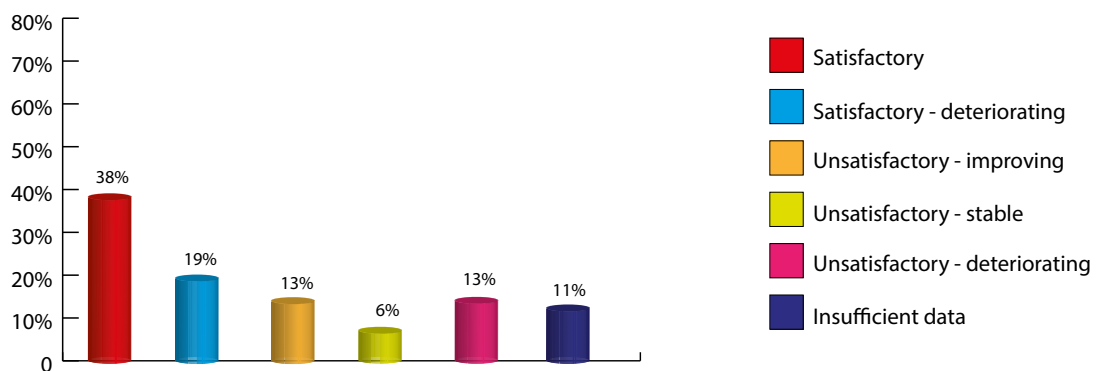
- ▶ Defamation laws allow for legitimate criticism and are not abused to influence the debate on issues of public interest.
- ▶ There are no criminal sanctions in defamation cases except where the rights of others have been seriously impaired.
- ▶ Awards of damages or legal costs in defamation proceedings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

FINDINGS

— The protection of journalists from the arbitrary application of defamation laws, including unjustified criminal sentences and fines, is satisfactorily handled in a majority of member states. Nonetheless, in a significant number there is a negative trend towards the arbitrary application of defamation laws. In some member states with an overall unsatisfying record on freedom of expression, unjustified sentences such as long imprisonment are imposed on journalists.

— Other declining trends in respect of an enabling legal environment for freedom of expression relate to the application of criminal laws and anti-terror laws. In some cases the wording of such laws is considered to be excessively broad and vaguely formulated, which in turn may lend itself to arbitrary action, discriminatory interpretation and unjustified restriction on the right to freedom of expression.

PROTECTION FROM ARBITRARY APPLICATION OF THE LAW



MEDIA INDEPENDENCE

Chapter 2 – Freedom of expression

Under the principle of editorial independence,⁹ the government, regulatory bodies or commercial interests should not influence editorial decisions and the content of the press, broadcast or Internet-based media. Media should not be prevented from covering contentious issues in public debates such as corruption and should not be subjected to overly restricted guidelines or directives from state authorities with regard to news coverage. Media owners should not exercise censorship over or excessively interfere with journalists' stories.

■ The media licensing system should not interfere with the independence of the media and should take into account the specific nature of broadcasters, press and Internet-based media. In the broadcasting sector, regulation must be accessible, clear and precise and it is essential to have an independent regulatory system guaranteed by a legal or other policy framework. Moreover, the law should guarantee the financial independence of the regulator.

■ The state should provide the legal, financial, technical and other means necessary to ensure genuine editorial independence and institutional autonomy of public-service broadcasters in order to remove any risk of political or economic interference. Public-service broadcasters should have an independent and transparent system of governance, including a supervisory or decision-making authority whose autonomy is legally guaranteed.

■ Media self-regulation is important for preserving editorial independence, minimising state interference, promoting qualitative journalism and media accountability. Journalists should develop their own professional codes of ethics, which include a right of reply and correction or voluntary apologies by journalists. Media should also set up their own self-regulatory bodies, such as complaint commissions and ombudspersons. Their decisions should be implemented and recognised legally by courts.

MEASUREMENT CRITERIA

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

FINDINGS

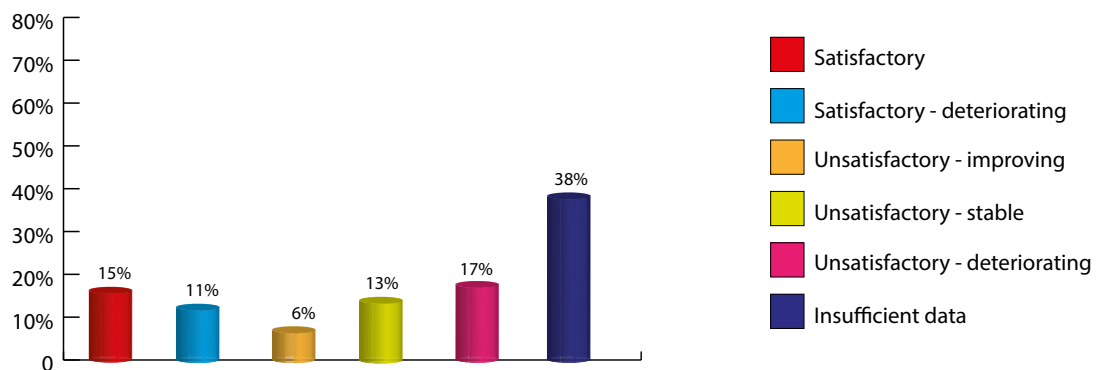
It is difficult to complete the overall picture of media independence across member states because of a lack of data for over a third of them. This in itself is a problem.

For the remaining two thirds only a minority are ensuring media independence in a satisfactory way. Even in these countries, however, problems such as a lack of funding for public broadcasting, interference with editorial independence by media owners and politicians and self-censorship occur frequently.

The majority of member states for which information is available rate as unsatisfactory. Problems include media content being influenced by the commercial or political interests of owners or governments, commercial broadcasters displaying political biases, the politicisation of broadcasting regulatory bodies and government-dominated public broadcasters, and self-censorship by journalists.

In the significant group of countries rated as “unsatisfactory – deteriorating”, independence has been undermined by an increase in high fines and sanctions for media content.¹⁰ In some member states the state controls most media outlets and censors content both offline and online.

MEDIA INDEPENDENCE



MEDIA PLURALISM AND DIVERSITY

Chapter 2 – Freedom of expression

Media pluralism contributes to the development of informed societies where different voices can be heard. A major threat to media freedom today is the tendency for monopolies to form among traditional media across Europe.¹¹

■ The requirements of Article 10 of the ECHR will be fully satisfied only if everyone can form his or her own opinion from diverse sources of information. Different societal groups, including cultural, linguistic, ethnic, religious or other minorities, should have the opportunity to receive and impart information, express themselves and exchange ideas.

■ The state should take measures to safeguard and promote a plural media landscape. This includes regulation to prevent or counteract excessive concentration of media ownership and to ensure that a sufficient variety of media outlets, belonging to a range of different owners, both private and public, is available to the public. Media should not be overly dependent on the state, political parties, big business, or other influential political actors for funding. The state should put in place rules on fair, transparent and non-discriminatory access to the technical infrastructure for distribution. In particular during election campaigns, the state should facilitate the pluralistic expression of opinions through the media.

■ A multiplicity of means of communication is not a sufficient condition for pluralism and diversity of expression. Hence, the state should take measures to ensure that a sufficient variety of information, opinions and programmes disseminated by the media is available to the public. Moreover, transparency of media ownership should also be ensured through information on bodies and persons participating in media structures.

■ Public-service media have a particular remit as they contribute to pluralistic public discussion, democratic participation and social cohesion and integration of all individuals, groups and communities. Public-service broadcasters should have their institutional and financial independence guaranteed by the state and should offer a wide range of programmes and services to all sectors of the public.

MEASUREMENT CRITERIA

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

- ▶ Media provide the public with a diversity of content capable of promoting a critical debate, with the participation of persons belonging to all communities and generations.
- ▶ Media, including public-service media, have fair and equal access to state advertising or subsidies.
- ▶ Political parties and candidates have fair and equal access to the media. Coverage of elections by broadcast media is fair, balanced and impartial.

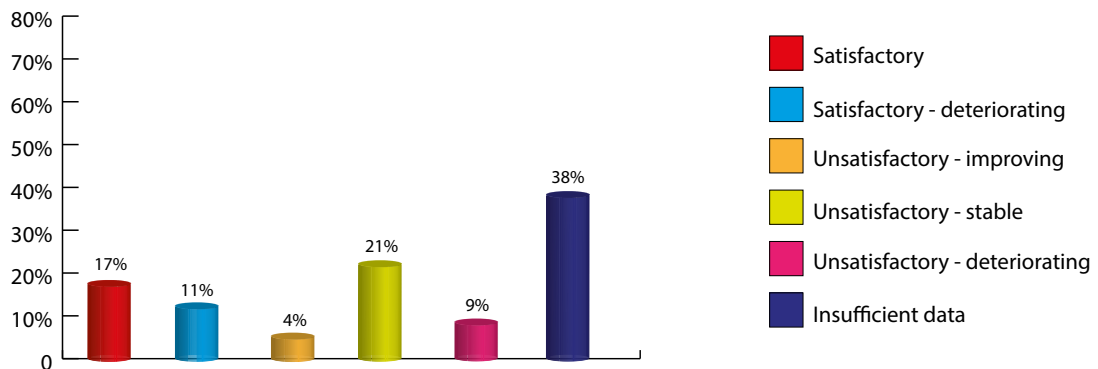
Media concentrations are also threatening independent regional media and thereby limiting citizen participation a crucial element of pluralist democracy.¹²

In countries rated as unsatisfactory, there are often numerous media outlets, but most are politically polarised and rely on financial support from their owners. In some cases, the representation of minority groups in the media continues to be weak. In severe and deteriorating cases, the entire media sector is under tight government control, which in turn limits the availability of diverse media content to the public. Moreover, the media is used by the state as a propaganda tool or as an instrument of incumbent candidates in election campaigns.¹³

FINDINGS

The data is not available for over a third of member states. For the remaining two thirds, media pluralism and diversity of media content are not ensured in a satisfactory manner in the majority and the overall trend is negative. Even where action against concentration of media ownership is on the agenda and in countries where the media landscape is generally pluralistic, an increasing lack of ownership transparency and abuse of state advertising power raise concern.

MEDIA PLURALISM AND DIVERSITY



PROTECTION OF FREEDOM OF EXPRESSION ON THE INTERNET

Chapter 2 – Freedom of expression

The Internet enables individuals to seek, receive and impart information across national borders unlike any other media. The Court has observed that access to the Internet is intrinsic to the right to access information and, as a result, a right to unhindered Internet access should also be recognised. Article 10 of the ECHR applies not only to the content of information, but also to the means of its dissemination, since any restriction imposed on the latter interferes with the right to receive and impart information. The state should take measures to ensure that the Internet is accessible and affordable, secure, reliable and ongoing. Everyone should benefit from the public-service value of the Internet, irrespective of age, gender, ethnic or social origin, including those on a low income, those in rural and geographically remote areas and those with special needs, for example people with disabilities.¹⁴

Restrictions on Internet content must meet the requirements of Article 10 in respect of legitimacy, necessity and proportionality. The state should refrain from applying nationwide general blocking and filtering measures. If such measures are applied, it should be done on the basis of a decision by a judicial or independent authority with due regard to proportionality.

Internet intermediaries who provide access, hosting, search or other services play a key role in the free flow of information and ideas on the Internet. Legal frameworks for intermediaries should recognise this role and contain safeguards for freedom of expression. Intermediaries themselves should establish clear and unambiguous terms of service in line with international human rights norms and principles.

The collection of information about individuals' communication and activities on the Internet and practices of monitoring and surveillance of Internet users not only constitute a violation of Article 8 of the ECHR, but also undermine people's confidence in the Internet and have a negative effect on freedom of expression. Hence, a number of adequate and effective guarantees against abuse must be in place.¹⁵

MEASUREMENT CRITERIA

- ▶ The Internet is available, accessible and affordable to everyone, without discrimination.
- ▶ Restrictions on Internet content are applied only when they are prescribed by law, pursue legitimate aims in accordance with Article 10 of the ECHR and are necessary in a democratic society. The law provides for sufficient safeguards against abuse, including control over the scope of restriction and effective judicial review.
- ▶ Any determination of the scope of a measure to block or filter Internet content is done by a judicial authority or an independent body with due regard to the proportionality of such a measure.
- ▶ The state does not block access to or usage of social media or other Internet platforms during specific events or on a permanent basis.
- ▶ Internet intermediaries do not monitor their users, whether for commercial, political or any other purposes.

- ▶ Internet intermediaries are not held responsible for the information disseminated via the technology they supply, except when they have knowledge of illegal content and activity and do not act expeditiously to remove it.
- ▶ Internet intermediaries do not censor content generated or transmitted by Internet users.
- ▶ There is no surveillance of Internet users' communications and activity on the Internet except when this is strictly in compliance with Article 8 of the ECHR.

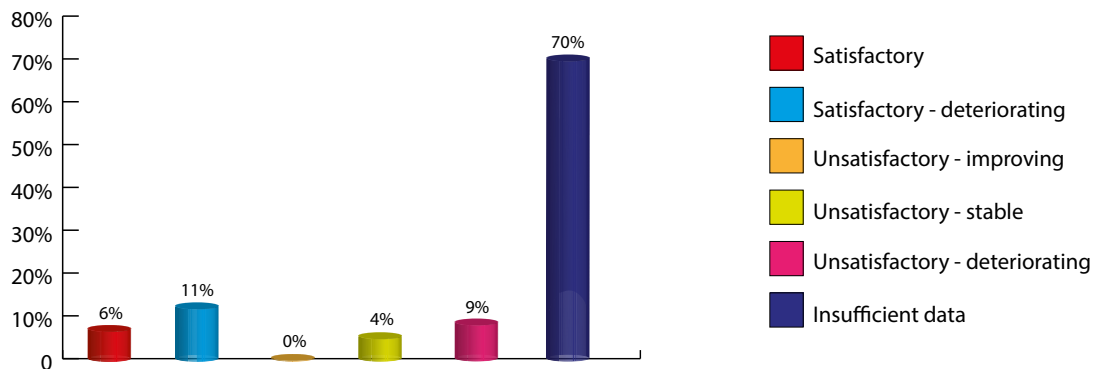
For the 30% of states for which information is available, it would appear that the overall trend is negative, even in countries with a generally satisfactory rating, where an increase in surveillance activities can be observed or pressure is put on intermediaries, undermining the freedom of expression.

In the member states with an "unsatisfactory" rating, governments interfere with online content and frequently block media-related websites. In severe cases, laws on freedom of expression on the Internet have been adopted which do not meet the criteria on the quality of law as defined by the Court.¹⁶

FINDINGS

Data relating to the protection of freedom of expression online is only available for 30% of states. There is therefore an information black hole with regard to an extremely important area of state activity, particularly in light of the current terror threats. It is extremely difficult to judge whether or not states are sufficiently protecting freedom of expression online while taking measures to protect national security.

PROTECTION OF FREEDOM OF EXPRESSION ON THE INTERNET



PROPOSED ACTIONS AND RECOMMENDATIONS

Chapter 2 – Freedom of expression

EUROPE-WIDE

- ▶ Drawing on existing initiatives – notably the work of the Commissioner for Human Rights, PACE, DG1 and the safety of journalists platform – the Council of Europe will develop a three-year Europe-wide programme to support national mechanisms to protect journalists, such as ombudsman institutions, press commissioners and non-governmental organisations. The goal of the programme will be to strengthen the capacities of such mechanisms, to promote networking and exchanges of experience in the area of safety of journalists and to raise the visibility of the issue in the member states.
- ▶ Accurate and up-to-date data on media ownership is an essential component of media pluralism and a safeguard against corruption. All member states should ensure they collect and make public sufficient information to identify the financial beneficiaries and ultimate owners of any media licensed to operate within their borders.
- ▶ Member states should implement effective regulation and monitor media concentration in order to encourage pluralism and independence. The Council of Europe will provide expertise on national legal and regulatory frameworks based on the case law of the ECHR (Article 10) and Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content.
- ▶ The Council of Europe will publish a review of states' practices with regard to blocking, filtering and removing Internet content, identifying key trends, best practices and areas in need of action. Based on the case law of the Court and standards developed by the Committee of Ministers, the Council of Europe will offer assistance to member states to uphold freedom of expression online while guaranteeing the safety of citizens.
- ▶ The Council of Europe will improve its capacity to collect and process media-related information through existing activities and co-operation programmes.

NATIONAL

The Council of Europe's bilateral work with member states, including through action plans, will now make the promotion of free media and freedom of expression a priority, focusing on:

- ▶ practical steps to improve the safety of journalists and to raise the visibility of the issue in the member states;
- ▶ actions to address impunity for those responsible of crimes against journalists;
- ▶ co-operation with member states in preparing, assessing, reviewing and bringing in line with the European Convention on Human Rights any laws which place restrictions on freedom of expression. This includes legislation relating to defamation, hate speech and blasphemy, as well as laws aimed at protecting public order, morals or national security. They should duly take into account the requirements of Article 10 of the ECHR and the case law of the Court. In particular, all laws limiting freedom of expression must respond to a pressing social need, be clearly and narrowly defined and be proportionate in scope and sanctions. Special attention will be given to the drafting and application of anti-terror laws, as well as legislation regulating access to official documents;
- ▶ implementing Council of Europe standards on the independence of media regulatory authorities, the remit of public-service broadcasters and media concentration;
- ▶ ensuring that legislation governing the use of Internet adequately reflects state obligations under the European Convention on Human Rights and the case law of the European Court of Human Rights.

1. All references to journalists in this report are understood to include both journalists and other media actors.
2. Discussion paper presented by the Secretary General following the thematic debate on the “safety of journalists – further steps for the better implementation of human rights standards”; 2 December 2013, SG/Inf(2013)42. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=2135987&Site=CM>.
3. See the explanatory memorandum to Assembly Resolution 2035 (2015) and Recommendation 2062 (2015) on the protection of media freedom in Europe, Doc. 13664, 12 January 2015, and in particular part 2.2 on the death of several journalists in Russia, Ukraine and Turkey between 2012 and 2014. Available at: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21350&lang=en>.
4. Report entitled “The principles drawn from ECHR case-law relating to the protection and safety of journalists and journalism”, by Philip Leach, presented at the Council of Europe Conference of Ministers responsible for Media and Information Society, Belgrade, 7-8 November 2013. Available at: [www.coe.int/t/dghl/standardsetting/media/belgrade2013/MCM\(2013\)012_en_Leach_ProtectionofJournalists.pdf](http://www.coe.int/t/dghl/standardsetting/media/belgrade2013/MCM(2013)012_en_Leach_ProtectionofJournalists.pdf).
5. Committee of Ministers Recommendation CM/Rec(2014)7 on the protection of whistleblowers.
6. See the explanatory memorandum to Parliamentary Assembly Resolution 2035 (2015) on the protection of media freedom in Europe, in Doc. 13664, and in particular part 2.6 “Issues of pressing concern in Ukraine, Russia, Turkey and Azerbaijan”. Available at: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21350&lang=en>.
7. To this end, see the explanatory memorandum to the Resolution 2035 (2015), op. cit.
8. See Parliamentary Assembly Resolution 1577 (2007) “Towards decriminalisation of defamation”. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>. See “Stopping the deterioration of press freedom”, opinion editorial by the Council of Europe Commissioner for Human Rights, 4 January 2015. Available at: www.coe.int/en/web/commissioner/-/stopping-the-deterioration-of-press-freedom.
9. “Positions on freedom of the media”, position paper by the Council of Europe Commissioner for Human Rights, referring to the Court’s case law in cases against the United Kingdom, Greece, Romania and France, 3 May 2010, CommDH/PositionPaper(2010)2. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=1617421>.
10. See the report by the Council of Europe Commissioner for Human Rights following his visit to Hungary, 1 to 4 July 2014, CommDH(2014)21, 16 December 2014. Available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH\(2014\)21&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBCDF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH(2014)21&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBCDF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).
11. “Media pluralism and human rights”, discussion paper by the Council of Europe Commissioner for Human Rights, 6 December 2011, CommDH(2011)43. Available at <https://wcd.coe.int/ViewDoc.jsp?id=1881589>.
12. Congress Recommendation 364 (2014) on the role of regional media as a tool for building participatory democracy.
13. Parliamentary Assembly Doc. 13611, “Observation of the presidential election in Turkey (10 August 2014)”, 29 September 2014. Available at: <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21140&lang=en>.
14. Committee of Ministers Recommendation CM/Rec(2007)16 on measures to promote the public service value of the Internet.
15. “The rule of law on the Internet and in the wider digital world”, issue paper by the Commissioner for Human Rights, December 2014.
16. Decision of the Minister’s Deputies, 1208th meeting, 25 September 2014, based on the case *Yildirim v. Turkey* pronounced by the Court on 18 December 2012. Available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH\(2014\)1208/23&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH(2014)1208/23&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383).

CHAPTER 3

FREEDOM OF ASSEMBLY AND FREEDOM OF ASSOCIATION

INTRODUCTION

Chapter 3 – Freedom of assembly and freedom of association

Freedom of assembly and freedom of association are inextricably linked to freedom of expression. Exercised together, they support an inclusive and effective system of checks and balances, in which power is held to account. A guaranteed enjoyment of these rights is a precondition for the active participation of civil society in decision making at all levels of government.¹

■ Countries with a high level of democratic security generally benefit from a vibrant, engaged civil society and recognise the overall value of public events and demonstrations, including those which criticise the state and raise concerns about human rights.

■ By contrast, freedom of assembly and association, along with freedom of expression, are among the first rights to be curtailed in countries where authoritarian governments are in power or where the level of democratic security is low. Insecurity is used as a pretext to dispense with these political rights and to enforce emergency laws – despite the fact that doing so will almost certainly undermine stability in the long term.

■ In Europe, freedom of assembly, association and expression are entrenched in all Council of Europe member states' constitutions. Having the right laws, however, is not enough. The practical implementation of these freedoms largely depends on the enabling domestic legal and social environment.

■ On the basis of the information available and the sizeable gaps which exist, it is extremely difficult to make accurate comparative assessments over whether or not states are meeting these obligations. As a result the findings in this chapter have not been quantified but rather highlight key challenges based on the available evidence.

LEGAL GUARANTEES AND FAVOURABLE IMPLEMENTATION OF THE LAW

Chapter 3 – Freedom of assembly and freedom of association

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

■ State authorities are entitled to require that reasonable and lawful regulations on public events, such as the system of prior notification, be respected and to impose sanctions for failure to do so. When rules are deliberately circumvented, it is reasonable to expect the authorities to react. However, the European Court of Human Rights and the Venice Commission have emphasised that the enforcement of these regulations cannot become an end in itself. The absence of prior authorisation and the ensuing “unlawfulness” of the action do not give “carte blanche” to the authorities; they are still restricted by the proportionality requirement of Article 11. The authorities

should always choose the least intrusive means of achieving the legitimate aims listed in Article 11 of the Convention. Content-based restrictions (visual or audible content of any message) should only be permissible in extreme cases, for example if there is an imminent threat of violence. Restrictions on time, place or manner of the assembly should not interfere with the message communicated, and the alternatives offered by the authorities should be reasonable and meet the principle that the assembly should take place “within sight and sound” of the target audience.

■ Freedom of assembly laws which allow for excessive sanctions (both pecuniary and non-pecuniary) against administrative offences – in which there has been no use of violence – are intimidating and deter potential organisers of and participants in peaceful public events.

MEASUREMENT CRITERIA

- ▶ There is an appropriate legal basis for the exercise of freedom of assembly, subordinating the possibility to limit it to respect for proportionality and appropriate procedures.
- ▶ The implementation of the legislation on freedom of assembly is guided by a presumption in favour of holding assemblies.
- ▶ The administrative authorities do not have excessive discretionary powers, and procedures are carried out in accordance with the standards of good administration.
- ▶ The legislation provides for pecuniary and non-pecuniary sanctions for non-respect of the law on freedom of assembly that are proportionate and non-discriminatory.
- ▶ Effective judicial review mechanisms are available.
- ▶ There are no or few judgments of the European Court of Human Rights that have found a violation of Article 11 of the Convention in respect of freedom of assembly.

FINDINGS

Most members of the Council of Europe have adopted legislation complying with the applicable standards, although in some states legislative changes are still needed.² However, according to the data available on a limited number of Council of Europe member states, the implementation of freedom of assembly laws remains highly unsatisfactory in some countries, where a pattern has emerged showing that the administrative authorities are unreasonably insisting on changes to the locations of demonstrations (and offering alternative locations which are far from the city centre and not easily accessible).^{3,4} Such changes in location often prevent a demonstration from conveying the intended message to the intended target audience, and thus represent a disproportionate interference with the exercise of the right to peaceful assembly. Regrettably, “pride” marches continue to be banned in some countries.

At the local level, many municipalities are restricting the freedom of expression and assembly of minority groups, such as lesbians, gays, bisexuals and transgendered persons.⁵

PROPER CONDUCT OF AUTHORITIES DURING PUBLIC EVENTS

Chapter 3 – Freedom of assembly and freedom of association

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

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

As the Commissioner for Human Rights has stated, misconduct of law-enforcement officials poses a direct threat to the rule of law. If the force used is illegal or disproportionate, civil and/or criminal liability should ensue. Effective, independent and prompt investigation must be carried out when participants in a demonstration are physically injured or deprived of their life by law-enforcement officers.⁶

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

As the Venice Commission and OSCE/ODIHR have stressed, the media also exercise a public watchdog role in respect of assemblies. Media professionals should therefore be guaranteed unimpeded access to assemblies and to the relevant policing operations.

MEASUREMENT CRITERIA

- ▶ The state ensures effective public security management at demonstrations.
- ▶ Excessive use of force is avoided.
- ▶ Law-enforcement officers are held accountable for abuses.
- ▶ Media professionals are guaranteed access to assemblies.
- ▶ There are no or few judgments of the Court finding a violation of Article 11 of the ECHR in respect to freedom of assembly.

FINDINGS

Data is available for only a few countries. However, cases of excessive force to disperse demonstrations and of arrests of peaceful demonstrators have occurred.⁷ Harsh sentences continue to be requested and imposed on peaceful demonstrators,⁸ and judicial review does not appear effective in some cases.⁹

In some instances, excessive force has also been used against journalists during rallies.

ENABLING CIVIL SOCIETY

Chapter 3 – Freedom of assembly and freedom of association

States should create an enabling environment, including a favourable legal framework, for the functioning of non-governmental organisations (NGOs) as well as sustainable mechanisms for dialogue, consultation and co-operation between civil society and the authorities. The watchdog role of NGOs is described by the European Court of Human Rights as “essential in a democratic society”. Therefore, the Court considers that it is similar to the role of the press as defined in its established case law.¹⁰ The 2014 report on the “State of democracy, human rights and the rule of law in Europe” noted that some states restrict the watchdog functions of NGOs by “curtailing their existence or activities with excessive formalities, financial reporting obligations, limits on foreign funding, and sanctions”.

MEASUREMENT CRITERIA

- ▶ Freedom of association is guaranteed by the state and can be exercised freely by everyone.
- ▶ An enabling legal and social environment is in place, facilitating and stimulating the existence of a vibrant civil society and the effective functioning of NGOs in particular.
- ▶ Effective and sustainable mechanisms for dialogue, consultation and co-operation between civil society and the authorities at all levels are in place, allowing the participation of all individuals and societal groups in democratic decision making.

FINDINGS

Even in the absence of systematic and comprehensive data, there is sufficient ground to conclude some member states perceive civil society organisations as a threat to their security and sovereignty and are, as a consequence, restricting their ability to contribute to democratic security.

On a positive side, a number of member states have put in place mechanisms responding to the need to involve civil society in social affairs, in decision making and in conflict resolution or prevention. In some countries, the models work reasonably well. In others, the model and the institutions for public consultation and participation lack effectiveness and often exist only as a formality. In the worst cases, governments are attempting – through legislation and various restrictive practices – to control citizen initiatives, including protests.

ENSURING LEGAL GUARANTEE FOR NGO FOUNDATION AND EXISTENCE

Chapter 3 – Freedom of assembly and freedom of association

There is no denying the ever-growing importance of NGOs. These organisations are on voluntary duty in areas torn by human conflicts, natural disasters and societal upheavals. Still, the legal status of NGOs is uncertain and imperfect. The quest by NGOs for recognition of their status under international law arose several decades ago. By adopting the 1956 Hague Convention on the recognition of the legal personality of foreign companies, associations and foundations, the international community recognised the need for such organisations. However, this convention never entered into force since governments were more than hesitant to give effect to this private international law instrument.

■ Nowadays, NGOs in Europe have legal status¹¹ and are established in society; their rights are guaranteed by Articles 9, 10 and 11 of the European Convention on Human Rights. But the recognition of NGOs does not always guarantee them the necessary protection. Legal guarantee is a fundamental condition for NGOs exercising their democratic functions. However, it appears to be increasingly under threat.

MEASUREMENT CRITERIA

- ▶ An appropriate legal basis for registering NGOs is available.
- ▶ The principle of proportionality for any restriction on the exercise of freedom of association is accompanied by an appropriate procedure.
- ▶ The applicable law is interpreted in favour of the founding and effectiveness of NGOs.
- ▶ Judicial review of refusals to register or of dis-solutions of NGOs is provided for in law.

FINDINGS

■ The legislation of a vast majority of member states meets the international legal standards for the registration and functioning of NGOs. However, a number of recent government decisions have provoked serious concerns with regard to the legal status and protection of a number of NGOs in some countries in Europe.

■ In an October 2014 opinion on Regulating Political Activities of Non-Governmental Organisations, the Expert Council on NGO Law of the Council of Europe Conference of INGOs (International NGOs) warned that: “Legislation currently drafted or adopted (...) in some member states of the Council of Europe reduces the possibility for active engagement of non-governmental organisations.” The introduction of new or amended laws restricting or prohibiting activities or even closing non-governmental organisations, provokes serious concerns for human rights defenders.¹²

■ Serious concerns about the free functioning of NGOs in certain countries in Europe have been expressed by Council of Europe bodies, by local NGOs and by international observers, including watchdog organisations. According to the Venice Commission, laws prohibiting the free functioning of NGOs are likely to have a damaging effect on civil society, especially on those associations that are devoted to key issues such as human rights, democracy and the rule of law.¹³

PROPOSED ACTIONS AND RECOMMENDATIONS

Chapter 3 – Freedom of assembly and freedom of association

EUROPE-WIDE

- ▶ The Council of Europe should prepare new guidelines to ensure meaningful civil participation in political decision making, based on best practice and shared standards.
- ▶ Building on the work begun by the Committee of Ministers – following the thematic debate on the “role and functioning of NGOs in the Council of Europe” – our own practices should be updated to ensure a greater voice for civil society within the Organisation through regular and formal opportunities to engage with the Committee of Ministers. This should also help to provide a clearer picture on the state of civil society, freedom of assembly and freedom of association across member states in order to identify appropriate policy responses.
- ▶ In consultation with the INGO Conference, the Secretary General will revise the guidelines on the participatory status for INGOs within the Council of Europe, and propose any necessary amendments to the rules.

NATIONAL

The Council of Europe’s bilateral work with member states, including through action plans, will aim to:

- ▶ align legislation, regulations and practice relating to peaceful assemblies and public events with the Council of Europe standards and requirements as set out in Article 11 of the ECHR and the case law of the Court;
- ▶ ensure active civil participation in decision-making processes, with formal safeguards in place in line with Council of Europe standards;
- ▶ ensure that NGOs enjoy clear and consistent legal status allowing them to perform their democratic functions.

1. See <http://human-rights-convention.org/our-rights-and-liberties/association/>.
2. "Freedom of Peaceful Assembly in Europe": comparative study requested by the Venice Commission referring to the United Kingdom, France, the United States of America, Belgium, Germany, Turkey, Russia, Ukraine, Poland, Serbia, Hungary and Tunisia, March 2014. Available at: www.venice.coe.int/files/Assemblies_Report_12March2014.pdf.
3. Venice Commission, Opinion on Federal Law No. 65-FZ of 8 June 2012 of the Russian Federation amending Federal Law No. 54-FZ of 19 June 2004 on Assemblies, Meetings, Demonstrations, Marches and Picketing and the Code of Administrative Offences, CDL-AD(2013)003; Joint opinion on the draft law on freedom of peaceful assembly of Ukraine by the Venice Commission and the OSCE/ODIHR, CDL-AD(2011)031.
4. Observations of the Commissioner for Human Rights on the human rights situation in Azerbaijan: an update on freedom of expression, freedom of association, freedom of assembly and the right to property, CommDH(2014)010; European Court of Human Rights, *Primov and Others v. Russia* judgment of 12/06/2014, No. 17391/06.
5. Congress Recommendation 211 (2007) on the freedom of assembly and expression for lesbians, gays, bisexuals and transgendered persons. Available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2555626&SecMode=1&DocId=1073862&Usage=2>.
6. Commissioner for Human Rights Annual Activity Report 2014, presented to the Committee of Ministers and the Parliamentary Assembly referring to visits and missions to several member states (*inter alia*: Georgia, Ukraine, Montenegro, Romania, the Netherlands, Hungary, France, Armenia, Azerbaijan), p.52 (Conduct of law enforcement officials). Available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2716555&SecMode=1&DocId=2252924&Usage=2>.
7. Observations of the Commissioner for Human Rights on the human rights situation in Azerbaijan: an update on freedom of expression, freedom of association, freedom of assembly and the right to property, CommDH(2014)010; Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 to 24 February 2014; <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2562949&SecMode=1&DocId=2164462&Usage=2>; Commissioner for Human Rights statement on Turkey posted on Facebook on 31 May 1 June 2014 (referring to the findings of the report following his visit to Turkey from 1 to 5 July 2013).
8. AS/Mon(2014)18rev, post-monitoring dialogue with Turkey, Information note by the rapporteur on her fact-finding visit to Istanbul, Ankara and Eskişehir (26-29 May 2014).
9. Observations of the Commissioner for Human Rights on the human rights situation in Azerbaijan, CommDH(2014)010, op. cit. European Court of Human Rights, *Navalnyy and Yashin v. Russia* judgment of 4 December 2014, No. 76204/11; *Nemtsov v. Russia* judgment of 31 July 2014, No. 1774/11.
10. *Vides Aizsardzibas Klubs v. Latvia*, No. 57829/00, § 40, 27 May 2004.
11. For the legal standards for Non-Governmental Organisations. Available at: https://www.coe.int/t/ngo/Legal_standards_en.asp.
12. Venice Commission Opinion No. 716/717/2013 of 27 June 2014 on federal law No. 121-FZ on "non-commercial organisations" ("Law on Foreign Agents"), on federal laws No. 18-FZ and N. 147-FZ on "making amendments to the Criminal Code". Available at: www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282014%29025-e.
13. Venice Commission Opinion No. 787/20147 of 15 December 2014 on the Law on Non-Governmental Organisations ("Public Associations and Funds") as amended, of the Republic of Azerbaijan". Available at: www.coe.int/t/ngo/Source/Venice_Comm_opinion_787_2014_amendments_NGO_law_Az_en.pdf.

CHAPTER 4

FUNCTIONING OF DEMOCRATIC INSTITUTIONS

INTRODUCTION

Chapter 4 – Functioning of democratic institutions

Democratic security needs well-functioning democratic institutions, respectful of international principles and standards. Free and fair elections, a functioning opposition, the separation of powers, the vertical distribution of powers and good governance are the basic criteria for assessing the functioning of democratic institutions.

■ In spite of the absence of a codified and comprehensive definition of democracy and democratic institutions, a considerable number of Council of Europe principles and standards can be used to evaluate performance in these areas.¹ However, on the basis of the information available and the sizeable gaps which exist, it is extremely difficult to make accurate comparative assessments across member states. As a result, the findings in this chapter have not been quantified; they rather highlight key challenges based on the available evidence.²

FREE AND FAIR ELECTIONS

Chapter 4 – Functioning of democratic institutions

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

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

MEASUREMENT CRITERIA

- ▶ Universal suffrage: subject to the conditions of age (and possibly residence, in particular related to local elections and limited exceptions to the right to vote), all nationals have the right to vote and to stand for election; electoral registers are public, permanent and updated at least once a year; the registration process is guided by an administrative or judicial procedure; and candidate registration is governed by clear rules and does not impose excessive requirements.
- ▶ Equal suffrage: each voter has the same number of votes, seats are evenly distributed between constituencies and equality of opportunity is guaranteed for parties and candidates alike through the election campaign, media coverage and the public funding of parties and campaigns.
- ▶ Free suffrage: voters can freely form an opinion, they are offered a genuine choice at the ballot box and they can vote freely – in particular, they are not threatened with violence at the polls. The counting takes place in a transparent way and the announced result corresponds to the votes cast.
- ▶ Secret suffrage: voting is individual; no link can be established between the content of a vote and the identity of the voter who casts it.
- ▶ Direct suffrage: at least one chamber of the national legislature, subnational legislative bodies – if any – and local councils are elected directly.
- ▶ Elections are held at regular intervals.
- ▶ Rules of electoral law have at least the rank of a statute, and the fundamental elements of electoral law are not open to amendment less than one year before an election.
- ▶ An impartial body is in charge of organising elections and central electoral commissions are independent. Where governmental or mixed models of electoral management are in place, the same guiding principles (impartiality, transparency, integrity, professionalism) have to be applied in order to ensure the legitimacy and credibility of electoral processes. Where central electoral commissions are permanent, an effective system of appeal for electoral matters is in place, and national and international observers are given the widest possible opportunity to participate in an election observation exercise.

FINDINGS

■ In general, elections held in Europe can be considered free and fair. However, no country can claim that it fully observes all the indicators identified above.

■ Key problems concern a lack of a level playing field between contestants. Where adequate financial campaign regulations are not in place, a lack of transparency on party funding may result in cases of misuse of administrative resources, unduly benefiting incumbent candidates.

■ Major concerns arise as a result of the worsening conditions of the electoral process recently experienced in some member states. Recently held state elections have shown increasing limitations on the freedoms of expression, assembly and association resulting from a restrictive media environment and voter intimidation. These restrictions have prevented electorates from enjoying a genuine choice of political alternatives.³ There have also been cases of excessive restrictions on the right to vote⁴ and even on the right to free elections,⁵ as well as inequalities between constituencies,⁶ which harm the principles of universal equality of the right to vote.

■ In some cases, the absence of a proper system of complaints and appeals has been problematic. Additionally, regional conflicts, including protracted conflicts, can prevent the conduct of free and fair elections in these regions.

■ Finally, even in countries where the election administration proves to be professional and there is a high level of trust in the integrity of the electoral process, overall turnout in elections is decreasing. This is particularly important for certain categories of voters, such as women, national minorities and young people.

THE ROLE OF THE OPPOSITION

Chapter 4 – Functioning of democratic institutions

“All countries have a parliament, but only democracies have an opposition.”

The opposition carries out several functions which are essential for the effective functioning of democratic institutions and which enhance the stability, legitimacy, accountability and transparency of the political system as a whole. These functions include: enabling fair parliamentary decision-making procedures, scrutinising the legislative and budgetary proposals of the government and overseeing the government and the administration.

Furthermore, the opposition offers the prospect of political change by democratic means: by its very existence it contributes to political pluralism and, through its active participation in parliamentary life, enables citizens to have a real and informed choice at election time.

The extent to which the parliamentary opposition is allowed to fulfil these functions is a sign of the level of maturity of a democracy. If none of these functions are fulfilled, it is a sign of a dysfunctional democracy.

MEASUREMENT CRITERIA

► Existence of a legal framework for the protection of the rights of the opposition: the way in which the rights of the parliamentary opposition are protected varies from country to country. Only a few countries explicitly define the role or status of the opposition in their constitutions, laws or regulations. Opposition members may have specific rights, as embedded in legal frameworks or parliamentary customs.

- Positions are reserved for the opposition: one of the most common rights is that certain positions should be reserved for opposition members. This applies especially to the chairmanship of committees responsible for supervision and scrutiny of government activities (for instance, budget, immunities or enquiry committees), based on the idea that parliamentary oversight of the executive is first and foremost a function that the opposition parties can be relied on to exercise.
- Impartiality of the president of parliament: the president or speaker of a parliament is the first guarantor of the rights of the opposition. In order to ensure equality of treatment between members of the ruling and opposition parties, the president or speaker must be impartial in exercising his or her functions.
- Constructive participation in parliamentary work by the opposition: the opposition has the right to oppose the views and proposals of the ruling parties/the government, and in some situations it can block decisions even when it is in a minority (for instance, when a qualified majority is required). However, the opposition has to strike a balance between scoring points against its opponents and the protection of the public interest.

- ▶ Rights and responsibilities of the opposition: it is not possible to separate the rights of the opposition from its responsibilities. Ensuring oversight of the government and scrutinising the work of other key institutions, initiating and participating in the legislative process and participating in the functioning of parliament are rights that must be protected.
- ▶ Pluralist representativeness of parliaments: the effectiveness of parliaments as democratic institutions depends on their ability to serve as a platform for dialogue between different political forces. In some Council of Europe member states, this function is impaired because of a lack of pluralist representation.
- ▶ Inclusive political process: enjoying a large majority does not absolve a ruling party or coalition from the obligation of seeking an inclusive political process, particularly when tackling fundamental reforms, and to respect and accommodate minority views and interests.

■ In some Council of Europe member states,⁸ opposition parties have systematically, or for a protracted period of time, boycotted parliament. This boycott has sometimes stalled parliamentary activity and delayed the adoption of important reforms. It has also led to the further deterioration of an already tense political climate, especially when they do not recognise the legitimacy of the parliamentary elections and do not accept their mandates.

■ In some countries, the limited representativeness of parliament has been identified as a concern, as has the existence of a fragmented opposition unable to present a viable government.

■ The lack of an inclusive political process involving the opposition in key state reforms has raised serious concerns. Both the Parliamentary Assembly⁹ and the Venice Commission¹⁰ have criticised this course of action.

FINDINGS

■ There is no common European model when it comes to regulating parliamentary opposition. It should be underscored that the Venice Commission does not consider it necessary or appropriate to try to formulate one; what is essential is that the basic legal requirements for an effective parliamentary opposition are protected in such a way that it cannot be overruled or set aside by a simple majority.

SEPARATION OF POWERS

Chapter 4 – Functioning of democratic institutions

The principle of separation of powers means that legislative, executive and judicial power within a state is vested in distinct institutions. Since the 18th century, the purpose of the separation of powers has been to prevent a concentration of powers in the executive branch which could become a threat to democracy.

MEASUREMENT CRITERIA

- ▶ The judiciary has to be independent from the executive and also legislative power (see Chapter 1).
- ▶ The legislature and the executive branch are clearly separate. While a fairly strict separation of powers is typical for presidential systems, in practically all Council of Europe member states the government is elected by and responsible before parliament. In a parliamentary system, the parliamentary majority supports the executive and supervision is exercised by the parliamentary minority, the media and public opinion.
- ▶ The norm-giving powers of the executive are limited to duly justified urgent cases or are based on a specific authorisation by the legislature as provided for in the constitution.
- ▶ The right of legislative initiative is granted to members of parliament or parliamentary groups.
- ▶ Parliament has sufficient powers to supervise the executive; for example, through the use of parliamentary questions, interpellations and enquiry committees.
- ▶ Parliament has to have the right to adopt and amend the budget.
- ▶ Parliament plays a key role in the constitutional amendment process and the executive cannot bypass parliament in this respect by direct recourse to a referendum.

FINDINGS

■ The application of the principle of separation of powers therefore depends on the political system, making it difficult to draw meaningful comparisons. It is difficult to identify common benchmarks. Nevertheless, in all systems the rights of parliament with respect to the executive as the stronger power have to be protected.

■ Most of the measurement criteria indicated above do not give rise to problems in the vast majority of Council of Europe member states. However, the lack of a well-functioning system of checks and balances has been identified as a problem in some member states.¹¹ The Venice Commission has warned, for instance, against the excessive use of government emergency ordinances and it has been critical of the fact that, in some cases, the legislative framework for delegating the right of legislative initiative to the government is not sufficiently clear. It has also noted that the weakness of the supervisory power of parliament and the limitations of the budgetary powers of parliament can be a threat.¹²

■ The Venice Commission has also repeatedly warned against attempts by the executive to bypass parliament in constitutional amendment processes in some member states, by direct recourse to referenda which were subsequently not implemented.

■ In a number of Council of Europe member states, the role of parliament as a counterweight to the executive power is not always well established. This weakness may be due to a variety of factors, including shortcomings in the constitutional framework, as well as the lack of the necessary structures, staff and legal expertise.¹³

VERTICAL DISTRIBUTION OF POWERS

Chapter 4 – Functioning of democratic institutions

A balanced, vertical distribution of powers is of paramount importance for creating democratic societies: “sustainable communities, where people like to live and work, now and in the future”.¹⁴ A balanced distribution of powers represents an essential component of checks and balances; strong local and regional government brings democracy closer to the people, thereby enhancing democratic security.

MEASUREMENT CRITERIA

- ▶ The principle of local self-government is recognised in the constitution or at least in law.
- ▶ Local authorities regulate and manage a substantial part of public affairs, and local authorities are elected directly.
- ▶ Basic competences are provided for in the constitution or in law; local authorities can exercise any initiative which is not excluded from their competence; public responsibilities are exercised by authorities who are closest to citizens; powers given to local authorities are full and exclusive or delegated powers; local authorities can adapt their exercises to local conditions; local authorities are consulted on decisions affecting them.
- ▶ Local boundaries are not changed without the prior consultation of concerned authorities, if possible by referendum.

- ▶ Administrative supervision is only exercised according to law.
- ▶ Local authorities have adequate resources of their own and of which they can dispose freely; financial resources are commensurate with responsibilities.
- ▶ Local authorities can form consortia for tasks of common interest.
- ▶ Local authorities have the right of recourse to judicial remedy.

FINDINGS

— The fact that all 47 Council of Europe member states, including small states, have ratified the European Charter of Local Self-Government may be indicative of the fact that subsidiarity has become an essential component of the democratic and administrative fabric of modern European democracy.¹⁵ Practically all the countries where the level of decentralisation may be judged as unsatisfactory in the light of the criteria above are currently working on reforms to improve their situation.

■ However, the Congress of Local and Regional Authorities has identified the limitation of competences devolved to local authorities and the lack of precision in defining and allocating powers and responsibilities between tiers of government as recurrent problems.¹⁶ It also believes that financial arrangements are sometimes not commensurate with the tasks devolved, the levels of locally collected tax revenue are low and local authorities may not be able to spend their resources freely. Other recurrent issues often criticised by the Congress during its monitoring exercise include the lack of adequate consultation mechanisms for governments to consult local authorities on matters concerning them and the ineffectiveness of judicial remedies at their disposal.

■ In the aftermath of the financial and economic crisis, several European countries have taken backward steps and have limited to a certain extent the autonomy (in particular financial) of local (and sometimes regional) authorities. While financial discipline is part of good governance at all levels, the crisis should not serve as a pretext to curb the very useful reform trend of bringing decision making and services closer to citizens.

■ Another tendency is the call for decentralisation and regionalisation in several parts of Europe. Regional government has an important place in many Council of Europe member states, in particular the larger ones; such calls should be treated with calm and should serve as a catalyst for an open dialogue rather than for threats or confrontation. Open dialogue on further transfer of competences and resources to regional authorities, possibly on an asymmetric model, can be a solution to problems appearing in many countries.

■ Several states have either implemented or are considering implementing territorial reforms of their second or third tiers of government. Such reforms may be useful in order to ensure efficiency and streamline public administration; they should, however, be conducted in full compliance with the international obligations of the member state.

GOOD GOVERNANCE

Chapter 4 – Functioning of democratic institutions

A peaceful society is based on effective state institutions. Good governance in this sense means the existence of effective and efficient structures, which provide optimal support to citizens to live a safe and productive life in line with their expectations and opportunities.

— “Effective democracy and good governance at all levels are essential for preventing conflicts, promoting stability, facilitating economic and social progress and hence for creating sustainable communities where people want to live and work, now and in the future.”¹⁷

MEASUREMENT CRITERIA

- ▶ Openness and transparency: decisions are taken and enforced in accordance with rules and regulations; the public has access to all information which is not classified for well-specified reasons; information on decisions, policies, implementation and results is made public.
- ▶ Innovation and openness to change: new, efficient solutions to problems and improved results are sought; modern methods of service delivery are tested and applied; and a climate favourable to change is created.
- ▶ Accountability: all decision makers take responsibility for their decisions; decisions are reasoned, subject of scrutiny and can be sanctioned; remedies exist for maladministration or wrongful decisions.
- ▶ Ethical conduct: public good takes precedence over individual interests; effective measures exist to prevent/combat corruption.
- ▶ Responsiveness: objectives, rules, structures and procedures seek to meet citizens’ legitimate needs and expectations; public services are delivered; requests/complaints are dealt with within a reasonable timeframe.
- ▶ Efficiency and effectiveness: results meet agreed objectives making the best possible use of resources; performance management systems and evaluation methods are in place; audits are carried out regularly.
- ▶ Sound financial management: charges meet the cost of service provided; budget plans are prepared in consultation with the general public or civil society; consolidated accounts are published.
- ▶ Sustainability and long-term orientation: long-term effects and objectives are duly taken into account in policy making, thereby aiming at ensuring sustainability of policies in the long run.
- ▶ Competence and capacity: improvement of professional skills is encouraged for those who deliver governance; public officials are encouraged to improve performance; practical measures and procedures seek to transform skills into capacity and improved results.

FINDINGS

■ In a number of member states, there has been significant tension over the implementation of major infrastructural projects in the face of persistent or unexpected popular opposition. This raises the issue of the lawfulness of procedures as opposed to the legitimacy of decisions which important segments of the population challenge through lawful and not-so-lawful means.

■ Participation is critical for the sustainability of Europe's political and social fabric and for the legitimacy of political institutions, and needs to be adequately supported. Falling participation rates in elections and loss of trust in the integrity of politicians and democratic procedures, as well as growing unwillingness to engage in trade unions and civil society organisations, need to be effectively monitored and, where necessary, tackled. In many member states efforts have been or are being made to improve procedures for public consultation and participation by citizens and civil society, including the use of information technology in relation to e-democracy and e-government initiatives. Nevertheless, trends in election participation and, more generally, in civic and political life should be followed and assessed more closely, in order to identify possible obstacles to participation and, where necessary, measures to strengthen it.

■ Engaging youth in the political process is another area where some countries are achieving very promising results, for example, by lowering the voting age and the age at which people can stand for election.

■ The number of member states having ratified the Additional Protocol to the European Charter of Local Self-Government has significantly increased over the last two years. However, no progress has been recorded as regards the ratification and entry into force of the Council of Europe Convention on Access to Official Documents.

■ Since the start of the financial crisis, some member states have also implemented reforms aimed at streamlining procedures and reducing levels of public expenditure, through measures such as professionalising public administration, cutting or merging public administration bodies and entities, selling public assets, externalising services and the public procurement of goods and services.

■ Progress has been recorded in a number of countries as regards the quality and performance of human capital in public authorities following the adoption of transparent recruitment procedures, the stabilisation of the civil service, the introduction of merit-based careers and the benchmarking of performance.

■ One area where efforts need to be pursued is the fight against corruption in public administration, including that at local level.¹⁸ In some countries, the legal framework for public officials has been expanded to include avoidance and management of conflicts of interests, declarations of assets, creation of independent oversight bodies, strict compliance with codes of conduct and the protection of whistle-blowers.¹⁹

■ Several governments of member states have also adopted "open government" policies by making information publicly available on recruitment, contracts, grants to private companies or individuals and the budgets of "quasi non-governmental organisations", among other things.

PROPOSED ACTIONS AND RECOMMENDATIONS

Chapter 4 – Functioning of democratic institutions

EUROPE-WIDE

- ▶ In order to level the playing field between candidates and prevent the misuse of administrative resources by incumbents, the Council of Europe should provide common guidelines on media coverage and the financing of election campaigns. These will allow for greater scrutiny by civil society and raise awareness of the problem among all electoral stakeholders.

NATIONAL

The Council of Europe's bilateral work with member states, including through action plans, will aim to:

- ▶ review existing regulations and practice with regard to financing and running election campaigns, as well as the rules governing fair and impartial media coverage;
- ▶ improve the regulatory framework for election observation and enhance the capacity for the monitoring of domestic elections;
- ▶ introduce measures to encourage the participation of women, minorities and young people in the electoral process.

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4. Parliamentary Assembly Resolution 1459 (2005) on the abolition of restrictions on the right to vote. Available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1459.htm>.
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CHAPTER 5

INCLUSIVE SOCIETIES AND DEMOCRATIC CITIZENSHIP

INTRODUCTION

Chapter 5 – Inclusive societies and democratic citizenship

Building and reinforcing inclusiveness in our societies – and thereby empowering all citizens to exercise and defend their rights, to value diversity and to play an active part in democratic life – is an essential element of democratic security.

■ All states need to intensify their efforts to anticipate and pre-empt divisions within our societies, and prevent their development into tensions and conflicts. Anti-discrimination, integration, education, youth and social policies are fundamental to developing an understanding of “democratic culture”. This has become all the more crucial as Europe continues to deal with the fallout of the economic crisis, and with populism and extremism on the rise.

■ Inclusive societies enable all their members to enjoy their fundamental rights, including their economic and social rights. They offer equal opportunities to all, and notably to young people, to participate and to contribute to community development. In inclusive societies prejudice and discrimination have no place and action is taken to build trust among citizens across social and cultural divides.

■ Legal protection of social rights, effective social rights enforcement, quality of anti-discrimination measures, the standards and mechanisms of integration policies, access to rights for young people and education for democratic citizenship, are the basic criteria for assessing the degree to which states promote inclusion and democratic citizenship.

LEGAL PROTECTION OF SOCIAL RIGHTS

Chapter 5 – Inclusive societies and democratic citizenship

Although embodied in the 1948 United Nations Universal Declaration of Human Rights along with civil and political rights, economic and social rights suffer from weaker protections. These weaknesses have been exposed and exacerbated by the economic turmoil that has engulfed Europe in recent years.

■ An essential step in guaranteeing social rights, such as the rights to housing, health care and education, is ensuring that they are properly protected at national level, in particular through the constitution and subsequent legislation.

■ Shared international standards support this. The main treaty on social rights in Europe is the European Social Charter, which opened for signature in Turin on 18 October 1961 and was revised in 1996. It represents the social constitution of Europe and is an essential component of the continent's human rights architecture. It consists of an integrated system of guarantees, the implementation of which at national level has the potential to reduce economic and social tensions by contributing to a greater sense of fairness among individuals and groups.

■ Political systems seen to protect social rights are likely to command greater levels of public confidence. In addition, the cohesive quality of these rights has taken on a new importance against a backdrop of ongoing austerity, rising populism and in the fight against violent extremism and radicalisation. By promoting equal opportunity, social rights encourage individuals to remain within mainstream society and help lessen the appeal of other, more extreme or divisive paths.

■ To achieve this, the Turin process promotes the reinforcement and a greater acceptance of the normative system of the Charter, as well as a better implementation of the provisions of this key Council of Europe treaty.

■ In this context, a specific dimension is the changing relationship between the law of the European Union and the Charter. There is an urgent need to enhance existing synergies and find effective solutions to the limited – but existing and emerging – conflicts. It must be ensured that the fundamental rights enshrined in the Charter are fully respected by decisions or legislation of the states parties resulting directly or indirectly from changes in EU law. To that effect, co-operation between competent Council of Europe and EU bodies, with a view to promoting the harmonisation of the two normative systems in order to improve states' abilities to comply with their international obligations, should be reinforced.

MEASUREMENT CRITERIA

Domestic law

- ▶ Constitutional set of rights.
- ▶ Statutory law or other binding texts.

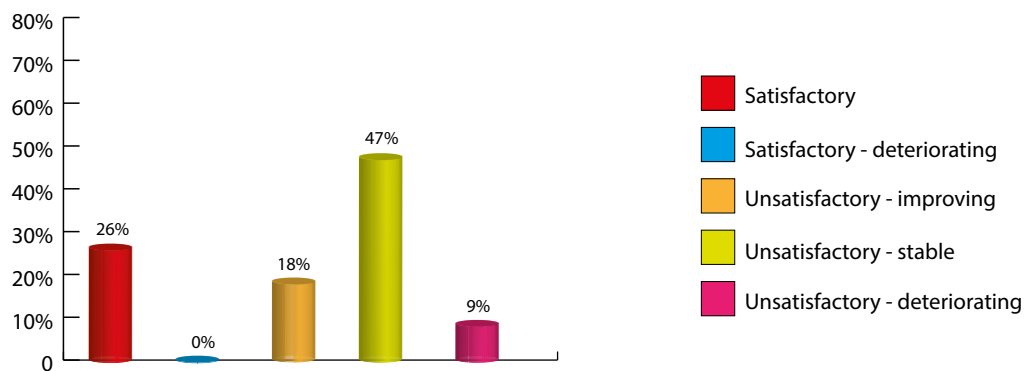
European law

- ▶ Ratification of the European Social Charter in its revised version.
- ▶ Adoption of a significant number of provisions, including key provisions, of the Charter.
- ▶ Acceptance of the collective complaints procedure.

FINDINGS

Some 33 member states have ratified the revised text of the 1961 European Social Charter and 15 member states have so far accepted the collective complaints procedure of the Charter. Where states have not ratified the Charter, they may nonetheless guarantee social rights at domestic level. However, their abstention from the treaty undermines the collective human rights mission and reduces the collective pressure on all member states to meet shared values and international standards.

LEGAL PROTECTION OF SOCIAL RIGHTS



EFFECTIVE SOCIAL RIGHTS ENFORCEMENT

Chapter 5 – Inclusive societies and democratic citizenship

The aim and purpose of the European Social Charter is to protect rights, not only theoretically but also in practice. The implementation of the Charter requires the states to not only take legal action but also to undertake practical action to give full effect to the rights recognised in the Charter. In particular, it requires informed decisions on the allocation of available public resources. This should be done in compliance with the principles of freedom and justice.

■ In addition, any policies aimed at implementing social rights must be assessed to ensure that, in practice, they are promoting genuine fairness, equality and non-discrimination.

■ Inclusive societies can be realised only through legal and social empowerment. In this respect, all the rights proclaimed by the Charter must be mobilised. Particular attention should be drawn on the right to housing, the right to health and the right to education. In addition, specific rights for the elderly and for people with disabilities constitute essential factors of social inclusion.

■ Moreover, the right to organise and the right to bargain collectively are essential components of democratic citizenship. Employment, as a result of the right to work and fair working conditions, including fair remuneration, are imperative, and come under threat in times of crisis.

■ The European Committee of Social Rights has made it very clear that the parties have accepted to pursue, by all appropriate means, the attainment of conditions in which, among other things, the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realised. The economic crisis – a time when beneficiaries need the protection most – should not have as a consequence the reduction of the protection of the rights recognised by the Charter.

■ At a time when there is a growing number of people in Europe deprived of dignity because of their exclusion from society, specific importance should be attributed to the protection against poverty and social exclusion.

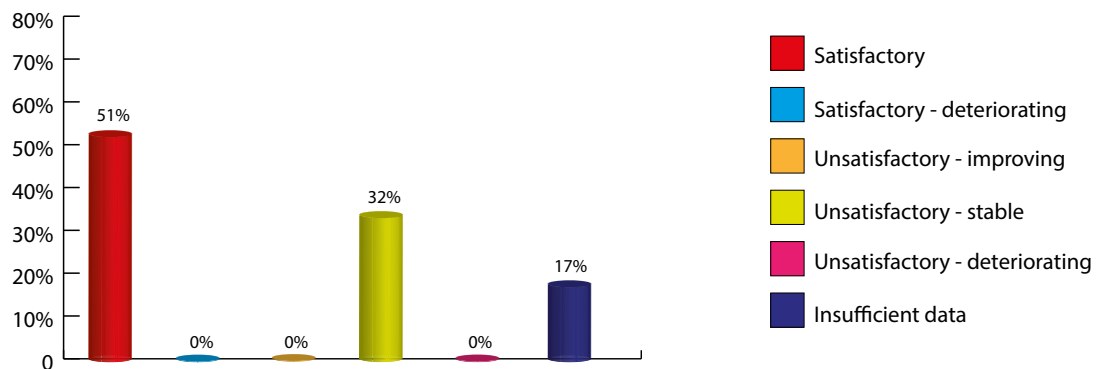
MEASUREMENT CRITERIA

- ▶ The number of findings of non-conformity by the European Committee of Social Rights.
- ▶ The types of findings (rights concerned, duration of the violation, number of people affected and consequences for those concerned).
- ▶ The enforcement of rights through domestic courts.

FINDINGS

— The majority of member states are complying with the European Social Charter and its revised text. For some specific countries however, the European Committee of Social Rights¹ has adopted a significant number of conclusions of non-conformity with the Charter compared with the total number of accepted provisions.²

EFFECTIVE ENFORCEMENT OF SOCIAL RIGHTS



QUALITY OF ANTI-DISCRIMINATION MEASURES

Chapter 5 – Inclusive societies and democratic citizenship

The quality of anti-discrimination measures depends on effective national legislation prohibiting and punishing discriminatory acts and on the existence of a well-functioning mechanism to promote and enforce the right to non-discrimination. The aim of the prohibition of discrimination is that human difference in a democratic society should be viewed positively but should also be responded to with discernment in order to ensure real and effective equality.

Protocol No. 12 to the European Convention on Human Rights prohibits discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The prohibition of discrimination as defined in the Convention and in the European Social Charter must apply to all public authorities as well as all natural and legal persons, both in the public and private sectors, in all areas of life, including employment, education, housing, health, social protection and public services. Easily accessible judicial and/or administrative proceedings should be available as well as effective sanctions including compensation for material and moral damages to victims.

The European Commission against Racism and Intolerance (ECRI) has set out, in its General Policy Recommendation No. 7, minimum standards for national legislation to combat racism and racial discrimination effectively, including provisions in all branches of the law – the constitution, civil, administrative and criminal.³ This integrated approach enables the problems to be addressed in an exhaustive, consistent and complementary manner.

Criminal law has a symbolic effect which raises society's awareness of the seriousness of racism and may have a dissuasive effect. Ideally, racist motivation should constitute an aggravating circumstance for all criminal offences.

Two of ECRI's General Policy Recommendations (Nos. 2 and 7) call for the setting up of specialised bodies to combat racism and discrimination at national level and provide guidance on the powers and functioning of such bodies. Importantly, they should operate without state interference and with all the guarantees necessary for their independence.

Homophobic and transphobic attitudes have been identified in all 47 member states, though attitudes vary significantly among and within the countries.⁴

MEASUREMENT CRITERIA

Legal criteria

- ▶ Ratification of Protocol No. 12 to the European Convention on Human Rights and of the European Social Charter in its revised version.
- ▶ National criminal law punishes: public incitement to violence, hatred or discrimination on the grounds ECRI has established; public insults and defamation; threats; the public expression of an ideology which claims the superiority of, or which depreciates or denigrates, a group of persons; the creation or leadership of, support for or participation in, a group which promotes racism.
- ▶ National legislation provides for an obligation to suppress public financing of organisations which promote racism, as well as the possibility of dissolution of such organisations.
- ▶ Civil and administrative law prohibits direct and indirect racial discrimination and segregation; it provides for the sharing of the burden of proof in discrimination cases.

Institutional criteria

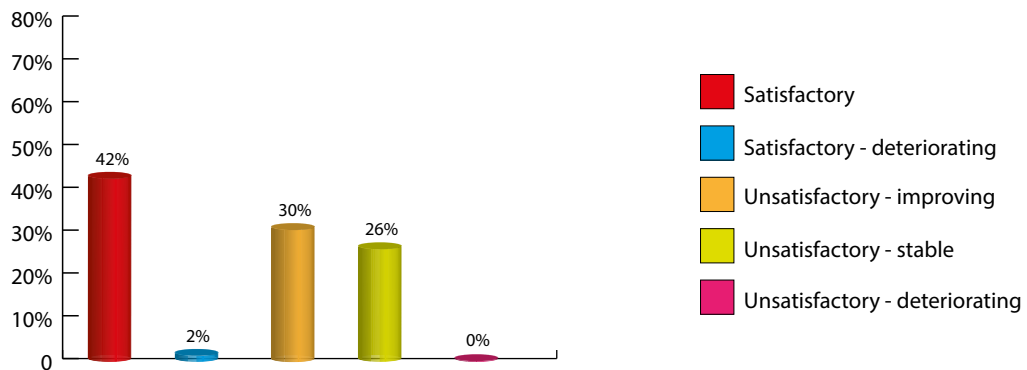
- ▶ National specialised bodies' powers include: assistance to victims; investigation powers; the right to initiate and participate in court proceedings; monitoring legislation and advice to legislative and executive authorities; and awareness raising.
- ▶ National specialised bodies have the freedom to appoint their own staff and to manage their resources.

FINDINGS

Whereas several member states already have sufficient anti-discrimination-related legislation or implement measures to combat different types of discrimination, gaps and loopholes in anti-discrimination legislation are still notable, especially in specific areas like racism and racial discrimination and employment discrimination, in particular on the grounds of age, sexual orientation or disability.⁵ In addition, some member states are completely lacking non-discrimination legislation in the field of civil and administrative law.⁶

In cases where there exists a specialised body to combat discrimination, often this body is dysfunctional or lacks independence, power, sufficient resources or even a clear mandate.

ANTI-DISCRIMINATION MEASURES



INTEGRATION POLICIES: STANDARDS AND MECHANISMS

Chapter 5 – Inclusive societies and democratic citizenship

Europe is built on the diversity of distinct cultural, religious and social traditions embodied in the cultures of its countries. It is home to people of many different racial, ethnic, religious and national backgrounds, and its economy and cultures have been enriched by the contributions of migrants from around the globe. In an increasingly globalised world, migratory movements will continue to shape European society. However, migration in Europe is often criminalised and has severe implications for human rights.⁷

As stated in the Secretary General's first report, unfortunately people with a different ethnic, religious or linguistic backgrounds often perform less well than the majority. Frequently they enjoy economic, social and political rights to a lesser degree, leading to segregation and the emergence of parallel societies, and sometimes contributing to radicalisation and extremism.

To redress this, successful integration policies are needed.⁸ ECRI, in its fifth cycle of country monitoring, is examining whether and to what extent member states have developed such policies, whether these cover all vulnerable groups (people with migrant backgrounds as well as historical ethnic, religious and linguistic minorities) and what impact they have had.⁹ ECRI takes into account standards set by the Council of Europe and other international organisations, as well as its own General Policy Recommendations in the fields of education, employment, anti-Semitism, anti-Gypsyism and combating intolerance against Muslims, among others.

As it is difficult to design and implement effective policies without quality data, ECRI insists that states should develop integration indicators. Properly designed, effectively implemented and scrupulously monitored integration policies promote inclusive societies. Integration is a two-way process; it not only requires efforts from those belonging to vulnerable groups but the majority also has a contribution to make and needs to open up to diversity. By addressing the problems related to social divisions and by preventing the emergence of new ones, good integration policies contribute to democratic security on our continent.

MEASUREMENT CRITERIA

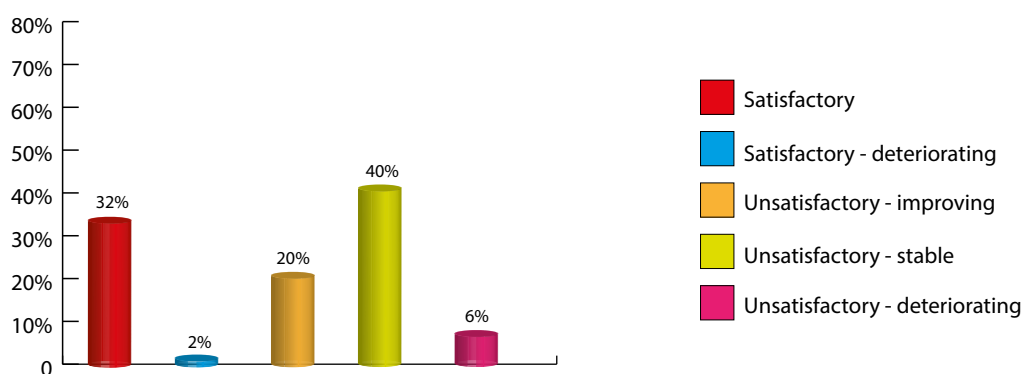
- ▶ Integration policies are comprehensive or fragmentary.
- ▶ Integration policies are coherent.
- ▶ Integration policies make use of good integration indicators to fix objectives.
- ▶ Integration policies are subject to regular evaluation.
- ▶ The results of integration policies in core areas such as educational outcome or labour market participation.

FINDINGS

Many member states face intolerance and integration problems due to historical, ethnic, political and religious reasons; the integration and stigmatisation of Roma and other ethnic groups, migrants and even LGBT persons remains a weak point in some countries. Often these countries lack political efforts to solve this situation in a sustainable manner, in areas like housing, schooling and employment. Recent events have shown that past policies on integration have not always been successful and have aggravated the situation, so that

new integration policies are currently underway or have been recently put in place. In a few member states, no coherent and comprehensive integration plan or policy has been deployed at all, while some other member states have already implemented an adapted all-encompassing integration strategy or are undertaking necessary steps towards policies and action plans on migration and integration.

INTEGRATION POLICY STANDARDS



ACCESS TO RIGHTS FOR YOUNG PEOPLE

Chapter 5 – Inclusive societies and democratic citizenship

Young people in Europe continue to be particularly affected by the economic and social difficulties facing many European societies: unemployment, precariousness, discrimination and social exclusion are a reality for many of them. The sustainability of society relies on the creativity, dynamism, social commitment and competences of young people.

■ Young people are entitled to the full respect, protection and promotion of their human rights and fundamental freedoms. Youth policy has the responsibility to facilitate young people's access to human and social rights which they are entitled to enjoy as full citizens and which are guaranteed by international treaties.

■ Action in the field of youth work, education and training should encourage the exchange of experience between young people of different backgrounds. In policy making, young people with diverse and minority backgrounds must be involved and integrated in policy formulation and implementation, and the self-representation of minority groups, particularly in decision-making bodies, should be reinforced.

■ In a context of ageing societies and the weakening of the welfare state, social policies may tend to neglect the needs of young people, especially as far as social welfare contributions and benefits are concerned. The European Social Charter is an important reference framework for youth policy. In turn, youth policy can support the implementation of elements of the Charter particularly relevant to young people, like health, education, employment, housing, free movement and mobility, and non-discrimination.

MEASUREMENT CRITERIA

Human rights and democracy

- ▶ Youth policy aims at enabling young people to accede to their rights, including by facilitating access to information and counselling services.
- ▶ Appropriate structures and mechanisms are established at local, regional and national levels to enable active participation of young people, such as youth parliaments, independent youth councils and support to youth NGOs and networks.
- ▶ Youth policy seeks to effectively implement gender equality and prevent all forms of gender-based violence.

Living together in diverse societies

- ▶ Youth policy aims at empowering young people to promote, in their daily lives, cultural diversity as well as intercultural dialogue and co-operation.
- ▶ Preventing and counteracting all forms of racism and discrimination on any ground constitute a clear priority of youth policy.
- ▶ Youth policy supports initiatives of young people and their organisations with regard to conflict prevention and management, as well as post-conflict reconciliation.

Promoting social inclusion of young people

- ▶ Youth policy has a special focus on supporting the integration of excluded young people.
- ▶ Concrete measures and tools are established in order to facilitate access to non-formal education and youth work, as means of facilitating autonomy and transition from education to employment.
- ▶ Youth policy seeks to support young people's autonomy, as well as their access to decent living conditions.
- ▶ Youth mobility programmes are developed as tools for supplementing young people's education and training.

FINDINGS

■ To date, no monitoring mechanisms are available to thoroughly assess the implementation of national youth policies or the enforcement of relevant legislation, including Council of Europe recommendations. The youth sector has developed a number of methodologies and tools of a non-binding nature, such as international reviews of national youth policies, youth policy advisory missions, peer coaching, etc. These fragmented data do not allow the presentation of country-based evaluation reports for all member states. It can however be observed that a coherent governmental approach towards young people is present in only a few member states.

EDUCATION FOR DEMOCRATIC CITIZENSHIP

Chapter 5 – Inclusive societies and democratic citizenship

The pace and scale of intolerance, radicalisation and violence in Europe today demands an urgent response, and education has an important role to play in this respect. Preparation of learners for life as active and responsible citizens, able to enjoy their fundamental rights and exercise their duties while effectively participating in democratic and complex societies, is one of the main features of quality education, in formal and non-formal settings, which should be enjoyed by everyone.

Monitoring reports and the results of other relevant Council of Europe assessments draw attention to the need to ensure that all children have equal access to quality education, regardless of their ethnic origins or immigration status or those of their parents, and to the promotion of equal opportunities in schools. Quality education provides a secure, non-violent and inclusive learning environment in which the rights of all are respected and everyone's participation in decision making is facilitated and supported, therefore contributing to the prevention of extremism and radicalisation. Teachers should be well equipped to deal with controversial issues at school in a constructive way: when discriminatory approaches are endorsed or tolerated, and when children do not have a sense of belonging, there is a high risk of exclusion, radicalisation and violence.¹⁰

Country monitoring reports suggest there are still large gaps in the promotion of knowledge and awareness of diversity in contemporary societies, in the combating of all forms of intolerance, racism, xenophobia and nationalism, and in strengthening social cohesion and developing a culture of co-operation. Attention is also drawn to the need to help migrants with a poor level of education to attain a sufficient level of integration and to monitor trends regarding hindrance based on a lack of language proficiency for integration. For the most vulnerable learners, those who use a different language for day-to-day communication and, especially, learners from disadvantaged socio-economic or migrant backgrounds, acquiring the language of schooling is a major challenge.

MEASUREMENT CRITERIA

- ▶ Quality education is ensured without discrimination on any grounds.
- ▶ Measures have been taken to guarantee equal opportunities for access to education at all levels while paying particular attention to vulnerable groups.
- ▶ Specific action has been taken to increase the level of priority of education for democratic citizenship and human rights in education policies, including provision of adequate resources.

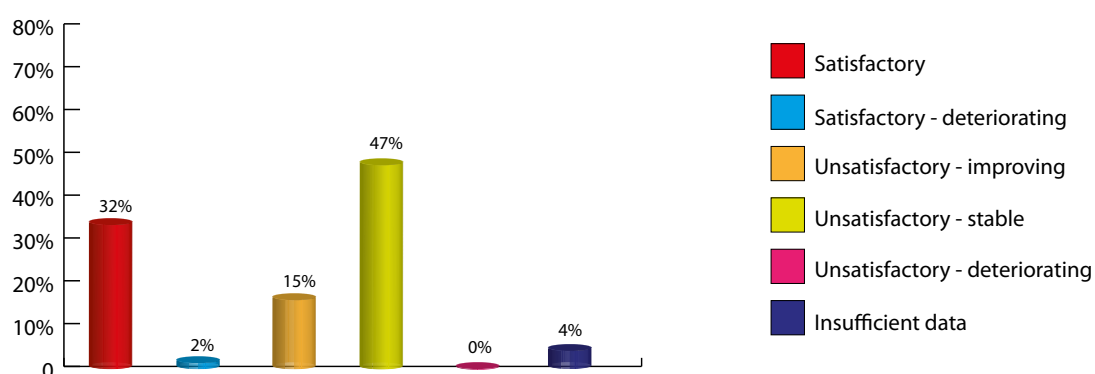
- ▶ Skills for promoting social inclusion, valuing diversity and handling differences and conflict are part of the teachers' education as well as of the teaching and learning process in schools.
- ▶ Measures are taken in the fields of education and research to foster knowledge of the culture, history, language and religion of the national minorities and of the majority.
- ▶ Appropriate forms and means for the teaching and study of regional or minority languages at all appropriate stages are in place.
- ▶ Positive measures are implemented and assessed with regard to the linguistic integration of children, adolescents and adults from migrant backgrounds.

FINDINGS

Just over one third of the member states comply with the standards and requirements of an inclusive educational system that provides access to all children, without any distinction based on ethnicity, religion, language or ability.

"Inclusive education" is a common theme across the legislative frameworks of most member states, but in many cases its practical implementation poses problems, especially where specific education is needed (for example, for children with disabilities) or in education systems with a religious and ethnic mix. Despite progress in this area, less than a quarter of all member states still have an educational system excluding minorities based on ethnicity, religion or language. Roma are systematically segregated, intentionally or not, from regular education, preventing a normal assimilation into society and causing many to drop out. Public awareness of the existence of diversity and the need to support vulnerable or disadvantaged groups in mainstream education is not yet an issue in most member states, and is therefore not translated into policies.

EDUCATION FOR DEMOCRATIC CITIZENSHIP



PROPOSED ACTIONS AND RECOMMENDATIONS

Chapter 5 – Inclusive societies and democratic citizenship

EUROPE-WIDE

- ▶ Implement the Council of Europe Action Plan to combat terrorism and radicalisation leading to terrorism (2015-2017).
- ▶ Implement the Council of Europe agenda on Roma inclusion (2015-2019), with its three priority lines of actions – tackling anti-Roma discrimination, introducing innovative models for inclusive policies for the most vulnerable and introduce best practices for local-level solutions for the social inclusion of Roma.
- ▶ Reinforce the follow-up of the decisions and conclusions of the European Committee of Social Rights, as provided in the “2014 “Turin Process” Action Plan.
- ▶ Develop within the Council of Europe modalities for the systematic assessment of how national youth policies facilitate young people’s access to rights.

NATIONAL

The Council of Europe’s bilateral work with member states, including through action plans, will aim to:

- ▶ bringing anti-discrimination and integration measures and policies in line with relevant Council of Europe standards, notably through the establishment of national specialised bodies to combat racism and discrimination and the development of comprehensive integration policies;
- ▶ review and update curricula in line with provisions of the Charter for Education for Democratic Citizenship and Human Rights and support initiatives for the acquisition of competences for democratic culture by all;
- ▶ ensure implementation of the European Social Charter and a better follow-up of the conclusions and decisions of the European Committee of Social Rights;
- ▶ facilitate the ratification of Protocol No. 12 to the European Convention on Human Rights and the revised Charter.

1. Conclusions adopted by the European Committee of Social Rights in the period 2011-2014 in the framework of the Charter's monitoring procedures (national reporting and collective complaints). Available at: www.coe.int/t/dghl/monitoring/socialcharter/conclusions/ConclusionsYear_en.asp.
2. European Committee of Social Rights Activity Report 2013, with reference to Bosnia and Herzegovina, Norway, Sweden and Turkey with regards to the procedure on non-accepted provisions, p. 38-41. Available at: www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ActivityReport2013_en.pdf.
3. www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/default_en.asp.
4. www.coe.int/t/Commissioner/Source/LGBT/LGBTstudy2011_en.pdf.
5. See the Venice Commission Opinion on the issue of the prohibition of so-called "propaganda of homosexuality" in the light of recent legislation in some Council of Europe member states, with reference to Russia, Ukraine and Moldova, 14-15 June 2013. Available at: [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)022-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)022-e).
6. ECRI Country Monitoring Work. Available at: www.coe.int/t/dghl/monitoring/ecri/activities/countrybycountry_en.asp.
7. See "Criminalisation of Migration in Europe: Human Rights Implications"; issue paper commissioned and published by the Council of Europe Commissioner for Human Rights, Comm/DH/IssuePaper(2010)1, 4 February 2010. Available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper\(2010\)1&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=BBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper(2010)1&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=BBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).
8. Report "Diversity and Cohesion: new challenges for the integration of immigrants and minorities", July 2000. Available at: www.coe.int/t/dg3/migration/archives/documentation/Series_Community_Relations/Diversity_Cohesion_en.pdf.
9. Information document on the fifth monitoring cycle of the European Commission against Racism and Intolerance (ECRI), 28 September 2012. Available at: www.coe.int/t/dghl/monitoring/ecri/activities/Information%20document%20fifth%20monitoring%20cycle_en.pdf.
10. Committee of Ministers Recommendation CM/Rec(2012)13 on ensuring quality education, 12 December 2012. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=2014671&Site=CM>.

Democratic security is an old idea, based on the argument that democracies rarely, if ever, go to war with each other. Democratic practices equally protect states from internal strife. Democratic security is a responsibility which all nations share.

This second annual report on the state of democracy, human rights and the rule of law in Europe assesses the capacities of the member states to guarantee and enhance democratic security within their borders and, collectively, across the continent. It measures the extent to which the Council of Europe's 47 member states are able to make the five pillars of democratic security a reality, namely: an efficient and independent judiciary, freedom of expression, freedom of assembly and association, the functioning of democratic institutions, and inclusive society and democratic citizenship. The report also draws on the Council of Europe's capacity to monitor and evaluate performance in terms of democracy, human rights and rule of law and to identify remedies for shortcomings and provide assistance in their implementation.

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The Council of Europe is the continent's leading human rights organisation.

It comprises 47 member states, 28 of which are members of the European Union.

All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law.

The European Court of Human Rights oversees the implementation of the Convention in the member states.