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# USE OF THE RULE OF LAW LEGAL INSTRUMENTS IN THE FACE OF MOUNTING DISSENSUS AT THE NATIONAL LEVEL

***Edited by Milieu SRL***

# COUNTRY LEVEL REPORT

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This study/report has been prepared by Milieu SRL under Horizon Europe RED-SPINEL Project N°101061621 coordinated by Prof. Ramona Coman (PI) and the Institut d'études européennes of the Universlité libre de Bruxelles.

Milieu Consulting SRL,
Chaussee de Charleroi 112, B-1060 Brussels,
tel.: +32 2 506 1000;
e-mail:marta.ballesteros@milieu.be;
web address: www.milieu.be.

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*RULE OF LAW INSTRUMENTS RESPONDING TO EMERGING DISSENSUS*

*Project N°101061621*

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# USE OF THE RULE OF LAW LEGAL INSTRUMENTS IN THE FACE OF MOUNTING DISSENSUS AT NATIONAL LEVEL

## *Latvia*

This study/report has been prepared by Milieu SRL under Horizon Europe RED-SPINEL Project N°101061621 coordinated by Prof. Ramona Coman (PI) and the Institut d'études européennes of the Universlité libre de Bruxelles. The main authors of the study/report are Julija Sproge and Linda de Keyser.


Milieu Consulting SRL, Chaussee de Charleroi 112, B-1060 Brussels, tel.: +32 2 506 1000; e-mail:marta.ballesteros@milieu.be; web address: www.milieu.be.

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# Abbreviations

| | |
|---|---|
| ECHR | European Court of Human Rights |
| EU | European Union |
| LGBTQ+ | Lesbian, gay, bisexual, transgender, quart, and/or questioning |
| TEU | Treaty on European Union |
| WJP | World Justice Project |
| NGO | Non-Governmental Organisation |
| PACE | The Council of European Parliamentary Assemble |
| UNHCR | The United Nations High Commissioner for Refugees |

# 1. Introduction: Rule of Law threats in times of dissensus

This factsheet shall analyze the existence and the use of rule of law instruments to face threats to democratic principles at a national level in a context of growing dissensus over liberal democracy and its core values in the EU. Hence, it examines how national legal norms and governance instruments might react to breaches of the rule of law.

For the purpose of this work, "*dissensus is understood here as the expression of social, political and legal conflicts which take place concomitantly in different institutional and non-institutional arenas (parliamentary, constitutional, public sphere, technocratic and expert arenas…) driven by political, social, legal actors, including state and non-state actors, seeking to maintain liberal democracy, to replace liberal democracy or to restructure liberal democracy*" (Brack and Coman 2023) [1].

Examples of dissenting action can be found in populist or nationalist movements seeking to subvert democratic principles, fundamental rights, and the rule of law. In parallel, there are specific measures or rules established in each country to protect the respect of democratic principles.

At EU level the rule of law tool kit is composed of:

- Article 7 TEU to protect institutional system, fundamental rights and democratic principles including control mechanisms of citizens' right to voting, participation to decision making, legislative initiative, access to justice
- The Infringement Proceeding
- The Preliminary Reference Procedure
- The Charter of Fundamental Rights

Policy tools at the EU level include:

- The EU Justice Scoreboard
- The Cooperation and Verification Mechanism
- The Technical Support Instrument and its precedents
- The Protection of the EU Financial Interests
- Rule of Law Conditionality Regulation

At national level, the existence and the use of rule of law instruments to face dissensus threatening democratic principles might be established in national Constitutions or national toolkits. Please try to identify measures that either have a similar function to those at EU level or implement the EU legislative measures at national level.

The Republic of Latvia is a unitary state with a certain degree of decentralisation. The country is divided into 43 local government units comprised of 36 municipalities (in Latvian: "*novadi*") and 7 state cities (in Latvian: "*valstspilsētas*") which have their own city council and administration [2].

[1] Coman, Ramona and Brack, Nathalie (2023) "Understanding Dissensus in the Age of Crises", RED-SPINEL Working Paper.
[2] Law on Administrative Territories and Populated Areas

The rule of law is a fundamental principle in the Latvian legal system upheld through a range of dedicated legal instruments and institutions. One of the most important instruments is the Latvian Constitution [3] (in Latvian:"*Satversme*"), which sets out the basic rules and principles of governance. It provides for checks and balances between the legislative, the judicial and the executive. When exercising the legislative and executive powers, public authorities must conform to the procedures and fundamental guarantees laid down by the Constitution. No legal norm may contradict the general principles and norms set forth in the Constitution. The Constitution also guarantees fundamental human rights, laws and international agreements binding upon Latvia. It is the responsibility of the judiciary to interpret and enforce the Constitution.

To ensure that the rule of law is upheld, the Latvian government has established a number of bodies and institutions, including the Constitutional Court [4] (in Latvian: "*Satversmes Tiesa*"), the Prosecutor's office [5], and the police [6]. These institutions work together to investigate and prosecute crimes, enforce court orders, and protect the rights of individual citizens. In addition to these core institutions, Latvia has a range of other bodies and mechanisms designed to promote the rule of law. For example, the Ombudsman office [7] (in Latvian: "*Tiesībsargs*") whose main task is to promote the protection of human rights and to ensure that the State authority is exercised legally, efficiently and in conformity with the principles of good administration.

However, the rule of law culture in Latvia is still developing. Based on the World Justice Project (WJP) Rule of Law Index, Latvia scores above the global average, but below the regional average. This index measures the constraints on government powers, absence of corruption, openness of the government, fundamental rights, order and security, regulatory enforcement, civil and criminal justice. Latvia gets the lowest score for corruption, civil and criminal justice [8].

As regards the possible violation of the European Union (EU) law and other international commitments, the recent immigration crisis and the methods to tackle the situation taken by the Government have raised may questions from international organisations, such as the United Nations Refugee Agency's Representation and the EU institutions.

In relation to threats to the rule of law, most seem to be related to the populistic rhetoric in the Latvian Parliament and are directed against the independence of the judiciary. However, also the executive functions by the Government have been implemented in a manner raising questions over the compliance with the principle of the rule of law and the respect for human rights.

In Latvia, there is no established rule of law toolkit to address threats to the rule of law within the national system. The protection and respect of the rule of law and fundamental rights is embedded in the Constitution. Threats to the rule of law are normally addressed within the power conferred to the Constitutional Court and the judiciary. Laws that violate the rights, rules and definition of powers set forth in the Constitution may be declared invalid by the Constitutional Court.

## 2. The instruments Provided by Latvian law

The principle of the rule of law includes the principle of legality, which implies a transparent, accountable, democratic, and pluralistic process for enacting laws, respect of fundamental rights and equality before the law; legal certainty and prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review [9].

Please explain how these principles are protected in national law. Please focus on key examples of the use of constitutional/legislative/governance instruments in situations of mounting dissensus. In section 2.5, please focus on the role, if any, of national courts.

[3] The Constitution of the Republic of Latvia
[4] The Constitutional Court Law
[5] Office of the Prosecutor Law
[6] Par policiju
[7] The Ombudsman law
[8] The World Justice Project
[9] Commission Communication, A new EU Framework to strengthen the Rule of Law. COM/2014/0158 final. p.4

### 2.1 Protection against threats to democratic principles

This section should be devoted to any attempts to affect the institutional structure or balance of powers.

As already mentioned in the Introduction, the institutional structure of Latvia is a unitary state with some degree of decentralisation. It is a parliamentary democracy, with a clear separation of powers among the executive, legislative, and judicial branches of government.

The **legislative** branch in Latvia is a unicameral Parliament. It is responsible for passing laws and overseeing the work of the government. The legislative process begins with the submission of a draft law by a member of the Parliament, the Cabinet of Ministers, or the President of Latvia. The draft law is then debated and voted on in plenary sessions of the Parliament, and if it is approved by a majority of the members, it is signed by the President and becomes law.

The **executive** branch in Latvia is the Cabinet of Ministers, which is headed by the Prime Minister. The Cabinet is responsible for implementing policies and decisions of the government, as well as proposing new laws to the Parliament.

The **judicial** branch in Latvia is comprised of several types of courts, including district courts, regional courts, and the Supreme Court [10]. Thus, the separation of powers is a fundamental principle, which ensures that no branch of government can become too powerful, and that the government functions in the best interests of the Latvian people.

Recently, there were no attempts to affect the institutional structure or balance of powers as such. However, until now, no institution of Latvia has been established that regularly oversees the implementation of the rule of law. The Constitutional Court in this regard does not have the authority to begin proceedings on its own.

### 2.2 Protection against threats to the principle of legality and abuse of power

Threats to the principles of legality and abuse of power will be illustrated with some measures adopted by the Government during the declared **state of emergency** in relation to Covid-19. According to Article 62 of the Constitution, the Government has the right to proclaim a state of emergency where "the State is threatened by an external enemy, or if an internal insurrection which endangers the existing political system arises or threatens to arise in the State or in any part of the State". According to the Law on Emergency Situation and State of Exception [11], during the state of emergency the Government has the right to **restrict the rights and freedoms** of State administration and local government authorities, natural persons and legal persons, as well as to impose additional duties to them.
However, such situation could also be used as an excuse to propose and approve some controversial rules and regulations, which as such can be seen as an abuse of power.

Latvia declared a state of emergency in relation to the Covid-19 pandemic on 12 March 2020. The emergency was terminated on 10 June 2020. The pandemic has triggered a significant number of applications to the Constitutional Court regarding restrictions introduced by the Government. The majority of applications contained claims that a number of restrictive measures were violating the constitution, thereby threatening the principles of legality. Until October 2022, the Constitutional Court received 108 applications. Out of 108 applications, 107 were constitutional complaints, six of which were collective applications.

The Constitutional Court has adopted decisions to refuse initiations of proceedings in 90 applications. Most of the applications were refused because the allegation that the measures taken to limit the spread of Covid-19 or to prevent its consequences had

[10] The Constitution of the Republic of Latvia
[11] Law on Emergency Situation and State of Exception

caused a violation of fundamental rights of individuals were not proven (e.g.,the Constitutional Court concluded regarding the alleged violation of Article 98 of the Constitution, which stipulates that everyone has the right to freely depart from Latvia, that despite the fact that the vaccination certificate or a negative test was required for entering the territory of Latvia, the entry of Latvian citizens was not banned, and borders of the country were not closed as such), and some because the matter in question fell within the competence of the administrative courts. No application has been refused on the insufficient legal grounds' basis.

Three cases were on a provision restricting commercial activities in large shopping centres which allegedly violated the principle of equality before the law and the courts. The Constitutional Court held that the restrictions, in so far as they applied to a trader whose shop was located in the premises of a large shopping centre to which separate external access could be provided and whose shop was not covered by the exceptions set out in this norm, were unconstitutional. The restrictions, in so far as they apply to the owner of a large shopping centre, are incompatible with the first sentence of Article 91 of the Constitution (all people in Latvia are equal before the law and the courts) [12].

Three cases were united in one joint case regarding the restrictions on live gambling established during the state of emergency. The Court concluded that the restrictions on live gambling were compatible with the Constitution, while the restrictions on interactive gambling were not. In this regard, the principles of Article 105, first sentence of the Constitution were violated (Article 105 of the Constitution stipulates that everyone has the right to property. Property must not be used against the public interest. Property rights can be restricted only by law) [13]. In general, it could be argued that the substantial number of applications submitted to the Constitutional Courts in relation to the implementation of Covid-19 restrictions and the subsequent rejection of most of these applications illustrate some lack of understanding of certain principles of the rule of law.

However, it can be concluded that in a few cases presented above the principle of legality was not fully followed. It is not possible to distill any specific political actors who were challenging democratic norms and principles. The aforementioned case merely occurred because most of the anti-Covid-19 measures were adopted in a rush, without thoughtful consideration of the consequences.

### 2.3 Protection against threats to Fundamental Rights

This section should cover political, civil and social fundamental rights, including environmental rights.

Chapter VIII of the Constitution1 [14] outlines the principles of human rights and establishes the principles of equality before the law, non-discrimination, and the prohibition of torture or inhumane treatment. These principles are essential to ensure that all individuals in the society are treated with fairness and dignity. It covers specific rights and freedoms, including the right to life, freedom of speech and conscience, and the right to privacy.

Overall, some potential threats from dissensus to fundamental rights were covered by the recommendations issued by the Ombudsman. In this regard, it is important to stress that recommendations of the Ombudsman are not legally binding in Latvian legal system. The Ombudsman has the power to issue legal opinions, statements, and reports on pertinent matters. The Ombudsman's office also prepares recommendations concerning violations of human rights and proposes changes to legislation for consideration by the Parliament, the Cabinet of Ministers, local governments, and other establishments. Nonetheless, all these actions do not have any legally binding force.

[12] The Constitution of the Republic of Latvia, Art. 91
[13] Ibid, Art. 105
[14] The Constitution of the Republic of Latvia

It is concluded that a number of recently issued recommendations were not followed [15]. Some of the most prominent cases are briefly described in the paragraphs below, including the immigration crisis issue.

On 16 November 2021, the Ombudsman recommended to establish in the Law on State Social Allowances [16] the right to receive family state support for all children in the family, even for the families whose relationship has been recognised only by a court decision (e.g., same-sex partnerships) [17]. This recommendation was not implemented on the grounds that the draft Civil Partnership Law will shortly be approved. However, to date, this proposal was not approved, because the conservative members of the Parliament boycotted the vote [18].

In the context of **same-sex relationships**, on 14 January 2021, 47 members of the Parliament voted in favour a draft law that planned to restrict the definition of family in the Constitution to effectively block same-sex partnerships and same-sex families [19]. This was in response to the judgment of the Constitutional Court to protect same-sex relationships. If adopted, the law would have contravened with international human rights law and European jurisprudence, as well as Latvia's Constitution and the rulings of the Constitutional Court. This proposed amendment was abandoned in due course, but later a referendum was proposed by conservative members of the Parliament to introduce a new definition of family which would strengthen the position of traditional family values. This initiative did not gather enough votes from the public for the question to be put to the people in a referendum [20], but it shows worrying trends.

In 2021, Latvia has faced unprecedented challenges due to **large migration flows** from Belarus, with irregular migrants crossing the external border between Belarus and the EU. Due to this unprecedented influx of illegal immigrants, a state of emergency was declared in several administrative territories leading to the suspension of the right to asylum in the designated emergency areas.

In a nutshell, an unprecedented number of irregular migrants was observed in 2021, which resulted in the highest number of asylum applications in Latvia.

Most irregular migrants came from Iraq (403 individuals), followed by 19 persons from Afghanistan, 11 persons from Sri Lanka, as well as a number of persons from Syria, Turkey, Cuba, Iran, India, Egypt, Belarus, and Pakistan. More than 32 % of the detained irregular migrants were minors. From 10 August 2021, when the emergency situation was introduced, until 31 January 2022, a total of 5506 instances of border-crossing deterrence (i.e.,pushbacks) were recorded: 4045 in 2021 and 1461 in January 2022 [21] in the Latvian territory bordering Belarus.

Four administrative territories of Latvia, including Ludza, Krāslava, Augšdaugava, and Daugavpils, the state of emergency lasted for three months starting from August 10, 2021. Order No.518 on the state of emergency [22] was issued, which aimed to stop any irregular border crossing in these territories by coordinating with the Border Guard, the National Armed Forces, and the State Police.

The Order specified that anyone who had violated the Latvian-Belarusian border or attempted to do so, would be returned to Belarus by relevant means, including physical force and special means in extreme necessity (pursuant to point 5 of the Order). Additionally, no asylum applications would be accepted in the emergency area (pursuant to point 6 of the Order). Authorities suggested that asylum applications could be accepted at other official border crossings, embassies abroad, and airports with visas. In practice, however, this was difficult to achieve, thus effectively suspending the right to asylum in the emergency areas [23].

[15] Latvijas Republikas tiesībsarga 2022. gada ziņojums
[16] Law on State Social Allowances
[17] Par likumu "Grozījumi Valsts sociālo pabalstu likumā"
[18] B Monciunskaite, 'The Risks to Judicial Independence in Latvia: A View Eighteen Years Since EU Accession' (2022) 18 CYELP 129
[19] ILGA 2022 Rule of Law Report - targeted stakeholder consultation
[20] B Monciunskaite, 'The Risks to Judicial Independence in Latvia: A View Eighteen Years Since EU Accession' (2022) 18 CYELP 129
[21] Salīdzinošs ziņojums par Lietuvas un Latvijas valdību reakciju uz migrantu pieplūdumu pāri Baltkrievijas robežai 2021.-2022. gadā, p. 21
[22] Order No. 518 of the Cabinet of Ministers of the Republic of Latvia on the Declaration of Emergency Situation
[23] Salīdzinošs ziņojums par Lietuvas un Latvijas valdību reakciju uz migrantu pieplūdumu pāri Baltkrievijas robežai 2021.-2022. gadā, p. 22-24

Following this, Latvia's Ombudsman Juris Jansons expressed serious concerns regarding the introduction of emergency measures which prevented irregular border-crossers from seeking asylum through legal channels. In a letter to the Latvian government and Parliament dated 12 August 2021, Juris Jansons emphasised Latvia's obligation to facilitate the filing of asylum applications and to avoid deporting individuals to countries where they may be at risk of mistreatment, persecution, or torture. The Ombudsman emphasised that collective expulsion of a group of people at once is not allowed. If someone is pushed back from the border, a person should be given another way to reach the responsible state authorities and apply for asylum legally.

*Latvia is called to provide appropriate reception to asylum seekers and avoid pushbacks and violence*

The Ombudsman referred to previous legal cases to highlight that if a country plans to send an asylum seeker to another country without assessing their asylum application, they should ensure that an individual has access to a suitable asylum procedure and guarantee that the principle of non-refoulement is respected. However, suspension of the asylum procedure in the territory of emergency remained in force [24]. It should, however, be added that the decisions of the Ombudsman are recommendations and thus **not legally binding** [25].

As a result, serious criticism was levelled at the Latvian government by international organisations, the European Commission, and the European Parliament for Latvia's implementation of legislative changes that enabled pushbacks of illegal immigrants. It was claimed that the Government violated the right to asylum, which is guaranteed by the EU law and international agreements, including the European Convention on Human Rights and the 1951 Geneva Convention on the Status of Refugees [26]. In this regard, the United Nations Refugee Agency's Representation for the Nordic and Baltic countries expressed worries about the deportation of irregular migrants to Belarus. It was stressed that, notwithstanding the irregular way the migrants crossed theborder, the right to asylum remained a fundamental human right [27].

The Council of Europe Commissioner for Human Rights supported these remarks and emphasised that Member States of the Council of Europe had a duty to honour the right to asylum and should not return individuals to the nation they entered from without proper asylum procedures and proper consideration of the potential hazards they may encounter in that nation [28]. The Council of Europe Parliamentary Assembly (PACE) issued a resolution on 30 September 30 2021 [29], urging Latvia to avoid pushbacks, grant migrants' access to asylum procedures and appropriate reception, and use detention for asylum seekers only as a last resort.

The United Nations High Commissioner for Refugees (UNHCR) suggested that Latvia should change the Order on emergency situation to allow irregular border-crossers to enter Latvian territory, provide access to asylum procedures regardless of their mode of entry, and comply with the principle of non-refoulement [30]. The UNHCR also emphasised that the state should not use violence against asylum seekers due to irregular border crossing.

Following that, the Progressive Alliance of Socialists and Democrats in the European Parliament wrote to the President of the European Commission Ursula von der Leyen, urging her to protect the individual right to asylum and access to asylum systems. The letter further stated that the Belarussian regime's inhumane treatment of vulnerable people did not excuse the EU states, including Latvia, from their legal duties, and vulnerable individuals should not be classified as security risks [31].

[24] Ibid., p. 22-24
[25] National courts and other non-judicial bodies: Latvia
[26] Salīdzinošs ziņojums par Lietuvas un Latvijas valdību reakciju uz migrantu pieplūdumu pāri Baltkrievijas robežai 2021.-2022. gadā, p. 34-35
[27] ANO Bēgļu aģentūru satrauc notiekošais pierobežā Latvijā.
[28] Latvija un imigranti pierobežā: Eiropas Padomes komisāre aicina ievērot cilvēktiesības
[29] Parliamentary Assembly of the Council of Europe. (2021, September 30). Resolution 2404 (2021), Instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus
[30] UNHCR's Representation for the Nordic and Baltic Countries. (2021, October 25). UNHCR law observations on Latvian declaration of emergency situation
[31]Brussels, Belgium. Group of the Progressive Alliance of Socialists & Democrats in the European Parliament. (2021, October 20). Letter to Commission PresidentUrsula von der Leyen by S&D MEPs Iratxe García, Simona Bonafé and Birgit Sippel on the situation of migrants at the EU's borders

As the reaction, the EU Commissioner for Home Affairs Ylva Johansson stated that taking laws and regulations that are not complying with the European *acquis* is not acceptable [32].

Despite the reactions from international organisations and the EU, the state of emergency has been **extended** several times and is currently in force until 10 May 2023. The situation has further escalated when, in this context of state of emergency, the Latvian Non-Governmental Organisation (NGO) "I Want to Help Refugees" received help request from a group of Syrians who argued that their lives and health were in danger. The NGO applied for interim measures to the European Court of Human Rights (ECHR) [33], which were granted (i.e., stating that these people should not be deported from Latvia until 8 February 2023 and that they should be provided with humanitarian aid). The NGO went to the border between Latvia and Belarus to make sure that the decision ofthe ECHR is implemented. They met with the irregular migrants and provided them with food, water and medical assistance. Nonetheless, the State Border Guard initiated criminal proceedings against the representatives of the NGO. This seems to be the **first case in Latvia where criminal proceedings are initiated against an NGO** related to providing humanitarian assistance to the irregular migrants [34].

Overall, it appears that the Governments' response to the influx of irregular migrants resulted in the violation of migrants' human rights, because many migrants were denied access to the asylum procedure and were also pushed back into Belarus. These allegations are currently being investigated by the ECtHR, Amnesty International, and local authorities [35]. The core allegations are because the implementation of pushbacks violates the principle of non-refoulement - the core element of refugee protection stipulated in the Refugee Convention, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the EU Charter of Fundamental Rights. Further, such actions also violate the EU *acquis*, notably the provisions of Return Directive [36].

A similarly contentious issue is the non-ratification of the Istanbul Convention on **violence against women and domestic violence**. Latvia signed the Istanbul Convention in 2016, but the Parliament has not ratified it. Twenty-one members of the Parliament used the possibility, as provided for by the law, to turn to the Constitutional Court with a request to assess the compliance of the Istanbul Convention with the Constitution, considering, inter alia, that the Convention imposes introduction of a specific form of marriage or family, forces the country to perform measures to alter public opinions and prevent discrimination of people who identify themselves with genders they were not born into. The UN Women's Discrimination Prevention Committee concluded in 2020 that there were still certain gender-discriminating stereotypes in Latvia, as well as patriarchy, sexist rhetoric including **among politicians** [37], which could explain also the resistance to this Convention. The Ombudsman invited the Parliament to ratify the Istanbul Convention, reminding that that violence against women remains a major problem for Latvia as well [38].

Thus, it can be concluded that the mechanisms against protection of the human rights are limited, because the Ombudsman does not have any mechanisms in place which would allow to enforce the protection against human rights. It needs to be added that, according to the 30 March 2021 UN Economic and Social Council observations, the Ombudsman's Office lacks sufficient resources to fully exercise its mandate, including with regard to investigating and resolving complaints of discrimination in access to economic, social and cultural rights. The budget to the Ombudsman is allocated by the Parliament.

As before, it is not possible to specify any specific political actors who would be deliberately challenging democratic norms and principles.

[32] The Civil Liberties Committee debate, LIBE. (2022, January 13)
[33]Atklāta vēstule par kriminālprocesa pret "Gribu palīdzēt bēgļiem" pārstāvjiem uzsākšanu; see also the Council of Europe Commissioner for Human Rights letter
[34] Ibid
[35] Salīdzinošs ziņojums par Lietuvas un Latvijas valdību reakciju uz 14igrant pieplūdumu pāri Baltkrievijas robežai 2021.-2022. Gadā, p. 47
[36] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, p. 98–107)
[37]Ombudsman invites Saeima to ratify Istanbul Convention – Baltic News Network (bnn-news.com)
[38] Ibid

The aforementioned case merely occurred to achieve the shortcoming political interests.

### 2.4 Protection of Judicial Independence

Latvia has an independent judiciary, with a three-tiered court system. The independence of the judiciary is guaranteed by the Constitution, which separates the powers of the legislature, executive, and judiciary. The historical context and development of Latvia's judicial system after regaining independence are essential factors that impact the potential for judicial intervention. The entire judicial system underwent significant changes following Latvia's restoration of independence in 1991. The Republic of Latvia reinstated the regulatory and legislative framework that governed the organisation and status of judicial power during the first independence time of the country. On 21 August 1991, the Constitutional law On the Statehood of the Republic of Latvia [39] was adopted, establishing the state structure in accordance with the Constitution of 1922. Additionally, on 15 December 1992, the Law on Judicial Power [40] was passed, recognising for the first time in Latvian history that there is an **autonomous judicial power** that operates alongside the legislature and executive branch. Finally, in January 1992, the Civil Law of the Republic of Latvia from the year 1937 [41] was reinstated by the Supreme Council.

Pursuant to the Law on Judicial Power, Latvia has an independent judiciary, with a three-tiered court system [42]. Chapter VI of the Constitution [43] states that judicial power is vested in district and city courts, regional courts, the Supreme Court and the Constitutional Court. In the event of war, military courts can also be established.[44]

In Latvia, judges are elected by the Parliament. The first step in this process involves the Parliament nominating a candidate to serve as a judge. The nomination process is initiated by the Judicial Qualification Committee, which is responsible for assessing candidates' qualifications, experience, and moral character.

The Committee develops a list of recommended candidates and submits it to the Parliament. The process of selecting judges in Latvia is designed to ensure that candidates are selected based on their qualifications, experience, and moral character.

However, one potential disadvantage of Latvia's judge election system is that it can be vulnerable to political influence. Since the Parliament is involved in this process, there is a risk that political considerations could play a role in the selection process. Recent case has revealed such weaknesses in the system. In February 2022, the Parliament did not approve Sanita Osipova, former President of the Constitutional Court, as a judge of the Supreme Court. One of the main reasons for this non-appointment was revealed throughout the debates at the Parliament and that was the candidate's liberal views, perceived as a threat to traditional values by the Parliament, which she expressed during her term as the head of the Constitutional Court as regards the protection of same- sex couples [45].

There was also another important case relevant to the appointment of a judge to the Constitutional Court. On 9 December 2021, Irēna Kucina received adequate votes from the Parliament to become a judge, but her candidacy was plagued by controversy, because prior to the appointment she served as legal advisor to the President. There were several reports before her nomination that the President held phone calls with parliamentarians and threatened to criticise parties if they failed to vote for Irēna Kucina. It was of course not possible to prove such allegations. However, if true, that would constitute a violation of judicial independence and the rule of law [46]. Overall, the above examples show that the careers of judges can be hindered due to their political or ideological visions.

[39] Law On the Statehood of the Republic of Latvia
[40] Law on Judicial Power
[41] Matisāne I., 11.11.2008, Tieslietu sistēmai – 90
[42]Law on Judicial Power
[43] Constitution of the Republic of Latvia, Chapter VI
[44] Constitution of the Republic of Latvia,
[45]Bijušo Satversmes tiesas priekšsēdētāju Osipovu neapstiprina par Augstākās tiesas tiesnesi
[46]Monciunskaite, B, 'The Risks to Judicial Independence in Latvia: A View Eighteen Years Since EU Accession' (2022) 18 CYELP 129

This would most likely have some effects on how judges adjudicate on sensitive political cases and as such can be seen as clear violation of the principle of judicial independence [47].

## 3. Judicial intervention

As explained above, in Latvia the principle of the rule of law and the protection of fundamental human rights are enshrined in the Constitution. When exercising their legislative and executive powers, public authorities must conform to the procedures and fundamental guarantees laid down by the Constitution. No legal norm or rule can be issued by ordinary or secondary law whose content is contrary to the general principles and norms set forth in the Constitution.

In Latvia, there is no established rule of law toolkit to address threats to the rule of law within the national system. Yet, since the protection and respect of the rule of law and fundamental rights is embedded in the Constitution, so the judiciary play a role in this.

### 3.1 Constitutional Court

The Constitutional Court is the highest court in the country responsible for interpreting the Constitution, reviewing the constitutionality of laws, and resolving disputes between state institutions. Its decisions are final and binding on all state institutions and individuals. The Constitutional Court therefore plays a crucial role in safeguarding the rule of law and protecting the fundamental rights and freedoms of Latvian citizens.

Recently, the Constitutional Court has been pivotal in setting aside laws passed by the Parliament in violation with the Constitution. However, there were attempts by the Parliament not to respect these decisions.
The most prominent case would be the backlash seen in response to a landmark judgment of 12 November 2020 in which the Constitutional Court affirmed the rights of same-sex parents and demanded legal protection for same-sex couples. While the lesbian, gay, bisexual, transgender, queer, and/or questioning (LGBTQ+) community and their supporters celebrated this milestone, the judgment was seen by many in society and the Parliament as an attack on traditional family and Catholic values [48]. Many members of the Parliament from a diverse group of parties and backgrounds voiced problematic opinions about the Constitutional Court and even called for its abolition [49]. Importantly, to date the decision of the Constitutional Court is still not complied with [50].

Another example would be an attempt by the Parliament to refuse the decision of the Constitutional Court from 28 May 2021 regarding the amendments to the Law on Administrative Territories and Populated Areas [51], which were prepared in order to comply with the Constitutional Court's judgement. In this case, following the territorial reform, which proved to be one of the most contentious political issues in recent years [52], the Court ruled against the merger of the municipalities of Varakļāni and Murmastiene with the municipality of Rēzekne. However, the Parliament threatened to ignore the judgement of the Constitutional Court, and the President of Latvia was forced to intervene to remind the Parliament the principles of the rule of law. The President also recalled that the Constitution entrusts him with the role of the guardian of the Constitution and prevents him from promulgating unconstitutional laws [53].

Similarly, some municipalities have attempted to self-interpret the decision of the Constitutional Court from 3 August 2018. The Court ruled that municipalities were no longer allowed to charge money for the allocation of a burial place. However, this practice still persisted in the capital city of Riga for some time after the judgement [54].

[47] Ibid
[48] B Monciunskaite, 'The Risks to Judicial Independence in Latvia: A View Eighteen Years Since EU Accession' (2022) 18 CYELP 129
[49] Ibid
[50] Tieslietu ministre: Partnerattiecību regulējums nebūs viens likums, bet gan pakotne
[51] Law on Administrative Territories and Populated Areas
[52] B Monciunskaite, 'The Risks to Judicial Independence in Latvia: A View Eighteen Years Since EU Accession' (2022) 18 CYELP 129
[53] G Laganovskis, Satversmes tiesas sprieduma ignorēšana faktiski mainītu valsts jēgu; Izaicina Satversmes tiesu? Latgales deputātu grupa negrib pieļaut Varakļānu nonākšanu Madonas novadā
[54] Rīga ar kapu ierādīšanas maksas atcelšanu nesteidzas, citas pašvaldības naudu vairs neprasa

### 3.2 Limits to the intervention by the Constitutional Court

Since Latvia is a democratic state governed by the rule of law, the Constitutional Court is also subject to the law. It cannot act and decide as it pleases. It is therefore important to clarify: 1) what the Constitutional Court may decide in its judgments in general; 2) who can initiate the proceedings, and 3) what exactly is binding (and what is not) in the Constitutional Court's judgments.

First, pursuant to Article 85 of the Constitution [55], the Constitutional Court has the power to declare laws and other acts null and void if they do not comply with higher legal norms, e.g., with the Constitution. Second, Article 17 of the Constitutional Court law stipulates that only certain individuals and institutions have the right to submit applications to the Court.

The President of the State, in the Parliament, in the Cabinet of Ministers, in the Prosecutor General, in the Council of the State Audit Office, in the municipal council, in the Ombudsman, in the Court, in the judge of the land registry department, in a person, as well as in the Judicial Council [56]. The Ombudsman's mandate is limited to the promotion of the protection of the human rights of a private individual, the compliance with the principles of equal treatment and prevention of any kind of discrimination, the compliance with the principles of good administration [57]. Third, the Court's judgments contain the actual judgment and the interpretation of the relevant legal norm given in the judgment, with the latter being binding [58].

Therefore, the limitations are as follows: the Ombudsman has limited rights to submit an application to the Court. There is no specific institution in Latvia that systematically monitors the rule of law. The Constitutional Court cannot initiate the procedures by itself.

### 3.3 Other branches of judiciary

The role of the judiciary in protecting the rule of law and monitoring that the checks and balances between power are respected is not limited to the Constitutional Court.

In Latvia, the courts of general jurisdiction can hear cases related to human rights abuses and the administrative court – cases related to the abuse of administrative power. However, these courts cannot initiate proceedings or intervene on its own initiative.

Overall, the examples above are well illustrating the fact that the level of the understanding of the rule of law and in this context – the role of the Constitutional Court's judgements and their applicability – is still developing. Also, the role of the Constitutional Court, as well as other courts is limited, since it does not have the power to systematically monitor the applicability of the Constitution.

It is not possible to specify any specific political actors who would be deliberately challenging democratic norms and principles. The aforementioned case merely occurred to achieve the shortcoming political interests.

## 4.Recent Trends on the implementation of the Rule of law

This section examines developments across the EU Member States, both positive and negative, in two key areas for the rule of law: the anti-corruption framework and media pluralism and whether inter-institutional cooperation and support mechanisms to strengthen the rule of law have been implemented. In your research, please focus on measures taken to address dissenting actions.

As a starting point, please read the 2022 Role of Law Report for your Member State.[59]
Please note that the Italian Report briefly analyses, among other instruments, the Technical Support Instruments. While it might not be an expected point in the reports, it could bring interesting points for the analysis of the relationship between the rule of law instruments at EU and national level. Should you find TSIs relevant for this section, please only refer to projects related to the rule of law.

[55] The Constitution of the Republic of Latvia
[56] Constitutional Court Law
[57] The Ombudsman Law
[58] Constitutional Court Law
[59] 2022 Rule of law report - Communication and country chapters

### 4.1 Anti-corruption

In the 2022 Rule of Law report [60], the Corruption Prevention and Combating Bureau (KNAB) has been praised for its efficient handling of corruption cases, including its ability to detect and prioritise cases of foreign bribery. The investigation and prosecution of corruption cases have been carried out efficiently. Overall, the report states that the Anti-Corruption legal framework is broadly in place.

However, the experts and the business community hold the belief that corruption levels in the public sector are rather high. According to the Transparency International's 2021 Corruption Perceptions Index, Latvia ranks 11th within the EU and 36th globally, scoring 59/100. This perception has remained relatively consistent over the past half-decade [61].

Recent developments, after the Rule of Law report was published, are as follows: the legislation on lobbying is now in force [62], while new legislation on whistleblowing was already adopted in 2022 [63]; corruption prevention and combating Action Plan 2023–2025 is now approved by the Cabinet of Ministers [64]. Nonetheless, the main concern in this regard is how the new legislation on lobbying can be implemented in practice. Pursuant to the new legislation, the lobby register should be established only in the year 2025. Currently the new legislation does not specify how the notification of lobbying activities shall be made in practice and how the lobbyists should register before the register is actually established [65]. The relevant guidelines still need to be established.

### 4.2 Media pluralism

Media pluralism and freedom are protected in Latvia through constitutional safeguards and sector-specific legislation. The Constitution [66] ensures freedom of expression and information while prohibiting censorship [67]. The Law on the Press and Other Mass Media [68] prohibits monopolisation of the press and grants access to information held by the state and public organisations, with censorship being prohibited. Additionally, public access to information is guaranteed through the Freedom of Information Law [69].

The Electronic Mass Media Law [70] is the primary governing law for media. Legislation has also been passed to implement the Audiovisual Media Services Directive [71]. However, there are some concerns regarding the high level of media concentration. When the market share of an electronic mass media in a particular market exceeds 35% [72], it is considered to amount to a dominant position. The recent assessment of the risks to media pluralism have shown that only the fundamental protection of media is at low risk (this concerns protection of freedom of expression, protection of right to information, journalistic standards and protection, etc.) [73]. The market plurality and political independence of media have improved, but the level of risks in the area of social inclusiveness (media literacy policies, hate speech and harassment) has increased.

As regards the **transparency of media ownership**, different regulations apply to different media segments, with no specific regulation for digital media companies to disclose beneficial and ultimate owners publicly. All media are required to disclose ownership information for the Register of Companies and public authorities, but this information does not have to be disclosed to the public [74]. At the same time, the **online platforms concentration** and competition enforcement shows high risk level. The risk of **commercial and owner influence** over editorial content is at high risk. This is because there are no mechanisms granting social protection to journalists in the case of changes of ownership or editorial line.

[60] 2022 Rule of Law report
[61] Ibid, p.8
[62] Interešu pārstāvības atklātības likums
[63] The Whistleblowing law
[64] Corruption Prevention and Combating Action Plan 2023–2025 approved by the Cabinet of Ministers
[65] Lobēšanas atklātības likums stājies spēkā; kā pildīt tā prasības – nav zināms
[66] Constitution of the Republic of Latvia, Chapter VI
[67] Ibid, art. 100
[68] Law on the Press and Other Mass Media
[69] Freedom of Information Law
[70] Electronic Mass Media Law
[71] Amendments brought into the Electronic Mass Media Law
[72] 2022 Rule of Law report
[73] Monitoring media pluralism in the digital era application of the media pluralism monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia & Turkey in the year 2021, country report: Latvia
[74] Ibid
[75] Ibid

Also, the decisions regarding appointments and dismissals of editors-in- chief are not regulated by any law. As regards the political independence of the media, there are no legal provisions which should prevent the conflict-of-interest situations. [75]

To sum-up, the legal framework and practical implementation of anti-corruption measures are still under development. The same observation applies to the media pluralism.

## 5. Conclusion and New Challenges

Over the past three decades, after regaining its independence, Latvia has gone through the fundamental changes of its State system. However, it is evident that the culture of the rule of law is still developing. For instance, there are some attempts to ignore or not to follow the Constitutional Court judgements and to introduce the rules infringing upon asylum rights. The recommendations of the Ombudsman are not always followed. The appointments of the judges are sometimes politically or ideologically motivated. The established judicial system has a few weaknesses, such as, for instance, inability of the courts to intervene on its own initiative in case if there are threats from movements seeking to subvert democratic principles, fundamental rights, and the rule of law.

Even though Latvia has recently passed legislation and Action Plan for combatting corruption, it is believed that corruption levels in the public sector are still rather high. Recent reports have shown that the freedom of press and media pluralism are not yet entirely ensured.
As such, it is not possible to identify specific actors who are challenging democratic norms and principles in Latvia. Some instances described above merely occurred due to the populist rhetoric and as a result – political influences which are aiming at short-coming interests of political actors.

[75] Ibid

# Use of the rule of law legal instruments in the face of mounting dissensus at the national level

# Lithuania

*RULE OF LAW INSTRUMENTS RESPONDING TO EMERGING DISSENSUS*

*Project N°101061621*

milieu
Law & Policy Consulting

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# USE OF THE RULE OF LAW LEGAL INSTRUMENTS IN THE FACE OF MOUNTING DISSENSUS AT NATIONAL LEVEL

## *Lithuania*

This study/report has been prepared by Milieu SRL under Horizon Europe RED-SPINEL Project N°101061621coordinated by Prof. Ramona Coman (PI) and the Institute for European Studies of the Université libre de Bruxelles. The author of the study/report is Stanislovas Staigvilas.


Milieu Consulting SRL, Chaussee de Charleroi 112, B-1060 Brussels, tel.: +32 2 506 1000; e-mail:marta.ballesteros@milieu.be; web address: www.milieu.be.

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# Abbreviations

| | |
|---|---|
| AEAJ Constitution CJEU | Association of European Administrative Judges The Constitution of the Republic of Lithuania of 1992 Court of Justice of the European Union |
| CC | Criminal Code of the Republic of Lithuania |
| Civil Code | Civil Code of the Republic of Lithuania |
| CAT CAO | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<br>Code of Administrative Offences |
| ConstitutionalCourt ECtHRSLAPP | The Constitutional Court of the Republic of Lithuania European Court of Human Rights<br>Strategic lawsuit against public participation |
| Supreme Court | The Supreme Court of the Republic of Lithuania |
| Rule of Law Report 2022 | Commission staff working document 2022 Rule of Law Report Country Chapter on the rule of law situation in Lithuania Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2022 Rule of Law Report The rule of law situation in the European Union, SWD/2022/509 final |

# 1. Introduction: Rule of Law threats in times of dissensus

This factsheet shall analyze the existence and the use of rule of law instruments to face threats to democratic principles at a national level in a context of growing dissensus over liberal democracy and its core values in the EU. Hence, it examines how national legal norms and governance instruments might react to breaches of the rule of law.

For the purpose of this work, "*dissensus is understood here as the expression of social, political and legal conflicts which take place concomitantly in different institutional and non-institutional arenas (parliamentary, constitutional, public sphere, technocratic and expert arenas…) driven by political, social, legal actors, including state and non-state actors, seeking to maintain liberal democracy, to replace liberal democracy or to restructure liberal democracy*" (Brack and Coman 2023) [1].

Examples of dissenting action can be found in populist or nationalist movements seeking to subvert democratic principles, fundamental rights, and the rule of law. In parallel, there are specific measures or rules established in each country to protect the respect of democratic principles.

At EU level the rule of law tool kit is composed of:

- Article 7 TEU to protect institutional system, fundamental rights and democratic principles including control mechanisms of citizens' right to voting, participation to decision making, legislative initiative, access to justice
- The Infringement Proceeding
- The Preliminary Reference Procedure
- The Charter of Fundamental Rights

Policy tools at the EU level include:

- The EU Justice Scoreboard
- The Cooperation and Verification Mechanism
- The Technical Support Instrument and its precedents
- The Protection of the EU Financial Interests
- Rule of Law Conditionality Regulation

At national level, the existence and the use of rule of law instruments to face threats to democratic principles might be established in national Constitutions or national tool kits. Please try to identify measures that either have a similar function to those at EU level or implement the EU legislative measures at national level.

Under the Constitution of the Republic of Lithuania (Lt. *Lietuvos Respublikos Konstitucija*), Lithuania is an independent democratic republic. The Republic of Lithuania is also a unitary state characterised by a significant degree of centralisation of power.

[1] Coman, Ramona and Brack, Nathalie (2023) "Understanding Dissensus in the Age of Crises", RED-SPINEL Working Paper.

As regards distribution of central powers, under the Law on Municipalities of the Republic of Lithuania (Lt. *Lietuvos Respublikos vietos savivaldos įstatymas*) there are specific competencies reserved to the central authority and the ones reserved to the **municipalities**, which are the main national administrative-territorial unit. In Lithuania there are 60 such municipalities. Each municipality has a **mayor**, who is the executive authority of the municipality (the head of the municipality), with powers of municipal authority and public administration, responsible for the direct implementation of the laws of the Republic of Lithuania, the Government of the Republic of Lithuania's resolutions and the decisions of the municipal council, and a **Municipal Council**, which is a representative body of the municipality, possessing powers of municipal government and public administration and is made up of councillors who are representatives of the municipal community.

Under the classic principle of separation of powers, in Lithuania there is the legislature, executive and judicial powers. All the three branches of state power are independent and coequal. **Lithuanian parliament** (***Seimas***) is unicameral, comprised of 141 members who are elected every four years by direct vote by the citizens of Lithuania. The main function of the Lithuanian parliament is the legislative one (adopt new laws) and the function of controlling the government. The **government of Lithuania** consists of the Prime Minister and ministers. The Prime Minister is appointed and dismissed by the President of the Republic with the approval of the *Seimas*, while ministers are appointed and dismissed by the President of the Republic on the proposal of the Prime Minister.

The main function of the government is to perform the executive tasks of the state. As regards the **judiciary**, justice in Lithuania is administered only by the courts. Judges and courts are independent in the administration of justice. Judges are subject only to the law when hearing cases and they rule on behalf of the Republic of Lithuania.

It is to be noted that in Lithuania the principle of judicial independence is *expressis verbis* set forth in the Constitution (Article 104 and 109 of the Constitution). With respect to the **President**, the President of the Republic is the head of state. He represents the State of Lithuania and does everything entrusted to him by the Constitution and the law. The President of the Republic is elected by the citizens of the Republic of Lithuania for a term of five years by universal, equal and direct suffrage, by secret ballot. The same person may not be elected President of the Republic more than twice in a row.

Under Article 68 of the Constitution, **the right of legislative initiative** is vested in the members of *Seimas*, the President and the Government, however citizens of the Republic of Lithuania also have the right of initiative – 50,000 citizens possessing the right to vote can submit a bill to the *Seimas*, which the *Seimas* is legally bound to consider. The Constitutional Court of Lithuania is vested with the authority to decide whether laws and other acts of the *Seimas* are in line with the Constitution, and whether acts of the President of the Republic and the Government are in line with the Constitution or laws.

The status of the Constitutional Court and the procedure for the exercise of its powers shall be determined by the Law on the Constitutional Court of the Republic of Lithuania. Under Article 4 of the Law on the Constitutional Court of the Republic of Lithuania, the Constitutional Court is composed of nine judges, appointed for nine years and only one term of office. It should be noted that the judges to the Constitutional Court are appointed on a rotational basis every three years as to preserve the Court's coherency.

It should be noted that the fundamental rights and values established in the Constitution of Lithuania are in sync with Article 2 of the Treaty on European Union (TEU). Article 2 of the TEU outlines that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. Similarly, under Chapter II of the Constitution, human rights and freedoms are inalienable, the right to life is protected by law and the human person is inviolable, likewise human dignity, private life and property are protected by law and inviolable. Every person has the right to hold opinions and to express them freely. So, the values and fundamental principles at both national and EU levels clearly match.

In the present context it has to be emphasised that under Article 3 of the Constitution no one may limit or restrict the sovereignty of the Nation or usurp the sovereign powers of the Nation as a whole, the Nation and every citizen shall have the right to oppose anyone who forcibly encroaches on the independence, territorial integrity, and constitutional order of the State of Lithuania. So, an obligation to protect the national sovereignty independence, territorial integrity and constitutional order is expressly laid down in the Constitution. However, in Lithuania there is no foreseen toolkit to address dangers to the rule of law within the national system.

It is, thus, by no accident that the 2022 Recommendations of the European Commission [2] mainly focus on the necessity to strengthen the anti-corruption regime, scrutinise the legitimacy of certain measures adopted during the COVID-19 crisis and to curb the threat to democratic principles of the strategic lawsuits against public participation, which are topics that will be dealt with subsequently.

## 2. The instruments provided by Lithuanian law

The principle of the rule of law includes the principle of legality, which implies a transparent, accountable, democratic, and pluralistic process for enacting laws, respect of fundamental rights and equality before the law; legal certainty and prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review [3]. Please explain how these principles are protected in national law.

Please focus on key examples of the use of constitutional/legislative/governance instruments in situations of mounting dissensus. In section 2.5, please focus on the role, if any, of national courts.

### 2.1 Protection against threats to democratic principles

This section should be devoted to any attempts to affect the institutional structure or balance of powers.

The elements of the principle of the rule of law are, firstly, established in the Constitution, where the basic notions are set forth, such as the inalienable and inherent concept of human rights, the sovereignty of the people of the nation, an interdiction to limit or attempt to usurp that sovereignty, the principles of representative democracy, the usage of the referendum, the requirements of the citizenship and the like. It should be noted that, Article 3 of the Constitution expressly outlines that no one may restrict or limit the **sovereignty of the Nation** or usurp the sovereign powers of the Nation as a whole and the Nation and every citizen have the right to oppose anyone who forcibly encroaches upon the independence, territorial integrity (indivisibility) and constitutional order of the State of Lithuania.

These fundamental constitutional precept are particularised in various national laws, in primis in the Criminal Code of the Republic of Lithuania (Lt. *Lietuvos Respublikos baudžiamasis kodeksas*). Chapter XVI of the Criminal Code forbids crimes against the independence, territorial integrity and constitutional order of the State of Lithuania and specific articles under this chapter deal with concrete activities geared against these values, in particular **crimes such as *Coup d'Etat*, treason, assistance to another state in carrying out activities hostile to the Republic of Lithuania, espionage,** collaboration with the enemy, creation of anti-constitutional groups or organisations and participation in activities thereof, public incitement to infringe upon the sovereignty of the Republic of Lithuania by using violence, violation of international sanctions, disclosure of a state secret and so forth.

[2]https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters_en

[3] Commission Communication, A new EU Framework to strengthen the Rule of Law. COM/2014/0158 final.

Misdeeds of lower dangerousness and lesser severity are prohibited under the Code of Administrative Offences (Lt. *Lietuvos Respublikos administracinių nusižengimų kodeksas*), like those regarding i**nfringement of the procedures** for the use and dissemination of confidential statistical data, legal persons submitting official documents in other than state language, obstruction of the exercise of rights or performance of duties by officials authorised by law, failure to comply with their lawful requests or instructions, and failure to comply with decisions of collegiate authorities or public officials, infringement of the procedure for raising flags, failure to report of acquiring of the nationality of another country, etc.

In order to fully understand the threats to democratic principles in Lithuania it is vitally important to take into consideration the historical context. On 11 March 1990 Lithuania has regained its independence from the then collapsing and dissolving Soviet Union. Despite that, the influence of the former Soviet Union has left its marks in the state and had long-lasting effects. Occasionally, various citizens leading dissenting actions try to revitalise the historical influence of the Soviet Union, advance communism, or proliferate pro-Russian political propaganda. From time to time, such instigators manage to establish legal entities to advance this cause.

One of the most remarkable cases of such occurrence is the case of Algirdas Paleckis, who is a pro- Russian Lithuanian citizen who has been **prosecuted for espionage at Lithuanian courts**. It has been determined with certainty that Mr Paleckis acting together with a person exempted from criminal liability, in an organised group with an employee of the Federal Security Service of the Russian Federation and citizens of the Russian Federation, on the instructions of the Federal Security Service, carried out the task assigned to them – to collect, on the territory of the Republic of Lithuania, for a pecuniary and other type of benefit, information of interest to the intelligence institution of the Russian Federation.

Article 119 of the Criminal Code on espionage sets forth that a person who, for the purpose of communicating it to a foreign state or organisation thereof, seizes, purchases or otherwise collects the information constituting a state secret of the Republic of Lithuania or communicates this information to a foreign state, organisation thereof or their representative shall be punished by imprisonment for a term of two up to ten years, whereas a person who, in performing an assignment of another state or organisation thereof, seizes, purchases or otherwise collects or communicates the information constituting a state secret of the Republic of Lithuania or another information of interest to the intelligence of a foreign state shall be punished by imprisonment for a term of three up to fifteen years.

As informs the National Courts Administration of Lithuania [4], the criminal case of Mr Paleckis was first examined before the Šiauliai Regional Court (Lt. *Šiaulių apygardos teismas*) and after the decision to find Mr Paleckis guilty it went on appeal before the Court of Appeal of Lithuania (Lt. *Lietuvos apeliacinisteismas*), which on 6 May 2022 rejected an appeal by the defence lawyers of the convicted Mr Paleckis and upheld the verdict of the court of first instance declaring Mr Paleckis guilty of espionage and sentenced him to 6 years of imprisonment. The Court of Appeal noted that there is no reason to doubt the information provided by the State Security Department of Lithuania (Lt. *Lietuvos Respublikos valstybės saugumo departamentas*) and the reached conclusion is confirmed by the data collected in the case.

*Despite regaining the independence on 11 March 1990, the influence of the former Soviet Union has left its marks in Lithuania, with long-lasting effects.*

[4]https://www.teismai.lt/lt/naujienos/teismu-pranesimai-spaudai/algirdas-paleckis-pagristai-pripazintas-kaltu-del-snipinejimo/10030

The court of first instance legitimately considered the Federal Security Service of Russia as an intelligence organisation of another State, and the person with whom Mr Paleckis had contact as a representative of the intelligence organisation of that foreign State. The Federal Security Service had an interest in obtaining information relating to the improvement of the conditions of detention or release of the person on trial in the case of "January 13th events" [5] (Criminal case of the Supreme Court of Lithuania № 2K-7-39-1073/2022) and to the whereabouts of the officials involved in the proceedings in that criminal case and in the proceedings in the other criminal cases relating to the aggression of the USSR against the Republic of Lithuania in 1990-1991. The Court also upheld the first instance court's finding that information of interest to the Russian Federation's intelligence organisation was in the process of being collected.

This is confirmed by the circumstances that a willing person was found, data was collected on a person who could help to execute this mission, payment for this international crime was discussed, data was passed on to a representative of a foreign intelligence organisation. The Court of Appeal also had no doubt that Mr Paleckis carried out the espionage activities for remuneration, since he and his accomplice were paid € 6 000, and were offered business development conditions in Russia, assistance in obtaining a free Russian visa, and a free stay at a country house. In court's assessment, these are typical methods used by the Russian intelligence and security services **to recruit and reward foreign nationals** (in this case, Lithuanian nationals) for their collaboration. The aim of the Federal Security Service is to deny the facts of aggression on the part of the Soviet power structures and to discredit the judicial proceedings taking place in Lithuania (the case of "January 13th events"), which, according to the assessment of the judicial panel Court of Appeal of Lithuania, is an activity directed against the national security and the national interests of the Republic of Lithuania.

The above-summarised ruling of the court entered into force on the date of its adoption, but was appealed on cassation to the Supreme Court of Lithuania within the deadline prescribed by the law (three months) and the Supreme Court has already announced that this case will be examined by the judicial chamber sitting in extended composition. At the moment of composing this report the ruling of the Supreme Court has not yet been published but it is bound to come in May.

Lastly, it should also be emphasised that, as alluded to previously, subversive activities of the sort are perpetrated **via legal entities** as well. In February 2023 the District Court of Vilnius Region (Lt. *Vilniaus regiono apylinkės teismas*) decided to liquidate the International Forum for Good Neighbourliness (Lt. *Tarptautinis geros kaimynystės forumas*), cofounded by Algirdas Paleckis and his associates, who had been convicted of espionage, after finding that the aim of the organisation was to act against Lithuania, thus it has been declared illegally established and accordingly the court has appointed the liquidator. Events and judicial cases of the sort clearly prove that in Lithuania a major threat to democratic principles is posed by the non-democratic ideologies that emanate from the ideological background of the former Soviet Union, however at the same time in Lithuania there is a sufficiently robust legal mechanism to deal with the cases as discussed above.

[5] The case of "January 13th events" refers to the notorious case before the Supreme Court of Lithuania, where the Supreme Court has recognised that inJanuary 1991 in the Republic of Lithuania crimes against humanity and war crimes were committed. The Supreme Court of Lithuania has ruled in acriminal case in which 67 foreign nationals were convicted of crimes against humanity and war crimes, namely treatment of human beings prohibited byinternational law, killing, maiming, torturing, or otherwise inhumanely treating persons protected by international humanitarian law, violating theprotection of their property, a prohibited act of war, use of a prohibited means of war. That is, the offenders were convicted for the preparation, planning and execution of a military operation against the State of Lithuania, the occupation of the Press Palace, the Vilnius Television Tower, the Lithuanian Radio and Television Building and other objects, and the imposition of a curfew in January 1991. During the occupation of the above-mentioned objects, in the course of carrying out the tasks assigned to the soldiers and officers, these persons used both sound and live ammunition and close combat actions (pushing, punching, kicking, kicking with fists, guns and other means of inflicting bodily harm, kicking with their feet), as well as the restriction of the rights of movement of persons during the curfew. These acts resulted in the killing of 14 persons and the infliction of various degrees of bodily harm on 837 persons.

The above cases show that even nowadays the major threats to democratic principles in Lithuania still are the remaining elements of Soviet Union era, whether in term of citizens compromised by the foreign intelligence authorities or legal entities that have been established specifically with an aim of spreading fake news and propaganda or whitewashing the history of Soviet Union. In spite of that, the above-mentioned cases also suggest that Lithuania possess the necessary political will and legal tools to effectively respond to the dissensus actions aiming at threatening the democratic system in the country.

### 2.2 Protection against threats to the principles of legality and abuse of power

The Seimas Ombudsman (Lt. *Seimo kontrolierius*) is a state official appointed by the Seimas of Lithuania to protects human rights and freedoms, investigates the complaints on abuse of office by or bureaucracy of officials and attempt to improve the public administration. The primary constitutional duty of the Seimas Ombudsman is to protect a person's right to good public administration securing human rights and freedoms and to supervise fulfilment by state authorities of their duty to serve the people properly.

The statutory grounds of the activities of the Seimas Ombudsman, firstly, is the Constitution which sets forth that the Seimas Ombudsman investigates **complaints from citizens on abuse of power** or bureaucracy by state and municipal officials (except judges) and they have the right to propose to the court that the guilty officials be dismissed from their posts. The Constitution also sets out that the powers of the Seimas Ombudsman are laid down by the law (Article 73). The law referenced in the Constitution is the Law on the Seimas Ombudsman of the Republic of Lithuania (Lt. *Lietuvos Respublikos Seimo kontrolierių įstatymas*). According to this law, the goals of this officialare to: 1) protect the fundamental human right to good public administration that safeguards human rights and freedoms, and to ensure that public authorities are fulfilling their duty to serve the people properly; 2) to promote the respect for human rights and freedoms in the exercise of the functions of national human rights institution; 3) to carry out national prevention of torture in places of detention in accordance with the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in compliance with which the Seimas Ombudsmen carries out the national prevention of torture in the places of detention.

Like it was the case in many European countries, **the fundamental question of legitimacy of the restrictions on human rights imposed during the COVID-19 pandemic** came about. As the Seimas Ombudsman pointed out in its Annual Report on the Activities of the Seimas Ombudsman's Office of the Republic of Lithuania (2020),it has performed an investigation with an aim of identifying the major challenges related to restrictions on the provision of personal health care services imposed by decisions of the Minister of Health of the Republic of Lithuania.

Firstly, on 24–25 March 2020 after a close inspection of the **circumstances of self-isolation of persons arriving from foreign countries** in the premises provided by Vilnius City Administration, the Seimas Ombudsman concluded that these persons were isolated in the premises not suited to their needs and possibly not satisfying public health safety requirements. The age, gender, state of health and special needs had not been taken into consideration prior to the isolation, the persons were denied alternative possibilities of self-isolation, such as staying at home or another place of residence, they were not appropriately informed on what grounds they had to self-isolate in the premises provided by the municipal administration. Therefore, according to the Ombudsman's assessment, the persons suffered significant inconveniences, stress and were exposed to the increased risk of contracting the COVID-19 disease; it added that the isolation of persons without any selection, and in premises not adapted for that purpose, was a restricting measure **disproportionate to the legitimate purpose sought by the application of the measure and 'could amount to degrading treatment prohibited under the international law', in flagrant breach of the principle of legality.**

As regards specifically adherence to the principle of legality, the Seimas Ombudsman concluded that the described actions were in contravention of both national and international legislation.

Article 8(9) of the Law on the Prevention and Control of Communicable Diseases of the Republic of Lithuania (Lt. *Lietuvos Respublikos žmonių užkrečiamųjų ligų profilaktikos ir kontrolės įstatymas*) lists the places where people may be isolated for epidemiological reasons, these are: a) specially equipped facilities organised by the municipal administration, b) in-patient personal health care facilities, c) homes of the persons, d) or other places of the persons, if they are adapted for isolation. As it has already been seen, in the case at hand only the first option was offered for the people subjected to isolation, thus limiting their right to choose a place for isolation according to their needs. Seimas Ombudsman also examined the dispositions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and concluded that any actions on the part of State officials or similar civil servants whereby torture or humiliation is inflicted on a person deprived of liberty are incompatible with the CAT.

Secondly, the Seimas Ombudsman also raised doubts as to whether certain measures taken during the quarantine to curb the spread of COVID-19 disease **in the field of personal health** met the criteria of reasonableness and proportionality, and Lithuania's international obligations, as well as whether the goal of protecting public health set during quarantine could not be achieved by less coercive and lower in scale restrictions. Once again, following a careful evaluation of all the pertinent circumstances, the Seimas Ombudsman concluded that during the period of quarantine in the Republic of Lithuania – considering the postponement of scheduled operations and hospitalisations, provision of routine consultations, diagnostic, prophylactic, preventive and therapeutic services (with some minor exceptions) – **the clarity and systematic nature of the legislation adopted on the control of measures to combat COVID-19 disease was not ensured.**

As a consequence, the right of each individual to accessible health care services and the highest possible level of health care protection generally was not adequately guaranteed.

To sum up, as regards restrictions on human rights imposed during the COVID-19 pandemic, the Seimas Ombudsman concluded that neither the premises of self-isolation of persons arriving from foreign countries in Vilnius, nor preventive measures in the field of personal health in Lithuania, guaranteed the necessary standard of the protection of human rights and oftentimes were improper or inadequate. As regards limitation of the locations for self-isolation only to the specially equipped facilities organised by the municipal administration, the Seimas Ombudsman concluded that such a restriction of human rights violated Article 8(9) of the Law on the Prevention and Control of Communicable Diseases of the Republic of Lithuania and it is susceptible to cause torture or humiliation forbidden under the CAT. Situation of the sort at the time of the pandemic inevitably indicates a breach of the principle of legality and can be considered to be an abuse of power.

Lastly, it should be noted that the Seimas Ombudsman has issued a set of recommendations concerning the COVID-19 measures. Considering that, under Article 19(1)(6) of the Law on the Seimas Ombudsman, the competent institutions are obliged to examine the recommendations of the Seimas Ombudsman, to consult with the Seimas Ombudsman on the possible measures for the implementation of the recommendations, and to inform the Seimas Ombudsman on the results of the implementation of the recommendations, they are an effective tool to balance the threats to the rule of law in Lithuania. Importantly, inspections of the Seimas Ombudsman do not preclude constitutional review by the Constitutional Court.

### 2.3 Protection against threats to Fundamental Rights

This section should cover political, civil and social fundamental rights, including environmental rights.
In the wake of political disturbances caused by the unprovoked attack of Ukraine on the part of the Russian Federation, a reflection is needed regarding **the protection of fundamental rights of Lithuanian citizens of Russian origin [6]. It is vitally important not to discriminate those citizens, clearly differentiating between the Russian Federation as a foreign country and the ethnic minorities in Lithuania, and to prevent a backlash against Lithuanians of Russian origin.** Lately, in Lithuania some rudimentary signs of such a downward slide have already been noticed and require an immediate remedial action.

In a publicly expressed position, a prominent Lithuanian philosopher (Mr G. Mažeikis) claimed that Russian speakers in Lithuania are divided into many groups, and those who support Russian president Putin are a clear minority, also adding that if we were to compare the polls of public opinions even before the occupation of Ukraine to those of the present time, we would conclude that the Russian-speakers' priorities and political views differ little from those of the Lithuanian-speaking population [7]. Hence, it seems that the war in Ukraine has actually levelled out the differences in political views between the majority population and Russian minority in Lithuania. In the same vein, a Lithuania-based NGO "Mano teisės" (Lt. My Rights) maintains that Russophobia can be defined as a type of xenophobia, or more specifically, a political and cultural fear of Russia, including hostility towards Russians. Although similar manifestations of hostility can be found in many areas (politics, everyday life, etc.), the media should be given special attention, as inadequate assessment of the Russian minority in the Lithuanian media is widespread [8]

On this note, it has to be stressed that Article 169 of the Criminal Code of the Republic of Lithuania (Lt. *Lietuvos Respublikos baudžiamasis kodeksas*) foresees legal protections for ethnic, linguistic and cultural minorities, as it sets forth that anyone who has committed acts aimed at preventing a group of people or a person belonging to such a group of people on the grounds of age, gender, sexual orientation, disability, race, colour, nationality, language, descent, ethnic origin, social status, religion, beliefs or opinions, from participating on an equal basis with others in political, economic, social, cultural, labouror other activities, or at restricting the rights and freedoms of such a group of people or person belonging to such a group, is punishable by community service or a fine, or by restriction of liberty, or by arrest, or by deprivation of liberty for a term not exceeding three years. Hence, in Lithuania there is a legal mechanism inplace to deal with such sort of crimes. As a matter of fact, in Lithuania there has been ascertained a case where a person belonging to an ethnic minority has experienced limitation of her rights due to the war in Ukraine; to counterbalance this, as explained below, the person had the possibility to turn to the Office of the Equal Opportunities Ombudsman.

The Office of the Equal Opportunities Ombudsman reports [9] that Lithuanian telecommunications company "Telia Lietuva" has discriminated against a candidate of Belarusian roots in a job selection process, as Belarus is known to be an ally of Russia which has triggered a conflict in Ukraine. According to the decision taken by the Equal Opportunities Ombudsman following a complaint by a Lithuanian resident, a representative of "Telia Lietuva" discriminated against a female candidate in a job interview on the basis of her nationality, language, origin and citizenship. In summer 2022, a woman contacted the Equal Opportunities Ombudsman's Office after she was invitedby a specialist at "Telia Lietuva" to interview for a SEO Manager job. During the telephone interview, the candidate answered questions about her experience and qualifications and stated that Lithuanian was not her mother tongue.

[6] According to the statistical data (2021) from the Department of National Minorities under the Government of the Republic of Lithuania (Lt.Tautinių mažumų departamentas prie Lietuvos Respublikos Vyriausybės), out of 2 810 761 Lithuanian citizens 141 122 are of Russian origin, which accounts for 5,02 % of the entire population.
[7]https://www.lrt.lt/naujienos/pasaulyje/6/1861115/filosofas-mazeikis-rusakalbiai-lietuvoje-susiskirste-i-daug-grupeliu-o-palaikanciu- putina-yra-mazuma
[8]https://manoteises.lt/straipsnis/lietuvos-rusai-matomi-vienpusiskai/
[9]https://www.lygybe.lt/lt/telia-lietuva-darbo-atrankoje-diskriminavo-baltarusisku-saknu-turincia-kandidate-pranesimas

The applicant was invited for a second interview, which was cancelled after she was informed that, although her qualifications were appropriate, due to the geopolitical situation, Belarusian and Russian applicants were not accepted. During the applicant screening process, the company found out that the Belarusian-born woman has dual (Polish-Belarusian) citizenship. During the investigation, the company's representatives explained that "Telia Lietuva" does not collect data on candidates' nationality or citizenship, and the reason for refusing to invite them to the next stage of the selection process was their insufficient knowledge of the Lithuanian language. After a detailed analysis of the situation, the Equal Opportunities Ombudsman found that the requirement to speak the national language is reasonable and understandable, but the company's defence arguments were not convincing. During the first interview, the applicant's knowledge of the Lithuanian language and fluency of expression were sufficient for her to be invited to the next stage. Moreover, the message from the recruiter revealing that nationality, origin and citizenship were the main reasons was clear and unambiguous: "Your experience does indeed meet the requirements and is suitable for the position we are offering, however, we do carry out a background check on all our candidates, which unfortunately, **due to the geopolitical situation, Russian and Belarusian candidates are not currently able to pass, and we are not able to consider you further at this time"** The Ombudsman concluded that the reason given in the message for not inviting the candidate to the next round of selection is **not only unethical but also illegal.**

**Discriminatory attitude threatens not only regular Russian speaker in Lithuania, but also Russian diplomats.** Prosecutor General's Office has announced that its Vilnius office has closed a pre-trial investigation initiated in connection with an incident in Vilnius, after which a Russian diplomat residing in Lithuania filed a complaint to the police alleging that he had been subjected to violence and a breach of public order. According to the diplomat's statement on 24 February 2022, in the evening, the complainant, together with another person, were leaving the premises of the Embassy of the Russian Federation in Lithuania when he noticed a stranger filming and following them.

Shortly thereafter, in his view, the stranger started bashing them in the courtyard of the apartment building without any reason. Police officers who were nearby and immediately arrived at the location apprehended the suspect at the scene. The diplomat was offered medical assistance but deliberately refused it. During the investigation – in view of the fact that the Embassy of Russian Federation informed that the applicant and the witness who enjoy immunity from criminal jurisdiction under international law did not agree to participate in the criminal proceedings and it became impossible to obtain a forensic medical service on the injuries sustained by the diplomat – the pre-trial investigation on these grounds had to be discontinued. In discontinuing this pre-trial investigation, the prosecutor also stated that the data collected during the pre-trial investigation confirmed that the suspect A. B. had offensively approached them during the event by demonstratively filming and photographing the diplomat and the person who was walking with him without consent, shining the light of a telephone in their eyes from a very short distance, following them for some time, thereby violating the privacy of these persons. As the prosecutor had no grounds for criminal prosecution, he has forwarded the pre-trial investigation file to the Vilnius County Chief Police Commissariat (Lt. *Vilniaus apskrities vyriausiasis policijos komisariatas*) to decide on the imposition of administrative liability on the suspect for a minor public order offence under Article 481(1) of the CAO. It is worth noting that this incident has been publicly commented by the Equal Opportunities Ombuds person of the Republic of Lithuania (Lt. *Lygių galimybių kontrolieriaus tarnyba*) where she has voiced her concern and unequivocally affirmed that aggression against Russian speakers in Lithuania is unjustified and impermissible.

To sum up, the recent turmoil in geopolitical situation is stirring up societal confrontation and in Lithuania there has already been noticed instances of manifestation of anti-Russian sentiments and Russophobia, nevertheless the public institutions are reacting thereto effectively and do seem to be able to cope with this sort of social dissensus.

### 2.4 Protection of Judicial Independence

The protection of judicial independence is recognised by the Lithuanian legal system and has been recenlty rediscussed in relation to judges' salaries, since the protection of the judges' remuneration is one of the guarantees of the judicial independence itself.

The Constitution of Lithuania sets forth that in the Republic of Lithuania, justice is administered only by the courts. **When administering justice, judges and courts are to be independent.** When considering cases, judges have to abide only by law. Courts adopt decisions in the name of the Republic of Lithuania. Judges may not apply any laws that are in conflict with the Constitution. In cases when there are grounds to believe that a law or another legal act to be applied in a particular case is in conflict with the Constitution, the judge shall suspend consideration of the case and apply to the Constitutional Court, for a ruling on whether the law or another legal act in question is in compliance with the Constitution (Articles 109 – 110). The above-mentioned constitutional precepts are amply elucidated in the doctrine of the Constitutional Court.

On the subject of judicial independence, the Constitutional Court specifically lays dawn that interference in the activities of a judge or a court on the part of the State institutions, members of the Seimas and other officials, political parties, political and public organisations or citizens is prohibited and punishable by law [10]. The same principle is enshrined in Article 109 of the Constitution. A court may administer justice only if the judge is able to decide the case impartially, having regard to the circumstances of the case and the law. It should be noted that, under the Constitution, public authorities and public administration are not only prohibited from influencing the judge and the courts, but also have a duty to ensure the independence of the judge and the judiciary.

It is in this context that the **financial aspect** kicks in. The constitutional imperative to protect the judge's remuneration and other social guarantees derives from the principle of the independence of the judge and the judiciary, enshrined in Article 109 of the Constitution and Article 113(1), which expressly prohibits judges from receiving any remuneration other than that for creative or pedagogical activities throughout their professional career.

The Constitutional Court has ruled [11] that in democratic countries it is recognised that a judge charged with the duty of dealing with conflicts arising in society, including personal conflicts with the State, must not only be highly qualified and of impeccable professional standing, but also materially independent and secure in his or her future. **The State has a duty to set the remuneration of a judge in a manner that is commensurate with the status of the judiciary and of the judge in terms of the functions performed and the responsibilities assumed.** The Constitutional Court has emphasised the importance of Article 109 and consistently maintained that the protection of a judge's remuneration and other social guarantees is one of the safeguards of the principle of judicial independence.

The issue of remunerations of judges is a long-standing problem in Lithuania. Lithuanian judges were for a long time raising the question of the inadequacy of their salaries also emphasising its danger to the judicial independence, however only recently this problem came to the fore. As a case in point, District Court ofVilnius Region (Lt. *Vilniaus miesto apylinkės*) is the largest court in Lithuania in terms of the number of judges (95 judges). A judge at this court in 2023 earns € 3570.99 gross, which is 107.54 € more than in 2022 (€ 3463.45).[12] It should be noted that the judges‘ salaries tend to increase in function of the instance of the court.

[10] The jurisprudence of the the Lithuanian Constitutional Court is epitomised in its collections of the Dispositions of the Official Constitutional Doctrine (Lt. Oficialiosios konstitucinės doktrinos nuostatos).

[11]Dispositions of the Official Constitutional Doctrine of the Constitutional Court of the Republic of Lithuania (1993–2009), the Constitutional Court of the Republic of Lithuania, 2010 pp. 897 – 898.

[12]Data officially published by the District Court of Vilnius Region, available at: https://vilniausmiesto.teismas.lt/administracine-informacija/darbo-uzmokestis/30.

For example, a judge at the Supreme Court of Lithuania in 2023 earns € 4434.00 gross. From the comparative point of view, e.g., a public prosecutor at the Prosecutor General's Office of the Republic of Lithuania in 2023 earns 4269.00 € gross.[13]

On 15 October 2013, the European Court of Human Rights (hereinafter "ECtHR") adopted a decision [14] declaring inadmissible the petitions of certain judges, thus effectively rejecting the judges' petitions contesting a reduction in their salaries and the resulting length of the proceedings. The ECtHR concluded that these judges were able to apply for compensation through the courts in Lithuania, also adding that the applicants in the present case did not suffer an undue burden and that the reduction of their salaries did not affect their independence or their ability to perform their duties as judges in a dignified manner. Taking into account the arguments put forward by the Government to justify the austerity measures, the ECtHR stated that the State of Lithuania had not exceeded the margin of appreciation conferred upon it by temporarily reducing the salaries of the judges, and held that the four petitions of the applicants were manifestly ill-founded.

Gradually, the discontentment on the part of Lithuanian judges was growing and the judges themselves were expounding an opinion that such low salaries are susceptible to impair their independance, which in turn is very negatively effecting the view of the society on the judiciary at large. In 2021, the Regional Administrative Court of the Regions (Lt. *Regionų apygardos administracinis teismas*) suspended administrative proceedings in respect of a complaint concerning the purported defective nature of the Law on the Remuneration of Judges (Lt. *Lietuvos Respublikos teisėjų darbo apmokėjimo įstatymas*) inasmuch as it does not provide for a mechanism to increase the remuneration of judges in case of increased workload during normal working hours or the absence of new judges. The Constitutional Court at that point in time stated [15] that the Law on the Remuneration of Judges provides for a uniform salary for judges of the same judiciary and the same branch of the judiciary in respect of the performance of their duties as judges, and that it does not provide for a differentiation of remuneration in respect of the judge's workload during his or her normal working hours, also adding that the applicant has not provided sufficient legal arguments in support of any presumed legislative omission. Consequenly, the application as such was rejected. This has significantly contributed to the mounting dissatisfaction in the judiciary.

The Judicial Council (Lt. *Teisėjų taryba*), which is the executive organ of Lithuanian judiciary, and the National Courts Administration (Lt. *Nacionalinė teismų administracija*), which is an institution servicing the courts, have consistently continued voicing the concern of Lithuanian judiciary regarding the inadequate salaries, e.g., the National Courts Administration has published on its website an announcement comparing the salaries of Lithaunian and Estonian judges concluding that the Estonian judges' salaries almost double those in Lithuania [16], similarly the Board of the Association of Judges of the Republic of Lithuania (Lt. *Lietuvos Respublikos teisėjų asociacijos valdyba*) has published its public statement on the matter affirming that it regrets the critical situation of judges' salaries in Lithuania. For this aim, the international judicial associations have also been employed, e.g., the Association of European Administrative Judges (AEAJ) (Fr. la Fédération Européenne des JugesAdministratifs, Lt. Europos administracinių teisėjų asociacija) has issed a public position reaffrming that Lithuania's judicial remuneration situation violates the independence of the judiciary and the rule of law. It should also be noted that to a large extent the Lithuanian judges who are raising the issue of the adequacy of their salaries are underpinning their position on the basis of the ruling of the Court of Justice of the European Union (CJEU) in the case Associação Sindical dos Juízes Portugueses (C-64/16), where the CJEU has

[13] Data officially provided by the Prosecutor General's Office of the Republic of Lithuania, available at: https://www.prokuraturos.lt/lt/administracine-informacija/darbo-uzmokestis/141.
[14]http://lrv-atstovas-eztt.lt/uploads/SAVICKAS_and_others_2013_decision.pdf
[15]https://lrkt.lt/lt/teismo-aktai/paieska/135/ta2413/content
[16]https://www.teismai.lt/lt/naujienos/teismu-sistemos-naujienos/estijos-teiseju-atlyginimai-beveik-dukart-didesni-nei-lietuvos/11051

inter alia stated that every Member State must ensure that the courts or tribunals, within the meaning of EU law, meet the requirements of effective judicial protection. The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions, like the protection against removal from office of the members of the body concerned or **the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence** (§ 45).

Currently, in Lithuania there have been some major changes in this regard. By the decisions [17] of 21 February 2023, the Constitutional Court has admitted two requests [18] from the applicant Regional Administrative Court of the Regions to examine whether Article 3 of the Law on Judges' Remuneration is contrary to the Constitution. The applications call into question the compatibility of the above mentioned legislation with Article 109 of the Constitution, in so far as it provides for the calculation of judges' remuneration without taking into account clearly defined criteria or economic indicators. The applicant has applied to the Constitutional Court following the suspension of the pending administrative proceedings for the award of pecuniary damages, which the applicants in the administrative proceedings, i.e. judges of the district court of general jurisdiction, attribute to the part of the judge's remuneration not received between 2019 and 2022, as calculated in accordance with the contested legal regulation. According to the applicant, the calculation of judges' official salary (remuneration) must be linked to a specific relative amount, calculated on the basis of a certain economic indicator, e.g. the average wage which is objectively established in the State or the minimum monthly salary, otherwise it leads to situations where judges' remuneration does not increase proportionally to the same extent as the relevant indicators.

According to the applicant, in the absence of objectively defined criteria, the State authorities (the Seimas, the Government) can determine and approve both the basic amount and the coefficient for calculating the salary of judges at their own discretion, by decisions which are subject to the will of the latter and without any legitimate grounds. The Constitutional Court found that the requests were based on legal arguments and accepted them for examination. At the moment of composition of this report, the Constitutional Court has not yet adopted its decision on the merits.

In conclusion, the remuneration for judges in Lithuania has for a long time been a controversial topic, which used to alienate the judiciary and purportedly encroach upon their independence. However lately there have been some major changes, as the the CJEU has adopted a relevant decision in the case C-64/16 and the Constitutional Court has accepted to examine the case on the national legislation regulating the criteria of the amount of the salaries of judges.

## 3. Judicial Intervention

Judicial intervention performed by the Constitutional Court is of vital importance in assuring legality and the rule of law, but especially it is the case when confronted with instances that are subject to controversy.

Lithuania has recently been going through one of the most sensational judicial corruption crises in its entire history. **A renowned judge of the Supreme Court of Lithuania and member of the Judicial Council, Mr Laužikas, after allegations were made against him in a judicial corruption case, has been charged with corruption, acceptance of a bribe and dismissed from the office in September 2019.** Investigation has revealed that in February 2019, when the arrests of judges and lawyers were made public, more than € 47,000 in cash was found in Mr Laužikas house, who was arrested by court order for ten days.

[17]https://lrkt.lt/lt/teismo-aktai/paieska/135/ta2805/content, https://lrkt.lt/lt/teismo-aktai/paieska/135/ta2806/content.
[18] https://lrkt.lt/~prasymai/6_2023.htm

Nonetheless, Mr Laužikas argued that procedural irregularities had been committed during his dismissal (considered unlawful), and that his rights and legitimate interests had been severely violated. In view of the applicable dispositions of the Lithuanian legislation, the judge in question sought to annul the decisions taken by the institutions involved in the proceedings, that is decrees of the President, resolutions of the Judicial Council and those of the Seimas.

Before entering into the merits of the constitutional justice case, it should be born in mind that under Article 90(9) of the Law on Courts of Lithuania, a judge who disagrees with their dismissal has the right to appeal to the Vilnius Regional Court (Lt. *Vilniaus Apygardos Teismas*) within one month from the date of dismissal. Mr Laužikas addressed the Vilnius Regional Court and during the process raised a number of questions regarding the legality of his dismissal, which led the trial court to stay the proceedings and appeal to the Constitutional Court for clarifications. In its appeal to the Constitutional Court, the Vilnius Regional Court **questioned certain legal measures by which the judge in question had been dismissed from the office on the charges of corruption.**

It submitted that according to the constitutional principle of responsible government, the authorities exercising State power must not, in the exercise of their functions, exceed the powers conferred on them by the Constitution and the law, and must, in the exercise of those powers, adopt legal acts which are lawful and reasonable (they must be based on the provisions of a higher legal act and must be clear, rational and well-reasoned, etc). In accordance with the constitutional principle of the rule of law, the principle of the independence of the judge and the judiciary, the requirements of due process of law and other imperatives enshrined in the Constitution must be respected in all cases when a judge is dismissed from office. It was also claimed that the decisions on dismissal did not comply with the constitutional requirements of due process of law.

**In its ruling [19], the Constitutional Court concluded that none of the adopted decisions violated the Constitution, thus putting an end to a long-standing controversy on the matter, which has been extremely magnified by the media and almost turned into a public altercation.** On the other hand, the curiosity of the media and of the society is understandable, because this has been a resonance case involving one of the most prominent judicial figures in Lithuania, who for a long period of time a member of both the Supreme Court of Lithuania and the Judicial Council of Lithuania. After the scandal and the subsequent deposition, Mr Laužikas has found refuge at a professional law partnership in Vilnius, Lithuania.

To conclude, even though the above-mentioned case has been one of the most emblematic cases of judicial corruption in Lithuania, especially in consideration of the fact that it has reached the very highest levels of Lithuanian judiciary, the due intervention of the Constitutional Court has cleared up the legal intricacies involved.

## 4. Recent trends on the implementation of the Rule of Law

This section examines developments across the EU Member States, both positive and negative, in two key areas for the rule of law: the anti-corruption framework and media pluralism and whether inter-institutional cooperation and support mechanisms to strengthen the rule of law have been implemented. In your research, please focus on measures taken to address dissenting actions.

As a starting point, please read the 2022 Role of Law Report for your Member State [20]. Please note that the Italian Report briefly analyses, among other instruments, the Technical Support Instruments. While it might not be an expected point in the reports, it could bring interesting points for the analysis of the relationship between the rule of law instruments at EU and national level. Should you find TSIs relevant for this section, please only refer to projects related to the rule of law.

[19]https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/ee1b4750bcf411ec9f0095b4d96fd400?jfwid=-uwm4cgf8h

[20] https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters_en

### 4.1 Anti-Corruption

Lately, Lithuania was stuck by a massive corruption scandal involving a mogul of Lithuanian media. Mr Darius Mockus is Lithuanian citizen holding 100 % of a holding company "MG grupė", which controls the media group LNK standing for Free and Independent Channel (Lt. *Laisvas ir nepriklausomas kanalas*). **The holding company has consistently maintained relations with the Liberal party in Lithuania and supported its attempt to win the 2016-2020 election for Lithuanian parliament, while the politicians associated with this holding company tried to secure its participation in large procurement projects.**

The public prosecutors have charged the holding company with bribery and the former chairman of the Liberal party E. Masiulis as well as the Liberal party itself with taking of a bribe in the form of an immaterial item with no economic value on the market. According to the case file presented by the prosecutors to the Vilnius Regional Court (Lt. *Vilniaus apygardos teismas*), as early as 22 October 2015 the chairman of the Liberal party was arranged to be interviewed about the country's political issues in the programme "Alfa Savaitė", which was broadcasted on LNK and Info TV channels both belonging the holding company "MG grupe" and hosted by their journalists. In the process the journalist revealed that, since the TV programme was portrayed to be on air but in fact it was pre-recorded, the invitee was asked not to mention any dates as not to be uncovered. The programme was broadcasted on 25 October, the day after Mr Masiulis was re-elected for another term at the Liberals party congress. However, the viewers did not even suspect that the journalist and the politician were not talking on the air – the programme was recorded two days before, when it was not even known who would win the elections.

In the criminal process at hand the prosecutors have intercepted the communication between the journalist and a high-level manager of the holding company where the journalist was asking the manager of the holding company as to who to invite on his TV show and the latter replied not only indicating a commandment to invite former chairman of the Liberal party but even prescribing concrete reasons and talking points that are advantageous for them to be touched upon. The fact that a journalist was following instructions from a hight level manager of a private holding company without declaring this sort of relation publicly is unacceptable in a democratic society and violates the society's need to be informed objectively. It should be noted that such a subservience on the part of a journalist to the mentioned manages violates Article 24 of the Code of Ethics of Lithuanian Journalists and Publishers (Lt. *Lietuvos žurnalistų ir leidėjų etikos kodeksas*) which lays down that every journalist and public information provider must be free and independent and a journalist must refuse to comply with the instructions of the public information service or of his or her supervisor an assignment from a journalist's public information service provider if it conflicts with the laws of the State, the journalist's ethics and his/her convictions.

The holding company has engaged in **weaponization of the media** for the benefit of the Labour party as well. As it has been ascertained by the public prosecutors, in November 2015 at the time when the Labour party was actively campaigning for the elections, the media channels belonging to the holding company provided this political group with a platform to spread their message and the same manager of the business concern has even made over € 12 000 discount, which has been regarded to be a bribery by the prosecutors. The public prosecutors have also discovered that in return a prominent member of the Lithuanian Labour party promised the manager of the business concern to support not only the amendments to the Consumer Credit Law, but also supported the parliamentary resolution on the reconstruction of an important road, which was a project of national importance of the maximum value of € 169 million, in the execution of which the holding company was highly interested. On 19 April 2022 Vilnius Regional Court has acquitted all the defendants in the case under discussion affirming that the Chamber of Judges took this decision after finding that the charges were not proven and that the acts charged in the indictment were not committed [21]

[21] https://vat.teismas.lt/naujienos/vilniaus-apygardos-teismas-prieme-sprendima-politines-korupcijos-byloje/804

The panel of judges concluded that communication between members of the Seimas and a private person, the content of which is the adoption of a legislative act of interest to a private person or the personal vote of a member of the Seimas is inconsistent with the standard of transparent decision- making; however, the evidence in the case does not support the constituent elements of the offences of bribery, bribery, influence peddling, and abuse. Notwithstanding that, the public prosecutors and defence attorneys of some of the defendants have filled an appeal at the Court of Appeal of Lithuania and this process has already started [22]. The case under examination shows that the privately owned media channels, when concentrated in the hands of few, may lead to their weaponization and turning media channels into tools for political competition. It should also be added that such instances cripple the trust that the public has towards the media and encourage them to believe that the media is not duly performing the function of a watchdog in a democratic society.

The presented case shows that the corruption-related activities in Lithuania remain among the most challenging threats to the rule of law. As it has been seen, corruption permeates private businesses, state politicians and the media, consequently the society suffers not only in financial terms but also in terms of their right to free and objective information and in decreased state of the rule of law in their country. However, the judicial intervention, as well as the one of public prosecutors at the pre- trial investigation stage, proves to be a key tool for ensuring the dissenting actions that could threaten the rule of law in Lithuania are identified and sanctioned.

### 4.2 Media Pluralism

Media pluralism is one of the bedrocks of Lithuanian constitutional order, the protection of which is of vital importance to the societal cohesion. Importantly, media pluralism should not be interpreted restrictively but should be understood to be synergetic with the fundamental right to receive and spread information, which nowadays are increasingly threatened by the strategic lawsuits against public participation (SLAPPs), as will be explained below.

Concerning media pluralism, firstly, it should be recalled that under Article 44 of the Constitution censorship of mass information is prohibited and the State, political parties, political and public organisations, and other institutions or persons may not monopolise the mass media. The mentioned constitutional dispositions are implemented via the Law on Informing the Public of the Republic of Lithuania (Lt. *Lietuvos Respublikos visuomenės informavimo įstatymas*), which lays down the procedures for collection, preparation, publication and dissemination of public information, and the rights, duties and responsibilities of producers and disseminators of public information, their participants, journalists, and the institutions that regulate their activities.

According to this law, the term "Means of public information" is to be intended as a newspaper, magazine, bulletin or other publication, a book, a television programme, a radio programme, a cinema or other audiovisual production, a means of informing the public, and any other means of disseminating information to the public, while for the purposes of this Law, a public information medium does not include an official, technical or official document, or securities. It should be stressed that under Article 29 of the aforementioned law, State and municipal bodies, as well as other undertakings, institutions and organisations of all kinds, or natural persons, may not monopolise the mass media. The State creates equal legal and economic conditions for fair competition between producers and disseminators of public information, with the exception of producers and/or disseminators of violent and erotic products. In accordance with the procedures laid down in this law and other laws applicable in Lithuania, the State and municipal authorities ensure that pluralism and fair competition in public information are preserved, and that no person abuses his dominant position among producers and/or disseminators of public information or in the market for any particular type of public information media.

[22] https://www.teismai.lt/lt/naujienos/teismu-pranesimai-spaudai/rytoj-vyks-pirmasis-posedis-su-mg-baltic-susijusios-politines-korupcijos- byloje/10390

A separate but closely related topic that has to be touched upon in this context is the **Strategic lawsuits against public participation** (SLAPPs), which refer to an abusive and meritless claims launched against journalists, someone exercising the right of freedom of expression, or political rights, or any person who is socially active and intent to make use of the right to freedom of expression. Importantly, The real purpose of SLAPPs is not to access justice via the judicial system but to silence, intimidate, drain the financial resources of the targeted victims, as well as to affect them mentally. SLAPPs by their very nature have a 'chilling effect on thecitizens and should not be regarded as affecting on a particular defendant in question. The SLAPPs as a tool of lawfare are dangerous not only to journalists, dissident, activists and environmentalists, but can potentially be levelled at any socially active person (the case-law to be resented below presents exactly this situation).

The European Commission on 27 April 2022 has already started a legislative initiative for a directive intended to protect people who engage in public participation from clearly meritless actions, but only those having transboundary effects proceedings with cross-border implications. Under the applicable legislative procedure, the proposal undergoes an assessment by the Council and the Parliament.
As regards Lithuania, on 10 October 2018 the Chancellery of Seimas has published a comparative analysis of how SLAPPs are dealt with in different jurisdiction "Protecting persons involved in public participation from strategic litigation in foreign countries" (Lt. *Į viešąjį dalyvavimą įsitraukusių asmenų apsauga nuo strateginio bylinėjimosi užsienio valstybėse*) where the situation in the United States, Canada, Australia and Europe has been reviewed with an aim of gaining advisable practices.

In order to answer the threat of SLAPPs, the Ministry pf Justice of Lithuania on 25 June 2021 published a public announcement presenting its envisioned actions to this end. According to the plan, the amendments in the CCP will allow for an expeditious procedure for assessing the preliminary merits of a claim, in order to prevent abuse of process when claims are brought in bad faith, with the aim of undermining a person's public information or other activities relating to the satisfaction or protection of the public interest.

Applying this procedure and eliminating an unfounded action brought in bad faith at an early stage of the proceedings would save the time and financial resources of the parties to the proceedings and of the court and would relieve the defendant of unjustified reputational consequences.

The application of this measure would, as envisaged, depends on the will of the defendant. It is envisaged that the procedure for the preliminary assessment of the merits of an application would be applied in cases where the defendant requests it in his defence. However, these amendments could risk infringing the applicant's right to a fair hearing and therefore require caution. The has also been organised a meeting of the stakeholders at the premises of the Ministry of Justice, where not only institutional subjects but also members of the Lithuanian Journalists Union (Lt. *Lietuvos žurnalistų sąjunga*) were in attendance in order to share mutually their practical experiences. The new provisions of the CC will help to limit the possibility of criminal liability for defamation by proposing to decriminalise the offence of disseminating information which is untrue and which is liable to disparage, humiliate or undermine the confidence of another person. It also provides for a reduction in the criminal liability for defamation of a person who is alleged to have committed a serious or very serious offence, or for defamation by means of the mass media. It is hoped that the proposed amendments will create the preconditions to protect not only journalists but also other public information disseminators from unjustified criminal prosecution for criticism of their work. It will also ensure that the principles of criminal liability as a measure of last resort and proportionality are implemented. The experience of foreign countries has been assessed and analysed in the preparation of the new legal framework. To this end, a working group has been setup in the Seimas to draft legislation.

Accordingly, a legislative initiative has been tarted and a group the members of Lithuanian parliament have tabled an Explicative note (Lt. *Aiškinamasis raštas*), whereby they affirm that these lawsuits are "a form of harassment that is increasingly being used against journalists and other public interest actors.

These are unfounded or exaggerated claims by public authorities, businesses and powerful individuals against weaker actors who criticise such claimants or provide them with unfavourable information on matters of public interest. They seek to censor, intimidate and silence critics by burdening them with legal defence costs". Accordingly, a proposal has been tabled to change a) Articles 142 and 296 of the Code of Civil Procedure of the Republic of Lithuania (Lt. *Lietuvos Respublikos civilinio proceso kodeksas*) to enable the courts operatively assess the grounds of the claim and to reject it, if it meets the requirements of SLAPPs, b) Article 154 of the Criminal Code of the Republic of Lithuania (Lt. *Lietuvos Respublikos baudžiamojo kodeksas*), which seeks to limit the possibility of criminal liability for defamation, and proposes to decriminalise the offence set forth under the CC providing for criminal liability for the dissemination of information which is untrue about another person and is liable to disparage, humiliate or undermine the confidence of that person. It is believed that the amendments proposed in the draft amendment to the CC will create the preconditions for protecting not only journalists but also other public information disseminators from unjustified criminal prosecution for criticism of their work, as well as for ensuring the implementation of the principles of criminal liability as a measure of last resort and proportionality.

In concrete terms, the first known case where the doctrine of SLAPPs has been invoked before a Lithuanian court dates back to 2012-12-06, when a civil case before the Vilnius Regional Court (Lt. *Vilniaus apygardosteismas*) № 2A-2394-392/2012 has been examined on appeal. In the case under examination, JSC "Vilniausenergija" (Lt. Vilnius ernergy), which is a dominant provider of energy in Lithuania, has filed a lawsuit against P.M. demanding for the denial of false information that infringes its business reputation (good name). Under the circumstances of the case, on 21 February 2011 in an interview with the newspaper "Lietuvos žinios" (LT.Lithuanian News) for the article entitled "The government hides the fact that heat bills are illegal" (also published on the internet), the defendant stated: "Our government does not care that millions of people have been cheated by the heating companies, because it is afraid of the chaos and the financial damage to the monopolies that will ensue when people find out that all their heating bills are illegal and that consumers are therefore entitled not to pay them".

The defendant also stated: "Although the houses are equipped with an inlet hot water meter, Vilniaus energija UAB uses the amount of hot water declared by the residents according to meters that have not been metrologically checked to distribute the heat, forcing them to pay for heat energy that they have not actually consumed". The applicant argued that, the defendant acted intentionally in bad faith. On 1 March 2011, the defendant also disseminated "untrue information" in the BTV television programme 'Karštas vakaras' (Lt. Hot Evening) by stating: "In Lithuania, probably 2/3 of the heat consumers consume heat under the so-called "conspiratorial heat consumption contracts, i.e. they do not have written contracts, they are all subject to standard contracts. For example, in Vilnius, when one such contract was examined by the Consumer Rights Protection Service on 25 October, it was simply massively declared unfair to consumers".

The applicant submitted that in civil law there is a presumption of good faith, according to which every person is presumed to be honest unless proven otherwise. Since this presumption is not rebutted, the claimant is presumed to be in good faith. The applicant considered all the information disseminated by the defendant to be news rather than opinion, since it can be objectively verified by applying the criterion of truth and falsity and submitted that the information disseminated confirms the fact of dissemination.

*Public authorities, businesses and powerful individuals against seek to censor, intimidate and silence critics by burdening them with legal defence costs*

P.M. in defending his freedom of speech invoked the doctrine of SLAPPs by stating that the applicant brought a **manifestly unfounded 'strategic action against the public and freedom of expression' in order to persecute the defendant in its capacity as a defender of consumer rights. The defendant stressed that such actions are in fact aimed at intimidating the public, discouraging them from criticising public officials, so that people do not exercise their right to speak out about public concerns and dare to demand that the authorities remedy infringements.** (Lt. "Nurodė, kad ieškovas, siekdamas persekioti atsakovą, kaip vartotojų teisių gynėją, pareiškė akivaizdžiai nepagrįstą „strateginį ieškinį prieš visuomenę ir žodžio laisvę". Atsakovas akcentavo, kad tokiais ieškiniais iš tiesų yra siekiama visuomenę įbauginti, atgrasinti ją nuo valdžios pareigūnų kritikos, kad žmonės neįgyvendintų savo teisių viešai kalbėti apie visuomenės interesus ir neišdrįstų reikalauti iš valdžios pažeidimų pašalinimo").

The court of first instance, which was the First District Court of Vilnius (Lt. Vilniaus miesto 1 apylinkės teismas) on 23 February 20212 has rejected the claim maintaining that on the ground that the defendant had expressed its opinions and assessments on television programmes and on websites based on data established by public authorities. Moreover, the applicant's activities as a heat supplier are in the public interest and, therefore, the limits of the criticism that can be accepted against it are undoubtedly wider. On the appeal the claimant essentially maintained the same argumentative line, just adding that the freedom of expression is not absolute as those exercising it must act in good faith towards the "addressee" of the information, strive to provide accurate and reliable information, and comply with ethical standards. It is of vital importance that, **regarding SLAPPs the defendant counterargumented that "Strategic lawsuits against public participation is merely a fabrication by the defendant to unjustifiably discredit the plaintiff and divert the court's attention away from the essential facts of the case"** (Lt. „Strateginiai ieškiniai prieš visuomenės dalyvavimą" tėra atsakovo išsigalvojimas, siekiant ieškovą nepagrįstai sukompromituoti, nukreipti teismo dėmesį nuo esminių bylos aplinkybių), which indeed was a strong term to be employed in that context.

The court on appeal ad rejected the applicant claim by concluding that P.M. expressed his opinion in the articles and programmes in question and did not present news. Article 2(36) of the Law on Informing of the Public states that an opinion may be based on facts, reasoned arguments and is usually subjective and therefore not subject to the criteria of truth and accuracy, but must be expressed honestly and ethically, without deliberately concealing or distorting facts and data. In the present case P.M. as a person stated in his pleadings, presented his opinion to the media on the basis of the data established by the state authorities. In the present case, the claim for the denial of the data which are supposedly untrue and which violate the business reputation was brought by JSC "Vilniaus Energija", which is well known to the public as a centralised supplier of heat and hot water to the population, thus its activities are clearly related to the public interest and it is considered to be a public legal person. Criticism of such a person harsh critique is permissible.

In view of the foregoing, it is clear that the need to protect journalist and every single person from SLAPPs is aneed that goes beyond the individual case and undermines the building up of a healthy and pluralistic democratic space in which citizens can participate actively. At the moment Lithuania seems to still be able to legal protect such persons; however there is a need for a more fine-tuned legislative framework.

### 4.3 Technical Support Instruments

The Technical Support Instrument (TSI) is an EU tool that provides for the Member States customized technical expertise to intended for reforms at the national level, in particular in the fields of the green and digital transitions as well as Recovery and Resilience Plans. TSI 2022 main novelties are the multi-country projects, geared at addressing common issues among Member States.

With the second round of the TSI, the Commission will **support Lithuania win 6 projects** in the areas of governance and public administration, financial sector, health and Sustainable growth and 2 of those projects are multi-country projects, such as

**Lithuania has so far benefited from 53 projects financed by the TSI or its predecessor**, the Structural Reform Support Programme (SRSP). This support has addressed a broad range of policy areas, including tax reform, green transition, labour reform, public administration reform and national innovation policy. A particular focus has been on addressing labour market challenges, health reform and education. To date, 32 projects have been successfully concluded [23].

## 5. Conclusion and New Challenges

In Lithuania the main identified challenges causing public dissensus are related to the still present political, economic, and social **influence dating back to the Soviet era** and certain remaining elements of the collapsed regime, which manifest itself via a number of ways, **such as proliferation of fake news, propaganda, establishment of unconstitutional organisations, agitating the society** with non-democratic slogans or engaging in espionage with a goal to extract vitally important state information and to leak it abroad. The Russian element is considered also in relation to the protection of fundamental rights of Lithuanian citizens of Russian origin and Russian diplomats. In addition to that, some of the problems related to the judiciary as the branch of State power are causing a significant deal of dissensus, such as emblematic cases of judicial corruption, sometimes reaching the very highest levels of justice, as well as the long-lasting problem of inadequate remuneration of judges, which in itself imperils judicial independence. However, as explained above, **Lithuanian legal system thus far has successfully dealt with these cases** involving the above- mentioned threats.

A particular attention should be given to the SLAPPs, as it is a new phenomenon in Lithuania directly causing public dissensus. As regards media pluralism, there are two principal causes of societal dissensus. Firstly, a large number of Lithuanian television channels and other means of media are concentrated in the hands of few prosperous business persons, who do not hesitate to use these channels for political goals; that is the media, which is supposed to perform the function of a watchdog in a democratic society, is weaponised for political aims.

Secondly, **SLAPPs is becoming an ever more cumbersome problem in Lithuania**, where not only journalists but even regular citizens who express their genuine views are subjected to meritless litigation in an attempt to shut them down, which, in a context of lacking legislative framework to regulate of ban SLAPPs, is very dangerous to societal cohesion. Both of the mentioned problems caused significant scandals in Lithuanian society, thus sharply contributing the growing dissensus in the society. To overcome the mentioned problems, **Lithuanian definitely needs to fine tune its legislative framework in the field of fundamental rights as well as national sovereignty which is all too often challenged or threatened by the non-democratic regimes in Russia and Belorussia**, as today, it seems, that the thus far encountered problems were effectively resolved due to exceptionally fine functioning judiciary branch.

# Use of the rule of law legal instruments in the face of mounting dissensus at the national level

# ITALY

*RULE OF LAW INSTRUMENTS RESPONDING TO EMERGING DISSENSUS*

*Project N°101061621*

July 2023

milieu
Law & Policy Consulting

# USE OF THE RULE OF LAW LEGAL INSTRUMENTS IN THE FACE OF MOUNTING DISSENSUS AT NATIONAL LEVEL

## *Italy*

This study/report has been prepared by Milieu SRL under Horizon Europe RED-SPINEL Project N°101061621 coordinated by Prof. Ramona Coman (PI) and the Institut d'études européennes of the Université libre de Bruxelles. The main author of the study/report is Raffaella D'Antonio.



Milieu Consulting SRL, Chaussee de Charleroi 112, B-1060 Brussels, tel.: +32 2 506 1000; e-mail:marta.ballesteros@milieu.be; web address: www.milieu.be.

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# Abbreviations

| | |
|---|---|
| Authority for Guaranteeing Communications | AGCOM |
| European Union | EU |
| Forza Italia | FI |
| Inter-ministerial Committee for Human Rights | CIDU |
| Movement Cinque Stelle Movement Five Stars | MVS |
| Member of the Parliament | MP |
| Medial Pluralism Monitor's | MPM |
| National Anticorruption Authority | ANAC |
| Non Governmental Organisations | NGOs |
| Public Administration | PA |
| Superior Council of the Judiciary Consiglio Superiore della Magistratura | CSM |
| Treaty on European Union | TEU |

# 1. Introduction: Rule of Law threats in times of dissensus

This factsheet shall analyze the existence and the use of rule of law instruments to face threats to democratic principles at a national level in a context of growing dissensus over liberal democracy and its core values in the EU. Hence, it examines how national legal norms and governance instruments might react to breaches of the rule of law [1].

For the purpose of this work, "*dissensus is understood here as the expression of social, political and legal conflicts which take place concomitantly in different institutional and non-institutional arenas (parliamentary, constitutional, public sphere, technocratic and expert arenas…) driven by political, social, legal actors, including state and non-state actors, seeking to maintain liberal democracy, to replace liberal democracy or to restructure liberal democracy*" (Brack and Coman 2023) [2].

Examples of dissenting action can be found in populist or nationalist movements seeking to subvert democratic principles, fundamental rights, and the rule of law. In parallel, there are specific measures or rules established in each country to protect the respect of democratic principles.

At EU level the rule of law tool kit is composed of:

- Article 7 TEU to protect institutional system, fundamental rights and democratic principles including control mechanisms of citizens' right to voting, participation to decision making, legislative initiative, access to justice
- The Infringement Proceeding
- The Preliminary Reference Procedure
- The Charter of Fundamental Rights

Policy tools at the EU level include:

- The EU Justice Scoreboard
- The Cooperation and Verification Mechanism
- The Technical Support Instrument and its precedents
- The Protection of the EU Financial Interests
- Rule of Law Conditionality Regulation

At national level, the existence and the use of rule of law instruments to face dissensus threatening democratic principles might be established in national Constitutions or national toolkits. Please try to identify measures that either have a similar function to those at EU level or implement the EU legislative measures at national level.

Italy is a not federal State, but it has a certain degree of decentralization. The Italian political and legal system is based on the separation of powers between the legislature, the executive, and the judiciary. The principle of the rule of law is enshrined in the Italian Constitution, regulating the relation between the state and its citizens, including the definition of the powers of the state and the fundamental rights and duties of those living under its jurisdiction. When exercising their legislative and executive powers, public authorities must conform to the procedures and fundamental guarantees laid down by the Constitution. No legal norm or rule can be issued by ordinary or secondary law whose content is contrary to the general principles and norms set forth in the Constitution.

[1] Commission Communication, A new EU Framework to strengthen the Rule of Law. COM/2014/0158 final.
[2] Coman, Ramona and Brack, Nathalie (2023) "Understanding Dissensus in the Age of Crises", RED-SPINEL Working Paper.

Such limitations, to which the rule of law apply, reduce the possibility of arbitrary exercise of legislative power and guarantee that the latter will respect the fundamental rights of the citizens.

Under EU law, the European Union (EU) has two main options to tackle rule of law violations in the Member States. It may initiate infringement proceedings or trigger the mechanism of Article 7 of the Treaty on European Union (TEU) thereby, relying predominantly on the majorities of votes of EU institutions (not only the Commission and the Parliament, but also the Council and European Council, in complex institutional system) to trigger Article 7.

At a national level, potential threats to the rule of law might come from different types of actors including think tanks, civil society, regional states, political parties, political representatives in constitutional/legal debates or within national parliaments. It is to be said, however, that over the past decades the main threats to democracy, fundamental rights and the rule of law in Italy has come from populist political movements that have found their way into the Italian parliament through Parliamentary elections. The Italian political Party 'Lega Nord' (Northern League), for instance, has attempted to introduce laws restrictive of fundamental rights and asylum rights, while increasing popular dissensus against the European Union. Similar, the populist 'Movement Cinque Stelle' (Movement Five Star hereafter MVS) has used populist propaganda to increase dissatisfaction (and eventually actions) against the State representatives and the public administration.

Yet, in Italy, there is no established rule of law toolkit to address threats to the rule of law within the national system. The protection and respect of the rule of law and fundamental rights is embedded in the Italian Constitution. Threats to the rule of law are normally addressed within the power conferred to the Constitutional Court and the judiciary. Laws that violate the rights, rules and definition of powers set forth in the Constitution may indeed be declared invalid by the Italian Constitutional Court.

## 2. The instruments provided by italian law

The principle of the rule of law includes the principle of legality, which implies a transparent, accountable, democratic, and pluralistic process for enacting laws and respect of fundamental rights and equality before the law; legal certainty and prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review.[3]

Please explain how these principles are protected in national law. Please focus on key examples of the use of constitutional/legislative/governance instruments in situations of mounting dissensus. In section 2.5, please focus on the role, if any, of national courts.

### 2.1 Protection against threats to democratic principles

This section should be devoted to any attempts to affect the institutional structure or balance of powers.

Over the past two decades, Italy has experienced an increase in populist political movements of right or extreme right faction which have attempted, to different extent, to interfere with the institutional and democratic asset of the Italian system. These are the coalition of Berlusconi-led Forza Italia (hereafter FI), which governed in Italy together with Alleanza Nazionale (hereafter AN) and Lega Nord (Northern League led by Matteo Salvini) between 2001–2006 and then in 2008–2011; the MVS and Lega Nord coalition in 2018–2019, and the current right-wing coalition of Fratelli D'Italia (Lead by the actual Italian Prime Minister Giorgia Meloni), Lega Nord and Forza Italia. These parties displayed radically different forms of populism, and changed their stance over time, [4] however, they all displayed a certain degree of dissensus against limits to the executive power and the democratic structure of the Italian State.

[3] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158&from=EN

[4]file:///C:/Users/salvatore/Downloads/resilience-without-resistance-public-administration-under-mutating-populisms-in-office-in-italy.pdf

The former deputy Prime Minister Matteo Salvini, for instance, marked a 'period of democratic regression initiated by his demagoguery, which uses the federal government as a tool to incrementally manipulate the Italian democracy from within [5]. By way of example, in 2015 Salvini called its followers on twitter to murder a judge, and in 2018 he attempted to place Prof. Paolo Savona, a declared Eurosceptic, as Ministry of Finance which could have risked passing Ministerial Decrees infringing upon European budget rules. Salvini's policy positions indeed align with that of most far-right and Eurosceptic populists within Europe and remains supportive of other leaders that actively undermine the rule of law as Viktor Orban.

Similarly, in March 2018, Giorgia Meloni, now Prime Minister of Italy and leader of Fratelli d'Italia (whose deepest cultural roots lie in neo-fascism) sought, through a proposed law on Constitutional revision, to enshrine in the Constitution the principle that Italian law always had precedence over European law and to amend the Italian Constitution by envisaging the direct election of the President of the Republic. The proposed law on Constitutional revision [6] also sought to centralize in the President of the Republic both the control of the Government and of the Parliament, thereby threatening the checks and balances among the legislative and executive power. Specifically, the proposed law on Constitutional revision would have allowed the President of the Republic to chair the Council of Ministers; to appoint the Prime Minister; and be able to appoint and dismiss Ministers.

*Salvini's policy positions indeed align with that of most far-right and Eurosceptic populists within Europe and remains supportive of other leaders that actively undermine the rule of law as Viktor Orban.*

According to constitutional scholars, the proposed law was susceptible to lead Italy into an authoritarian regime, where the President of the Republic loses his role as guarantor of the Constitution and the Parliament risk being subject to the will of the political party to which the President of the Republic is member. While the proposed draft law on Constitutional revision did not pass into law (see explanation below), Prime Minister Meloni has very recently reopened debates concerning the direct election of the President of the Republic and Constitutional amendments similar to the law on constitutional revision proposed in 2018. While it is too early to assess the true impact of the recent election of Meloni as Prime Minister on the Constitutional asset of the Italian State, to date Italy has resisted democratic backsliding primarily thanks to the democratic guarantees foreseen in the Italian Constitution.

Specifically, Italy has a system of representative democracy, whereby the people exercise sovereign power through the election of the National Parliament (Article 1 Constitution). Yet, popular sovereignty is not exhausted in the national parliament, but is also expressed through the investiture of the representative bodies of territorial autonomies (regions, provinces/metropolitan cities, municipalities) [7]. The representative nature of the Italian system does not, however, exclude the presence of some direct democracy institutions, including the right of petition and, above all, the referendum.

Popular sovereignty, and the assemblies representing it, is generally formed within the Parliament according to the majority principle. To counterbalance risks to unlimited majority power and protect the democratic principle, the Italian Constitution foresees mechanisms aimed at guaranteeing the respect of Constitutional rules, minorities and fundamental rights.

[5] https://www.democratic-erosion.com/2020/02/12/democratic-backsliding-in-italy-and-the-rise-of-matteo-salvini/
[6]http://documenti.camera.it/leg18/pdl/pdf/leg.18.pdl.camera.716.18PDL0015210.pdf
[7] See Constitutional Court judgment no 106/2002

These include:

- the monitoring role of the President of the Republic over the respect of the Constitution by the Government and the Parliament;
- the enhanced procedure of constitutional revision;
- the review of constitutional legitimacy of laws and acts having force of law by the Constitutional Court (see section 2.5);
- the referendum, by which, under certain conditions and following certain procedures, citizens can decide on the repeal of a law or an act having the force of law (hereafter 'repealing referendum');
- the right to petition;
- the independence of the judiciary (see section 2.4).

In Italy, **the President of the Republic** perform the function of Constitutional guarantor of the acts having force of law of the Government. Furthermore, he elects and has veto power over the members of the Government (the Ministries) on the basis of lists presented by the elected Parliament. The veto power on the list of Ministers has rarely been used by the Presidents of the Republic. However, in 2018 President Mattarella vetoed the nomination of Prof. Paolo Savona on the basis that the Eurosceptic positions expressed by Prof. Savona were susceptible to undermine the Constitutional recognized primacy of EU law within the national system, thereby leading to Italy's exit from the eurozone without explicit popular consent.

While Meloni's proposal to amend the Constitution did not reach the majority necessary within the Parliament to become a draft law, in practice the Italian Constitution foresees an enhance procedure for the adoptions of laws modifying the rights and guarantees enshrined therein, thereby enhancing protection of democracy and the rule of law against possible democratic backsliding.

Thus, any attempts to unilaterally modify the Constitution, would have been counterbalanced by the role of the President of the Republic and the enhanced procedure of constitutional revision.

The **enhanced procedure of constitutional revision** is a procedure established by Article 138 of the Italian Constitution which requires stricter majorities than the ordinary legislative procedure to prevent the Constitution from being amended. Laws revising the Constitution and other constitutional laws shall indeed be adopted by each House (the Senate and the Chamber of Deputies) in two successive deliberations at intervals of not less than three months and shall be passed by an absolute majority of the members of each House in the second vote. If a qualifying 2/3 majority is not reached, but an absolute majority is reached in both chambers, the law is published in the Official Gazette. Within 3 months from the publication in the Official gazette, a constitutional referendum can be requested, so that the text is submitted to popular approval. In this case, it will be up to the people to decide whether to approve or oppose the entry into force of the constitutional law amending the Constitution.

Recently, the enhanced procedure of constitutional revision has resulted in the Constitutional Referendum no 261/2020 concerning a cut in the number of the elected MPs within the Parliament. Specifically, in 2020 a draft constitutional law provided for a drastic reduction in the number of MPs (from 630 to 400 for the member of the Chamber of Deputies and from 315 to 200 for Senators) by amending Articles 56 and 57 of the Constitution and thereby aligning the number of MPs with other Member States of the EU. The constitutional reform was proposed by the 'yellow– green' coalition supported by the MVS and Lega Nord and was highly contested within the members of the Parliament since it was meant to be the result of a populist anti-establishment campaign. Critics of the amendment argued that cutting the number of lawmakers would reduce representation thereby threatening democracy against only marginal savings for taxpayers.

Hence, considering the highly sensitive and contested matter, the Constitutional Referendum, which resulted in favour of the adoption of the law, ensured citizens participation in the choice to unilaterally reform the democratic representativeness of the Parliament.

Aside from political attempts to threaten democratic principles, in Italy demands to ensure the respect of democratic principles and legality might also come from different types of actors including civil society which can follow the procedures recognised under the Italian legal system. Yet, while far right wind-populist movements have attempted to modify the Constitutional guarantees of the State, civil society actions have played a pivotal role in enhancing fundamental rights or environmental protection through exercising their **right to petition**. Article 50 of the Italian Constitution indeed allows citizens to participate in the political life by demanding legislative measures or setting forth general needs. In 2014, one of the most prominent Italian environmental NGO Legambiente and Libera (the association that solicits and coordinates civil society against all mafias) have promoted an online petition asking the Senate to quickly approve a law on environmental crimes in the Italian Criminal Code in light of the proved relationship between organized crime and illicit trafficking of waste and the low penalties associated at the time to environmental crimes. The political pressure arising from environmental gross-roots movements and the petition demanding to strengthening the environmental rule of law in Italy resulted in the adoption of the law in 2015 [8].

### 2.2 Protection against threats to the principles of legality and abuse of power

In Italy, the success of populist parties can be traced back to a political dissatisfaction of the Italian administrative and political system and economic and social problems existing within the country. [9] The rise ofthe 'yellow-green' coalition lead by MFS and Lega North resulted in Salvini's attempts to intensifying administrative control over politically sensitive matters such as immigration, or to escalating Euroscepticism within society.

Salvini's political action has indeed been characterized by attempting to suspend administrative asylum procedures till the EU agreed on fair distribution of refugees and has blocked boats loaded with rescued migrants from docking in Italian ports. Specifically, on three occasions between 2018 and 2019, the ships Diciotti Gregoretti, and Open Arms were refused authorization to dock in Italian ports by Salvini (at the time Ministry of the Interior) notwithstanding the difficult physical and mental conditions of the migrants onboard. Salvini's action created a fracture within the political discourse and among supporters of Italy's sovereignty and control of national boarders, and those supporting rescuing migrants at sea for humanitarian reasons. Yet, the pillar of the dissenting reactions arising from these events was whether Salvini had acted within the limits of the powers conferred to him by law.

In Italy, checks and balances between the legislative and executive power and the respect of the principle of legality is ensured through the protection granted by the Constitution. While the Italian Constitution does not contain an express formulation of this principle, the latter is indirectly referred to in various articles including:

- Article 24, 97, 113 Constitution concerning the legality principle and the power of the Public Administration (hereafter PA).
- Article 25 Constitution and Article 1 and 199 of the Criminal Code, concerning the legality principle within criminal law.

In administrative law, the principle of legality provides a guarantee against the unilateral activity of an executive power which must therefore necessarily be predetermined by the legislator. The scope of the public administration's discretion must in fact be well defined by the limits set by public law rules and by the Constitution, which the public power cannot derogate from, not even in the pursuit of a general interest (Article 97 Constitution). [10]

[8] Law n 68 of 22 May 2025 published in the Official Gazette no 122 28 May 2015.

[9] G. Di Federico, 'Judicial Independence in Italy' (2012) in A. Seibert-Fohr (eds.), Judicial Independence in Transition: Strengthening the Rule of Law in OSCE Region.

[10] See also the Constitutional Court sentence no 115/2011 available at https://www.forgionegianluca.it/PROCEDIMENTI_AMMINISTRATIVI/DOTTRINA/FONTI/2011_ccost_115_principio_legalita_sostanziale.php

This principle founds further implementation through Article 1 of the law on administrative proceedings (Law 241/1990) providing that administrative activity shall pursue the ends determined by law and in Articles 24 and 113 of the Constitution.

Within the context of actions of Ministers, Article 9 of the Italian Constitution provides that Ministers and the president of the Council of Ministers, even if they have ceased to hold office, are subject, for crimes committed in the exercise of their functions, to the ordinary jurisdiction, subject to authorization by the Senate of the Republic or the Chamber of Deputies. The authorization by the Senate of the Republic or the Chamber of Deputies can be denied only if it is deemed that the Minister or the Prime Minister acted in the interest of the State or public interest.

The Tribunal of Ministers is a specialized section of the district court competent for crimes committed by the President of the Council of Ministers and by Ministers in the exercise of their functions (the so-called ministerial offences). Against Salvini's actions to block the ships Diciotti Gregoretti, and Open Arms the Tribunal of Ministers has opened investigations for abuse of power and abduction of migrants at sea. While the case Diciotti and Gregoretti have been dismissed by the Chamber of Deputies [11] and the public prosecutor [12] respectively, Salvini is currently facing criminal charges and 15 years of detention for the case Open Arms.

To that extent, in Salvini's attempts to interfere with the principle of legal certainty through arbitrary exercise of power found its counter-limits through the judicial review of ordinary courts and of the Constitutional Court (see section 2.4). Furthermore, in Italy the principle of legality and protection against the abuse of power of the public administration is ensured through the jurisdiction of Regional Administrative Tribunals.

### 2.3 Protection against threats to fundamental rights

The Italian Constitution (Article 2) recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where the human personality is expressed, as enshrined in the EU Charter and in the European Convention on Human Rights.

Yet, in Italy the rise of the 'yellow-green' coalition has resulted in the introduction of restrictive laws on immigration and asylum rights, thereby undermining the fundamental human rights of those attempting to enter the Italian costal boarders. The so called Decreto Sicurezza and Decreto Sicurezza bis (Security Decree and Security Decree bis) [13] restricted access to the Italian borders for humanitarian reasons and increased the number of offences related to illegal immigration by sea.

Furthermore, according to the Media Pluralism Monitor's (MPM) 2022 report, media pluralism and freedom from political interference in Italy has been threatened by the high concentration of media ownership in all sectors of media production and the online platforms market. In 2020, the President of the Italian Press Association has also reported an increase in the attacks and intimidation carried out against journalist; alleged wiretapping of at least 15 journalists working on migration issues as part of a public prosecutors' investigation into relations between NGOs and traffickers and a general deterioration of the freedom of press and information. Lastly, the MPM report on Italy highlighted increased instances of SLAPPs (strategic lawsuits against public participation) with the perceived aim of silencing journalists who write on issues of public interest and a lack of legal safeguards against them.

While measures to address action against media pluralism susceptible to undermine the right to information and press freedom will be better examined in section 4, it is to be pointed out that in Italy protection against threats to fundamental rights and freedom from arbitrary exercise of power or any dissenting action attempting to restructure liberal

[11] The Chamber of Deputies held that Salvini acted, on that occasion, in the interest of the State.
[12] The public prosecutor decided not to prosecute due to lack of evidence.
[13] decreto-legge 4 ottobre 2018, n. 113, coordinato con la legge di conversione 1° dicembre 2018, n. 132 Gazzetta Ufficiale 3 dicembre 2018, n. 281

democracy finds its counter-limit in the supervisory work of the Constitutional Court and the judiciary (see section 2.5 below). In Italy, indeed, no laws can be adopted in violations of the fundamental rights and freedoms embedded in the Constitutions and any interference to citizen's rights must be provided by law and pursuit a legitimate objective (such as, for instance, the protection of public health).

Furthermore, in Italy anyone may bring cases before a civil, criminal, or administrative court of law in order to protect their rights. Defence is indeed an inviolable right at every stage and instance of legal proceedings (Article 24). Being a Party to the European Convention on Human Rights, citizens complaining about a violation of a fundamental human right may also bring a case to the European Court of Human Rights after having unsuccessfully exerted the internal (national) legal remedies.

Aside from the role of the judiciary in the protection of fundamental human rights, Italy has established human rights monitoring bodies. The Inter-ministerial Committee for Human Rights (CIDU) [14] is the coordinating national institution interacting with civil society, academia, and all relevant stakeholders to ensure reporting and follow-up on human rights issues. Established with Ministerial Decree 15 February 1978 no 519, the CIDU aims to support the Italian Government in fulfilling Italy's main obligations under the numerous agreements and conventions adopted at international level in the field of the protection and promotion of human rights. Furthermore, the CIDU performs acts as focal point for the monitoring bodies of the international organisations of the United Nations, the Council of Europe, and the European Union. Hence, the CIDU prepares the periodic reports that Italy must submit to the respective international monitoring bodies verifying the status of implementation of the recommendations that the aforementioned bodies formulate following particular examinations or visits to the country. The CIDU also reports on its work to Parliament, in an Annual Report and through regular hearings of its President.

The Italian legal system provides a legal framework for the balancing of rights and interests of the Italian society as a whole, with the popular legislative initiative, expression of the right to participate in the political life. The power granted to citizens to instigate the legislative process is embedded in Article 71 of the Italian Constitution and it is not an institution of participatory democracy since the sole will of the electorate does not in itself produce legal effects. In practice, the Parliament is not obliged to rule on popular initiative proposals and there are not mechanisms that guarantee significant forms of procedural priority. Between 1979 and 2014, 260 proposals were presented to the Parliament and 1.15% become law. The supervision of the Parliament over the popular legislative action indeed allows to balance between citizens 'right to participate (and to express their dissensus through legislative proposals) and the democratic principle to which the Parliament is the ultimate expression.

### 2.4 Protection of judicial independence

In Italy, the structure of the justice system is set out in the Constitution, which enshrines its independence and impartiality. As it will be explained below, the Italian judiciary appears sufficiently protected from direct political pressure. However, threats to the rule of law as it regards the division of powers among institutions of the State have recently come not from the executive of legislative power but from the judiciary itself. Observers have indeed warned about improper internal influences of the Superior Council of the Judiciary over matters related to promotion of judges and internal distribution of cases [15].

Specifically, the principle of impartiality of judges is ensured in Italy by the provisions of the Constitution concerning the prohibition to institute ex officio proceedings (Article 24(1)); the establishment of judges by law (Article 25(1)); the prohibition to set up extraordinary (or special) courts (Article 102, Constitution). The independence of the judiciary is instead enshrined in Article 101 of the Italian Constitution. Accordingly, 'judges are subject only to the law'.

[14] See https://cidu.esteri.it/comitatodirittiumani/it/

[15] https://democracy-reporting.org/en/office/EU/publications/italys-election-and-the-rule-of-law

In Italy, and thanks to its organizational structure of self-governance, the judiciary is institutionally free from outside interference. To protect judicial independence, Article 105 of the Italian Constitution indeed provides that all decisions concerning judges (e.g. promotions, transfers, discipline etc.) shall be taken within the exclusive competence of the Superior Council of the Judiciary (Consiglio Superiore della Magistratura; hereafter: CSM) predominantly composed of magistrates elected by judges (two third) and by the Parliament (one third). The President of the Republic, the First President of the Court of Cassation, and the Prosecutor General at the Court of Cassation are ex officio members of the CSM. Appeals against decisions of the CSM can be brought before the Supreme Court of Cassation (disciplinary decisions) or administrative courts (decisions on career, professional evaluation, or transfer).

Yet, the CSM has acquired considerable influence over the decisions of the executive and legislative powers concerning matters affecting judicial system. The expansion of the powers of the CSM has taken place through a liberal and expansive interpretation of the powers granted to the CSM to promoting, protecting and defending judicial independence [16]. Hence, the CSM has extended its power related to the organization and functioning of the courts; education and training; and opinion concerning legislative initiatives. Furthermore, in Italy judges organised themselves in associations normally reflecting the political movements existing within the State. These include the Magistratura democratica (left wing); Unità per la Costituzione (centre); Magistratura indipendente (right wing); Movimento per la giustizia I Verdi-Articolo 3 (left wing); Autonomy and Independence (independent) A major concern regarding the CSM elections is that judge-members are elected not on merits but based on affiliation to a particular association. In such context, in 2019 members of the associations Magistratura Indipendente have faced challenges in relation to allegations of corruption concerning the appointment of high-level prosecutors and attempts to politically influence the outcome of politically sensitive criminal investigations [17].

The inherent autonomy of the judiciary from external interference has however resulted in the instigation of internal investigation which led to the resignation of five members of the CSM: to the expulsions and new elections of the CSM and to disciplinary proceedings. Furthermore, to fight corruption within the judiciary andupheld the rule of law on 7 August 2020 the Government proposed a draft law reforming the High Council (see in this respect, section 4.2), which was adopted on 16 June 2022.
The internal structure of the CSM and the self-organization powers to it mandated by law hence provide a strong counter-limit against any external influence attempting to restructure the independence and impartiality of the judiciary.

## 3. Judicial intervention

As explained above, in Italy the principle of the rule of law and the protection of fundamental human rights are enshrined in the Italian Constitution. When exercising their legislative and executive powers, public authorities must conform to the procedures and fundamental guarantees laid down by the Constitution. No legal norm or rule can be issued by ordinary or secondary law whose content is contrary to the general principles and norms set forth in the Constitution.

In Italy, there is no established rule of law toolkit to address threats to the rule of law within the national system. Yet, since the protection and respect of the rule of law and fundamental rights is embedded in the Italian Constitution, the Constitutional Court has the role to monitoring and set aside any normative or administrative acts of public authorities adopted in violations of the fundamental rights and principles of the State.

[16] See G. Di Federico, 'Judicial Independence in Italy' (2012) in A. Seibert-Fohr (eds.), Judicial Independence in Transition: Strengthening the Rule of Law in OSCE Region available at https://www.europarl.europa.eu/document/activities/cont/200804/20080403ATT25664/20080403ATT25664IT.pdf lastaccessed 02/03/2023.
[17] See in this respect COM Staff Working Document (SWD(2020) 311 final, 2020 Rule of Law Report Country Chapter on the rule of law situation in Italy available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0311&from=EN last accessed 28/02/2023.

Recently, the Constitutional Court has been pivotal in setting aside ordinary laws passed by the Parliament in violation of protected fundamental rights. The rise of the 'yellow-green' coalition between the Northern League and the MVS, represented by the first Conte government (2018-2019), has led, as mentioned above, to the introduction of restrictive laws on immigration and asylum rights, invoked as political strategy to capitalise resentment of right-wing movements against immigration and the European Union.

As explained above, the so called Decreto Sicurezza and Decreto Sicurezza bis [18] restricted access to the Italian borders for humanitarian reasons and increased the number of offences related to illegal immigration by sea. However, the Constitutional Court set aside several provisions for violation of Article 3 (equality before the law) of the Constitution. Specifically, the Constitutional Court found that the censured rules did not facilitate the pursuit of the territorial control declared by the Security Decree and made it unjustifiably more difficult for asylum seekers to access services that should be guaranteed to them.

The role of the judiciary in protecting the rule of law and monitoring that the checks and balances between power are respected is, however, not limited to the Constitutional Court. In Italy, Administrative Courts can hear cases related to abuse of administrative power, while civil and criminal courts can hear cases related to human rights abuses. By way of example, and as explained above, the former Minister of the Interior and Leader of Lega Nord, is currently under criminal investigation for unlawfully denying the NGO Open Arms, with 147 refugees rescued at sea, to land in Lampedusa and illegitimately depriving them of personal freedom. The judicial intervention followed the increased right-wing populist action and propaganda carried out in 2018 by Lega Nord against immigrants and asylum seeker.

## 4. Trends on the implementation of the Rule of Law

This section examines developments across the EU Member States, both positive and negative, in two key areas for the rule of law: the anti-corruption framework and media pluralism and whether inter-institutional cooperation and support mechanisms to strengthen the rule of law have been implemented. In your research, please focus on measures taken to address dissenting actions.

As a starting point, please read the 2022 Role of Law Report for your Member State. [19]
Please note that the Italian Report briefly analyses, among other instruments, the Technical Support Instruments. While it might not be an expected point in the reports, it could bring interesting points for the analysis of the relationship between the rule of law instruments at EU and national level. Should you find TSIs relevant for this section, please only refer to projects related to the rule of law.

### 4.1 Anti-Corruption

The 2021 Corruption Perceptions Index ranks Italy 17th in the European Union and 42nd globally. The 2022 Eurobarometer on Corruption shows that 89% of respondents consider corruption widespread in their country and 32% of respondents feel personally affected by corruption in their daily lives [20].

Corruption in Italy has been a strongly perceived problem, susceptible to undermine the stability of the State and the rule of law. Yet, over the past decades Italian legislation on corruption and bribery has notably developed and nowadays a legal and institutional anti-corruption framework is broadly in place. Today, the prevention and fight against corruption is shared between several authorities, including the National Anticorruption Authority (ANAC); the Anti-corruption Unit of the Financial police (Guardia di Finanza); specialised police and prosecution services and the Financial Intelligent Unit within the Bank of Italy.

Established in 2012, ANAC is the independent authority in charge with the prevention of corruption within the public administration in cooperation with the district anti-mafia directorate composed of prosecutors specialised in countering infiltration of organised crime within public administration. Over the past years, the powers and capacity of the National Anti-corruption Authority have been strengthened as regards its preventive role to fight corruption. [21]

In 2019, Italian lawmakers implemented Law 3/2019 (known as 'Legge Spazza Corrotti' or 'Sweep- the-Corrupt' law), a law specifically designed to counter corruption through harsh penitentiary treatment.

As latest development to fight corruption within the judiciary, on 7 August 2020 the Government proposed a draft law reforming the CSM. The proposed draft law included an increase in the number of the Council's members and a new disciplinary panel. Moreover, it adopted new rules to increase transparency in the appointment of high-level judges and prosecutors and tightening the requirements for magistrates to engage in political activity. It is to be noted, however, that stakeholders have raised concerns that some provisions of the draft law on the reform of the CSM and the justice system could result in an undue influence on judges.

To that extent, the in the 2022 Rule of Law Report on the situation in Italy, the Commission has recalled that the new draft should not compromise efficiency over judicial independence [22]. Nevertheless, the draft law was adopted on 16 June 2022 and, as reported by the 2023 Rule of Law Report, concerns raised by stakeholders and by the CSM itself as regards the combined effect that the new provisions might have regarding the influence on judges' independence remain [23].

### 4.2 Media Pluralism

In Italy, press freedom is enshrined in the Italian Constitution (Article 21). Law n. 47 of 8 February regulates the written press while the Italian Audio-visual Media Law regulates audio-visual communications. The Authority for Guaranteeing Communications (AGCOM) is the independent monitoring body of the Italian public service media while a specialised Coordination Centre monitors acts of intimidation against journalists.

To address some of the issues raised above (see section 2.3), Italy has recently adopted the Legislative Decree no 208/2021 (amending the Italian Press Law) transposing the AVMS Directive (EU) 2018/1808 and enhancing the independence of the audio-visual media service while strengthening the monitoring powers of AGCOM. Furthermore, Legislative Decree no 208/2021 redefined the precise services which public service media shall guarantee and the procedures through which the concession of public radio, television and multimedia service is granted.

Nevertheless, the 2022 Rule of Law Report on media pluralism highlighted a further increase of attacks against journalists particularly during COVID-19 while there have been no amendments to the existing Press Law to address the problem of SLAPs.

To that extent, while action have been taken to address dissenting action susceptible to undermine the freedom of press and the right to information, in Italy media pluralism still remain an issue.

[21] Report 2020
[22] https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters_en
[23]See https://commission.europa.eu/system/files/2023-07/29_1_52611_coun_chap_italy_en.pdf, p.4.

### 4.3 Technical Support Instruments (TSI)

In order to help national authorities in improving their capacity to design, develop and implement reforms, including those covered by recovery and resilience plans, the European Parliament and the Council adopted on 10 February 2021 a regulation establishing a Technical Support Instrument. The Instrument may finance a broad range of technical assistance actions referring to policy areas related to cohesion, competitiveness and others, with specific emphasis on digital and just green transitions [24].
Italy has so far benefited from 60 projects financed by the TSI, through which it addressed a broad range of policy areas, including fiscal reform, infrastructure planning, green transition, labour market reform, public administration reform and the national digital strategy.

In Italy, projects financed by the TSI had a particular focus on the public administration reform and anti-corruption measures. As it regards the public administration sector, Italy is collaborating with the European Commission to improving the exchange of information between different levels and departments of the public administration to enhance the administrative capacity to implement reforms necessary to strengthen the rule of law within the national system. Furthermore, with the second round of the TSI, the Commission will support Italywith 16 projects in the areas of, inter alia, digital public administration, health, gender mainstreaming andinequalities, migrant integration, and public finance.

## 5. Conclusion and New Challenges

Over the past two decades, Italy has experienced an increase in populist political movements of right or extreme right faction which have attempted, to different extent, to interfere with the rule of law asset of the Italian system. Lega Nord and Fratelli d'Italia, in particular, have attempted to increase Euroscepticism among the population, to pass laws infringing upon asylum rights and to increase control over public administration.

While it is early to assess the true impact of the recent election of Meloni as Prime Minister, to date Italy has prevented rule of law backsliding primarily thanks to the work of the judiciary and the guarantees foreseen in the Italian Constitution.

Furthermore, Italy has recently passed legislation to strengthen the fight against corruption and increase the governance of public administration.
Nevertheless, recent trends show that freedom of press and media pluralism still remain a major issue in Italy.

[24] See https://reform-support.ec.europa.eu/supporting-reforms-italy-tsi-2022_en

# Use of the rule of law legal instruments in the face of mounting dissensus at the national level

# Hungary

*RULE OF LAW RESPONDING TO EMERGING DISSENSUS*

*Project N°101061621*

July 2023

milieu
Law & Policy Consulting

# USE OF THE RULE OF LAW LEGAL INSTRUMENTS IN THE FACE OF MOUNTING DISSENSUS AT NATIONAL LEVEL

## *Hungary*

This study/report has been prepared by Milieu SRL under Horizon Europe RED-SPINEL Project N°101061621 coordinated by Prof. Ramona Coman (PI) and the Institut d'études européennes of the Université libre de Bruxelles. The main authors of the study/report are Katalin Dobiás and Ágnes Csonta.
The views expressed herein are those of the consultants alone and do not necessarily represent the official views of the European Commission.
Milieu Consulting SRL, Chaussee de Charleroi 112, B-1060 Brussels, tel.: +32 2 506 1000; e-mail:katalin.dobias@milieu.be; web address: www.milieu.be.

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# Abbreviations

| Abbreviation | Full text |
|---|---|
| CC | Constitutional Court |
| ETA | Equal Treatment Authority |
| CFR | Office of the Commissioner for Fundamental Rights in Hungary |
| NAIH/DPA | National Authority for Data Protection and Freedom of Information |
| NHRI | National Human Rights Institution |
| NOJ | National Office for the Judiciary |
| NJC | National Judicial Council |
| GANHRI | Global Alliance of National Human Rights Institutions |
| SCA | Sub-committee on Accreditation |
| CJEU | Court of Justice of the European Union |

# 1. Introduction: Rule of Law threats in times of dissensus

This factsheet shall analyze the existence and the use of rule of law instruments to face threats to democratic principles at a national level in a context of growing dissensus over liberal democracy and its core values in the EU. Hence, it examines how national legal norms and governance instruments might react to breaches of the rule of law.

For the purpose of this work, "*dissensus is understood here as the expression of social, political and legal conflicts which take place concomitantly in different institutional and non-institutional arenas (parliamentary, constitutional, public sphere, technocratic and expert arenas…) driven by political, social, legal actors, including state and non-state actors, seeking to maintain liberal democracy, to replace liberal democracy or to restructure liberal democracy*" (Brack and Coman 2023) [1].

Examples of dissenting action can be found in populist or nationalist movements seeking to subvert democratic principles, fundamental rights, and the rule of law. In parallel, there are specific measures or rules established in each country to protect the respect of democratic principles.

At EU level the rule of law tool kit is composed of:

- Article 7 TEU to protect institutional system, fundamental rights and democratic principles including control mechanisms of citizens' right to voting, participation to decision making, legislative initiative, access to justice
- The Infringement Proceeding
- The Preliminary Reference Procedure
- The Charter of Fundamental Rights

Policy tools at the EU level include:

- The EU Justice Scoreboard
- The Cooperation and Verification Mechanism
- The Technical Support Instrument and its precedents
- The Protection of the EU Financial Interests
- Rule of Law Conditionality Regulation

At national level, the existence and the use of rule of law instruments to face threats to democratic principles might be established in national Constitutions or national tool kits. Please try to identify measures that either have a similar function to those at EU level or implement the EU legislative measures at national level.

Hungary is a parliamentary Republic with a unicameral National Assembly (the Parliament) that is the principal organ of the legislature with important oversight functions over the executive as well. The Parliament adopts and amends the 2011 Fundamental Law, which is the country's constitution.

[1] Coman, Ramona and Brack, Nathalie (2023) "Understanding Dissensus in the Age of Crises", RED-SPINEL Working Paper.

Its legislative powers also extend to ordinary laws as well as to the so-called cardinal laws (sarkalatos törvenyek) that are special legislative acts that complement the Fundamental Law and contain the implementing rules of constitutional rights and democratic institutions covering 35 issue areas specified by the Fundamental Law [2]. The cardinal laws complement the Constitution and lay out its implementation measures both regarding the institutions and the exercise of fundamental rights [3]. The Parliament also elects the most important public officials, including the President of the Republic. There is no national rule of law toolkit as such in place, however, various processes can be considered to perform functions that can safeguard the rule of law. The extent to which those in fact provide protection against threats to the rule of law are called into question by a national context marred by rule of law violations. Potential threats to the rule of law come from different types of actors, primarily the government whose two-thirds parliamentary majority has long been used for the creation of legal and constitutional procedures to circumvent rule of law principles. The scope of actors implementing the Hungarian model of an illiberal democracy has grown as government influence has extended from the legislature to the prosecutor's office, the judiciary and to the media – areas where rule of law violations are increasingly entrenched as explained in the sections below.

*Potential threats to the rule of law come from different types of actors, primarily the government whose two-thirds parliamentary majority has long been used for the creation of legal and constitutional procedures to circumvent rule of law principles.*

## 2. The Instruments Provided by Hungarian Law

The principle of the rule of law includes the principle of legality, which implies a transparent, accountable, democratic, and pluralistic process for enacting laws, respect of fundamental rights and equality before the law; legal certainty and prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review [4].
Please explain how these principles are protected in national law. Please focus on key examples of the use of constitutional/legislative/governance instruments in situations of mounting dissensus. In section 2.5, please focus on the role, if any, of national courts.

### 2.1 Protection against threats to democratic principles

The passing of the **Fundamental Law of Hungary** was the signature act in the process of democratic backsliding in Hungary understood broadly as "the state-led debilitation or elimination of the political institutions sustaining an existing democracy" [5]. The Fundamental Law sits on the top of the hierarchy of norms in the domestic legal order and since 2011 has continued to provide both the ideological and legal framework of the now Fifth Orbán government. In the process, Prime Minister Orbán has entrenched his role with the aim of establishing an illiberal democracy. In April 2022 he once again reasserted his power by winning a fourth consecutive term in the parliamentary elections [6].

[2] 2 Parliament, Cardinal Laws, available at: https://www.parlament.hu/aktual/srk_trv/bevezetes
[3]Commission Staff Working Document, 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, p 23 available at: https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf
[4]Commission Communication, A new EU Framework to strengthen the Rule of Law. COM/2014/0158 final.
[5] Bermeo, Nancy. "On Democratic Backsliding". Journal of Democracy, vol. 27, no. 1, Jan. 2016, pp. 5-19, available at: https://www.journalofdemocracy.org/articles/on-democratic-backsliding/
[6]Freedom House, Freedom of the World 2023, p 12, available at: https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigtalPDF.pdf p 28

The period of 2010 – 2020 saw the systemic deterioration of the checks and balances eroding the separation of powers within the institutional system as well as continued attacks on fundamental rights and democratic principles. In 2023, Freedom House's Freedom of the World Report continued to rank Hungary as only 'partially free', reporting a staggering 22-point decline in its democracy score over the past ten years [7]. The V-Dem 2023 Democracy Report echoes similar concerns and continues to report sustained decline in the state of democracy in Hungary, underlining that the country "has returned to electoral autocracy" [8], naming it among the top 10 autocratizers globally [9] and ranking it the lowest on its democracy index among the EU Member States [10].

The Fundamental Law of Hungary came into force on 1 January 2012 amidst controversy - superseding the country's 1989 Constitution that marked Hungary's democratic transition from the communist era as part of the third wave of democratization, globally. The new Constitution was the flagship project of the second Orbán government, which obtained a sweeping victory in the 2010 parliamentary elections that guaranteed its super-majority in the legislature. The governing majority essentially draw up the Fundamental Law single-handedly in a process that was characterized by lack of transparency, shortcomings in the dialogue between the majority and the opposition, insufficient opportunities for an adequate public debate as well as a very limited timeframe - according to the Venice Commission reflecting national [11] and international criticism [12].

The Fundamental Law declared Hungary to be an independent State governed by the rule of law [13], in Article U specifically guaranteeing that "[t]he form of government [is] based on the rule of law". In the lack of an express definition, the concept and content of the rule of law in the national legal context have been clarified by the jurisprudence by the Constitutional Court (CC). In light of this, the **constitutional complaint procedure** can be considered as an important tool within the national legal system with the (de lege), possibility to guard the principles of the rule of law.

The Constitutional Court has examined the rule of law as a question of collision of norms [14], as the protection of public trust [15], as the guarantee of sufficient preparation time [16], as the clarity of norms [17], as the protection of acquired rights [18], and as the prohibition of legislation with retrospective effect [19]. In addition, the CC dealt with other elements of the rule of law in various cases, such as the separation of powers [20] or democratic elections [21]. However, in practice, none of the above procedures proved to be effective in safeguarding the system of checks and balances in the face of the executive's sustained attempts to erode the rule of law (see Section 2.5).

[7] Largest ten-year declines in Freedom House, Freedom of the World 2023, p 12, available at: https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigtalPDF.pdf

[8] V-Dem Institute: Democracy Report 2023: Defiance in the Face of Autocratisation, p 10, available at: https://www.v-dem.net/documents/29/V-dem_democracyreport2023_lowres.pdf

[9] Ibid. p 23.

[10] Ibid p. 45.

[11] Z. Fleck et al., Opinion of the Fundamental Law, June 2011 available at: https://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf

[12] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), OPINION ON THREE LEGAL QUESTIONSARISING IN THE PROCESS OF DRAFTING THE NEW CONSTITUTION OF HUNGARY, Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011) available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)001-e

[13] Article B of the Fundamental Law of Hungary 2011 (rev. 2016)

[14] Constitutional Court Decision 43/2012. (XII. 20.) AB határozat, Indokolás [54]–[60], [63]–[64].

[15] Constitutional Court Decision 40/2012. (XII. 6.) AB határozat, Indokolás [24], [29], [34].

[16] Constitutional Court Decision 3062/2012. (VII. 26.) AB határozat, Indokolás [14], [138]–[151]

[17] Constitutional Court Decisions 30/2012. (VI. 27.) AB határozat, Indokolás [26], 31/2012. (VI. 27.) AB határozat, Indokolás [25]–[26], 32/2012. (VII. 4.)AB határozat, Indokolás [50], 38/2012. (XI. 14.) AB határozat, Indokolás [54]–[65], [84], 45/2012. (XII. 29.) AB határozat, Indokolás [76], [79], [85], [111], [113].

[18] Constitutional Court Decision 25/2012. (V. 18.) AB határozat, Indokolás [4], [37], 3062/2012. (VII. 26.) AB határozat, Indokolás [12], [113]–[119], [136], [162].

[19] Constitutional Court Decisions 32/2012. (VII. 4.) AB határozat, Indokolás [51], 3062/2012. (VII. 26.) AB határozat, Indokolás [88]–[91],
3353/2012. (XII. 5.) AB határozat, Indokolás [48], [51], [68], 40/2012. (XII. 6.) AB határozat, Indokolás [33].

[20] Constitutional Court Decision 33/2012. (VII. 17.) AB határozat

[21] Constitutional Court Decision 1/2013 (I. 7.) AB határozat

To that end the Fifth Orbán government continues to capitalize on an **electoral system** that it re- drew in its own favour using the two-thirds majority it has held. To that end, the Fundamental Law first cut the size of the Parliament in held then it redrew the electoral districts in line with voter preferences, thereby ensuring that Fidesz voters are distributed across many smaller districts whereas opposition supporters are concentrated in larger districts – leaving them less chance to win an electoral system that combines 106 single member districts elected using the first-past-the-post system, and 93 elected from a national list using the closed list proportional representation system [22]. It is also noted that fragment votes casted on candidates in single-member constituencies are also added to the votes cast on national party lists. To illustrate, the re-districting led to a Fidesz victory in 2014 where the Fidesz-coalition took 91% of the districts with only 45% of the votes [23]. Similar proportions followed in the four consecutive Orbán victory; however, when prior to last year's parliamentary elections, the six opposition parties fragmented across the political spectrum joined forces with the sole goal of defeating the Orbán-government, yet another amendment came into force allowing for 'voter tourism' via allowing voting to be allocated to a certain district purely based on a contact address [24].

In addition, it is recalled, that back in 2010 the Orbán government introduced a new, simplified naturalisation procedure – benefiting primarily ethnic Hungarians living across the Carpathian Basin, who two years later were also granted voting rights. Since ethnic Hungarian citizens living outside of Hungary, have no Hungarian residency, they can only cast their votes to the party list via letter votes. Reportedly, the overwhelming majority of these voters support the Orbán government – partly out of gratitude for their dual citizenship [25]. In this context, many irregularities were reported concerning postal votes, including in the context of the 2022 national elections with reports about postal ballots being burned in Transylvania, Romania [26] and pro-Orbán activists delivering the ballot papers to voters in Vojvodina, Serbia instead of the Serbian post [27].

### 2.2 Protection against threats to the principles of legality and abuse of power

Safeguards against threats to the principles of legality and abuse of power are embedded across the entire system of checks and balances that are fundamental to a constitutional democracy. The procedural and substantive concerns over the Hungarian legal system and its functioning, including its implementation by the judiciary, are addressed in various sections of this Country Report. Of particular relevance to the protection of legality stands the effective functioning of the legislative process without undue interference or restrictions as well as the judicial review by the Constitutional Court which exercises normative control, as discussed in the following.

In the lack of effective checks on the executive's growing de lege and de facto power, threats to democratic principles have increasingly become entrenched practices in the national context.

[22] International IDEA, ELECTORAL SYSTEM FOR NATIONAL LEGISLATURE – HUNGARY, available at: https://www.idea.int/answer/ans1303551903424613

[23] Washington Post, Kim Lane Scheppele, In Hungary, Orban wins again — because he has rigged the system, 7 April 2022, available at: https://www.washingtonpost.com/politics/2022/04/06/orban-fidesz-autocratic-hungary-illiberal-democracy/

[24] Euractive, 'Voter tourism': New Hungarian residency law raises risk of electorate manipulation, NGOs warn, 17 November 2021, available at: https://www.euractiv.com/section/elections/news/voter-tourism-new-hungarian-residency-law-raises-risk-of-electorate-manipulation-ngos-warn/

[25] Hungary Today, Discarded, Burnt Postal Ballots Found – Growing Scandals around Postal Voting, 1 April 2022

[26] Euractive, A special version of a stolen election – the case of Hungary, 6 May 2022

[27] Radio Free Europe Radio Liberty, Orban-Linked NGO In Serbia Responsible For Distributing Postal Votes To Ethnic Hungarians, 18 August 2022

[28] Submission by Amnesty International Hungary, the Eötvös Károly Institute, and the Hungarian Helsinki Committee for the third cycle of the Universal Periodic Review of Hungary, 25 March 2021, available at: https://helsinki.hu/wp-content/uploads/2021/03/AIHU_EKINT_HHC_UPR2021_Hungary_RoL_web.pdf, pp. 13-15;
Statement of the Hungarian Helsinki Committee made during the OSCE SHDM II 2021 on Democratic Law-Making: Ensuring Participation,
26 April 2021, available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2021/04/OSCESHDM-II-2021_HungarianHelsinkiCommittee.pdf.

In particular, the transparency and inclusiveness of the **legislative process** has been eroded to the degree that national CSOs have consistently reported that public consultation on draft laws has virtually ceased to exist [28]. For instance, as also reported by the 2022 Rule of Law Report of the European Commission, the Hungarian Government has systematically failed to comply with its legal obligation to publish the online draft laws for public consultations. According to the government website, out of the 145 government draft laws in 2021, only three laws were published for public consultations. From these three, only one can be deemed as having been genuinely open for consultation; the other two drafts were published three weeks after the bills had already been submitted to Parliament. [29]

While the amendments in Act CXXXI of 2010 on Public Participation in Preparing of Laws that came into effect in October 2022 brought about some improvements, key areas of concern have remained intact [30]. For instance, while in response to the conditionality mechanism activated against Hungary(see Section 3.1), ministries started to publish some laws for consultation, none of those the Government submitted to meet the milestones required by the conditionality mechanism were published [31].

In addition, under what has been called a 'façade of legality' – and with that, an affront to the rule of law - the Orbán government has cemented its rule by decree via the introduction of various new forms of 'special legal orders' which are **forms of state of emergency** in the Hungarian legal system. The mentioned state of danger, as well as an additional so-called 'state of medical crisis' were invoked and continuously extended since 2019. In addition, in May 2022 the Parliament passed the tenth amendment to the Constitution [32] in ten years adding yet another special legal order type, this time with reference to an armed conflict in a neighboring country, such as Ukraine, which was then promptly invoked - in effect, providing a constitutional ground for the government's continued decree governance. Due to the ongoing special legal order, the standard legislative procedure, as set out in Act CXXX of 2010 on Legislation [33], with its inbuilt checks and balances has been set aside - with heavy reliance on various fast—track and **emergency legislative procedures** [34]. These are characterized by both rapid law-making with often next day or next week promulgation, little to no public consultation and the use of omnibus bills, bundling together substantively completely unrelated amendments, that have eroded the rule of law safeguards of the legislative process falling short of a transparent, accountable, democratic, and pluralistic process for enacting laws. The Government has also continued its decree legislation and passed 637 government decrees in 2022 alone, 267 (41.9%) of which were adopted as emergency decrees, either with a reference to the pandemic or to the war [35]. Reportedly, the government has also routinely resorted to passing key amendment through individual Members of the Parliament bills or via the urgent or extraordinary procedure. In this context, it is underlined that draft laws submitted by Members of Parliament, unlike those submitted by the Government or the President of the Republic, do not require an obligatory public consultation as set out in the Act on Legislation. The possibility of the Constitutional Court to annul already final judicial decisions, as elaborated on in Section 2.5 below, has been heavily criticised as an avenue to deteriorate legal certainty in the country.

[29] Commission Staff Working Document, 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, p 24 available at: https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf

[30] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p 56 available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

[31] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p 56 available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

[32] GOVERNMENT OF HUNGARY No T/25. Proposal Tenth Amendment to the Fundamental Law of Hungary (MAGYARORSZÁG KORMÁNYA T/25. Számú javaslat Magyarország Alaptörvényének tizedik módosítása) available at: https://www.parlament.hu/irom42/00025/00025.pdf

[33] Act CXXX of 2010 on Legislation (2010. évi CXXX. Törvény a jogalkotásról) available at: https://net.jogtar.hu/jogszabaly?docid=a1000130.tv

[34] Contribution of Hungarian CSOs to the European Commission's Rule of Law Report (January 2023) p 57, available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

[35] Contribution of Hungarian CSOs to the European Commission's Rule of Law Report (January 2023) p 58, available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

A grave expression of both the government's 'anti-Brussels' rhetoric and, in line with that, its continued attempts to exempt Hungary from its legal obligations under EU law, rather than complying with the CJEU ruling in the case Commission v Hungary, C-808/18, that found the country in violation of the EU asylum acquis [36], the government petitioned the Constitutional Court – in effect, seeking a constitutional ground for the non-implementation of the CJEU judgment. The CC indeed found that "as long as the EU institutions do not take the measures necessary to ensure the effectiveness of the joint exercise of competences, Hungary is entitled to exercise the relevant non-exclusive field of competence of the EU" [37]. In response, the Commission brought action against Hungary before the CJEU requesting, among others, that the court declares that Hungary has failed to fulfill its obligations under Article 260(1) TFEU, in not taking all the necessary measures to comply with the CJEU judgment of 17 December 2020 concerning the reception of applicants for international protection [38].

### 2.3 Protection against threats to Fundamental Rights

This section should cover political, civil and social fundamental rights, including environmental rights.
The Fundamental Law assigns as the primary obligation of the state the protection of the inviolable and inalienable fundamental rights of human beings. Pursuant to Article I para. (3) of the Chapter on freedom and responsibility, "a fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a Constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right". Protection from discrimination is also guaranteed by the Fundamental Law which, however, does not expressly recognise gender and sexual orientation as a protected ground. Nevertheless, Decision No. 20/1999 (25.VI.)

Despite the constitutional protection, **systemic human rights violations have been taking place, affecting particularly LGBTQI people, refugees, and migrants, Roma people and human rights defenders** [42]:

- Starting with 2019, **LGBTQI people** became the new target of the government's hate propaganda (see for example the government's "homophobic referendum" described under Section 2.5. below), after years of xenophobic hate campaigns against migrants and asylum-seekers. A number of measures and laws were adopted severely violating the rights of LGBTQI people. For instance, constitutional amendments further curtailed the rights of LGBTQI people [43], and laws were adopted for prohibiting legal gender recognition [44], for blocking adoptions, among others, for same-sex couples [45], and for the protection of children while in effect discriminating against and stigmatising the LGBTQI community [46].

[36] Judgment of the Court (Grand Chamber) of 17 December 2020, European Commission v Hungary, available at: https://curia.europa.eu/juris/liste.jsf?num=C-808/18
[37] Commission Staff Working Document, 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, p 28 available at: https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf
[38] InfoCuria, Case Law, Action brought on 21 February 2022 – European Commission v Hungary (Case C-123/22), available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=272148&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2439749
[39] Háttér Gay Legal Aid Service (A Háttér Meleg Jogsegély Szolgálata) p 52 available at: https://www.icj.org/wp-content/uploads/2002/03/Hatter-v.-Pepsi-Sziget-Budapest-2nd-and-3rd-District-Court-of-Justice-Hungary-Hungarian.pdf
[40] Articles 26 - 31 of Law CLI on the Constitutional Court, available at: https://net.jogtar.hu/jogszabaly?docid=a1100151.tv
[41] Commission Staff Working Document, 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, p 25 available at: https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf
[42] Hungarian Helsinki Committee (2021), Shadow report to the GANHRI Sub-Committee on Accreditation on the activities and independence of the Commissioner for Fundamental Rights of Hungary in light of the requirements set for national human rights institutions, 18 February 2021, availableat https://helsinki.hu/wp-content/uploads/Assessment_NHRI_Hungary_18022021_HHC.pdf , p.14.
[43] The 9th Amendment to the Fundamental law restricted the notion of family, stating that "The mother is female, the father is male" and provided for the protection of "the right of children to their identity in line with their sex by birth" and their "upbringing in accordance with the values based on [...] Christian culture".
[44] Act XXX of 2020 on the Amendment of Certain Laws Related to Public Administration and on Donating Property (2020. évi XXX. Törvény egyes közigazgatási tárgyú törvények módosításáról, valamint ingyenes vagyonjuttatásról), available at https://njt.hu/jogszabaly/2020-30-00-00
[45] Act CLXV of 2020 amending certain laws on justice (2020. évi CLXV. Törvény az egyes igazságügyi tárgyú törvények módosításáról).

- Since 2015, the government has also continuously destroyed the **Hungarian asylum system**, and in 2020 introduced a new system that made applying for asylum in Hungary practically impossible [47].
- **Educational segregation of Roma pupils** has been a serious problem in Hungary for decades and when a second instance court awarded compensation to 60 Roma victims, high-level politicians from the governing party initiated a public campaign against the court ruling, questioning its credibility and politically interfering in the case (which was at that time pending as the court decision was challenged at the Curia by the respondents) [48]. After the Curia upheld the second instance court's decision, an amendment to the National Public Education Act [49] was adopted, obliging courts to grant compensation in case of similar future violations in the form of educational services instead of monetary compensation for moral damages [50]. This latter is an example of how the government and the ruling majority use the law to undermine respect for court decisions [51].
- Governing party politicians have been making political statements trying to discredit **human rights defenders**, for instance those involved in the Roma segregation case described above or in other human rights cases [52]. Furthermore, several legislative measures were adopted to obstruct civic space in Hungary. For example, in 2017, a law was adopted [53] which introduced "discriminatory and unjustified restrictions on foreign donations to civil society organisations", leading to a 2020 CJEU judgement [54] that confirmed that the law and the restrictive measures introduced amounted to "unjustified interference with the respect for private life, protection of personal data and freedom of association […] likely to create a general climate of mistrust and stigmatisation of the associations and foundations concerned in Hungary" [55]. After the Commission sent a letter of formal notice to Hungary for non-compliance with the CJEU ruling, in 2021 the Parliament adopted a new law [56] which repealed the former contested one; however, it introduced new measures, influencing the operational space of NGOs and further stigmatising them [57].

[46] Act LXXIX of 2021 adopting stricter measures against persons convicted of paedophilia and amending certain laws for the protection of children (2021. évi LXXIX. törvény a pedofil bűnelkövetőkkel szembeni szigorúbb fellépésről, valamint a gyermekek védelme érdekében egyes törvények módosításáról szóló).
[47] Hungarian Helsinki Committee, All you ever wanted to know about what happened to refugee protection in Hungary since 2015 in one place, 20 August 2018 (regularly updated), available at https://helsinki.hu/en/all-you-ever-wanted-to-know-about-what-happened-to- refugee-protection-in-hungary-since-2015-in-one-place/.
[48] Hungarian Helsinki Committee, Unfettered Freedom to Interfere – Ruling party politicians exerting undue influence on the judiciary in Hungary 2010–2020, 29 July 2020, p. 5-6, available at, https://www.helsinki.hu/wp-content/uploads/HHC_Hun_Gov_undue_influence_judiciary_29072020.pdf.
[49] Act CXC of 2011 on National Public Education (2011. évi CXC. Törvény a nemzeti köznevelésről), available at https://njt.hu/jogszabaly/2011-190-00-00
[50] Act LXXXVII of 2020 amending Act CXC of 2011 on National Public Education (2020. évi LXXXVII. Törvény a nemzeti köznevelésről
szóló 2011. évi CXC. törvény módosításáról).
[51] Hungarian Helsinki Committee (2021), Shadow report to the GANHRI Sub-Committee on Accreditation on the activities and independence of the Commissioner for Fundamental Rights of Hungary in light of the requirements set for national human rights institutions, 18 February 2021, p.14.
[52] Hungarian Helsinki Committee (2021), Shadow report to the GANHRI Sub-Committee on Accreditation on the activities and independence of theCommissioner for Fundamental Rights of Hungary in light of the requirements set for national human rights institutions, 18 February 2021, p.24-26.
[53] Act LXXVI of 2017 on the Transparency of Organisations Supported from Abroad (2017. évi LXXVI. Törvény a külföldről támogatott
szervezetek átláthatóságáról), available at https://njt.hu/jogszabaly/2017-76-00-00.
[54] European Commission v. Hungary, Case C-78/18, Judgment of the Court (Grand Chamber), 18 June 2020.
[55] Hungarian Helsinki Committee (2021), Shadow report to the GANHRI Sub-Committee on Accreditation on the activities and independence of theCommissioner for Fundamental Rights of Hungary in light of the requirements set for national human rights institutions, 18 February 2021, p.23.
[56] Act XLIX of 2021 on the transparency of civil organisations capable of influencing public life (2021. évi XLIX. törvény a közélet befolyásolására alkalmastevékenységet végző civil szervezetek átláthatóságáról), available at https://njt.hu/jogszabaly/2021-49-00-00.
[57] Hungarian Civil Liberties Union (2021), Statement on the transparency of NGOs capable of influencing public life and on the legislative actmodifying certain related legislative acts (Álláspont a közélet befolyásolására alkalmas tevékenységet végző civil szervezetek átláthatóságáról és az ezzel összefüggő egyes törvények módosításáról szóló törvényről), available at https://tasz.hu/allasfoglalas-civilellenes-torveny-2021.

Another law criminalising assistance to asylum seekers [58] was also subject to a CJEU court ruling [59], deciding that Hungary breached Union law, but the judgment was not implemented by Hungary which puts further pressure on CSOs working in the field of asylum [60].

The government and the political majority have also taken a series of measures to undermine **media pluralism and judicial independence** (please see examples in the sections below). Hungary used to have several national human rights institutions, but the human rights protection system got significantly centralised with the entry into force of the Fundamental Law in 2012. Former ombuds institutions were abolished, and the Parliamentary Commissioner for National and Ethnic Minority Rights and the Parliamentary Commissioner for Future Generations became subordinated as deputies to the Parliamentary Commissioner for Citizens' Rights, re-named to Commissioner for Fundamental Rights (hereinafter CFR). The mandate of the Commissioner for Data Protection was delegated to the newly created National Authority for Data Protection and Freedom of Information (hereinafter NAIH). Further centralisation took place in 2020, when the Equal Treatment Authority and the Independent Police Complaints Board were also integrated as departments into the Office of the Commissioner for Fundamental Rights. The Equal Treatment Authority, established in 2004 used to be an autonomous institution responsible for investigating violations of the prohibition of discrimination, while the Independent Police Complaints Board, created in 2008, used to be an organ of civil control over the Police.

**The Commissioner for Fundamental Rights (CFR)**

Following the merger of several bodies responsible for the protection against threats to fundamental rights, as described above, the CFR now acts as ombudsman (through the office of the CFR, and the Deputy-Commissioner responsible for the protection of the interests of nationalities living in Hungary and the Deputy-Commissioner responsible protection of the interests of future generations), equality body (through its Directorate-General for Equal Treatment) and oversight body of police conduct (though its General Directorate for Law Enforcement).

It also carries out the activities of the National Preventive Mechanism introduced by the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

With this overarching mandate and according to the Fundamental Law, the CFR exercises several functions that could safeguard rule of law principles on the national level. Firstly, it holds a broad obligation to both investigate any violations related to fundamental rights that come to its knowledge, or to ensure that such violations are investigated and must initiate general or specific measures to remedy them. Detailed rules on the activities of the CFR are laid down in Act no. CXI of 2011 [61], which specifically requires the CFR to conduct ex officio proceedings for the protection of the rights of the child, the interests of future generations, the rights of national minorities living in Hungary, and the rights of the most vulnerable social groups [62].

Procedures before the CFR may be initiated by anyone. An individual complaint may be sent to the CFR by email, post or in person. The CFR also runs an electronic platform where complaints or public interest disclosures can be submitted. The latter also serves as a reporting channel for whistle-blowers. The latter includes an additional guarantee providing for the anonymity of the whistle-blowers who may request that their personal data to be accessible only to the CFR [63]. However, according to the 2022 Commission Rule of Law Report, the CFR has "limited formal competence as regards whistle-blower complaints, including the forwarding of reports to competent authorities" [64]; thus, the protection of whistle-blowers is not effectively ensured.

[59] Commission v Hungary, Case C-821/19, Judgment of 16 November 2021.

[60] Commission Staff Working Document, 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, p. 29.

[61] Act no. CXI of 2011 on the Commissioner for Fundamental Rights (Az alapvető jogok biztosáról szóló 2011. évi CXI. törvény), available at https://njt.hu/jogszabaly/2011-111-00-00.

[62] Article 1 of Act no. CXI of 2011 on the Commissioner for Fundamental Rights.

[63] See webpage of the Office of the Commissioner for Fundamental Rights of Hungary at https://www.ajbh.hu/web/ajbh-en/about-the-office; See also Act CLXV of 2013 on Complaints and Public Interest Disclosures (2013. évi CLXV. Törvény a panaszokról és a közérdekű bejelentésekről), available at https://njt.hu/jogszabaly/2013-165-00-00.

[64] Commission Staff Working Document, 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, p.18.

Since 2015, the CFR may also inquire into ordering and conducting a review of national security checks to determine whether there is an irregularity related to fundamental rights [65], as provided for in the Act on National Security Services [66]. However, the CFR's investigation cannot cover certain information related to national security services in light of Article 23 of the Act on the Commissioner for Fundamental Rights, which lists 39 sets of cases in relation to which the CFR cannot access sensitive or classified information regarding the operation of certain state bodies. Thus, in addition to the security services, the CFR cannot access certain information in relation to the armed forces, police forces, the tax and customs authority, prosecution services, and of the National Security Inspectorate. In all of these cases, the CFR can turn to the Minister in charge to carry out the inquiry and to inform the CFR about the results [67]. This limits the ability of CFR to access information for its investigations and to carry out its fundamental rights mandate in an independent manner, especially so in controversial cases that often involve the above-listed agencies with investigative and prosecutorial functions.

In addition, the CFR can give its opinion on draft legislation falling under its competence, and to propose the amendment or the adoption of legislative acts affecting fundamental rights, or the recognition of the binding force of an international treaty [68]. The CFR may also initiate at the Constitutional Court the constitutionality review of legislation as well as the interpretation of constitutional provisions [69].

This multiplicity of competencies and powers allocated to the CFR and the procedures attached to these could serve as tools for safeguarding the rule of law against dissensus threatening fundamental rights. However, in practice several national and international stakeholders raised concerns about the independence of the CFR and its ability to fulfil the Office's mandate to effectively promote and protect all human rights.

Among others, the Global Alliance of National Human Rights Institutions (GANHRI) responsible for reviewing and accrediting National Human Rights Institutions (NHRIs) in compliance with the Paris Principles [70] have for the past three years consistently raised concerns over the CFR's compliance with the minimum standards that NHRIs must meet in order to be considered credible and to operate effectively. As highlighted by the Venice Commission in its 2021 official Opinion on certain legal amendments in Hungary [71], the GANHRI's Sub-Committee on Accreditation (SCA), in its 2019 Report concluded that "the CFR did 'not demonstrate adequate efforts in addressing all human rights issues, nor has it spoken out in a manner that promotes and protects all human rights'. The SCA further noted that the Commissioner made limited use of international and regional human rights mechanisms in relation to sensitive issues. The SCA referred, inter alia, to concerns expressed by the Special Rapporteur on the situation of human rights defenders in 2017 that, despite its mandate, the CFR has been reluctant to refer complaints to the Constitutional Court for review in cases that it deems political or institutional".[72]

[65] Article 38/E of Act no. CXI of 2011 on the Commissioner for Fundamental Rights.
[66] Act CXXV of 1995 on National Security Services (1995. évi CXXV. törvény a nemzetbiztonsági szolgálatokról), available at https://njt.hu/jogszabaly/1995-125-00-00.44.
[67] Article 23(7) of Act no. CXI of 2011 on the Commissioner for Fundamental Rights.
[68] Article 2, paragraph 2 of Act no. CXI of 2011 on the Commissioner for Fundamental Rights.
[69] Article 2, paragraph 3 of Act no. CXI of 2011 on the Commissioner for Fundamental Rights
[70] The Paris Principles ('Principles Relating to the Status of National Human Rights Institutions') set out the minimum standards that NHRIs must meet in order to be considered credible and to operate effectively.
[71] European Commission for Democracy through Law (Venice Commission) (2021), Hungary – Opinion on the Amendments to the Act on Equal Treatment and Promotion of Equal Opportunities and to the Act on the Commissioner for Fundamental Rights as adopted by the Hungarian Parliament in December 2020, Adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)034-e
[72] Ibid, p. 8, citing Global Alliance of National Human Rights Institutions (GANHRI) (2019), Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), 14–18 October 2019, p. 24- 26. available at https://ganhri.org/wp-content/uploads/2021/03/SCA-Report-October-2019-English.pdf.

Furthermore, in its 2021 report, the SCA stated that failure of the CFR to speak out in a manner that promotes protection of all human rights demonstrates a lack of sufficient independence. It also noted that the CFR "is operating in a way that has seriously compromised its compliance with the Paris Principles" [73], therefore, it recommended that the CFR be downgraded to status "B" (partially compliant with the Paris Principles). The CFR was given the opportunity to provide the documentary evidence necessary to establish its continued conformity with the Paris Principles. However, in its most recent report issued in March 2022, the SCA reiterated its previous recommendation for downgrading, noting again with concern, among others, that: "[b]ased on the CFR written and oral response […] the SCA is of the view that the CFR has not effectively engaged on and publicly addressed all human rights issues, including in relation to vulnerable groups such as ethnic minorities, LGBTI, refugees and migrants as well as constitutional court cases deemed political and institutional, media pluralism, civic space and judicial independence" [74]. The recommendation took effect in April 2022, and since then the CFR is accredited as a "B" status institution with the GANHRI [75].

**Hungarian human rights NGOs**, such as the Hungarian Helsinki Committee, Amnesty International Hungary, Eötvös Károly Institute, Háttér Society and the Hungarian Civil Liberties Union also raised similar concerns, and in their shadow report submitted to the SCA in February 202176, concluded that "while the Commissioner has been very active in certain, politically neutral areas, he has been avoiding to go against the Government and the governing majority in politically sensitive cases, and has failed to step up or to step up adequately to protect the rights of affected groups" [77]. The selection process of the CFR was also contested by the SCA in 2019 as not sufficiently broad and transparent, and the mentioned NGOs showed in their shadow report that no initiatives have been taken by the executive or the legislative to ameliorate this [78]. The NGOs also recalled the controversial abolishment of the Equal Treatment Authority (ETA) and the transfer of its tasks and competencies to the CFR as of 1 January 2021 in a process that lacked transparency, and stressed that while the ETA used to step up in the defence of vulnerable groups, the CFR fails to (adequately) act in defence of their rights [79]. The European Network of Legal Experts in Gender Equality and Non-discrimination reported that: "while the Equal Treatment Authority was a well-functioning body that had gained the respect of a wide range of stakeholders, including civil society organisations representing the interests of the protected groups, the same cannot be said about the Ombudsman […] there is a strong concern that due to the lack of the Ombudsman's functional independence, the reorganisation of the institutional framework has decreased the level of protection against discrimination in Hungary". [80]

[73] Global Alliance of National Human Rights Institutions (GANHRI) (2021), Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation (SCA), 14-21 June 2021, pp.12-13, available athttps://ganhri.org/wp-content/uploads/2021/08/EN-SCA-Report-June-2021.pdf.

[74] Global Alliance on National Human Rights Institutions (GANHRI) (2022), Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation (SCA) 14-25 March 2022, p 44-45, available at https://www.ohchr.org/sites/default/files/2022-04/SCA-Report-March-2022_E.pdf.

[75] OHCHR and GANHRI (2022), Chart of the status of national institutions, accredited by the Global Alliance of National Human Rights Institutions, Accreditation status as of 27 April 2022, available at https://ganhri.org/wp-content/uploads/2022/04/StatusAccreditationChartNHRIs_27April2022.pdf.

[76] Hungarian Helsinki Committee (2021), Shadow report to the GANHRI Sub-Committee on Accreditation on the activities and independence of the Commissioner for Fundamental Rights of Hungary in light of the requirements set for national human rights institutions, 18 February 2021, availableat https://helsinki.hu/wp-content/uploads/Assessment_NHRI_Hungary_18022021_HHC.pdf.

[77] [emphasis added] Hungarian Helsinki Committee (2021), Peers from other countries recommend that the Ombudsperson is downgraded as a national human rights institution, 4 August 2021, available at https://helsinki.hu/en/peers-from-other-countries-recommend-that-the-ombudsperson-is-downgraded-as-a-national-human-rights-institution/.

[78] Hungarian Helsinki Committee (2021), Shadow report to the GANHRI Sub-Committee on Accreditation on the activities and independence of the Commissioner for Fundamental Rights of Hungary in light of the requirements set for national human rights institutions, 18 February 2021, p.4.

[79] Ibid, p.5.

[80] András Kádár (2022), Hungary's Ombudsman is downgraded by the Global Alliance of National Human Rights Institutions to B status due to lack of functional independence, European Network of Legal Experts in Gender Equality and Non-discrimination, 2 August 2022, available at https://www.equalitylaw.eu/downloads/5673-hungary-hungary-s-ombudsman-is-downgraded-by-the-global-alliance-of-national-human-rights-institutions-to-b-status-due-to-lack-of-functional-independence-101-kb .

**The Council of Europe Commissioner of Human Rights** also expressed concerns about the merger of the ETA and the CFR, indicating that doubts remained about the appointment of the Commissioner in office and the adequacy of the CFR's efforts to address all human rights issues [81]. In the **Venice Commission**'s view, "the new system of protection against discrimination is overall more complicated and thus has the potential to be less effective than the previous one" [82].

Hungarian NGOs have reported that the number of discrimination complaints has significantly decreased since the CFR became the equality body. For instance, while the ETA received 868 cases in 2019, in the first semester of 2021, the Directorate of Equal Treatment of the CFR received only 156 complaints [83]. In addition, it was also reported that the CFR did not investigate complaints filed with the institution. For instance, Romaversitas, a Roma-led community education organisation in Hungary reported that Romani activists have complained to the CFR about cases of discrimination of Transcarpathian Roma displaced persons in Hungary, but the CFR did not initiate investigations into the violations brought to their attention [84].

Against this background, **the efficacy of the procedures available before the CFR is questionable.** Furthermore, the CFR does not seem to have challenged any legislative acts before the Constitutional Court since 2020 [85], and as mentioned above, it has been unwilling to refer political or institutional cases to the Constitutional Court for review. As to reviewing draft legislation and initiating legislative proposals, in 2021 NGOs reported that the CFR "has not stepped up in any way against an unconstitutional new law that excludes pecuniary compensation for segregation, even when 21 NGOs asked him to do so […], he has failed to protect the rights of LGBTQI people (e.g. against laws banning legal gender recognition and blocking adoptions, an anti-LGBTQI constitutional amendment, and homophobic statements by politicians), despite calls by NGOs" [86]. Hence, the exercise of the CFR's function to challenge controversial draft or adopted legislative acts affecting fundamental rights is also deemed to be problematic.

**National Authority for Data Protection and Freedom of Information (NAIH or DPA).**

According to Act no. CXII of 2011 on the right to informational self-determination and information freedom (hereinafter Information Act), the NAIH is an autonomous state administration organ, responsible for monitoring and promoting the enforcement of personal data rights, including access to data of public interest and data accessible on public interest grounds, as well as for the promotion of the free movement of personal data within the European Union [87]. As mentioned above, its predecessor was the Commissioner for Data Protection which was abolished in 2012, leading the CJEU to found a violation of EU law on the grounds that "by prematurely bringing to an end the term served by the supervisory authority for the protection of personal data, Hungary had(s) failed to fulfil its obligations under Directive 95/46/EC" [88].
The NAIH can conduct investigations in its field of competence, based on complaints or data breach notifications, but also ex officio. This function of the NAIH and the procedures related to it could serve as tools for safeguarding the rule of law against dissenting actions misusing personal data.

[81] Commission Staff Working Document, 2021 Rule of Law Report, Country Chapter on the rule of law situation in Hungary.
[82] European Commission for Democracy through Law (Venice Commission), op.cit., p.10.
[83] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p.62, available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf.
[84] Romaversitas (2022), The Situation of Transcarpathian Romania Families Fleeing from Ukraine to Hungary, p 7, available at https://romaversitas.hu/wp-content/uploads/2022/12/Transcarpathian_romani_families_EN_spread.pdf.
[85] According to the search engine of the Constitutional Court.
[86] Amnesty International Hungary, Eötvös Károly Institute, Hungarian Civil Liberties Union, K-Monitor, Mérték Media Monitor, Political Capital and Transparency International Hungary (2021), Contribution for the 2021 Rule of Law Report, p. 52, available at https://helsinki.hu/wp-content/uploads/2021/03/HUN_NGO_contribution_EC_RoL_Report_2021.pdf .
[87] Article 38 of Act CXII of 2011 on the right to informational self-determination and information freedom (2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról), available at https://njt.hu/jogszabaly/en/2011-112-00-0. The president of the Authority is nominated by the Prime Minister and appointed by the President of the Republic, see Art. 40(1) of the same Act.
[88] Court of Justice of the European Union, Case C-288/12, European Commission v Hungary, 8 April 2014.

However, the law provides for extensive exceptions which limit the NAIH's ability to access data for its investigations. The NAIH is subject to almost the same limitation as the CFR (based on Article 23 of the Act on the CFR described above and Article 71 of the Information Act [89]) in relation to a list of state institutions. The European Court of Human Rights in its judgment of September 2022 in Hüttl v. Hungary found that the above exceptions raise concerns, as "it does not allow for the legal scrutiny of certain instances of data-processing by an external and independent body. This is so because the DPA cannot find out, of its own volition, the contents of the documents and data in question. Instead, it must rely on information obtained from the minister overseeing the activity, who will communicate their views on the matter – while potentially having a direct interest in maintaining the secrecy of the data concerned" [90].

In the most serious wiretapping scandal in recent years, in 2021 investigative journalists uncovered that hundreds of journalists, businessmen and lawyers in several countries may have had the Pegasus spy software installed on their mobile phones. In Hungary, the scandal affected over 300 prominent opposition politicians, civil society critical of the government as well as journalists. The NAIH initiated an ex officio investigation on the use of the Pegasus spyware in Hungary, as media information indicated a possible violation of data protection laws [91]. The NAIH in its report specifically referred to its limited ability to access information [92], and concluded in a very formalistic manner that during "the Authority's investigation, no information was found that the bodies authorised to covertly gather information subject to external authorisation […] would have used the spyware for any purpose other than those specified by the manufacturer (prevention and detection of criminal acts and acts of terrorism), and the discharge of the duties specified by law" [93]. The evasive approach of the NAIH, the lack of either de lege or de facto remedy and/or protection provided to the individuals under surveillance, some of whom filed lawsuits against the state [94], are yet another example of how the rules of secret information gathering are too loose in Hungary, allowing for secret surveillance of citizens, including lawyers and journalists, on grounds of national security, without effective judicial supervision [95].

### 2.4 Protection of Judicial Independence

Pursuant to Article C (1) of the Fundamental Law, the functioning of the Hungarian State is based on the principle of the separation of powers. The administration of justice belongs to the courts, which are organised at multiple levels, in a four-tier hierarchy: there are 113 district courts, 20 regional courts (tribunals), five regional courts of appeal and the Curia, which is the supreme judicial organ [96]. The Constitutional Court is not part of this ordinary court system. However, the hierarchical organisation does not mean that lower courts are subordinated to the higher ones. According to the Fundamental Law and the Courts Administration Act [97], judges are independent and subordinated only to the law and they may not be influenced or instructed in relation to their activities in the administration of justice. The Fundamental Law also specifies that judges may not be members of political parties or engage in political activities.

[89] Art. 23 of Act CXI of 2011 on the Commissioner for Fundamental Rights is applicable to the NAIH following Art. 71(3) of Act CXII of 2011 on the right to informational self-determination and information freedom.

[90] ECtHR, Hüttl v. Hungary, No. 58032/16, 29 September 2022, paras. 16–18.

[91] Case No. NAIH-423-2/2022.

[92] NAIH (2022), Findings of the investigation of the Nemzeti Adatvédelmi és Információszabadság Hatóság (Hungarian National Authority for DataProtection and Freedom of Information) launched ex officio concerning the application of the "Pegasus" spyware in Hungary,
31 January 2022, p. 21, available at https://www.naih.hu/data-protection/data-protection-reports?download=492:findings-of-the-investigation-of-the-nemzeti-adatvedelmi-es-informacioszabadsag-hatosag-hungarian-national-authority-for-data-protection-and-freedom-of-information-launched-ex-officio-concerning-the-application-of-the-pegasus-spyware-in-hungary.

[93] NAIH (2022), op.cit., p. 49.

[94] The Guardian, Hungarian journalists targeted with Pegasus spyware to sue state, 28 January 2022, available at:https://www.theguardian.com/world/2022/jan/28/hungarian-journalists-targeted-with-pegasus-spyware-to-sue-state

[95] Commission Staff Working Document, 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, p.26.

[96] Article 16(1) of Act CLXI of 2011 on the organisation and administration of courts (2011. évi CLXI. Törvény a bíróságok szervezetéről
és igazgatásáról), available at https://njt.hu/jogszabaly/2011-161-00-00.

[97] Act CLXI of 2011 on the organisation and administration of courts (2011. évi CLXI. Törvény a bíróságok szervezetéről és igazgatásáról), available at https://njt.hu/jogszabaly/2011-161-00-00.

The rule of law guarantee of judicial independence and its accompanying Constitutional safeguards implemented via a territorially and competence-wise decentralised judicial apparatus has been challenged by the **new uniformity complaint procedure** that was introduced on 1 April 2020. The procedure can be initiated before the Curia in case a final and binding court decision differs from judgments previously published by the Curia. While the Curia has long held the role of guaranteeing the uniform application of the law and to that end it has adopted uniformity decisions (jogegységi határozat) that have been binding on courts, on the basis of the new procedure, the uniformity complaint panel of the Curia can simply annul final and binding judgments of other courts and of other panels of the Curia should it deem that the ruling diverted from published jurisprudence of the Curia [98].

The Fundamental Law assigns the central responsibility of administration of courts to the President of the National Office for the Judiciary (NOJ), supervised by the National Judicial Council (NJC).

In this context, it is recalled that the NOJ and the NJC were created back in 2012 when the second Orbán government rehauled the judicial system and declared the sudden expiry of the mandate of the members of the then National Judicial Service Council (Országos Igazságszolgáltatási Tanács (OIT)). As a result, the OIT's tasks were split - with the central administration of courts taken over by the newly created National Office for the Judiciary (NOJ), while for the supervision of the NOJ's work allocated to the newly established National Judicial Council (NJC). It is noted that the NOJ tasks are in fact allocated to the NOJ President who is "supported by deputies and the Office" [99].

The "reform" also entailed the lowering of the mandatory retirement age of judges from 70 to 62. Many argued that these changes in fact aimed at removing the then OIT (and Supreme Court) President, András Baka, who has expressed his professional criticism concerning legislative and constitutional reforms in Hungary [100].

His dismissal from office was found to be arbitrary and in violation of the European Convention on Human Rights by the Grand Chamber of the ECtHR. In the case Baka v Hungary, the Court found a violation of Article 10 ECHR on the basis of judge Baka's claim that "his mandate as President of the Supreme Court had been terminated as a result of the views he had expressed publicly in his capacity as President of the Supreme Court and the National Council of Justice, concerning legislative reforms affecting the judiciary" [101]. The ECtHR confirmed, among others, that the premature termination of judge Baka's mandate "undoubtedly had a "chilling effect" in that it must have discouraged not only him but also other judges and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary" [102]. In addition, the Court also found that Hungary impaired the very essence of the judge Baka's right of access to a court in an affront to Article 6(1) ECHR. In relation to the judicial reform, the European Commission also launched an infringement procedure against Hungary, and the CJEU found in Case C-286/12, that the reduction of the mandatory retirement age constituted age discrimination and breached European Union law [103].

The National Judicial Council and other bodies of judicial self-government also participate in the administration of courts [104].

[98] Act CLXI of 2011 on the organisation and administration of courts; Joint contribution from Amnesty International Hungary and eight other CSOs for the 2023 Rule of Law Report, p. 21-22.

[99] Courts of Hungary, National Office for the Judiciary Scope of authority of the President of NOJ and the central administrative supervision of the National Judicial Council (NJC), available at: https://birosag.hu/en/national-office-judiciary

[100] HVG, Orbán replaces the chief justice because of his criticism of Fidesz (A Fidesznek címzett kritikái miatt váltják le Orbánék a főbírót), 23 November 2011

[101] CASE OF BAKA v. HUNGARY (Application no. 20261/12) 23 June 2016, para 171, available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-163113%22]}

[102] CASE OF BAKA v. HUNGARY (Application no. 20261/12) 23 June 2016, para 173, available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-163113%22]}

[103] European Commission, Court of Justice rules Hungarian forced early retirement of judges incompatible with EU law, available at: https://ec.europa.eu/commission/presscorner/detail/mt/MEMO_12_832

[104] Article 25(5) of the Fundamental Law.

The NJC is a judicial self-governing body, composed of 15 judges, out of which one is the president of the Curia and the others are elected by secret ballot by the judges themselves, with the appointment of delegates. The body can bring decisions with two-thirds of its members present [105]. **This could serve as a framework for checks and balances in the administration of courts and judicial independence**; however, the NJC does not have enough powers to effectively counterbalance the powers of the NOJ's President who is able to bring arbitrary decisions concerning appointment and promotion of judges.

Judges are appointed by the President of the Republic, on the recommendation of the President of the NOJ, based on an application procedure that provides for **certain guarantees against arbitrary appointments**; for instance, the ranking of candidates is established by the local judicial councils and the NOJ President cannot deviate from this in his recommendation without the approval of the National Judicial Council [106]. However, these guarantees are not sufficient, as the national legislation includes loopholes by which the NOJ President or the President of the Curia may block or circumvent the application procedure. It was reported that these loopholes were often utilised in 2022 and several judicial appointments were made in a non-transparent and non-objective manner [107]. Since these Presidents are politically appointed (they are elected for nine years by two thirds of the Members of the Parliament, on the proposal of the President of the Republic [108]), they might misuse the procedure to grant judicial appointments to politically affiliated persons or persons without appropriate qualifications, as was the case in the appointment of a former state secretary without any prior judicial experience [109]. While RoL safeguards, such as the NCJ's consent to judicial appointments, are seemingly in place, both the Kúria President and the NOJ President appointed several judges throughout 2022 in processes that maintained the illusion of checks and balances, while, in fact, circumvented relevant safeguards. Questionable appointment procedures include, among other, that of Barnabás Hajas, a former state secretary who was appointed to be a judge of the Kúria (equivalent of the Supreme Court) - without any prior judicial experience [110].

Judicial promotions and leadership positions should also be awarded in the framework of an ordinary application procedure, but the law allows for a number of exceptions [111]. The presidents of the NOJ and the Curia have discretionary powers concerning decisions on promotions without an application procedure, eliminating thus the guarantees associated with a transparent application procedure. No judicial remedy is available against such appointments [112]. Certain legislation amendments also took place which allowed for the appointment as judges and heads of panels at the Curia of some persons (such as the current president and vice-president), exempting them from going through the ordinary application procedure [113]. Secondments to the Curia based on discretionary decisions of the NOJ President have also been widely used to bypass the ordinary process of promotions [114]. **Such irregularities in appointments and promotions call into question the independence and professionalism of the judges and judicial leaders.** A survey with the participation of 29% of the Hungarian judges shows the lack of trust in the judicial appointment processes even among the judiciary itself with 42% believing that judges in Hungary "have entered the judiciary on first appoint-

[105] See webpage of the National Judicial Council at https://orszagosbiroitanacs.hu/bemutatkozas/.
[106] Act CLXII of 2011 on the status and remuneration of judges (2011. évi CLXII. Törvény a bírák jogállásáról és javadalmazásáról), available at https://njt.hu/jogszabaly/2011-162-00-00; See also Commission Staff Working Document, 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, p.3; and Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p. 4.
[107] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p. 4-5.
[108] Articles 25(6) and 26(3) of the Fundamental Law.
[109] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p. 4-5.
[110] Contribution of Hungarian CSOs to the European Commission's Rule of Law Report (January 2023) p 5, available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf
[111] Article 7(1) and 8(1) of Act CLXII of 2011 on the status and remuneration of judges.
[112] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p. 7.
[113] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p. 5.
[114] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p. 7.

-ment other than solely on the basis of ability and experience during the last three years"; whereas 52% believing the same in case of judges appointed to the Curia [115].

In addition, court presidents have discretion on establishing the case allocation schemes, and since 1 April 2020, schemes can be modified any time, which in practice happens on a regular basis, sometimes from one day to the next [116]. The case allocation schemes leave ample room to manipulate the judicial system by failing to prevent the possibility that sensitive or politically important cases can be allocated to "reliable" judges who will adjudicate according to political interests [117]. Moreover, the NOJ president and judicial leaders have a wide discretion in setting bonuses for judges; therefore, cutting or giving bonuses can serve as a tool for silencing judges or influencing their activities. This has further impact on the independence of the judiciary.

With the dissolution of the Administrative and Labour courts on 1 April 2020, the Curia *"gained exclusive competence to rule (i) as the first instance court (especially in certain politically sensitive matters, including cases related to elections and the right to freedom of assembly); (ii) as the second instance court (in general in all cases where regional courts ruled as first instance) and (iii) as the court of extraordinary review (in all administrative cases)"* [118]. According to NGO contributions to the 2023 Commission Rule of Law Report, such centralisation of administrative adjudication was important for the Hungarian government as in such instances relevant cases involving fundamental rights (such as elections, asylum, administrative decisions by the police, or the exercise of the right to freedom of assembly) and cases of significant economic importance (such as tax and customs disputes, public procurement, building and construction permits, land and forest ownership) are decided.

The extensive centralisation and the mentioned legal or practical shortcomings of the national system of checks and balances within the judiciary has indicated the judicial proceedings and administrative processes related to the judiciary have increasingly fallen short of the standards, such as judicial independence, required to protect the rule of law especially in the face of mounting dissensus from the executive. **How the Fidesz-led political majority has been undermining the independence of the judiciary in Hungary since 2010** has been subject of extensive criticism, among others, by the Hungarian Helsinki Committee whose analysis concluded that the only independent body, for now, remains the National Judicial Council that, however, has limited powers to uphold judicial independence [119].

*According to NGO, the centralisation of administrative adjudication was important for the Hungarian government as in such instances relevant cases involving fundamental rights and cases of significant economic importance are decided.*

[115] European Network of Councils for the Judiciary (ENCJ), ENCJ Survey on the Independence of Judges, 2022, available at https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/GA 22/Report ENCJ Survey 2022.pdf; cited in Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p. 24.
[116] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p. 9.
[117] Hungarian Helsinki Committee, New study on case allocation in courts: Current system does not prevent abuse, 27 June 2019, available at: https://helsinki.hu/en/new-study-on-case-allocation-in-courts-current-system-does-not-prevent-abuse/
[118] Hungarian Helsinki Committee, Court Capture Project Completed – The Hungarian recipe for getting a grip on the judiciary, 26 October 2022, available at https://helsinki.hu/en/wp content/uploads/sites/2/2022/11/Court-Capture-Project-Completed-20221026-.pdf.
[119] Ibid.

## 3. Judicial Intervention

The Constitutional Court processes explained in Section 2.1 above give various avenues for the CC to intervene in case of breaches of the rule of law either during legislative or judicial processes. These make the CC well placed, on paper, to guard the rule of law in the national context. However, in practice, as the individual complaint mechanism has not performed an effective control function on the executive's continued attacks on the separation of powers, neither did the **preliminary and subsequent norm control functions** of the Constitutional Court - even though their very objective is to provide additional de lege tools to ensure that national legislation is in line with constitutional principles, such as the rule of law.

The preliminary norm control, as defined in Article 23 of Act CLI of 2011 on the Constitutional Court, assigns competence to the Constitutional Court to examine whether an adopted but not yet promulgated law is in line with the Constitution, including its rule of law guarantees, while Article 27 assigns the same competence vis-à-vis laws already in effect. In 2021, the Constitutional Court annulled six legal acts and in 11 cases provided recommendations [120]. Importantly, the CC does not carry out the norm control ex officio but only acts upon specific request.

Article 25 of the Act on the CC also provides for a **judicial referral procedure, akin to the preliminary ruling procedure to the CJEU** as per Article 267 TFEU, whereby the sitting judge in an individual case can suspend the procedure before it on suspicion of unconstitutionality and can request its individual norm control from the Constitutional Court.

The efficacy of these procedures has remained limited under the use of various types of **state of emergency** – in the domestic legal order 'special legal order'- that in practice has been the new normal for the past three years. This is despite the fact that Article 54 (7) of the Fundamental Law provides a specific guarantee to ensure that even in a state of emergency, the operation of the Constitutional Court cannot be restricted (unlike that of the ordinary courts).

After initiating a state of emergency, the Government is obliged to take all measures to guarantee the continuous operation of the Constitutional Court" [121]. At the same time, it followed from the above explained standing rules that in fact no cases could reach the CC as long as adjudication within the ordinary court system was suspended or limited with reference to the pandemic. It is only the abstract norm control procedure that could have been exercised, however, the initiation of those procedures are limited (to the Government, a quarter of the members of the National Assembly, the President of the Curia, the Chief Prosecutor or the Commissioner of Fundamental Rights [122]), i.e., officials whose independence from the government has long been called into question, including due their reluctance to challenge politically sensitive matters [123]. Accordingly, neither of the above outlined procedures meant a meaningful check on the expansion of executive power in practice. This is despite the fact that it has for years been extensively documented how the government used the declaration of a 'state of danger' to rule by decree. As a result, it has circumvented the statutory safeguards built in the ordinary legislative procedure and has also routinely overstepped parliamentary authorization and uses its decree power to regulate matters unrelated to the pandemic and to overrule judicial decisions and limit the exercise of fundamental rights, such as media freedom [124]. Recent examples include the ban of the media from Hungarian hospitals - despite the Hungarian Medical Association along with 28 media platforms

[120] Commission Staff Working Document, 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, p 28 available at: https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf

[121] Article 54 of the 2011 Fundamental Law of Hungary available at: https://net.jogtar.hu/jogszabaly?docid=a1100425.atv

[122] Article 24 (1)e) of the 2011 Fundamental Law of Hungary available at: https://net.jogtar.hu/jogszabaly?docid=a1100425.atv

[123] Gábor Halmai; Kim Lane Scheppele, Don't Be Fooled by Autocrats! Why Hungary's Emergency Violates Rule of Law, EUI Constitutionalism and Politics, 22 April 2020 available at: https://blogs.eui.eu/constitutionalism-politics-working-group/dont-fooled- autocrats-hungarys-emergency-violates-rule-law/

[124] Commission Staff Working Document, 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, p 25 available at: https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf

requesting the lifting of the ban [125]. When the Budapest Regional Court's ruling [126] quashed the ministerial decision banning access, the government issued yet another government decree [127] giving de lege authorisation to administrative authorities, such as the ministry in question, to regulate contact between hospitals and the media [128].

Lastly, the role of the Constitutional Court processes as a guard of the rule of law have been called into question, especially, due to the insertion of Article 24 (2)d) in the Fundamental Law via the Fourth Amendment, whereby the CC acquired competence to review the consistency of a final judicial decision with the Fundamental Law based on a constitutional complaint. This has not only increased the tensions between the CC and ordinary courts [129], as the CC can annul already final decisions, but has also created a de facto fourth instance in the domestic justice system, which the CC has reportedly used to overrule ordinary courts in politically sensitive cases [130]. In this context, it is important to recall that the judges of the Constitutional Court are elected by the Parliament, and not nominated by the judiciary. Among others, in its most recent decisions, the CC annulled the Supreme Court, in the Hungarian terminology Curia (Kúria)), decision and found it unconstitutional to hold a national referendum about a controversial high-investment project to develop in Budapest a campus for the Chinese Fudan University [131], which in its Founding Declaration pledged the service of the Chinese Communist Party.

Pursuant to Article 28 of the Fundamental Law, "in the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law". However, as indicated in Section 2.4 above, the independence of the judiciary, in particular of the Curia, has been seriously undermined by the ruling party, which also affects the outcome of the judicial decisions addressing threats to the rule of law and fundamental rights.

One prominent example is the 2021 "referendum for child protection" initiated by the government, which was actually part of a hate campaign against LGBTIQ persons [132]. The government planned to organise the referendum together with the general elections in April 2022 which was not possible under the election law in effect.

Therefore, a legislative amendment was initiated and approved, allowing for holding the referendum on the same day as the parliamentary elections [133]. The questions played on populist sentiments and a fear-mongering campaign against the LGBTIQ community that prompted human rights organisation to encourage the casting of an invalid vote on the referendum. The referendum questions and the massive campaign surrounding it systematically conflated (and equated) homosexuality and paedophilia [134] and asked voters provocative questions that did not reflect the views of either the political opposition or the LGBTIQ community, such as, whether they "support(ed) the unrestricted exposure of minors to sexually explicit media content, that may influence their development?"

[128] Commission Staff Working Document, 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, p 25 available at: https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf

[129] Kinga Zakarias, Scope of constitutional court review of judicial decisions in German and Hungarian practice (A bírói döntések alkotmánybírósági felülvizsgálatának terjedelme a német és magyar gyakorlatban) March 2020 available at: https://abszemle.hu/a-biroi-dontesek-alkotmanybirosagi-felulvizsgalatanak-terjedelme-a-nemet-es-magyar-gyakorlatban/#_ftn2

[130] Contributions of Hungarian NGOs to the European Commission's Rule of Law Report, January 2022, p 52, available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2022/01/HUN_NGO_contribution_EC_RoL_Report_2022.pdf

[131] Constitutional Court, The Constitutional Court decided on the authentication of referendum questions (Népszavazási kérdések hitelesítése ügyébendöntött az Alkotmánybíróság), 18 May 2022 available at: https://alkotmanybirosag.hu/kozlemeny/nepszavazasi-kerdesek-hitelesitese-ugyeben-dontott-az-alkotmanybirosag/

[132] Hungarian Civil Liberties Union (2021), 'HCL filed a lawsuit against the unlawful referndum questions of the Government' (A kormány jogsértő népszavazási kérdései miatt bírósághoz fordult a TASZ), 16 August 2021.

[133] Act CXVII of 2021 amending certain laws related to elections (2021. évi CXVII. törvény egyes választási tárgyú törvények módosításáról).

[134] DW, Hungary has passed new anti-LGBTQ+ legislation, 15 June 2021, available at: https://www.dw.com/en/hungary-approves-law-banning-lgbtq-content-for-minors/a-57909844

or whether they "support(ed) showing minors media content on gender changing procedures? [135].
Nevertheless, the National Electoral Commission approved the five questions proposed to be asked at the referendum [136]. The National Electoral Commission's decision was challenged before the Curia, among others, by the Hungarian Civil Liberties Union (HCLU), arguing that the questions lacked clarity, and violated international human rights conventions (by restricting children's freedom of information) as well as the Fundamental Law (which protects sexual orientation as part of human dignity) [137]. Four of the questions were upheld by the Curia, while one question [138] was found unlawful, violating Article XVI of the Fundamental Law on the rights of the child [139]. Yet, the president of the judges' panel deciding on this question was accused to be 'a left-wing judge, supporting gender ideology' in the pro-government media [140].

The government submitted an appeal against the decision to the Constitutional Court [141]. The Constitutional Court found the Curia's decision contrary to Article XXVIII (1) of the Fundamental Law on the right to fair trial and therefore annulled it [142]. Nevertheless, the government did not wait for the Constitutional Court's decision, and removed the question from the list; thus, the referendum took place with the four questions approved by the Curia. Due to critics calling for casting an invalid vote in protest of what has been referred to as the "homophobic referendum", none of the questions reached the required threshold of 50% of registered voters casting a valid "yes" or "no" vote. [143] Nevertheless, **this case illustrates the lack of independence of the Curia and that its review procedure may not be effective in protecting human rights against the dissenting actions of the government.**

However, positive examples of courts upholding human rights and rejecting populist practices and propaganda also exist. For example, after the 2018 elections, the government-related newspaper Figyelő published an article which contained a list of 200 private individuals and public figures, including jurists, academics, journalists, and people working for NGOs, and claimed that these persons were associated with George Soros, a Hungarian-American businessman and philanthropist, calling them "Soros' mercenaries" who committed treason against the nation [144]. The affected persons became the target of online and personal verbal attacks and harassment or had to live in fear of such attacks [145].

[135] ILGA Europe, ANTI-LGBT HUNGARIAN REFERENDUM IS IN BAD FAITH, SAYS ILGA-EUROPE, 1 April 2022, available at: https://ilga-europe.org/news/referendum-hungary-3-april-2022/
[136] The questions in loan translation were the following:
"(1) Do you support that education presenting sexual orientations be available to minors in public education institutions without the consent of the parents?
(2) Do you support that sex change treatments be propagated to minors?
(3) Do you support that sex change treatments be available also to minors?
(4) Do you support the presentation of sexual media content to minors that influences their development without restrictions?
(5) Do you support the presentation of media content to minors that display sex change?"
See: Zsolt Körtvélyesi, Orsolya Salát, Júlia Mink, Tamás Fézer, Balázs Majtényi (2022), Franet National contribution to the Fundamental Rights Report 2022 Hungary, Milieu Consulting SRL, p.13, available athttp://fra.europa.eu/sites/default/files/fra_uploads/fundamental_rights_report_2022-_hungary_.pdf.
[137] Hungarian Civil Liberties Union (2021), 'HCL filed a lawsuit against the unlawful referndum questions of the Government' (A kormány jogsértő népszavazási kérdései miatt bírósághoz fordult a TASZ), 16 August 2021, available at https://tasz.hu/cikkek/a-kormany- jogserto-nepszavazasi-kerdesei-miatt-birosaghoz-fordult-a-tasz.
[138] Question no. 3: Do you support that sex change treatments be available also to minors?
[139] Curia, Decision No. Knk.II.40.646/2021/9, 22 October 2021, available at https://kuria-birosag.hu/hu/nepszavugy/knkii40646220219- szamu-hatarozat.
[140] Kisalfold.hu (2021), 'There will be a parliamentary election and a child protection referendum at the same time' (Egyszerre lesz a parlamenti választás és a gyermekvédelmi népszavazás), available at https://www.kisalfold.hu/orszag-vilag/egyszerre-lesz-a- parlamenti-valasztas-es-a-gyermekvedelmi-nepszavazas-11579954/ .
[141] Constitutional Court, Case no. IV/03991/2021.
[142] Constitutional Court Decision no. 33/2021. (XII. 22.), 22 December 2021.
[143] 444.hu, The homophobic referendum became invalid (Érvénytelen lett a homofób népszavazás), 4 April 2022, available at: https://444.hu/2022/04/04/ervenytelen-lett-a-homofob-nepszavazas
[144] Szabad Európa (2022), 'Court finds Figyelő's listing unlawful and intimidating (Jogsértő és félelemkeltő volt a Figyelő listázása a bíróság szerint), 28 September 2022, available at https://www.szabadeuropa.hu/a/figyelo-soros-lista-birosag-itelet/32056195.html.
[145] Hvg.hu, 'Court: Figyelő's blacklist was unlawful and intimidating, everyone is entitled to apology and compensation' (Bíróság: Jogsértő és félelemkeltő volt a Figyelő feketelistája, mindenkinek jár a bocsánatkérés és a sérelemdíj), 28 September 2022, available at https://hvg.hu/itthon/20220928_Jogsertes_birosag_itelet_Figyelo_Sorosugynokozos_listazas_serelemdij.

The article was part of a national-wide, long-running, intimidating media propaganda campaign against civil society actors. The case was brought before the Budapest- Capital Regional Court by 34 plaintiffs, mainly people working at NGOs and universities. The Court, in its judgment of September 2022 [146] found the article to be not only unlawful, but also fear-mongering which could not remain without legal consequences. It maintained that such 'listing' damaged the public opinion of the persons concerned and gave rise to fear, especially in view of the historic precedents of the Second World War. The judgement held that just because someone works for a particular organisation does not mean that they are an enemy of the nation. The Court awarded damages to the plaintiffs and ordered the publishing of the Court's judgment in the online version of the newspaper (since the printed version ceased to exist), and a public apology to the listed persons [147]. The judgment become final and legally binding on 3 December 2022. The Figyelő published an apology on its website on 10 February 2023 for violating the plaintiffs individual right to the protection of their reputation [148]. **This is an example of how the judiciary withstanding political pressure and populist ideology could provide effective remedies against violations of the rule of law through a discrediting and intimidating media practice directly violating the fundamental right of the targeted individuals and indirectly threatening political dissent to the ruling party's ideology.**

# 4. Recent Trends on the Implementation of the Rule of Law

This section examines developments across the EU Member States, both positive and negative, in two key areas for the rule of law: the anti-corruption framework and media pluralism and whether inter-institutional cooperation and support mechanisms to strengthen the rule of law have been implemented. In your research, please focus on measures taken to address dissenting actions.

As a starting point, please read the 2022 Rule of Law Report for your Member State [149]. Please note that the Italian Report briefly analyses, among other instruments, the Technical Support Instruments.

While it might not be an expected point in the reports, it could bring interesting points for the analysis of the relationship between the rule of law instruments at EU and national level. Should you find TSIs relevant for this section, please only refer to projects related to the rule of law.

## 4.1. Anti-corruption

Corruption constitutes a significant threat to the rule of law. It jeopardises the good functioning of public institutions and diverts their human and financial capacities from public interest. It can disrupt the legislative process, introduce a degree of arbitrariness in decision-making and can be the breeding ground of human rights violations. The form notwithstanding, corruption undermines citizens' trust in state institutions. Against this conceptual framework, as outlined by the Parliamentary Assembly of the Council of Europe [150], Hungary has the worst corruption perception score among all EU Member States according to the latest Transparency International Report [151]. The country's corruption perception index has consistently deteriorated since 2012 - in 2023 standing at its lowest, 44/100 score [152], in yet another year marked by high-profile corruption cases closely entangled with the political elite. In February 2023, the largest corruption trial of recent years has started with 22 defendants, including the prime accused, György Schadl, the President of the Hungarian Association of Judicial Officers, and Pál Völner, the former Parliamentary State Secretary of the Ministry of Justice [153].

[149] https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters_en

[150] CoE Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Corruption as a threat to the Rule of Law – Report, available at: https://assembly.coe.int/CommitteeDocs/2013/NYFf%C4%B1nalpressfjdoc1e.pdf

[151] Politico, Hungary seen as most corrupt country in the EU, study finds, 31 January 2023, available at:https://www.politico.eu/article/hungary-orban-corruption-transparency-international/ Transparency International, Corruption Perception Index 2022, available at: https://images.transparencycdn.org/images/CPI2022-Report-Embargoed-until-6.01am-CET-31-JANUARY-2023.pdf

[152] Transparency International, Corruption Perception Index: Hungary, available at: https://www.transparency.org/en/cpi/2022/index/hun

[153] Index, Everything you need to know about the Schadl-Völner case (Minden, amit a Schadl–Völner-perről tudni érdemes), available at: https://index.hu/belfold/2023/02/12/schadl-gyorgy-volner-pal-korrupcio-vesztegetes-befolyassal-uzerkedes-vegrehajto/

Nevertheless, it was only on 27 April 2023 that György Schadl resigned (along with the entire chairmanship of the association) – after he has spent the previous year and a half in detention [154].

Against this background, the efficacy of the procedures available in national law to protect the rule of law from the threats brought about by corruption are questionable. The main law enforcement agency responsible for anti-corruption is the National Protection Service, which is overseen by the Ministry of Interior that is also in charge of related policymaking. Private sector corruption cases are investigated by the police, whereas corruption in the public sector fall under the exclusive competence of the Investigation Division of the Central Chief Prosecution Office of Investigation [155].

These **preventative and investigative functions** are also complemented by the work of the National Tax and Customs Administration as well as the State Audit Office. In addition, various anti-corruption processes are in place at the Hungarian Competition Authority, the Public Procurement Authority, the Prosecution Service, and the Government Control Office – all of which, however, are administered by the minister in charge of the thematic area. Since mid-2022, the National Protection Service can only carry out **integrity checks** vis-à-vis the staff of institutions under the supervision of the Ministry of Interior, as well as public healthcare providers. Whereas the integrity tests and crime detection for public administrative staff not in healthcare or under the Interior Ministry's supervision is allocated to the Constitution Protection Office, which is one of Hungary's civilian secret services, overseen by the Prime Minister's Cabinet Office, functioning in a less transparent manner – and with neither procedure covering political leaders.[156]

In the course of 2022, the national rule of law framework has been strengthened, which however took place in a national context where the state of play had led to the European Commission triggering the EU's conditionality mechanism as well as to the negotiations over Hungary's Recovery and Resilience Plan.

It was only in response to these EU-level RoL mechanisms that Hungary committed to meeting 27 rule of law related 'super milestones' with the objective of protecting the financial interests of the European Union [157]. However, national NGOs reiterated that despite the pledges, little substantive improvement has been achieved in practice and has called on the European Commission to be more intransigent in order to stop systemic corruption in Hungary [158]. As part of the above efforts, in 2022, the Anti-Corruption Task Force was set up as well as the investigative judges of the Buda Central District Court were assigned exclusive competence to examine individual complaints concerning the termination of corruption investigations. A relevant tool added to the national anti-corruption processes is the group of acts the newly established the Integrity Authority can carry out in all cases where an organization that has tasks and powers in the use of EU funds has not taken the necessary steps to prevent, detect and correct irregularities, in particular, fraud, conflict of interest, corruption and other violations of law that affect the efficient and effective financial management of the EU budget or the protection of the EU's financial interests [159].

[154] HVG, György Schadl and the chairmanship of the executive faculty also resigned (Lemondott Schadl György és a végrehajtói kar elnöksége is) 27 April 2023, available at: https://hvg.hu/gazdasag/20230427_schadl_gyorgy_lemondott_mbvk

[155] Commission Staff Working Document, 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, p 10 available at: https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf

[156] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p 26 available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

[157] European Parliament, Think Tank, Rule of law-related 'super milestones' in the recovery and resilience plans of Hungary and Poland, 24 January 2023, available at: https://www.europarl.europa.eu/thinktank/en/document/IPOL_BRI(2023)741581

[158] Hungarian Helsinki Committee, K-MONITOR, Transparency International: Hungary, The European Commission should be more intransigent to stopsystemic corruption in Hungary - Civil society on Hungary's unfolding anticorruption package, 17 November 2022, available at: https://transparency.hu/wp-content/uploads/2022/11/HU_17_measures_assessment_17112022.pdf

[159] Article 3 of 2022. évi XXVII. Törvény az európai uniós költségvetési források felhasználásának ellenőrzéséről, available at: https://net.jogtar.hu/jogszabaly?docid=A2200027.TV&searchUrl=/gyorskereso

The Integrity Authority is, however, wholly reliant on other government agencies in carrying out its mandate, that, as reported by national CSOs, have proven reluctant to uncover wrongdoings associated with the government [160]. In addition, the monitoring procedure of the newly established Directorate for Internal Audit and Integrity is another procedure that aims at curbing corruption – specifically via monitoring conflict of interest declarations and to "raise awareness" about related incidents at any national authority implementing EU funding. Besides this limited mandate, the Directorate also operates a reporting platform via which anyone can report incidents of conflict of interest even anonymously [161]. Nevertheless, the ineffectiveness of the integrity and conflict of interest procedures has been reported in numerous instances. Most recently, a new phenomenon of conflict of interest have pervasively emerged in the form of channelling massive public funding to so-called public interest asset management foundations, which are in fact private law foundations with boards filled with Fidesz-affiliates and leaders, such as János Lázár, Minister of Construction and Traffic and Mihály Varga, Minister of Finance who both hold a number of such board memberships [162].

In the context of public procurement, despite various reforms initiated in response to the triggered conditionality mechanism, the need for corruption prevention safeguards as well as for an in fact independent Public Procurement Council continue to lack. This is despite the fact that these functions would be essential to prevent, among others, the circumvention of public procurement principles when establishing concessions such as the one that was recently assigned with waste management and the operation of expressways for 35 years [163].

A new tool on the national level to incentivise data disclosure and to increase the transparency of public contract data, is that bodies of the state budget – but not other agencies - are now required to disclose, among others, the metadata of their contracts. If the information is not uploaded in the new public data repository, the National Authority for Data Protection and Freedom of Information can impose fines up to HUF 50 million (ca. EUR 127,000) [164].

*The need for corruption prevention safeguards as well as for an in fact independent Public Procurement Council continue to lack.*

As part of the bundle of legislative amendments passed in order for the country to meet the super-milestones required by the conditionality mechanism, both private individuals and legal entities can now submit a complaint to a judge to challenge termination of a corruption investigation, which can be ordered to re-commence upon judicial decision [165]. While the private prosecution of high-level corruption cases is now available on paper as a new remedy process to counter the inaction of the Prosecution Service, CSOs have warned that the lack of equality of arms within the procedure, and the hindered accessibility of case files make such procedure unviable in practice [166].

[160] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p 26 available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

[161] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p 29 available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

[162] Ibid. P 31

[163] Transparency International: Hungary, Letter to the European Commission on the highway concession case, 7 July 2021, available at: https://transparency.hu/en/news/letter-to-the-european-commission-on-the-highway-concession-case/

[164] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p 34 available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

[165] Act XLIV of 2022 on the Directorate General for Auditing European Subsidies and amending certain laws adopted at the request of the European Commission in order to ensure the successful completion of the conditionality procedure (2022. évi XLIV. Törvény az Európai TámogatásokatAuditáló Főigazgatóságról és a kondicionalitási eljárás eredményes lezárása érdekében az Európai Bizottság kérésére elfogadott egyes törvények módosításáról)

[166] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p 36 available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

[167] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p 36 available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

This is in a context where the lack of appropriate prosecutorial action is a hindering factor to the prudent administration of both public and EU funds. One prominent example of the latter is the irregularities found in the administration of the "Bridge to the Word of Labour" EU project, in relation to which Transparency International Hungary and K-MONITOR reported that "tax administration terminated the process in 2022 after having investigated into supposed subsidy fraud for seven years in lack of evidence of a criminal conduct. The prosecution service approved this decision, albeit both the European Commission (OLAF) and the Hungarian government uncovered signs of serious misconduct. The European Commission ordered the repayment of the entire project budget (HUF 1.5 billion)." [167] The beneficiary of the grant was the National Roma Self-Government, whose president during the grant period, Flórián Farkas, used to serve as a Fidesz MP and who was not even interrogated in the process despite the fact that he was referred to as the instigator in related interrogations.

### 4.2 Media Pluralism

While freedom of expression is guaranteed by Article IX of the Fundamental Law, the 2010 Media Act [168] has been criticized from the start, among others by the OSCE Representative on Freedom of the Media [169] for being a means of eliminating media pluralism. Throughout the past decade, the public service media has continued to become increasingly concentrated and has openly served the interests of the Orbán government [170]. This is backed by an advertising market that favours pro-government companies at the detriment of independent media. National watchdogs continue to report on how "this practice renders fair competition impossible and distorts the market" [171]. In this context, the 2022 Election Observation Mission of ODIHR concluded that "the pervasive bias in the news and current-affairs programs of the majority of broadcasters monitored … combined with extensive government advertising campaigns provided the ruling party with an undue advantage" [172].

In this context, it is recalled how the pro-government media empire, the Central European Press and Media Foundation or KESMA (Közép-Európai Sajtó és Média Alapítvány), was created back in 2018 and controls the majority of Hungarian media outlets from cable news channels, radio stations, and internet news portals, to the printed press. Importantly, the Prime Minister signed an order declaring the KESMA transactions to be a matter of "national strategic importance in the public interest" - a tool that has helped the empire to avoid the investigation of authorities, such as the Hungarian Media Council of the Hungarian Competition Authority [173]. The media market share of KESMA was already at 16% in 2018 and in 2022 the Hungarian Media authority continued to support the expansion of Fidesz-affiliated radio stations, for instance, by concluding another four frequency contracts with Karc FM, one of the many KESMA-affiliated media service providers [174].

[166] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p 36 available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

[167] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p 36 available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

[168] CLXXXV of 2010 law on media services and mass communication (2010. évi CLXXXV. Törvény a médiaszolgáltatásokról és a tömegkommunikációról), available at: https://net.jogtar.hu/jogszabaly?docid=a1000185.tv

[169] OSCE Representative, Revised Hungarian media legislation continues to severely limit media pluralism, says OSCE media freedom representative, 25 May 2012, available at: https://www.osce.org/fom/90823

[170] ODIHR Election Observation Mission, Parliamentary Elections and Referendum, Final Report Hungary, 3 April 2022, p 23

[171] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p 44 available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

[172] ODIHR Election Observation Mission, Parliamentary Elections and Referendum, Final Report Hungary, 3 April 2022, p 28

[173] Contribution of Hungarian CSOs to the European Commission's Rule of Law Report (January 2023) p 47, available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

[174] Contribution of Hungarian CSOs to the European Commission's Rule of Law Report (January 2023) p 41, available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

Besides KESMA, several commercial media companies are owned by pro-government investors, like TV2 commercial television, Radio1 network and Index news portal [175] - amounting to the near total government influence over the Hungarian media landscape.

The Media Council plays a central role in maintaining this status quo and to back the political agenda of the ruling part. Most recently, it even refused to investigate complaints about Russian propaganda infiltrating the Hungarian public media and rather publicly criticized the complainants [176].
In this context, rule of law safeguards, such as freedom of information requests, while available under national law, are obstructed by entrenched institutional practices. One such example is how national authorities tend to deny they have the requested data unless court proceedings start and tend to only make the information accessible after significant time and sustain efforts required from the requester. When the data is provided, the case is automatically closed [177]. In addition, FOI requests can only be used with restrictions when it comes to the access of data concerning public funds, due to a constitutional amendment that narrowed down the definition of the latter. The narrow interpretation of the term is confirmed by the Curia's standing case law, which found that information about subcontractors' participation in national constructions carried out with the support of EU funds does not need to be disclosed in response to FOI requests [178].

The use of **judicial proceedings** to protect the journalistic freedom to research and report publicly available information on public figures has systematically been repressed in Hungary. In this context, national watchdogs report that 2022 has even seen the emergence of strategic litigation against public participation (SLAPP) lawsuits in Hungary [179]. The legal ground for these is usually the fact that Hungary failed to implement the **GDPR with regard to journalism exemptions of Article 85**, which expressly requires Member States to reconcile the right to the protection of personal data with the right to freedom of expression and information, including processing for journalistic purposes, in their national law [180].

## 5. Conclusion and New Challenges

Since 2010 the Fidesz-led governing coalition has systematically captured democratic institutions, such as the Parliament, the Constitutional Court, the judiciary as well as other key state agencies, such the Office of the Commissioner for Fundamental Rights or the Media Council that were supposed to ensure checks and balances against undue expansion of power. To that effect a variety of tools were employed by the four consecutive Orbán-governments ranging from the rewriting of the constitution to the massive centralisation of the equality bodies and the circumvention of the safeguards of the ordinary legislative process via the use of decree-governance. The revamp of the legal and democratic institutional landscape was accompanied by an increasingly exclusionary populist political rhetoric with open attacks on any political view different from the Christian-conservative government ideology, on minorities and vulnerable groups from LGBTIQ persons to refugees, as well as on any entities not falling in line. So-called public consultations have increasingly become means of gaining populist support for the government policies that focused on painting an enemy picture against whom the Hungarian nation must protect itself: be it the anti-immigrant Stop-Soros campaign, or the Stop-Brussels consultation claiming a list of ways in which "Brussels have attacked our country" [181]. In the reign of what has emerged as the hybrid partially-free electoral autocracy of a nationalist populist leader [182], the national tools to protect the rule of law have proven to be weak and recent positive legislative and administrative steps to strengthen the rule of law have not been the result of domestic mechanism but have rather been linked to the activation of the EU rule of law toolkit.

[175] Contribution of Hungarian CSOs to the European Commission's Rule of Law Report (January 2023) p 46, available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

[176] Media1, The Media Council criticises the opposition for criticising the public media for spreading Russian propaganda and Dániel Papp, the CEO of MTVA (Bírálja a Médiatanács az ellenzéket, amiért kritizálta az orosz propagandát terjesztő közmédiát és Papp Dánielt, az MTVA vezérigazgatóját), 1 March 2022, available at: https://media1.hu/2022/03/01/biralja-a-mediatanacs-az-ellenzeket-amiert- kritizalta-az-orosz-propagandat-terjeszto-kozmediat-es-papp-danielt-az-mtva-vezerigazgatojat/

[177] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p 51 available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

[178] Kúria, Pfv.IV.20.904/2021/5 in Ibid.

[179] Contributions of Hungarian CSOs to the European Commission's Rule of Law Report, January 2023, p 52 available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/HUN_CSO_contribution_EC_RoL_Report_2023.pdf

[180] Article 85 GDPR, available at: https://gdpr-info.eu/art-85-gdpr/

[181] Hungarian government launched a national consultation of all Hungarian households, entitled «Stop Brussels», focusing on 6 specific issues. Several of the claims and allegations made in the consultation are factually incorrect or highly misleading in European Commission, "Stop Brussels": European Commission responds to Hungarian national consultation, 27 April 2017, available at: https://commission.europa.eu/publications/stop-brussels-european-commission-responds-hungarian-national-consultation_en

[182] European Parliament News, MEPs: Hungary can no longer be considered a full democracy, 15 September 2022, available at: https://www.europarl.europa.eu/news/en/press-room/20220909IPR40137/meps-hungary-can-no-longer-be-considered-a-full- democracy

# Use of the rule of law legal instruments in the face of mounting dissensus at the national level

# Spain

*RULE OF LAW INSTRUMENTS RESPONDING TO EMERGING DISSENSUS*

*Project N°101061621*

July 2023

# USE OF THE RULE OF LAW LEGAL INSTRUMENTS IN THE FACE OF MOUNTING DISSENSUS AT NATIONAL LEVEL

## *Spain*

This study/report has been prepared by Milieu SRL under Horizon Europe RED-SPINEL Project N°101061621 coordinated by Prof. Ramona Coman (PI) and the Institut d'études européennes of the Universlité libre de Bruxelles. The main authors of the study/report are Laura Vona and Marta Ballesteros.



Milieu Consulting SRL, Chaussée de Charleroi 112, B-1060 Brussels, tel.: +32 2 506 1000; e-mail:marta.ballesteros@milieu.be; web address: www.milieu.be.

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# Abbreviations

| | |
|---|---|
| CGPJ | General Council for the Judiciary |
| CNMC | Comisión Nacional de los Mercados y la Competencia |
| GRECO | Group of States against Corruption |
| LOAPA | Organic Law for the Harmonization of the Autonomous Process |
| LOPJ | Organic Law of the Judicial Power |
| LOPJ | Organic Law of the Judicial Power |
| LOTC | Organic Law for the Constitutional Court |
| PP | Partido Popular |
| PSOE | Partido Socialista Obrero Español |
| RecommendationsCommission Rule of Law Report 2022 | ANNEX to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions,2022 Rule of Law Report, COM(2022) 500 final |
| Rule of Law Report 2020 | COMMISSION STAFF WORKING DOCUMENT 2020 Rule of Law Report Country Chapter on the rule of law situation in Spain Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Rule of Law Report The rule of law situation in the European Union, SWD/2020/308 final |
| Rule of Law Report 2021 | COMMISSION STAFF WORKING DOCUMENT 2021 Rule of Law Report Country Chapter on the rule of law situation in Spain Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Rule of Law Report The rule of law situation in the European Union, SWD/2021/710 final |
| Rule of Law Report 2022 | COMMISSION STAFF WORKING DOCUMENT 2022 Rule of Law Report Country Chapter on the rule of law situation in Spain Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2022 Rule of Law Report The rule of law situation in the European Union, SWD/2022/509 final |
| TSI | Technical Support Instrument |

# 1. Introduction: Rule of Law threats in times of dissensus

This factsheet shall analyze the existence and the use of rule of law instruments to face threats to democratic principles at a national level in a context of growing dissensus over liberal democracy and its core values in the EU. Hence, it examines how national legal norms and governance instruments might react to breaches of the rule of law.

For the purpose of this work, "*dissensus is understood here as the expression of social, political and legal conflicts which take place concomitantly in different institutional and non-institutional arenas (parliamentary, constitutional, public sphere, technocratic and expert arenas…) driven by political, social, legal actors, including state and non-state actors, seeking to maintain liberal democracy, to replace liberal democracy or to restructure liberal democracy*" (Brack and Coman 2023) [1].

Examples of dissenting action can be found in populist or nationalist movements seeking to subvert democratic principles, fundamental rights, and the rule of law. In parallel, there are specific measures or rules established in each country to protect the respect of democratic principles.

At EU level the rule of law tool kit is composed of:

- Article 7 TEU to protect institutional system, fundamental rights and democratic principles including control mechanisms of citizens' right to voting, participation to decision making, legislative initiative, access to justice
- The Infringement Proceeding
- The Preliminary Reference Procedure
- The Charter of Fundamental Rights

Policy tools at the EU level include:

- The EU Justice Scoreboard
- The Cooperation and Verification Mechanism
- The Technical Support Instrument and its precedents
- The Protection of the EU Financial Interests
- Rule of Law Conditionality Regulation

At national level, the existence and the use of rule of law instruments to face threats to democratic principles might be established in national Constitutions or national toolkits. Please try to identify measures that either have a similar function to those at EU level or implement the EU legislative measures at national level.

[1] Coman, Ramona and Brack, Nathalie (2023) "Understanding Dissensus in the Age of Crises", RED-SPINEL Working Paper.

Spain is a parliamentary monarchy. Spain is not a federal State, but its institutional structure and distribution of competences is based on a high degree of decentralization. It is considered a quasi-federal state or decentralised unitary State, with devolved powers to its 17 Autonomous Communities ('Comunidades Autónomas'), including financial and even fiscal matters in some cases (i.e. Basque country and Navarra). The bicameral Parliament (Cortes Generales) consists of the Congress (of Deputies) and the Senate (chamber of territorial representation), which are directly elected, except for 58 senators that are appointed by the regional assemblies of the Autonomous Communities.

The State and the Autonomous Communities ('Comunidades Autónomas') have both exclusive and shared competences. **The legislative power** is in the hands of the Parliament, which – according to Article 82 of the Spanish Constitution – can decide to delegate it to the Government, subject to certain limitations. The Government, led by the President, holds the State's executive and administrative powers and some legislative powers justified by reason of urgency or delegation.

The institutional structure of the Autonomous Communities is based on a Legislative Assembly, a Governing Council with executive and administrative competences and a President. Autonomous Communities have political and financial autonomy.
The right of legislative initiative is recognised to the Government, the two Chambers of the Parliament, the assemblies of the Autonomous Communities, and a group of at least 500.000 citizens (Article 87 of the Constitution).

*Spain is considered a quasi- federal state or decentralised unitary State, with devolved powers to its 17 Autonomous Communities, including financial and even fiscal matters in some cases*

The Constitutional Court is competent to review the constitutionality of laws. The rule of law is enshrined in Article 2 of the Treaty on European Union (TEU) as one of the common values for all EU Member States. It states: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

As stated by the 2020 Rule of Law report by the European Commission, 'under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts' [2].

Spain recognises the **principle of legality** under Article 9(1) of the Constitution. **Fundamental rights** are an integral part of the Spanish Constitution (Chapter II, Section I, 'De los derechos fundamentales y de las libertades públicas') and – according to Article 53 – are binding for all public authorities. The protection of fundamental rights is competence of the Constitutional Court, ordinary courts and the Ombudsman (Defensor del Pueblo). The Spanish Constitution does not mention expressly the impartiality of the judiciary; however, this notion can be included under the concept of independence (expressly recognised by Article 117 of the Constitution). The right to an impartial court is of jurisprudential creation [3].

In Spain, there is no established toolkit to address threats to the rule of law within the national system, as at the EU level. However, as described below, there is a rule of law system based on several tools embedded in the Constitution and/or Organic Laws that protect (to a certain extent) the rule of law in Spain.

[2] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC
AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS 2020 Rule of Law Report The rule of law situation in the European Union, COM/2020/580 final.
[3] Starting from STC 113/1987 onwards.

However, considering the institutional crisis in December 2022 regarding the nomination of the General Council for the Judiciary (Consejo General del Poder Judicial), doubts are expressed about the effectiveness of these tools. Critics have been raised by the European Commission itself, which in its 2022 Recommendations -formulated as part of the Rule of Law Annual Report - suggested several actions for Spain in order to improve its Rule of Law protection system [4].

## 2. The Instruments Provided by Spanish Law

The principle of the rule of law includes the principle of legality, which implies a transparent, accountable, democratic, and pluralistic process for enacting laws, respect of fundamental rights and equality before the law; legal certainty and prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review [5].

Please explain how these principles are protected in national law. Please focus on key examples of the use of constitutional/legislative/governance instruments in situations of mounting dissensus. In section 2.5, please focus on the role, if any, of national courts.

### 2.1 Protection against threats to democratic principles

This section should be devoted to any attempts to affect the institutional structure or balance of powers.

As already mentioned in the Introduction, the institutional structure of Spain is a decentralised unitary state. The Territorial Organization of the State is governed by the TÍTULO VIII of the Spanish Constitution [6]. As a general principle, Article 137 of the Constitution provides that 'The State is organised territorially into municipalities, provinces and Autonomous Communities that may be constituted. All these bodies shall enjoy self-government for the management of their respective interests'. The State and the Autonomous Regions have both exclusive and shared competences attributed under Articles 148, 149 and 150 of the Constitution.

A clear example of institutional clash between the Central Government and an Autonomous Region was the **Catalan crisis** in 2017 when the Catalan Autonomous Community declared unilaterally the independence from the State without following the constitutional procedures and which culminated in the activation (for the first time) of **Article 155 of the Spanish Constitution** by the Government. According to Article 155:

'If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by an absolute majority of the Senate, take the measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests'.

The Article does not specify which kind of measures can be applied [7] and while at the start of the century the need for a legal development of article 155 of the Constitution was discussed, the legislative development has never been undertaken.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2022 Rule of Law Report The rule of law situation in the European Union, COM/2022/500 final, p.9.

[5] Commission Communication: A new EU Framework to strengthen the Rule of Law. COM/2014/0158 final.

[6] The updated version of the Spanish Constitution (in ES) is published here https://www.boe.es/biblioteca_juridica/index.php?tipo=C The EN version of the Spanish Constitution (used for this Country Report) is available here https://www.boe.es/biblioteca_juridica/codigos/codigo.php?id=158&modo=2&nota=0 Another version is available here https://www.senado.es/web/conocersenado/normas/constitucion/index.html?lang=en

[7] On the doctrinal debate on the interpretation of the wording 'necessary measures' of Article 155 please see Rovira, E. A., Cuestiones constitucionales en torno a la aplicación del artículo 155 CE en el conflicto de Cataluña, Revista d'estudis autonòmics i federals, (27), 1-23, 2018, p.5 et seq.

Its application was also considered in relation to the non-compliance by the governing bodies of the Parliament of the Basque Country in relation to the obligations derived from the judgment requiring the declaration of illegality and dissolution of certain political parties (Herri Batasuna, Euskal Herritarrok, Batasuna), issued in application of the current Organic Law of Political Parties by the Chamber of article 61 of the Organic Law of the Judiciary [8].

The following conditions need to be respected to apply Article 155:

- The Autonomous Community does not comply with the obligations that the Constitution or other laws impose on it.
- The Autonomous Community acts in a way that seriously threatens the general interest of Spain.
- Once the aforementioned circumstances have been verified, the Government must comply with two procedural requirements for the application of article 155 of the Constitution:
- Send a prior request to the President of the Autonomous Community to cease his actions.
- When this said requirement is disattended, the Government has to obtain approval by an absolute majority of the Senate (where territorial representation is reflected).

Article 155 of the Constitution attributes to the Government the power to assess whether any Autonomous Community is failing to comply with its obligations. Once the Government reaches the conclusion that the material requirements are met, and that the procedures that need to be developed are completed, the Constitution authorizes it to adopt the necessary measures to force the corresponding Autonomous Community to comply with its obligations or to ensure the protection of the general interest.

It has been pointed out that Article 155 cannot affect the constitutionally recognized rights and freedoms of individuals and cannot be used to reform the Constitution, i.e. it cannot modify or alter the established territorial organization rules, whether of an organizational-institutional, competence-based or relational nature [9].

To this end, Articles 167 and 168 of the Constitution come into place, which describe in detail the procedures that must be followed [10]

The Catalan crisis (which started in 2015) exploded with the organisation of an independence referendum held on 1 October 2017 in Catalonia without any legal and electoral guarantees and controls. The referendum was in contravention of the constitutional provisions (since according to Article 92 of the Spanish Constitution the power to regulate and authorize referendums corresponds exclusively to the State) and went against the express prohibition of the Constitutional Court [11]. After the statement of a positive vote for independence by the regional Government, the Parliament of Catalonia signed on 10 October the Unilateral Declaration of Independence which established the Catalan Republic as an independent and sovereign State [12].

[8] Sinopsis artículo 155, https://app.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=155&tipo=2

[9] Rovira, E. A., Cuestiones constitucionales en torno a la aplicación del artículo 155 CE en el conflicto de Cataluña, Revista d'estudis autonòmics i federals, (27), 1-23, 2018, p.7.

[10] Article 167: '1. Bills on Constitutional amendment must be approved by a majority of three-fifths of the members of each House. If there is no agreement between the Houses, an effort to reach it shall be made by setting up a Joint Commission of Deputies and Senators which shall submit a text to be voted on by the Congress and the Senate. 2. If approval is not obtained by means of the procedure outlined in the foregoing clause, and provided that the text has been passed by an absolute majority of the members of the Senate, Congress may pass the amendment by a two-thirds vote in favour. 3. Once the amendment has been passed by the Cortes Generales, it shall be submitted to ratification by referendum, if so requested by one tenth of the members of either House within fifteen days after its passage'. Article 168: '1. If a total revision of the Constitution is proposed, or a partial revision thereof, affecting the Preliminary Title, Chapter Two, Section 1 of Title I, or Title II, the principle shall be approved by a two-thirds majority of the members of each House, and the Cortes shall immediately be dissolved. 2. The Houses elected must ratify the decision and proceedto examine the new Constitutional text, which must be approved by a two-thirds majority of the members of both Houses. 3. Once the amendment has been passed by the Cortes Generales, it shall be submitted to ratification by referendum'.

[11] «Recurso de inconstitucionalidad n.º 4334-2017, contra la Ley del Parlamento de Cataluña 19/2017, de 6 de septiembre, del Referéndum de Autodeterminación.».

[12] DECLARACIÓ DELS REPRESENTANTS DE CATALUNYA, 2017, https://www.ara.cat/2017/10/10/Declaracio_Independencia_amb_logo_-1.pdf

*More recently the institutional clash of December 2022, evidences a basic democratic problem of separation of powers as well as an issue if judicial intervention.*

The day after, the Spanish Government addressed the formal notice to the President of the Generalitat, applying for the first time in history the mechanism of Article 155. After the reply of the Catalan President, the Government considered not attended the requirements included in the formal notice and, on October 27, it agreed to adopt a series of measures under Article 155, measures considered necessary to guarantee compliance with constitutional obligations and to protect the general interest [13]. The measures caused, inter alia: the removal of the President of the Generalitat, the Vice-President and other members of the Government; the dissolution of the Parliament of Catalonia and the calling of elections; the designation of bodies and authorities to enforce the application of the measures authorized.

Article 155 has a similar exceptional character and follows a similar process than Art 7 TEU procedure. It has therefore been used as an instrument to react to the Catalan dissensus, which has been defined as 'serious breach of legality', an act that 'questions the political integrity of the State' [14] and democratic principles including voting rights or minority rights. Some criticised the choice to use Article 155 – which has been considered the resounding failure (el fracaso rotundo)[15] of the prior process of dialogue and deliberation that the Constitution requires before adopting extraordinary measures [16] – and pointed out its inefficacy, since the serious breach of law caused by the Puigdemont putsch has not been restored with the application of article 155 and cannot be resolved by the unilateral imposition of one party (the Government even though it was supported by the nationalist parties, including those in the Catalan Government) over the other (the Autonomous Region) [17].

The judgments of the Spanish Constitutional Court 89 and 90/2019 determined the constitutionality of the activation of the mechanism provided for in Article 155 (see Section 3 on Judicial Intervention).

The tensions still continue as highlighted in the 2022 NHRI report by the Spanish Ombudsman pointing at the reluctance of the Government of Catalonia to apply a judgment of the Spanish Supreme Court on the declaration of Castilian as a "vehicular" language, in different areas of education on its territory [18]. However, for the moment, nothing is done on that issue by the Government, which might question the effectiveness of the rule of law tools [19].

More recently the **institutional clash of December 2022**, evidences a basic democratic problem of separation of powers as well as an issue if judicial intervention. Therefore, this case will be treated both under this Section and Section 3 related to Judicial intervention. The case refers to the renewal of the General Council for the Judiciary (CGPJ) members which are appointed by qualified majority of 3/5 of the Parliament. Since 2018, the negotiations between the main political parties reached an impasse, which has not had any significant progress despite numerous calls, including from the EU.

[13] BOE, Núm. 260 Viernes 27 de octubre de 2017 Sec. I. Pág. 103529, https://www.boe.es/boe/dias/2017/10/27/pdfs/BOE-A-2017- 12328.pdf
[14] Olmeda, J. A., Cataluña en el laberinto del minotauro, Cuadernos de Pensamiento Político, (65), 15-28, 2020, p.23.
[15] Rovira, E. A., Cuestiones constitucionales en torno a la aplicación del artículo 155 CE en el conflicto de Cataluña, Revista d'estudis autonòmics i federals, (27), 1-23, 2018, p.16.
[16] For the critics against the use of Article 155 see Rovira, E. A., Cuestiones constitucionales en torno a la aplicación del artículo 155 CE en el conflicto de Cataluña, Revista d'estudis autonòmics i federals, (27), 1-23, 2018, p.14 et seq.
[17] Rovira, E. A., Cuestiones constitucionales en torno a la aplicación del artículo 155 CE en el conflicto de Cataluña, Revista d'estudis autonòmics ifederals, (27), 1-23, 2018, p.21 and Olmeda, J. A., Cataluña en el laberinto del minotauro, Cuadernos de Pensamiento Político, (65), 15-28, 2020, p.23. See also Torres Gutiérrez, A., and Lecatelier, A., Doctrina del Tribunal Constitucional sobre la aplicación del artículo 155 de la Constitución española a raíz de la declaración de independencia por el Parlamento de Cataluña: estudio de las STC 89 y 90/2019, de 2 de julio, Civitas Europa, (2), 2019, 131-151.
[18] State of the rule of law in Europe 2022, Spanish Ombudsman, 2022.
[19] Ibid.

The European Commission has reacted over several years against the deadlock in the renewal of the CGPJ and urging the government and the opposition to solve the impasse [20]. For instance, in October 2022 the spokesperson of the Commission Christian Wigand recalled the recommendation of the 2021 Rule of Law Report which urged Spain to renew the CGPJ as a matter of priority and to tackle a reform of the system for electing members immediately afterwards [21].

The deadlock in the renewal of the CGPJ members, which exercised its functions ad interim since December 2018 until 2023, is a consequence of the procedure for the election of the CGPJ itself (see Section 2.4) [22].

It is difficult to locate where the dissensus over the CGPJ was coming from, since it was more systemic or structural and was not originating from a single party but was equally distributed among the various institutional positions. According to the majority parties of the Parliament (PSOE and Unidas Podemos), the minority party (PP) was – and is still – blocking the renewal of the CGPJ because it would have lost its majority position in the CGPJ. As mentioned in the Commission Rule of Law Report 2020, professional associations (such as: Asociación Profesional de la Magistratura; Asociación Juezas y Jueces para la Democracia; Asociación Judicial Francisco de Vitoria; Foro Judicial Independiente; Asociación de Fiscales; Unión Progresista de Fiscales; Asociación Profesional e Independiente de Fiscales; Asociación de Abogados FiscalesSustitutos) were calling for a renewal of the CGPJ [23], and were legally challenging the competence of the acting Council to continue with appointments for top judicial positions [24]. In order to react to this constitutional anomaly, the Government reformed the relevant Organic Law of the Judicial Power (LOPJ) [25] (art. 570 bis, LO 4/2021, of March 29) [26] and reduced the functions of the CGPJ. However, the reform was inadequate, since it hindered the effective functioning of the CGPJ and the quality of justice [27]. The reform established that the CGPJ could not appoint two of the twelve judges of the Constitutional Court (as provided in Article 159 of the Spanish Constitution), the president and the judges of the Supreme Court and other presidents of lower courts [28].

The impossibility for the CGPJ of nominating the judges of the Constitutional Court was particularly serious because it was blocking completely the renewal of the Constitutional Court itself, as established under Article 159 of the Constitution.

Consequently, and to overcome the impasse reached, the Government decided to proceed with a counter-reform of the LOPJ (LO 8/2022, of July 27) [29] and gave back to the interim CGPJ the power to elect the two judges of the Constitutional Court.

[20] Suanzes, P.R., Bruselas respalda al Constitucional y recalca que "las reformas de calado requieren consultas previas", elmundo, 2022, https://www.elmundo.es/espana/2022/12/20/63a1b066fdddff27928b4585.html

[21] Martialay, A., Bruselas insiste en la presión y pide la reforma del sistema de elección del CGPJ que rehúye Sánchez , elmundo, 2022, https://www.elmundo.es/espana/2022/10/10/6343cd6cfc6c83ad268b45c9.html

[22] For a deeper analysis of the 2022 institutional crisis See Andreu, J. M. C., Reformas legislativas del Consejo General del Poder Judicial y del Tribunal Constitucional y erosión democrática en España. DPCE Online, 55(4), 2023 (main source of this sub- Section).

[23] El Pais, Los jueces exigen al ministro la renovación cuanto antes del Poder Judicial, 20 February 2020, https://elpais.com/politica/2020/02/19/actualidad/1582142956_826283.html and La Moncloa, Campo pide a las asociaciones de jueces y fiscales su cooperación para sacar adelante el Plan Justicia 2030, 2020, https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/justicia/Paginas/2020/190220-asociaciones.aspx

[24] Order of the Civil Section of the Supreme Court, of 5 June 2019.

[25] Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial. «BOE» núm. 157, de 02/07/1985. https://www.boe.es/eli/es/lo/1985/07/01/6/con

[26] Ley Orgánica 4/2021, de 29 de marzo, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, para el establecimiento delrégimen jurídico aplicable al Consejo General del Poder Judicial en funciones, «BOE» núm. 76, de 30 de marzo de 2021, páginas 35948 a 35951, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-4907

[27] Andreu, J. M. C., Reformas legislativas del Consejo General del Poder Judicial y del Tribunal Constitucional y erosión democrática en España. DPCE Online, 55(4), 2023, p. 2261. The author adds that concerns over the lack of functioning of the TC (caused by the impasse in the CGPJ) was raised already in the 2020 Rule of Law Report and during the International round table on "Shaping judicial councils to meet contemporary challenges", organised by the Venice Commission, the Università La Sapienza and the University of Barcelona in Rome on 21-22 March 2022, CDL-PI(2022)005, www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2022)005-e

[28] Andreu, J. M. C., Reformas legislativas del Consejo General del Poder Judicial y del Tribunal Constitucional y erosión democrática en España. DPCE Online, 55(4), 2023, p. 2261

[29] Ley Orgánica 8/2022, de 27 de julio, de modificación de los artículos 570 bis y 599 de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, «BOE»núm. 180, de 28 de julio de 2022, páginas 108271 a 108272, https://www.boe.es/buscar/doc.php?id=BOE-A-2022-12579

However, given the failure of this option due to the lack of agreement in the CGPJ on the candidates (that have to be elected by three-fifths of the members of the CGPJ), the Government presented another package of legislative reforms to facilitate the renewal of the Constitutional Court judges. The amendments were presented by the majority parties (PSOE and Unidas Podemos), during the debate in the Congress on the reform of the Penal Code in December 2022 [30]. One amendment modified the Organic Law for the Constitutional Court LOTC [31] and will be further analysed under Section 2.4. The other amendment was aimed to modify Article 599(1) LOPJ, by stating that three months after the end of the mandate of the previous CGPJ, if the quorum of three-fifths was not reached in the first vote for the election of the constitutional judges, simple majority would be sufficient in the second vote. A complementary change granted to the CGPJ three months to agree to the renewal, with the threat of sanction, even criminal, if the agreement was not reached. This reform has been criticised because – even though it does not eliminate pluralism, since the majority and minority of the members of the CGPJ may continue to appoint one judge each – it destroys the consensus needed by the three-fifths vote, which aims to choose candidates that are accepted by the vast majority of the body, and not to distribute them equally between majority and minority parties [32].

From this point onwards of the institutional crisis, the situation became even more complicated and delicate. From one side, the proposed reform could be seen as a reaction of the Parliament to the obstructionism of a group of members of the CGPJ to the renewal of the Constitutional Court and of the PP to that of the CGPJ (in other terms, a tool to block the dissensus coming from the CGPJ and the PP). However, from the other side, the Parliament decision was suspended by the Constitutional Court through ruling (Auto) of 19 de December de 2022 [33]; the Court affirmed that the use of amendments to legislative texts – presented in the phase of parliamentary discussion by the majority groups when the parliamentary debate is already under way – raises problems of form and of affectation to the rights of minorities [34].

Furthermore: the decision of the Constitutional Court has also been criticised by some constitutionalists as an act that went beyond the Court's competence (see Section 3). This is an illustration of domestic dissensus over principles and the functioning of democratic institutions. Interestingly, during this crisis, all the institutions – Constitutional Court included – have been accused to undermine the rule of law in Spain.

The block caused by the intervention of the Constitutional Court brought back an impasse situation related to the renewal of the Constitutional Court members. The King called for institutional responsibility during his speech on Christmas Eve and had a great impact on public opinion and probably helped to solve (at least partially) the institutional crisis. When the crisis reached its peak, there was an 'unexpected distension', with effects limited to the renewal of the Constitutional Court: on December 27, the CGPJ unanimously elected two judges, in addition to the two that the Government had appointed on November 29, completing (finally) the renewal of one-third of the Court [35].

[30] Enmiendas núm. 61 y 62. www.congreso.es/public_oficiales/L14/CONG/BOCG/B/BOCG-14-B-295-4.PDF

[31] Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional. «BOE» núm. 239, de 05/10/1979. https://www.boe.es/eli/es/lo/1979/10/03/2/con

[32] Andreu, J. M. C., Reformas legislativas del Consejo General del Poder Judicial y del Tribunal Constitucional y erosión democrática en España. DPCE Online, 55(4), 2023, p. 2262

[33] Pleno. Auto 177/2022, de 19 de diciembre de 2022. Recurso de amparo 8263-2022. Admite a trámite y acuerda la suspensión en el recurso de amparo 8263-2022, promovido por doña Concepción Gamarra Ruiz-Clavijo y otros doce diputados del Grupo Parlamentario Popular en el Congreso en procedimiento parlamentario. Votos particulares. «BOE» núm. 17, de 20 de enero de 2023, páginas 8564 a 863, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2023-1773

[34] Andreu, J. M. C., Reformas legislativas del Consejo General del Poder Judicial y del Tribunal Constitucional y erosión democrática en España. DPCE Online, 55(4), 2023, p. 2266

[35] Andreu, J. M. C., Reformas legislativas del Consejo General del Poder Judicial y del Tribunal Constitucional y erosión democrática en España. DPCE Online, 55(4), 2023, p. 2267. In footnote 14 of this Article, the author raises that these appointments caused great controversy due to the governmental closeness of the judges appointed: a former minister judge and a professor of Constitutional Law former director general, both from the Sánchez government. A critique can be found in Jaime Nicolás Muñoz, 'Political and ex-political wars in the Constitutional Court', El Confidencial, 2023 (elconfidencial.com).

While the case shows that there are sufficient legal and institutional layers in the Spanish legal system to ensure the respect of the rule of law, legislative changes are necessary to ensure that the renewal of the CGPJ is not blocked for political reasons again in the future.

### 2.2 Protection against threats to the principles of legality and abuse of power

**The choice of the Government to use its emergency powers during the COVID-19 pandemic** has also given rise to dissensus, which endangered the principle of legality. This has been raised also in all the Rule of Law Reports published until now [36]. During the COVID-19 pandemic, the Government declared the state of alarm [37], which was prolonged six times [38]. According to Article 86(1) of the Spanish Constitution: 'In cases of extraordinary and urgent need, the Government may issue temporary legislative provisions which shall take the form of decree-laws and which may not affect the regulation of the basic State institutions, the rights, duties and liberties contained in Title 1, the system of the Autonomous Communities, or the General Electoral Law'. Article 86(2) of the Spanish Constitution adds that these decree-laws must be submitted to the Congress and be debated and voted upon in their entirety within thirty days after their promulgation. The Congress must expressly declare itself in favour of ratification or repeal.

As a tool to counterbalance this governmental power, the Constitutional Court may control if the Government exceeds its margin of discretion. More precisely, the Constitutional Court clarified the concept of 'purely political judgment' of the Government, which is responsible for the political direction of the State, for the appreciation of the concurrence of circumstances of extraordinary and urgent need. This is without prejudice to the fact that the Constitutional Court can control the 'cases of abusive or arbitrary use' (STC 29/1987) that could distort the ordinary legislative power of the Parliament, which can also legislate through the urgent procedure (STC 6/1983)39. In other terms, the control that is the responsibility of the Constitutional Court is an external control, in the sense that it must verify, but not replace, the political judgment of the Government and the Parliament in the exercise of the parliamentary control function (STC 182/1997).

This is exactly what happened in relation to some emergency measures taken by the Government to fight the COVID-19 pandemic. The Constitutional Court exercised its judicial review in July 2021 on the Royal Decree declaring unlawful the first state of alarm [40]. The Court ruled that some restrictions on the right to free movement were unlawful since they should have been implemented during a 'state of emergency' rather than a state of alarm. According to academic authors (Tejada), the widespread violation of the principle of legality has led to a scenario in which the principle of legal certainty has not been guaranteed and in which there have been numerous violations of fundamental rights41 (see Section 2.3).

In October 2021, the Constitutional Court issued another decision in relation to the extension of the state of alarm and declared that the extension was not justified, as there was no certainty on the measures that were going to be taken by the Government [42]. In the same decision, it considered that the designation of the Autonomous Communities as competent authorities for the implementation of the emergency measures – as decided in the third state of alarm [43] - was unconstitutional.

[36] Rule of Law Report 2020, p.12; Rule of Law Report 2021, p. 17; Rule of Law Report 2022, p. 19 – main sources used for drafting this paragraph.

[37] Royal Decree 463/2020, of 14 March, declaring the state of alarm for the management of the health crisis caused by COVID-19.

[38] As mentioned in the Rule of Law Report 2020 (footnote 6), while the competence to declare the state of alarm lies exclusively with the Government,its prorogation must be expressly authorised by the Congress of Deputies, which can present proposals regarding the extent and the conditions applicable during the prorogation of the state of alarm. See also Royal Decree 476/2020, of 27 March 2020; Royal Decree 487/2020, of 10 April 2020; Royal Decree 492/2020, of 24 April 2020; Royal Decree 514/2020, of 8 May 2020; Royal Decree 537/2020, of 22 May 2020; Royal Decree 555/2020, of 5 June 2020. The state of alarm ceased on 21 June 2020

[39] For a deeper analysis of Article 86 see García-Escudero Márquez, P., et al., 'Sinopsis artículo 86', n.d., https://app.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=86&tipo=2

[40] Decision 148/2021 of the Spanish Constitutional Court, 14 July 2021.

[41] Tejada, J., El Estado de Derecho frente al COVID: reserva de ley y derechos fundamentales. Revista Vasca de Administración Pública/Herri-Arduralaritzarako Euskal Aldizkaria, 2021, 137-175, p. 171.

[42] Decision 183/2021 of the Spanish Constitutional Court, 27 October 2021.

[43] Royal Decree 926/2020, of 25 October, declaring the state of alarm to contain the spread of infections caused by the SARS-CoV-2.

It should be added that, as underlined in the Rule of Law Report 2021, several stakeholders have claimed that the repeated use by the Government of Article 86 would limit the involvement of stakeholders in the legislative procedure [44].
The control of the Constitutional Court, used as a tool to counterbalance dissensus, has been essential in establishing the principle of legality and rule of law in Spain.

It was critical in the COVID-19 cases as well as during the **Catalan crisis** (see Section 1). According to the Court, the Autonomous Community authorities violated the principle of legality and the general interest of Spain, by questioning the unity of the State and its territorial and constitutional integrity, and by seeking a rupture of the constitutional order [45]. More precisely, according to the Court, the regional actions justified the activation of Article 155, since essential principles of the Spanish constitutional order were contradicted: Article 9(1) of the Constitution – according to which all public powers are subject to the Constitution and must adapt their actions to its determinations – was violated by the autonomous authorities [46]. Indirectly, they attempted also to the sovereignty of the Spanish people (Article 1(2) of the Constitution), since the Constitution itself is the result of the determination of the sovereign nation through a unitary subject, the Spanish people, in whom that sovereignty resides and from whom emanate, the powers of a State [47].

### 2.3 Protection against threats to Fundamental Rights

This section should cover political, civil and social fundamental rights, including environmental rights.
The main tool for monitoring the respect of fundamental rights against forms of dissensus in Spain is the **control of constitutionality** carried out by the Constitutional Court. According to Article 161(1)(a) of the Spanish Constitution, the Constitutional Court has exclusive competence to review the constitutionality of legislation. Article 162 specifies that the President of the Government, the Ombudsman, fifty Deputies, fifty Senators, the executive corporate bodies of the Autonomous Communities and, when applicable, their Assemblies, can lodge an appeal of unconstitutionality against a legislative act.

In general, a declaration of unconstitutionality by the Court triggers the nullity of the law erga omnes and produces retroactive effects. When it comes to the protection of fundamental rights, even though the Spanish model is defined as one of concentrated constitutional control, it combines in practice both concentrated and diffuse constitutional jurisdiction because ordinary courts (in addition to the Constitutional Court) exercise as well certain control. Article 53(2) of the Spanish Constitution provides that any citizen may assert their claim to protect their fundamental rights before the ordinary courts. Moreover, another way to protect fundamental rights is the recurso de amparo, to be presented before the Constitutional Court by any natural or legal person who invokes a legitimate interest, as well as the Ombudsman and the Public Prosecutor (Articles 53(2), 161(1)(b) 162(1)(b) of the Spanish Constitution) [48].

As already mentioned in the previous Section, the COVID-19 measures severely restricted the right to free movement and assembly. The Constitutional Court acted as a guarantor of the Constitution and fundamental rights. What was discussed was not the need for these measures, but the way and the form in which they were adopted [49].

[44] Footnote 13 of Rule of Law Report 2021: "Information received in the context of the country visit to Spain. In this context, see also Ruling 110/2021, of 13 of May 2021 of the Constitutional Court, which declared unconstitutional a provision of the Royal Decree- Law 8/2020 of 17 March regulating measures to deal with the economic and social impact of the COVID-19 pandemic, as it considered that the requirements that allowed theGovernment to avoid the ordinary legislative procedure in Parliament and directly use the fast-track route of the Royal decree were not met".
[45] Torres Gutiérrez, A., and Lecatelier, A., Doctrina del Tribunal Constitucional sobre la aplicación del artículo 155 de la Constitución española a raíz de la declaración de independencia por el Parlamento de Cataluña: estudio de las STC 89 y 90/2019, de 2 de julio, Civitas Europa, (2), 2019, p. 137
[46] Fundamento Jurídico 6º, STC 89/2019.
[47] Fundamento Jurídico 6º, STC 89/2019.
[48] For more information on recurso de amparo see Tribunal Constitucional de España, El recurso de amparo, https://www.tribunalconstitucional.es/es/tribunal/Composicion-Organizacion/competencias/Paginas/04-Recurso-de-amparo.aspx
[49] Decision 148/2021 of the Spanish Constitutional Court, 14 July 2021. See also Tejada, J., El Estado de Derecho frente al COVID: reserva de ley yderechos fundamentales. Revista Vasca de Administración Pública/Herri-Arduralaritzarako Euskal Aldizkaria, 137- 175, 2021.

As an author commented, 'the end does not justify the means' (el fin no justifica los medios) and these limitations to fundamental rights – even if needed – must have sufficient constitutional coverage [50]. Examples of judiciary protection of fundamental rights can be found also in the past, during the economic crisis that affected Spain from 2008 onwards. For instance, the Supreme Court (Labour Chamber) held that a company (that subjected to collective dismissal the entire staff of a company under the provisions established by Decree-Law 3/2012 3/2012 [51]) failed to act in good faith during the negotiations and failed to prove that the economic situation was untenable; as a consequence, the decision of collective dismissal was declared invalid [52].

The importance given to the protection of fundamental rights by the Constitutional Court can be observed also in the context of the **interpretation of the 2007 reform of the LOTC** [53], given by the Court itself. The 2007 reform significantly modified the legal regime of the recurso de amparo by introducing a new admission requirement: the special constitutional relevance of the claim. The most outstanding aspect of the application of the amparo reform has been the constitutional relevance of the claim regarding the violation of the fundamental right invoked [54]. Therefore, when the Constitutional Court considered it necessary to hear a matter due to the seriousness of the alleged violation of the fundamental right, it made a generous interpretation of the burden of justifying the special constitutional relevance of the claim [55].

As a final note, it has to be underlined **the role of the Ombudsman (Defensor del Pueblo) in the protection of fundamental rights**. According to Article 54 of the Spanish Constitution, the Ombudsman is appointed by the Parliament to defend the rights contained in Title I of the Constitution and, for this purpose, it may supervise Administration activities and report thereon to the Parliament. The Ombudsman is an independent institution acting as National Human Rights Institution in Spain; therefore, it does not receive instructions from any authority and carries out its duties autonomously [56]. During the COVID-19 pandemic it had an active role as a guarantor of fundamental rights, together with the Constitutional Court.

It received 28 028 complaints (from 20 215 in 2019) and 909 requests to interpose constitutional reviews to the Constitutional Court (from 135 in 2019) [57]. Moreover, it carried out 406 ex officio actions that were duly followed by the authorities (including recommendations about jail prisoners, arrival of migrants to the Canary Islands, and closure of detentions centres for migrants while borders were temporarily closed) [58]. Therefore, it is clear as its power is an important tool to counterbalance potential threats to fundamental rights.

While Spain has a system to ensure the respect of Fundamental rights, it might not always be effective. As stated in the latest NHRI report by the Spanish Ombudsman, the fundamental rights in Catalonia are currently affected by the reluctance of the Government of Catalonia to apply a judgment of the Spanish Supreme Court on the declaration of Castilian as a "vehicular" language, in different areas of education on its territory [59]. The Court stated that the right of speaking and choosing to study in Castilian a certain number of hours in the schools in Catalonia is not respected. However, for the moment, nothing is done on that issue, which might question the effectiveness of the rule of law tools [60].

[52] Supreme Court, Labour Chamber. Judgment 3490/2014, of 11 April 2014, Available at www.poderjudicial.es/search/documento/TS/7164134/Despido/20140919. In general, to read about the impact of the economic crisis on fundamental rights in Spain read Lladós Vila, J., Freixes, T., The impact of the crisis on fundamental rights across Member States of the EU Country Report on Spain, European Parliament – LIBE Committee, 2015.

[53] Ley Orgánica 6/2007, de 24 de mayo, por la que se modifica la Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional. «BOE» núm. 125, de 25 de mayo de 2007, páginas 22541 a 22547 (7 págs.). https://www.boe.es/eli/es/lo/2007/05/24/6

[54] González Beilfuss, M., La especial trascendencia constitucional de las demandas de amparo. Análisis de la doctrina del Tribunal Constitucional sobre un concepto etéreo Revista Española de Derecho Constitucional, 107, 333-367, 2016, p. 365, doi: http://dx.doi.org/10.18042/cepc/redc.107.10, p. 365.

[55] González Beilfuss, M., La especial trascendencia constitucional de las demandas de amparo. Análisis de la doctrina del Tribunal Constitucional sobre un concepto etéreo Revista Española de Derecho Constitucional, 107, 333-367, 2016, p. 365, doi: http://dx.doi.org/10.18042/cepc/redc.107.10, p. 366.

[56] Rule of Law Report 2020, p. 12.

[57] Rule of Law Report 2021, p. 18.

[58] Rule of Law Report 2021, p. 18. See also: Defensor del Pueblo, 'Actuaciones realizadas ante la pandemia COVID-19', 2020, https://www.defensordelpueblo.es/grupo-social/covid-19/

[59] State of the rule of law in Europe 2022, Spanish Ombudsman, 2022.

[60] Ibid.

### 2.4 Protection of Judicial Independence

The **protection of judicial independence** is of particular interest in Spain, in particular considering the recent institutional clash of December 2022 over the renewal of the CGPJ. The issues originate from the high risk of politicisation of the CGPJ and the Constitutional Court which is against the separation of powers principle. The actual situation – denounced also by the GRECO and the European Commission itself in the Rule of Law Reports – shows an insufficient toolkit in a context of dissensus. The risk of politicisation is strictly linked to the way of election of the members of the CGPJ and the Constitutional Court.

According to Article 122 of the Spanish Constitution, the CGPJ is the governing body of the judiciary. It consists of the President of the Supreme Court and of twenty members appointed by the King for a five-year term, i.e. 12 judges or magistrates, and 8 lawyers or other jurists of recognised competence with more than fifteen years of professional practice. From a combined reading of Article 122(3) of the Constitution and Article 567 of LOPJ, the CGPJ is entirely elected by the two Chambers of the Parliament (Congress and Senate), which has to appoint the 20 members through a qualified majority of three-fifths.

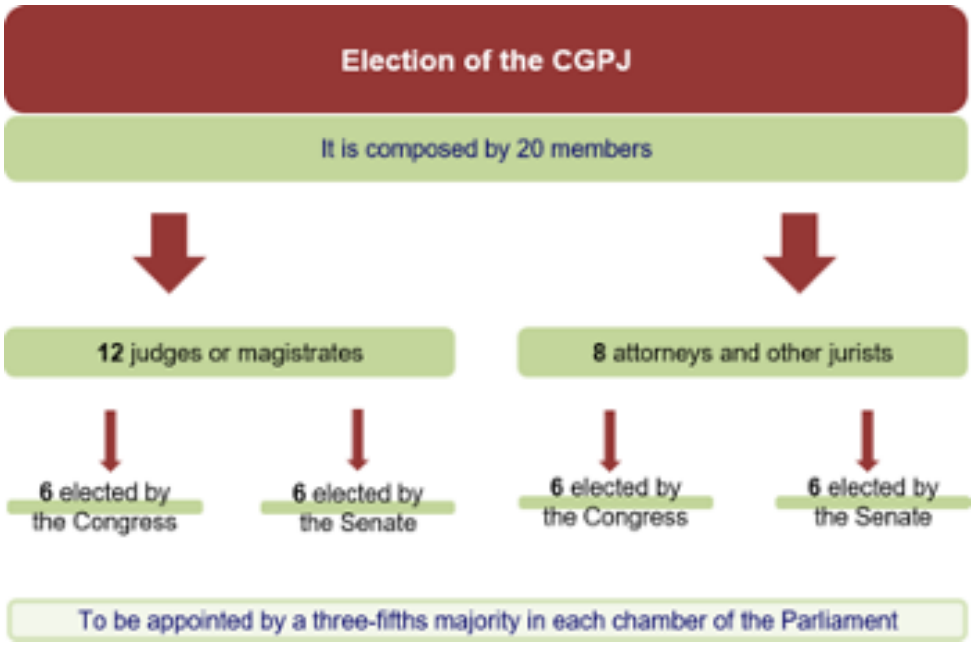
However, the CGPJ has been exercising its functions ad interim since December 2018 because the majority was not reached in the Parliament.

**Election of the CGPJ**[61].

According to the Constitution, the CGPJ consists of the President of the Supreme Court (who chairs) and of 20 individuals – 12 judges or magistrates, and 8 lawyers or other jurists of recognised competence with more than fifteen years of professional practice. While the Constitution requires the eight attorneys and other jurists to be appointed by a three-fifths majority in each chamber of the Parliament (four by the Congress and four by the Senate), it does not specify how the members representing judges are to be appointed (Art. 122(3) of the Spanish Constitution). However, this is specified by Article 567 of Organic Law 6/1985 which requires the 12 members to be Judges or Magistrates and 6 to be elected by Congress and 6 by the Senate, from a list of 36 candidates proposed by associations of judges or by non-associate judges.

[61] 2020 Rule of Law Report, pp. 2 and 3.

*Graph created by the Authors*



This lack of renewal, caused by the stalemate of the negotiations between the main political parties (i.e. the PSOE and the PP), is particularly delicate because it shows the dependence of the CGPJ on the Parliament and the parties represented in it. The President of the CGPJ considered this situation an 'institutional anomaly' and warned that the prolongation of this situation could discredit the Council [62]. The European Commission itself stated in the Rule of Law Reports that this situation prolongs the concerns that the CGPJ might be perceived as vulnerable to politicisation [63]. Also, the Venice Commission has emphasized the need for qualified majorities while also highlighting the danger of stalemates and urging the development of strong and reliable anti-deadlock procedures [64].

This situation hinders the good functioning of the Spanish judiciary system. As already mentioned in Section 2.1,even if the counter-reform of the LOPJ (LO 8/2022, of July 27) [65] gave back to the interim CGPJ the power to elect the two judges of the Constitutional Court, the CGPJ cannot appoint the president and the judges of the Supreme Court and other presidents of lower courts. A Report published at the end of 2021 by the Technical Cabinet of the Supreme Court concludes that the Supreme Court is exercising its functions with 14% fewer judges than required by law; this could result in the Court issuing 1 000 fewer decisions per year and a dangerous undermining of the efficiency of justice [66].

As underlined in the Commission 2022 Rule of Law Report [67], several stakeholders are asking to change the system of appointment of the members of the Council for the Judiciary, in line with European standards, so that no less than half of its members be judges chosen by their peers. The European Commission itself, in its recommendations published together with the 2022 Rule of Law Report, asked Spain to 'Proceed with the renewal of the Council for the Judiciary as a matter of priority and initiate, immediately after the renewal, a process in view of adapting the appointment of its judges-members, taking into account European standards' [68]. Similarly, the Council of Europe reminded the importance of ensuring that the CGPJ is not perceived as being vulnerable to politicisation [69] and has denounced the form of election of the CGPJ in Spain in the following terms:

'GRECO regrets the lack of any positive outcome to implement this recommendation. GRECO refers again to the standards of the Council of Europe regarding the election of the judicial shift in judicial councils: when there is a mixed composition in judicial councils, the standards provide that judges are to be elected by their peers (following methods guaranteeing the widest representation of the judiciary at all levels) and that political authorities, such as Parliament or the executive, are not involved at any stage of the selection process. Last but not least, the four-year deadlock in the designation of the CGPJ is a matter of critical concern, which needs to be addressed as a matter of priority' [70].

The difficulties in the renewal of the CGPJ members have also a dangerous impact on the renewal of the Constitutional Court. According to Article 159(1) of the Spanish Constitution, the Constitutional Court shall consist of twelve members appointed by the King; of these, four are nominated by the Congress by a majority of three-fifths of its members, four are nominated by the Senate with the same majority, two are nominated by the Government and two by the CGPJ. As already explained under Section 2.1, the fact that the Constitution establishes the renewal of the Constitutional Court 'by thirds' (por tercios) combined with the lack of consensus on the two judges to appoint among the CGPJ members,

[62] Press release of the Council of the Judiciary of 23 December 2019.
[63] Rule of Law Report 2020, pp. 2 and 3; Rule of Law Report 2021, pp. 2 and 3; Rule of Law Report 2022, pp. 3-5.
[64] Venice Commission 2010, Report on the Role of the Opposition in a democratic Parliament, CDL-AD(2010)025 and Venice Commission 2019,Report on the relationship between the parliamentary majority and the opposition in a democracy: a checklist, CDL-AD(2019)015.
[65] Ley Orgánica 8/2022, de 27 de julio, de modificación de los artículos 570 bis y 599 de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, «BOE»núm. 180, de 28 de julio de 2022, páginas 108271 a 108272, https://www.boe.es/buscar/doc.php?id=BOE-A-2022-12579
[66] Technical Cabinet of the Supreme Court 2021, Report on the current and future impact of the lack of renewal of vacant posts of Magistrates of the Supreme Court.
[67] Rule of Law Report 2022, p. 4
[68] Recommendations Commission Rule of Law Report 2022.
[69] GRECO, Fourth Evaluation Round – Corruption prevention in respect of members of Parliament, judges and prosecutors, Second interim compliance report, Recommendation (para 29 and 32 on the need to remove the selection of the judicial shift from politicians).
[70] Fourth Evaluation Round. Addendum to the Second Compliance Report Spain, 2 de diciembre de 2022, GrecoRC4(2022)16; (núm. 16). rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a93b24

blocked de facto the renewal of the Court itself, since the two judges proposed by the Government could not take office until the CGPJ appointed the two that it had to propose. The Government tried to overcome this stalemate by presenting an amendment to the LOTC [71]. The amendment would have caused two changes:

- The reform of Article 16(1) of the LOTC, to allow the election of the two magistrates by the body that renews them (in this case the Government) without having to wait for the appointment of the other two (by the CGPJ). This change would have circumvented the constitutional requirement of renewal 'by thirds' [72].
- The removal of the procedure by which the Plenary of the Constitutional Court states on the suitability of the candidates (Articles 2(1)(g) and 10(1)(i) LOTC), leaving to each proposing body (the Government, the Parliament and the CGPJ) the power to assess the suitability of the judges proposed. This would go against the need to depoliticize and objectify as much as possible the election process of the constitutional bodies and would rise the interference of the executive and legislative powers on the judiciary [73].

As already mentioned in Section 2.1 and as illustrated below in Section 3, these amendments had no repercussions because the Constitutional Court blocked the legislative discussion. However, this shows how thin the balance of powers is and how the control of the Constitutional Court represents a crucial issue for the political parties since they want to prevent their own policies from being vetoed [74].

As a final note, it should be mentioned that the Commission 2020 Rule of Law Report raised concerns related also to the **Prosecutor's Office and its relationship with the Government** [75]. These concerns have been partially solved through the approbation of the new rules of procedure for the Prosecution Service [76]. However, as mentioned in the Commission 2022 Rule of Law Report [77], 'stakeholders have signaled that a wider reform of the statute of the Prosecutor General, in particular regarding the coincidence in the term of office of the Prosecutor General and the Government, remains necessary [78]'.

The Report specifies also that 'this aspect has been subject to criticism considering in particular that the fact that the Prosecutor General's mandate ends at the same time as the Government's mandate may affect the perception of independence [79]'. The European Commission built specific recommendations by asking Spain to: 'Strengthen the statute of the Prosecutor General, in particular regarding the separation of the terms of office of the Prosecutor General from that of the Government, taking into account European standards on independence and autonomy of the prosecution' [80].

[71] Enmiendas núm. 61 y 62. www.congreso.es/public_oficiales/L14/CONG/BOCG/B/BOCG-14-B-295-4.PDF

[72] Andreu, J. M. C., Reformas legislativas del Consejo General del Poder Judicial y del Tribunal Constitucional y erosión democrática en España. DPCE Online, 55(4), 2023, p. 2263

[73] Ibid., p. 2264

[74] Jean-Baptiste Harguindéguy, Gonzalo Sola Rodríguez & José Cruz Díaz (2018): Between justice and politics: the role of the Spanish Constitutional Court in the state of autonomies, Territory, Politics, Governance, DOI: 10.1080/21622671.2018.1557073, p. 10.

[75] Rule of Law Report 2020, p. 3. et seq

[76] Royal Decree 305/2022, of 3 May 2022.

[77] Rule of Law Report 2022, p.. 5.

[78] Contribution from the Association of Prosecutors for the 2022 Rule of Law Report, p. 5; information provided by the Independent Judicial Forum in the context of the country visit to Spain.

[79] GRECO Fourth Evaluation Round – Evaluation Report, para 126. In its Second Compliance Report, from March 2021, GRECO acknowledged that the recommendation had been considered by the Government,although it resulted in no change in the method of selection and the term of tenure of the Prosecutor General. GRECO also reiterated the need for further reflection on the additional safeguards that can be introduced in the Spanish prosecution system to shield it from undue interference.

[80] Recommendations Commission Rule of Law Report 2022

## 3. Judicial Intervention

The importance of judicial intervention related to the protection of fundamental rights has been analysed under Section 2.3 above. However, there are other areas in which judicial intervention needs to be analysed.

**Judicial intervention – and in particular by the Constitutional Court – has been essential in Spain in relation to the relationship between the State and the Autonomous Communities** [81].

Several instruments allow to solve most of the conflicts of constitutional dimension between these two entities (such as claims against acts with the force of law, positive and negative conflicts of competence, possibility of the Government to contest before the Constitutional Court the provisions and resolutions adopted by the agencies of the Autonomous Communities) [82]. The Court has been defined as a 'central actor in the territorial politics in Spain' and 'an ordinary court of last resort for channelling centre–periphery tensions' [83]. In other terms, the Court intervention may be seen as a legal and institutional tool to prevent (or react to) dissensus, which can originate between the central State and the Autonomous Communities, mostly on issues of competence.

There are several examples of judicial interventions that shaped the Spanish territorial system.
In 1981, three years after the adoption of the Spanish Constitution, Leopoldo Calvo-Sotelo, President of the Government, and Felipe González, leader of the PSOE, signed the autonomies pacts which aimed to apply the provisions of the Constitution while ensuring a balance of competences between Spanish regions. As a consequence, some communities would have had a lower level of powers than the one established in their statutes based on historical rights (such as the ones of Catalonia and the Basque Country in 1979 and Galicia in 1981) [84]. The consequence of these pacts was the LOAPA (Organic Law for the Harmonization of the Autonomous Process) approved in 1982 [85].

*The Constitutional Court forbade the central legislative from modifying the sharing of power established by the Constitution and the regional statutes through a simple law*

However, the LOAPA was contested by the Basque and Catalan governments. The Constitutional Court intervened through ruling 76/1983 [86] and 'forbade the central legislative from modifying the sharing of power established by the Constitution and the regional statutes of autonomy (since both constitute the so-called "bloc of constitutionality") through a simple law'; by doing so, 'this ruling preserved the distinction between constituted and constituent powers and guaranteed autonomy to the regions' [87].
Another example of 'famous' judicial intervention related to centre–periphery tensions are the judgments related to Catalonia, and in particular Judgments 89 and 90/2019 (see also Section 2.1). The Court had already intervened in the relationship between the State and Catalonia in several rulings between 2013 and 2015.

[81] Competence given to the Constitutional Court through Articles 161 and 162 of the Spanish Constitution.
[82] Rovira, E. A., Cuestiones constitucionales en torno a la aplicación del artículo 155 CE en el conflicto de Cataluña, Revista d'estudis autonòmics i federals, (27), 1-23, 2018, p. 2.
[83] Jean-Baptiste Harguindéguy, Gonzalo Sola Rodríguez & José Cruz Díaz (2018): Between justice and politics: the role of the Spanish ConstitutionalCourt in the state of autonomies, Territory, Politics, Governance, DOI: 10.1080/21622671.2018.1557073, pp. 1 and 3
[84] Aparicio, S., Los pactos autonómicos, La España de las autonomías – un especial de Elmundo.es,https://www.elmundo.es/especiales/2005/06/espana/estatutos_autonomia/historia2.html
[85] A) TEXTOS LEGALES TRANSCRITOS, a) LEGISLACIÓN DE LAS AUTONOMÍAS: PROYECTO DE LEY ORGÁNICA DE ARMONIZACIÓN DEL PROCESO AUTONÓMICO (LOAPA), APROBADO POR EL PLENO DEL CONGRESO DE LOS DIPUTADOS Y POR EL PLENO DEL SENADO. (1) http://e-spacio.uned.es/fez/eserv.php?pid=bibliuned:BFD-1983-09-10-10006&dsID=PDF
[86] SENTENCIA 76/1983, de 5 de agosto (BOE núm. 197, de 18 de agosto de 1983)
[87] Jean-Baptiste Harguindéguy, Gonzalo Sola Rodríguez & José Cruz Díaz (2018): Between justice and politics: the role of the Spanish Constitutional Court in the state of autonomies, Territory, Politics, Governance, DOI: 10.1080/21622671.2018.1557073, p. 8.
[88] Pleno. Sentencia 42/2014, de 25 de marzo de 2014, «BOE» núm. 87, de 10 de abril de 2014, páginas 77 a 99, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-3885

It suspended and declared void the 'Declaration of sovereignty and right of determination 'Declaración de soberanía y del derecho de determinación' adopted by the Catalan Parliament through judgment 42/2014 [88], suspended the 'consultas' (practically referendums) that the Catalan Government organized in September and November 2014 and finally declared the whole Participative Process unconstitutional by the court through judgment 31/2015 [89].

The Constitutional Court intervened again in relation to the independence movements of Catalonia in 2019. Through judgments 89 and 90/2019, it determined the constitutionality of the activation of the mechanism provided for in Article 155 of the Spanish Constitution and dismissed in practice all the appeals filed against the Senate Agreement of October 27, 2017, by which the green light was given to the activation of Article 155 [90]. The procedural and teleological reasoning of Article 155, recalled by the Constitutional Court in these judgments [91], support the argument that this mechanism is not a normal and ordinary instrument of State supervision, but a extraordinary remedy for situations of political crisis and major disturbances in the relationship between the central State and the Autonomous Communities [92]. The control of the Constitutional Court becomes in this case the decisive tool to ensure the respect of the law and block any illegal activities of dissensus and – on the contrary – it could be an additional means of protection in case the Government abused in the use of article 155.

According to the Court, the autonomous authorities violated the principle of legality (see Section 2.2) and the general interest of Spain, by discussing the unity and the territorial and constitutional integrity of the State, and by seeking a rupture of the constitutional order [93]. In the judgment, the Constitutional Court also specified the scope and intensity of the coercive measures that the central authority can adopt when applying Article 155, since it does not include a closed list of them. Without closing the discussion entirely, and leaving open the possibility for the interpretation to evolve [94], it specifies that:

'The concept of "necessary measure" used in art. 155 supposes a legal limit that the Court must use, to judge, not the measure itself, but the judgment made by other constitutional bodies, the Government and the Senate, about the adequacy of the measure to the circumstances that have triggered the application of Article 155. In this external judgment, it is the Court, which is the guarantor of constitutional supremacy, which is responsible for deciding whether or not the assessment of necessity conforms to what is required by art. 155 CE, exercising its role as interpreter of the definition of constitutional categories and concepts (STC 31/2010, FJ 6), without substituting impeachment or formulating hypotheses about the viability of other alternatives' [95].

[88] Pleno. Sentencia 42/2014, de 25 de marzo de 2014, «BOE» núm. 87, de 10 de abril de 2014, páginas 77 a 99, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-3885

[89] Pleno. Sentencia 31/2015, de 25 de febrero de 2015, «BOE» núm. 64, de 16 de marzo de 2015, páginas 190 a 212, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-2832 . To know more about this kind of judicial interventions please see Jean-Baptiste Harguindéguy, Gonzalo Sola Rodríguez & José Cruz Díaz (2018): Between justice and politics: the role of the Spanish Constitutional Court in thestate of autonomies, Territory, Politics, Governance, DOI: 10.1080/21622671.2018.1557073, p. 9 et seq and for similar intervention, this time in relation to the Basque Country, Ibid. p. 8

[90] Pleno. Sentencia 89/2019, de 2 de julio de 2019. Recurso de inconstitucionalidad 5884-2017, «BOE» núm. 192, de 12 de agosto de 2019, páginas89503 a 89578, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2019-11901.; and Pleno. Sentencia 90/2019, de 2 de julio de 2019. Recurso de inconstitucionalidad 143-2018, «BOE» núm. 192, de 12 de agosto de 2019, páginas 89579 a 89627, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2019-11902.

[91] For a deeper analysis of the Constitutional Court jurisprudence on Article 155 see Torres Gutiérrez, A., and Lecatelier, A., Doctrina del Tribunal Constitucional sobre la aplicación del artículo 155 de la Constitución española a raíz de la declaración de independencia por el Parlamento de Cataluña: estudio de las STC 89 y 90/2019, de 2 de julio, Civitas Europa, (2), 2019, (specifically p. 135 and more generally the whole article).

[92] Torres Gutiérrez, A., and Lecatelier, A., Doctrina del Tribunal Constitucional sobre la aplicación del artículo 155 de la Constitución española a raíz de la declaración de independencia por el Parlamento de Cataluña: estudio de las STC 89 y 90/2019, de 2 de julio, Civitas Europa, (2), 2019, p. 137

[93] Ibid.

[94] Ibid., p. 139.

[95] Fundamento Jurídico 11º, STC 89/2019.

The judicial intervention – this time not related to the Autonomous Communities – was under the spotlight again during the **institutional clash of December 2022** (see also Section 2.1). The PP filed an appeal before the Constitutional Court against the agreement of the Justice Committee of the Congress ('Mesa de la Comisión de Justicia del Congreso') and its President by which they admitted for discussion the amendments to the LOTC and the LOPJ. According to the appellants, the reason was the violation of their right to political participation as representatives in the Parliament, provided by Article 23 of the Spanish Constitution. Moreover, the PP requested to adopt a precautionary measure (medida cautelarísima) that would have suspended the parliamentary debate on the specific amendments until the resolution of the claim (provided by Article 56(6) LOTC).

The Court agreed to the suspension of the discussion through the Plenary Order of December 19, 2022 (Autodel Pleno de 19 de diciembre de 2022) [96]. Moreover, it accepted the thesis of the claimants and affirmed that with the approval of such amendments (considered to be unconstitutional in terms of the legislative technique used) the Parliament was going against the rights of political minorities and political pluralism.

The point is that among constitutionalists there has been a clear division of opinions. From one side, some consider this intervention of the Constitutional Court a defense from the danger caused by the Parliament amendments to the principles of the Rule of Law, such as the separation of powers, the independence of the Judiciary and the rights of minorities [97]; others – even recognising as unorthodox the decision of the Parliament to present these amendments during the debate on the reform of the Penal Code – criticised the intervention of the Constitutional Court, which de facto blocked the legislative initiative of the Parliament, and considered it an excessive interference of the judiciary [98]. Those that criticise the Constitutional Court intervention affirm that through an 'indirect' route such as the filing of an appeal against an act or decision in the legislative process, the Court breaks an essential rule of the system: by accepting its competence to judge in advance the constitutionality of the amendments presented, it is configuring itself as an actor in the approval procedure of a legislative norm that has not yet fully acquired that legal nature [99]. It is added that the formal deficiencies of a legislative procedure cannot serve as a pretext to subvert the model of constitutional justice and validate the fact that the Constitutional Court has conferred on itself a competence that is granted neither by the Constitution nor by the LOTC [100].

[96] Pleno. Auto 177/2022, de 19 de diciembre de 2022. Recurso de amparo 8263-2022. Admite a trámite y acuerda la suspensión en el recurso de amparo 8263-2022, promovido por doña Concepción Gamarra Ruiz-Clavijo y otros doce diputados del Grupo Parlamentario Popular en el Congreso en procedimiento parlamentario. Votos particulares, «BOE» núm. 17, de 20 de enero de 2023, páginas 8564 a 8636, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2023-1773

[97] Andreu, J. M. C., Reformas legislativas del Consejo General del Poder Judicial y del Tribunal Constitucional y erosión democrática en España. DPCE Online, 55(4), 2023, p. 2270. See also footnote 13 of the cited article which mentions: Manuel Pulido Quecedo, "El TC como guardián de laConstitución", Diario de Navarra, 21 de diciembre de 2022; Javier Díaz Revorio, "El Tribunal Constitucional fortalece la democracia", La Voz de Galicia, 21 de diciembre de 2022 El Tribunal Constitucional fortalece la democracia (lavozdegalicia.es); Javier Tajadura Tejada, "¿Conflicto de poderes?", El Correo, 22 de diciembre de 2022; Manuel Aragón, "El TC ha actuado correctamente", El Mundo, 23 de diciembre de 2022www.iustel.com/diario_del_derecho/noticia.asp?ref_iustel=1228907 También Agustín Ruiz Robledo, "La exagerada importancia de una decisión", Diario de Sevilla, 28 de diciembre de 2022 www.diariodesevilla.es/opinion/tribuna/exagerada-importancia-decision_0_1751824899.html.

[98] Ibid. footnote 13: magistrado José Antonio Martín Pallín, "El Tribunal Constitucional ha prevaricado", Público, 20 de diciembre de 2022 blogs.publico.es/dominiopublico/49572/el-tribunal-constitucional-ha-prevaricado/ Miguel A. Presno Linera, "El Constitucional en la maraña de lapolítica", El País, 20 de diciembre de 2022, www.iustel.com/diario_del_derecho/noticia.asp?ref_iustel=1228760 José Antonio Montilla, "El Tribunal Constitucional en el bloqueo institucional", elDiario.es, 18 de diciembre de 2022 www.eldiario.es/opinion/tribuna-abierta/tribunal-constitucional-bloqueo-institucional_129_9804650.html. See also Ruiz, G. R. R., ¿Réquiem por el Tribunal Constitucional? Comentario al último caso en el proceso de politización de la justicia constitucional en España (laatribución ilegítima de una competencia para el control preventivo de los actos del Parlamento). DPCE Online, 55(4) 2023.

[99] Ruiz, G. R. R., ¿Réquiem por el Tribunal Constitucional? Comentario al último caso en el proceso de politización de la justicia constitucional en España(la atribución ilegítima de una competencia para el control preventivo de los actos del Parlamento). DPCE Online, 55(4) 2023, p. 2289

[100] Ruiz, G. R. R., ¿Réquiem por el Tribunal Constitucional? Comentario al último caso en el proceso de politización de la justicia constitucional enEspaña (la atribución ilegítima de una competencia para el control preventivo de los actos del Parlamento). DPCE Online, 55(4) 2023, p. 2291

All these examples, evidence the existence in Spain of an effective system that is able to ensure the respect of the Rule of law.

## 4. Recent Trends on the implementation of the Rule of Law

This section examines developments across the EU Member States, both positive and negative, in two key areas for the rule of law: the anti-corruption framework and media pluralism and whether inter-institutional cooperation and support mechanisms to strengthen the rule of law have been implemented.

In your research, please focus on measures taken to address dissenting actions. As a starting point, please read the 2022 Role of Law Report for your Member State [101]. Please note that the Italian Report briefly analyses, among other instruments, the Technical Support Instruments. While it might not be an expected point in the reports, it could bring interesting points for the analysis of the relationship between the rule of law instruments at EU and national level. Should you find TSIs relevant for this section, please only refer to projects related to the rule of law.

### 4.1 Anti-Corruption

One of the major threats to democracy is corruption. While the most direct anti-corruption tool is the citizens electoral rights and capacity to decide their representatives on the basis of criteria linked to how seriously they take the fight against corruption, more systematic tools are needed.

In Spain – although the fight against corruption follows a certain strategic line of action – **there is not a dedicated overall anti-corruption strategy in place** [102]. As mentioned in the Commission 2021 Rule of Law Report, 'GRECO has recommended to develop a strategy that puts together preventive measures to detect and mitigate risk areas of conflicts of interest, with a plan of action for implementation' [103]. According to the Commission 2022 Rule of Law Report, 'the adoption of a national anti-corruption plan is being considered, which is expected to contribute to creating a comprehensive policy to prevent and reduce corruption' [104].

Interestingly, Spain is receiving technical support from the EU in the context of the TSI project for the elaboration of a National Anti-Fraud Strategy aimed at ensuring the effective protection of EU financial interests105 (see also Section 4.3 on TSI). In its 2022 Recommendations, the European Commission asks Spain to address the challenges related to the length of investigations and prosecutions to increase the efficiency in handling high-level corruption cases [106], since these cases (such as fraud involving public officials, as well as economic crimes) constitute the main risks of serious corruption in Spain [107].

In each of the Rule of Law Reports the Commission criticised the **lack of a general whistle-blower protection framework** (i.e. stand-alone legislation to ensure the protection of persons reporting criminal offences including corruption) and the lack of full and correct transposition of Directive (EU) 2019/1937108. However, in February 2023, the Senate approved the whistle-blower protection framework (Ley de Protección de Informantes) [109]. The regulation now requires both public and private companies, as well as public administrations, to implement a secure, anonymous and confidential complaints channel.

[101] https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters_en

[102] As mentioned in the 2021 Rule of Law Report, p. 9: 'The Spanish Government has adopted a range of measures to fight against forms ofcorruption including the National Strategy against Organised Crime or the specialisation of Law enforcement authorities such as the judicial police units treating matters of economic crimes and corruption. More information in the 2020 Rule of Law Report, Country Chapter on the rule of law situation in Spain, p. 7'.

[103] GRECO Fifth Evaluation Round – Evaluation report, para. 50.

[104] 2022 Rule of Law Report, p. 10

[105] Technical Support Instrument, Commission implementing decision on the financing of the Technical Support Instrument and adoption of the work programme for 2021.

[106] Recommendations Commission Rule of Law Report 2022.

[107] 2022 Rule of Law Report, p. 10.

[108] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. OJ L 305, 26.11.2019, p. 17–56.

[109] Ley 2/2023, de 20 de febrero, reguladora de la protección de las personas que informen sobre infracciones normativas y de lucha contra la corrupción,
«BOE» núm. 44, de 21/02/2023, https://www.boe.es/buscar/act.php?id=BOE-A-2023-4513

Spain is also working on the adoption of a specific **regulation lobbying** [110], which currently remains unregulated in Spain. The European Commission specifically asked in its 2022 Recommendations on the Rule of Law report to 'Continue efforts to table legislation on lobbying, including the establishment of a mandatory public register of lobbyists'.

### 4.2 Media Pluralism

In Spain, media pluralism is guaranteed by the **National Commission of Markets and Competition** (Comisión Nacional de los Mercados y la Competencia, CNMC), and in particular by its Telecommunications and Audio-Visual Sector. The CNMC has earned a solid reputation and is deemed fully effective and independent in its work; for this reason, the Media Pluralism Monitor (MPM 2020) report for Spain [111] considers there is a low risk to the independence and effectiveness of the media authority [112].

The Draft General Law on Audiovisual Communication [113], which provides that new competences would be attributed to the Audiovisual Sub-Directorate of the CNMC, was welcomed by the European Commission; however, some concerns have been raised related to the lack of consideration of the adequacy of resources (as required by the Audio-Visual Media Services Directive) [114] and the operational autonomy of CNMC115. For this reason, the European Commission indicated in its 2022 Recommendations on the Rule of Law for Spain to 'ensure adequate resources for the national audiovisual media regulatory authority to strengthen its operations, taking into account the European standards on the independence of media regulators in particular as regards resource adequacy'.

In the Commission Rule of Law Reports some concerns have been raised about **journalists' protection and the challenges faced by them in the performance of their professional activities.** The Government is currently implementing an Agreement signed in December 2020 between the Ministry of Home Affairs, the Federation of Associations of Journalists of Spain, and the National Association of Graphic Press and Television Informants, which aims to facilitate the work of information professionals in places and events where situations of violence may occur [116]. The implementation of the agreement has been considered overall positive [117]. However, concerns have been raised in relation to the harassment of journalists on social media and cyber-attack in general [118].

### 4.3 Technical Support Instruments (TSI)

Technical Support Instrument (TSI) is the EU programme that provides tailor-made technical expertise to EU Member States to design and implement reforms [119]. The TSI provides technical support to Member States in a wide range of policy areas. Interestingly, in 2021, the TSI approved two projects that are directly related to the Rule of Law protection.

One project is **'A National Anti-Fraud Strategy for Spain'** [120]. Spain is therefore receiving technical support from the EU in the context of the project for the elaboration of a National Anti-Fraud Strategy aimed at ensuring effective protection of EU financial interests [121]. The other project is **'Promotion of cyber justice in Spain, phase III: Judicial organization and quality management'** [122]. As explained in the 2021 country fact sheet [123], the programme supports Spain in:

[110] 2022 Rule of Law Report, p. 14 See also Juárez, M. G., Romera, J., El Gobierno pone en marcha la regulación de los 'lobbies' tras la reclamación deBruselas, elEconomista.es, https://www.eleconomista.es/actualidad/noticias/12028053/11/22/El-Gobierno-pone-en- marcha-la-regulacion-de-los-lobbies-ante-las-peticiones-de-Bruselas.html

[111] 2020 Media Pluralism Monitor.

[112] 2020 Rule of Law Report, p. 9

[113] General Law on Audiovisual Communication, of 26 May 2022. To be noted that the European Commission on 19 May 2022 had referred Spain (and four other Member States) to the Court of Justice of the European Union over the failure to transpose the revised AVMSD.

[114] Art. 30.4 AVMSD.

[115] 2022 Rule of Law Report, p. 15

[116] Resolución de 15 de enero de 2021, de la Secretaría General Técnica, por la que se publica el Convenio entre la Secretaría de Estado deSeguridad, la Federación de Asociaciones de Periodistas de España y la Asociación Nacional de Informadores Gráficos de Prensa y Televisión, para la identificación de profesionales de la información durante los hechos que requieran actuaciones policiales, «BOE» núm. 19, de 22 de enero de 2021, páginas 6598 a 6609, https://www.boe.es/buscar/doc.php?id=BOE-A-2021-962

- setting up a system for electronic management of judicial files, improving the collection of relevant statistics as well as enhancing the capacity to support victims;
- developing full interoperability of respective ICT systems across all autonomous communities;
- contributing crucial digitalisation and management support to the 'Justicia 2030' programme which aims to make the Spanish judicial system ready for the future.

This programme is therefore helping in addressing shortcomings of the digitalisation of justice, as recognised also by the 2022 Rule of Law Report [124].

## 5. Conclusion and New Challenges

The Spanish case illustrates how even developed Western democracies are not safe from democratic and institutional erosion. Threats to the rule of law are real and dissensus over key democratic principles may even affect national institutions.

While Spain has a system to ensure the respect of the Rule of Law, some of the cases mentioned, raise doubts about the effectiveness of some of the Spanish tools created to fight these attempts. The lack of implementation of Constitutional court rulings by Autonomous Community of Catalonia regarding fundamental right of speaking in Castilian without any reaction from the Government or the political intervention in the nomination of members of high courts in Spain threaten the Rule of Law system. The politicization of the judiciary power, strictly connected to the elections of the members of the CGPJ and the Constitutional Court need to be addressed. The actual situation – denounced also by GRECO and the European Commission itself in the Rule of Law Reports – reveals an insufficient toolkit to counterbalance certain acts of dissensus.

[117] From 2022 Rule of Law Report footnote 43: Information provided by the associations of journalists (European Journalists' Association and FAPE) in the context of the country visit to Spain.
[118] 2021 Rule of Law Report p. 15 and 2022 Rule of Law Report p. 17.
[119] European Commission, Technical Support Instrument, https://commission.europa.eu/funding-tenders/find-funding/eu-funding-programmes/technical-support-instrument/technical-support-instrument-tsi_en
[120] European Commission, Reform Support, https://reform-support.ec.europa.eu/our-projects/country-factsheets/spain_en (under 2021 tab).
[121] 2021 Rule of Law Report p. 9.
[122] European Commission, Reform Support, https://reform-support.ec.europa.eu/our-projects/country-factsheets/spain_en (under 2021 tab).
[123] https://commission.europa.eu/system/files/2021-02/tsi_2021_country_factsheet_spain.pdf The link can be found under the 2021 projects list here https://reform-support.ec.europa.eu/our-projects/country-factsheets/spain_en
[124] Rule of Law Report 2022 p. 8