

Protecting Civil Society in Europe:
Challenges and Opportunities for the Rule of Law
Event Report

Date: 22 November 2016

Venue: The Bingham Centre for the Rule of Law

Speakers:

- Katerina Hadzi-Miceva Evans (Executive Director, The European Center for Not-for-Profit Law (ECNL))
- Richard Clayton QC (UK member, Venice Commission; Deputy High Court Judge; and 4-5 Gray's Inn Square)
- Prof Philip Leach (Professor of Human Rights Law, School of Law, Middlesex University London; and Director, European Human Rights Advocacy Centre (EHRAC))
- Kersty McCourt (Senior Advocacy Advisor, Open Society Justice Initiative)

Chair:

- Adrian Di Giovanni (Senior Program Specialist, Law and Development at the International Development Research Centre (IDRC) and International Visiting Fellow, Bingham Centre for the Rule of Law)

Organiser:

- This event was organised by the Bingham Centre for the Rule of Law. It was convened by Lucy Moxham (Associate Senior Research Fellow, Bingham Centre).

Opening Remarks

Adrian Di Giovanni gave some opening remarks. He noted that the topic of this event – which relates to promoting new evidence and knowledge to feed into reform processes and positive change – is an important one today, in a context where civil society space and debate are increasingly challenged. Especially in light of the recent American election, Di Giovanni noted that it is important to consider two questions in particular: first, the extent to which civil society might be shifting to an increasingly virtual space, which could present new threats seen in the form of what he called “false news reports” coupled with a tendency to “echo chambers”; and second, the extent to which civil society space in Europe is protected.

Setting the scene: Restrictions facing civil society in Europe and key themes

Katerina Hadzi-Miceva Evans discussed the range of initiatives to restrict civil society space in Europe. She outlined that, according to the tracker of the [International Center for Not-for-Profit Law](#), since 2012, there have been over 166 restrictive legal initiatives against civil society organisations globally; and that since 2015, we have witnessed over 20 restrictive initiatives in Europe alone. She was careful to distinguish between Western and Eastern Europe; since, as reported in [a recent survey by Civil Society Europe and CIVICUS](#), there is “a trend for deterioration in key civic space freedoms, which is more significant in Eastern and Central Europe”. Indeed, Eastern Europe is witness to far more extensive restrictions on civil society space; but Hadzi-Miceva Evans emphasised that in Western Europe too, “small steps that threaten civil society space, together create a collective feeling of insecurity”. She highlighted five types of restriction in particular: (i) attempts by the media and politicians to stigmatise the civil society sector; (ii) reduced space for genuine dialogue and consultation, and for meaningful participation; (iii) increased restrictions on civil society funding, including for example administrative burdens related to fundraising; (iv) crackdowns on assemblies and protests held by civil society; and (v) increased scrutiny of civil society organisations in the name of transparency and accountability, without distinction for example between business and public interest organisations. In fact, the [UN Special Rapporteur on the rights to freedom of peaceful assembly and of association](#) recently published a report on this last point, which “compares the enabling environments that States, multilateral organizations and other actors create for businesses and associations, and highlights instances where they are treated inequitably”.

At the same time, Hadzi-Miceva Evans noted that we must recognise the positive trends that do exist, build a positive narrative and create constructive partnerships. We must seek to strengthen the normative framework at a regional and international level (for example, seek stronger standard setting from the UN and Council of Europe) as well as the protection mechanisms at a domestic level. At a European Union level, she suggested we need to look internally and create benchmarks to allow for closer monitoring. Hadzi-Miceva Evans concluded by commending the important advancements in the protection of civil society space, but encouraged the civil society sector to “stop being complacent and look internally: to exchange experiences and build coalitions”.

The Council of Europe: Focus on the work of the Venice Commission

Richard Clayton QC presented an account of the work of the European Commission for Democracy through Law (the ‘Venice Commission’) across (and beyond) the Council of Europe member states. The primary task of the Venice Commission is to assist and advise individual countries on constitutional matters to improve the functioning of democratic institutions and the protection of human rights: crucial enabling factors for the effective operation of civil society. Clayton outlined the history, working methods and approach of the Venice Commission, before moving on to address particular areas of concern in this field. He noted that the Venice Commission takes as its starting point Article 11 of the European Convention on Human Rights (freedom of assembly and association). He highlighted the legal status and registration of NGOs, and the funding of NGOs as possible instruments of control and restriction by governments across

Europe. He also spoke about the liability and dissolution of NGOs, and supervision and reporting obligations.

Clayton illustrated his points with three particular examples. First, Azerbaijan -- where the Venice Commission recently concluded in an [Opinion on the Law on NGOs \(December 2014\)](#) that “Globally, the cumulative effect of those stringent requirements, in addition to the wide discretion given to the executive authorities regarding the registration, operation and funding of NGOs, is likely to have a chilling effect on the civil society, especially on those associations that are devoted to key issues such as human rights, democracy and the rule of law”. Second, the Russian Federation -- where the Venice Commission has adopted a number of Opinions in this area, including an [Opinion on the “Law on Foreign Agents” \(June 2014\)](#) and an [Opinion on the “Federal Law on Undesirable Activities of Foreign and International Non-Governmental Organisations” \(June 2016\)](#). Third, Egypt -- where the Venice Commission recently adopted an [Interim Opinion on “The Draft Law on Civic Work Organisations of Egypt” \(June 2013\)](#).

Clayton concluded that the Venice Commission’s contribution is valuable but noted that there are limits which derive from its non-coercive structure. In his view, one of its most valuable functions is using the opportunities offered for example by country visits to speak to local civil society actors to demonstrate international support and offer reassurance.

For more information, read Richard Clayton’s paper [here](#).

The Council of Europe: Access to justice for civil society and the approach of the European Court of Human Rights

Prof Philip Leach analysed the approach of the European Court of Human Rights (ECtHR) and other Council of Europe institutions with respect to civil society and human rights defenders. Leach began by emphasising the breadth of civil society impacted by restrictive measures, including for example, journalists, bloggers, lawyers and NGOs. Like Clayton, he highlighted the examples of the “Foreign Agents” law and the law on “Undesirable Organisations” in Russia as instruments of control. Indeed, a recent [Human Rights Watch article](#) reports that to date 148 groups have been designated as “foreign agents” by the Justice Ministry in Russia. The EHRAC at Middlesex University London is advising applicants in [a case before the ECtHR challenging the “Foreign Agents” law](#). Given the existential threat to NGOs, Leach criticised the Court’s failure to prioritise this case.

Leach then discussed several cases concerning human rights activists with which the EHRAC has also been involved, including the cases of Leyla Yunus in Azerbaijan and Natalia Estemirova in Russia. He highlighted work by the Venice Commission in relation to Azerbaijan and interventions by the Commissioner for Human Rights in cases relating to both Azerbaijan and Russia. He then examined some of the Court’s jurisprudence in the area of protecting civil society space, highlighting issues around protection against the dissolution of NGOs, information rights (including the very [recent Grand Chamber judgment in Magyar Helsinki Bizottság v Hungary \(8 November 2016\)](#)), freedom of assembly, and positive obligations. Leach concluded on a positive note: The ECtHR is increasingly taking a broader approach to threats to civil society, commenting not only on

individual cases, but also on systemic issues and on states' positive obligations to protect civil society. Leach stressed that these are important signs of hope.

For more information, see Philip Leach's presentation [here](#).

The European Union's internal and external policies to protect civil society rights

Kersty McCourt provided an insight into the internal and external policies of the European Union (EU) to protect civil society space. She began with its external policies, noting that the EU does have a "good declaratory framework" around space for civil society and that one sees "strong statements" about why the EU views it as important to protect civil society space. McCourt highlighted various instruments used to implement those policies, including human rights guidelines, country strategies and roadmaps, human rights dialogues, human rights clauses, démarches and statements, financial instruments, and the role of the European Parliament. However, she noted the difficulty in assessing how these policies and instruments are being used and whether they are being used effectively. Problems include a lack of guidance on what comprises an "enabling environment" and on how the EU's tools might be deployed; and the absence of benchmarks in action plans for example. McCourt also questioned whether "closed door diplomacy" in the EU is having an impact, noting that the lack of transparency around many of the instruments and discussions makes it difficult for civil society to assess their effectiveness from the outside. She also noted in this regard that public statements are sometimes necessary, and can give NGOs and human rights defenders a level of public support and in some cases protection. She highlighted that the [17th EU-NGO Human Rights Forum in December 2015](#) focused on protecting and promoting civil society space; and expressed her hope that recent work has changed the perception by some within the EU that the enabling environment for civil society is an intangible and elusive concept. However, she concluded that a "huge gap" still exists between the declaratory rhetoric of the EU and its actions, and that inconsistencies remain between policy areas (for example, human rights and trade policies).

With regard to the internal policies of the EU, McCourt emphasised that the EU "appears very ill-equipped" to tackle restrictions on civil society space internally – she noted that there is not the same policy framework, nor the same number of tools that the EU can use to address these problems. She highlighted some of the key instruments that do exist including Article 7 of the Treaty on European Union (TEU) (though noting that this "nuclear option" is "unusable in practice"); the [Commission's Framework to strengthen the rule of law](#); and the [Council's Rule of Law Dialogue](#). She also noted recent [calls for a new binding EU mechanism](#) to monitor the state of democracy, rule of law and fundamental rights in the member states. McCourt concluded by questioning whether there are some policies, such as those around counter-terrorism, that actually hinder the 'enabling environment' for civil society.

For more information, see Kersty McCourt's presentation [here](#).

The panel was followed by a Q&A session with the audience.