

## ARTICLE

# The Role of Civil Society in Monitoring the Executive in the Case-Law of the European Court of Human Rights: Recasting the Rule of Law

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This article explores the role of civil society in monitoring the executive as perceived by the European Court of Human Rights. Although this role is traditionally associated with the judiciary and the legislature, in light of the institutional mutations in modern States, the ECtHR case-law envisages a multitude of forms through which civil society can monitor the government and thus uphold the 'rule of law from below.' In addressing this recasting of the rule of law, the article discusses in particular the role of good and bad faith on the part of both the State and civil society. The ECtHR case-law on the *mala fides* restrictions of rights under Article 18 ECHR highlights the idea that the monitoring of the executive by civil society is even more crucial in States where the rule of law is suffering from a systemic point of view and thus civil society is the only entity within the State that can genuinely monitor the executive. Civil society, on its part, should exercise these monitoring functions in good faith.

**Keywords:** rule of law; civil society; monitoring of the executive; European Court of Human Rights; bad faith; separation of powers; accountability

## 1. Introduction

There is no doubt that the restrictions on civil society qualify as a global trend. The oppression of the protests against the Belarusian government and President Alexander Lukashenko in August 2020,<sup>1</sup> or the detention of more than 5,000 demonstrators and of dozens of journalists during the large-scale protests in Russia at the beginning of 2021 were some of the latest additions to an already long list of restrictions on civil society across the globe.<sup>2</sup> Civic space is 'squeezed,' to use the term employed by Antoine Buyse, which is a very apt and vivid depiction of this dramatic situation.<sup>3</sup>

In a number of cases, the restrictions on civil society have been brought to the attention of the European Court of Human Rights (ECtHR or the Court) through applications lodged by individuals, groups of individuals or non-governmental organisations (NGOs) claiming violations of their rights, mainly on the basis of Articles 5 (Right to liberty and security), 10 (Freedom of expression) and 11 (Freedom of assembly and

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<sup>1</sup> See indicatively, 'Belarus: Violence, Abuse in Response to Election Protests' (*Human Rights Watch*, 11 August 2020) <<https://www.hrw.org/news/2020/08/11/belarus-violence-abuse-response-election-protests>> accessed 30 April 2021; 'Bachelet condemns Violent Response of Belarus to Post-electoral Protests' (*OHCHR*, 12 August 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26162>> accessed 30 April 2021; 'Secretary General comments on the Situation in Belarus' (*Council of Europe*, 14 August 2020) <<https://www.coe.int/en/web/portal/-/secretary-general-comments-on-the-situation-in-belarus?inheritRedirect=true>> accessed 30 April 2021; 'Statement by Venice Commission President Gianni Buquicchio' (*Council of Europe*, 14 August 2020) <<https://www.coe.int/en/web/portal/-/international-electoral-standards-must-be-respected-in-belarus?inheritRedirect=true>> accessed 30 April 2021; 'Belarus: Joint Statement by the Committee of Ministers Presidency, PACE President and Secretary General' (*Council of Europe*, 26 August 2020) <<https://www.coe.int/en/web/portal/-/belarus-joint-statement-by-committee-of-ministers-presidency-pace-president-and-secretary-general?inheritRedirect=true>> accessed 30 April 2021.

<sup>2</sup> See indicatively, 'Russian Federation: Freedom of Expression and the Right to Peaceful Assembly must be respected' (*Council of Europe*, 1 February 2021) <<https://www.coe.int/en/web/commissioner/-/russian-federation-freedom-of-expression-and-the-right-to-peaceful-assembly-must-be-respected>> accessed 30 April 2021.

<sup>3</sup> Antoine Buyse, 'Squeezing Civic Space: Restrictions on Civil Society Organizations and the Linkages with Human Rights' (2018) 22 (8) *The International Journal of Human Rights* 966.

association), and sometimes in conjunction with Article 18 (Limitation on use of restrictions on rights) of the European Convention on Human Rights (ECHR or the Convention). On the basis of the Convention and building on the premises of liberal democracy, the case-law of the ECtHR indicates that the rule of law functions as a protective shield for the activities of civil society.<sup>4</sup> What needs to be further explored is whether civil society itself contributes to the rule of law. The present contribution will focus on the appraisal of this jurisprudence to identify civil society's role in upholding 'rule of law from below'.<sup>5</sup> In particular, it will explore the role of civil society in monitoring the executive.<sup>6-7</sup>

Such an exploration inevitably raises the question of what 'civil society' is. The notion of 'civil society' is a constantly evolving one and is subject to a vivid scholarly debate.<sup>8</sup> While defining 'civil society' goes beyond the purposes of the present paper, some of the elements of its definition need to be delved into from the outset. The classic conception of 'civil society' revolves around the idea of a 'residue,' with civil society being 'that part of society which is not the [S]tate.'<sup>9</sup> Such a conception is of particular relevance for this paper since it 'contains the assumption that civil society (...) is in a position to ensure that the [S]tate does its job but no more, and that it does it properly.'<sup>10</sup> The notion of civil society is thus closely related to the idea of monitoring the State.

Monitoring the State, and the executive in particular, is a focal feature of the rule of law. While there is no novelty in suggesting that the notion of rule of law can hardly be defined, its connection to the idea of subjecting the exercise of power to certain constraint is undisputed.<sup>11</sup> The monitoring of the executive is traditionally carried out by the legislative and judicial branches of government. After all, the rule of law is closely paired with the idea of separation of powers/checks and balances. As it has been described in scholarly work, the rule of law 'has always been somewhat amorphous, being used to refer in different ways to the making of legislation, to the operation of courts, to the use of executive power and, indeed, to the overall separation of the powers of government into these three branches.'<sup>12</sup>

Nonetheless, in light of the mutations in democratic societies, the monitoring of the executive does not stem solely from the other two branches of government but 'from below' as well, namely from civil society itself. The rule of law's requirement that the government should be accountable under the law is of 'unquestionable value.'<sup>13</sup> This accountability does not only involve the oversight of the executive by the legislative and the judiciary but also the by civil society.<sup>14</sup> As specified in political sciences, accountability does not solely have a horizontal dimension but also a vertical one.<sup>15</sup> Horizontal accountability refers to processes of institutional oversight, checks and balances within the State.<sup>16</sup> Vertical accountability refers to power relations between the State and its citizens.<sup>17</sup> In the new accountability regimes, civil society organizations have 'increasingly taken on [themselves] the task of monitoring the operation of both governments and intergovernmental institutions in relation to a number of fields where the rights of individuals and groups are concerned.'<sup>18</sup>

<sup>4</sup> For the relation between civil society, democracy and human rights, see: Antoine Buyse, 'Why Attacks on Civic Space Matter in Strasbourg: The European Convention on Human Rights, Civil Society and Civic Space' (2019) 4 *Deusto Journal of Human Rights* 13, 19.

<sup>5</sup> International Conference 'The Rule of Law from below: Individuals and Civil Society as Protectors of the Rule of Law in Troubled Times' organized by Utrecht University's Montaigne Centre for the Rule of Law and Administration of Justice, together with the Netherlands Institute of Human Rights (SIM) on 29–30 October 2020.

<sup>6</sup> The paper will use the general term 'monitoring' to describe the process of checking the content or quality of something. See further, John Keane, 'Civil Society in the Era of Monitory Democracy' in Lars Trägårdh Lars, Nina Witoszek and Bron Taylor (eds), *Civil Society in the Age of Monitory Democracy* (Berghahn Books 2013) 22–51.

<sup>7</sup> The term 'government' will also be used in the present paper as synonymous to the term 'executive.'

<sup>8</sup> Gordon A. Christenson, 'World Civil Society and the International Rule of Law' (1997) 19 (4) *Human Rights Quarterly* 724, 724–731; Buyse (n 3) 968–969.

<sup>9</sup> Ernest Gellner, 'The Civil and the Sacred' (The Tanner Lectures on Human Values delivered at Harvard University, 20–21 March 1990) <[https://tannerlectures.utah.edu/\\_documents/a-to-z/g/Gellner\\_91.pdf](https://tannerlectures.utah.edu/_documents/a-to-z/g/Gellner_91.pdf)> accessed 30 April 2021, 303.

<sup>10</sup> *ibid.*

<sup>11</sup> See indicatively, European Commission for Democracy through Law (Venice Commission), 'Rule of Law Checklist' adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016) and 'World Justice Project Rule of Law Index' (*World Justice Project*, 2020) <[https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf)> accessed 30 April 2021.

<sup>12</sup> Michele O'Kelly, 'The Rule of Law and Advocacy in Civil Society' (2006) 95 (380) *An Irish Quarterly Review* 387, 387.

<sup>13</sup> Naomi Choi, 'Rule of law' in Mark Bevir (ed), *Encyclopedia of Governance*, vol 1 (SAGE Publications, 2007) <<https://www-doi-org.proxy-ub.rug.nl/10.4135/9781412952613.n475>> accessed 30 April 2021.

<sup>14</sup> 'World Justice Project Rule of Law Index' (n 11) 12.

<sup>15</sup> Guillermo O'Donnell, 'Delegative Democracy' (1994) 5 (1) *Journal of Democracy* 55–69.

<sup>16</sup> Jonathan A. Fox, *Accountability Politics: Power and Voice in Rural Mexico* (OUP 2007) 30.

<sup>17</sup> *ibid.* 30–31. 'Transversal' accountability will not be addressed in this paper. 'Transversal' accountability refers to public oversight agencies that bring together [S]tate and societal actors: *ibid.* 31.

<sup>18</sup> Dario Castiglione, 'Accountability' in Mark Bevir (ed), *Encyclopedia of Governance*, vol 1 (SAGE Publications, 2007) <<https://www-doi-org.proxy-ub.rug.nl/10.4135/9781412952613.n1>> accessed 30 April 2021.

The role of civil society in monitoring the executive in modern democracies is pertinently contemplated elsewhere in literature too. In the ‘monitory democracy’ of John Keane, civil society is one of the monitory bodies that mark this new historical form of democracy.<sup>19</sup> This form of democracy is characterised by a variety of “post-parliamentary” politics defined by the rapid growth of many different kinds of extra parliamentary, power-scrutinising mechanisms.<sup>20</sup> These monitoring mechanisms ‘are committed to providing publics with extra view points and better information about the performance of various governmental [...] bodies.’<sup>21</sup> They are further defined by their overall commitment to strengthening the diversity and influence of citizens’ voices and choices in decisions that affect their lives [...].<sup>22</sup> Works on constitutionalism equally embrace the pertinence of civil society especially in times of democratic backsliding. Constitutionalism and the rule of law are related ideas about how the powers of the State are to be limited.<sup>23</sup> In recent years, constitutionalism primarily develops in the legal sphere, through the review power of the judiciary, which stems from the separation of powers/checks and balances.<sup>24</sup> There are scholarly voices, though, that suggest that ‘it is perhaps time for constitutionalism to trace back to its ancient political roots with further democratic revivals and better civic engagements.’<sup>25</sup>

Analysing further the conceptual framework on the monitoring of the executive by civil society is not the aim of the present paper. The aforementioned remarks, however, set the basis for the assessment of the ECtHR’s case-law on the monitoring of the executive by civil society that this paper will undertake.

In this context, the paper will also focus on the notions of good and bad faith, given their growing pertinence in upholding the rule of law. The system of the Convention relies on the assumption of good faith, ‘which presupposes that all States share a common goal of reinforcing human rights and the rule of law.’<sup>26</sup> The rule of law backsliding in many Council of Europe States invites the consideration of the concept of *mala fides* restrictions of rights by States under Article 18 ECHR. Article 18 ECHR revolves around the idea of misuse of power. The case-law thereon allows us to draw significant conclusions on the role of civil society in monitoring the executive within a State that restricts rights in bad faith, i.e. by pursuing ulterior purposes. The prevention of misuse of powers is after all explicitly listed in the *Rule of Law Checklist* of the Venice Commission of the Council of Europe.<sup>27</sup> The case-law on the *mala fides* restrictions of rights under Article 18 ECHR highlights the idea that the monitoring of the executive by civil society is even more crucial in States where the rule of law is systemically suffering and thus civil society is the only (internal) entity which can genuinely check the executive.

The good faith of civil society in the monitoring of the executive will also be addressed. Given that the role of civil society organisations has become more prominent as an instrument of accountability, they themselves have been made the object of new demands of accountability.<sup>28</sup> Certainly the purpose of the article is not to appraise the issue of civil society’s accountability. Scrutinising, however, the way the good faith of civil society appears in the case-law of the Court allows for a holistic understanding of the upholding of ‘rule of law from below.’

Based on the above, the structure of this paper will be the following. The first part will provide an overview of the contribution of civil society to the rule of law through the monitoring of the executive (Section 2). In particular, it will demonstrate that the idea of monitoring the executive transcends the case-law of the Court. It will accordingly delineate the role of civil society in monitoring the executive from the Court’s perspective. The ties between civil society and the notion of ‘public opinion’ as conceived by the Court, will be also addressed. The second part of the paper will examine the monitoring of the executive by civil society through the lens of bad and good faith (Section 3). The paper will conclude by proving that for the Court, civil society contributes to the ‘rule of law from below’ through the monitoring of the executive in a significant and versatile way.

<sup>19</sup> John Keane, ‘Monitory democracy?’ in Sonia Alonso, John Keane and Wolfgang Merkel (eds), *The Future of Representative Democracy* (CUP 2011) 212–235.

<sup>20</sup> Keane (n 6) 23.

<sup>21</sup> *ibid.* 26.

<sup>22</sup> *ibid.*

<sup>23</sup> Chin Liew Ten, ‘Constitutionalism and the Rule of Law’ in Robert E Goodin, Phillip Pettit and Thomas W Pogge (eds), *A Companion to Contemporary Political Philosophy* (2nd edn, Blackwell Publishing 2017) 493–502.

<sup>24</sup> Wen-Chen Chang, ‘Back into the Political? Rethinking Judicial, Legal, and Transnational Constitutionalism’ (2019) 17 (2) *International Journal of Constitutional Law* 453, 456.

<sup>25</sup> *ibid.* 459–460.

<sup>26</sup> Floris Tan, ‘The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?’ (2018) 9 (1) *Goettingen Journal of International Law* 109, 113.

<sup>27</sup> ‘Rule of Law Checklist’ (n 11) 29.

<sup>28</sup> See indicatively, Castiglione (n 18).

## 2. Monitoring the executive as a fundamental contribution of civil society to the rule of law

It has been indicated at the outset that the monitoring of the executive lies at the very heart of the rule of law. The following lines will demonstrate that the monitoring of the executive is also a central feature of the ECHR system (2.1.). Not only that, the case-law of the Court also reflects the idea that this monitoring function does not exclusively belong to the judicial and legislative branches of government; civic entities might as well undertake similar monitoring functions (2.2.).

### 2.1. Monitoring the executive: a fundamental premise of the ECHR system

Monitoring the executive is an idea that permeates the system of the Convention and its liberal values. This comes as no surprise. Of all the branches of government, the executive is the primary suspect of violating human rights. As Patrick Wachsmann has pertinently noted:

in the liberal tradition, the project or, in any event, the possibility of an attack on freedoms is above all attributed to holders of executive power and to the administrative authorities that depend on them. This suspicion arises from the fact that they are the agents of the administration that, through their daily relations with the population whose activity they regulate and to whose needs they must provide, are most frequently called upon to infringe on the rights recognized to individuals [translation by the author].<sup>29</sup>

In principle, the legislative and judicial branches of government undertake this monitoring function in a rule of law system based on separation of powers. However, while the rule of law is a central feature of the Strasbourg system, it cannot be argued that the ECtHR imposes a specific scheme of relations between the three branches of government.<sup>30</sup> In a number of cases the Court has referred to the growing importance of the separation of powers,<sup>31</sup> without, though, imposing compliance with specific theoretical constitutional concepts regarding the permissible limits of the powers' interaction. It instead reiterates that '[t]he question is always whether, in a given case, the requirements of the Convention are met.'<sup>32</sup> The Convention does not refer to the separation of powers or any other relevant theory so it comes as no surprise that the Court avoids to implicate itself in institutional questions. Thus, even in cases where the separation of powers comes into the fray the Court makes sure to highlight that, just like in every case, its role is the monitoring of the implementation of the Convention.

The observation of the Convention's standards, however, cannot be met in a system of power where the executive remains unchecked. The idea that both the legislative and the executive branches of government scrutinise the executive transcends the case-law of the Court.

The parliamentary oversight of the executive is highlighted by the Court. In its landmark case *Castells v Spain*, the Court acknowledged the 'right to criticise the government' of the applicant,<sup>33</sup> a member of parliament, famously accepting that '[t]he limits of permissible criticism are wider with regard to the Government

<sup>29</sup> Patrick Wachsmann, 'Techniques de protection' in Michel Troper and Dominique Chagnollaud (eds), *Traité international de droit constitutionnel*, Tome 3 (Daloz 2012) 300.

<sup>30</sup> Aikaterini Tsampi, *Le principe de séparation des pouvoirs dans la jurisprudence de la Cour européenne des droits de l'homme* (Pedone 2019).

<sup>31</sup> *Kleyn and others v the Netherlands* App nos 39343/98, 39651/98, 43147/98 and 46664/99 (ECHR, 6 May 2003) para 193; *Easterbrook v the United Kingdom* App no 48015/99 (ECHR, 12 June 2003) para 28; *Sacilor-Lormines v France* App no 65411/01 (ECHR, 9 November 2006) paras 59, 64 and 71; *Henryk Urban and Ryszard Urban v Poland* App no 23614/08 (ECHR, 30 November 2010) para 46; *Fruni v Slovakia* App no 8014/07 (ECHR, 21 June 2011) para 139; *Agrokompleks v Ukraine* App no 23465/03 (ECHR, 6 October 2011) para 131; *Oleksandr Volkov v Ukraine* App no 21722/11 (ECHR, 9 January 2013) paras 103 and 118; *Maktouf and Damjanović v Bosnia and Herzegovina* App nos 2312/08 and 34179/08 (ECHR, 18 July 2013) para 49; *Saghatelyan v Armenia* App no 7984/06 (ECHR, 20 October 2015) para 43; *Thiam v France* App no 80018/12 (ECHR, 18 October 2018) paras 61–62; *Ramos Nunes de Carvalho e Sá v Portugal* App nos 55391/13, 57728/13 and 74041/13 (ECHR [GC], 6 November 2018) para 144 (also, *Ramos Nunes de Carvalho e Sá v Portugal* App nos 55391/13, 57728/13 and 74041/13 (ECHR, 21 June 2016) para 70); *Cosmos Maritime Trading and Shipping Agency v Ukraine* App no 53427/09 (ECHR, 27 June 2019) para 70; *Baş v Turkey* App no 66448/17 (ECHR, 3 March 2020) para 144; *Anželika Šimaitienė v Lithuania* App no 36093/13 (ECHR, 21 April 2020) para 78; *Mándli and others v Hungary* App no 63164/16 (ECHR, 26 May 2020) para 72; *Mugemangango v Belgium* App no 310/15 (ECHR, 10 July 2020) para 138; *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECHR, 1 December 2020) paras 207, 215 and 233; *Svilengacánin and others v Serbia* App nos 50104/10, 50673/10 and others (ECHR, 12 January 2021) para 65; *Xhoxhaj v Albania* App no 15227/19 (ECHR, 9 February 2021) paras 290–295; *Bilgen v Turkey* App no 1571/07 (ECHR, 9 March 2021) para 96; *Eminağaoğlu v Turkey* App no 76521/12 (ECHR, 9 March 2021) paras 76, 123, 145 and 147.

<sup>32</sup> *Kleyn and others v the Netherlands* (n 31) para 193.

<sup>33</sup> *Castells v Spain* App no 11798/85 (ECHR, 23 April 1992) para 43.

than in relation to a private citizen, or even a politician.<sup>34</sup> The Court conceives the government as a collective political entity which occupies a dominant position,<sup>35</sup> especially in parliament.<sup>36</sup> This institutional status justifies the fact that the government, on its part, does not have the right not to be criticised, even 'in harsh terms.'<sup>37</sup> The parliament qualifies, after all, as 'the main instrument of democratic control and political responsibility.'<sup>38</sup>

The control of the executive does not solely derive from the exercise of the parliamentary function, but also of the judicial one. It is not an overstatement that the judicial function exercised by domestic courts is central to the system of Strasbourg, to the extent that the Court conceives the judiciary as the primary protector of human rights and the judicial review as a fundamental safeguard against arbitrariness.<sup>39</sup> As the Court suggested very early in its case-law '[t]he rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.'<sup>40</sup> The separation of powers between the executive and the judiciary is focal for the Court, which highlights the 'nature of the judicial function as an independent branch of State power.'<sup>41</sup> The essence of the right to access to court, addressed under Article 6(1) ECHR, is the protection against the arbitrary exercise of power. As the Court famously noted in *Golder*, the assumption that certain cases would be taken away from the jurisdiction of courts and entrusted instead to organs dependent on the government would be indissociable from the danger of arbitrary power.<sup>42</sup>

In light of the aforementioned observations, it is not an exaggeration to claim that the solutions suggested by the Court put the separation of powers front and centre, especially in its manifestation that pertains to monitoring the executive branch of government by both the legislative and the judiciary.

Nonetheless, for the ECHR system, the monitoring of the executive is not solely associated with the legislative and the judiciary in light of the idea of separation of powers. The ECtHR postulated very early in its case-law, that the control of the executive does not simply stem from these two branches of government but from other entities as well: '[i]n a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion.'<sup>43</sup> Such an approach encompasses the monitoring of the executive as part of a wider accountability system.

For the Court, the press in its task as purveyor of information, qualifies as a 'public watchdog.'<sup>44</sup> Its monitoring role is even more crucial in circumstances where the judiciary or the legislative are not in a position to control the relevant actions of the executive. The Court has explicitly noted that '[p]ress freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature.'<sup>45</sup>

Conceiving of the press as a monitoring entity is not surprising to the extent that it is widely described as the 'fourth branch of government.' What is more compelling to note is that the same monitoring role is assigned by the Court to 'public opinion.'<sup>46</sup> What makes this particular point interesting is namely that the 'public opinion' does not qualify as a specific institution, body, structure or even space, but as an 'aggregate of the individual views, attitudes, and beliefs about a particular topic, expressed by a significant proportion

<sup>34</sup> *ibid* para 46.

<sup>35</sup> *ibid*.

<sup>36</sup> *Szanyi v Hungary* App no 35493/13 (ECHR, 8 November 2016) para 42.

<sup>37</sup> As the Court suggested in particular: 'it cannot be argued that the Government as a collective political entity has a right not to be criticised in harsh terms as long as it is not demonstrated that such criticism affects the rights of the individual members of the Government in a manner contrary to Article 10': *ibid* para 42.

<sup>38</sup> *Yumak and Sadak v Turkey* App no 10226/03 (ECHR, 8 July 2008) para 140.

<sup>39</sup> *Tsampi* (n 30) 55.

<sup>40</sup> *Klass and others v Germany* App no 5029/71 (ECHR, 6 September 1978) para 55.

<sup>41</sup> *Baka v Hungary* App no 20261/12 (ECHR, 23 June 2016) para 172.

<sup>42</sup> *Golder v United Kingdom* App no 4451/70 (ECHR, 21 February 1975) para 35.

<sup>43</sup> *Castells v Spain* (n 33) para 46.

<sup>44</sup> *Barthold v Germany* App no 8734/79 (ECHR, 25 March 1985) para 58; *Lingens v Austria* App no 9815/82 (ECHR, 8 July 1986) para 44. It must be noted that for the purposes of the present article, the press does not fall within the notion of 'civil society.'

<sup>45</sup> *Stoll v Switzerland* App no 69698/01 (ECHR, 10 December 2007) para 110.

<sup>46</sup> See indicatively, *Gerger v Turkey* App no 24919/94 (ECHR, 8 July 1999) para 48; *Öztürk v Turkey* App no 22479/93 (ECHR, 28 September 1999) para 66; *Arslan v Turkey* App no 23462/94 (ECHR, 8 July 1999) para 46; *Başkaya and Okçuoğlu v Turkey* App no 23536/94 and 24408/94 (ECHR, 8 July 1999) para 62; *Süreç v Turkey (no 1)* App no 26682/95 (ECHR, 8 July 1999) para 61; *Erdoğan v Turkey* App no 25723/94 (ECHR, 15 June 2000) para 62; *Seher Karataş v Turkey* App no 33179/96 (ECHR, 9 July 2002) para 37; *Emir v Turkey* App no 10054/03 (ECHR, 3 May 2007) para 37; *Mehmet Hatip Dicle v Turkey* App no 9858/04 (ECHR, 15 October 2013) para 35; *Yavuz and Yaylalı v Turkey* App no 12606/11 (ECHR 17 December 2013) para 52; See also, *Sanocki v Poland* App no 28949/03 (ECHR, 17 July 2007) para 60.

of a community.<sup>47</sup> As it has been argued in scholarly debate, the lacking of a specific legal status does not allow 'public opinion' to be identified as a proper monitoring power.<sup>48</sup> Is it so, though? In the following analysis, we shall, *inter alia*, explore the connection between the 'public opinion' and 'civil society' to appraise the distinctive role of civil society in monitoring the executive under the case-law of the Court.

## 2.2. Civil society's distinctive role in monitoring the executive

As it has been previously demonstrated, the Court refers to the idea of the executive being monitored by a number of entities and institutions *lato sensu*. Civil society *in globo* is not explicitly listed as one of them, even though in 2004, in *Vides Aizsardzibas Klubs v Latvia*, the Court for the first time extended the role of watchdog from the media to an NGO.<sup>49</sup> On the other side of the Atlantic, on the contrary, the Inter-American Commission on Human Rights clearly submitted that '[t]he disclosure of State-held information should play a very important role in a democratic society, because it enables *civil society to control the actions of the government* to which it has entrusted the protection of its interests. (...)'.<sup>50-51</sup> Nonetheless, the absence of explicit reference to the monitoring role of civil society by the ECtHR does not imply that the Court disregards the contribution of civil society to this fundamental function for the rule of law. The Court refers to civil society itself, recognising explicitly that 'civil society makes an important contribution to the discussion of public affairs'.<sup>52</sup> In essence, though, this contribution extends beyond the simple discussion of public affairs and, hence, also includes the monitoring of the executive, through a number of activities and actions. Even if the connection of civil society *per se* with the monitoring of the executive is not an explicit one in the case-law of the Court, this role is certainly implied if one considers the pragmatic connection between 'civil society' and 'public opinion' and the jurisprudential connection between the different entities that compose 'civil society' and the monitoring of the executive.

Indeed, as has been recognised by political scientists, the connection between civil society and public opinion is a close one. Civil society operates as the 'interface between the public and the private and the locus of public opinion formation'.<sup>53</sup> It can be thus argued that, through this *locus* or even more through its variable structures, organisations, institutions and networks, civil society operationalises public opinion in its monitoring role, which has been ascribed to it by the ECtHR. The dissemination of information is a fundamental tool in the monitoring of the executive and, through this, civil society establishes connections between the executive and public opinion. As it has been proven, '[t]he engagement in associations with an interest in the policy issue stimulates correspondence between public opinion and policy through their ability to collect and disseminate information to policy makers and the public'.<sup>54</sup>

In addition to the aforementioned, the role of civil society in monitoring the executive is exercised through the actions of its different components. As was clarified in the introduction, civil society is this part of society, which is not the State, and is composed of a number of different entities.<sup>55</sup> The case-law of the Court acknowledges a number of these entities.

<sup>47</sup> Walter Phillips Davidson, 'Public Opinion' (*Encyclopaedia Britannica*, March 2017) <<https://www.britannica.com/topic/public-opinion>> accessed 30 April 2021.

<sup>48</sup> Fabrice Hourquebie, 'Le contre-pouvoir, enfin connu. Pour une analyse de la démocratie constitutionnelle en termes de contre-pouvoirs' in Jean du Bois de Gaudusson (ed), *Démocratie et liberté : tension, dialogue, confrontation. Mélanges en l'honneur de Slobodan Milacic* (Bruylant 2008) 107–108 and 114–115; The author uses the term 'contre-pouvoir' to denote this checking power. For the term 'contre-pouvoir', see in English Aikaterini Tsampi, 'The New Doctrine on Misuse of Power under Article 18 ECHR: Is it about the System of contre-pouvoirs within the State after all?' (2020) 38 (2) *Netherlands Quarterly of Human Rights* 134, 136–137.

<sup>49</sup> *Vides Aizsardzibas Klubs v Latvia* App no 57829/00 (ECHR, 27 May 2004) para 42. See also, Buyse (n 4) 28–29.

<sup>50</sup> Emphasis added.

<sup>51</sup> *Claude Reyes et al. v Chile*, Judgment (Merits, Reparations and Costs), Inter-American Court of Human Rights Series C App no 151 (19 September 2006) para 58; The ECtHR has invoked this case in its judgment *Stoll v Switzerland* (n 45) para 111.

<sup>52</sup> *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECHR, 8 November 2016) para 166; *Medžlis Islamske zajednice Brčko and others v Bosnia and Herzegovina* App no 17224/11 (ECHR, 27 June 2017) para 86. As the ECtHR elaborated in *Társaság A Szabadságjogokért v Hungary* App no 37374/05 (ECHR, 14 April 2009) para 27: 'The function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant's activities can therefore be said to have been an essential element of informed public debate.'

<sup>53</sup> Arnaud Sales, 'The Private the Public and Civil Society: Social Realms and Power Structures' (1991) 12 (4) *International Political Science Review* 295.

<sup>54</sup> Anne Rasmussen and Stefanie Reher, 'Civil Society Engagement and Policy Representation in Europe' (2019) 52 (11) *Comparative Political Studies* 1648.

<sup>55</sup> Johann van der Westhuizen, 'A Few Reflections on the Role of Courts, Government, the Legal Profession, Universities, the Media and Civil Society in a Constitutional Democracy' (2008) 8 (2) *African Human Rights Law Journal* 251, 269; Garry Jenkins, 'Non-Governmental Organizations and the Forces Against Them: Lessons on the Anti-NGO Movement' (2012) 37 (2) *Brooklyn Journal of International Law* 459, 468; Buyse (n 3) 968.

Associations are the primordial entities of civil society. Given the liberal political tradition of the ECHR system, political parties were one of the first associations to captivate the attention of the Court. For the ECtHR, these political formations function as the lungs of a democratic society that represent 'a form association essential to the proper functioning of democracy.'<sup>56-57</sup> Apart from political parties,<sup>58</sup> though, the Court considered a number of other associations as equally important entities for the functioning of democracy, 'including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness.'<sup>59</sup> The Court explicitly connected the functioning of these associations with the functioning of civil society. As suggested in the landmark case of *Gozelik and others v Poland*, '[i]t is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.'<sup>60</sup>

The Court went so far as to consider the role of organisations/movements in the political system itself. The Court noted that social organisations/movements have, in principle, fewer legally privileged opportunities to influence political decision making compared to political parties and many of them do not participate in public political life.<sup>61</sup> It acknowledged, however, that such entities may play an important role in the shaping of politics and policies and their actual political relevance can be determined only on a case-by-case basis.<sup>62</sup>

While associations of any type can, indeed, be pertinent to the functioning of civil society and of democracy itself, it is undisputable that NGOs are the entities that contribute the most to the monitoring of the executive as such. The Court accepted that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press and may be characterised as a social 'watchdog.'<sup>63-64</sup> It, has furthermore, explicitly connected this function of the NGOs to the functioning of civil society, recognising that 'civil society makes an important contribution to the discussion of public affairs.'<sup>65</sup>

Whereas associations and, in particular, NGOs are the key collective actors of civil society,<sup>66</sup> they are not the only entities that are pertinent to the monitoring role of civil society. The Court accepted in *Steel and Morris v United Kingdom* that 'in a democratic society even small and informal campaign groups [...] must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.'<sup>67</sup> Such an approach reflects the widely accepted doctrinal idea that 'not all manifestations of civil society are formally organised groups.'<sup>68</sup>

The aforementioned affirmation of the Court in *Steel and Morris* also brings to the forefront the question of whether individuals can also be considered as entities relevant to the monitoring role of civil society. The stance of the Court in *Sioutis v Greece* is telling in this regard.<sup>69</sup> In that case, the applicant, a private individual who was not a party to certain judicial proceedings, complained that the refusal of his request for a judgment was in breach of his rights under Article 10 ECHR. The Court rejected his application as incompatible *ratione materiae* with the Convention, relying, *inter alia*, on the status of the applicant as private individual. The Court held that

<sup>56</sup> Joël Andriantsimbazovina, 'L'État et la société démocratique dans la jurisprudence de la Cour européenne des droits de l'homme' in Luigi Condorelli *et al.* (eds), *Liberté, Justice, Tolérance: Mélanges en hommage au doyen G. Cohen-Jonathan*, vol. 1 (Bruylant 2004) 64.

<sup>57</sup> *Case of the United Communist Party of Turkey and others v Turkey* App no 133/1996/752/951 (ECHR, 30 January 1998) para 25.

<sup>58</sup> For the connection of political parties to parliamentary opposition as a checking mechanism of the political majority, see Tsampi (n 30) 305 *et seq.*

<sup>59</sup> *Gozelik and others v Poland* App no 44158/98 (ECHR, 20 December 2001) para 92.

<sup>60</sup> *ibid.*

<sup>61</sup> *Vona v Hungary* App no 35943/10 (ECHR, 9 July 2013) para 56.

<sup>62</sup> *ibid.*

<sup>63</sup> see *Vides Aizsardzības Klubs v Latvia* (n 49) para 41; *Animal Defenders International v the United Kingdom* App no 48876/08 (ECHR, 22 April 2013) para 103.

<sup>64</sup> *Társaság A Szabadságjogokért v Hungary* (n 52) para 27; *Youth Initiative for Human Rights v Serbia* App no 48135/06 (ECHR 25 June 2013), para 20; *Magyar Helsinki Bizottság v Hungary* (n 52) para 166; *Medžlis Islamske zajednice Brčko and others v Bosnia and Herzegovina* (n 52) para 86; *Case of Gra Stiftung gegen Rassismus und Antisemitismus v Switzerland* App no 18597/13 (ECHR, 9 January 2018) para 57.

<sup>65</sup> see, for instance, *Steel and Morris v the United Kingdom* App no 68416/01 (ECHR, 15 February 2005) para 89 and *Magyar Helsinki Bizottság v Hungary* (n 52) para 166; *Medžlis Islamske zajednice Brčko and others v Bosnia and Herzegovina* (n 52) para 86.

<sup>66</sup> Buyse (n 3) 968.

<sup>67</sup> *Steel and Morris v the United Kingdom* (n 65) para 89.

<sup>68</sup> Buyse (n 3) 968.

<sup>69</sup> *Sioutis v Greece* App no 16393/14 (ECHR, 29 August 2017).

[w]hile Article 10 guarantees the freedom of expression to ‘everyone’, the Court has held that an important consideration is whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public ‘watchdog’ (...). The applicant, however, did not invoke any special role that he might have had in enhancing the public’s access to news and facilitating the dissemination of information assimilated to that of ‘public watchdogs’ in so far as the protection afforded by Article 10 is concerned. The purpose of the applicant’s activities cannot therefore be said to have been an essential element of informed public debate.<sup>70</sup>

*Sioutis* clearly indicates that private individuals – who hold no mandate or other capacity connected to public interest or debate – cannot be equated to civil society entities in their monitoring role. Such a stance does not derive from the Court’s disbelief in such private individuals’ role in monitoring the executive,<sup>71</sup> but rather on the strong conviction of the Court on the decisive role of civil society in pursuing this function:

in a comparable way to the press, an NGO performing a public watchdog role is likely to have greater impact when reporting on irregularities of public officials, and will often dispose of greater means of verifying and corroborating the veracity of criticism than would be the case of an individual reporting on what he or she has observed personally.<sup>72</sup>

However, this is not the end of the road for the capacity of individuals to assume monitoring functions within a democratic society governed by the rule of law. It has been recognised, for example, that in general individuals like human rights defenders are included in the list of actors constituting civil society.<sup>73</sup> Human-rights defenders, NGO activists, civic movements leaders,<sup>74</sup> eminent members of the political opposition,<sup>75</sup> or even prominent figures of economic powers can be considered as civil society’s forces in monitoring the government.<sup>76–77</sup> Equating individuals in their capacity as human rights-defenders with NGOs themselves, the Court acknowledges the ‘particular role of human-rights defenders (...) and non-governmental organisations in a pluralist democracy (...).’<sup>78</sup>

This particular role of civil society in a democratic society is of significant variability and versatility. The ECtHR’s case-law has drastically evolved to encompass a multitude of forms through which civil society can monitor the government. Direct political criticism against the government, the governmental agenda,<sup>79</sup> and other State authorities is only the most evident form of civil society scrutiny of the executive.<sup>80</sup> This scrutiny can take more forms, namely: reporting on the human rights situation in a country,<sup>81</sup> reporting on alleged misconduct or irregularities by public officials,<sup>82</sup> organising human rights campaigns calling for

<sup>70</sup> *ibid* para 31.

<sup>71</sup> ‘[I]t is one of the precepts of the rule of law’ that ‘citizens should be able to notify competent State officials about the conduct of civil servants which to them appears irregular or unlawful’: see indicatively, *Zakharov v Russia* App no 14881/03 (ECHR, 5 October 2006) para 26.

<sup>72</sup> *Medžlis Islamske zajednice Brčko and others v Bosnia and Herzegovina* (n 52) para 87.

<sup>73</sup> Buyse (n 3) 968.

<sup>74</sup> *Rasul Jafarov v Azerbaijan* App no 69981/14 (ECHR, 17 March 2016); *Mammadli v Azerbaijan* App no 47145/14 (ECHR, 19 April 2018); *Rashad Hasanov and others v Azerbaijan* App nos 48653/13, 52464/13 and 65597/13 (ECHR, 7 June 2018); *Aliyev v Azerbaijan* App nos 68762/14 and 71200/14 (ECHR, 20 September 2018); *Natig Jafarov v Azerbaijan* App no 64581/16 (ECHR, 7 November 2019); *Kavala v Turkey* App no 28749/18 (ECHR, 10 December 2019); *Ibrahimov and Mammadov v Azerbaijan* App nos 63571/16, 74143/16 and 2883/17 (ECHR, 13 February 2020); *Khadija Ismayilova v Azerbaijan (no 2)* App no 30778/15 (ECHR, 27 February 2020); *Yunusova and Yunusov v Azerbaijan (no 2)* App no 68817/14 (ECHR, 16 July 2020); *Azizov and Novruzlu v Azerbaijan*, App nos 65583/13 and 70106/13 (ECHR, 18 February 2021).

<sup>75</sup> *Lutsenko v Ukraine* App no 6492/11 (ECHR, 3 July 2012); *Tymoshenko v Ukraine* App no 49872/11 (ECHR, 30 April 2013); *Ilgar Mammadov v Azerbaijan* App no 15172/13 (ECHR, 22 May 2014); *Merabishvili v Georgia* App no 72508/13 (ECHR, 28 November 2017); *Navalnyy v Russia* App nos 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 (ECHR, 15 November 2018); *Navalnyy v Russia (no 2)* App no 43734/14 (ECHR, 9 April 2019); *Selahattin Demirtaş v Turkey (no 2)* App no 14305/17 (ECHR, 22 December 2020).

<sup>76</sup> *Gusinskiy v Russia* App no 70276/01 (ECHR, 19 May 2004); *Cebotari v Moldova* App no 35615/06 (ECHR, 13 November 2007).

<sup>77</sup> Whistle-blowers will not be considered as falling within the category of civil society for the purposes of this paper e.g., *Bucur and Toma v Romania* App no 40238/02 (ECHR, 8 January 2013); *Guja v Moldova* App no 14277/04 (ECHR, 12 February 2008).

<sup>78</sup> *Kavala v Turkey* (n 74) para 231.

<sup>79</sup> *Ilgar Mammadov v Azerbaijan* (n 75) para 143. The author would like to thank Ms Ana Costov for assisting with part of the research on the right to criticise the government.

<sup>80</sup> *Lutsenko v Ukraine* (n 75) paras 108–109; *Tymoshenko v Ukraine* (n 75) paras 299–300; *Rasul Jafarov v Azerbaijan* (n 74) para 162; *Rashad Hasanov and others v Azerbaijan* (n 74) para 125.

<sup>81</sup> e.g., *Rasul Jafarov v Azerbaijan* (n 74) para 148.

<sup>82</sup> *Medžlis Islamske zajednice Brčko and others v Bosnia and Herzegovina* (n 52) para 86.



improvement of the general situation,<sup>83</sup> organising protests or informal gatherings against the government,<sup>84</sup> or against specific legislation,<sup>85</sup> holding assemblies to commemorate human-rights defenders or promote human rights,<sup>86</sup> setting up NGOs and civil-society movements active in the areas of human rights.<sup>87</sup> Apart from the aforementioned, and as it has already been implied above, the imparting of information is of particular pertinence in monitoring the executive. Again, this can also take variable forms, ranging from receiving information,<sup>88</sup> to disseminating information on matters of public concern,<sup>89</sup> or to diffusing information that the government wishes to keep secret.<sup>90</sup>

This typology of monitoring activities shows how the monitoring of the executive by civil society differs from the traditional monitoring mechanisms inherent in the separation of powers/checks and balances system. The monitoring activities undertaken by civil society complement the checks stemming from the legislative and judiciary. The monitoring model one can identify in the case-law of the ECtHR is thus a more participatory one that relies on the idea of accountability. The case-law of the Court echoes the mutations in democratic societies in which, as outlined in the introduction, the monitoring of the executive relies on the provision of publics with diverse view points and information about the performance of the executive. This monitoring also relates to the opportunities for upholding diversity and influence of people's voices and choices in decisions that concern them.

### 3. Recasting the rule of law through civil society and the role of good faith

It has been demonstrated above that what emerges from the jurisprudence of the ECtHR is that the relationship between rule of law and civil society is a two-way one. It is not just the rule of law protecting civil society but the other way around as well; civil society contributes to 'rule of law from below' through its monitoring function of the executive branch of government. The Strasbourg system relies on the idea of scrutinising the executive, and civil society has a role in this monitoring process. While the preceding analysis already reflects the recasting of the rule of law through the role of civil society, there are two points that require further attention. First, the monitoring role of civil society against the executive is of particular pertinence in States where the rule of law, separation of powers/checks and balances are under attack. This is in particular implied by the case-law on Article 18 ECHR where the notion of good and bad faith of the State is focal (3.1.). However, the discussion on recasting the rule of law does not solely pertain to the good and bad faith of the State. Good faith qualifies as a key element also in the exercising of the monitoring function by civil society (3.2.).

#### 3.1. Monitoring the executive where the rule of law is systematically suffering

There exists no executive of any State in the world that is in no need of being monitored, including by civil society. But what if civil society is the only one left to check the government within a State? Ironically and sadly enough, this is not a rhetorical question or just a mental exercise. The recent constitutional crisis and riots in a number of States around the globe have brought to the surface concerns as to the efficiency of the separation of powers/checks and balances.<sup>91</sup> The case-law of the Court on Article 18 ECHR offers a snapshot of these concerns in a number of Council of Europe member-States.

Article 18 provides that '[t]he restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.' This provision is considered to be inspired by the *détournement de pouvoir* (misuse/misapplication of power) theory of French Administrative Law.<sup>92</sup> There such misuse of power occurs when an administrative authority uses its

<sup>83</sup> e.g., *Rasul Jafarov v Azerbaijan* (n 74) para 148.

<sup>84</sup> *Navalnyy v Russia* (n 75) para 156.

<sup>85</sup> *Lashmankin and others v Russia* App nos 57819/09 and 14 others (ECHR, 7 February 2017); *Natig Jafarov v Azerbaijan* (n 74) para 68.

<sup>86</sup> *Lashmankin and others v Russia* (no 85).

<sup>87</sup> e.g., *Kavala v Turkey* (n 74); *Rashad Hasanov and others v Azerbaijan* (n 74).

<sup>88</sup> *Magyar Helsinki Bizottság v Hungary* (n 52).

<sup>89</sup> *Steel and Morris v the United Kingdom* (n 65) para 89.

<sup>90</sup> *Gusinskiy v Russia* (n 76) para 76; *Ilgar Mammadov v Azerbaijan* (n 75) para 143.

<sup>91</sup> See some indicative examples, Jack M. Balkin, *The Cycles of Constitutional Time* (OUP 2020) 38–43; Marcin Matczak, 'The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defense' (2020) 12 *Hague Journal of the Rule of Law* 421. The COVID-19 crisis has also risen issues with respect to the separation of powers. See indicatively, Moshe Maor, Raanan Sulitzeanu-Kenan and David Chinitz, 'When COVID-19, Constitutional Crisis, and Political Deadlock meet: the Israeli Case from a Disproportionate Policy Perspective' (2020) 39 (3) *Policy and Society* 442; Jan Petrov, 'The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?' (2020) 8 (1–2) *The Theory and Practice of Legislation* 71.

<sup>92</sup> Commentary on the single text of the Convention proposed by the Conference of senior officials (8–17 June 1950): *Collected Edition of the Travaux préparatoires of the European Convention on Human Rights*, vol IV (Martinus Nijhoff 1977) 258.

powers to serve a different purpose than the one for which those powers were conferred to it.<sup>93</sup> Such a conscious misuse of power implies a reproach of a moral nature.<sup>94</sup> In the Strasbourg system the exact meaning of the doctrine remained obscure for long as the use of Article 18 was scarce until recently.<sup>95</sup> Its reinvigoration came in 2017 with the Grand Chamber judgment in *Merabishvili v Georgia*.<sup>96</sup> The applicant in this case, a leading figure of the political opposition, was one of the protagonists of the Georgian ‘Rose Revolution’ that took place in 2003. He alleged, *inter alia*, a violation of Article 18 in conjunction with Article 5(1) ECHR, claiming that the ulterior purpose of the criminal proceedings against him and of his pre-trial detention was to exclude him from the political scene and to obtain information from him on issues that had nothing to do with the criminal proceedings against him.<sup>97</sup> The Grand Chamber found a violation of Article 18 in conjunction with Article 5(1), holding that the restriction of the applicant’s right to liberty primarily served an ulterior purpose, namely the obtaining of political information from the applicant.<sup>98</sup>

Ever since, the application of Article 18 by the Court has been regularised and the Court has found violations of Article 18 in conjunction with a number of other ECHR articles in a growing number of cases.<sup>99</sup> In all cases the applicants were prominent figures of organisations, political parties, civic movements, the press itself, but also of companies,<sup>100</sup> that were in opposition of the government and were arrested and imprisoned for officially neutral reasons but in reality on political grounds. As such the violation of Article 18 has become synonymous with the bad faith oppression of dissent by a State that succumbs to misuse of power. While the ECHR system is premised on the presumption of good faith, the idiosyncratic Article 18 does not adhere to this presumption.<sup>101</sup> Article 18 is thus considered to function as an early warning signal that European States are at risk of becoming illiberal democracies or even of reverting to totalitarianism and the destruction of the rule of law.<sup>102</sup> While this is indeed true, the question that remains open is in what exact way the rule of law is destroyed. So far, the Court has found violations of Article 18 in conjunction with a number of other articles against Russia, Moldova, Ukraine, Azerbaijan, Georgia and Turkey. The States in question restricted the rights of the applicants in bad faith with a view to achieve the ulterior goal of silencing not only them but also often the entirety of the civic space, which is monitoring the government.<sup>103</sup> The observations of the Court in *Aliyev v Azerbaijan* are telling in this regard.<sup>104</sup> The case pertained to the detention of the applicant, a human rights defender and the search of his home and office for the purpose of silencing and punishing him and preventing him ‘from conducting his NGO activity in any meaningful way.’<sup>105</sup> The Court noted that it ‘cannot lose sight of the chilling effect of those measures on civil society at large, whose members often act collectively within NGOs and who, for fear of prosecution, may be discouraged from continuing their work of promoting and defending human rights.’<sup>106</sup> It should be noted that Azerbaijani cases brought before the Court stand out as they ‘reflect a troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law.’<sup>107</sup> A violation of Article 18 ECHR is

<sup>93</sup> Pascale Gonod and Mattias Guyomar, ‘Détournement de pouvoir et de procédure’ in *Répertoire de contentieux administratif* (Dalloz 2008) 2.

<sup>94</sup> *ibid* 4.

<sup>95</sup> See for an appraisal, Corina Heri, ‘Loyalty, Subsidiarity, and Article 18 ECHR: How the ECtHR Deals with Mala Fide Limitations of Rights’ (2020) 1 (1) *The European Convention on Human Rights Law Review* 25.

<sup>96</sup> *Merabishvili v Georgia* (n 75).

<sup>97</sup> *ibid* paras 241–243.

<sup>98</sup> *ibid* para 354.

<sup>99</sup> *Gusinskiy v Russia* (n 76) para 78; *Cebotari v Moldova* (n 76) para 53; *Lutsenko v Ukraine* (n 75) para 110; *Tymoshenko v Ukraine* (n 75) para 301; *Ilgar Mammadov v Azerbaijan* (n 75) para 144; *Rasul Jafarov v Azerbaijan* (n 74) para 163; *Merabishvili v Georgia* (n 75) para 354; *Mammadli v Azerbaijan* (n 74) para 105; *Rashad Hasanov and others v Azerbaijan* (n 74) para 127; *Aliyev v Azerbaijan* (n 74) para 216; *Navalnyy v Russia* (n 75) para 176; *Navalnyy v Russia (no 2)* (n 75) para 99; *Natig Jafarov v Azerbaijan* (n 74) para 71; *Kavala v Turkey* (n 74) para 232; *Ibrahimov and Mammadov v Azerbaijan* (n 74) para 158; *Khadija Ismayilova v Azerbaijan (no 2)* (n 74) para 120; *Yunusova and Yunusov v Azerbaijan (no 2)* (n 74) para 195; *Selahattin Demirtaş v Turkey (no 2)* (n 75) para 438; *Azizov and Novruzlu v Azerbaijan* (n 74) para 80.

<sup>100</sup> In the cases of *Gusinskiy v Russia* (n 76) and *Cebotari v Moldova* (n 76) the applicants were, respectively, the former Chairman of a private media holding company in Russia and the head of a Moldovan State-owned power distribution company. It is interesting to note that economic powers can fall under the concept of ‘civil society’: While the traditional conception of civil society does not comprise the State or the market, this separateness has been nuanced in recent years: *Buyse* (n 4) 17.

<sup>101</sup> Heri (n 95) 25.

<sup>102</sup> Tan (n 26) 109.

<sup>103</sup> See for the conception of ‘chilling intent’, *Buyse* (n 3) 982. See also, *Buyse* (n 4) 32–33.

<sup>104</sup> *Aliyev v Azerbaijan* (n 74).

<sup>105</sup> *ibid* para 213.

<sup>106</sup> *ibid*.

<sup>107</sup> *ibid* para 223.

connected, thus, with the *male fide* effort of the executive branch of government to erode the social, political and economic monitors within a State.<sup>108</sup>

However, as we demonstrated in a recent study, for the executive to achieve this ulterior purpose one more condition must be fulfilled: the institutional monitors, namely the judicial and the legislative branch of government, fail to avert this erosion.<sup>109</sup> Such a structural deficiency is serious enough to indeed undermine the premises even of rule of law. As the Court suggested on multiple occasions, the restrictions occurring in violation of Article 18 affect not merely the applicants alone, or human-rights defenders and NGO activists, but the very essence of democracy as a means of organising society.<sup>110</sup> Article 18 is not simply about oppressing dissent within any State, but oppressing dissent in a State where there are serious indications that the judiciary and the legislative are not in a position to effectively check the government and where the latter tries to both exploit and solidify its dominant position.<sup>111–112</sup> A government's agenda to impose its dominant position cannot be tolerated by the system of the Convention. It comes as no surprise, that the Court in *Navalnyy*, one of the landmark Article 18 cases, made reference to the dominant position of the majority. In this case, the Court held that the obstacles to the freedom of assembly of the applicant, a political opposition figure, pursued the ulterior purpose of suppressing pluralism.<sup>113</sup> In particular it noted that '[a]lthough individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids abuse of a dominant position.'<sup>114</sup> Such a statement is not new to the case-law of the Court. On the contrary it reflects standard case-law.<sup>115</sup> The fact that the Court is invoking it in the context of Article 18 is telling about the nature of ulterior purposes that are incompatible with the Convention. The ulterior purpose of the executive can go as far as the suppression of pluralism which 'forms part of "effective political democracy" governed by "the rule of law," both being concepts to which the Preamble to the Convention refers.'<sup>116</sup>

In one of the most recent Article 18 cases, namely in *Kavala v Turkey*, the Court made a point of noting 'that the ulterior purpose thus defined [i.e. to affect not merely the applicant alone, or human-rights defenders and NGO activists, but the very essence of democracy] would attain significant gravity, especially in the light of the particular role of human-rights defenders (...) and non-governmental organisations in a pluralist democracy (...).'<sup>117</sup> In this case, the Court found a violation of Article 18 taken together with Article 5(1) as the extended detention of the applicant, a human-rights defender pursued the ulterior purpose of reducing him to silence.<sup>118</sup> The aforementioned affirmation is particularly important and demonstrative of the evolution of the case-law on issues pertaining to the monitoring of the executive by civil society. Of course, the Court could potentially become even more vocal and explicitly assert that on occasion civil society seems to be the last bastion against a government that attempts to consolidate its absolute dominance. In such a scenario, civil society would be the ultimate internal check against rule of law failures when the legislative and judiciary no longer counterweigh the executive's power. In any case, however, the case-law on Article 18 currently qualifies as the most prominent jurisprudential area where the Court emphasises the relevance of the monitoring role of civil society against the government.

### 3.2. Monitoring the executive in good faith

In many States where civil society is functioning as a monitoring power that opposes the government, local NGOs and their leaders, are accused of being 'a "fifth column" for foreign interests, national traitors, foreign agents, and so on.'<sup>119</sup> While such accusations are consistently used by populist governments in their effort to

<sup>108</sup> Tsampi (n 48).

<sup>109</sup> *ibid.*

<sup>110</sup> *Navalnyy v Russia* (n 75) para 174; *Kavala v Turkey* (n 74) para 231.

<sup>111</sup> In *Selahattin Demirtaş v Turkey* (no 2) (n 75) para 434, the Court expressed concerns about the independence of the judiciary in Turkey; see also *Aliyev v Azerbaijan* (n 74) para 224 on the courts' 'automatic endorsement of the prosecution's applications to detain the applicants without any genuine judicial oversight.'

<sup>112</sup> See for the increasingly restrictive legislation on a number of monitoring activities, *Navalnyy v Russia* (n 75) 172; *Rasul Jafarov v Azerbaijan* (n 74) para 159; *Mammadli v Azerbaijan* (n 74) para 99; *Aliyev v Azerbaijan* (n 74) para 212.

<sup>113</sup> *Navalnyy v Russia* (n 75) para 175.

<sup>114</sup> *ibid.*

<sup>115</sup> *Gozelik and others v Poland* (n 59) para 90; *Karácsony and others v Hungary* App nos 42461/13 and 44357/13 (ECHR, 17 May 2016) para 147.

<sup>116</sup> *Navalnyy v Russia* (n 75) para 175.

<sup>117</sup> *Kavala v Turkey* (n 74) para 231.

<sup>118</sup> *ibid* para 232.

<sup>119</sup> *Rasul Jafarov v Azerbaijan* (n 74) para 160; *Mammadli v Azerbaijan* (n 74) para 100.

silence dissenting voices in bad faith,<sup>120</sup> it goes without saying that the upholding of rule of law cannot be guaranteed unless the monitoring functions of civil society are also exercised in compatibility with the rule of law imperatives and good faith.<sup>121</sup> This point is of particular relevance in the case of ‘appointed civil society’ which is managed by the State itself – as demonstrated in the case of Russia by Professor Sergey Yu. Marochkin and Artem Asanov<sup>123</sup> – or by other entities. Such an appointed and controlled civil society may implement a hidden agenda and pursue an ulterior purpose, namely the avoidance of genuine and harsh criticism against the government.

In upholding rule of law, civil society does not enjoy a *carte blanche* in monitoring the executive. Such an approach permeates the case-law of the Court. In *Gorzelik* the Court acknowledged that ‘the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively,’<sup>124</sup> but connected such a reality to the condition of a civil society functioning ‘in a healthy manner.’<sup>125</sup> This healthy functioning does not only depend on the State but also on civil society itself.

To serve the rule of law, the monitoring functions of civil society are to be exercised in compatibility with the rule of law imperatives. In *Petropavlovskis v Latvia* on the refusal to grant citizenship to the applicant, a leader of protest movement against the government’s language policy, the Court held that in exercising his freedom of expression and assembly, the applicant was free to disagree with government policies ‘for as long as that critique [took] place in accordance with the law.’<sup>126</sup> In addition to this legality-related requirement, the Court also alluded to the compatibility with the underlying values of the system of the Convention. The Court made sure to note in *Navalnyy v Russia* that the Russian authorities harassed the applicant ‘[w]hilst he had promoted the ideas and values of a democratic society [...] and as the most prominent opposition figure [he was] advocating these values.’<sup>127</sup> After all, if civil society were to advocate against these values, Article 17 ECHR would come into the fray disallowing such an abuse of rights.<sup>128</sup> The Court has held, in general, that speech, which is incompatible with the values proclaimed and guaranteed by the Convention is not protected by Article 10 by virtue of Article 17 of the Convention.<sup>129</sup> The ECHR system is not protective to statements that are directed against the Convention’s underlying values, for example by stirring up hatred or violence, and to individuals that attempt to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it.<sup>130</sup>

Apart from the aforementioned, the case-law of the Court reflects the idea of monitoring functions exercised in good faith as such. Already in *Castells*, the Court suggested that while the government should tolerate the criticism of its adversaries, the competent authorities can nonetheless adopt, ‘in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.’<sup>131–132</sup> Recent case-law has been more vocal in this respect. According to established case-law, the safeguard afforded by Article 10 ECHR to journalists in relation to reporting on issues of general interest ‘is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.’<sup>133</sup> In *Magyar Helsinki Bizottság*, the Court affirmed that the same considerations

<sup>120</sup> For a thorough study on populism and human rights, see Laurence Burgorgue-Larsen, ‘Populisme et droits de l’homme. Du désenchantement à la riposte démocratique’ in Edouard Bubout and Sébastien Touzé (eds), *Refonder les droits de l’homme. Des critiques aux pratiques* (Pedone 2019) 199–261.

<sup>121</sup> O’Kelly (n 12) 395.

<sup>122</sup> Sergey Yu. Marochkin and Artem Asanov, ‘The Rule of Law from Below: Civil Activities in the Current Political Environment in Russia’ paper submitted at the International Conference ‘The Rule of Law from below: Individuals and Civil Society as Protectors of the Rule of Law in Troubled Times’ (n 5) 13.

<sup>123</sup> *ibid.*

<sup>124</sup> *Gorzelik and others v Poland* (n 59) para 97.

<sup>125</sup> *ibid.*

<sup>126</sup> *Petropavlovskis v Latvia* App no 44230/06 (ECHR, 13 January 2015) para 85.

<sup>127</sup> *Navalnyy v Russia* (n 75) para 156.

<sup>128</sup> See Buyse (n 4) 29–30.

<sup>129</sup> See among others, *Delfi AS v Estonia* App no 64569/09 (ECHR, 10 October 2013) para 136.

<sup>130</sup> See for example, *Perinçek v Switzerland* App no 27510/08 (ECHR, 15 October 2015) para 115.

<sup>131</sup> Emphasis added.

<sup>132</sup> *Castells v Spain* (n 33) para 46.

<sup>133</sup> See for example, *Bladet Tromsø and Stensaas v Norway* App no 21980/93 (ECHR, 20 May 1999); *Colombani and others v France* App no 51279/99 (ECHR, 25 June 2002) para 65; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECHR, 27 June 2017) para 183.

would apply to an NGO assuming a social watchdog function.<sup>134</sup> The presence or absence of good faith on the part of an NGO criticising the executive is one of the criteria the Court considers central to the assessment of the essential functions that civil society fulfils in a democratic society.<sup>135</sup> In times when the rule of law is under pressure the consideration of such a criterion does not come as a surprise. The good faith of all the actors of a democratic society is inherent in the recasting of rule of law that the current realities require and the Court has proven to have the reflexes and the tools for addressing the challenges of this era of good/bad faith. Rule of law thrives in a democratic society where civil society monitors the executive in good faith. As it has been already stated, in many States, the executive intentionally calls into question the good faith of civil society with a view to quell the exercise of its monitoring functions or institutionalises civil society with a view to control it. Opposing, in such cases, the good faith of civil society to the bad faith of the State machinery sends a strong message in support of rule of law in these turbulent times.

#### 4. Conclusion

On the basis of the ECHR and building on the premises of liberal democracy, the case-law of the ECtHR is a testament to how the rule of law qualifies as a protective shield to the activities of civil society. Even more than that though, this case-law also reflects the variability and versatility of civil society's contribution to the rule of law itself.

The function of scrutinising the activities of the executive lies at the very heart of the rule of law and the idea of checks and balances. Traditionally, thus, the monitoring of the executive was associated with the judicial and legislative branch of government. However, the institutional mutations in modern societies suggest that civic entities might as well undertake similar monitoring functions in the context of a participatory model of accountability. This stance is also shared by the ECtHR, which encompasses a multitude of forms through which civil society can monitor the government. The ECtHR has accepted that NGOs have a 'particular role in a pluralist democracy' and the manner in which they carry out their activities in their capacity as 'public watchdogs' may have a significant impact on the proper functioning of a democratic society. More importantly even, the ECtHR jurisprudence suggests that allowing persons to engage in such activities and sustain an active civil society within the State is the only way to maintain the values of the Convention. This is even more crucial in States where the rule of law is systematically suffering and thus civil society is the only entity which can genuinely check the executive. Such an approach is particularly visible in the case-law on Article 18 ECHR where the State is restricting the rights of civil society in bad faith with a view to achieve a chilling effect silencing dissent. If Article 18 visibly brings the issue of good and bad faith into the fray, the idea of good faith permeates the entirety of the Convention's requirements. It thus comes as no surprise that the case-law of the ECtHR also suggests that the monitoring functions of civil society itself should also be exercised in good faith.

#### Competing Interests

The author has no competing interests to declare.

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<sup>134</sup> *Magyar Helsinki Bizottság v Hungary* (n 52) para 159. See also the more recent, *Medžlis Islamske zajednice Brčko and others v Bosnia and Herzegovina* (n 52) para 87.

<sup>135</sup> See, more precisely on Article 10 ECHR: *Margulev v Russia* App no 15449/09 (ECHR, 8 October 2019) para 51.

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