Rule of law perspective on EU policing, 9 November 2022

Report of meeting: Key takeaways

On 9 November, representatives from the civil society organisations Fair Trials, EDRi, PICUM and ENAR, as well as from the EPDS, were hosted at the European Parliament by MEPs Saskia Bricmont and Birgit Sippel to discuss the serious structural issues in EU policing and our concerns about the increasing mandates of Europol and Frontex. See the video of the event here: Youtube, Twitter.

Given the rising role of the European agencies Europol and Frontex, we need to come together and seize the momentum to raise awareness and create the space for debate on the activities of these agencies in terms of fundamental rights and rule of law. There is **an urgency to act given the numerous accusations of non-respect of EU laws** and fundamental rights by both security agencies.

MEP Bricmont pointed to the scandals in EU policing, including most recently the PeDRA programme that was revealed by investigative journalists last summer and the way in which Europol tried to delete a Dutch activist's personal data to avoid disclosing it. The agencies are side-lining the expertise of their own data protection officers and orders from the supervising agency, the EDPS. These scandals make clear that we urgently need to reinforce oversight of EU agencies. We have a 'foot in the door' for improvement of Europol's political oversight mechanism, the Joint Parliamentary Scrutiny Group, which brings together MEPs and representatives from national parliaments. They need to act as scrutinisers, not supports of Europol. MEPs recently refused to discharge Frontex's budget because of fundamental rights abuses at EU borders. This was not a small signal. It is an important step to mark that we need stronger, better, and more democratic oversight of EU agencies involved in policing.

MEP Sippel called for taking a step back and talking about the general problems when it comes to European policing systems. MEP Sippel highlighted two key problems. First, the data-driven model of policing, with policing agencies increasingly relying on the collection and processing of data. Second, policy-makers are moving ahead with digitalisation and artificial intelligence in the belief that technology will make everything better. We tend to rely on these systems because we think it means less staff for law enforcement and judicial authorities. However, experience in the US in particular shows that this is not the case: artificial intelligence can be treated as artificial idiocy. The results that AI produce are reflective of the data that is fed into these systems: data that reflects police activity, which targets racialised people.

On behalf of **Fair Trials, Laure Baudrihaye-Gerard** argued that the expansion of policing is a rule of law issue. In a system based on the rule of law, we can all agree

that police should not have a blank cheque to do whatever they like. They are required to act within their remit, within their legal powers. The scandals show that there is a structural problem with oversight and accountability. How can civil society actors participate in the scrutiny of the agencies? Beyond scrutiny, we also need to question the breadth of the expanding legal powers of policing agencies and have uncomfortable conversations about the mandate of policing, including EU policing. The cooperation between Frontex and Europol reveals a conflation we also see at national level between migration and criminality. Are populist criminal narratives being used to expand the mandate and power of EU policing? What policies beyond policing can promote public safety?

We need to probe the larger contexts that motivate data collection, the development of technological projects, their deployment and use. **Oyidiya Oji presented ENAR's** work on policing, explaining how policing is deeply rooted in colonialism, and that people from racialised backgrounds, especially migrant backgrounds, have historically been criminalised and continue to be criminalised today. The same people are being stopped, searched and have to answer questions from the police to collect data about them. We all recently experienced our freedom of movement restricted by policing as part of the enforcement of the Covid19 pandemic rules. But this is what people of colour face throughout their lives, creating a sense through generations that they are not welcome. Such practices should not be normalised. Yet we are creating more control and surveillance tools, such as predictive policing. Technology is not neutral. These systems are based on data collected by national police authorities that historically targets minoritised communities and are known to reinforce discrimination. Instead of linking criminalisation to certain communities, we should focus on other policies that can promote public safety: supporting migrants and refugees, investing in education, caring for mental health and exploring transformative justice solutions that reinforce the role of communities.

Michele LeVoy, on behalf of PICUM, analysed the harms from the conflation between migration and criminality. The current approach to migration relies heavily on enforcement. For instance, German law requires health practitioners to report an undocumented person. Irregular migration is treated as a crime and results in discriminatory profiling, interacting with other forms of criminalisation such as sex work. The EU has spent huge resources on 'big data' and creating a colossal interoperable migration IT system that makes it possible for law enforcement to access data. This policy is based on an assumed link between migration and terrorism. We need to interrogate the basis for such assumptions and interrupt the framework that all people perceived as foreigners are potential threats to public safety. On top of criminalisation and increased punishment of irregular migration, administrative law is also being used to pursue criminal law objectives. This creates double standards in fair trial rights

guarantees, based on whether a person is an EU citizen or not. We have big asks: overhauling the approach to migration and shifting from policing to support, based on human rights. We need to recognise the historical structural and institutional racism in the context of migration policies – starting in the proposed EU AI Act by ensuring that the uses of predictive policing AI tools in the migration context are treated as creating unacceptable risks. The only way to protect people from these irreparable harms is to ban predictive policing technologies.

Oyidiya and Michele made the case that the politics of data collection connect to the reproduction of broader injustices. In the face of the problematic policing model that we see at national and EU level, **Chloe Berthelemy of EDRi** explained that there are not enough measures in place to counterbalance the massive expansion of Europol's powers. Europol's recent revised mandate legitimises a data-driven model of policing and opens the way for a predictive model of policing, which poses great threats to rights and freedoms, as well as to the rule of law. This leads to mass data collection, with Europol increasingly involved in data analysis. There are many barriers in exercising individual rights, starting with a lack of transparency in what data is being transferred from national authorities to Europol. There is a culture to despise fundamental rights and data protection, rendering such controls almost meaningless; and the political oversight mechanism, the JPSG, lacks the autonomy for organising its work methods and the culture to operate as a real watchdog. We are concerned that the existing oversight mechanisms of EU agencies are being used as red herrings or tick box exercises to justify further expansion of powers.

Sharing her experience supervising the activities of Europol and Frontex, **Fanny Coudert of the EDPS** focused on how we can improve the checks and balances in place. There are several levels of oversight in place, starting with internal controls, and then administrative supervision, including by the EDPS. But this supervision is restricted to a personal data processing perspective. There is also a political oversight mechanism in place (the JPSG) but it faces a problem of access to information. In that respect, the role of civil society organisations in the ecosystem of checks and balances is important, to promote transparency and make problematic practices public; but also to create alternative narratives to bring attention to certain problems such as racism at national level. The impact of the agencies' work on people's lives keeps increasing, with higher risks of abuse and mistakes, as fewer red lines being drawn by the legislator. Everything is being put in place to permit increased data collection and sharing between states and agencies. This is magnified by the scope of action, which is EU-wide, the opacity of the action, and the use of new, intrusive technologies such as AI. We are entering into an unchartered territory. Our challenge is to build an effective system of checks and balances at EU level in cooperation with national systems. It is also important to bring the judiciary in the picture. One institution on its

own cannot act as a counterweight. Everyone, including civil society organisations, has a role to play in promoting an ecosystem of checks and balances and in reinforcing each other, with a common goal of working towards a fair society.

A criminal justice system based on the rule of law requires many elements to come together: from tightly framed legal frameworks that leave no gaps; to individual rights that are accessible and effective; to political oversight and specialised supervision. The rule of law requires a complex and comprehensive ecosystem of checks and balances. The discussion made clear that the growth in policing powers is not counterbalanced by enhanced scrutiny and accountability. Where one element is weakened or compromised, the whole system collapses.

Ultimately, we need to address the structural issues/racism in policing, and reflect on policies promoting public safety other than policing and ensure a human rights based approach in policing and migration.

THE KEY MESSAGES:

➢ We all need to **work together and participate in the complex ecosystem of checks and balances on EU policing**. Civil society plays a key role in demanding increased transparency and accountability. We cannot accept double standards: EU policing needs to be held to the rule of law and fundamental rights standards.

➢ There is a need to work across movements to question the underlying assumptions on which the politics of data collection are based and to **counter the securitisation narrative, including the conflation between migration and criminality.**

➢ We can work together towards **a shift from punishment to support**, and reimagine public safety beyond policing, focusing on promoting policies centred on communities that we want going forward.