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"Emerging issues of access to justice for vulnerable groups, in particular:
- migrants and asylum seekers;
- children, including children perpetrators of crime"

Report presented by the Minister of Justice of Switzerland

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I. Foreword

1. That all human beings are nowadays entitled to assert certain fundamental rights can be regarded as an important historical advance, especially since, as provided in Article 2 of the Universal Declaration of Human Rights adopted in 1948, they can do so "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." At European level, the same concept is rooted, inter alia, in Article 14 of the European Convention on Human Rights.

2. However, rights are ineffective if they are not enforced. Effective enforcement of a right primarily entails that those seeking to avail themselves of it should have sufficient access to justice. An individual's access to justice can be hindered by various kinds of obstacles, not least linked to their personal circumstances.

3. The groups deserving attention from this standpoint include migrants, asylum-seekers and children. They often encounter particular difficulties in taking their case before a court and effectively arguing it there.

4. This may result in a situation where those who are disadvantaged are in fact the groups most in need of protection of their rights. Special measures are accordingly needed to facilitate access to the courts, thereby enhancing judicial protection.

5. These are also very topical issues in Switzerland, where various legislative reforms have already been implemented in this field or will shortly be decided by parliament.

II. The situation of migrants and asylum-seekers

1. Introduction

6. Access to justice is a particularly thorny question in matters of asylum. Asylum-seekers' access to justice to safeguard their right to fair, impartial assessment of their asylum request can undoubtedly come into conflict with potential abuses of the very system of access to justice by persons seeking to utilise asylum rights for reasons that have nothing to do with protection from persecution. This problem is reflected in the legislation, and in the constant adaptations thereof. The main challenge facing Europe's democratic societies is to strike a fair balance in these matters. Switzerland's report will therefore focus on some specific questions that inevitably arise in the context of first-instance asylum procedure, viewed in the light of its own national legislation.

7. In addition, although asylum-seekers can be regarded as a vulnerable group per se, the fact remains that this group includes some particularly vulnerable categories of individuals, primarily women and unaccompanied minors. There is therefore every justification for developing special policies in their favour.

2. General guarantees and procedural rights

8. Apart from, or in parallel with, the instruments of public international law, Swiss national law affords a number of general guarantees and procedural rights deriving from the federal constitution. One fundamental guarantee is the right to a hearing, which also applies to foreigners. An indispensable requirement of access to justice, particularly with regard to an asylum request, is that the applicant should be able to speak out from the very start of the procedure. Depending on the circumstances, where an applicant cannot exercise his or her right to be heard in a satisfactory manner at first instance the decision may go against him or her, and this lack of a satisfactory hearing can have a detrimental impact on the subsequent outcome of the case, not

least at appeal, particularly as regards the credibility of arguments relied on later that could not be submitted before the authority dealing with the first-instance procedure.

9. This guarantee has been enshrined in the Asylum Act, which institutes a right to be heard concerning the grounds for an asylum request. As a general rule, all asylum-seekers are entitled to undergo a full oral interview about their reasons for seeking asylum at least once in the course of the first-instance procedure. From the standpoint of the immediacy of evidence, it is also advisable that this interview, which constitutes the principal form of evidence in asylum cases, should as far as possible be carried out by the authority taking the decision.

10. The right to a hearing can exceptionally be disregarded in cases where the applicant is clearly abusing the procedure (in particular where he or she has assumed a false identity or is in serious breach of his or her duty to co-operate); however, even in such cases, the asylum-seeker is at least entitled to be questioned in writing about the facts constituting the abuse.

11. In the context of such an interview, effective enforcement of the right to a hearing entails that an applicant with inadequate command of one of the official languages should be entitled to an interpreter appointed ex officio. The applicant also has the right to designate someone to assist him or her, who need not necessarily be a legal counsel. The applicant's presence at the interview is nonetheless compulsory, as asylum-seekers must state in person their reasons for making the application.

12. A report on the interview is drawn up, which is not a mere summary but a full verbatim record. This is of vital importance where, as is the case in Switzerland, appeals are usually decided by written procedure. The report is signed by the applicant, after having been translated for him or her so he or she can confirm its accuracy or make any additions or corrections, in which case these ultimate observations are themselves placed on record.

13. One particularity of Swiss asylum law is NGOs' involvement in the procedure. A representative of an approved assistance organisation attends the interview as an observer and is entitled to request that clarifications be sought regarding the asylum-seeker's situation or to lodge objections. His or her statements are recorded in full in the report.

14. This approach to the right to a hearing not only helps to clarify the applicant's circumstances, and hence facilitates a rapid decision, but also contributes to better acceptance of the decision by the applicant.

15. In addition to its obligation properly to determine the circumstances of the case, the authority is required to deal with it within a reasonable time. In this connection, the period between the filing of the asylum request and the interview with the applicant should not be too long.

16. Apart from the fundamental right to advance his or her arguments before a decision is taken, the applicant benefits from other procedural rights deriving from the right to a hearing:

- information on his or her rights and obligations in connection with the procedure; this information is provided in writing, where possible in the applicant's mother tongue, failing which it will be translated for the applicant;
- the right to consult the documents in the case-file, except where there is an overriding public interest to the contrary;
- the right to participate in the taking of evidence and in particular to submit observations on the outcome of any evidence gathering measure ordered by the authority;
- the right to a decision giving reasons;
- the right to be represented and assisted, in particular the right to free legal aid.

17. On this last point, asylum procedure at first instance is free of charge; except in cases where a request for review is deemed clearly ill-founded no procedural costs are charged. The right to counsel appointed ex officio, resulting from the federal constitution, applies only where a number of criteria are all met (financial hardship, procedure not devoid of a prospect of success, need).

18. In situations where the applicant's freedom of movement is restricted (detention, asylum-seekers stopped on arrival at an airport, placement in a collective reception and processing centre), access to legal counsel or a legal representative must not only be guaranteed, but should also be facilitated by the automatic provision of information on the right to assistance and of means of contact.

19. However, as a corollary to these procedural rights, the applicant is obliged to co-operate in the establishment of his or her circumstances. It is for the applicant to prove that he or she is in need of protection. At the same time, the evidential requirements should not be too strict; the fact that the applicant's claims seem fairly probable should suffice.

3. Specific procedure in the case of particularly vulnerable groups

20. In an asylum context special attention should be paid to two particularly vulnerable groups: women victims of persecution linked to their gender or of a sexual nature and unaccompanied minors.

21. Under Swiss law the concept of a refugee has been defined so as to include the reasons for fleeing one's country particular to women. In addition, the law contains specific procedural provisions to take account of the situation of women and minors.

The situation of women from a procedural standpoint

22. Where there is solid circumstantial evidence of persecution of a sexual nature or where the situation in the state of origin is such that the existence of this kind of persecution can be inferred, the person seeking asylum is interviewed by a person of the same gender. This rule must be applied as a matter of course, failing which the procedure must be restarted and a fresh interview must be held.

23. Apart from the formation of an entirely female interview team, a traumatised person will be questioned by a woman officer specially trained in conducting this type of interview. In-service training seminars are organised, and a specialist working group has been set up within the first-instance authority to coordinate practice in this field, support and advise the female officers concerned, particularly regarding the legal processing of cases and the necessary investigation measures, and gather information on the situation of women in the country of origin from the cultural, social and legal standpoints, with a view, inter alia, to determining whether the country of origin is willing and able to protect women from persecution by third parties.

24. Another procedural provision takes account of the situation of women accompanying a spouse or partner who files an asylum request on his own and his family's behalf. Each person within the family seeking asylum is entitled to have his or her individual grounds for making the request assessed. In other words, even where, on filing the request, the spouse or partner alone expressly states the grounds for it, the woman is entitled to an individual procedure, that is to say to be heard in person.

25. This procedure also applies in cases where a refugee is married and an application for family reunification is lodged. This application is treated as an asylum request and will be examined from that angle. This therefore guarantees that a female spouse will, where the need arises, be able to advance her own grounds for seeking asylum.

The situation of unaccompanied minors from a procedural standpoint

26. In the case of unaccompanied minors seeking asylum, access to the procedure must be guaranteed regardless of their age and of whether they are capable of understanding. Any minor capable of understanding may file an asylum request in person or through a representative. As for minors incapable of understanding, a request filed by their representative is fully valid.

27. However, even where an unaccompanied minor is capable of understanding and can legally act alone in the context of an asylum procedure, a "person of trust" must be designated for him or her. This requirement follows from the specific protective measures whereby, in the case of a minor, a person responsible for representing the child's interests throughout the procedure must be appointed from the outset.

28. This person of trust plays a varied role, resembling that of a legal or procedural guardian. It encompasses not only defending the child's interests and representing him or her throughout the asylum procedure, but also administrative and organisational tasks (supervision in the residential care facilities arranged, dealing with insurance issues, securing medical treatment where necessary and so on). The person of trust accompanies and assists the minor, which means that he or she should have sufficient legal knowledge to be able to provide effective support in connection with the asylum procedure. The person concerned should have a basic knowledge of asylum procedure and be familiar with how the main stages in the procedure are conducted (in particular the interview concerning the applicant's reasons for seeking asylum, the first-instance decision, appeal procedure).

29. In addition, the person of trust must take all possible steps to ensure that he or she can be contacted by the minor whenever the latter deems necessary. In this connection, once the first-instance decision has been served, a minor must be able to benefit from special support during the subsequent stages of the procedure, guaranteeing the effective defence of his or her interests. Moreover, where the complexity of the situation so requires, the person of trust must also ensure that the minor can obtain the assistance of a legal adviser. If the person of trust clearly acts against the minor's interests or fails to act in the manner necessary to the defence of those interests, he or she must be deemed to have failed in the due performance of his or her role, and this conduct must be held to constitute a breach of the right to a hearing.

30. Through the series of measures adopted, Switzerland is seeking to respond to the specific situation of women and unaccompanied minors in the context of asylum procedure, notably by attaching particular importance to their special treatment. Framework criteria have been determined to guarantee the appropriate assessment of asylum requests filed by persons belonging to these vulnerable groups. This process, which is ongoing, has made it possible more closely to determine the protection needs of such individuals.

III. The situation of children

1. Principles

31. Because of the age factor, children are frequently unable to exercise their rights independently, making appropriate procedural methods necessary to facilitate access to justice for juveniles.

- Where it proves necessary, children are entitled to free legal aid and to the payment of lawyer’s fees.
- Children can enforce their rights only if they are aware of them. They should therefore be adequately informed of their rights.

32. During judicial proceedings, children should not be treated as objects, but taken seriously as persons entitled to rights and subject to obligations:

- In so far as their age permits, children should be given a hearing. They should be allowed to express their own needs and preferences.
- When children are involved in proceedings, questions concerning them should be explained to them in a language that they understand. This presupposes not only the assistance of a translator for children whose language is a foreign one, but also, if necessary, the use of a person trained in psychology and education and therefore able to explain to the children, in language appropriate to their age, the facts and the legal situation.
- Proceedings should be designed to be as simple and informal as possible, so that children can follow the various stages.
- Jurisdiction should be undivided as far as is possible. Children should not be passed from one authority to another. Where several authorities are dealing with a case, they should obtain the requisite information together.
- Jurisdiction ratione loci should primarily lie with the authorities of the child's place of residence, which are in a better position to react speedily and with the advantage of local knowledge.

2. Child victims of offences

33. Children should be effectively protected from infringements of their physical, psychological and sexual integrity. This also - and particularly – applies in the event of violence within the family.

34. Children react particularly sensitively to intervention by the state, so they need particular protection. There is good reason to take account of this by making special provision for assistance to child victims, especially when hearings take place. Not only should they have the customary right to participation and to protection, but special measures should also be taken to spare them psychological trauma and to avoid further victimisation:

- The first hearing should take place as soon as possible; the holding of further hearings should be exceptional and, in so far as is possible, these should be conducted by the same person who conducted the first hearing.
- It should be possible for the authority to exclude the person of trust from the proceedings where this person might have a negative influence on the child.
- Confrontation of a child victim with the accused should be avoided. The rights of the accused should be taken into account in a different manner, e.g. through the use of one-way mirrors.
- Hearings should be conducted by an investigator trained for the purpose.
- When it is in the interest of the child, it should be possible to forego prosecution altogether and to guarantee protection of the victim by another means.

35. In Switzerland, these principles are currently regulated by the Assistance to Victims Act; in future, they will be incorporated into the unified Code of Criminal Procedure recently adopted by parliament.

3. Children who commit offences

Causes

36. The main offences committed by children in Switzerland are offences against other people's physical integrity, life, property, liberty and sexual integrity. Additionally, drug-related offences and Highway Code infringements are to the fore. The public perception is that young people now use violence more readily than in the past. To date, however, there are no statistics clearly confirming this tendency.

37. The causes of youth offending, which are manifold, are under close scrutiny. The experts broadly agree at the moment that numerous factors connected with young people's social environment increase the risk that they may offend:

- Parents do not look after their children or supervise them closely enough, not because they are unwilling, but as a result of their circumstances: in some cases, for instance, although both parents work, their children are not in the care of a school or nursery school and are left to their own devices during the day. Often unconsciously, the young people concerned try to gain more attention by offending.
- Some parents thoughtlessly fail to set clearly defined limits, and from this situation their children learn that no negative consequences ensue if they do the opposite of what they are asked to, or if they break the rules. Such children regard offending as a way of testing the limits set by society and the law.
- Children experience major disputes within the family circle. They often witness violent scenes or themselves fall victim to physical violence. In later life, they often become perpetrators instead of victims.
- Problems at school or in other spheres may leave children feeling inferior. Some try to regain their self-esteem by repeatedly and successfully breaking the law. If they also find themselves in a group (their set of friends) which does not reject delinquency, they may also regard offending as a way of earning social recognition.
- Today's children grow up in a consumer society which gives them the impression that everyone is entitled to the best possible standard of living. If young people from disadvantaged backgrounds just go one step further, they try to obtain what they want illegally.

38. The list of causes of youth offending is in fact even longer. Other factors, such as the viewing of violent or pornographic videos, exert a still largely unknown influence.

39. In short, youth offending today always represents a failure as well by the families and friends of the young people concerned and by society in general. This is why it is particularly important to take preventive action against youth crime. The criminal law as it applies to children is a last resort and should be used only when non-criminal educational measures have failed, or seem inappropriate from the outset. It is all too easy to call for tougher penalties for young offenders. This may help to assuage public fears and to demonstrate a political will to do something about it, but will not be enough to solve the problem.

Substantive criminal law

40. The aim of substantive criminal law as it relates to children must be to educate young offenders. The relevant law is thus - more so than is adult criminal law - a law that relates to the offender: a penalty is not imposed for its own sake, but solely to reintegrate the offender into society.

41. This objective can be achieved only if a specific system of penalties is used, distinct from that applied to adults; such a system has recently been introduced under federal Swiss legislation, namely the Criminal Status of Juveniles Act. The principles on which this system has been based are:

- The kind of penalty should not depend primarily on the seriousness of the offence. The decisive criteria should be the young offender and his or her personality, level of development and family and friends.
- Young people should be held in custody only if this seems necessary, in the specific cases concerned, for their social rehabilitation.
- The criminal law relating to children should provide for an adequate number of different penalties, so that appropriate account may be taken of individual situations.

- Priority should be given, not to penalties, but to, for example, individualised measures, or - in serious cases - residence at an educational establishment.

Criminal procedure and sentence enforcement

42. The aim of the criminal law relating to children is education. True education can take place only if young offenders acknowledge that what they did was wrong: the extent of their acts should be explained to them, and they should understand, as far as is possible, that they have done wrong.

43. Several conclusions may be drawn from this:

- Very young offenders can recognise that they behaved wrongly only if their penalty is imposed within an appropriate period. As far as is possible, criminal proceedings against juveniles should therefore be conducted speedily. The principle of rapid action deserves particular attention.
- It is important to explain to young persons why society regards their conduct as wrong. Personal interviews are the most appropriate means of doing this. As far as is possible, written proceedings should thus be avoided.
- In principle, the public should not be admitted to criminal proceedings relating to juveniles: the aim should not be to put young offenders on display.
- It should be an exception for children to be remanded in custody.
- Not only alternative types of penalties, but also special procedures deserve greater attention. Particular encouragement should be given to compensation and mediation between offender and victim.
- Needless formalities should be avoided. Young people should respect their judges, but not be in fear of them.

Care should be taken to ensure that the state has an adequate number of establishments for sentence enforcement, where young people's individual needs can be adequately taken into account.