



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



Strasbourg, 18 February 2009

CommDH/Speech(2009)1

9th Informal ASEM Seminar on Human Rights “Human Rights in criminal justice systems”

KEYNOTE SPEECH

by Thomas HAMMARBERG

Council of Europe Commissioner for Human Rights

When trying to present the human rights situation in Europe to friends from other parts of the world I usually focus on two aspects. One, that we Europeans have no grounds for complacency – there are serious human rights problems on our continent. And two, that there is a process of harmonisation of human rights policies and procedures - not least through the Strasbourg court and other institutions of the Council of Europe - and that this encourages positive reform.

It is not difficult to list the problems. There is a tendency of xenophobia in many European countries. The number of hate crimes is high, and many of those crimes are fed by racism and anti-Semitism, anti-Ziganism, Islamophobia, homophobia and other prejudices among the population at large. Migrants are often disadvantaged in the system of justice, in particular, of course, those who have no permit to stay in the country. Trafficking of human beings is still a major problem, and the victims of trafficking are vulnerable in society.

More needs to be done for the full implementation of women's rights. Women are still discriminated on the labour market and the phenomenon of domestic violence is still of great concern. Violence in the homes and in institutions also victimise children. Another group of people whose rights are not fully ensured are those with disabilities. I am deeply concerned about the situation of persons with mental disabilities in a number of European countries.

These and other problems of discrimination also affect the workings of the system of justice as such, including the theme of this seminar covering different moments of deprivation of liberty - from arrest to punishment.

This as a major area of work for the Council of Europe not least thanks to the case law of the Court. I would like to contribute with some reflections largely based on my own field visits to the 47 member states. My appeal is that all these different moments of deprivation of liberty be guided by two underlining principles: **respect of human dignity and respect of the rule of law**. Even in situations of emergency or armed conflict these principles should be respected.

1. Arrest and detention should take place in respect of human dignity and **not in a spirit of impunity**. I have received so many reports that people are beaten up, ill-treated in order for the police to get a quick confession, and thereby advance quickly in the proceedings. This is something we need to stem. We have to make absolutely clear that such methods cannot be used.

When I talk with prisoners in privacy they often mention that they were beaten up by the police. When I ask them why they have not complained, they say that they were afraid of being beaten up again. This is a problem that we have to face, should not deny, should try to keep an eye on. And try to teach the police forces that this is just not acceptable. Take, for example, the growing number of judgments by the Court on excessive use of violence by the police. Most of the time these judgments pinpoint the lack of an effective judicial investigation. I have come to the same conclusion during my country visits.

The need to combat impunity for certain perpetrators goes hand in hand with winning public confidence. The Court is clear in this respect: *“the domestic judicial authorities must on no account be prepared to let the physical or psychological suffering inflicted go unpunished. This is*

essential for maintaining the public's confidence in, and support for, the rule of law and for preventing any appearance of the authorities' tolerance of or collusion in unlawful acts"¹.

My Office convened a workshop which discussed current developments among police complaints bodies and the effects of the jurisprudence of the European Court of Human Rights on investigations into **alleged police misconduct** at national level. We will publish in the coming weeks an Opinion concerning independent and effective determination of complaints against the police.

2. Respect of human dignity means also that **conditions of detention should be humane**. Conditions in prisons are appalling in several European countries. In some cases the treatment of the inmates is clearly inhuman and degrading. It may not be popular to invest in the improvement of detention centres but governments have a duty to ensure that prison sentences do not destroy the health of those deprived of liberty.

International watch mechanisms have been established to ensure that states adopt measures to uphold these treaties and to condemn any practices of torture when they occur.

The reports of the European Committee for the Prevention of Torture (CPT) have encouraged reforms and rebuilding of prisons. Important is also the 2002 optional protocol to the United Nations Convention against torture, the so-called OPCAT. One obligation for States which have ratified the protocol is to establish a *national preventive mechanism* to monitor police detention cells, prisons, psychiatric hospitals, detention centres for refugees and migrants, institutions for young law offenders and any other place where persons are held involuntarily. The implementation of this obligation has started in some countries.

3. The right to **fair trial** requires an **independent judiciary**. When the judiciary is not independent the proper administration of justice is at danger. Factors other than those contemplated by the legal system are likely to distort the judicial work with the result that the rule of law will not always be adhered to. In several European countries there is a widespread belief that **the judiciary is corrupt** and that the courts tend to favour people with money and

¹ *Okkali v. Turkey*, 17 October 2006, para.65.

contacts. Though this perception may sometimes be exaggerated, it is not baseless and should be taken seriously. No system of justice is effective if not trusted by the population.

These flaws should be tackled with priority and in a systematic manner. The basis has to be a concise legislation which criminalises acts of corruption. However, such laws can in themselves hardly address all concrete problems in this field. It is extremely difficult to define the criminal dimension of some of the corrupt practices, such as nepotism and political favouritism.

Issues relating to conflict of interest must also be assessed in their context. In other words, more focused standards and effective follow-up mechanisms are necessary. Codes of conduct could serve as useful tools to enhance the integrity and accountability of the judiciary. Judges should not have to fear dismissal after inopportune decisions and should therefore have a security of tenure until a mandatory retirement age or expiry of a fixed term of office.

Clear procedures for the recruitment, promotion and tenure of judges and prosecutors are a must and should confirm the fire-wall between party politics and the judiciary. The requirements concerning the integrity of the judges should be defined at an early stage of judicial selection and appointment. Each candidate's application should be reviewed properly with a focus on theoretical, as well as practical, issues; and questions relating to the Convention and the case-law of the European Court of Human Rights should be integrated into the selection procedure. Finally, the establishment of a performance evaluation system and regular training for judges is essential.

A particular problem in some countries with a recent history of Communist rule is the excessive power of the prosecutors including the quasi-judicial function of general oversight. Some of these prosecutors interfere in the judicial process, sometimes with a political agenda, and thereby undermine the independence of the procedures. Admittedly, there have been important reforms in some of the countries so that the oversight function has been relocated and a distinction made between investigation and prosecution.

4. Particular attention must be given to the problem of young people who go astray and commit crimes at an early age, **juvenile offenders**. In juvenile justice there should be *no retribution*. The intention is to establish responsibility and, at the same time, to promote re-integration. We need

to separate the concepts of “responsibility” and “criminalization”. It is essential to establish responsibility for conduct which contravenes the law. Where responsibility is disputed, there has to be a formal process to determine responsibility in a manner which respects the age and the capacity of the child. However, this does not have to be a criminal process nor involve the criminalization of children.

The young offender should learn the lesson and never repeat the wrongdoing. This is not easy to achieve in reality. It requires innovative and effective community sanctions. In principle, the offender’s parents or other legal guardian should be involved, unless this is deemed counter-productive for the rehabilitation of the child. There should be particular court procedures to deal with juveniles. They should be child-friendly and, from the outset, aim at the purposes of rehabilitation and re-integration rather than aiming at punishment for the sake of retribution.

For this to work, there is a need for everyone involved, including judges and prosecutors, to be educated about the special needs of children. Imprisonment should generally be avoided. Any arrest or detention of a child should only be used as a measure of last resort and for the “shortest appropriate period of time”. The only justification for detaining children should be that they pose a continuing and serious threat to public safety. This requires frequent periodic review of the necessity of detention in each case. The conditions of any detention must be humane and focused on rehabilitation

5. Indeed rehabilitation is the aim of punishment not only for juvenile offenders. The vision of rehabilitation should be protected, not undermined. I have called for a re-examination of **life imprisonment** without the possibility of release. My opinion is that sentencing to indefinite imprisonment is wrong. In fact, some countries in Europe do not allow for life sentences irrespective of the crime, for instance Norway, Portugal, Spain and Slovenia (though very long fixed-term prison sentences can be handed down). This gives the convict at least some clarity about the future. Some other countries permit reviews after a certain period of time during which the behavior of the prisoner normally is one criterion. Convicts in these cases may therefore see a possibility of release.

There is also a need to discuss a new category of “lifers” which has emerged in a growing number of countries: offenders who have never been convicted to a life sentence but might well

serve one in reality. By virtue of new laws adopted in the name of so-called public security, serious offenders may be denied not only conditional release but even release once they have served their full sentence - if defined as dangerous by experts. If release is denied persistently until the end of a detainees' life, this will amount to de facto life imprisonment. Such legislation raises concerns about compatibility with the rule of law, the principle of legal certainty and of the right not to be tried or punished twice – important principles of our penal law systems and the international human rights norms. It is my conviction that the present trend of the use of life sentences must be questioned. Though severe punishments will continue to be necessary in some cases to protect public safety, it is possible if there is a political will to give room to human considerations and for the chance of rehabilitation of convicts.

I believe I have made the point that complacency would not be justified. I hope I have also clarified that there are steps taken to address the problems and that the Council of Europe institutions play an important role for these efforts. The fact that the European Convention on Human Rights is ratified by all member states and also made *law of the land* in all of them is of crucial importance. All 800 million inhabitants in the Council of Europe area have the right through individual petition to the Strasbourg Court to seek justice when feeling that the domestic remedies have not protected their rights. The mere existence of that possibility has an impact for the promotion of human rights on our continent.