# REFORMS OF THE CRIMINAL JUSTICE SYSTEM IN EUROPE – COMPARATIVE PERSPECTIVES AND GOOD PRACTICES

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In these remarks I would like to comment on a few aspects of what is really a very large topic. Certainly the need for reform of criminal justice has been and continues to be an issue which engages all the member States of the Council of Europe. This is because reform is not something that can ever be said to have been finally accomplished. In reality, the process of reform is an ongoing or never-ending requirement on account of various factors. I will say something first about these factors and then the process of reform and its implementation, concluding with a number of essential points or good practices that ought to be observed.

The need for reform can arise from the recognition that particular well-established ways of doing things are now creating problems, especially with respect to compliance with the European Convention on Human Rights, even if that was not always the case. It can also arise from the emergence of new problems or challenges and from the eventual recognition that certain long-standing problems actually do exist.

An example of circumstances overtaking established methods can be seen in Malta which has had a process for determining whether or not a suspect should be committed for trial that was introduced in the nineteenth century. This has involved subjecting all potential witnesses to examination and cross-examination before a judge. The aim was to ensure that no one was forced to undergo an oppressive or unwarranted prosecution. However, this system originated when there was a low level of criminality and when proceedings were not particularly complex. As these circumstances changed so did a procedure that was relatively brief become much more lengthy, often on account of difficulties in arranging for all witnesses

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to attend a single hearing and numerous extensions of deadlines being required both to hear them and also to allow for some further investigations to be undertaken.

As a result, the procedure has become unduly long-winded and has been creating problems of complying with the reasonable time requirement, even before the trial had even begun. The solution now being elaborated – with the assistance of the Council of Europe - is likely to entail entrusting the decision to prosecute to a newly-established independent prosecution service and to require early disclosure of the evidence to the defence, together with the possibility for the defence to submit to a judge that the evidence so disclosed does not justify the case going to trial.

As regards the second factor, it is not surprising that there are many new challenges for criminal justice systems that arise from the emergence of new means of criminal activity. This is especially so of the opportunities afforded by the internet, notably as regards the misuse of a person's identity for fraud or theft and the dissemination of exploitative images of children. Such activities require not only the creation of new criminal offences but also the authorisation of additional and new forms of investigative techniques. Both of these needs must, of course, be addressed in a manner that is still in conformity with the essential elements of the rights and freedoms in the European Convention.

The third situation – the realisation that a problem actually exists – can be seen in the increasing realisation that hate speech in a wide variety of forms is something should be tackled. At times this may have been ignored on account of the need to safeguard the right to freedom of expression but that right is not absolute and there is now greater appreciation of the obligation also to protect those who are subjected to hate speech from the assault on their dignity and their right to equality.

Equally, it is now being recognised that domestic violence is something that should be addressed in criminal justice systems. Such violence is really nothing new but the very use of

the adjective “domestic” was in the past a way of keeping conduct that amounted to a number of offences out of the reach of those systems. Now, with the adoption of the Istanbul Convention, that unjustified neglect is no longer possible and there is a need for the reappraisal of the substantive criminal law so that it deals with psychological as much as physical violence, as well as conduct such as stalking and forced marriage. At the same time there is a need for action to protect and support victims, to ensure that there is effective investigation and to facilitate international cooperation, all of which have implications for procedural law. Support for such action is something to be undertaken through cooperation projects being initiated by the Council of Europe’s Gender Equality and Violence against Women Divisions.

The provisions of the Convention are in some respects a codification of a process that could already be seen to be under way in the interpretation of provisions of the European Convention on Human Rights. Thus, the European Court of Human Rights had found on a number of occasions – notably in cases such as *Sandra Janković v. Croatia*, no. 38478/05, 5 March 2009 and *Opuz v. Turkey,* no. 33401/02, 9 June 2009 - that the failure to deal with instances of domestic violence not only entailed violations of substantive and procedural obligations arising from the right to life and the prohibition of inhuman treatment but also amounted to a violation of the prohibition of discrimination.

This case law of the European Court is just one instance of the considerable importance that the rulings of the European Court have for the reforms being undertaken in criminal justice systems across Europe. It shines a light on problems in those systems, both ones that are new but also ones that were not fully appreciated. Certainly, those who were responsible for drafting the European Convention were undoubtedly quite confident in their assumption that there were no problems of compliance with its requirements in their own legal systems.

However, that assumption was clearly misplaced, not because they were deluding themselves but for at least three inter-related considerations. Firstly, the European Convention is a living instrument and is not to be applied in a static framework. Secondly, some situations now seen as problematic – such as domestic violence – had not then been so recognised. Thirdly, the focus in dealing with criminal justice was firmly on the explicit provisions dealing with it – notably those in Articles 5 and 6 – without really thinking about the potential for the operation of criminal justice systems to have an impact on other rights. In the light of these considerations, the case law of the European Court has thrown up many issues in respect of which member States have found it necessary to reform aspects of their criminal justice systems.

A good instance of the first consideration is the way in which the European Court came to appreciate in *Borgers v. Belgium* [P] no. 12005/86, 30 October 1991 that the presence of the advocate general in certain systems at the deliberations of cassation courts with a view to ensure consistency in the formulation of its case law was incompatible with the right to equality of arms. This was because it gave the advocate general to recommend that an appeal be allowed or dismissed without the defence having an opportunity to respond. There was no question as to the integrity of the advocate general but the European Court underlined how the importance of appearances and increased sensitivity of the public about the fair administration of justice shaped the way the right to a fair trial was to be viewed.

This emphasis on fairness as the overriding consideration in the application of the requirements in Article 6 has also led the European Court to elaborate some specific requirements that are not dealt with expressly in this provision and which, therefore, had necessitated adjustments to be made to a number of criminal justice systems.

Thus, fairness was the basis for establishing that there is a need for protection against any compulsion to incriminate oneself. This has been made clear in cases such as *Saunders v. United Kingdom*, which dealt with a legal compulsion to participate in an administrative

inquiry, the fruits of which were then used in the course of a later criminal prosecution of the persons required to give evidence to that inquiry.

However, the protection against self-incrimination goes beyond such situations of legal compulsion. It will, for example, also cover the use of persistent questioning of a suspect by a cell-mate which is orchestrated by the police (*Allan v. United Kingdom*, 48539/99, 11 July 2006), the use of force to regurgitate something swallowed (*Jalloh v. Germany* [GC], no. 54810/00, 11 July 2006) and the roadside questioning by a police officer of a suspect in a stressful situation (*Alexander Zaichenko v, Russia*, no. 39660/02, 18 February 2010). All of these can have implications for the rules governing criminal proceedings as well as the manner in which they are actually conducted, for which the adoption of reforms may be needed.

Similarly, the concept of fairness has also been important for it being established by the European Court that evidence obtained through incitement to commit an offence will render a conviction based on this contrary to Article 6. The use of undercover operations has, of course, become crucial for tackling certain forms of criminality and this is understood by the European Court. Without it establishing who was involved in activities such as the trafficking of drugs and people would often be impossible since such persons do not readily leave a public trail of the stages involved, even if the ultimate consequences of drug use and prostitution are all too evident.

Nonetheless, the European Court has emphasised the need for there to be a proper procedural framework for authorising the use of undercover activities, which will entail their approval by a judge and consideration of the basis for undertaking them and the particular background of the suspect. In many cases – such as *Ramanauskas v. Lithuania* [GC], no. 74420/01, 5 February 2008 - it has found this to be lacking and also concluded that that, without the intervention of the police, the accused would not have committed the offence. However, in some cases – such as in *Lagutin v. Russia* – the evidence before the European

Court was insufficient for it to reach such a conclusion. Nonetheless, in those cases it has underlined the need for national courts themselves to have given proper consideration to the justifiability of allegations that the cases before them have involved entrapment. Where this cannot be demonstrated, there has still been a finding of a violation of Article 6 on account of this procedural failing. These developments have had important implications for both the rules of evidence and the practice of the courts.

These are, of course, just a few instances of the rulings of the European Court that have necessitated the reconsideration of domestic rules and practices. Others that should be briefly mentioned are cases such as those concerned with the way in which courts should approach situations where a witness cannot be subjected to cross-examination, whether or not his or her absence is for good reason, as seen in the rulings in *Al-Khawaja and Tahery v. United Kingdom* [GC], no. 26766/05, 15 December 2011 and *Schatschaschwili v. Germany* [GC], no 9154/10, 15 December 2015 and the requirements to be followed when introducing and operating a system of plea bargaining, as underscored in *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, 29 April 2014 and N*avalnyy and Ofitserov v. Russia*, no. 46632/13, 23 February 2016

However, reform is not just about adapting existing provisions so that they are in conformity with the requirements of the European Court. It is also a matter of ensuring that measures adopted for good reason and that are, in principle, compatible with the European Convention, do not have an adverse effect on rights other than those in Articles 5 and 6. Regrettably this does not always happen and reform is then needed.

Thus, certain criminal activities need to be detected with the assistance of investigative techniques such as the interception of communication and the conduct of searches. Neither are inherently inconsistent with the right to respect for private life, the home and correspondence in Article 8. Nonetheless, the use of such techniques has, in many cases, been found to violate this provision. In some instances, such as *Khan v. United*

*Kingdom,* no. no. 35394/97, 12 May 2000 and *Heino v. Finland*, no. 56720/09, 15 February 2011 this has been because the law did not provide any or a proper legal basis for these techniques. This requirement will only be satisfied where there are clear, detailed rules, which set out in particular safeguards against possible abuse or arbitrariness. In all cases there will be a need for judicial authorisation, generally in advance and only subsequently in genuine cases of urgency.

Moreover, in terms of safeguards against abuse where the interception of communications is to occur, the requirements are quite elaborate and thus demanding for the legislature. This is because the applicable rules need to specify the categories of persons and communications affected, the offences for which the measures can be used – these ought not to be the majority of them – the basis for applying for them, their maximum duration, the procedure for examining, using and storing the data gathered, those persons having access to it, the rules on retention and destruction and the provision for independent supervision. These are exacting requirements which require close attention to the framing of the provisions in the legislation being adopted or amended.

As I have already mentioned, hate speech is a problem now recognised to exist in all member States and in some instances tackling it with the criminal law will be the appropriate and necessary response, notwithstanding the right to freedom of expression in Article 10. However, while that right is not absolute, its requirements cannot be completely disregarded. Thus, the particular focus of offences needs to address the actual likelihood of statements stirring up violence, hatred or intolerance. Account should therefore be required to be taken of factors such as a tense political or social situation, direct or indirect calls to violence, the context in which the relevant statements were made and the position of the person making them.

At the same time, such offences should not be drawn in a way that opens up the possibility of suppressing criticism of official positions or of political opposition and religious

beliefs. All of which can make the task of legislating difficult. Nonetheless, the need for there to be reform in this area is one which member States have generally done their best to address. In a number of instances – such in Georgia and the Republic of Moldova - this has or is being done with the assistance of the Council of Europe, with the aim of ensuring that all the relevant standards are duly taken into account in framing new legislative provisions.

In many cases before the European Court in which the use of particular offences has been challenged as infringing a particular right or freedom, an important factor in their successful outcome is not always the framing of the offence itself – which might be regarded as actually consistent with the European Convention – but the nature or scale of the penalty that has been imposed. Thus, it is often the case that the use of imprisonment or a large fine is seen as a disproportionate response to particular conduct. This tends to point to the need to review the framing of the penalties attached to offences and also to the development of sentencing guidelines so that judges are helped in determining how to weigh the circumstances of a particular case and thereby avoid imposing a penalty that is not warranted by them.

In some member States the requirements for reform have gone well beyond the incremental adaptations that are necessitated by particular developments in the case law of the European Court. This is especially so of the States that have joined the Council of Europe in the last couple of decades or so. For at least some of them the need has been to undertake a much more thorough-going reform, adapting the justice system so that it becomes fully compatible with the requirements of the European Convention.

For example, in Ukraine this has entailed the elaboration – with the assistance of the Council of Europe – of an entirely new Criminal Procedure Code – in which the requirements of an adversarial system are now a key feature of the investigation and prosecution of offences. Furthermore, this change has been reinforced by the provision made for the role of investigative judge, in whom is vested the responsibility for ensuring that the conduct of pre-

trial investigations is in accordance with the requirements of Articles 5, 6 and 8 of the European Convention. The efficacy of these changes has also greatly assisted by the institution of a free legal aid scheme for all persons apprehended in connection with offences. This has entailed the establishment of over 100 legal aid centres led by the Coordination Centre for Legal Aid Provision, which mobilises lawyers in private practice and ensures the quality of the standards of legal assistance being provided.

Similar reforms – again with the assistance of the Council of Europe – are currently under way in Armenia, where the focus is not only on modernising its Criminal Procedure Code but also its Criminal Code.

The changes required for a modern criminal justice can involve not only the creation of new institutions – such as investigative judges and legal aid centres – but also the reform of existing ones and their staffing. In particular, some member States – such as the Republic of Moldova and Ukraine - have found it necessary to reform their prosecutorial system to ensure that there were arrangements in place to ensure protection both for the autonomy of individual prosecutors in their decision-making but also for the independence of the system as a whole so that it would no longer be assailed by improper outside pressures to act in a particular way, often at the expense of the due application of the criminal law. Establishing a genuinely independent institution is a complex undertaking that involves often changes to the constitution as well as to legislation and the creation of many subordinate rules.

In both these countries, this has been achieved by, for example, limiting the scope for political considerations to influence the selection of the head of the prosecution service, reducing the possibility for decision-making in individual cases to be dictated by a prosecutor's hierarchical superiors and transferring responsibility for disciplinary decision-making to bodies with a degree of independence from senior prosecutors so that this function is governed by genuinely objective criteria and is not used as a management tool guided by purely subjective considerations.

At the same time, in Ukraine the reform has also been recognised that it is inappropriate for prosecution to be directly involved in the function of investigation as that had provided opportunities for misuse of power and, in particular, corruption. The position now is that prosecutors no longer undertake investigation themselves but are only charged with providing guidance as to its conduct, with a view to ensuring that the efforts of investigators are directed to gathering evidence that can really support a prosecution.

The particular circumstances of Ukraine have also led to the creation of two new agencies with specific responsibility for investigating particular criminal activity relating to public activities. These are the National Anti-Corruption Bureau of Ukraine – whose name clearly identifies its mission – and the State Bureau of Investigation, which is concerned with other offences committed by public officials and especially those involved in law enforcement. Their establishment may not need to be emulated everywhere but their functioning will certainly provide useful lessons as to how to deal with misuse of power.

There has also been a need in some of these member States – notably in Albania, the Republic of Moldova, Serbia and Ukraine - to focus on the requirements for selecting and preparing those who will become judges and prosecutors. This goes beyond them having a certain level of legal knowledge. Those appointed need also not only to have integrity but a wide range of competences and skills for the role that they are expected to play in ensuring the fair, impartial and efficient administration of justice.

This has implications not only for the content of basic legal education in universities but also for the more professional training that needs to be undertaken before those selected take up any appointment as a judge or prosecutor, as well as after they have taken up their posts. A particularly good practice that some have adopted has been moving away from mere classroom learning to much more practical experience to develop the necessary skills and competences, with guidance in this regard being provided by appropriately qualified mentors working as judges or prosecutors.

All these reform efforts might be seen as still no more than work in progress but it is possible to see emerging from it a cadre of judges and prosecutors who not only have the skills to operate a criminal justice in a manner that accords with the requirements of the European Convention but also members with the outlook and independence of mind needed to ensure that those requirements are met in practice.

The experience of these countries – which have been undergoing fairly fundamental reforms – also reveals some useful lessons as to the approach to future reforms – both good practices and pitfalls which one should seek to avoid.

The first is the importance of wide involvement in the reform process so that there is a good understanding of what the reform is trying to achieve. In some countries this has not always been the case so that those who had to implement the reform did not embrace its objectives and public at large were often misinformed or under misapprehensions as to its benefits. The consequence of this was a situation in which some judges, lawyers, police officers and prosecutors worked against the reform, either ignoring its requirements or trying to apply them in a way that meant nothing had really changed. This, of course, reinforced the view of the public that the reform was not beneficial and contributed to strengthening an existing weak level of confidence in the relevant bodies. Engaging with those affected by the reform in the process of considering its adoption will not necessarily bring everybody on board but it is likely to mitigate unhelpful behaviour once it is adopted.

Secondly, there is a clear need for the leadership of those parts of the justice system being reformed to show a clear commitment to the change being undertaken. A lack of enthusiasm on the part of the head of some judiciaries and prosecution systems has tended at times to reinforce the unwillingness of those below to adapt their behaviour to the new requirements.

Thirdly, reform efforts will not succeed if the necessary resources and infrastructure for them is not put in place after adopting the relevant legislative changes. Thus, a stipulation that trials or interrogations should be audio or video-recorded will not be realisable if no provision is made for all police stations and courts to have the necessary equipment and not just some of them. Similarly, if you are going to change the dominant role of the prosecutor in the investigation of crime to one where that task is essentially one for the police acting only under the guidance of prosecutors, this will not be achievable if the personnel requirements are not adjusted.

Moreover, a stipulation that suspects should have legal advice free of charge when being interrogated is unlikely to be effective without ensuring that there is financial support for the provision of legal aid and practical arrangements to secure the availability of lawyers out of ordinary working hours.

Fourthly, it is important to have regard not only to the provisions in the Criminal and Criminal Procedure Codes and other such legislation but also to other institutional arrangements that have an impact upon the way in which the criminal justice system actually functions. Thus, if you want prosecutors to be autonomous in their decision-making, there is a need to ensure that the disciplinary system is not still organised in a way that allows the hierarchical superiors to undermine that autonomy. Moreover, a change of culture will require not simply changes to the law but also changes to the ethical standards expected of judges, lawyers and prosecutors and of the way in which recruitment criteria are elaborated and applied.

Fifthly, there needs to be an appreciation of the impact that one change may have on other aspects of the system. In one member State there was introduced the institution of investigating judge as a means of exerting better control over compliance with the requirements of the European Convention at the pre-trial stage. This was done well but it was not appreciated that there was no legal provision allowing for the continued remand of an

accused person in custody – where this was justified – when jurisdiction over the case was transferred from the investigating judge to the trial judge. As a consequence of this lacuna, the continued detention of an accused was ultimately found in *Chanyev v. Ukraine*, no. 46193/13, 9 October 2014 to be in violation of Article 5(3) as there was no basis for extending this detention after the order of the investigating judge had ceased to be effective.

Sixthly, there needs to be appropriate time allowed for implementing change. Some member States adopt laws that either come into force immediately or do so with only a little delay. In some cases this might be of no importance but it is inappropriate where there are reforms of any real significance. Not only is there the need to ensure that the necessary resources and infrastructure has been put in place but it will in most instances be necessary for there to be provided training and guidance as to how the new rules are to operate. Some guidance – especially that by the higher courts – may only be possible once concrete cases have arisen but professional institutions need to reflect even before that as to what the changes are likely to mean for them and to ensure that articles, books and other aids are prepared to help ensure that the new arrangements work as they are intended.

Similarly, there will be a need for training. It is crucial that this be provided for the sectors in the criminal justice system affected by a particular change. Sometimes it seems that lawyers in private practice are overlooked in this regard. However, it can also be the case that the training arrangements made for judges and prosecutors are unsuccessful because their workload is such that they do not have the time to take the course, whether these are given live or are in an online format. Training needs to be seen as part of the normal working commitment and not an optional extra. A good practice - for certain topics at least – can be to have joint trainings for judges, lawyers and prosecutors or some mix of these as they can learn from each other in adapting to the new requirements that they are expected to observe.

Finally, the most important lesson is to keep monitoring the operation of the justice system even after changes have been made and to keep an eye on the way in which the case

law of the European Court evolves. The former is important because changes do not always work out as intended and adjustments may be needed. The latter is also crucial and this monitoring should not be restricted to the cases involving one's own country. Seeing what problems have been encountered by other countries may be helpful. Looking at the Court's ruling in a given case, one should ask what would happen if such circumstances arose? Would the same outcome be reached as that of the national court concerned? Even if the answer is no, the need is still to reflect on whether there might still be some difficulties in complying with the relevant Convention requirements. In either case, this reflection can provide the opportunity then to take appropriate pre-emptive action so that resort to the Court in Strasbourg does not become necessary.

The task of reform is, as I have said both a continuing and a demanding one. Rising to its challenges is a price worth paying for a justice system that meets the requirements of the modern age without in any way sacrificing the requirements of the rights and freedoms guaranteed by the European Convention.