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"The Justice System Could Function Better"

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Modernising the justice system is urgent in several member states. Such measures would contribute to enhancing efficiency, accessibility and the ability to deliver timely decisions in a cost-effective manner. Modern Information and Communication Technologies (ICT) are a key aspect of this process, and can be used to improve transparency and interaction between public authorities and people. Such technologies are an essential tool for allowing the justice system to keep pace with current information and communication practices.

However, the concept of transparent and efficient justice goes beyond the question of efficient information processing systems. Modern ICT solutions are necessary, but they cannot cure some systemic ills which, unfortunately, continue to affect our justice systems. I will focus on these problems.

Transparent and efficient justice

The right to a fair trial requires an *independent* judiciary. When the judiciary is not independent the proper administration of justice is in danger. Factors other than those contemplated by the legal system are likely to distort judicial work, with deleterious effects upon the rule of law.

In several European countries there is a widespread belief that *corruption* is affecting key components of the justice system: the judiciary, the police and the penitentiary. Though this perception may sometimes be exaggerated – or exploited in party-based political propaganda - it should nevertheless be taken very seriously.

Certain leading politicians do not always respect the independence of the judiciary and instead give underhanded signals to prosecutors or judges on what they are expected to deliver. This is sometimes referred to as 'telephone justice'. Another symptom of an ailing system for the administration of justice is the tendency to resort to the selective prosecution of political opponents.

These shortcomings should be tackled in a systematic manner. The basis has to be a concise legislation which criminalises acts of corruption. 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.

An important aspect of ensuring transparency of the justice system is the need to protect those individuals working within the system who become aware of wrongdoing and report misconduct in good faith. Such whistleblowers have too often been hit by retaliation - dismissals or worse - which in turn may have silenced others who have had grounds to report. Also, many corruption scandals have been exposed by the media. This is one reason why it is essential to promote freedom and diversity of the media and to protect the political independence of public service media. A further factor for promoting transparency is freedom of information legislation.

Not only should governments be passively transparent, they also have an obligation to ensure that the public has effective access to information. The European Court of Human Rights has emphasised that the public must have information on the functioning of the judicial system, which is an essential

institution for any democratic society: "The Courts, as with all other public institutions are not immune from criticism and scrutiny."[1] No system of justice is effective if it is not trusted by the population.

Some non-governmental organisations already play an important role in the struggle against corruption. Ombudsmen and other independent national human rights structures are in some countries actively working against undue influence and other corrupt practices.

Many Council of Europe member states have experienced the challenge of moving from a system in which judges served the political interests of the regime, to an order based on the rule of law. While progress has been made in many areas, I have observed that the independence of judges is still not fully protected in some of the countries I have visited. Political and economic pressure still influences the courts. Where money and politics are mixed up, justice suffers.

Another key factor is that the judicial system functions in an efficient and timely manner - justice delayed is justice denied. The Strasbourg Court is inundated with applications concerning lengthy judicial proceedings. This is a problem which affects the whole continent, although some countries are particularly fraught with lengthy judicial proceedings and have attempted to resolve this problem with domestic remedies. An efficient judiciary demands:

- Proper working conditions. In practice this means that there should be a sufficient number of judges recruited.
- Judges need adequate support staff and equipment.
- Judges need to be safe. States need to ensure the safety of judges by including the presence of security guards on Court premises or providing police protection where necessary.

Several of these recommendations could be addressed to all European states. It is in the nature of these problems that further measures to safeguard the independence, impartiality, competence and efficiency of judges are relevant everywhere.

Prisons in today's Europe

The right to liberty is one of the most fundamental of human rights, recognised in international human rights instruments and national constitutions. Interference with this right should only take place if deprivation of liberty is the only possible means for achieving an important societal objective which cannot be attained through an alternative and less restrictive measure. A particularly delicate situation arises when suspects or accused persons are deprived of liberty, as the presumption of innocence applies to them. Under Article 5 of the European Convention on Human Rights, deprivation of liberty of such persons has to be justified as reasonably necessary to prevent them from committing an offence or fleeing after having done so.

My appeal is that each deprivation of liberty be guided by two underlying principles: respect for human dignity and respect for the rule of law. Even in situations of emergency or armed conflict these principles should be respected.

[1] *Skalka v. Poland*, 27 May 2003, para. 34

Respect for 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 places of deprivation of liberty, but governments have a duty to ensure that the prison environment does not destroy the health of those imprisoned.

Several judgments issued by the European Court of Human Rights[2] and the increase in the number of applications relating to overcrowding submitted to the Court show that this issue has become a systemic problem. According to Council of Europe statistical data, as of September 2008 there were more than 1.8 million persons in correctional institutions. The figures show that prison overcrowding exists in many Council of Europe states. Overcrowding poses major challenges to the prison administration as well as provoking a host of problems for the prison population, amongst them the increased potential for violence and tension between prisoners. Overcrowded places of detention are known to be incubators of diseases such as tuberculosis and AIDS, which also affects the wider community. Family visits and other contacts with the outside world for prisoners are more difficult to arrange in overcrowded prisons.

This problem needs to be tackled. A coherent strategy should be developed and legislators, judicial officers, members of NGOs and civil society should be actively involved. Alternatives to imprisonment should be carefully considered.

The European Committee for the Prevention of Torture (CPT) has performed excellent work by carefully documenting the nefarious effects of overcrowding in prisons throughout Europe and by encouraging reforms through its dialogue with member States' authorities. The mechanism created by the 2002 optional protocol to the United Nations Convention against torture (OPCAT) is another important preventive tool. One obligation for States which have ratified the protocol is to establish a national preventive mechanism to monitor places of deprivation of liberty. The implementation of this obligation has started in some countries.

Prisons exist in every European country. Authorities and policy-makers have too often come to regard imprisonment as the only possible response to crime, and are reluctant to seek alternatives, even though imprisonment has in many respects been shown to be ill-adapted and even counterproductive in the rehabilitation and reintegration of those sentenced for minor offences, as well as for vulnerable groups – juveniles, migrants, mentally ill persons.

There is too little discussion about alternative measures to imprisonment and other forms of custodial measures or sanctions. In my view, it is crucial to examine all possibilities which help achieve rehabilitation. In some countries the use of electronic devices which allows monitoring of detainees outside prison has been introduced. Other alternative measures include community service and probation. However, I have noticed that some governments fear taking an approach which may appear to be too "soft" when public opinion – or some vocal part of it –demands heavy punishments.

The impression that the public is of an inherently punitive mindset should not be a guiding factor in criminal justice policy. The authorities should develop a strategy for placing sufficient information in the public domain so that members of the public can make an informed opinion about alternatives.

[2] (i.e. *Kalashnikov v Russia*, no. 47095/99, judgment of 15 July 2002, *Melnik v. Ukraine*, no. 72286/01, judgment of 28 March 2006, *Istratii and others v. Moldova*, nos. 8721/05, 8705/05 and 8742/05, judgment of 27 March 2007, Petrea v. Romania, no. 4792/03, judgment of 28 April 2008)

Senior politicians and civil society leaders are key actors who have an important role to play in informing the discussion on alternatives to imprisonment, as do the media. It is essential that the public have reliable information about the overall efficacy of alternatives to imprisonment.

Implementing effective alternatives to imprisonment will reduce overcrowding and make it easier to manage prisons in a way that will allow states to meet their basic obligations to the prisoners in their care.

Particular attention must be given to the case of young people who have committed crimes. In juvenile justice there should be no retribution. An effective and humane policy should put the emphasis on prevention. If prevention fails and a minor commits a crime, the principle should be to establish responsibility and, at the same time, to promote re-integration. Imprisonment should generally be avoided. Any arrest or detention of a minor should only be used as a measure of last resort and for the shortest appropriate period of time. The only justification for detaining children and minors can 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.

If minors are to be deprived of their liberty, their conditions of detention must be humane and focused on rehabilitation. The 2008 European Rules for Juvenile Offenders set out fundamental guidelines that should be carefully implemented. An individual assessment should be made for every child in order to determine the type of placement best suited to his or her needs. The facilities should be properly adapted and permit full separation from places where adults are held. Detention facilities should provide a range of services and education, including physical education.

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One of the unfortunate situations I have encountered during my visits is that there are persons who are in prisons who should not be there at all. This is sometimes a consequence of an inefficient judiciary susceptible to undue influence. Independence of the justice system is still a distant goal in some places.

Human rights discourse has in recent years focused considerably on the obligation of State authorities to protect people against specific types of criminal abuse – our campaigns against trafficking in human beings and against domestic violence are examples. While some people are unjustly imprisoned, we are concerned that some of the most serious crimes are not punished at all.

The challenge for criminal justice policy is to combine preventive action, professional and effective law enforcement and a system of sanctions which is fair and facilitates rehabilitation rather than contributing to recidivism.