COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

CommDH/Speech(2012)17
English only

"Re-thinking Access to Justice in Practice"

Address by Nils Muižnieks
Council of Europe Commissioner for Human Rights

Fundamental Rights Conference 2012
Justice in austerity – challenges and opportunities for access to justice

Brussels, 7 December 2012

In my day-to-day work with the 47 member states of the Council of Europe, I am confronted with a simple reality: human rights and the rule of law are empty words when the justice system is inefficient or inaccessible. In practice, litigation remains one of the most effective ways in which human rights standards come to life for ordinary citizens.

When a court enforces a human right in a particular case, it is not only the litigant who benefits from it, but the whole society. In the context of the Council of Europe, nothing illustrates this better than the impact of the judgments of the European Court of Human Rights. I have observed first-hand how these judgments can be fundamental game-changers where everything else, including politics and diplomacy, has failed.

However, going before a court to seek justice is a daunting task for many. For vulnerable groups or victims of institutional discrimination, the task quickly gets from daunting to virtually impossible. There is a gap between ordinary persons and the judge who could enforce their human rights, as court proceedings are, more often than not, complex, time-consuming and extremely costly. The economic crisis cannot but amplify this gap, in particular for the most marginalised segments of society.

I want to share with you some thoughts about possible ways of bridging this gap and how the Council of Europe contributes to this process. These ideas are centred around: 1) legal aid; 2) the particular needs of the most vulnerable, which are not sufficiently catered for under the existing legal aid schemes; 3) the value of resource-efficient alternatives complementing legal aid, such as public interest litigation, low-threshold bodies and simplified procedures.

Legal aid

The traditional method of bridging the gap between the ordinary citizen and the judge has of course been legal aid. As the Committee of Ministers of the Council of Europe recognised in 1978, legal aid in non-criminal cases should not be seen "as charity to indigent persons but as an obligation of the community as a whole".[1] The Strasbourg Court also developed an important body of case-law as to when legal costs interfere with the very essence of the right of access to a court. For example, denial of legal aid can be a human rights violation when

[1] Resolution (78) 8 on legal aid and advice, adopted by the Committee of Ministers on 2 March 1978.

the procedure is very complex or when representation by a lawyer is compulsory before the court.[2] Excessive court fees can also violate one's right to a fair trial.[3]

However, statistics of the European Commission for the Efficiency of Justice (CEPEJ) show extreme variability in terms of court fees and legal aid. Legal aid budgets range from 1 euro cent per inhabitant in Albania or 3 euro cents in Hungary, up to 22 euros in the Netherlands or 46 euros per inhabitant in England and Wales. Even allowing for differences in legal systems, that is a ratio of thousands to one. In addition, some countries have problematic procedures and practices in granting legal aid. Last month, I wrote to the Minister of Justice of Albania precisely on this issue. While most Council of Europe member states are still trying to build a more effective legal aid system, there is also a worrying trend in some to cut their legal aid budgets in the context of austerity measures (the cases of Latvia, Lithuania and Bulgaria are particularly significant in CEPEJ statistics).

It is clear that more needs to be done to align the practice of our member states in this area. In doing so, member states must take full account of the case-law of the Strasbourg Court and avoid the trap of taking the lowest common denominator. States with a generous legal aid budget (such as Denmark, Sweden, Finland, UK, Netherlands or Ireland) are clearly doing something right and should set an example.

Needs of the most vulnerable

Although they are indispensable for the functioning of the justice system, existing legal aid schemes often fail to empower individuals belonging to the most vulnerable groups to seek justice before courts. Sadly, these persons are affected by austerity measures in a seriously disproportionate manner and will need judges more than ever in order to enforce their rights. The Council of Europe has a lot to offer in this respect, and I would like to mention a few (non-exhaustive) examples:

- Migrants: I was very happy to see FRA's work on access to effective remedies for asylum seekers. This issue has also been taken up in many reports published by my Office, most recently in Austria. We must also pay attention to irregular migrants and victims of human trafficking. These are persons who are exposed to the worst forms of exploitation and abuse, precisely because they cannot seek justice without facing severe consequences. It is not by chance that the Council of Europe Convention on human trafficking devotes many provisions to the protection of victims, including their right to legal assistance and free legal aid.

- Children: While one does not automatically think of children in connection with access to justice, it is a fact that our justice systems currently lack the capacity to respond adequately to the needs of children. The Council of Europe developed ground-breaking guidelines on child-friendly justice, which contain specific sections on access to courts, as well as legal counsel and representation. The main idea here is that, as bearers of rights, children who understand these rights should be able to go to a court when they are violated, with appropriate legal advice. The issue at stake is not only legal aid, but also legal standing. I am very glad that the EU decided to promote these guidelines and use them as a benchmark for future EU legislation.

- Persons with disabilities: In particular, persons with intellectual and psychosocial disabilities, still face the risk of being arbitrarily stripped of all control over their lives. They are often deprived of their legal capacity entirely and therefore not even able to go to court to challenge guardianship or institutionalisation, in violation of agreed

[2] *Airey v. Ireland* (No. 6289/73)
[3] *Kreuz v. Poland* (No. 28249/95)

human rights standards. Supported decision-making alternatives have to be developed to enable the exercise of full legal capacity in line with the principles of the UN Convention on the Rights of Persons with Disabilities. My Office published an issue paper on this question this year, highlighting the problems affecting practically all our member states. For this group in particular, even access to the European Court of Human Rights is an issue. My predecessor made a third party intervention in a recent case, arguing that the legal standing requirements of the Strasbourg Court should be adapted to the needs of persons with disabilities, if necessary allowing NGOs to bring cases on their behalf.[4]

The importance of complementing legal aid with resource-efficient alternatives

Indeed, when states fail to bridge the gap between the individuals and the courts, NGOs everywhere in Europe are doing excellent work in empowering people and advancing human rights through strategic public interest litigation, very efficiently and with very limited resources. Public interest litigation takes its full meaning when it comes to violations of the human rights of disenfranchised groups such as those I mentioned earlier, since the democratic process on its own is often unable to place their concerns sufficiently high on the political agenda. As recognised by the European Commission against Racism and Intolerance, collective action by associations also has the important advantage of protecting victims of discrimination who may otherwise face retaliation.

In times of economic crisis, when social and economic rights are particularly at stake, the role of professional associations and trade unions is particularly important. This role has been recognised within the Council of Europe system through the mechanism of collective complaints under the European Social Charter. Unfortunately only 15 member states (13 of which are EU members) have accepted this mechanism, and only one, Finland, has opened the right to bring collective complaints to all NGOs.

When courts remain unreachable in practice, national human rights structures (such as independent commissions, ombudsmen, equality bodies, police complaints mechanisms) can also step in, lowering the access-to-justice threshold through simplified procedures. My mandate includes close co-operation with such low-threshold bodies, and I have observed that people can obtain redress through these non-judicial remedies, provided that the sanctions imposed are effective, dissuasive and enforceable. Sometimes such bodies also engage in judicial litigation themselves in support of victims, especially in a strategic way on key issues. In addition, through their outreach national human rights structures can raise awareness of different avenues to justice which is often lacking among disadvantaged groups of people.

In a context of general deterioration of the human rights situation caused by the economic crisis, maintaining and increasing the capacity of both NGOs and national structures should therefore be an absolute priority. Unfortunately, through my country-monitoring work so far I have seen a trend in the opposite direction: the resources of such bodies are hard hit in many member states. This can only aggravate the situation even further.

Apart from public interest litigation and low-threshold bodies, self-representation as a viable alternative for seeking justice should also be further explored. Evidence suggests that self-representation increases at times of economic downturn. This presupposes available legal resources, as well as a huge shift in the attitude of the judiciary through education and training. Here too the Council of Europe has a lot to offer through its specialised bodies, such as CEPEJ or the Consultative Council of European Judges, as well as its co-operation and assistance programmes.

[4] *The Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (No. 47848/08)

Finally, we should bear in mind that many member states face huge difficulties relating to the functioning of their judiciary, such as excessively lengthy proceedings or failure to enforce final judgments. Many of the Strasbourg Court's judgments point to the failure of domestic courts to rectify violations. Even worse, the judiciary itself is the source of human rights violations in some cases. The figures are very telling: from its inception until 2011, the Court had delivered some 12,500 violation judgments, with over 10,000 counts of violation of the right to a fair trial within a reasonable time and the right to an effective remedy.

The resolution of the very serious and systemic dysfunctions affecting the judiciaries of our member states should remain an absolute priority. This is why I decided to prioritise the functioning of the justice systems in my work, in particular in countries which are the source of the highest number of applications to the Strasbourg Court. In this connection, my Office has already published detailed reports on the administration of justice in Georgia, Ukraine, Turkey and more recently Italy. These reports point to entrenched problems which are very difficult to resolve without a very serious and concerted effort over long periods of time.

In conclusion, access to justice should not be treated in isolation. We must ensure that better access to justice (in the sense of access to judicial procedures) results in better access to justice (in the sense of justice actually being made).