COMMISSIONER FOR HUMAN RIGHTS

COMMISSAIRE AUX DROITS DE L'HOMME

CommDH/Speech(2012)2
English only

"Administration of Justice and Independence of the Judiciary"

Speech by Thomas Hammarberg,
Council of Europe Commissioner for Human Rights

Seminar "Human Rights in the Constitution – a Nordic comparison" organised by the Voksenåsen Cultural Centre in cooperation with the Parliamentary Human Rights Committee

Oslo, 28 February 2012

An efficient judicial system, fully respecting human rights, is one of the cornerstones of the rule of law and therefore, of democracy.

However, the justice systems in European countries are far from perfect. In fact, many of the complaints to the Strasbourg Court relate to excessively slow proceedings and to the failure of member states to enforce domestic court decisions. In several European countries, court decisions are often enforced only partly, after long delays, or sometimes not at all.

Domestic courts themselves are not functioning as they should in a great number of states, and former communist countries in particular have been slow to develop a truly independent and competent judiciary. Corruption and political interference are undermining public trust in the system.

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

While there has also been some progress, I have observed that the independence of judges is still not fully protected in some of the countries I have visited. Political and economic pressures still appear to influence the courts in some cases. Ministers and other leading politicians do not always respect the independence of the judiciary and instead signal to prosecutors or judges what is expected of them.

In order to reverse this situation, many changes are needed. These obviously include capacity-building and awareness-raising, but changes to the legal framework remain fundamental. And within this legal framework, the guarantees established in the constitution are key.

Issues relating to the administration of justice (and particularly independence of the judiciary) have been raised repeatedly in countries in Central and Eastern Europe. This is essentially due to the fact that these countries have been – and still are to different extents - faced with 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.

However, many of the applicable standards and principles are relevant for countries in other regions of Europe, including Western Europe. Indeed, issues of delayed justice are for instance very topical in a number of countries in Western Europe. In addition, tendencies or attempts to undermine the principle of the independence of the judiciary can unfortunately also be noted.

More generally, it is important that these standards and principles are taken fully into account as member states of the Council of Europe proceed to reform their domestic justice systems, including constitutional reform.

Four areas to be addressed in this presentation: 1) independence and impartiality of the judiciary; 2) abusive use of remand in custody; 3) length of proceedings and execution of judgments; 4) equality of arms and adversarial proceedings

These areas follow the elements of Article 6 of the European Convention of Human Rights (ECHR), which enshrines the right to a fair trial. Article 6 establishes inter alia:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

1) Independence and impartiality of the judiciary

The basic principles relevant to the independence of the judiciary should be enshrined in the Constitutions (or at the highest possible legal level) of member states of the Council of Europe, with more specific rules provided at the legislative level.[1]

These basic constitutional principles include: the judiciary's independence from other state powers; that judges are subject only to the law; that they are distinguished only by their different functions; the principle of the natural or lawful judge pre-established by law; and that of his or her irremovability.[2]

Constitutions can protect the independence of the judiciary by establishing appropriate councils for the judiciary. Indeed, the Committee of Ministers of the Council of Europe recommends that such councils for the judiciary be established by law or under the Constitution.[3] They should have "decisive influence on decisions on the appointment and career of judges".[4] At least half of them should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.[5] In some countries, a constitutional amendment is necessary to bring the composition of the council into line with these standards.[6]

According to Article 6 of the ECHR, a court must be established by law. This should be reflected in the Constitution (see the principle of the natural or lawful judge pre-established by law). In some countries, eg Ukraine, the Constitution provides for the establishment of courts by the President. The Strasbourg Court has underlined in this regard that the courts should be created by an act of Parliament rather than being dependent on the discretion of the executive power.[7]

In some countries, the letter and spirit of the Constitution as a whole (reflecting the historic context within which it was adopted) enshrine a state-centred approach, which tolerates too many exceptions to the enjoyment of human rights and fundamental freedoms. This fact is key to creating an environment or "entrenched culture" whereby the judiciary sees protection of the state as often taking precedence over the protection of human rights.[8] Independence of the judiciary is accordingly compromised. This is an important issue in Turkey, for instance.

Lack of impartiality (and independence) of the judiciary is often at the origin of (or compounds) the problem of impunity for serious human rights violations. For instance, impunity for the assassination or disappearance of journalists in a number of countries is a serious concern.

---

[1] Recomm CM(2010)12 § 7
[2] Venice Commission Report on the Independence of the Judicial System.
[3] Recomm CM(2010)12
[4] Venice Commission Report on the Independence of the Judicial System.
[5] Recomm CM(2010)12
[6] CommHR Rep on Ukraine §§37-38
[7] CommHR Rep on Ukraine §§ 14-15.
[8] CommHR Rep on Turkey §§127-129

Legal provisions can help to address the problem of impunity only in part. However, in some context, legal provisions [including perhaps constitutional provisions,] can help. For instance, in Turkey, there is a requirement to obtain prior administrative authorisation for judicial investigations into allegations of serious human rights violations (with the exception of cases relating to torture); there are also short prescription periods for prosecution of serious human rights violations committed by state security forces falling under Articles 2 and 3 ECHR. This type of provisions may stand in the way of addressing impunity effectively.

2) Abusive use of remand in custody

25% of the individuals kept in prison in Europe today are in pre-trial detention, "detained on remand". They have not been tried at all or are waiting for the review of an earlier sentence. As their guilt is not established, they are in principle to be regarded as innocent.

25% is an average estimate; the figures vary significantly between the countries – from 11 % in the Czech Republic to 42 % in Italy.

The principle of the presumption of innocence must be respected, including through adequate constitutional safeguards. The use of remand in custody must always be exceptional and justified. The only justification for imprisoning persons whose guilt has not been established by a court is to ensure that the investigations are effective (securing all available evidence, preventing collusion and interference with witnesses) or that the persons concerned do not abscond. Where less restrictive alternative measures (such as judicial control, release on bail or bans on leaving the country) can address these concerns, they must be used instead of remand in custody. In any event, remand in custody must be as short as possible and only continue for as long as it is justified.[9]

The fundamental principle that judicial decisions must be reasoned is also useful in this context. Indeed, pre-trial detention should be ordered by a judicial authority after a critical assessment of the absolute need for such a decision – and the reasons should be spelled out.

However, the Strasbourg Court has for instance found that court decisions in Turkey did not provide sufficient information as to the reasons justifying the detention. In these cases, only identical, stereotyped wordings were used by the courts - such as "having regard to the nature of the offence, the state of the evidence and the content of the file". In Georgia as well, decisions to impose pre-trial detention tend to lack individualised reasoning based on each case.

3) Length of proceedings and execution of domestic judgments

Unduly delayed court proceedings are a violation of the ECHR, which provides that "everyone is entitled to a fair and public hearing within a reasonable time" (Article 6, paragraph 1). This provision applies to both civil and criminal trials, as well as to disciplinary and administrative proceedings.

The ECHR also provides that everyone arrested or detained has the right to be brought promptly before a judicial authority and is entitled to a trial within a reasonable time (Article 5, paragraph 3).

Excessive delays in the administration of justice constitute a danger for the rule of law, over and above the problems created for the individuals directly concerned. They undermine the credibility of the justice system as a whole.

A very elaborate and complicated judicial system carries with it the risk of prolongation of proceedings. Constitutions are therefore crucial in avoiding this danger by laying the foundations of an effective judicial system. The Strasbourg Court emphasises in its judgments that the Convention obliges State parties to "organise their judicial system in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time".

Looking at the Strasbourg Court case-law on these issues, there are three sets of problems:

---

[9] See Recommendation Rec(2006)13 of the Committee of Ministers on the use of remand in custody.

I - One problem concerns the time that it takes to get to a decision: excessive length of civil and criminal proceedings and unlawful or excessively long deprivation of liberty, including lengthy periods of remand in custody.

For a number of countries (Italy for example) the excessive length of both civil and criminal proceedings is the subject-matter of many, or most, of the cases filed against that country at the Strasbourg Court. There are several general problems affecting the length of proceedings: lengthy inactivity of investigative authorities and courts (to a large degree due to a heavy workload of judges and prosecutors); numerous transfers of cases between various courts and remittals for additional investigation, expert assessments and re-trials; the courts' failure to ensure the presence of the parties, experts, witnesses, etc. at the proceedings; frequent adjournments of hearings due to judges' non-availability (hearing of another case, sick leave, vacations, etc).

II - Another problem occurs after a decision is taken: non-enforcement or delayed enforcement of domestic judicial decisions.

In many countries there is a serious problem of non-execution of judgments. Again, non execution of domestic judgments constitutes a significant part -- or even the majority (eg. Ukraine) -- of the cases against certain countries before the Strasbourg Court. According to available data, only 40 percent of domestic judgments are executed in Ukraine.

III - A further problem is the lack of an effective domestic remedy to address the problems mentioned above (excessive length of proceedings and unjustified remands in custody)

In countries characterised by excessive length of proceedings and remands in custody, the Strasbourg Court has often found that domestic remedies available to challenge these practices are not effective - within the meaning of Article 13 ECHR.

Therefore, in accordance with the case-law of the Strasbourg Court, I have recommended that the authorities introduce, effective domestic remedies, for both excessive length of proceedings and unjustified remands in custody. These remedies should make it possible to accelerate the proceedings or challenge the lawfulness of detention with reasonable prospects of success, as well as to obtain adequate compensation for unreasonably long proceedings and unlawful detentions. It should be ensured that persons can avail themselves of these remedies even while the principal trial is ongoing.

4) Equality of arms and adversarial proceedings

Imbalances between the defense and the prosecution are still a conspicuous feature of the criminal justice system in a number of countries (former Communist countries, Turkey). Systemic measures are needed to ensure genuine adversarial proceedings, including comprehensive legal training of prosecutors.

I have expressed concerns about adversarial proceedings and equality of arms, which are important components of the right to a fair trial. For instance, these concerns regard the rules concerning the non-disclosure of evidence to suspects, the resort to 'protective measures', and the lack of adversarial proceedings relating to certain phases of the criminal procedure.

I have also pointed to practical problems concerning the possibility for the defense to cross-examine and summon witnesses and experts and voices concerns about the way resort is made to secret witnesses.

In Turkey, I have called for a review of the need for assize courts with special powers, owing to the severe restrictions to the rights of defense before these courts, by derogation from normal procedural guarantees. Any derogation from ordinary procedural guarantees must be highly exceptional. Preference should be given to having all serious criminal cases tried in ordinary, well-resourced assize courts.