



Organization for Security and Co-operation in Europe

Supplementary Human Dimension Meeting

ACCESS TO JUSTICE AS A KEY ELEMENT OF THE RULE OF LAW

16-17 NOVEMBER 2017

Hofburg, Vienna

ANNOTATED AGENDA

Access to justice and equal treatment in the administration of justice lie at the heart of the OSCE holistic and human rights based vision of the rule of law and represent a vital contribution to peaceful and inclusive societies. The promotion of the rule of law and access to justice for all represents a central goal in the achievement of the 2030 Agenda for Sustainable Development adopted by the United Nations Summit in September 2015. With the Copenhagen Document in 1990 OSCE participating States subscribed to the principle of rule of law as not “merely a formal legality [...], but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression“. The right to seek and obtain judicial remedies is a prerequisite to fair, accountable and efficient justice systems. In 1994, the Budapest Document introduced the idea of legal security for each individual so that all action by public authorities must be consistent with the rule of law. At the Helsinki Ministerial Council 2008, participating States agreed to enhance their efforts to share information and best practices and to strengthen the rule of law, including in the effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, and the right to legal assistance.

Enjoyment of the right to access to justice by all is currently endangered by a number of threats, some of which are cross-cutting and affect the entire OSCE region. Legal, economic, cultural and practical obstacles to the full enjoyment of this right result in a disproportionate number of unreported cases. These so-called ‘hidden figures’ of crime are far higher among certain segments of the population and groups of individuals. Administrative and civil proceedings are no exceptions. Women, minorities, including Roma and Sinti and persons with disabilities, especially persons with mental health issues and intellectual disabilities, are among the most disadvantaged groups with respect to the enjoyment of the right to access to justice. Failing to ensure equal access to justice undermines not only the rule of law but also the security and safety of our societies.

“Access to justice” has been recognized by participating States as both a human rights issue, as well as a factor in conflict prevention. Furthermore, at the 2009 Athens Ministerial Council participating States recognized the important role that respect for human rights and the rule of law play in preventing transnational threats.

Responsibility for upholding all OSCE commitments lies with the governments of the participating States. National laws, administrative and judicial systems should be designed in a way which protects and promotes access to justice for all segments of populations and irrespective of differences in gender, ethnicity, culture, language, religion or other characteristics (Copenhagen 1990).

This Supplementary Human Dimension Meeting aims at providing a forum to identify the main current legal and practical challenges to access to justice in the OSCE area, and to identify good practices in addressing these challenges, to exchange information, and finally to articulate recommendations for OSCE participating States on improving access to justice as a key element of the rule of law.

This Supplementary Human Dimension Meeting will focus on the following key areas:

- 1) Current Trends, Challenges and Opportunities in the Area of Access to Justice*
- 2) Access to Justice and Conflict Prevention*
- 3) Gender, Diversity and Access to Justice*

DAY 1, 16 NOVEMBER 2017

13:00 -14:45 Side Events

15:00 – 16:00	<u>OPENING SESSION</u>
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Opening remarks

Keynote speech

Technical Information

16:00 – 18:00 <u>SESSION I: Current Trends, Challenges and Opportunities in the Area of Access to Justice</u>
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Access to justice requires that individuals as well as groups are able to seek redress of grievances: to remedy civil wrongs, to limit the discretionary power of the administration and to defend themselves in criminal proceedings. Access to justice is a key element of the rule of law and is relevant to civil, administrative and criminal law. In order to deliver a good quality of justice, all components of the judiciary must abide by international standards of competence, efficiency, independence and impartiality and provide effective and enforceable remedies. However, in the face of a dynamic set of trends and challenges, many justice systems fail to adequately uphold these obligations.

Crime reporting rates are one indicator of the level of access to justice in a given country. Access to criminal justice tends to be lowest in countries with the highest insecurity, which also tend to have proportionately higher levels of income inequality and crime, as well as lower rates of reporting. Lack of trust in the ability of the judiciary to provide effective redress is often a key reason and result of the discrepancies between the number of incidents, the number of cases reported to the police, and the number of cases adjudicated. Certain types of crime, including hate crime exhibit even higher discrepancies between incidents occurring and cases reported. The harmful impact of hate crimes resonates through the whole community of the victim and beyond. The threat to societal cohesion hate crimes alone represent can be exacerbated when judicial response is ineffective. Failure to effectively and promptly receive and process hate crime reports diminish the likelihood for targeted communities to report future incidents thus impacting on the access to justice for these communities. Income inequality and lack of awareness of rights and of legal avenues to obtain

redress, lack of identity documents and unclear legal status may exacerbate barriers to accessing civil and administrative courts for certain demographic groups, such as minorities, including Roma and Sinti, whose access may already be constrained by the effects of other forms of disempowerment and exclusion.

Available data indicate therefore a worrisome trend in respect to the fulfilment of OSCE commitments in the area of access to justice, and participating States should identify areas of major concerns and establish and implement ways to address these concerns. Notwithstanding abovementioned setbacks and the overall recognition of States' responsibility to ensure full enjoyment of access to justice, innovative mechanisms have been tested and have proven beneficial to enhance access to justice, especially among marginalized groups.

E-courts and more broadly the use of new technologies in the area of justice can play a significant role in reducing certain barriers in the access to justice. A study commissioned by ODIHR in 2016 revealed that in countries with high internet access, e-courts may prove beneficial to those living in remote areas and those with physical disabilities disability or by other factors (e.g. principal caretakers of young children). At the same time, e-courts may disfranchise those whose access to the internet is limited as well as the digital illiterates. Such groups include individuals living in remote areas in countries with low internet access; the elderly, who may be less likely to possess sufficient digital literacy; blind persons and persons with visual impairments if the websites are not accessible; and linguistic minorities, when e-courts services are provided in the State's official language only. In those cases, it is crucial to devise compensatory measures. For instance, for persons with sensory disabilities special measures can be introduced to improve accessibility and the installation of free internet access points in rural areas with low internet penetration may help improve access too.

Restorative justice mechanisms for instance, including victim-offender mediation, family group conferencing and community justice committees, can be used as tools to remove barriers in access to justice and thereby contribute to the protection, participation and empowerment of vulnerable groups. A victim-centred and community-based approach to criminal justice can lead to powerful transformation of people, relationships and communities. By offering a wide array of creative and inclusive solutions, restorative justice can be extremely powerful in addressing access to justice related issues in the current security environment, including in the context of the refugee and migration crisis, the violent radicalization of youth and the marginalization of and persistent discrimination against certain groups and communities. Restorative justice mechanisms require strong judicial guarantees in place to make sure that issues of safety, power imbalances, and the rights of the vulnerable victims are properly taken into account. The decision to forego standard criminal proceedings should always be assisted by procedural guarantees and in full respect of human rights standards and in cases where power imbalance is ascertained or assumed, standard criminal proceedings should stay available to victims.

Questions for discussion:

- What are the main trends in respect to access to justice, particularly in regard to crime reporting rates, underreporting and the hidden figure of crimes? What are the measures undertaken by participating States to reduce the gap between the number of committed crimes and the number of reported crimes?
 - Are participating States collecting disaggregated data in respect to the incidence of crimes? Are these data pointing at specific groups who happen to be the main target for instance in hate crimes? What are the measures adopted by participating States to enhance access to justice of these target groups?
 - Are income inequalities or other grounds of social exclusion further preventing access to justice among certain segment of the population? What are the mechanisms participating
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States adopt to ensure that low-income or otherwise socially marginalized individuals fully enjoy access to justice?

- Which are the most successful e-court mechanisms that can be adopted to reduce the gap in access to justice? What are the pre-conditions that need to be met for these mechanisms not to further exacerbate access to justice related obstacles?
- Are there any successful examples of restorative justice mechanisms, including but not limited to victim-offender mediation, family group conferencing and community justice committees? Are there any studies demonstrating the impact of such mechanisms on building community trust vis-à-vis the judiciary, especially in respect to traditionally excluded or marginalized communities?

18:00	Reception hosted by the Austrian OSCE Chairmanship at Palmenhaus (Burggarten 1, 1010 Vienna)
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DAY 2, 17 NOVEMBER 2017

10:00 – 12:00 <u>SESSION II: Access to Justice and Conflict Prevention</u>

The denial of justice to individuals and groups, or exclusion from effective participation in the justice system, may have direct and serious repercussions on societal cohesion. This, in turn, may affect peace and stability within and between states. In the experience of the HCNM, stability and security are best served by ensuring that everyone, including persons belonging to national minorities, is fully represented within, and receives fair treatment by, the State justice mechanisms. The above considerations stand at the core of the HCNM involvement with access to justice for national minorities as a conflict prevention mechanism.

Full respect for the human dimension commitments made by participating States on human rights, is important for building and sustaining social cohesion and peace, both within and between OSCE participating States. Consequently, successive High Commissioners have addressed access to justice issues, both within the public domain and confidentially, in keeping with rigours of the mandate. The institution's most recent compilation of thematic recommendations, the Ljubljana Guidelines on Integration of Diverse Societies (2012), stress that "Lack of trust in the justice system or a perception that the system favours members of the majority undermines social cohesion, fosters alienation and can increase the risk of conflict, including of an inter-ethnic nature".

In the 1990s, the first High Commissioner, Max van der Stoel, validated his rationale for addressing access to justice concerns. Making the link between justice and conflict prevention clear, he stated that "where there is injustice, there is insecurity and this in time gives rise to instability and ultimately threats to peace". The necessity of revisiting this topic seems clear. Weak rule of law institutions which leave national minorities marginalized, or vulnerable to abuse, weaken the fabric of the state itself, and thus pose a threat to stability and security.

Amongst national minority groups, some groups remain particularly vulnerable in conflict prevention scenarios, including the Roma and Sinti. Participating States have additionally recognised within the 2003 *Action Plan on Improving the Situation of Roma and Sinti in the OSCE region* that

lack of respect for the rights of Roma and Sinti people within the justice system also poses a conflict risk which the HCNM should continue to address.

Lack of access to justice issues in post-conflict environments, sometimes involving unaddressed accusations of war crimes or crimes against humanity, remains an obstacle for integration of societies. This being well-recognised, measures could also be taken to reduce the temporary volatility which dealing with the past can raise.

Questions for discussion:

- Which access to justice programmes have also had a positive effect on the integration of society and conflict prevention?
- Are participating States collecting disaggregated data in respect of the representation of vulnerable groups, including national minorities, within the justice system? To what extent are participating States able to use this information to affect future recruitment of justice system professionals?
- Which difficulties have participating States faced in relation to protection of the particularly vulnerable members in society, within the justice system, including those that belong to national minorities?
- What are the measures undertaken by the participating States to facilitate access to justice for Roma and Sinti people in the context of conflict prevention?
- How can participating States enhance their efforts to promote the rule of law and access to justice, in post-conflict settings? What measures can be taken to reduce volatility when addressing these difficult issues?

12:00 – 14:00 Lunch break

12:00 – 13:45 Side Events

14:00 – 16:00 <u>SESSION III: Gender, Diversity and Access to Justice</u>
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The OSCE Ministerial Council Decision adopted in Athens in 2009 called on participating States to provide for specific measures to achieve the goal of gender balance including in the judiciary. Paths for entry into and promotion within the judicial profession differ from country to country with some OSCE participating States having near gender equality on the bench. However, even where women appear as often as men in the judiciary, they are found disproportionately in lower-level courts and in traditionally “feminized” practices such as family law.

The representation of persons with disability in the judiciary is seriously hampered despite the provisions of the UN Convention on the Rights of Persons with Disabilities recognizing the right to their full inclusion and participation in the community, including through the employment of persons with disabilities in the judiciary. At the same time, a number of barriers prevent the implementation of such provisions in practice, including a lack of accessibility for persons with various types of impairments, limited individual support mechanisms, denial of reasonable accommodation, low capacities of persons with disabilities, often due to segregated educational systems and lack of employment.

Furthermore, certain minorities groups, including Roma and Sinti, continue to experience barriers to equal representation, and effective participation in the judiciary. This is mainly due to the persistence of patterns of social exclusion, disempowerment and discrimination which heavily hamper their

access to quality education and public and private employment. The abovementioned situation is further aggravated in cases of intersectionality when a person is for instance simultaneously a woman and belongs to a minority.

As a result, the composition of the judiciary in the vast majority of OSCE participating States remains strikingly disconnected from the population it serves. Diversity is critical to the legitimacy of the judiciary and public perception that the justice system is fair, equal and accessible to all. The lack of proper representation of diverse groups in the judiciary may lead to potential bias towards certain constituencies in judgements and court proceedings. Evidence demonstrates that gender or other stereotyping significantly increase barriers for women's and other groups' equal access to justice.

Stereotyping happens when a police officer, a judge or other legal professional reach a view about an individual based on preconceived beliefs about a social group, rather than a view based on relevant facts. There is broad academic recognition of what is called "implicit bias", namely the unconscious assumptions held about specific groups (gender, race, ethnicity, religion, etc.). Studies examining the influence of these assumptions have confirmed that behaviours, including judicial decision-making, are influenced by implicit bias. In the context of women's access to justice, those stereotypes that consider men as the primary bearers of rights, authority and knowledge play an important role in the way justice is administered.

In the context of the minorities that are subject of widespread and persistent discrimination, such as Roma and Sinti, stereotyping very often lead to lack of response on the part of the police and justice system. In hate crime related cases, in particular, this can create an atmosphere of impunity for the perpetrators and secondary victimization for the victims by the justice system.

In the context of persons with disabilities, persons with mental health issues or intellectual disabilities are often perceived as incapable of making decisions or expressing their will, resulting in a situation where the views of their family members, carriers or guardians is considered as more reliable and trustworthy, including in cases against these persons.

The impact of the abovementioned bias is far-reaching and direct consequences can be observed in criminal, administrative and civil law, particularly: in the qualification of criminal cases, in sentencing practices (including the weighting of aggravating or mitigating circumstances), and in the outcomes of court proceedings in specific areas of law such as family, guardianship, incapacitation, assignment to close institutions, inheritance and property law.

ODIHR initiated a new programmatic area in its rule of law work focusing on Gender, Diversity and Justice in October 2016 with the conduct of an expert meeting on Gender, Diversity, and the Judiciary: Exploring the Benefits and Challenges of Equal Opportunity, Representation, and Effective Participation. In 2017, ODIHR started a needs assessment in selected OSCE participating States to increase understanding of needs and challenges related to gender equality and diversity in these justice systems and to identify measures to promote positive policy change and practice.

Questions for discussion:

- Are judiciaries in OSCE participating States perceived by their constituencies to reflect the diversity of societies in which they work?
 - What are some of the challenges faced by participating States in selecting, promoting, and training qualified men and women, including with various types of disabilities, from different segment of the population to become members of the judiciary? What are some of the best practices from OSCE participating States that have helped address these challenges?
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- Which measures can OSCE participating States put in place to ensure that women are equally represented not just at the lower level of the judiciary or in traditionally “feminized” courts, but also in the prosecution service, in appellate courts and courts of final instance and/or constitutional courts?
- Do participating States collect data and commission studies and research projects, including through the monitoring of court proceedings, focussing on the linkage between gender and other implicit bias and the administration of justice?
- What are the measures undertaken by the participating States to improve the representation of Roma and Sinti in the judiciary, particularly Roma and Sinti women?
- What measures should be introduced in OSCE participating States to ensure that persons with disabilities can participate in judiciary on an equal basis with others?
- Is there any evidence demonstrating that gender and other types of implicit bias may influence the qualification of criminal cases, sentencing practices and the outcome of court proceedings in specific areas of law such as family, inheritance and property law?

16:00-17:00 <u>CLOSING SESSION</u>

Report by the Rapporteur from the Working Sessions:

Comments from the floor

Closing remarks

17:00 **Closing of the meeting**
