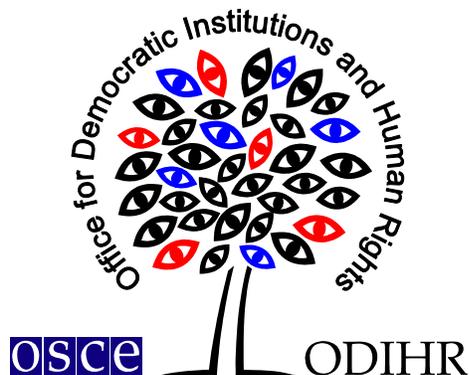


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Judicial Systems and Human Rights: Lessons
Learned from the OSCE/ODIHR Perspective

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Recent years have seen dramatic changes in OSCE participating States in developing an accessible, independent, and reliable judicial system ensuring respect for, and protection of, human rights. However, in many states in the OSCE region, there is still a long way to go to ensure that human-rights standards are fully implemented. Also, in more-advanced judicial systems, the changing nature of challenges in society results in a constant need to review and improve in view of optimizing human-rights protection.

ODIHR rule-of-law assistance

The ODIHR's approach to assisting in the process of achieving better implementation of human-rights standards has been to look at a whole spectrum of factors and institutions involved in the administration of justice and to provide practical assistance for institution-building, covering the range from legislative support to training for officials to working with civil society. Such a comprehensive approach is particularly important when addressing long-term structural issues.

Such assistance is best offered as part of a co-ordinated effort by the international community. For us, the "international community" means states, international organizations, international and local NGOs, professional associations, and all those actively involved in the promotion of human rights and the rule of law.

It is banal to say that when the international community works together we get better results. But this is sometimes still easier said than done. Unfortunately, many in the international community continue to view the administration of justice as a series of individual/isolated "projects". This approach means that development assistance is often offered in isolation and that individual assistance efforts are disconnected from the final goals. This approach results in much of the "form over substance" work that we still see all too often in this field today. As an international community concerned with achieving better compliance with human-rights standards, we need to start looking in a more holistic fashion at the assistance we offer, and we must be consistent in identifying what are the broad areas that need focus, assistance, and improvement. I will come back to this need at the end of my intervention.

With the Human Dimension Seminar on "Judicial Systems and Human Rights" in April 2002 in Warsaw, the OSCE reviewed challenges for the judiciary in established and developing democracies in its protection of human rights. The seminar assessed in particular the lessons learned within the reform process of the last decade following the adoption of the 1990 CSCE Copenhagen and 1991 CSCE Moscow Documents.

Drawing on the recommendations that came out of this seminar and that have since been further developed and refined, I will point to some areas where the ODIHR considers that the international community should focus its efforts. In doing so, I will also illustrate some practical approaches that the ODIHR and the OSCE have taken to provide assistance with a particular focus on the challenges to the independence of the judiciary and the question of ensuring access to justice as a fundamental principle of a democratic

society. Human-rights protection is also linked to the human-rights literacy of judges and lawyers and to a developed legal culture and tradition.

Safeguarding the independence of the judiciary

The independence of the judiciary is the cornerstone of any democratic judicial system. It has been recognized in a number of international documents, including OSCE human dimension commitments. An independent and impartial judiciary provides the framework for ensuring that international fair-trial principles and human-rights standards are upheld.

In practice, however, undue interference in the judicial system is a daily occurrence in the OSCE area. There exist many different kinds of threats to the independence and integrity of the judiciary: Challenges take many forms, such as direct or indirect political pressure and executive interference, as well as pressure from others, such as business or criminal groups. The appointment and dismissal of judges, making decisions about the duration of their tenure, and the extent to which executive power influences this process are of great relevance. The respective system of salaries and benefits can also make the system susceptible to direct or indirect influence and corruption.

Safeguarding the independence of the judiciary carries such importance because it is ultimately the judge in a criminal or civil proceeding who is responsible for ensuring that all guarantees encompassed within the right to a fair trial are implemented.

Constitutional and legal provisions are of great importance for safeguarding the independence of the judiciary. OSCE institutions and other international organizations can and do provide assistance in this field. The ODIHR works very closely in this regard with the Council of Europe's Venice Commission.

In fact, one very practical method of assistance provided by the OSCE/ODIHR is an online database of domestic legislation, constitutional provisions, and international human-rights standards. This database, called Legislationline (www.legislationline.org), was created with a view to providing access to the standards required for setting up the domestic legislative framework necessary in order to ensure judicial independence and fair proceedings.

In regard to the independence of the judiciary, the **role of the prosecutor** is highly relevant, too: Not only do we still see a lack of clarity about their relationship, all too often, the power of prosecutors goes uncontrolled by the judiciary in many post-communist systems – one example especially detrimental to safeguarding human rights relates to the making of decisions on arrests without the involvement of a judge.

Access to justice

An effective democratic judicial system requires equal access to justice by all members of society. For this reason, access to justice is a fundamental right in both developing and established democracies. It reinforces the principle of an inclusive society, where all

disputes can be settled within procedures set by law. As with an independent judiciary, access to justice is an issue that involves many components.

There are numerous factors that hamper the effective use by everybody of the judicial system: for instance, lack of access to competent and effective legal counsel, high costs of legal help, often highly technical rules for filing court papers, costs of litigation, and the question of free legal aid and its system of implementation. Another concern is the occurrence of long delays in proceedings that can amount to a *de facto* denial of justice both in established and developing democracies.

Increasingly, the question of access to justice includes the possibility to challenge administrative decisions in front of a judicial authority. Access to justice is also linked to the representation of groups in the judicial system, for example, with regard to gender equality. Discrimination and perceptions can also affect the access of minorities, Roma and Sinti, migrants, Internally Displaced Persons, foreigners, and others. All of these disadvantaged groups, including trafficking victims, can suffer from the failure of some states to allow administrative fees and court filing costs to be waived in specific circumstances. Failure to allow for fee waivers can and does have a direct impact on access to justice in many instances.

The ODIHR is involved in a number of activities to promote better access to justice. These activities include supporting legal clinics in Central Asia. Legal clinics traditionally are established in connection with law faculties and provide both opportunities for law students to gain practical legal experience under the supervision of an experienced lawyer and free legal services to people who would otherwise not be able to afford legal services. The ODIHR currently supports three legal clinics in Central Asia, including a clinic in Osh, Kyrgyzstan, which provides direct legal services to the population of this region.

Lack of access to competent and effective legal counsel

Access to lawyers is often limited for a number of reasons. In some OSCE participating States, the rules surrounding who is allowed to practise law are overly restrictive or arbitrarily applied. This results in severe limitations on the number of people allowed to practise law with the end result being that there are insufficient numbers of attorneys to handle cases. The ODIHR is working with OSCE participating States in order to help them undertake all necessary measures to create an independent, self-governing professional association in a transparent and inclusive process.

Lawyers in many countries of the OSCE region do not receive a legal education that adequately prepares them for the practice of law. Basic skills, such as advocacy, interviewing skills, and legal writing, are still not a part of the law-school curriculum in many law faculties in the OSCE region. There is a need for more and better training for lawyers, including continuing legal education, so they have the skills and knowledge necessary to competently represent their clients.

In 2003, the ODIHR identified this as an area in need of increased attention, both on the political level and on the project level. The above problems will be tackled in a number of ways through the ODIHR's project activities underway and planned for 2004 and beyond. For example, one component of the ODIHR Fair Trials programme for 2004-5 is to strengthen the capacity of lawyers to represent clients through a professional-skills training course and to support legal and structural reforms that increase access to professional legal assistance.

One of the lessons that the ODIHR has learned in looking at the issue of rule-of-law development, and in particular in view of access to justice in developing democracies, is the following: In the OSCE region, the international community as a whole has tended to focus on judges and, increasingly, prosecutors, but it has not given equal attention to defence lawyers. Clearly, all three are important in insuring fairness in the judicial process. All too often, however, defence lawyers have been viewed, in many societies, as an obstruction to efficiency. This view, that defence lawyers "only slow things down", has failed to recognize the vital role that they play in insuring fairness, justice, and respect for human rights in the legal process. In addition, in too many instances, defence lawyers face legal or practical obstacles themselves, especially in accessing and investigating their cases.

A number of organizations are starting to recognize these difficulties, and the ODIHR is working in close co-operation with all of these organizations. However, there is a pressing need for greater focus on improving lawyering skills, while at the same time addressing the structural impediments defence lawyers face in many countries.

Capacity-building and training of justice-system professionals

An independent judiciary is an important democratic safeguard for the protection of human rights. However, that independence alone is not sufficient for guaranteeing the enforcement of human rights through the courts. There is a distinct need to increase awareness and knowledge of the specific requirements of international human-rights standards and in particular of the concept of legitimate limitations to human rights in a democratic society.

The OSCE/ODIHR is expanding its role in the sphere of human-rights training and education. In Central Asia, for instance, the ODIHR provides both institutional and technical support to the Judicial Academy, a training centre for the judiciary in Kazakhstan. Institutional support can be, and often starts with, such simple things as supplying books for the library. ODIHR technical support has included providing experts who assist in the development of training curricula for judges and training for the faculty in interactive training methodologies.

Safeguarding human rights in the fight against terrorism

Among the challenges faced by all democracies, safeguarding human rights in the fight against terrorism constitutes an especially important challenge for the whole OSCE

region. Currently, the ODIHR, in co-operation with the OHCHR, is engaged in developing a training module that aims to increase awareness of the protection of human rights in the fight against terrorism. A specific module is devoted to reflecting upon "rights at risk" and sets out the legislative framework for permissible restrictions in this context.

Civil society as important partner of the judiciary in safeguarding human rights

In creating a legal culture and tradition, the role of civil society cannot be underestimated, both with regard to monitoring the judicial system and ensuring transparency as a tool to improve respect for human rights. Let me give you one example: My Office and a number of the OSCE field missions have considerably increased trial-monitoring activities over the past year. The goal of our trial-monitoring programme is two-fold. First, it aims to build the capacity of local civil society to accurately monitor and report on trials, and, second, it seeks to increase access to regular and high-quality information on compliance with basic fair-trial standards through co-ordination of their subsequent trial monitoring. The information gathered from the trial-monitoring programme is fed into our rule-of-law reform activities.

The way forward

I have highlighted some practical examples of how the ODIHR provides assistance in the field of strengthening the judiciary in view of ensuring the protection of human rights.

However, stronger efforts are required in co-ordinating activities in the field to ensure the efficient use of resources available. The exchange of experiences and best practices in international forums, as well as on a more regular basis at a working level between actors in this field, is one way in which we, as an international community concerned with achieving better compliance with human-rights standards, can start looking in a more holistic fashion at the assistance we offer. (This issue will be elaborated tomorrow by my friend and former colleague John Packer.)

We must be consistent both in identifying the broad areas that need focus, assistance, and improvement, as well as in seeing our work through.

Close co-operation within the international community, and between them and national governments and societies, is crucial in this regard. Only a consistent message, clear national commitment and ownership, and long-term assistance programmes can ensure a viable judicial system. The Council of Europe and the OSCE, in particular the ODIHR, have been at the centre of such efforts, both in the field and increasingly also at headquarters level. Both organizations, with their strong complementarity in standard-setting, monitoring, and assistance activities, can provide crucial frameworks for facing the important challenges still unresolved with regard to judicial systems.

Strong domestic commitment and capacity is the objective.

In addition to our practical activities, we also need continued political commitment and support. Strong multilateral action must never become a pretext for complacency. I hope this conference can show the way, and I wish you all success.

I thank you for your attention.