Criminal-Justice Systems in the OSCE Area

Reform Challenges and ODIHR Activities

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OSCE ODIHR

All of the participating States of the Organization for Security and Co-operation in Europe (OSCE) have undertaken international obligations and committed themselves to comply with a set of rules and principles in the administration of criminal justice. These rules ensure fairness of the proceedings and create safeguards to protect the human rights of people who are particularly vulnerable to the state's influence and pressure. Ultimately, they ensure that criminal proceedings result in justice and uphold the rule of law.

The criminal-justice systems of some participating States still require substantial structural and institutional reforms to achieve compliance with OSCE human dimension commitments. The Office for Democratic Institutions and Human Rights (ODIHR) encourages and supports such reforms at all stages of the criminal process: pre-trial, trial, and post-trial.

Any reform effort in the area of criminal justice should be comprehensive, since all the individual parts of the system must work together. The ODIHR carries out its activities with an understanding that no part of the legal system stands alone and that all institutions involved in the administration of criminal justice are interconnected and interdependent.

Just as a criminal-justice system has different levels — the working level of lawyers, prosecutors, judges, and law enforcement personnel, as well as the level of criminal-policy decision-making — so should reform assistance. In its approach to reform, the ODIHR does just that. At the working level, training is provided to judges, prosecutors, and lawyers to help them improve their professional skills; opportunities to exchange experiences and knowledge are also created through the organization of seminars, conferences, and occasional study trips. At the political level, the ODIHR provides advice and expertise to facilitate policy decisions to further uphold and strengthen the rule of law and human rights in the administration of justice.

Strengthening the rule of law in criminal-justice systems is by definition a long-term process that ultimately requires significant cultural and attitudinal changes. Thus, the ODIHR's work in this field involves ongoing, long-term programmes that take into account the need to ensure customized assistance specific to each country's history and current developments.

Guided by these principles, the ODIHR implements activities in the criminal-justice sector of OSCE participating States in Central and Eastern Europe, South-Eastern Europe,

In 2005, the participating States recognized the importance of work in the area of criminal-justice reform through Ljubljana Ministerial Decision No. 12 on "Upholding Human Rights and the Rule of Law in Criminal Justice Systems". The participating States agreed to increase attention to this area in 2006.

the Caucasus, and Central Asia. These activities are currently conducted by two post-table professional staff and four professional staff funded through generous contributions of the participating States. The Office builds on these resources by using outside expertise, stressing good practices developed across the OSCE region, including from those states with comparable experiences.

Co-operation with OSCE field operations is vital, as those on the ground in the relevant countries are able to react quickly to developments in governmental policies or to cases that require OSCE involvement. The ODIHR also co-operates with a strong network of governmental and non-governmental partners, recognizing that they are a fundamental part of all its fieldwork.

Torture prevention

Prevention of torture, as well as other cruel, inhuman, or degrading treatment, is a topical issue in the OSCE area. Frequent instances of such treatment are symptoms of deficient criminal-justice systems that lack adequate safeguards for the protection of human rights. Such systems have implicit incentives that reward "solving crimes" at any cost. This leads to reliance by the police and prosecutors on confessions and witness testimony obtained through pressure and illegal treatment, with courts often closing their eyes to such illegally obtained evidence. Breaking this cycle requires the removal of flawed institutional incentives, greater professionalism, accountability, and a zero-tolerance policy towards abusers.

For these reasons, the ODIHR approaches torture prevention as an integral part of criminal-justice reform, promoting political awareness and encouraging structural changes in criminal-justice systems.

In 2005, the ODIHR continued to advocate for the transfer of power to authorize arrest from prosecutors to the judiciary. The ODIHR also continued to support the development of independent monitoring boards for places of detention and encouraged participating States to give early consideration to signing and ratifying the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

Transfer of authorization of arrest to the judiciary

Most ill-treatment and torture take place against people held in custody. International human rights standards and OSCE commitments require that the decision on whether someone is to be held in custody be made by an independent judge. This is done through a procedure known as *habeas corpus*. The integration of this procedure into legislation puts both the defence and prosecution on a more equal footing when arguing their points before the court in an adversarial setting, as the prosecutor does not have the immediate advantage of deciding if a defendant remains in custody.

To date, prosecutors in six countries in the OSCE region retain the authority to place and hold a person in custody: Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan.

At present, discussions on the transfer of powers of arrest from the prosecutor's office to the judiciary are prominent on the agenda in some countries of Central Asia. The ODIHR provides legislative advice and facilitates the sharing of experience and expertise on

how to implement this reform. In this context, the ODIHR, jointly with the parliament of Kazakhstan, held a conference in June 2005 on the transfer of powers of arrest from the prosecutor's office to the judiciary.

OPCAT and detention monitoring

In 2005, the ODIHR worked closely with NGOs and governmental partners to promote ratification of the OPCAT. One aspect of the OPCAT that could be a powerful torture-prevention tool is the monitoring mechanism: the OPCAT envisages the creation of a worldwide monitoring body and constantly working independent and transparent national mechanisms.

The ODIHR provides assistance in the development of independent national monitoring mechanisms. In 2005, this assistance included activities in Armenia and Kazakhstan. The ODIHR supported the Armenian Monitoring Board in the development of regular and institutionalized monitoring of places of detention by civil society. The ODIHR translated the manual *Monitoring Places of Detention: A Practical Guide for NGOs* into Armenian to support the training and capacity-building activities of the Armenian Monitoring Board.

In Kazakhstan, the ODIHR followed up the adoption of the law that allowed public monitoring of places of detention in 2004 by working with other partners, such as Penal Reform International, to assist the authorities of Kazakhstan with the drafting of official regulations on the creation and functioning of monitoring boards. The ODIHR is also closely following ongoing discussions on the establishment of monitoring boards in Kyrgyzstan.

Public participation in the administration of justice

In the former Soviet Union, trials were decided by a judge who was typically joined by two so-called lay assessors, who were ordinary citizens, not legal professionals. Due to their penchant for agreeing with whatever the judge decided, these assessors became known as "nodders." Seen as both expensive and ineffective, this system was dismantled during the first wave of judicial reforms in the early 1990s that took place in most post-Soviet states.

ODIHR advocates greater support for criminal defence lawyers

Throughout a large part of the OSCE region, a person's ability to get a fair trial can be severely hindered by the lack of proper legal representation. This glaring weakness has never been adequately addressed by the international community, while the few domestic reform efforts have often foundered.

"International actors have been slow in recognizing the importance of the defence lawyer, especially in states where there are concerns over other aspects of the judicial system," says Cynthia Alkon, Head of the ODIHR's Rule of Law Unit.

"But defence lawyers are as important as judges and prosecutors in ensuring a fair trial and are often the first to learn about allegations of torture and mistreatment, before traditionally recognized human rights defenders such as non-governmental organizations."

Shortage of defence lawyers

One problem that affects some OSCE states in particular is an acute shortage of defence lawyers. In Azerbaijan, for example, there are as few as 300 for a population of eight million, compared to the European Union average of one per thousand.

Defence lawyers in the Soviet Union joined mandatory defence bars, known as collegia of advocates. These bodies enjoyed considerable autonomy but had tight control over the practice of their members. Reform of this system has taken different directions across the region, and the ODIHR is promoting discussions on whether these reforms have resulted in strong defence bar structures and improved access to legal assistance for citizens.

Inadequate reform efforts

In some countries, the few reforms that have been made to the existing defence bar structure have produced systems that are restrictive and rife with nepotism. Admission procedures are obscure and bar exams lack transparency. And despite a steady supply of law graduates, defence bars are failing to replace even those retiring from their ranks.

Where there is no structured defence bar, on the other hand, the system can be chaotic. Admission to practice is usually controlled by the Ministry of Justice, or bodies created by it, which also leaves room for abuse. Defence lawyers lack the ability to lobby effectively as a professional association, and there is no framework for training or for regulating competence. Lack of organization also means inadequate provision of legal aid, with frequent instances of collusion between police investigators and lawyers to the detriment of defendants.

Greater transparency and independence

Finding the right path to reform is not easy. Developing a professional bar structure that is transparent and independent requires the will of both the government and the legal profession. Issues such as responsibility for provision of legal aid must also be taken into account, as well as ensuring that whatever body regulates admission to practice and disciplinary proceedings is free from political interference.

"In Tajikistan, the defence bar is considered the least attractive option for law graduates. Lawyers need to push for reforms themselves, but many of the younger members of the collegium are afraid to lobby for change since they depend on older members for work," says Nigina Bakhrieva of the Tajik non-governmental organization Bureau of Human Rights and the Rule of Law.

"Lawyers want reform, but morale is low, and left to their own devices they can't initiate it. The state needs to take the lead in reform, but in close co-operation with members of the legal profession."

Raising awareness

"The structural reforms needed for the defence bars in these countries will take many years of work, and the ODIHR will continue to press for reform and offer legislative support," says Alkon. "In the short term, we would like to raise international awareness of the importance of the defence bar in ensuring fair trials. Criminal lawyers in many parts of the OSCE region work in difficult conditions and their voice should be heard by policy-makers."

Following these initial changes, however, some countries began considering the idea of reintroducing lay assessors. In some cases, the argument for this return centred on a widespread distrust of the judiciary, allegations of corruption, judicial dependence on the executive branch, or on the lack of transparency in the making of judicial decisions. In Russia, the fact that jury trials were used prior to the 1917 Revolution also contributed to this renewed interest.

Russia was the first post-Soviet country to take this step, reintroducing jury trials in 1993. As a result, there have been improvements: defence lawyers have better standing in criminal proceedings; there is more procedural balance between the defence and the prosecution; and rules related to the admissibility of evidence have begun to work in practice.

Since Russia's return to jury trials, other post-Soviet countries, including Azerbaijan, Georgia, Kyrgyzstan, and Ukraine, have considered the possibility of taking this step. In 2005, Kazakhstan adopted a new law calling for mixed courts of judges and lay assessors. This law will be implemented beginning in January 2007.

The reintroduction of lay participation in criminal proceedings can have a serious impact on the administration of justice and the rule of law. On the one hand, it can help to further democratize judicial systems that have often been viewed as corrupt and unjust. Reform, however, should avoid the return of "nodders", which would further undermine public trust in the judiciary. In addition, the reintroduction of lay participation needs to be seen in the broader context of its role in the entire criminal-justice system. If the prosecution and defence are not ensured equality of arms, if the judiciary depends on the executive, and if jurors or lay assessors are unable to make independent decisions, then such a system would hardly perform any better than its predecessor.

With this in mind, the ODIHR has facilitated discussions in Kazakhstan and Kyrgyzstan on both the means of reintroducing lay participation and the possible consequences of doing so. These discussions have included the sharing of experiences from those OSCE states that have jury trials, including expertise from Russia.

Another Step in Criminal-Justice Reform:

ODIHR Facilitates Discussions on Abolishing the Practice of Further Investigation

Many of the problems related to criminal-justice reform in post-Soviet countries are rooted in the legacy of Soviet criminal procedure. One of these problems is the authority of the courts to refer a case for "further investigation".

This power provides a court with three main options after a trial: to find a defendant guilty; to acquit the defendant; or to return the case to the prosecutor, providing an opportunity (and more time) to investigate the case and look for more evidence. When a court decides to send a case back for further investigation, it says, in effect, that there is insufficient evidence for a conviction. Fair-trial standards require that, if there is insufficient evidence to uphold a conviction, the court should make a finding of acquittal.

In practice, the power to return a case for further investigation allows prosecutors to bridge gaps and discrepancies in their case and often excuses unprofessional prosecutorial work. This can translate into breach of evidence rules, at best, and ill-treatment or torture, at worst, to ensure that the next time the case goes through the system it will result in a guilty verdict. Some cases go back and forth between the court and investigation for years, depriving the defendant of both a speedy trial and a final court decision.

Such authority of the court reinforces the accusatorial approach of the judiciary and is at odds with the presumption of innocence of the accused, as well as the principle of equality of arms. This also partially explains why some countries in the OSCE region have acquittal rates of only around 1 per cent.

The practice of further investigation violates the principles of adversarial procedure and the right to be tried without undue delay by an impartial tribunal. Due to the serious consequences of this practice, the ODIHR has facilitated discussions on the abolition of further investigation and assisted OSCE participating States that have expressed their intention to abolish this practice.

One recent example is Kazakhstan. In 2005, at the request of the Prosecutor's Office, the ODIHR helped organize a conference on the abolition of further investigation by providing best practices from other countries that have already carried out this reform and brought their legislation into conformity with Article 14 of the International Covenant on Civil and Political Rights, an international instrument that sets fundamental fair-trial standards. Obviously, this reform does not solve all the problems of the criminal-justice system, but without taking such important steps, overall progress towards implementing international fair-trial standards is not possible.

Reforming the defence bar

Where the defence bar is not an open institution that freely admits new members on a regular basis, there will inevitably not be enough lawyers to counsel those in need of legal assistance.

The ODIHR has been an advocate for bar reform in order to improve access to legal advice. This assistance takes the form of expert recommendations, legislative reviews, or simply initiating much-needed discussion among all interested parties, including the non-governmental sector. In addition, the ODIHR has also encouraged the development of professional skills among lawyers.

In Azerbaijan, the ODIHR has been observing implementation of the new law on advocates. Along with the OSCE Centre in Baku and other actors, the ODIHR initiated dialogue with partners in Azerbaijan to ensure that the law is implemented.

In Kyrgyzstan, the ODIHR made two assessments of the draft law on defence lawyers. In October 2005, the ODIHR, together with the parliament and other interested parties, organized a roundtable to discuss the draft. Discussions focused on the status of advocates and ensuring independence of the proposed new bar while maintaining professional ethical standards and effective disciplinary procedures.

In Kazakhstan, the ODIHR also reviewed new amendments to the law on defence lawyers that concern reform of access to the bar, disciplinary proceedings, and the organizational structure of the bar. During the Supplementary Human Dimension Meeting on the Role of Defence Lawyers in Guaranteeing a Fair Trial, in November 2005, a number of recommendations were made with respect to bar reform that could be implemented in Kazakhstan. The ODIHR plans to organize an international conference on reform of the bar in Kazakhstan in 2006.

In Armenia, the ODIHR followed the implementation of the new law on advocates and also monitored the unification of two former bodies into the newly established Chamber of Advocates.

Professional development

The ODIHR also encourages the creation of continuing legal education programmes that allow legal professionals to regularly update their professional knowledge and improve their skills.

In 2005, the ODIHR worked with defence lawyers in Kazakhstan on improving the professionalism of bar members. A group of Kazakh trainers who completed an ODIHR training programme in 2004 conducted more than 90 hours of seminars to improve the professional legal skills of their less-experienced colleagues in the Almaty City Collegium of Advocates. In Kyrgyzstan, the ODIHR provided support to the Youth Human Rights Group, a national NGO that implements an advanced training course for lawyers on the International Covenant on Civil and Political Rights. Twenty-five lawyers will complete this programme in 2006.

Responding to a request from the Armenian Prosecutor General's Office, the ODIHR carried out a training session for a group of Armenian prosecutors in November 2005 on dealing with domestic violence. The seminar featured a prominent expert from the English Crown Prosecution Service. In 2006, the ODIHR will conduct another training session for Armenian prosecutors on prosecuting cases of sexual assault.

Trial observation

Trial-observation programmes can be instrumental to promoting the right to a fair trial. The information gathered by observers often points to the most pressing reform needs and may provide a basis for reform discussions. In individual cases, the presence of observers in the courtroom may encourage the court and the parties to adhere to the procedural rules more vigorously.

When the ODIHR organized the first OSCE Inter-Mission Trial Observation Meeting in 2002, trial observation was a relatively new activity for OSCE field operations, conducted primarily in the countries of South-Eastern Europe. A wealth of experience has been gained by those trial observers, who can offer experience to others who have begun to conduct trial observation in other parts of the OSCE region. The ODIHR organized two meetings in 2005 to provide such opportunities to exchange experiences and lessons learned. The fourth Inter-Mission Trial Observation Meeting was held in Sarajevo in the fall, with staff from 12 OSCE field missions attending. A smaller meeting followed this in Zagreb that was dedicated to observation of war-crimes cases.

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