CIVIL RIGHTS DEFENDERS

KONRAD ADENAUER STIFTUNG

NORDIC RULE OF LAW FORUM 2021:

EFFECTIVE REMEDIES TO ENSURE ACCESS TO JUSTICE

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Civil Rights Defenders, together with the Konrad Adenauer Stiftung, held the first Nordic Rule of Law Forum on 26 November 2021. The event drew on the success of the annual Regional Rule of Law Forum for southeast Europe, also organised by Civil Rights Defenders together with the Aire Centre, and was attended by legal practitioners from across the Nordics, as well as guests from the Western Balkans who had previously participated in the Regional Forum. This year's topic was Effective Remedies to Ensure Access to Justice.

The day's events began with the organisers welcoming the speakers and participants. John Stauffer, Legal Director and Deputy Executive Director at Civil Rights Defenders, explained that in developing the Forum, Civil Rights Defenders hoped to create "a platform for dialogue, debate, and learning around human rights and rule of law." Maintaining an ongoing dialogue is particularly important in light of the negative trend of countries around the world moving toward authoritarian rule and undermining human rights, and it should be held broadly in society. Even if the issues in essence are legal, they concern all members of society. The strong interest in the Forum indicates an interest and willingness to engage in these discussions, as well as a need for a forum in which to do so, and Civil Rights Defenders' goal is for the Forum to become an annual event.

Gabrielle Baumann of the Konrad Adenauer Stiftung gave an overview of her organisation's programs and mission. She emphasised the importance of ensuring a strong rule of law, both to prevent authoritarian regimes as well as to support social and economic progress, and of having a dialogue among friends about these issues. Goran Miletic, Director of the Europe and Middle East/North Africa Department at Civil Rights Defenders, spoke about his experiences organising the Regional Rule of Law Forum. It has become a particularly important way of enabling judges and lawyers in the Western

Balkans to learn about European Court of Human Rights jurisprudence directly from judges of that court, and a valuable tool in promoting regional cooperation, especially amongst judges.

The Nordic Rule of Law Forum was organised into a morning and an afternoon session. The morning session consisted of presentations from three speakers, each representing a different international perspective, followed by a general Q&A session. In the afternoon, the first session focused on the Swedish system while the second part consisted of a panel discussion featuring speakers from Sweden, Norway, the Western Balkans, and the European Court of Human Rights.

SESSION 1.
INTERNATIONAL OUTLINES

THE INTERPLAY BETWEEN DOMESTIC REMEDIES AND THE CONCEPT OF SUBSIDIARITY IN THE COURT'S CASE LAW

Speaker: Robert Spano, President of the European Court of Human Rights

Robert Spano began by stressing the importance of holding a dialogue with domestic stakeholders and encouraged engagement with the European Convention on Human Rights on a national level, as a bottom-up strategy to uphold the Convention empowers national stakeholders to uphold the Convention. Respect for human rights must exist in the hearts and minds of peoples.

President Spano noted the timeliness of the Forum's topic, stating that without effective remedies, human rights are almost meaningless. His presentation focused on the link between domestic remedies and the principle of subsidiarity, under which the European Court is subsidiary to national systems. States are responsible for implementation of the rights and freedoms enshrined in the European Convention, and human rights must therefore be protected at the domestic level – as close to the person affected as possible. For the Court to be able to concentrate on its essential role as a guarantor of human rights, sovereign states must be the first to address

rights violations that occur in their territories. Moreover, the Court must respect the autonomy of national systems, which are better placed to assess the various factors in a case. At the same time, this does not limit the Court's competence to review domestic court judgements.

President Spano explained that when the European Convention is sufficiently incorporated in a state's legal system, the Court can function in a more "process-based" role and apply the principle of subsidiarity more robustly. However, the opposite is also true when the Convention is not applied in good faith or is applied by authoritarian governments. President Spano then explained what remedies a state must have in place to address Convention violations and the relevant Convention articles. He concluded by emphasizing that national authorities and judicial bodies must be independent and impartial, and governed by the rule of law. The European Convention's success relies on the level of embeddedness in domestic legal systems.

RULE OF LAW AND ACCESS TO JUSTICE IN EUROPE – CAN ONE EXIST WITHOUT THE OTHER?

Speaker: Anne Ramberg, former Secretary General of the Swedish Bar Association and a member of the Board of Civil Rights Defenders

Anne Ramberg spoke next about the close link between access to justice and the rule of law: rule of law is a prerequisite for effective access to justice and a necessary element in protecting human rights. She began by presenting an overview of the historical development of the concept of rule of law, from Aristotle's ideas on judgment through Magna Carta, to the creation of the United Nations, the signing of the Universal Declaration of Human Rights, the post-World War II Nuremberg trials, and up to the international tribunals for Rwanda and the former Yugoslavia. Over time, the principles of the rule of law have been elaborated.

However, without effective access to justice, "the rule of law is just a nice idea." It must be possible for individuals to seek redress for violations of their rights. Yet the lack of effective access to justice remains a problem for many groups in most European countries. Countries must have a fair and accessible legal aid system. In criminal matters in particular, domestic legal aid systems must comply with the requirements of the European Convention. In Sweden, many areas of law are ineligible for legal aid and the threshold for receiving such aid is high. Following the Legal Aid Act of 1996, it was expected that the income ceiling for receiving legal aid would be reviewed regularly, at least every three years, but the current ceiling has been in place since 1999.

The “loser pays” rule is another barrier to access to justice in Sweden. Because of this rule, which requires the losing party in court proceedings to reimburse the opposing party for litigation costs, few individuals are able to assume the economic risks necessary to enforce their rights. When it comes to cases involving alleged discrimination, there is an obvious imbalance in power and a lack of efficiency that results in limited access to justice in practice. Victims tend to have limited experience with the law and the potential for compensation is very limited. As such, few cases are brought and those that are pursued are filed as small claims matters. While Sweden does have an Equality Ombudsman, the focus is often on spreading information and awareness-raising rather than enforcing the law, so that few cases are brought.

While Sweden is often top ranked in surveys about protection of and respect for human rights, it still has shortcomings and areas where it is regularly criticised by the EU, such as having lengthy detention periods, especially for juveniles. Minority groups are not sufficiently protected and hate crimes are often not prosecuted. Ms. Ramberg cited the Julian Assange case in Sweden involving alleged rape as a particularly egregious failure in that there has been no investigation into how the case was handled and no one has been held responsible for the decisions made.

Ms. Ramberg also drew attention to the EU Charter of Fundamental Rights. The Charter goes even further than the European Convention, addressing issues such as the environment, elderly rights, and protection of diversity, and yet only 12% of Europeans know what the Charter is about. All these issues are coming at a time when legal systems are already facing many new challenges, including social media, globalisation, climate change, and artificial intelligence and the use of algorithms.

In these challenging times, lawyers and bar associations have critical roles to play in protecting human rights and providing access to justice. In democratic societies, citizens need to be aware of their rights and bar associations therefore have a duty to raise awareness and educate people about their rights. Many law firms limit their client base by not taking on clients that oppose big companies. Bar associations should be responsible and act in a watchdog role to ensure that the rule of law and access to justice are given their proper place within domestic legislatures. It is equally important that lawyers remain independent. Without independent lawyers, there can be no independent courts and therefore no access to justice. Ms. Ramberg concluded by emphasising that access to justice must be about safeguarding the right to fair trials and maintaining public confidence in judicial systems. Upholding the rule of law means that individuals must have access to justice.

ACCESS TO JUSTICE AND EFFECTIVE REMEDIES: EXPERIENCES FROM THE WESTERN BALKANS

Speaker: Mirjana Lazarova Trajkovska, judge on the Supreme Court of Macedonia and former European Court of Human Rights judge

Mirjana Lazarova Trajkovska began by stating that governments have a positive duty to translate the concept of access to justice into practice. There are a number of principles that all justice systems should meet in order to ensure access to justice for all. Firstly, the system must be fair to all litigants. It must offer legal procedures at a reasonable cost to the public and with reasonable speed. The justice system must have effective and adequate resources, and the right of access to courts must be practical and effective.

Judge Trajkovska noted that the Western Balkans have had challenges in harmonising legal perspectives across countries and implementing European Convention principles. While there has been plenty of new legislation to address this, and significant advances have been made in ensuring access to justice, such as the introduction of constitutional complaints, there is still much to be done. As such, she offered some constructive criticisms for further improvement.

The establishment of an independent judiciary is key for those countries in line for EU accession. However, many judiciaries face challenges such as limited budgets, long court delays, lengthy proceedings, high case backlogs, and lack of transparency. Threats to judicial independence, including external pressure from politicians on courts and the granting of amnesties, further

damages the integrity and visibility of the judiciary. Judges under such pressure often remain quiet, choosing not to speak out about the problems as it is difficult for them to be visible in these conditions. In some countries, historical legacies, such as that of communism, also have an influence on the development of the rule of law and access to justice. Judge Trajkovska cited recent European Court case law addressing some of these issues. There are also numerous applications involving breaches of Article 6, in which judgments are issued but go unenforced. Litigants may have access to courts and legal remedies may exist, but when there is no execution of judgments, the question arises as to whether the available remedies are indeed effective.

Following the conclusion of Judge Trajkovska's presentation, the audience had the opportunity to pose questions to the morning's speakers.

SESSION 2.
INSTITUTIONS PROVIDING REMEDIES

DEFENDING BASIC RIGHTS IN COURT FROM AN INDIVIDUAL'S PERSPECTIVE – ACTION FOR DAMAGES AS A TOOL?

Speaker: Anders Eka, President of the Swedish Supreme Court

The afternoon session began with Anders Eka who took up the issue of the principle of subsidiarity discussed earlier by President Spano, but from a domestic perspective. The European Convention provides that states must provide effective remedies for rights violations in some form, although the individual states should have the freedom to decide upon national remedies themselves based on their individual legal systems and cultures.

One such remedy is damages. Although a violation of the Convention does not automatically trigger a remedy for damages, they can be an important tool, especially in cases where other remedies are not available. National courts and authorities should be the starting point for curing violations, which should be done during the ordinary legal process and through remedies aside from damages, such as mitigating a prison sentence or reducing a penalty fee in administrative procedures. However, such remedies may not always be available, or even if they are, they might not necessarily provide adequate compensation in certain cases. For example, a prisoner who has

already served a lengthy prison sentence cannot be given that time back. In such cases, awarding damages should be an option.

Judge Eka reviewed the Swedish case law establishing a right to damages for violations of the European Convention. After multiple judgments confirmed this right, the Swedish parliament requested a government proposal on the capacity to regulate individuals' ability to obtain damages for Convention violations. In 2018, a new provision to the Tort Liability Act came into force, giving the court the authority to provide compensation in the form of damages in cases involving Convention violations. This amendment clarified the rights of individuals who had experienced rights violations under the Convention, allowing them to receive damages directly based on Swedish law, as if they had gone through the European Court process.

Permitting non-material damages for European Convention-related violations in turn raised the question in Sweden of whether it should be possible to receive damages for violations that arise under the Swedish constitution. A number of supreme court judgments subsequently dealt with this issue and created legal precedent for the awarding of non-material damages in constitutional cases. A parliamentary commission was appointed in 2018 to further explore this issue and determine whether it is appropriate for such a right to be regulated by law; an amendment to the Tort Liability Act addressing this is likely forthcoming in 2022.

THE CHANCELLOR OF JUSTICE – A DOUBLE HEADED CRANE?

Speaker: Mari Heidenborg, Swedish Chancellor of Justice (Justitiekanslern)

Mari Heidenborg spoke about this unique institution which has wide-ranging supervisory powers over Swedish public authorities, including the judiciary. The Chancellor may initiate disciplinary proceedings against civil servants, even judges, and prosecute them where appropriate. At the same time, the Chancellor has a dual role in both handling complaints from individuals against the Swedish state while at the same time responding on the state's behalf when individuals sue the state. Although these may seem like conflicting roles, Ms. Heidenborg said that she did not see them as such. She explained the types of cases that her office takes on, noting that she tends to focus more on violations of a systematic nature and investigates structural problems, rather than looking at more individual cases. Ms. Heidenborg stressed that her decision as the Chancellor of Justice should not be viewed as the state acting against an individual, but instead "as a private law response of the state as a party to a potential civil dispute." Therefore, if she denies a claim, the claimant cannot appeal her decision but rather must sue the state in court where Ms. Heidenborg will be the person representing the state. She does not see this as a conflict as she will give the same response then, based on an objective assessment of the law. In determining whether a claim is well-founded and the state liable, she must give a reasoned, objective decision based on the law and if she finds that the state is indeed

liable, she will admit to the violation and pay the required damages. She will not dispute the claim, even if it would be to the state's benefit to do so. Ms. Heidenborg expressed that the state should not have an interest in winning cases it does not have a legal basis for winning and emphasised that her role is to act "as an agent for justice under the laws."

Because of this seemingly conflictual position, it is of utmost importance that the Chancellor be constitutionally independent, act objectively and impartially, and be an agent for justice. Ms. Heidenborg stressed that she does not represent the government in court and does not take instruction from them on how to proceed: she makes an independent assessment of what the law requires. She noted that following a negative decision from her office, individuals may go directly to the European Court without going through the Swedish courts. While this may be favourable for the individual, Ms. Heidenborg expressed her belief that it would be better for the case to continue to be pursued through the domestic court system so the courts could examine her decision. As she noted, her decisions tend to be conservative so a court would be more likely to make a more progressive decision – which would have a greater impact on the system. Furthermore, domestic courts, which operate in the national context and therefore have a better understanding of the country's laws and culture, are better placed to assess whether a right has been violated than the European Court. Finally, trying rights violations in national courts will help build good national case law on human rights. As Ms. Heidenborg stated: "It is through national case law that we make those rights our own."

JUDICIAL CONTROL IN THE 21ST CENTURY – CAN WE MAKE THE EFFECTIVE REMEDIES MORE EFFECTIVE?

Speaker: Per Lennerbrant, Swedish Parliamentary Ombudsman (Justitieombudsman)

Per Lennerbrant spoke about the role his office plays in ensuring access to justice and promoting the rule of law in Sweden. The role of the four ombudsmen is to ensure that statutory laws are correctly applied by the country's parliamentary bodies and that state actions do not infringe upon citizens' fundamental rights and freedoms. Moreover, they work to remedy legislative shortcomings, for example by petitioning Parliament or the government on issues involving statutory amendments or other state measures. Their work is viewed as supplementing the regular supervisory bodies that exist within, for example, the health care system or a particular public agency.

The Parliamentary Ombudsmen's work is based primarily on complaints received from individuals, of which the office receives approximately 10,000 per year. After investigating and making a decision in a case, the Ombudsman will then state whether the state action (action by a public agency or official) is contrary to the law or otherwise inappropriate or incorrect. These statements are intended "to promote the uniform and appropriate application of the law." Their goal is to provide guidance more generally, not just to the agency or official in question. The Ombudsmen are limited in that they may not change decisions made by the courts or public agencies,

nor may they award damages. Their decisions are also not legally binding, although public agencies and officials are generally keen to comply. At the same time, a decision can weigh heavily in subsequent damages cases, and provide an authoritative recognition of an error having been made by the state.

In keeping with the theme of the Forum, Mr. Lennerbrant explored what it means for a decision by his office to be effective or to have an impact. He noted that the cases received by the Ombudsmen each year span a very broad variety of issues and the Ombudsmen have wide discretion to choose which ones to investigate. In prioritising and picking cases for investigation, then, he noted that the Ombudsmen try to look for those with the potential to contain indicative statements, as it is important for them to consider the impact of any decision made. While they may be critical of public authorities, the Ombudsmen work to issue decisions that are constructive so that lessons can be learned from them. The Ombudsmen's role, in Mr. Lennerbrant's view, is partly to help authorities improve.

To do so, the decisions must be as clear and concise as possible and easy to understand, even for those without a legal background. They should be well-structured and clearly explain issues of public interest. They should also be publicised, for example via press releases, and widely disseminated so that everyone has the opportunity to read and learn from them. Mr. Lennerbrant emphasised his belief in the importance of the Ombudsmen being open and accessible to the media, and "emerge from the relative anonymity" that exists today.

For this system to work properly, however, public authorities must have the will to comply with the requirements of the law. Larger public bodies such as the police or the Migration Authority usually have routines in place for addressing and implementing decisions by the Parliamentary Ombudsmen. Mr. Lennerbrant noted that in the vast majority of cases, the authorities indicate that they accept the Ombudsman's criticism and will put in place measures to ensure that the incident does not reoccur. In some cases, the authority in question will begin to address the problem right away after receiving notification of an investigation by the Ombudsmen, long before a decision is actually issued. Overall, it is important for the leadership of a public authority to communicate effectively and take the lead in demonstrating for employees that the criticism is taken seriously and will lead to positive changes.

Although no formal procedure currently exists to measure public authorities' compliance with Parliamentary Ombudsman decisions, Mr. Lennerbrant noted that this can sometimes be tracked based on follow-up

visits to the authority or by monitoring new complaints. One suggestion for a more official tracking system would be for the authorities to report all investigations conducted during the year, along with subsequent actions taken by the authority to follow up. For authorities not under investigation, but for whom Parliamentary Ombudsman decisions may be relevant, again, the larger authorities tend to have routines in place to keep up to date with such decisions and make adjustments if necessary. Even smaller authorities, however, are responsible for remaining updated on relevant decisions. Mr. Lennerbrant noted that the Parliamentary Ombudsmen are currently conducting an inquiry looking at the impact of decisions on the authorities investigated. A report is expected by May 2022.

Mr. Lennerbrant concluded by emphasising that if the Parliamentary Ombudsmen are to be effective in their role as a guarantor of the laws, their decisions must have an impact in society. Both the Ombudsmen themselves and the authorities investigated must help ensure this: the Ombudsmen by issuing clear and effective decisions, and, in turn, the authorities by taking the decisions seriously and implementing measures to address the concerns expressed.

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PANEL DISCUSSION

The final presentation of the day was a panel discussion featuring four speakers: **Eric Wennerström**, a judge on the European Court of Human Rights from Sweden; **Helena Jäderblom**, President of the Swedish Supreme Administrative Court; **Adele Matheson Mestad**, Director of the Norwegian National Human Rights Institution; and **Dragoljub Popovic**, professor and a former judge on the European Court from Serbia. The panel was moderated by **Merete Smith**, Secretary General of the Norwegian Bar Association. The panellists, each representing a different perspective, shared their views on the issues of effective remedies and access to justice.

The panel discussion opened by noting that the Rule of Law Index, after showing improvement for several years, has shown that over the past four years the state of the rule of law worldwide has been declining. Rule of law work is therefore especially important at this time.

Judge Wennerström began by noting that access to justice in practice obliges states to guarantee individuals' right to go to court, or an equivalent dispute resolution body. When it comes to the European Convention, the concept of access to justice brings together several rights, including the Article 6 right to trial and the Article 13 right to a remedy. The Court has recognised the right to go to court as a central component of Article 6. Judge Wennerström remarked that one-third of the applications received by the Court each year pertain to Article 6. The independence of the courts to which an individual turns is also critical and connected to Article 6, and Judge Wennerström highlighted recent case law from the Court regarding these issues. He also addressed the Article 13 right to an effective remedy – an essential component of access to justice as it enables individuals whose rights have been violated to seek redress. He discussed the institutional requirements for a remedy to be considered effective.

Judge Jäderblom's presentation focused on Article 13 and she emphasised that it contains a twofold requirement: the state must both offer damages and also admit that a violation has occurred. This is a critical point – the Court must conclude on the merits whether a violation has occurred. Following up on Judge Eka's presentation earlier in the day on damages as a remedy, she highlighted certain situations, such as cases involving past violations, in which damages may be the only form of redress possible. She agreed with Judge Eka's statement that damages are a secondary remedy but noted that the Administrative Court does not decide damages – that is a matter for the general courts.

Adele Matheson Mestad observed that overall, Norway has a very well-functioning judicial system that is currently ranked second in the World Justice Project's rule of law index. At the same time, there are still challenges to ensuring equal access to justice in practice. She described Norway as having a "fragmented" system for addressing European Convention violations, and even some constitutional violations, in that some specific areas have regulations, but not all. There is no general legal basis for awarding non-pecuniary damages and courts have not addressed this in a sufficiently uniform manner. Additionally, access to legal aid is limited in practice. Legal proceedings are very expensive as prospective litigants not only need to hire a lawyer but also assume the risk of having to pay their opposing party's legal fees. This is a huge economic risk for anyone to take on, but especially for low-income groups. The income ceiling to qualify for legal aid is also very low, meaning that many vulnerable groups therefore do not have access to legal aid. It is important to ask who we do not see in courts and what kinds of cases are not adjudicated. For example, elder rights and disability rights cases are rarely heard in Norway. Norway does not have institutions like the Parliamentary Ombudsmen or Chancellor of Justice in Sweden that provide additional pathways to justice. Ms. Matheson Mestad expressed the need for Norway to engage in a larger debate on granting this authority to public bodies that can take on important cases and ensure that vulnerable groups and important issues are brought before the courts and effectively adjudicated. Moreover, payment rates for publicly appointed lawyers are very low. Norwegian lawyers are currently taking action to push for change. Ms. Matheson Mestad concluded by reiterating that many vulnerable groups in society are underrepresented in the legal system, leading to their rights not being clarified. Some groups do not really have access to justice, and it is often hard to draw political attention to these issues. It is important that politicians understand the importance of effective remedies.

Judge Dragoljub Popovic noted the similarities and differences between the challenges facing the Nordic and the Western Balkan judiciaries. He presented in detail two cases that highlighted the issues raised. The first concerned judicial review of administrative action while the second involved an alleged Article 8 violation of the right to family life. He walked the audience through the facts and legal proceedings of each to illustrate the complexity of the legal issues involved. Judge Popovic noted that although the Nordics and Western Balkans have problems in common, the Nordics "do not have our problems." He stated that countries in his region often have a problem of repetitive remedies.

At the conclusion of the panel discussion, the audience again had the opportunity to ask questions of the speakers and comment themselves on the issues raised. A lively discussion ensued. Participants considered whether Sweden faced the same issues as Norway regarding the underrepresentation of minority groups in court, and what measures should be taken to ensure that these groups have equal access to justice and that their rights are better protected. Ms. Matheson Mestad reiterated the point that this access must exist in practice: in theory, there are ways for such groups to take cases to court but in practice, doing so is actually very hard given the challenges mentioned, such as the high requirements to receive legal aid. She suggested ideas such as enabling more public bodies to bring cases to court and getting more lawyers to take on pro bono cases, which is a crucial role that lawyers can play in ensuring widespread access to justice. Another audience participant added that many vulnerable groups are not familiar with legal procedures such as presenting evidence, litigation rules, and other complex issues but find themselves opposing lawyers and law firms well-versed in these areas. While on paper, anyone may bring a case, many do not know how to do so, which is a big problem from the rule of law perspective.

There was also a good deal of discussion about the roles of the Chancellor of Justice and the Parliamentary Ombudsmen. Both of these speakers were able to clarify their positions for the audience. Mr. Lennerbrant reemphasised the importance of public authorities following up on decisions by his office so that employees and the wider public could learn from them. He also reflected on whether it should be the Ombudsmen's role to follow up on the authorities' responses themselves.

To conclude the day's events, the Forum organisers expressed hope that the discussions held would provide food for further thought and dialogue as they should be discussed continuously. The Forum's goal is to become an annual event where different aspects of human rights, the rule of law, and democracy are discussed.

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