

Q & A: Reform of the European Court of Human Rights

APRIL 2012

THE MEMBER STATES of the Council of Europe will debate proposed reforms of the European Court of Human Rights at a meeting in Brighton, from April 18-20. A draft declaration prepared by Britain, which currently holds the chairmanship of the Council of Ministers, has provoked concern among human rights groups, including the Open Society Justice Initiative. The following Q & A seeks to explain those concerns.



What's the problem?

We agree with the United Kingdom and others that the European Court of Human Rights is overburdened, due primarily to a dramatic surge in applications from the countries of East and Central Europe that joined the Council of Europe with the collapse of the Iron Curtain in the early 1990s.

As a result, the Court currently has a backlog of around 150,000 applications from individuals seeking redress for alleged violations of the European Convention on Human Rights.

In 2011 the Court rejected as inadmissible just over 50,677 applications. But during the same period it also received 64,500 new applications. As a result the overall backlog of applications between 2010 and 2011 increased by 9 per cent (giving us the 150,000 overall figure).

Can this backlog be dealt with?

Priority Cases

The most pressing issue is the roughly 6,000 “priority” applications awaiting a hearing. These applications are judged to be priority because they involve alleged violations of the “core” rights of the European Convention: the right to life, personal freedom and security and violations involving children or family life.

But the Court has never rendered more than 2,607 judgments in one year (in 2010), while last year it passed judgment on 1,511. Last year, 1,500 new priority applications were registered, meaning the Court is more or less keeping up with the pile of priority cases, but not reducing its backlog.

Non-Priority Cases

There are also 19,000 cases that are also considered “non-priority” applications, involving issues such as property rights and free speech, with 4,600 new cases like this added in 2011.

But the Court believes that it can take steps to deal with these cases using new case law procedures under its existing powers. This would not require changes to the European Convention on Human Rights.

Repetitive Cases

The backlog also includes 34,000 admissible “repetitive” non-priority cases – cases that arise from a root cause that has already been identified in a previous Court judgment. 10,800 new cases like this were registered in 2011, almost double the number of non-repetitive cases. They don't need to be heard again, but bundled up and added to the list of applicants attached to the previous judgment, awaiting action by the government concerned.

Inadmissible cases

The remaining 90,000 applications have been submitted for review, but the Court has yet to decide whether they will be heard, or rejected as inadmissible. The Court estimates that around 90 per cent will be rejected as inadmissible.

What should be done about all this?

We and others believe that despite the alarming numbers, existing reforms of the way the Court operates—which have yet to be fully implemented or adequately backed with money and staff—are already reducing the backlog of cases, and should be given more time to work.

We also believe that the most effective way to reduce the flow of new applications is for the member states of the Council of Europe to address the abuses that are the source of so many applications. More than half of the cases ruled admissible each year are so-called “repetitive” applications: cases which concern issues the Court has previously decided, but which governments have failed to address. The Committee of Ministers of the Council of Europe is responsible for ensuring that members respond to Court rulings. It needs to be made more effective, to provide more public and detailed guidance to states on implementation, and, in certain cases to fine states for non-compliance.

So what are these “existing reforms”?

In 2010, the Committee of Ministers approved amendments to the European Convention on Human Rights, known as Protocol No. 14, seeking to “maintain and improve the efficiency” of the Court. These included speeding up the process for determining whether new applications are admissible or not by using whenever possible a single judge, rather than the three required previously.

In the first nine months of 2011, the twenty appointed Single Judges issued 30,779 decisions, an increase of 35 per cent compared with the same period in 2010. The number of inadmissibility decisions reached increased by 15 per cent during this period.

The Court is also increasingly using a “pilot judgment” procedure under which it groups together repetitive applications, and sets out detailed recommendations on how the member state concerned should rectify the problem. Repetitive cases can now be considered by on the merits by a three-judge committee, instead of having to be handled by a seven-judge chamber or the grand chamber. Recently, the Court has also introduced a new procedure to prioritise the most serious cases.

But are these reforms working, or not?

Yes, they are. They have led to a sharp increase in the rate at which the Court can process and reject inadmissible cases. Sir Nicolas Bratza, the current president of the European Court of Human Rights, has said that under the existing reforms and with “with a relatively modest addition of staff” the Court could deal with the backlog of inadmissible cases “within three years”.

That still leaves the backlog priority cases?

Yes. But we disagree with those who believe the answer is to amend the European Convention of Human Rights in order to change the factors which determine whether or not a case should be admissible.

The draft declaration under discussion ahead of the Brighton meeting includes two proposals on this. The current draft includes a proposal to amend Article 35 of the Convention to make it clear that a case will be rejected as inadmissible if it “raises a complaint that has been duly considered by a national court applying the Convention in light of the well-established case law of the Court, unless the application raises a serious question affecting the interpretation or application of the Convention.” In other words, if a national court has made a decision while properly taking into account the principles of the Convention and the decisions of the Court, that decision should be left untouched.

But the Court itself has argued that any proposal along these lines would not significantly reduce the case burden, since the existing system would already screen out any case where the national Court system had in fact done its job of assessing a case against the Convention.

We also disagree with the idea of writing into the Convention the principle of “states’ margin of appreciation”, a doctrine developed by the Court to grant a degree of adaptability to the national context

(section 19 of the draft declaration). Possibly limiting the scope of the human rights protection – and without addressing the Court’s backlog – the margin of appreciation should remain an interpretative judicial tool to be used at the discretion of the Court.

So what do you want to do instead?

We and other civil society groups argue that the solution is to deal with the source of the problem: continuing fundamental rights violations in member countries which produce the greatest volume of applications, many of them so called repetitive applications.

Five countries—Russia, Ukraine, Romania, Turkey and Italy—currently account for just over half of the cases before the Court, with Russia accounting for 27 per cent of applications last year. Prison conditions and arrest rights issues accounted for the preponderance of cases for the first four, while Italy’s largely repetitive cases arise from the overlong trial procedures.

These problems can be fixed if the political will is there. The Council of Ministers of the Council of Europe should be encouraged and resourced to use its existing authority more robustly, transparently and effectively in overseeing the execution of judgments.

Are there any other ideas out there?

Other ideas that have been floated in the past include the idea of a “sunset” clause that would mean that any case that isn’t heard after a certain time is automatically dropped, or giving the Court discretionary powers, rather like the US Supreme Court, to pick and choose which cases it takes up.

We believe the better answer lies in enforcement and implementation of judgments. We welcome current proposals to recruit additional judges and/or lawyers to help the Court deal with pending applications. And we favour proposed measures that aim at improving implementation of the Court judgments by enhancing national mechanisms and increasing the pressure from the Committee of Ministers.

Presumably this would cost money?

We recognise that European states will not want to invest in more staff, judges and lawyers at the ECHR during an economic crisis. But the ECHR provides remarkably good value for money.

Moreover, the costs of additional lawyers required to address the backlog of inadmissible cases are not large. In order to clear the backlog of inadmissible cases by 2015, the Court says it will need just over a dozen seconded lawyers for a three year period. It also wants another 24 lawyers to expand its new system for filtering out repetitive applications, which would cost each member state just €21,000 a year.

Many believe that the Court’s own judgments are often more effective in reinforcing the rule of law than numerous and often expensive programs in rule of law capacity building supported by European donor states.

So what’s your position?

The Open Society Justice Initiative believes that reforming the Strasbourg Court should strengthen the Court rather than weaken it. There should not be any immediate amendment to the European Convention on Human Rights without careful analysis of the proposals for change. Member states should help the Court deal with the growing number of pending applications.

**E-mail: info@justiceinitiative.org
www.justiceinitiative.org**



The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. Our staff is based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, Freetown, The Hague, London, Mexico City, New York, Paris, Phnom Penh, Santo Domingo, and Washington, D.C.