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International Law DG Meeting Summary

European Court of Human Rights: A Court in Crisis?

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Introduction

The International Law Discussion Group meeting was held at Chatham House on 30 June 2009 and chaired by Elizabeth Wilmshurst. Participants included legal practitioners, academics, NGOs, and government representatives. The meeting was held under the Chatham House rule.

Speakers were Derek Walton, Legal Counsellor, Foreign and Commonwealth Office, and Philip Leach, London Metropolitan University's European Human Rights Advocacy Centre

The European Court of Human Rights: A Court in crisis?

There is a crisis. In the first 43 years of the Court's existence, the Court and Commission had about 45,000 cases to deal with. That figure has risen steadily each year. Last year there were around 50,000 new applications: more than the combined total for the first 43 years. To put that figure of 50,000 new applications in perspective, in the same year, the Court made 30,200 admissibility and other decisions and delivered 1,900 judgments, leaving a net deficit of just under 18,000 cases. 2008 was not unusual. The Court's backlog of cases now stands at over 100,000; and it continues to grow.

That means that cases take longer to decide. For most applicants going to Strasbourg takes years. It's a good thing that the requirement of Article 6 for Courts to deal with legal proceedings in a reasonable time doesn't apply to the Strasbourg Court itself!

So the Court is facing a real crisis in terms of the sheer numbers of cases. But the backlog is not evenly distributed. Of the pending cases as at 31 December 2008, four States account for about 57% of the Court's workload (Russia, Turkey, Romania and Ukraine). Newer Contracting Parties to the Convention figure prominently in the top 12. The UK is not among these, perhaps due in part to the existence of the Human Rights Act.

The reasons for being in the top 12? Population plays a role. Russia has a population of 150 million; but if population alone were the criterion, you would expect Russia to have twice as many cases than Germany, not more than ten times the number. Another factor is a poor human rights culture. Some countries do not have an embedded human rights tradition and consequently the Convention is not yet as well implemented there as it should be. Another factor is inadequate legal structures: many repetitive, but well-founded cases still go to Strasbourg when they should have been dealt with at the national level.

The result is that Strasbourg has become the agent for effecting change in society. This is both painful for the country concerned and crippling for the Court.

A further factor is that many cases with no prospect of success are submitted because applicants have unrealistic expectations of the Convention and in particular the role of the Court. These cases have no prospect of success but still have to be examined.

Solutions

The solution is either to reduce the number of applications reaching Strasbourg or to increase the Court's capacity to deal with cases. Or both.

Reducing applications would come about by improving the implementation of the Convention at the national level so that breaches of the Convention don't occur in the first place. Obviously this is the ideal; and is the long term goal. In addition national legal systems should be improved so that when breaches occur they are dealt with effectively by the national courts and never get as far as Strasbourg. Further, there should be more information about the Court so that potential applicants are deterred from making hopeless applications. The more radical solution is to restrict the right of individual application in some way – this is mentioned just for the sake of completeness.

As regards increasing the Court's capacity, the Court has already taken a number of measures, many of them in response to a review carried out by Lord Woolf. In particular, the Registry has been restructured; and the Court's procedures for handling cases have been streamlined. A particularly useful innovation has been the introduction of a combined admissibility and merits procedure. This leads to a single judgment rather than admissibility decision and then a judgment.

The Court has also changed the way it prioritises cases. It now focuses on well-founded and complex cases, so as to concentrate its resources where they are perhaps most useful. But this leads to even longer delays for bad cases.

The Court has also begun to use the pilot judgment procedure. The Court identifies a structural problem giving rise to a large number of cases and delivers judgment in one lead case. It then delegates responsibility to a national procedure for applying the principles from that judgment to all the other cases. There is also greater use of friendly settlement and unilateral declarations.

A satellite office of the Registry has been set up in Warsaw and others are being considered for other States which have high numbers of inadmissible cases.

Protocol 14

In May 2004 the Parties to the Convention adopted Protocol 14. This introduces a number of measures intended to address some of the problems that have led to the backlog. Clearly inadmissible cases to be dealt with by a single judge (not national judge). There will be three-judge committees to decide on cases covered by established case law. And there is a new admissibility criterion: (1) applicant suffered no significant disadvantage; (2) respect for human rights does not require examination of the merits; and (3) case must have been considered by a domestic tribunal.

The Court's Registry estimates that these procedures will between them improve efficiency by 20-25%.

The problem is that Protocol 14 is not yet in force. It requires all 47 States to ratify. 46 have done so. Russia has failed to ratify despite sustained pressure. Protocol 14 therefore has not yet entered into force. Meanwhile the Court's problems have only grown worse. Why hasn't Russia ratified? Perhaps an underlying reason is dissatisfaction with a series of high profile losses in the Court.

The Council of Europe Steering Committees on Human Rights and International Law identified two possible transitional options: a new Protocol, with less stringent entry into force requirements; and provisional application of Protocol 14. Two procedures were identified from Protocol 14 which would have most impact on the case load: single judge procedure and three-judge committees.

As a result, in May this year Protocol 14bis was adopted by consensus by the States parties at Madrid. It amends the Convention for those who are parties, and introduces the two new procedures for their cases. It has already been ratified by Denmark, Ireland and Norway, and will therefore come into force for those States on 1 October. It will lapse when Protocol 14 enters into force.

In addition the parties adopted an agreement on provisional application of the two procedures regarding the new single-judge formation and the new three-judge committees contained in Protocol 14. The agreement came into effect on 31 May. States which have submitted declarations accepting provisional application of the two procedures from Protocol 14 are Germany,

Luxembourg, Netherlands, Switzerland and the UK¹ – the new procedures will apply to their own cases.

However, neither Russia nor Turkey is expected to take either option. So these measures won't come close to achieving the 20-25% benefits identified by the Registry. Even when Protocol 14 comes into force, more will be needed.

Further ideas for change

Some further ideas for change originate in the report of a panel of 'wise persons'. This made a number of recommendations:

- To amend the Statute of the Court incorporating a fast track amendment procedure. Work is likely to start later this year. This is a long term project with no real effect on caseload.
- To adopt a new Judicial Filtering mechanism – a judicial committee to hear all admissibility issues and deal with cases covered by established case law. This is controversial and still under discussion.
- To allow the Court to give advisory Opinions following requests from national courts of final instance. This is likely to be considered in parallel with work on the new Statute.
- To improve domestic remedies. A recommendation on this is to be drafted.
- To repatriate the issue of just satisfaction so that national courts deal with this following an ECtHR judgment. This is not being pursued.

A number of alternative visions for the Court have been suggested:

- A 'US Supreme Court' model?
- A two tier system? This would be a return to the Commission; or something new (the Wise Persons suggested a judicial body).

Of course all these envisage keeping the Court. There have been those who want to abolish it. If we do want to keep a Court in Strasbourg, let alone the right of individual application, we are going to have to find creative ways of dealing with the structural problems caused by the ever-growing caseload.

¹ UK accepted on 1 July 2009.

The next Council of Europe chair (Switzerland) is planning a major conference on the future of the Court. Planning is still at early stages. But there must at least be a focus on ways to improve national measures. Subsidiarity is the key. States need to implement the Convention and put in place effective control mechanisms domestically.

Discussion

Importance of the Court's Accessibility

The work of London Metropolitan University's European Human Rights Advocacy Centre (EHRAC) focuses largely on the former Soviet Union, with a long-term relationship with the Russian Human Rights NGO, Memorial, providing a steady caseload from Chechnya. Currently, the EHRAC is working on cases stemming from the 2008 conflict between Georgia and Russian-backed separatists in South Ossetia and Abkhazia.

The right of individual petition to the Court plays a central role in such cases. For example, in the Kurdish and Chechen situations, the ability to initiate a case with a single letter in the petitioner's language made the Convention and the Court a real tool for the weak to challenge the powerful.

Moreover, the Court and the Convention has played an important role in spreading standards as States have democratised, moving from the original 10 to embed human rights standards in Spain and Portugal after their democratic transitions in the 1970s through to a Council of Europe of 47 Members today. This process has seen changes in national law and the Court has served as a catalyst to increase standards in these emerging democracies.

The Court's accessibility is of the greatest importance: complainants can initiate their complaints in their own language, free of charge and without a standardized form. Supported by legal aid, the Court's accessibility provides a major contribution to its success to date; the ability for NGOs to support cases and to make third party intervention is also important to the Court's success.

Redress offered through the Court underscored its value: simply put, these judgements provide the only realistic opportunity for independent apportionment of responsibility and redress. It is notable that the Russian Federation has a track record of complying with the Court judgements, though this commendable record is undermined by the failure of the Russian

Federation to implement the changes required to substantially improve its overall human rights record.

There was broad recognition of the positive role that Pilot Judgements can make in treating systemic problems. Two clear benefits were evident: first, it empowered national legislators and courts to change their approaches to ensure that the systemic problems were addressed. Second, it could make a significant impact on the Court's backlog.

Court Case Backlog

The primary problem facing the Court is the delay imposed by the backlog of cases. This is seeing delays of six to ten years at the Court, itself accessible only after the exhaustion of domestic remedies.

In discussion it was noted that though there had been over ten thousand judgements brought by individuals against States, only twenty-two judgements had been handed down in interstate cases. This imbalance suggested a lack of State appetite for cases that may impact their wider bilateral diplomatic relationships. There was criticism that States were failing to implement their collective enforcement responsibilities, preferring to leave the difficult cases to the Court. In particular, there was criticism of the Council of Europe's Council of Ministers for the slow and opaque nature of their discussions, and for the lack of comprehensive quality assurance of the national action plans, and limited follow up of the offending States.

In discussion, it was observed that the new Protocol 14*bis* offered a route for reducing the backlog by allowing those States that were in favour of the stalled Protocol 14 to implement it immediately. On the specific point of Protocol ratification, it was noted that procedural differences in States could have a significant impact on implementation strategies: in particular, the UK exemplified one approach in which Ministers in the Executive could accede with only limited oversight from the legislative branch. By contrast, Russia exemplified those States with a federal structure, with ratification requiring the State Duma to approve the proposal. Though there was no suggestion that the Russian Government's Protocol 14 ratification efforts were currently being frustrated by a non-cooperative Duma, it served to illustrate the more general point that differing constitutional systems could make a substantial difference to the speed with which States could enact changes to the Court's mandate.

Growing Pains: Super Majorities and National Vetoes

The post-Cold War growth of the Council of Europe was, it was suggested, responsible for the political stalemate surrounding Protocol 14*bis*. Would the

Council of Europe and the Court be served by moving to a system of super-majorities in the Court to remove national vetoes? The sense of the meeting was that though this may be desirable, it was unlikely to succeed politically or diplomatically; it also begged the question of when a Member State should be suspended or expelled from the organisation. On this broader point, there was clear agreement that sanctions had to be meaningful but that engagement with serial offenders was more likely to bring real improvements for the respect of human rights on the ground than expulsion from the Council of Europe. Indeed, it was precisely the existence of rights of individual appeal to the Court that served as the ultimate sanction to a recalcitrant Member State.

Domestic Implementation

Domestic implementation safeguards that ensured that ECHR rights were protected across the 47 Member States should be the collective aim. It was obviously preferable to avoid legal action through implementation of effective domestic safeguards, rather than relying on the Court to enforce the Convention after State violations.

It was agreed that the Council of Europe Parliamentary Assembly and the Council of Ministers could make a useful contribution by auditing draft legislation and sharing best practice between and beyond Member States. The UK's Joint Committee on Human Rights was held up as an example of good practice, and the impact in Ukraine of undertaking to implement specific Convention obligations was favourably commented upon.

Growing Pains: Potential Models of Court Reform

Following the invocation of Lord Hoffman's recent comments suggesting that the Court could be rendered superfluous if national judges correctly interpreted the Court, a discussion of potential reform models ensued. It was pointed out that the Court existed precisely to ensure the protection of Convention rights when national courts failed.

In discussion, it was proposed that the log-jam could be broken if States with a 'good record' could be allowed to deal with Court cases without reference to the Court for a trial period of say five years. Operating in the mode of ICC-style complementarity, it was suggested that this could have significant efficiency benefits. But the suggestion was dismissed: first, practicality – were there any States that would ever qualify under the 'good record' criteria? No Member State would qualify for such a position. Second, on a policy basis,

there was real concern that reimposing a West/East divide on Council of Europe membership was politically undesirable, with Central and Eastern European States – those most likely to fail the ‘good record’ test – being especially keen to avoid the stigma of ‘Second Division’ status.

Growing Pains: Resources and Budgets

It suggested in discussion that as the Court’s workload grew faster than the budget of the Council of Europe, it was inevitable that there would be pressures on the CoE’s other activities, and that the Court itself could not be immunised from the CoE’s wider financial pressures.

However, though there was broad support in the audience for additional Court resources, there was no unanimity on this point; it was noted by some that without reform to the Court’s procedures, additional resources would represent poor value for money. Moreover, the exact form of reform may have very significant resources implications: a two-tier system would be likely to be more expensive. On the question of whether there was sufficient support for additional resources for the Court, there was little expectation that in the current economic climate additional resources would be forthcoming.

Growing Pains: Expectations

One problem was of expectations; since its establishment, the Court’s record has been exceptional. There is the risk that too much is expected of the Court and the legal process.

In better aligning expectations, it was suggested that the role of the CoE Commissioner is especially important, in that through outreach and advocacy in the 47 Member States, the Commissioner could reduce the number of cases without a realistic chance of success. There was broad welcome for the Commissioner’s work and the parallel introduction of the CoE education programme in Member States and the recently-opened Warsaw outreach centre. Anecdotal evidence suggests that Warsaw centre’s education has increased understanding of what the Convention and the Court do – and do not – protect, reducing the number of inadmissible cases sent to the Court.