COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

Opinion of the Court on the Wise Persons' Report

(as adopted by the Plenary Court on 2 April 2007)

I. Introduction

In this Opinion, the Court will give its initial reaction to the proposals made by the Group of Wise Persons in their report to the Committee of Ministers. Before addressing the substance of that report, the Court wishes to acknowledge the valuable work of the Group. The members paid close regard to the views advanced by the Convention system's different components and participants. The Wise Persons affirm the centrality of the right of individual petition, which is the most distinctive element of the mechanism, rightly described as a basic feature of European legal culture. The report contains a series of useful short- and longer-term proposals, comprising suggested reforms and accompanying measures. Furthermore, the Court appreciates the Wise Persons' emphatic call for exceptional measures to be taken as of now to equip the Court to deal with the unacceptably large backlog of cases. It would remind States of their obligation under the Convention (Article 50) to provide the Court with the necessary means to fulfil the mandate conferred upon it by Article 19.

The urgent need for Protocol No. 14

The Wise Persons' task was complicated by the regrettable delay in the entry into force of Protocol No. 14. It made one strand of their mandate – assessing the initial effects of the Protocol – impossible. Given the continuing uncertainty over the date of the Protocol's entry into force, the present exercise remains rather theoretical. Accordingly, the Court emphasises that the comments it will make in this opinion are provisional in nature, the proviso being that Protocol No. 14 enter into force swiftly so that its impact may be assessed within a reasonable time. That assessment should inform the thinking on further change.

It must be stressed that the Wise Persons' proposals cannot be viewed as an alternative to Protocol No. 14. The Group had little choice in the circumstances but to take the forthcoming reforms contained within the Protocol as the starting point for its work. Its suggestions are predicated on the assumption that the Court will very soon be able to take full advantage of the new procedures in order to deal with the growing number of cases on its docket. In other words, there cannot be a leap from the Convention system in its current form to a system based on the Wise Persons' proposals. Bearing in mind the likely timescale for discussing and reaching consensus on the next round of Convention reform, it is obvious that the tools created by Protocol No. 14 are indispensable for the Court in the short- and medium-term.

The Court continues to seek ways to streamline its procedures and ensure that applications are treated as fairly and effectively as resources permit, most recently on the basis of the report delivered by Lord Woolf. Since the adoption of the Protocol, the Court has made the necessary preparations for its entry into force, so as to make full use of the new procedures from the very outset. It is plain, however, that if Protocol No. 14 were not to enter into force, the only remaining solution would be considerable budgetary increases for the Court.

II. Comments on proposals

1. Greater flexibility of the procedure for reforming the judicial machinery

The Court shares the analysis of the Group and considers the latter's proposal for an intermediate level of rules to be sound. Experience shows that the continuous evolution of European societies makes periodic readjustment of the Convention mechanism necessary. This should be possible without having to go through the protracted and burdensome procedure of an amending protocol that must be ratified by all Contracting States. The value of such an arrangement is clearly demonstrated in the Community legal order, as the Group indicates.

Given that the Statute would encompass organisational and procedural provisions, it would be desirable for the Court to have the right to initiate the amendment procedure, in addition to the right to approve amendments proposed by the Committee of Ministers.

The Court considers that this proposal could be directly referred to the competent body, i.e. the Steering Committee on Human Rights, for detailed consideration and follow-through.

2. Establishment of a new judicial filtering mechanism

The Court endorses the idea of separating the functions of filtering and adjudication on the merits. The proposed Judicial Committee corresponds to the model that the Court itself previously suggested at the time of the drafting of Protocol No. 14[1]. The proposal deserves to be developed. There are important questions to consider regarding the structure, remit, composition, procedures and operation of any such body, as well as the implications for the Registry and the consequences for the competence of the Court itself.

The Court would further observe that, as the idea of such a functional separation represents a step beyond the model adopted by Protocol No. 14, the serious groundwork should not begin until a certain experience in the functioning of the single-judge formation and the expanded role for three-judge committees has been acquired. Each reform of the system should proceed logically and coherently from the previous stage. It is also important to know what increase in case-processing capacity the Protocol will bring about.

In sum, a reform of such magnitude, transforming the institutional framework of the Convention system, requires in-depth analysis and planning. The Court is naturally prepared to participate in the deliberations on the possible direction and detail of reform.

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[1] "Position paper on the proposals for reform of the European Convention on Human Rights and other measures as set out in the report of the Steering Committee for Human Rights of 4 April 2003", dated 12 September 2003.

3. Enhancing the authority of the Court's case law in the States Parties

The Court cannot but endorse the comments and suggestions contained in the report regarding the translation and dissemination of its case law. Responsibility for publishing judgments and decisions rests with the Court, whose publications committee makes a careful selection of the cases that merit inclusion in the official Reports, published in English and French. Translation into the other languages of Council of Europe States is a task that must be taken up by national authorities. The efforts of the Council of Europe to improve matters cannot make up for the current deficit in the great majority of European languages. As the Court said in the *Scordino* judgment in 2006, "…domestic courts must …be able, under domestic law, to apply the European case-law directly and their knowledge of this case-law has to be facilitated by the State in question"[2].

Some States translate and publish Court judgments in their official journal, but this usually only concerns cases taken against that particular country. Yet the courts in every Contracting State must be aware of both the judgments handed down against that State and the most important judgments of the Strasbourg Court. States should therefore ensure that these judgments are translated into the different national languages[3]. The scale of the undertaking is substantial, but workable solutions can be found, e.g. case law digests, joint funding by countries sharing a common language, alternative sources of funding, participation of commercial or professional publishers.

The Court agrees entirely with the Group's call for the widest dissemination of Convention case law within public institutions and agencies, among the relevant professional groups and within educational establishments (§ 74 of the report). Although its judgments do not, strictly speaking, have *erga omnes* effect (see Article 46 of the Convention), all States should take due notice of judgments against other States, especially judgments of principle, thereby pre-empting potential findings of violations against themselves.

4. Forms of co-operation between the Court and the national courts – Advisory opinions

The objective pursued by this proposal – fostering dialogue with the highest national courts – is certainly a valid one. The advantages of such a system are that it reinforces the subsidiary nature of the system, and allows an international court to rule on points of law in a non-contentious setting, i.e. without condemning a particular State. Integrating such a mechanism into the existing system based on the adjudication of individual cases calls for careful reflection, however. The extent to which these two procedures could co-exist needs to be studied in the light of the experience of other international courts that give such opinions, particularly the Inter-American Court of Human Rights.

As an advisory jurisdiction would obviously entail more work for the Court, it considers that this is a proposal to be reserved for future consideration, when the current problems of the system will have been resolved through the necessary reforms. At that point, it could be useful to assess Article 47 of the Convention also.

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[2] *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 239, ECHR 2006-…

[3] The Court naturally endorses the contents of Recommendation Rec(2002)13 of the Committee of Ministers to member states on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights.

5. Improvement of domestic remedies for redressing violations of the Convention

In stressing the need for effective domestic remedies for infringements of Convention rights, the Group has raised a fundamental issue in the debate over the future of the European system. The absence of adequate remedies within the domestic legal order is a shortcoming that cannot be made good by the Convention mechanism. Usually, the problem is most acute in the domain of the administration of justice – excessive length of proceedings and non-execution of judicial decisions being the most frequent. Within the limits of its competence, the Court has sought through its case law to give impetus to the necessary domestic reforms, but progress is largely dependent upon political will and capacity for reform. It is an area in which all of the political and technical resources of the Council of Europe should be mobilised; the work of other bodies such as the European Commission for the Efficiency of Justice (CEPEJ) and the European Commission for Democracy through Law (Venice Commission) must be supported and followed up. There is scope for action by the Commissioner for Human Rights too.

The quotation from the *Scordino* judgment above is equally relevant here. For as long as accessible and effective remedies are lacking in the Contracting States, the Convention system will suffer from grave imbalance. A viable equilibrium, i.e. subsidiarity, can only be achieved when every court of law in Europe is in a position to vindicate the Convention rights of those who come before it.

It is for the Member States to evaluate whether the drafting of a Convention text[4] consolidating the *Scordino* case law is the best way to proceed.

6. The award of just satisfaction

The proposal to transfer to the national legal system the function of assessing the level of compensation required to afford just satisfaction to an applicant derives from the concern to relieve the Court of a task that might be more effectively performed by a national organ. The Court is not persuaded, however, that this is a task that would as a rule, be more efficiently handled by a judicial body at national level. It recalls that a specialised just satisfaction division was established towards the end of 2006 in order to assist the Court with this aspect of its jurisdiction. In sum, the case for systematic referral of the just satisfaction facet of Convention proceedings to the national level appears not to be made out.

As for cases in which the application of the Article 41 aspect is particularly complex, the possibility of referring the matter to a competent national authority, which might be better placed than an international court to deal with it by virtue of its knowledge of local market conditions, could be envisaged. However, rigorous institutional and procedural safeguards would have to be put in place. As the Wise Persons indicate, it would need to be an independent, judicial body with fair, efficient and readily accessible procedures. The views of the competent national judicial authorities on the proposal could be ascertained. The place of such a body in the Convention system, relative to the Court and to the Committee of Ministers, requires much thought.

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[4] The Wise Person's report is slightly ambiguous on this point (§ 93). The English version seems to envisage a new provision in the Convention itself. The French version refers to "un texte conventionnel", i.e. a treaty provision, which the Court finds more plausible in this context.

7. The "pilot judgment" procedure

The Court welcomes the Wise Persons' endorsement of the pilot judgment procedure. Regarding their suggestion that, in order to produce the intended results, it might be advisable to write the procedure into the Convention itself, the Court takes the view that further experience in operating the procedure is required, along with an evaluation of its success in assisting States confronted with systemic problems.

8. Friendly settlements and mediation

These alternative means of dispute resolution are to be encouraged. As noted in the report, the Court has recently reviewed its practice in the area of friendly settlements with a view to promoting this solution, particularly in cases where the legal issues are beyond contest. It must be noted, however, that the concept of the friendly settlement is not familiar in some States, where neither the Government nor applicants' representatives are conversant with it. A special effort is called for to develop the practice in relation to these States. In this respect, the Court would refer to its developing practice of striking out cases on the basis of a unilateral declaration by the Government concerned[5].

The potential role of mediation, whether at national or European level, in preventing or curing violations of the Convention requires further thought.

9. Extension of the duties of the Commissioner for Human Rights

The Court concurs in the Wise Persons' assessment of the scope for action by the Commissioner for Human Rights, acting in concert with the equivalent officials and institutions at national level so as to contribute to both preventive and remedial aspects. Any extension of the Commissioner's role in the Convention system must be strictly delineated, however.

10. The institutional dimension of the control mechanism

The Wise Persons refer to the vital importance of creating of a proper social security scheme for judges, as an essential guarantee of judicial independence. The Court must once again insist on the introduction of adequate social cover. The vulnerable position in which a judge finds him or herself at the end of their mandate runs counter to the imperative of the Court's independence.

The proposal to set up a committee to advise on candidates' professional and linguistic ability is for the Parliamentary Assembly to consider; the Court will refrain from expressing a view on the matter.

The third recommendation of the Wise Persons under this heading – reducing the number of judges at a future time – is, as they acknowledge, a particularly sensitive matter. The principle of a judge from each legal system in the Council of Europe has always been a prominent characteristic of the Convention system and is an important safeguard of legal pluralism. The Court observes that its role under the Convention entails more intense scrutiny of domestic laws than is usual for an international tribunal. Thus, the participation in a case of the judge elected in respect of the respondent State enhances the legitimacy of the judgment, not only for the parties but also for the national courts who must take account subsequently of the European Court's ruling.

[5] On the basis of Article 37 § 1 (c) of the Convention and in light of its judgment in *Tahsin Acar v. Turkey* (preliminary objection) [GC], no. 26307/95, ECHR 2003-VI.

Finally, the Court welcomes the Wise Persons' endorsement of its long-standing request for the greatest possible operational autonomy, notably in the budgetary and staffing areas.

III. Taking the process forwards

It is possible to group the Wise Persons' proposals and recommendations into short-, medium- and long-term. In this opinion, the Court has already referred to the difficulties created by the delay in the entry into force of Protocol No. 14. Consideration of further amendments to the Convention should be postponed until the Protocol has taken effect and sufficient experience has been acquired to assess the capacity of the modified system. Thus, consideration of the proposal for a filtering mechanism and for the referral, where appropriate, to a national organ of the just satisfaction aspect of certain cases, should be reserved for the medium-term. Moreover, in view of the more political character of these proposals, it would be preferable to seek to reach a sufficient degree of political agreement before referring the dossier to the competent body. On these points, the Wise Persons' report should be seen as setting out initial markers for the political deliberations to come.

As noted under point no. 4 above, the proposal to introduce an advisory opinion procedure is for consideration in the longer-term.

The remaining proposals, i.e. the majority, lend themselves to immediate follow up by the authorities to whom they are addressed. This includes the proposal to draft a Statute for the Court, which could be the subject of an initial round of reform.

In conclusion, the Court wishes to assure the national and Council of Europe authorities of its readiness to engage with them in the next stages of Convention reform.