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Council of Bars and Law Societies of Europe
The voice of European Lawyers

Rue Joseph II, 40/8 - B-1000 Brussels
+32 (0)2 234 65 10 | ccbe@ccbe.eu | www.ccbe.eu

CCBE Proposals for further reform of the ECHR machinery

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The regulation of the profession, the defence of the Rule of Law, human rights and democratic values are the most important missions of the CCBE. The CCBE cooperates with the Council of Europe in a number of areas, notably through its membership of the Conference of International Non-Governmental Organisations, its observer status at the Steering Committee on Human Rights (CDDH), European Commission for the Efficiency of Justice (CEPEJ) and the Consultative Council of European Judges (CCJE), as well as at a number of committees and drafting groups related to the future of the Convention, migration, and freedom of expression. The CCBE also has a close relation with the European Court of Human Rights which includes among other things the publication and regular updating of a practical guide for lawyers (The European Court of Human Rights - Questions & Answers for Lawyers – last updated in 2020) and annual bilateral meetings to discuss issues of particular importance for the legal profession.

Explanatory Memorandum

CCBE reforms to the Execution of Judgments of the European Court of Human Rights

1. In June 2019, as part of the review of the Interlaken process, the CCBE adopted detailed proposals for reforms of the machinery of the European Convention on Human Rights (EN/FR). The reforms addressed senior national courts, the European Court of Human Rights (the Court), the Committee of Ministers of the Council of Europe through the CMDH, the human rights subcommittee for supervising the execution of judgments, and lawyers, Bars and Law Societies.
2. The CCBE's reforms are practical, but do not involve amending the Convention. The experience of the slow ratification of uncontroversial Protocol No 15, which took 7 years, is very unattractive. The CCBE's reforms could be implemented without delay. They have been discussed by PD Stras with the Court, the Committee of Ministers' Steering Committee on Human Rights, and with the Agents of the Member States.
3. The current German Presidency of the Committee of Ministers is focusing on the reform of the supervision of the execution of the Court's judgments. Under Article 46(1) of the Convention, Member States accept that judgments are binding. That is an unconditional legal obligation.
4. Nevertheless, and despite the Court's reputation, the execution of its judgments is a severe weak point. Of approximately 20,000 judgments ever given by the Court in which a violation

has been found[1], over 5,200 remain to be fully implemented[2]. 1,370 payments of compensation, fees and settlements are late and still outstanding[3]; individual redress and lasting general measures to avoid future breaches of the Convention are all chronically delayed. These delays add to the notorious delays of five to six years before the Court even gives judgment[4], after lengthy domestic remedies have been exhausted. New thinking is needed and the CCBE proposals provide it.

5. The CCBE's existing reform proposals need an additional focus on the 'tricky cases', where delays are worst. Lawyers, Bars and Law Societies need a clearer opportunity to be heard[5] and to contribute to addressing the backlog.
6. Two new additional steps are crucial in the continuing effort to make execution effective:
   a. The Rules of the Committee of Ministers for the supervision of the execution of judgments and settlements (the Rules) should allow lawyers, Bars and Law Societies to make proposals for all aspects of the execution of Court judgments; and
   b. Member States should allow the enforcement in their national courts of the payment of just satisfaction (compensation and fees) awarded by the Court and friendly settlements agreed to by the parties as a debt.

Changing the Rules

7. The work of the Committee of Ministers' specialist human rights committee, the CMDH, examines the execution of judgments applying the Rules, which were last amended in 2017[6]. A key provision is Rule 9, dealing with communications to the CMDH from the injured party, the respondent Government or others, in relation to the execution of any judgment[7].
8. As presently drafted, Rule 9(1) permits the injured party, through their lawyer, to make submissions to the CMDH relating only to the non-payment of just satisfaction or the taking of individual measures. Neither the injured party nor their lawyer can make submissions about any other aspect of the execution of the judgment. Bars or Law Societies have no *locus standi* to make any submissions.
9. However, under Rule 9(2) NGOs and national institutions for the protection or promotion of human rights (NHRIs), may make submissions on any aspect of 'the execution of judgments under Article 46(2) of the Convention', encompassing just satisfaction, individual or general measures, procedural questions, priority and whether the respondent Government has at all complied with the judgment[8].

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1 https://www.echr.coe.int/Documents/Overview_19592020_ENG.pdf
2 https://rm.coe.int/2020-cm-annual-report-eng/1680a1f4e8
3 https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a06354
4 https://www.echr.coe.int/Documents/Court_that_matters_ENG.pdf
5 These new proposals add to the CCBE's 2019 reform proposals that the CMDH should:
   a. Increase transparency as to the allocation of new judgments to existing grouped cases or 'lead' judgments. The criteria are opaque, and their application is inconsistent;
   b. Develop and publish criteria for priority in the examination of judgments, and apply them consistently;
   c. Inform the legal representative who acted before the Court that the case is allocated to enhanced supervision, which the relevant 'lead' case is and invite brief submissions under Rule 9;
   d. Publicly identify the cases selected for debate in advance of each CMDH meeting; and
   e. Increase the length of the CMDH meetings and their frequency, so that difficult cases can be examined more frequently than the present average rate of once in five years.
6 CM/Del/Dec(2017)1275/4.1 of 18 January 2017
7 The text of Rule 9 is set out in the Annex
8 The Committee of Ministers' Annual Report 2020 notes with satisfaction the increasing number of such submissions from NGOs and NHRIs

10. These restrictions on the role of lawyers in the procedures of the CMDH are inexplicable and unjustified.
    a. The CMDH has gradually increased the involvement of injured parties and their lawyers from nothing to something, but the present limitations, such as on procedural questions and the adequacy of the respondent Government's response to the judgment are unnecessary;
    b. The difference whereby NGOs and NHRIs can comment on any aspect of the execution of the judgment, but the injured party is restricted to whether payment has been made and individual measures has no rational justification;
    c. In the many years which follow the original violation, lawyers, including the applicant's lawyer, will experience various similar cases putting the original application in context. Those cases will often illustrate the scope of legal reforms necessary to prevent repetitive cases and the CMDH would benefit from knowing about them;
    d. It is extraordinary that, both the applicant's legal representative and the wider legal community of practising lawyers, working in specialist committees of Bars and Law Societies, and frequently involved in questions of legal reform and amendment, should be excluded from participating in ensuring the full implementation of the Court's judgment.
11. Rule 9(2) should be amended to expressly permit Bars and Law Societies as well and their international associations, such as the CCBE, the same scope to contribute to the work of the CMDH as that provided to NGOs and NHRIs. Similarly, the lawyer for the injured party should be enabled under Rule 9(1) to make equivalent submissions with regard to the execution of the judgment in which he, she or they were involved under Article 46(2) of the Convention.

Recognition and enforcement of payments in national courts

12. In addition to its practical proposals in 2019, the CCBE has carried out a study of the enforcement of monetary awards of just satisfaction by national courts, including, but not limited to, those of the respondent State. This was a specific response to the CMDH's revelation in December 2020 that 1370 payments of just satisfaction or settlements were still outstanding, some for many years[9].
13. The Committee of Ministers' report for 2020 shows that over the last ten years, during which the total number of Court judgments given has gradually fallen, the number of awards paid at all or on time has fallen steadily too[10]. Similarly, the apparently favourable statistic of friendly settlements reached is undermined by the number which remain unpaid, although agreed to by the Government concerned.
14. In short, the CMDH is not succeeding in securing payments, which should be the simplest part of the execution of judgments. Strasbourg is evidently not the best place for debt collection: what can be done to improve the situation?
15. The CCBE's PD Stras has reviewed the results of a survey of national court practice in relation to the recognition and enforcement of financial awards made under Article 41 of the Convention under domestic law[11]. Given the established process for national debt collection

[9] The Committee of Ministers' Annual Report 2020 acknowledges delays of over six months and counting in payments of awards of just satisfaction in 1118 cases and a stubbornly stable total of 634 leading cases (each with many related cases awaiting the outcome of the leading case), which have not been resolved after over five years https://rm.coe.int/2020-cm-annual-report-eng/1680a1f4e8.

[10] Ibid at page 65

[11] Round Table held on 210121 by PD Stras on the basis of a survey of national court practice.

in all Member States and the fact that the Convention is part of the domestic law of all Member States, it is time to transfer this part of the Committee of Ministers' work to the national legal systems, as an aspect of subsidiarity.

16. Repatriating the execution of monetary payments offers twin advantages of using existing national machineries of debt enforcement to accelerate these payments, both of awards of just satisfaction and of friendly settlements, and of relieving the Committee of Ministers of a work burden which it continues to find difficult, as the relevant statistics reveal. This reform will also allow the Committee of Ministers to concentrate on other aspects of execution of judgments, where there remains much to be done. Of course, the Committee of Ministers would still retain its responsibility to 'supervise' the execution of judgments in accordance with Article 46(2) of the Convention, as a long stop if national execution faltered.
17. The recognition of a financial obligation in domestic law arising from a judgment of the Court depends in the first place on the status of the judgment of an international tribunal in the domestic legal system. However, given the established position of the Convention in the domestic law of all Member States, and the unconditionally binding character of judgments imposed by Article 46(1) of the Convention, there is clearly scope to develop national practice and to relieve at least this burden from the Convention machinery and bring it home.
18. Specialist committees in the Council of Europe would be well placed to develop this area further and act as a catalyst for this reform, as is the CCBE.

CCBE Proposals for Reforms to the Execution of Judgments of the European Court of Human Rights

The CCBE

CONSIDERING the importance of the effective protection of human rights;

RECALLING that human rights protection is the responsibility of national authorities and courts, supplemented by the subsidiary, but essential, role of the European Court of Human Rights (the Court);

CONCERNED by the length of proceedings under the European Convention of Human Rights (ECHR), involving both the Court and the execution of the Court's judgments, supervised by the Committee of Ministers through its specialised human rights committee, the CMDH;

MINDFUL of:

- The necessity for reforms which maintain and enhance the credibility of the ECHR machinery which can be implemented forthwith, without the need to amend the ECHR or draft any additional Protocol;

- The risk that even when judgments are ultimately given, after cases have been pending before the Court for many years, the execution of those judgments often takes five further years. These execution delays include long delays in the payment of financial awards made by the Court (just satisfaction) and even of friendly settlements agreed to by the parties;

- The anomalous restrictions imposed on the role of lawyers and the legal profession, when compared with NGOs and others, by the Rules of the Committee of Ministers operated by the CMDH in receiving external input on the necessary steps for the execution of the Court's judgments;

ALERT to the responsibility which the CCBE has already taken to propose reforms and to participate in the debate with the Court and the Committee of Ministers generated by the Interlaken Process, and

the need to enlarge the opportunity for the legal profession to contribute further to that debate and to improve the efficiency of the ECHR machinery:

RECOMMENDS:

A. That the Committee of Ministers should amend its Rules for the Supervision of the Execution of Judgments and Settlements operated by the CMDH and notably Rule 9 to expressly permit lawyers instructed in the case, Bars and Law Societies and their international associations, such as the CCBE, to make proposals for all aspects of the execution of Court judgments under Article 46(2) of the ECHR;

B. That the Committee of Ministers acting with the Member States of the Council of Europe should ensure that the payment of just satisfaction (compensation and fees) awarded by the Court and of friendly settlements agreed to by the parties are enforceable as a debt in their national courts.

Annex

Rule 9 of the Rules

Rule 9 - Communications to the Committee of Ministers

1. The Committee of Ministers shall consider any communication from the injured party with regard to payment of the just satisfaction or the taking of individual measures.

2. The Committee of Ministers shall be entitled to consider any communication from non-governmental organisations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of judgments under Article 46, paragraph 2, of the Convention.

3. The Committee of Ministers shall also be entitled to consider any communication from an international intergovernmental organisation or its bodies or agencies whose aims and activities include the protection or the promotion of human rights, as defined in the Universal Declaration of Human Rights, with regard to the issues relating to the execution of judgments under Article 46, paragraph 2, of the Convention which fall within their competence.

4. The Committee of Ministers shall likewise be entitled to consider any communication from an institution or body allowed, whether as a matter of right or upon special invitation from the Court, to intervene in the procedure before the Court, with regard to the execution under Article 46, paragraph 2, of the Convention of the judgment either in all cases (in respect of the Council of Europe Commissioner for Human Rights) or in all those concerned by the Court's authorisation (in respect of any other institution or body).

5. The Secretariat shall bring, in an appropriate way, any communication received in reference to paragraph 1 of this Rule, to the attention of the Committee of Ministers.

6. The Secretariat shall bring any communication received under paragraphs 2, 3 or 4 of this Rule to the attention of the State concerned. When the State responds within five working days, both the communication and the response shall be brought to the attention of the Committee of Ministers and made public. If there has been no response within this time limit, the communication shall be transmitted to the Committee of Ministers but shall not be made public. It shall be published ten working days after notification, together with any response received within this time limit. A State response received after these ten working days shall be circulated and published separately upon receipt.