

CCBE comments on the amendment of Rules 36 and 44 of the Rules of Court of the European Court of Human Rights

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Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 46 countries, and through them more than 1 million European lawyers. The European Court of Human Rights (ECtHR) has consulted the CCBE on a proposed amendment of Rules 36 and 44 of the Rules of the Court.

The Court is master of its own Rules and their amendment, subject to a degree of consultation.

The Court's proposed amendments regard appointment of independent representative for the purposes of representing the applicants who are children, persons whose legal capacity has been restricted or persons in a comparable situation of vulnerability.

Reasons for the CCBE's suggestions

The mechanism enables the Court to ensure that a child, a protected adult, or a highly vulnerable person has an independent representative with full capacity to act before it, including as a third-party intervener.

The CCBE believes that in general the reform goes in the direction of taking better account of the vulnerability of certain applicants. The CCBE welcomes the objective pursued by this reform, which aims to strengthen the effectiveness of representation for children and vulnerable persons before the Court. It believes, however, that certain safeguards should be clarified to ensure the full compliance of the mechanism with the requirements of the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and relevant international standards.

The amendments raise questions about the definition of vulnerability and comparable concept, the independence and the role of the lawyer chosen by the litigant.

Definition of vulnerability and comparable concept

The term "persons whose legal capacity has been restricted" implies that a Court (or other authority) has issued a decision restricting the person's legal capacity. One therefore wonders if

such persons might be included whose legal capacity is restricted by operation of the law. This should clearly be the case.

In general, the concept of “comparable vulnerability” should be better defined and clarified. The Court's jurisprudence recognises vulnerability as a contextual and evolving concept. However, the absence of explicit criteria or guidelines could lead to inconsistent application of the mechanism. Therefore, indicative criteria should be added and the assessment of vulnerability should be guided by relevant international standards (in particular the United Nations Convention on the Rights of Persons with Disabilities).¹ This would also better guarantee that the Court takes a consistent approach and safeguard against expansion to new categories of persons who, while vulnerable, possess the ability to meaningfully engage with legal proceedings.

Independence

The possibility of having the costs of representation borne by the respondent State can remove a major financial obstacle for these highly vulnerable applicants.

The “independent” representative is appointed through an internal procedure, at the request of the Court, by a judge, a national authority, or a bar association, which creates a risk of capture by the authorities of the respondent State, particularly if the latter chooses “compliant” profiles.

For this reason, in order to fully preserve the equality of arms within the meaning of Article 6 of the Convention, it would be advisable that:

- the mechanism guarantees the absence of direct or indirect influence by the respondent State on the choice of representative;
- the Court retains effective control over the independence of the appointed representative;
- the role of bar associations, as independent institutions, be given priority.

For bar associations in many countries, the challenge is to claim a central role in the appointment of these independent representatives, with specialised lists, reinforced ethical obligations, and the guarantee that independence also applies in relation to the defendant State.

The reference in § 4(a) of Rule 36 to “a lawyer authorised to practice” or “any other person approved by the section president” creates ambiguity: representation could be entrusted to non-lawyers, or even to institutional actors with little training in ECtHR litigation. While the CCBE is mindful of differing practices between jurisdictions and that this is a possibility in certain member states of the Council of Europe (e.g. UK), the rules should provide some guidance on the duties of an independent representative and the qualifications and experience expected of them.

Consequently, the CCBE thinks that the text should specify that the independent representative must, in principle, be a lawyer registered with a bar association in a State Party, experienced in

¹ For example, in England and Wales, the Law Society has provided written guidance to their members of the wide-ranging risk factors for vulnerability, which draws on research from the Legal Services Board. Examples include: advanced/young age, learning disabilities, mental health conditions, acquired brain injury, English as a foreign language, neurodiversity, and behavioural disorders.

Strasbourg litigation, and appointed by an independent professional body rather than by government authorities.

Relationship with the lawyer chosen by the applicant

The text confers on this representative the general power to “act on behalf of the applicant before the Court” without specifying how his powers are reconciled with those of the lawyer already appointed or the family, which may lead to the neutralisation of the litigation strategy desired by the applicant or his relatives.

The text should propose a clear relationship between the chosen lawyer and the independent representative (e.g., joint representation, obligation to consult, primacy of the petitioner's instructions when their capacity for discernment allows). The CCBE believes that the mechanism should be subsidiary. The appointment of an independent representative at the initiative of the Section President should occur primarily in cases of deficiency, manifest conflict of interest, or objective impossibility for the person concerned to organise their own representation. It is important to avoid the measure leading to the disregard of the wishes of a minor capable of discernment or of a vulnerable person able to express a preference.

It is essential that the person concerned be able, for legitimate reasons:

- to contest the choice of the appointed representative;
- or to request their replacement.

This right helps to preserve trust in the lawyer-client relationship, to guarantee the effectiveness of the defence, and to ensure respect for the right to an effective remedy.

The text stipulates that the appointed representative is authorised to act on behalf of the applicant before the Court. This mandate must be exercised with due regard for: the best interests of the person concerned; as far as possible, their expressed wishes; and national criteria for legal representation.

Other considerations

The CCBE also believes that the amendment should strengthen the obligation to provide reasons when the Court decides to use this exceptional mechanism, in order to avoid a shift towards excessive interference in the lawyer-client relationship. The decision to use the mechanism should be motivated.

In addition, §3bis should better be positioned behind §2 as a §2bis because it constitutes an exception to Rule 36 §2 rather than Rule 36 §3. If the proposed amendment as above mentioned is accepted, the existing § 4(a) of Rule 36 should be adjusted accordingly.

The draft legislation provides for the intervention of the mechanism **after** the request has been communicated. However, certain situations of vulnerability may affect the very ability to validly lodge a request. It would therefore be necessary to ensure that procedural formalities do not, in

such cases, deprive the person concerned of effective access to the Court, contrary to Article 34 of the Convention and the right of access to a court. The mechanism should ensure that effective access to the Court is preserved even from the moment **before** the application is filed.

CCBE amendments

Amendments proposed	CCBE amendments
<p><i>A new § 3bis be inserted in Rule 36 :</i> <i>Representation of applicants, as follows:</i></p> <p>"3bis. Once the application has been communicated in accordance with Rule 54 § 2 b), if the circumstances so warrant, with respect to children, persons whose legal capacity has been restricted or persons in a comparable situation of vulnerability, the President of the Section may request the respondent Government or the Government of another Contracting party concerned to ensure the appointment, by a court, another competent domestic authority or a Bar Association, and in accordance with the relevant domestic procedure, of an independent representative for the purposes of representing the applicant in the proceedings before the Court. The appointed representative shall have the authority to act on behalf of the applicant before the Court. The President of the Section may decide to request the Government to bear the costs of such representation."</p>	<p><i>A new § 2bis be inserted in Rule 36 :</i> <i>Representation of applicants, as follows:</i></p> <p>"2bis. Once the application has been communicated in accordance with Rule 54 § 2 b), if the circumstances so warrant, with respect to children, persons whose legal capacity has been restricted or persons in a comparable situation of vulnerability, the President of the Section may request the respondent Government or the Government of another Contracting party concerned to ensure the appointment, by a court, another independent competent domestic authority or a Bar Association, and in accordance with the relevant domestic procedure, of an independent representative for the purposes of representing the applicant in the proceedings before the Court. The appointed representative shall have the authority to act on behalf of the applicant before the Court. The President of the Section may decide to request the Government to bear the costs of such representation."</p> <p><i>In case of own choice representation, the independent representative shall have an obligation to consult, and joint representation shall be possible.</i></p> <p><i>Applicant's instructions shall have primacy when his or her capacity for discernment allows it.</i></p>
<p><i>The existing § 4(a) of Rule 36 be adjusted as follows:</i> "4. (a) The representative acting on behalf of the applicant pursuant to paragraphs 2 and 3 to 3bis of this Rule shall be an advocate authorised to practise in any of the Contracting Parties</p>	<p><i>The existing § 4(a) of Rule 36 be adjusted as follows:</i> "4. (a) The representative acting on behalf of the applicant pursuant to paragraphs 2, 2bis and 3 and 3 of this Rule shall be an advocate authorised to practise in any of the Contracting Parties and resident in the</p>

<p>and resident in the territory of one of them, or any other person approved by the President of the Section."</p>	<p>territory of one of them, or any other person approved by the President of the Section."</p> <p><i>In case of representation pursuant to par. 2bis, in principle, it shall be considered to appoint as independent representative a lawyer registered with a Bar Association in a State Party.</i></p>
<p><i>A new § 3 (c) be inserted in Rule 44 - Third-party intervention:</i></p> <p>"3(c). Exceptionally, with respect to children, persons whose legal capacity has been restricted or persons in a comparable situation of vulnerability and in accordance with the procedure provided in Rule 36 § 3 bis, the President of the Section may request the appointment of an independent representative for the purposes of representing an individual who has been invited or granted leave to intervene under Article 36 § 2 of the Convention. The President of the Section may decide to request the Government to bear the costs of such representation."</p>	<p><i>A new § 3 (c) be inserted in Rule 44 - Third-party intervention:</i></p> <p>"3(c). Exceptionally, with respect to children, persons whose legal capacity has been restricted or persons in a comparable situation of vulnerability and in accordance with the procedure provided in Rule 36 § 2 bis, the President of the Section may request the appointment of an independent representative for the purposes of representing an individual who has been invited or granted leave to intervene under Article 36 § 2 of the Convention. The President of the Section may decide to request the Government to bear the costs of such representation."</p>