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## ***COUNCIL OF EUROPE***

### ***COMMITTEE OF MINISTERS***

#### **Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies**

*(adopted by the Committee of Ministers on 12 May 2004,*

*at its 114th Session)*

The Committee of Ministers, in accordance with Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is the achievement of greater unity among its members, and that one of the most important methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reiterating its conviction that the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") must remain the essential reference point for the protection of human rights in Europe, and recalling its commitment to take measures in order to guarantee the long-term effectiveness of the control system instituted by the Convention;

Recalling the subsidiary character of the supervision mechanism set up by the Convention, which implies, in accordance with its Article 1, that the rights and freedoms guaranteed by the Convention be protected in the first place at national level and applied by national authorities;

Welcoming in this context that the Convention has now become an integral part of the domestic legal order of all states parties;

Emphasising that, as required by Article 13 of the Convention, member states undertake to ensure that any individual who has an arguable complaint concerning the violation of his rights and freedoms as set forth in the Convention has an effective remedy before a national authority;

Recalling that in addition to the obligation of ascertaining the existence of such effective remedies in the light of the case-law of the European Court of Human Rights (hereinafter referred to as "the Court"), states have the general obligation to solve the problems underlying violations found;

Emphasising that it is for member states to ensure that domestic remedies are effective in law and in practice, and that they can result in a decision on the merits of a complaint and adequate redress for any violation found;

Noting that the nature and the number of applications lodged with the Court and the judgments it delivers show that it is more than ever necessary for the member states to ascertain efficiently and regularly that such remedies do exist in all circumstances, in particular in cases of unreasonable length of judicial proceedings;

Considering that the availability of effective domestic remedies for all arguable claims of violation of the Convention should permit a reduction in the Court's workload as a result, on the one hand, of the decreasing number of cases reaching it and, on the other hand, of the fact that the detailed treatment of the cases at national level would make their later examination by the Court easier;

Emphasising that the improvement of remedies at national level, particularly in respect of repetitive cases, should also contribute to reducing the workload of the Court;

Recommends that member states, taking into account the examples of good practice appearing in the appendix:

- I. ascertain, through constant review, in the light of case-law of the Court, that domestic remedies exist for anyone with an arguable complaint of a violation of the Convention, and that these remedies are effective, in that they can result in a decision on the merits of the complaint and adequate redress for any violation found;
- II. review, following Court judgments which point to structural or general deficiencies in national law or practice, the effectiveness of the existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court;
- III. pay particular attention, in respect of aforementioned items I and II, to the existence of effective remedies in cases of an arguable complaint concerning the excessive length of judicial proceedings;

Instructs the Secretary General of the Council of Europe to ensure that the necessary resources are made available for proper assistance to member states which request help in the implementation of this recommendation.

#### **Appendix to Recommendation Rec(2004)6**

##### **Introduction**

1. The Ministerial Conference<sup>[1]</sup> held in Rome on 3 and 4 November 2000 to commemorate the 50th anniversary of the European Convention on Human Rights (hereinafter referred to as "the Convention") emphasised that it is states parties who are primarily responsible for ensuring that the rights and freedoms laid down in the Convention are observed and that they must provide the legal instruments needed to prevent violations and, where necessary, to redress them. This necessitates, in particular, the setting-up of effective domestic remedies for all violations of the Convention, in accordance with its Article 13.<sup>[2]</sup> The case-law of the European Court of Human Rights (hereinafter referred to as "the Court")<sup>[3]</sup> has clarified the scope of this obligation which is incumbent on the states parties to the Convention by indicating notably that:

- Article 13 guarantees the availability in domestic law of a remedy to secure the rights and freedoms as set forth by the Convention.

- this article has the effect of requiring a remedy to deal with the substance of any “arguable claim” under the Convention and to grant appropriate redress. The scope of this obligation varies depending on the nature of the complaint. However, the remedy required must be “effective” in law as well as in practice;
- this notably requires that it be able to prevent the execution of measures which are contrary to the Convention and whose effects are potentially irreversible;
- the “authority” referred to in Article 13 does not necessarily have to be a judicial authority, but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy it provides is indeed effective;
- the “effectiveness” of a “remedy” within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant; but it implies a certain minimum requirement of speediness.

2. In the recent past, the importance of having such remedies with regard to unreasonably long proceedings has been particularly emphasised,<sup>[4]</sup> as this problem is at the origin of a great number of applications before the Court, though it is not the only problem.

3. The Court is confronted with an ever-increasing number of applications. This situation jeopardises the long-term effectiveness of the system and therefore calls for a strong reaction from contracting parties.<sup>[5]</sup> It is precisely within this context that the availability of effective domestic remedies becomes particularly important. The improvement of available domestic remedies will most probably have quantitative and qualitative effects on the workload of the Court:

- on the one hand, the volume of applications to be examined ought to be reduced: fewer applicants would feel compelled to bring the case before the Court if the examination of their complaints before the domestic authorities was sufficiently thorough;
- on the other hand, the examination of applications by the Court will be facilitated if an examination of the merits of cases has been carried out beforehand by a domestic authority, thanks to the improvement of domestic remedies.

4. This recommendation therefore encourages member states to examine their respective legal systems in the light of the case-law of the Court and to take, if need be, the necessary and appropriate measures to ensure, through legislation or case-law, effective remedies as secured by Article 13. The examination may take place regularly or following a judgment by the Court.

5. The governments of member states might, initially, request that experts carry out a study of the effectiveness of existing domestic remedies in specific areas with a view to proposing improvements. National institutions for the promotion and protection of human rights, as well as non-governmental organisations, might also usefully participate in this work. The availability and effectiveness of domestic remedies should be kept under constant review, and in particular should be examined when drafting legislation affecting Convention rights and freedoms. There is an obvious connection between this recommendation and the recommendation on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the Convention.

6. Within the framework of the above, the following considerations might be taken into account.

#### **The Convention as an integral part of the domestic legal order**

7. A primary requirement for an effective remedy to exist is that the Convention rights be secured within the national legal system. In this context, it is a welcome development that the Convention has now become an integral part of the domestic legal orders of all states parties. This development has improved the availability of effective remedies. It is further assisted by the fact that courts and executive authorities increasingly respect the case-law of the Court in the application of domestic law, and are conscious of their obligation to abide by judgments of the Court in cases directly concerning their state (see Article 46

of the Convention). This tendency has been reinforced by the improvement, in accordance with Recommendation *Rec(2000)2*,<sup>[6]</sup> of the possibilities of having competent domestic authorities re-examine or reopen certain proceedings which have been the basis of violations established by the Court.

8. The improvement of domestic remedies also requires that additional action be taken so that, when applying national law, national authorities may take into account the requirements of the Convention and particularly those resulting from judgments of the Court concerning their state. This notably means improving the publication and dissemination of the Court’s case-law (where necessary by translating it into the national language(s) of the state concerned) and the training, with regard to these requirements, of judges and other state officials. Thus, the present recommendation is also closely linked to the two other recommendations adopted by the Committee of Ministers in these areas.<sup>[7]</sup>

#### **Specific remedies and general remedy**

9. Most domestic remedies for violations of the Convention have been set up with a targeted scope of application. If properly construed and implemented, experience shows that such systems of “specific remedies” can be very efficient and limit both the number of complaints to the Court and the number of cases requiring a time-consuming examination.

10. Some states have also introduced a general remedy (for example before the Constitutional Court) which can be used to deal with complaints which cannot be dealt with through the specific remedies available. In some member states, this general remedy may also be exercised in parallel with or even before other legal remedies are exhausted. Some member states add the requirement that the measure being challenged would grossly infringe constitutional rights and that a refusal to deal with the appeal would have serious and irreparable consequences for the appellant. It should be pointed out that states which have such a general remedy tend to have fewer cases before the Court.

11. This being said, it is for member states to decide which system is most suited to ensuring the necessary protection of Convention rights, taking into consideration their constitutional traditions and particular circumstances.

12. Whatever the choice, present experience testifies that there are still shortcomings in many member states concerning the availability and/or effectiveness of domestic remedies, and that consequently there is an increasing workload for the Court.

#### **Remedies following a “pilot” judgment**

13. When a judgment which points to structural or general deficiencies in national law or practice (“pilot case”) has been delivered and a large number of applications to the Court concerning the same problem (“repetitive cases”) are pending or likely to be lodged, the respondent state should ensure that potential applicants have, where appropriate, an effective remedy allowing them to apply to

a competent

national authority, which may also apply to current applicants. Such a rapid and effective remedy would enable them to obtain redress at national level, in line with the principle of subsidiarity of the Convention system.

14. The introduction of such a domestic remedy could also significantly reduce the Court's workload. While prompt execution of the pilot judgment remains essential for solving the structural problem and thus for preventing future applications on the same matter, there may exist a category of people who have already been affected by this problem prior to its resolution. The existence of a remedy aimed at providing redress at national level for this category of people might allow the Court to invite them to have recourse to the new remedy and, if appropriate, declare their applications inadmissible.

15. Several options with this objective are possible, depending, among other things, on the nature of the structural problem in question and on whether the person affected by this problem has applied to the Court or not.

16. In particular, further to a pilot judgment in which a specific structural problem has been found, one alternative might be to adopt an ad hoc approach, whereby the state concerned would assess the appropriateness of introducing a specific remedy or widening an existing remedy by legislation or by judicial interpretation.

17. Within the framework of this case-by-case examination, states might envisage, if this is deemed advisable, the possibility of reopening proceedings similar to those of a pilot case which has established a violation of the Convention, with a view to saving the Court from dealing with these cases and where appropriate to providing speedier redress for the person concerned. The criteria laid out in Recommendation *Rec(2000)2* of the Committee of Ministers might serve as a source of inspiration in this regard.

18. When specific remedies are set up following a pilot case, governments should speedily inform the Court so that it can take them into account in its treatment of subsequent repetitive cases.

19. However, it would not be necessary or appropriate to create new remedies, or give existing remedies a certain retroactive effect, following every case in which a Court judgment has identified a structural problem. In certain circumstances, it may be preferable to leave the cases to the examination of the Court, particularly to avoid compelling the applicant to bear the further burden of having once again to exhaust domestic remedies, which, moreover, would not be in place until the adoption of legislative changes.

#### **Remedies in the case of an arguable claim of unreasonable length of proceedings**

20. The question of effective remedies is particularly topical in cases involving allegations of unreasonable length of proceedings, which account for a large number of applications to the Court. Thus the Court has emphasised in the *Kudla v. Poland* judgment of 26 October 2000 that it is important to make sure there is an effective remedy in such cases, as required by Article 13 of the Convention. Following the impetus given by the Court in this judgment, several solutions have been put forward by member states in order to provide effective remedies allowing violations to be found and adequate redress to be provided in this field.

##### *Reasonable length of proceedings*

21. In their national law, many member states provide, by various means (maximum lengths, possibility of asking for proceedings to be speeded up) that proceedings remain of reasonable length. In certain member states, a maximum length is specified for each stage in criminal, civil and administrative proceedings. The integration of the Convention into the domestic legal systems of member states, particularly the requirement of trial within a reasonable time, as provided for in Article 6, has reinforced and completed these national law requirements.

##### *Preventing delays, accelerating proceedings*

22. If time limits in judicial proceedings – particularly in criminal proceedings – are not respected or if the length of proceedings is considered unreasonable, the national law of many member states provides that the person concerned may file a request to accelerate the procedure. If this request is accepted, it may result in a decision fixing a time limit within which the court – or the prosecutor, depending on the case – has to take specific procedural measures, such as closing the investigation or setting a date for the trial. In some member states, courts may decide that the procedure has to be finished before a certain date. Where a general remedy exists before a Constitutional Court, the complaint may be submitted, under certain circumstances, even before the exhaustion of other domestic remedies.

##### *Different forms of redress*

23. In most member states, there are procedures providing for redress for unreasonable delays in proceedings, whether ongoing or concluded. A form of redress which is commonly used, especially in cases already concluded, is that of financial compensation. In certain cases, the failure by the responsible authority to issue a decision within the specified time limit means that the application shall be deemed to have been granted. Where the criminal proceedings have exceeded a reasonable time, this may result in a more lenient sentence being imposed.

#### **Possible assistance for the setting-up of effective remedies**

24. The recommendation instructs the Secretary General of the Council of Europe to ensure that the necessary resources are made available for proper assistance to member states which request help in setting up the effective remedies required by the Convention. It might take the form, for instance, of surveys carried out by expert consultants on available domestic remedies, with a view to improving their effectiveness.

4. European Ministerial Conference on Human Rights, see paragraph 14.i of Resolution No. 1 on institutional and functional arrangements for the protection of human rights at national and European levels, section A ("Improving the implementation of the Convention in member states").

5. Article 13 provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority". It is noted that this appendix does not contain particular reference to the procedural guarantees resulting from substantive rights, such as Articles 2 and 3.

6. See for instance, *Conka v. Belgium* judgment of 5 February 2002 (paragraphs 64 et seq.).
7. *Kudla v. Poland* judgment of 26 October 2000.
8. See Declaration of the Committee of Ministers of the Council of Europe of 14 May 2003 "Guaranteeing the long-term effectiveness of the European Court of Human Rights".
9. Recommendation *Rec(2000)2* of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted on 19 January 2000, at the 694th meeting of the Ministers' Deputies.
10. 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 (adopted by on 18 December 2002 at the 822nd meeting of the Ministers' Deputies), as well as Recommendation *Rec(2004)4* of the Committee of Ministers on the European Convention on Human Rights in university education and professional training, adopted on 12 May 2004 at the 114th Session of the Committee of Ministers.

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