

# COMMISSION ON A BILL OF RIGHTS

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Dear Ministers

## **REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS**

### **INTRODUCTION**

1. I am writing in parallel to my letter of today's date which sets out the Commission's interim advice on reform of the European Court of Human Rights pursuant to the Commission's terms of reference. I should note that for one member of the Commission agreement to the interim advice was conditional on the addition of a third question, namely: how can the democratic legitimacy of the Court be assured while at the same time assuring its independence and authority? I return to this question below.
2. As I note in paragraph 25 of the letter conveying our interim advice, a number of other areas for potential reform of the Court have either been raised with the Commission by those with whom we have discussed these issues or have been raised by individual members of the Commission themselves. These other areas include, but are not limited to, some further suggestions to address the Court's backlog; a number of suggestions intended to address the respective roles of the judiciary and the democratic institutions of the Council of Europe and the Member States, and considerations regarding the case law of the Strasbourg Court which have been expressed not only in this country but in others, including the perception among some but by no means all commentators that the Court is at times too interventionist in matters that are more appropriate for national legislatures or courts to decide.

3. In the time available to us to provide our interim advice, we have not been able to consider these further suggestions, or the evidence relating to them, in any depth and we have not therefore included any discussion of them in our interim advice. However, since we are highly likely to return to some of these issues at a later stage in our work programme in order to examine them further, I thought it would be useful at least to list them for you at this stage simply so that you are aware of them. In doing so I should stress that I am putting forward this letter myself and that, unlike the letter conveying our interim advice, it does not carry the endorsement of the Commission.

### **REFORM IDEAS RAISED WITH US OR BY INDIVIDUAL MEMBERS**

4. Subject to the above very important caveats, I set out below a number of suggestions for reform, emanating either from individuals with whom we have spoken or from one or more members of the Commission. I set them out in no particular order of priority or merit and no inference should be drawn from the order in which the arguments for and against each are marshalled. The suggestions, which may or may not be the subject of further consideration and recommendations by the Commission, and some of which we may decide not to pursue, are these:
  - Using retired judges to determine admissibility; while the change which has been introduced by Protocol 14 under which a single judge may now determine admissibility has undoubtedly helped, much of the time of the Court's judges is still being spent on admissibility issues (inadmissible applications are estimated to account for over 90% of the Court's caseload). The Interlaken and Izmir Declarations call on the Committee of Ministers to consider further filtering mechanisms for inadmissible cases. In this context, one option could be to engage either retired judges of the Court or of appellate courts in Member States to undertake this work on a contract basis possibly as an emergency task force to clear the current backlog. Similar proposals for appointing judges or committees of judges solely to decide admissibility have in the past met with concerns that few judges would be interested in carrying out such work and that may well be true. Equally it is possible that there might be more interest in such arrangements if they were to be introduced within the framework of a dedicated time bound task-force. In any event, it would be important to consider the extent to which such proposals would create additional bureaucratic processes.
  - Authorising officials of the Registry to take decisions on admissibility; a more fundamental change, but with the same objective, would be to put the responsibility for determining admissibility with the Registry rather than the judiciary of the Court. We understand that this is effectively already occurring under the supervision of a single Judge. While many might object to the possibility of admissibility being determined by officials rather than judges, such an approach would, in some ways, be similar to the system originally put in place by the founders of the Convention by which the secretariat of the Commission considered cases in the first instance, subject to oversight by the legally-qualified Commissioners. Only cases that

had passed the admissibility test could ever reach the Court on a reference by the Commission. Alternatively, the objection could be overcome by investing a small number of the Registry officials with judicial status as recommended by the Evaluation Group in 2001.<sup>1</sup>

- Requiring applications to the Court to be signed by a lawyer or NGO; it was clear from the Commission's meetings in Strasbourg that proposals, originating within the Court itself, are being considered for a requirement to be introduced for lawyers or non-governmental organisations to have to sign applications to the Court. The aim of this proposal would be to involve the legal profession and NGOs in sharing responsibility for reducing the very high number of manifestly inadmissible cases which currently arrive at the Court. The requirement would not be for individuals to have full legal representation, and safeguards would need to be considered to ensure that well-founded cases were not rendered inadmissible simply because it was not possible or practical in the local circumstance to gain a lawyer's signature. Those who believe that this proposal has merit consider that it might help to reduce the number of patently inadmissible cases with which the Court has currently to deal, without interfering with the right of individual petition. That would need, however, to be balanced against the risk that such a requirement could make it too difficult for those with admissible and serious allegations that their Convention rights had been infringed to gain access to the Court.
- Enabling the Court to deliver advisory opinions; while some current reform proposals, reflecting those made previously by the Group of Wise Persons in 2006, suggest forms of cooperation between the Court and national courts via requests by the latter for advisory opinions, some believe that further thought should be given to whether the Court might be given the power to deliver an advisory opinion of its own initiative. Under this proposal, the Court could choose to deliver, as an alternative to a finding that a breach of the Convention has or has not occurred, an advisory opinion to the Member State concerned. This, it is argued, could give the Court greater flexibility in those cases where it believed that a case was essentially well-founded but not sufficiently serious or clear cut as to require a specific and binding determination by the Court. On the other hand there could be a risk of such opinions leaving the legal position in the Member State uncertain and of the parties not being clear as to what was or was not required of them. Further, some express concern that this proposal would not be consistent with the Court's task of adjudicating concrete cases and where appropriate ordering effective remedies, while advising respondent States about the measures needed to secure compliance with the Convention.

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<sup>1</sup> Council of Europe, Committee of Ministers, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court (2001) 1 [2001 Report], para. 98.

- Enabling preliminary references to be made from the highest national court; the Izmir Declaration invites the Committee of Ministers to consider a “procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention that would help clarify the provisions of the Convention and the Court’s case-law, thus providing further guidance in order to assist States Parties in avoiding future violations”. As noted above, and drawing upon the practice in European Union law, it may be possible to consider whether, under certain well-defined conditions, the highest national court might be able to refer to the Court a question on a point of law arising under the Convention, leaving it to the national court then to apply the legal conclusion to the facts of a particular case. This, it is argued, would enhance the principle of subsidiarity and could – potentially at least – remove some cases from the Court’s caseload. Others, however, express concern that such a procedure, unless the Court in Strasbourg were able to respond to such requests far more quickly than its present case load would appear to allow, would delay the ultimate resolution of the cases concerned to an unacceptable degree. They also note that the Convention system presupposes that it is for the national court to decide the facts and decide whether Convention rights have been infringed, recourse to the Court being open only after all available and effective domestic remedies have been exhausted.
- Introducing a Statute of the Court which would allow the working practices of the Court to be changed more quickly; reform proposals in the Interlaken and Izmir Declarations refer to a Statute for the Court as a possible means by which to introduce a simplified procedure for amending provisions of the Convention relating to organisational matters, possibly requiring only a resolution of the Committee of Ministers for approval. The Evaluation Group and the Group of Wise Persons also recommended such simplified procedures.<sup>2</sup> Such a measure could go some way to increasing the flexibility of Member States to undertake future reforms where necessary. However, some consider that it may be difficult to persuade the Governments of all 47 States to widen the Court’s ability to manage its cases and exercise a wider area of discretionary judgment. Some members of the Commission who share the views expressed by some commentators that the Court is at times too interventionist are also concerned that this tendency might be reinforced by a Statute conferring greater independence on the Court in respect of procedural topics.
- Considering some form of ‘democratic override’ or dialogue; in order to recognise the legitimate role of Parliaments and the democratic process in all of the Member States. In states where there is a supreme court with powers to strike down legislation there is always some mechanism, usually requiring an enhanced majority or approval in more than one forum,

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<sup>2</sup> 2001 Report, para. 88; Council of Europe, Committee of Ministers, *Report of the Group of Wise Persons to the Committee of Ministers*, CM(2006)203, para. 47.

whereby the democratic will can ultimately prevail over court decisions. Section 33 of the Canadian Charter of Rights and Freedoms is one such power. Some believe that something equivalent should be considered within the Council of Europe and that fundamental reforms of the Strasbourg Court need to balance greater focus and efficiency on the one hand with greater democratic accountability on the other. The Interlaken Declaration called for a simpler procedure to amend Convention provisions of an organisational nature; an extension of that approach could be to empower other institutions of the Council of Europe to add qualifications to Convention rights. This could allow the effect of a Court decision to be overridden if such was the will of the Parliamentary Assembly or Committee of Ministers, or perhaps of both acting collectively. A variant of this approach might be a power in the Committee of Ministers to determine that a Court judgment should not be enforced if it considered that that course of action was desirable and justifiable in the light of a clear expression of opinion by the relevant Member State's most senior democratic institution. Another variant could be a requirement in respect of proposed ground-breaking findings of violations for the Court first to consult the other Council of Europe institutions and for the Court to take a collective expression of opinion into account.

Those opposed to this concept argue that any possibility of override is fundamentally inconsistent with the Rule of Law inherent in the Convention system and with the concept of the Convention as a charter of fundamental rights and freedoms. They ask how, if a right or freedom is fundamental, it can be right to allow any legislature, however democratic, to override it. They point, for example, to the fact that there are examples in history of discriminatory laws being passed by democratically elected assemblies. They note that the ECHR as a judicial body is an essential protection against majorities voting to discriminate against minorities.

For some members of the Commission, this area is a key issue and of sufficient importance that, in the view of one member at least, they would have wished to have added an additional principle to those mentioned as guiding the interim advice: namely that the democratic legitimacy of the Strasbourg Court should be better assured while at the same time ensuring its judicial independence. This is, however, a matter which the Commission has yet to discuss and address.

Others argue not that there should be a mechanism of democratic override but that the absence of any such override should act as a check on "activism" on the part of the Court. The jurisdiction of the Court should be defined in such a way as to require it to respect the proper role of democratic institutions in determining social and economic priorities, particularly those that involve allocation of financial and other resources. However, those who question the charge of judicial activism argue that there is no evidence that the Court can fairly be criticised for over-reach and that the Court in fact allows the State authorities a wide margin of appreciation or area of discretionary judgment based on the principle of

subsidiarity. They point to the fact that UK courts are criticised in the same way when they interpret and apply the law in ways that create controversy, but that a purposive approach to statutory interpretation, which updates the law, is well established in the common law.

- Introducing subsidiarity reviews by analogy to the EU treaty; the Lisbon Treaty introduced into the procedures of the EU the possibility of review by the European Court of Justice of a proposal where a challenge to it on the ground of infringement of subsidiarity is made supported by 25% (or in other cases 33%) of the parliamentary voting strength of the EU Member States. The principle of one institution's judgment on subsidiarity being open to challenge by another might be adopted in the Council of Europe in various ways. One could be a power in the Committee of Ministers to resolve that a judgment should not be enforced on the ground that it infringed the principle of subsidiarity. This would arguably reflect the Izmir Declaration which states that:

*The Conference*

2. *... invites the Committee of Ministers to apply fully the principle of subsidiarity, by which the states Parties have in particular the choice of means to deploy in order to conform to their obligation under the Convention.*

An alternative approach could be to leave the decision on subsidiarity with the Court but to build in new arrangements for the submission to the Court prior to a case's final consideration of formal memoranda contending that the proposed finding of violation is a matter on which democratic states should have a choice of means to comply with the Convention. A third approach could be acceptance of the jurisdiction of an external international body to determine a challenge that the Strasbourg Court had exceeded its competence by an infringement of the principle of subsidiarity.

A counter-argument to such an approach is that the Court and the Committee of Ministers already give full effect to the principle of subsidiarity, and that the Court requires no direction or guidance from the political branches of international or national governments on how to interpret and apply Convention law. A further counter-argument is that, unlike the EU, there is within the institutions of the Council of Europe no directly elected body such as the European Parliament to which such a role might be given.

**CONCLUSION**

5. I hope this letter is useful to you at least in indicating some of the further areas into which the Commission may decide to enquire further as part of its future work programme. As with my parallel letter conveying the Commission's interim advice on Court reform, I am intending to publish this letter, so that others are able to comment upon it if they so wish, in parallel with that advice once Parliament returns in early September.

6. I am sending a copy of this letter to the Foreign Secretary and Lord McNally.

Yours sincerely

A handwritten signature in black ink that reads "Leigh Lewis". The signature is written in a cursive style with a large initial 'L'.

Sir Leigh Lewis KCB  
Chair of the Commission

- cc Rt Hon William Hague MP, Secretary of State for Foreign and Commonwealth Affairs
- cc Rt Hon Lord McNally, Minister of State for Justice and Deputy Leader of the House of Lords