

Non-implementation of the Court's judgments: our shared responsibility



HUMAN RIGHTS COMMENT

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Council of Europe European Court of Human Rights

In December last year, the Council of Europe's Steering Committee on Human Rights (CDDH) published a [report on the longer-term future of the system of the European Convention on Human Rights](#) ("the Convention"). There were two challenges which particularly struck me: firstly, prolonged non-implementation of a number of judgments of the European Court of Human Rights and secondly, direct attacks on the Court's authority.

It is difficult to overstate the extraordinary contribution of the Court to the protection of human rights in Europe. This has been acknowledged in each High Level conference declaration along the Interlaken-Izmir-Brighton-Brussels reform process. The fact that so many Europeans turn to the Strasbourg Court for redress reflects the high level of trust that they place in the Convention system. Yet states must make sure that the system works.

Prolonged non-implementation of the judgments of the Court is a challenge to the Court's authority and thus to the Convention system as a whole.

While the [2015 Annual Report of the Committee of Ministers on the execution of the Court's judgments](#) shows that a new record number of cases were closed in 2015, there is a continued increase of cases pending for more than five years. In 2011 these cases accounted for 20% of the total number of cases,

while by the end of 2015 that figure had risen to 55%. The number of 'leading' cases pending, those indicating structural problems, has also risen steeply from 278 cases in 2011 to 685 cases in 2015.

The average time it takes to close a case is generally around 4 years, however in some States that figure is much higher: around 10, 8 and 7 years in cases concerning Russia, Moldova and Ukraine, respectively.

Indeed, last year, in its [eighth report on the implementation of Court judgments](#), the Legal and Human Rights Committee of the Council of Europe's Parliamentary Assembly concluded that there was a rising number of judgments concerning complex or structural problems, so-called 'leading' cases, that have not been implemented for more than ten years. It expressed its concern about the approximately 11,000 non-implemented judgments pending before the Committee of Ministers.

Prolonged non-implementation is problematic, even if it is true that complex problems do take time to resolve. Reforms can legitimately take time to design and implement. Nevertheless, the rule of law requires that all judgments should be implemented promptly, fully and effectively. Prompt execution of *domestic* court decisions is one of the hallmarks of a democratic society. The same should apply for execution of international judgments.

As Commissioner for Human Rights, I travel to many member states and push for the execution of the Court's judgments and the implementation of reforms aimed at addressing the root causes of repeat applications. This goes on in my bilateral meetings with government representatives and publicly in my reports. Sometimes my discussions with the authorities go even further. In 2013 I was invited to engage with a UK Parliamentary Committee by submitting my [views on the UK's non-implementation of the *Hirst \(No. 2\)* and *Greens and M.T.* judgments](#) concerning voting rights for prisoners. In that written submission I underlined that continued non-compliance would send a negative signal to other member states.

To execute or not to execute: that is not the question

Let us recall the basics.

State parties to the Convention have accepted the creation of a mechanism which has the competence to examine and decide on the way they ensure Convention rights and freedoms within their jurisdiction. That mechanism is the Strasbourg Court. States have also accepted the Court's ability not merely to apply, but to *interpret* the Convention.

According to Article 46 of the Convention, contracting parties must abide by the final judgment of the Court in any case to which they are parties. Article 46 (1) is an unequivocal legal obligation.

Article 1 of the Convention does not exclude any part of a member state's jurisdiction, including the Constitution, from scrutiny under the Convention. Possible conflicts between national law and the Court's case-law cannot be settled through refusing to execute a judgment of the Court. That would be unacceptable.

Moreover, a State is bound under Article 26 of the Vienna Convention on the Law on Treaties to respect ratified international agreements and pursuant to Article 27 it cannot invoke the provisions of its internal law as justification for its failure to perform a treaty, including the European Convention on Human Rights.

The authority and the efficiency of the human rights protection system based on the Convention is undermined where national authorities chose not to fully comply with judgments of the Court. Member states can fully see what their peers are doing during the Committee of Ministers' meetings.

Pitting sovereignty against the Convention system

In recent years direct challenges to the authority of the Court within a handful of member states have also become more explicit and vocal. They have gone beyond prolonged non-implementation of a few of the Court's judgments.

They are of particular concern because the integrity and legitimacy of the Convention system is at stake. I have been able to catalogue a number of these worrying national examples during my country visits and through my on-going discussions with civil society.

Last year the first political party in Switzerland, the UDC, launched a popular initiative entitled "Swiss law instead of foreign judges". The initiative does not rule out the possibility of Switzerland leaving the Convention in the event of repeated, fundamental conflicts with Swiss Constitutional law. This is worrying even though we are still at an early stage of the procedure, with a popular vote not foreseen until 2017 or 2018.

Six years ago in the United Kingdom, the Conservative Party's manifesto set out its proposal to repeal a domestic piece of legislation which gives effect to the Convention into national law (the Human Rights Act) and replace it with a UK Bill of Rights. Consultation on those proposals is still awaited.

The authority of Strasbourg judgments has also been questioned in Russia. In December last year the Federal law on the Federal Constitutional Court was amended to allow the Russian Constitutional Court to declare some judgments of the Strasbourg Court (and other human rights bodies) unconstitutional and therefore impossible to implement. The Council of Europe's Commission for Democracy through Law (the Venice Commission) issued an [interim opinion](#) in March this year on the amendments. The Opinion underlined that a State does not have the choice to execute or not to execute. Only the modality of execution may be at a State's discretion.

On 19 April this year, the Russian Constitutional Court applied the amended law for the first time in the case of [Anchugov and Gladkov v. Russia](#) (2013). It found that the Constitutional provisions enshrining the ban on prisoners' voting could not be amended and therefore the general measures flowing from the judgment could not be directly implemented. While the Constitutional Court suggested legislative amendments which would give some effect to the Strasbourg judgment, the principle of review of Strasbourg judgments by a Constitutional Court is problematic and cannot affect their validity in international law.

In Azerbaijan, a Draft Constitutional Law, along the lines of the Russian Constitutional Court law, has been introduced by one of the members of parliament during the 2016 spring session of the National Assembly.

The way forward

If we need reminding about what the Convention has done for us, [a recent Parliamentary Assembly report](#) provides examples from all 47 member states which illustrate how the protection of human rights

and fundamental freedoms has been strengthened at the domestic level thanks to the Convention and the Strasbourg Court's case law. A member state's commitment to the implementation process sends a strong signal of continued commitment to upholding and advancing human rights globally. This is what I urge to all member states of the Council of Europe.

Some judgments may be difficult to implement because of technical reasons, or because they touch extremely sensitive and complex issues of national concern, or because they are unpopular with the majority population. Nevertheless, the Convention system crumbles when one member state, and then the next, and then the next, cherry pick which judgments to implement. Non-implementation is also our shared responsibility and we must not turn a blind eye to it any longer.

The way forward is through three major lines of action: improving domestic implementation of the Convention thus reinforcing subsidiarity; improving the efficiency of the procedures before the Court and improving the Committee of Ministers supervision of the implementation process. A future where each Council of Europe member state reorganises its internal constitutional hierarchy so that the Convention can be trumped is a danger to the rule of law in that state and in all other states.

Nils Muižnieks

Useful Resources

- > High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility" [Brussels Declaration](#) 27 March 2015
- > [CM/Rec\(2008\)2](#) Recommendation of the Committee of Ministers to member states on **efficient domestic capacity for rapid execution of judgments** of the European Court of Human Rights (adopted by the Committee of Ministers on 6 February 2008 at 1017th Session)
- > [CM/Rec\(2004\)5](#) Recommendation of the Committee of Ministers to member States on the **verification of the compatibility** of draft laws, existing laws and administrative practice with standards laid down in the European Convention on Human Rights (adopted by the Committee of Ministers on 12 May 2004 at its 114th Session)
- > [CM/Rec\(2004\)4](#) Recommendation of the Committee of Ministers to member States on the European Convention on Human Rights concerning **university education and professional training** (adopted by the Committee of Ministers on 12 May 2004 at its 114th Session)
- > [CM/Rec\(2002\)13](#) Recommendation 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 the case-law of the European Court of Human Rights (adopted by the Committee of Ministers on 18 December 2002 at its 822nd Session)