



Reform of the European Court of Human Rights

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Protocol No. 15 to the European Convention on Human Rights and Fundamental Freedoms (ECHR), which entered into force on 1 August, was to improve the functioning of the European Court of Human Rights (ECtHR), including by accelerating the examination of cases. However, some of the changes made by it may have the opposite effect. The protocol does not solve the problem of overloading the ECtHR with incoming complaints. The reform should be thus continued by, for example, more effective resolution by states of systemic problems identified by the ECtHR.

The ECtHR has jurisdiction over all states of the Council of Europe (CoE) and is considered one of the most effective mechanisms for the protection of human rights in the world. Protocol No. 15 to the ECHR, on the basis of which the Court rules, was adopted in 2013 and has since been pending ratification by all its 47 States Parties. The last one to agree to its provisions was Italy in April this year. The purpose of its introduction was to strengthen the standards of human rights protection. This is to take place by, for example, depriving the parties to the proceedings the right to object relinquishment of jurisdiction by a Chamber in favour of the Grand Chamber (extended bench) and the actual increase of the retirement age of judges (enabling the lawyers with the most experience to adjudicate). The second expected result is to reduce the ECtHR's burden of incoming complaints by simplifying and accelerating the procedure.

Introduced Changes. Some of the changes introducing organisational improvements were reported by the Tribunal itself. Those proposals concerned the age of the judges elected for nine years (the new requirement is that they be less than 65 as candidates instead of holding the office until the age of 70), shortening the time limit for lodging a complaint from six to four months and abolishing parties' right to opposition to referral to the Grand Chamber. They did not raise any major reservations on the part of the States Parties to the Convention.

Much more controversy was caused by the inclusion of the principles of the margin of appreciation and subsidiarity in the

preamble to the ECHR, proposed by the Committee of Ministers of the CoE composed of representatives of the states. The margin of appreciation refers to a certain discretion of the state in interpreting the provisions of the Convention, depending on the circumstances, the nature of the law, and the lack of a uniform interpretation of it at the European level. Subsidiarity means that states are primarily responsible for the protection of human rights, and the ECtHR should only be involved when they fail to fulfil their duty or do so incorrectly. NGOs pointed to the risk of states interpreting these rules after their inclusion in the preamble in such a way as to limit the jurisdiction of the Tribunal in their favour to avoid responsibility. Similar concerns were also expressed by the ECtHR itself. It criticised the lack of mention in the text of the Protocol that, in terms of the margin of appreciation and subsidiarity, it merely codified the existing rules and did not lead to changes in the interpretation of the ECHR (such an explanation was contained in the Brighton Declaration of 2012 initiating the reform and—as a result of the intervention of the ECtHR—in the explanatory report to the Protocol).

An additional objection of NGOs was the failure to include in the Protocol the remaining interpretative rules developed in the jurisprudence: the interpretation of the ECHR as a “living instrument” (which evolves over time), and proportionality and inviolability of the essence of law. These are rules that enable the Court to define the scope of individual rights and freedoms and to modify the meaning assigned to them previously to meet the changing social realities. NGOs raised concerns that leaving them uncoded would imply the

overriding role of subsidiarity and the margin of appreciation that were included in the text of the Convention.

The Applicants' Perspective. For years, the ECtHR has struggled with an overload of the number of complaints examined. Since its establishment in 1959, it has issued more than 23,400 judgments; most against Turkey, Russia, and Italy. In 2020, about 62,000 cases were pending before the Court (about 41,700 were brought successfully), of which 22% were against Russia, 19% against Turkey, and 16.8% against Ukraine. Most of the breaches identified by the ECtHR concern the right to a fair trial (37.65%), the right to liberty and security (13.34%), and the right to life and the prohibition of torture (16% in total).

Proceedings before the ECtHR are almost always initiated by individuals, their groups, or NGOs. As it is these applicants—and not the states (since the establishment of the ECtHR, they have brought fewer than 30 applications)—that give the actual impetus to the Court's action, their access to the Strasbourg court should not be limited, despite the overburdening of the ECtHR with the number of cases. Among the reforms considered previously, the proposed changes (reducing the time limits for bringing an action and removing the clarification that a case cannot be dismissed only because it has not been properly examined by the national court) offer the least disincentive for them bringing an action. The rejected solutions were, among others, introducing a complaint fee or a sunset clause allowing the striking from the list of cases not heard within a specified period, which actually worsened the procedural situation of the applicants. From this perspective, the modifications introduced by Protocol No. 15 can be assessed positively. The mere reduction of the time-limits for bringing an action should not undermine the level of protection of the applicants. According to the authors of the Protocol, it is the result of the increasing use of new technologies in communication and the existence of comparable terms in national procedures. Nevertheless, other attempts to improve the work of the Court should be continued.

Systemic Problems. Earlier Protocols— No. 11, establishing the ECtHR as a permanent court, and No. 14, entrusting the ruling on the inadmissibility or striking complaint from the list in the most obvious cases to single judge—were aimed at increasing the efficiency of the ECtHR. Contrary to them, the reforms contained in Protocol No. 15 do not remove the cause

of the Tribunal's overburdening, which is largely the failure by states to perform so-called pilot judgments.

In the event of a significant inflow of complaints concerning a similar problem, the Court finds systemic deficiencies in the legal order of a given country. Such violations should be remedied by introducing changes to national practices or regulations (e.g., the judgments of the ECtHR resulted in the introduction of a complaint about the length of proceedings previously non-existent in many countries, the decriminalisation of homosexuality in Cyprus, the abolition of corporal punishment in British schools, and the equalisation of inheritance rights for children born out of wedlock in France). Nevertheless, states introduce relevant systemic changes much less frequently (around 45% of pilot judgments have never been enforced) and limit themselves to paying applicants standard individual compensation, which has resulted in the ECtHR being constantly faced with new complaints about similar violations.

Conclusions and Perspectives. Emphasising the principle of subsidiarity and the margin of appreciation may be interpreted differently by the states and by the Court. This new wording may encourage states to challenge the jurisdiction of the ECtHR. This is particularly problematic in the current political situation in Europe where national authorities increasingly negate the possibility of assessing internal legal orders by international institutions. Despite the apparent strengthening of the role of states, the supervision over the application of the disputed rules will remain with the Tribunal, which should enable it to maintain its current position. The entry into force of Protocol No. 15 should also not lead to a deterioration of the applicants' access to the protection system of ECHR. However, overburdening the Tribunal with the number of incoming and examined complaints will remain a significant problem.

Many cases brought before the Court deal with the same systemic problems, which block the resources of the ECtHR and prevent it from focusing on new legal problems. Individual states, including Poland, can support the smooth functioning of the Tribunal by introducing internal reforms and collective elimination of the shortcomings indicated by the ECtHR. This would be beneficial to all parties to the proceedings; it improves statistics on the rule of law of states by reducing complaints against them and may increase citizens' trust in the state by reducing the likelihood of violations of their rights by public authorities.