THE AIRE CENTER
Advice on Individual Rights in Europe

Foreign & Commonwealth Office

SWEDEN

CIVIL RIGHTS DEFENDERS

annual regional
RULE OF LAW FORUM
for south east europe

Second Annual Regional Rule of Law Forum for South East Europe

6th and 7th of March 2015
Belgrade, Serbia, Falkensteiner Hotel Belgrade

Report

1. Introduction

The second regional Rule of Law Forum for South East Europe was held on the 6th and 7th of March 2015 in Belgrade, Serbia at the Falkensteiner Hotel.

The Rule of Law Forum is an initiative of the AIRE Centre and Civil Rights Defenders, implemented with the support of the UK Foreign and Commonwealth Office and the Government of Sweden. The Forum provides a platform to: promote the implementation of the European Convention on Human Rights (ECHR) across the region; encourage regional cooperation in strengthening the rule of law and respect for human rights; and assist the process of EU integration in South East Europe.

This year's topic was Article 6 of the ECHR, which guarantees the right to a fair trial. This right is of fundamental importance in a democratic society, occupying a central place in the Convention system. Article 6 is the provision of the Convention most frequently invoked by applicants to the European Court of Human Rights (ECtHR). Some of the countries in the region have exceptionally high numbers of applications before the Strasbourg Court in per capita terms, in particular concerning the right to a fair trial. Many of these cases are similar, indicating systemic problems in the region's domestic legal systems.

The invited participants were from Albania, Bosnia and Herzegovina, Croatia, Kosovo*, Macedonia, Montenegro and Serbia. The Forum brought together Presidents and Judges of Supreme Courts and Constitutional Courts from the region, Directors of Judicial Training Academies and Institutions, Government Agents before the Strasbourg Court, representatives of NGOs and prominent legal experts in the field.

2. Presentations

The event was opened by the organisers Biljana Braithwaite, Programme Manager for the Western Balkans at the AIRE Centre and Goran Miletic, Programme Director for the Western Balkans at Civil Rights Defenders. Introductory speeches by distinguished guests followed: Nikola Selakovic, Minister of Justice of Serbia; Dragomir Milojevic, President of the Supreme Cassation Court of Serbia; Nenad Vujic, Director of the Judicial Academy of Serbia; Denis Keefe, United Kingdom Ambassador to Serbia; and Christer Asp, Swedish Ambassador to Serbia.

The Forum's structure was a mixture of panel discussions, interactive working groups andseminars with legal experts. This structure gave participants extensive opportunities to contribute and participate.

The panel of four Strasbourg judges was comprised of Ledi Bianku (Albania), Mirjana Lazarova Trajkovska (Macedonia), Nebojsa Vucinic (Montenegro) and Dragoljub Popovic (Serbia). The panel focused on 'common problems throughout the region identified through recent case law from the ECHR', looking, in particular, at typical Article 6 violations. These included: inconsistent case law in domestic court judgments; the importance of clear reasoning; non-enforcement of domestic judgments; the role of precedent both at domestic and Strasbourg level; access to court and equality of arms; and the impact of the responsibility of States for the debts of socially owned companies on fair trial guarantees (enforcement). National judges and domestic practitioners were able to contribute by sharing their domestic experiences, discussing the issues and asking questions.

Nuala Mole, Senior Lawyer at AIRE Centre spoke about the challenges relating to the national implementation of judgments concerning Article 6 of the ECHR. After the seminar, participants broke into three working groups, with the smaller number of participants enabling more in depth analysis and discussions to take place, in line with the aims of the Forum.

Working groups were organised in a way which enabled participants to share good practice with their regional counterparts. ECtHR judges and national judges formed the first group, NGO representatives and legal experts formed the second and Government Agents and Judicial Training Centres formed the third. All groups reported their findings back the following day and conclusions were shared.

Finally, the development, promotion and future of the European Human Rights Database was presented to and discussed with all participants.

The Forum provided an opportunity to share experiences, and to hear what has and has not been successful in other countries facing similar challenges in the application of ECHR case law.

3. Opening session

Welcome from the organisers and introduction to the Forum

"We are here today to talk about the extent to which the rights guaranteed under the ECHR are indeed secured in practice, at thenational level. We will be focusing on Article 6, which guarantees the right to a fair trial. This right is of a fundamental importance in a democratic society, occupying a central place in the Convention system. Its object and purpose enshrines the principle of the rule of law, upon which such a society is based and built, as well as reflects part of the common heritage of the States parties to the Convention."

Biljana Braithwaite
Programme Manager for the Rule of Law in the Western Balkans, AIRE Centre

"Civil Rights Defenders is raising awareness amongst citizens, supporting NGOs and running moot court competitions for students to engage with the European Convention on Human Rights at an early stage in their careers. Knowledge creates independence in the judiciary. Formal and substantive training of the judiciary is key to the rule of law project."

GoranMiletic
Programme Director for the Western Balkans, Civil Rights Defenders

"We need to further our knowledge, to share it, and to raise awareness. Access to the EHR database will further strengthen the application and implementation of the Convention and provide for future deliberation to take into account the case law from the European Court of Human Rights.

Events like this are a precious opportunity for persons who want to professionally develop and to share and discuss the problems of the region. It is an opportunity to apply our experiences in our Courts."

Nikola Selakovic
Minister of Justice of Serbia

"Establishing the rule of law is fundamental to establishing societies of freedom, justice and security, societies with accountable governments and economic development.

Governments should be held accountable by and have a constructive dialogue with civil society. This forum provides an excellent opportunity to get a look at the European Convention on Human Rights in order to ensure that the rule of law is for the benefit of its citizens."

Christer Asp
Swedish Ambassador to Serbia

"Comprehensive reform in the rule of law is at the heart of EU accession, and it is perhaps the greatest challenge the countries of the EU face.

Strengthening the capacity of the countries in the region to meet the central rule of law requirements that are needed for closer association to membership is not just a technical requirement but it is a key value itself. The right to a fair trial is fundamental. Things must be done fairly and also be seen to be done fairly."

Denis Keefe
United Kingdom Ambassador to Serbia

"This forum provides an opportunity to strengthen the implementation of the ECHR by sharing and collaborating with each other. We are responsible to ensure that the law is applied in an unbiased way, that there is fair trial and equal treatment. Judges can now rely on tools such as the EHR database for guidance in undertaking application problems. It is fundamental to strengthen knowledge and accountability so that the judiciary acts independently of external pressures."

DragomirMilojevic
President of the Supreme Cassation Court of Serbia

"Only the professionalism and educational development of judicial office holders can ensure the good administration of justice. Only a professional and efficient judiciary will be impartial, unbiased, and a guarantee for the rule of law.

Our role as the Judicial Academy is to uphold this. This forum is an excellent platform to discuss regional collaboration to take forward personal development and education but also helpful tools such as the EHR database."

Nenad Vujic
Director of the Judicial Academy of Serbia

COMMON PROBLEMS THROUGHOUT THE REGION IDENTIFIED THROUGH RECENT CASE LAW FROM THE ECHR

Ms Ana Vilfan- Vospernik, senior lawyer at the Registry of the European Court of Human Rights, spoke about the current atmosphere and perspective in Strasbourg. She mentioned changes being introduced by Protocols 14 and 15 but emphasised Protocol 16 will bring further changes by opening the way for Advisory Opinions.

The Court has introduced many new working methods and has operated changes such as: the introduction of the single judge procedure and changes to the filtering process of applications to the Court, which have helped tackle new applications immediately.

Changes have given encouraging results acknowledged in research reports. Less than 70,000 applications are pending before the Court now when for years we were used to numbers as high as 100,000. Half of those 70,000 cases are repetitive cases, representing a high docket also for some States participating at this conference. What has also been highlighted in these reports is that the ECtHR has limited capacity to execute changes on its on, it is up to the State parties to implement changes and share responsibility. It is the national authorities who need to implement more radical changes.

4. Main Discussions and Conclusions

4.1 Panel Discussion with Judges from the Strasbourg Court: *Looking in particular at common Article 6 violations and issues throughout the region, including inconsistent case law, clear reasoning, non-enforcement, precedent at domestic and Strasbourg level, access to court, equality of arms, impact on fair trial guarantees of the responsibility of States for the debts of state or socially owned companies (enforcement).*

Moderator: Catharina Harby, Senior Legal Consultant, AIRE Centre
Panel (left to right): Mirjana Lazarova Trajkovska (Macedonia), Nebojsa Vucinic (Montenegro), Ledi Bianku (Albania), Dragoljub Popovic (Serbia), Catharina Harby, Ana Vilfan- Vospernik

The Panel discussion, led by Strasbourg judges, reached the conclusion that the repetitive factual situations brought before the ECtHR indicated a deeper systemic and domestic problem in the region.

General measures to tackle these issues at the national level were called for strongly. Notable suggested measures included a domestic remedy to address the unreasonable length of proceedings. The optimal solution, discussed in reference to *Scordino v. Italy (no. 1),* is a combination of a remedy designed to expedite the proceedings and another to afford compensation, although a suitable compensatory remedy alone might suffice.

Judges highlighted that inconsistencies in domestic judgments pose a grave problem. Applicants need to have legal certainty. Where factual situations considered by several courts of the same level are so similar as to be nearly identical, the rule of law requires consistent decision-making so that the same result is delivered each time.

In terms of litigation in the Strasbourg Court, a situation which amounts to a continuing violation will not indefinitely postpone the running of the six-month time limit for applying to the ECHR. Applicants have to introduce their complaints "without undue delay"once it becomes apparent that there are no realistic prospects of a favourable outcome or progress domestically.

Finally, both national and Strasbourg judges repeatedly mentioned violations overlapping with debts, pensions, land, home, possessions, etc, in relation to Article 1 of Protocol No. 1 in discussions concerning the non-enforcement of judgments regarding socially owned enterprises. Participants proposed that organisers kept Article 1 of Protocol No. 1 in mind as a potential topic for next year's Forum.

4.2 Challenges in relation to the National implementation of judgments concerning Article 6, a presentation by: NUALA MOLE

Nuala Mole, Senior Lawyer at the AIRE Centre, spoke about the execution of final national binding judgments. Many challenges exist at national level, including lack of resources and lack of political will, but more often there is indifference to the problem and inertia in addressing it. However, the problem of non-execution cannot be looked at in isolation as it is connected to many of the other rights protected by the Convention, such as the requirement for a reasonable length of proceedings.

> "The right to court would be illusory if a State's legal system allowed a final binding judicial decision to remain inoperative ...
>
> Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial"..."
>
> *(Hornsby v Greece para 40)*

4.2.1 *The duty to execute judgments rendered against the state*

The ECtHR has emphasised that when a judgment is rendered against a State authority, it must be executed automatically. Thus, the State must normally be seen to comply promptly and effectively with a final binding judgment against it. As an illustration of the State's obligation, in *Jasiuniene v Lithuania* there was a violation of Article 6 where Lithuania had not only failed to execute a judgment but it had made it difficult for anyone to push for implementation. In contrast, in *Uzkureliene and Others v Lithuania,* no violation was found because the Lithuanian government had done everything that it should have done to assist in the execution of the decision.
The Court has held that the duty to execute applies not only to final binding decisions but also to interim or interlocutory decisions, e.g. *Okyay and Others v Turkey.* The ECtHR is sympathetic to financial concerns but it requires the State to show that it has taken all the steps that it could reasonably be expected to take to attempt to comply with the judgment.

4.2.2 *States'duty to execute judgment in litigation between private persons*

In financial cases, the State's duty is less onerous in executing judgments in respect of disputes between private parties. Therefore, while lack of funds cannot justify failure to execute against the State, it may excuse failure to enforce a final domestic judgment against a private individual or company. The State's role is not to enforce the judgment, but to ensure that there is a mechanism in place for judgments to be enforced e.g. *Fociac v. Romania.* Delays in enforcement are more complex but some degree of postponement is acceptable, so long as it does not impair the very essence of the right, e.g. *Hornsby v. Greece* and *Lunari v Italy.*

There is no requirement under the ECHR that States should compensate individuals for property taken from them prior to the State's ratification of the Convention under a previous regime and social system. However, if the State chooses to set up a restitution scheme and makes it legally binding, the implementation of this scheme by domestic court judgments will engage Article 6 and Article 1 of Protocol 1.

4.2.3 Regional challenges

In conclusion, Nuala Mole gave a 'snapshot'of the regional challenges relating to the national implementation of judgments concerning Article 6:

- Albania has *Manushaqe Puto,* where a pilot judgment was adopted to assist the Albanian authorities in implementing the cases –a lack of funds was no excuse.
- Bosnia and Herzegovina has 22 of these cases including *Jelicic* (foreign currency savings), *Colic and Others* (war damages), and *Runic and Others* (delays) –these can be looked at thematically to identify the particular problems experienced in specific circumstances.
- Croatia has *Mikulic,* where the ECtHR made clear that domestic courts must be particularly diligent in ensuring the progress of proceedings concerning civil status and capacity.
- Macedonia has been found in violation for failure to take measures to enforce judgments - this is not just a negative obligation not to be obstructive in enforcement, but also a positive obligation to do something to help, even if the dispute is between private individuals.
- Montenegro has had 11 cases heard before the Chamber about Article 6 out of the 18 cases it has had, e.g. *Milic, Mijanovic, Vukelic* and *Velimirovic* - all emphasise the importance of prompt execution.
- Serbia has many cases on children, e.g. *V.A.M., Felbab, Damnjanovic, Krivosej* and *Tomic,* as well as cases concerning lack of enforcement of judgments against socially owned companies. Additionally, there is a problem concerning the effectiveness of Constitutional Court appeals (*Minkovic* and *Ferizovic*).

4.3 The Working Groups

The working groups were a space of thorough discussion. This interactive platform allowed every participant a more relaxed and informal opportunity to speak and ask questions. Each working group set out with key objectives and aims and the following is a short overview of some of the main concluding points.

4.3.1 Working group 1, comprised of **Strasbourg and domestic judges,** was tasked with discussing inconsistencies in the application of ECtHR jurisprudence. National judges then presented their findings and reported back to all participants by sharing their domestic experience. The aims were to share the specific issues affecting each domestic court, as well as examples of good practice and any steps taken to identify and deal with particular problems.

Moderator: Catharina Harby, Senior Legal Consultant, AIRE Centre
Panel (left to right): Albania, Croatia, Kosovo*, Bosnia and Herzegovina, Serbia, Macedonia, Montenegro.

Amongst their conclusions:

The representative from the **Albanian** Constitutional Court presented cases on Article 22 of the Albanian Constitution, which corresponds with Article 6 of the ECHR. The main issues the Constitutional Court faces are: (1) a lack of conclusive decision-making, as the Court often returns a tied vote or refuses to give a verdict and (2) a lack of an effective mechanism to address delays. On the other hand, Albania has made progress by stopping the reopening of cases, which was a major problem before the ratification of the ECHR.

The representative from the Constitutional Court of **Bosnia and Herzegovina** spoke about the ECHR's incorporation into BiH's constitutional framework and its supremacy over domestic legislation. In practice, the Court tries to free itself of excessive formalism and interpret human rights as broadly as possible. They receive over 6000 applications on Article 6 of the ECHR, pertaining to alleged violations of the right to a fair trial. Another significant problem is the lack of effective means to ensure that all the other legal avenues have been explored prior to actual submission, so as to reduce the number of applications before them.

The representative from the **Croatian** Constitutional Court spoke about their experience since joining the EU and acquiring full membership. He highlighted the interworking of constitutional and parliamentary changes in order to align their legal system to EU standards. He emphasised that the national constitution should protect against serious violations of human rights, as it acts as an expression of the State and its values. He then stressed that we must not only ask the government to implement its decisions, but also to appoint a body which is responsible for enforcing constitutional norms. Judgments should not only be about giving instructions but also about ensuring that such constitutional norms are enforced.

The representative of **Kosovo** spoke about the evolution of their judicial system, the way in which it has been established on three different occasions, and the troubles encountered when the courts were taking on all cases, except those concerning war crimes. He concluded that, although Kosovo is not a signatory to the ECHR, the domestic courts still apply the principles developed by ECHR case law.

The representative of the Supreme Court of **Macedonia** spoke about the progress achieved through direct implementation of the ECHR. The length of proceedings is the main problem in domestic criminal cases. There is an issue with prosecutors abusing their powers and often failing to appear at hearings, leading to proceedings being delayed, sometimes for a number of years. The Supreme Court proposed a review on the rights of the prosecutor but encountered problems as the executive branch has failed to take action on the issue. The Court does not operate in isolation, so even with the best will and recommendations progress can be delayed.

The representative of the Court of **Montenegro** spoke about the progress which has been made in enforcing judgments, mentioning that new legislation was introduced after the cases of Boucke v Montenegro and Bijelic v Montenegro. However, there are significant issues remaining concerning harmonisation. Firstly, in terms of awarding proportionate damages, Montenegrin courts are worried that they are awarding either too much or too little compared to that ordered by the ECtHR. Secondly, in terms of the formalistic approach to the reasoning of decisions, Montenegrin Courts expect Strasbourg to provide detailed rationale, given that the case has reached the highest court and has undergone three or more hearings. Sometimes members of the judiciary feel that there is not enough explanation as to why or how a decision was reached, especially when it comes to the admissibility of a case.

The representative of the Supreme Cassation Court of **Serbia** focused on excessive repetitive cases and the systemic problem this posed across the judiciary. As a result of judgments of the ECtHR, there have been serious efforts on the part of Serbia to harmonise standards and practiceto reflect ECHR standards in domestic judgments. For example, the cases of V.A.M. v. Serbia and Tomic v. Serbia have had a significant impact on practice. However, there is a continuing problem with some national organisations, as there is a lack of consistency in the quality of decision-making in different regional administrative bodies. There are also issues in ensuring that fair and proper indemnity is paid because such payments are made from the budget of the court.

4.3.2 Working group 2, comprised of **legal experts and representatives of NGOs,** set out to discuss the issues they faced in domestic and international litigation.

Amongst their findings:

a) They discussed the difficulty faced in finding the resources to litigate. The recommendation here is that there is a need for legal aid systems, which are workable and effective, rather than theoretical and illusory. This wouldensure that those who have arguable claims alleging human rights violations have practical and efficient access to court for determination of those rights.

b) The key question asked was whether national courts should develop a practice of permitting appropriate NGOs to bring cases relating to, for example, prison conditions or conditions in psychiatric institutions. The group considered the important precedent that the case of *Valentin Campeanu v Romania* set for NGOs wishing to take a case on behalf of individuals who are unable to do so themselves.

c) Cases where a first instance decision is made on the basis of very little evidence, or cases with complex evidence that is ineffectively managed and considered, create a high percentage of appeals, an increased burden on the court system, and a large number of decisions simply being reversed on appeal. The Group felt it was important that judicial training centres addressed this issue, which would require not just a focus on substantive laws, but on judgment writing skills.

4.3.3 Working group 3, comprised of **Government Agents to Strasbourg and Judicial Training Academies,** discussed the development and future of the EHR Database, its promotion and impact in the region. The group was opened with the announcement that there will be an evaluation in July this year by which stage the Database will have launched in all countries.

Amongst the conclusions:

a) The group found a causal link between countries where the launch and promotion of the database had been thoroughly undertaken and consequently yielded results of higher user activity, and those who had fewer opportunities to promote where there was lower usage. A proposal was therefore made to incorporate contact points in each country. Having a contact point would increase communication links and assist in the promotion and dissemination of the database.

b) In relation to future plans for the database,we aim to incorporate:

- Summaries from the AIRE Centre Human Rights Bulletin.
- National pages, which will incorporate national jurisprudence and provide national examples of good practice. Developing this section will give the database another dimension and create a powerful link with domestic practice.
- Other literature such as links to Council of Europe guides and AIRE Centre handbooks.

By July 2015 the database will have launched in Albania and Kosovo and will conclude its official regional tour. Training is, and will continue to be, incorporated throughout the Judicial Training Academies. The promotion of the database will aim to extend its targets to Law Faculties.

5. Acknowledgments

The Regional Cooperation Council is delighted to be able to support the 2015 Regional Rule of Law Forum. This excellent initiative of the AIRE Centre and the Civil Rights Defenders enables discussion of key challenges and the exchange of best practices in strengthening the rule of law and respect for human rights between representatives of the senior national courts, legal institutions and non-governmental organisations from throughout the Western Balkans. The presence of the judges of the European Court of Human Rights coming from the region has been particularly valuable for the participants. The RCC is looking forward to cooperation with the AIRE Centre and the Civil Rights Defenders in this and similar activities aimed at advancing rule of law in the region and assisting the process of its European integration.

Goran Svilanovic
Secretary General, Regional Cooperation Council

The event was an enormous success and the Civil Rights Defenders and the AIRE Centre would like to express a special thanks to all those who have made this Forum possible, namely: The UK Foreign and Commonwealth Office and the Government of Sweden, for recognising the importance of our work and giving us the means to carry it out; the judges from the region who sit in the European Court, who have been closely involved in the planning of this event; the Regional Cooperation Council, based in Sarajevo, who have contributed to this event with the aim of fostering regional cooperation on all levels and support the European integration of the aspiring countries in the region; and to all participants who, with their involvement and contributions, made the event exceptional.

6. Rule of Law Forum 2016

As the 2015 Rule of Law forum was ending participants began to speak about 2016. Suggested topics were informally proposed, feedback and comments were received, and organisers reflected that they could not be happier with what was accomplished in two days of intense discussion and hard work. This report will be published and circulated to all participants. Based on this year's findings, organisers will propose topics for next year's forum and a consultation will be launched in 6 months' time for selection. Once again thank you all for your participation and collaboration.

We look forward to seeing you in 2016.