Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts

(Adopted by the Committee of Ministers on 16 September 1986 at the 399th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Having regard to the increasing number of cases brought before the courts, which is liable to interfere with everyone's right to a hearing within a reasonable time under Article 6.1 of the European Convention on Human Rights ;

Considering, moreover, the high number of non-judicial tasks to be performed by judges which, in some countries, has a tendency to increase ;

Convinced of the interest of limiting the number of non-judicial tasks performed by judges as well as of reducing any excessive workload of the courts in order to improve the administration of justice ;

Further convinced of the interest of permanently ensuring a balanced distribution of cases among the courts and of making the best possible use of their human resources,

Invites the governments of member states, apart from allocating to the judiciary the necessary means to deal effectively with the increasing number of court proceedings and non-judicial tasks, to consider the advisability of pursuing one or more of the following objectives as part of their judicial policy :

I. Encouraging, where appropriate, a friendly settlement of disputes, either outside the judicial system, or before or during judicial proceedings.

To that effect, the following measures could be taken into consideration :

a. providing for, together with appropriate inducements, conciliation procedures for the settlement of disputes prior to or otherwise outside judicial proceedings ;

b. entrusting the judge, as one of his principal tasks, with responsibility for seeking to achieve a friendly settlement of the dispute in all appropriate matters at the commencement or at any appropriate stage of legal proceedings;

c. making it an ethical duty of lawyers, or inviting the competent bodies to recognise as such, that lawyers should seek conciliation with the other party before resorting to legal proceedings and at any appropriate stage of such proceedings.

II. Not increasing but gradually reducing the non-judicial tasks entrusted to judges by assigning such tasks to other persons or bodies.

The appendix to this recommendation contains examples of non-judicial tasks which in some states are at present performed by judges and of which they could be relieved, taking into account the particular circumstances of each country.

III. Providing for bodies which, outside the judicial system, shall be at the disposal of the parties to solve disputes on small claims and in some specific areas of law.

IV. Taking steps, by suitable means and in appropriate cases, to make arbitration more easily accessible and more effective as a substitute measure to judicial proceedings.

V. Generalising, if not yet so, trial by a single judge at first instance in all appropriate matters.

VI. Reviewing at regular intervals the competence of the various courts as to the amount and nature of the claims, in order to ensure a balanced distribution of the workload.

VII. Evaluating the possible impact of legal insurance on the increasing number of cases brought to court and taking appropriate measures, should it be established that legal insurance encourages the filing of ill-founded claims.

Appendix to Recommendation No. R (86) 12

Examples of non-judicial tasks of which judges in some states could be relieved according to the particular circumstances of each country

Celebration of marriage;

Establishment of family property agreements;

Dispensing with the publication of marriage bans;

Authorising one spouse to represent the other : replacing the consent of the spouse prevented from giving consent ;

Change of family name – change of first name ;

Recognition of paternity ;

Administration of the property of those lacking legal capacity ;

Appointment of a legal representative for the legally incapacitated adults and for absent persons ;

Approval of acquisition of property by legal persons ;

Supervision of traders' account books ;

Commercial registers :

traders,
companies,
trademarks,
motor vehicles,
ships, boats and aircraft ;

Granting of licences for the exercise of commercial activities ;

Judicial intervention in elections and referenda other than provided for in the constitution ;

Appointment of a judge as chairman or member of committees in which his presence is merely required to strengthen the committee's impartiality ;

Collection of taxes and customs duties ;

Collection of judicial fees ;

Acting as a notary public ;

Measures relating to estates of deceased persons ;

Civil status documents and registers ;

Land registry (control over registration of transfer of property, of charges over immovable property) ;

Appointment of arbitrators when such appointment is required by law.

Explanatory memorandum

Introduction

1. The concern to improve the efficiency of the judicial system is shared by many governments. It is nothing new : congestion and slowness have long been deplored as characteristics of the judicial process. But the problem is particularly acute today because Europeans are in a position to avail themselves more freely of the judicial system, probably because the continual changes in society give rise to a growing number of conflicts which need to be settled and situations which have to be resolved. For budgetary reasons, however, states might find it difficult to meet the increasing number of cases with a corresponding increase of the various resources made available to the judicial system.

2. Improving the functioning of the judicial system was one of the major themes of the 12th Conference of European Ministers of Justice, held in Luxembourg in May 1980.

Previously the Council of Europe's member states had co-operated mainly on access to the courts : informing the public, legal aid, linguistic assistance, etc. On the initiative of the Ministers of Justice, a Committee of experts on the working of the judicial system was set up in 1981.

3. If the judicial system is to be able to meet an increasing demand rapidly and without any drop in standards, a whole range of possible reforms must be explored, covering, *inter alia*, education and further training of judges and judicial staff, courts' working conditions, simplification of procedures, and alternative methods of solving disputes, etc.

4. The committee looked first of all at measures likely to make civil procedure simpler, swifter and more flexible.

Recommendation No. R (84) 5 on the principles of civil procedure designed to improve the functioning of justice was drawn up on the committee's initiative and adopted by the Committee of Ministers on 28 February 1984 on a proposal by the European Committee on Legal Co-operation (CDCJ).

5. The committee went on to study ways of reducing the number of cases brought before the courts and the volume of the courts' work. The outcome of these discussions forms the principal part of this recommendation.

6. On the invitation of the 14th Conference of European Ministers of Justice, held in Madrid in May 1984, the Committee of Ministers decided that the work undertaken should be extended to include a study of

the following: the means of lessening the burden on the judicial system by encouraging the development of non-judicial forms of enforcement, modern enforcement techniques, and the situation relating to the recognition of the means of enforcement in European states.

7. The committee will further study how far it is possible, at an international level, to improve the training of judges and judicial staff, and to establish a better correspondence between the requirements of justice and the availability of the necessary resources to satisfy these requirements.

General considerations

8. An increasing number of cases and the excessive workload of judges are the main causes of delay in dealing with cases. The right of the individual – secured by Article 6, paragraph 1, of the European Convention on Human Rights – to a hearing within a reasonable time might be jeopardised. In some cases, delay may give rise to despair or to irreparable damage; it may amount to a denial of justice. A democratic state cannot plead budgetary difficulties to excuse infringement of this basic right.

9. In search of means to ameliorate this situation, the committee focused its work on the following questions:

a. Would it be advisable to devise further solutions other than judicial trials to the inevitable conflicts of life in society?

b. Is it not the case that, in the course of time, judges have been increasingly burdened with a whole range of duties not incumbent upon them in virtue of any higher principle?

c. Cannot adjustments be made to the rules on jurisdiction and the composition of courts so as to make the best possible use of the judges, provided it remains compatible with the requirements of good justice?

The committee was also led to study the possible impact of legal insurance on the workload of courts.

10. In October 1981 a detailed questionnaire on matters relating to the functioning of the judicial system was sent to member states' governments. Study of the replies prompted the committee in 1983 to seek further details about freeing judges from duties often regarded as non-judicial. The information thus obtained showed up substantial differences in practice and experience.

11. Aware of the difficulty of transferring innovations or transplanting institutions from one legal system to another, the committee felt it was appropriate to request Council of Europe member states to consider whether it might be advisable to pursue one or more of the following main objectives in their judicial policy, in the light of experience already acquired in various places: to promote the friendly settlement of disputes and the use of informal procedures for resolving conflicts; to free the judges from non-judicial duties; to adjust the rules on jurisdiction and the composition of courts with a view to making better use of the judicial system's human resources; and/or to forestall any exaggerated demand for judicial services which might arise as a result of extending legal-expenses insurance.

12. During the course of its work, the committee encountered two main difficulties: defining the area of non-judicial activity; and reconciling the use of alternative methods of resolving conflicts with the right of every individual to bring or defend his case before a court, as secured notably by Article 6, paragraph 1, of the European Convention on Human Rights.

Comments on the proposed objectives

Friendly settlement of disputes

13. An appreciable number of disputes lead to litigation because there has been no real contact between the parties nor any attempt to narrow the gap between their positions. Sometimes, even, condemning the other party seems to be a more pressing concern than trying to find a solution.

In a society in which everyone daily carries out a variety of acts whose legal dimension is not immediately perceived and everyone faces legal situations which change rapidly, there is ample room for conflict. Before judicial proceedings or any other procedures for settling a dispute are embarked upon, the parties should have had an opportunity to make an accurate assessment of the dispute and to try to iron out the problem. Moreover, even where attempted conciliation prior to judicial proceedings proves ineffectual, the judge could usefully take on the role of an intermediary in such a way as to enable the parties to find a solution to the conflict themselves. This matter was raised in a different context in Recommendation No. R (81) 7 of 17 May 1981 on measures facilitating access to justice.

14. With the exception of disputes about rights whose exercise is not entirely at the parties' own discretion because they are a matter of public policy, the scope for conciliation is enormous.

Since it is likely to result in savings of time and money as well as to encourage a constructive attitude, conciliation should be specially encouraged where the parties will have to maintain close relations in the future (family, neighbours, colleagues, etc.) and in all cases in which the balance of power between the parties or the importance of the interests at stake is not such as to justify the fear that the weaker party will accept a solution that is manifestly contrary to his own interests (for instance, everyday consumer disputes).

15. As it presupposes a minimum of goodwill, conciliation has greater chances of succeeding if it is resorted to early – before the parties to the dispute adopt entrenched positions – and if it is optional. There are signs of a decline in compulsory conciliation, which has in practice often become an ineffective formality.

As a general rule, an application from one of the parties should be sufficient for the conciliation procedure to be put into motion. Such procedure will necessarily depend on the circumstances of the judicial set-up in each state. It could first take place before an auxiliary judge or any independent body with conciliatory competence in a particular field (labour law, consumer law, building law). In the event of failure, a new attempt at conciliation could be made by the judge dealing with the case, either at the request of one of the parties or on the judge's own initiative.

The conciliator should be seen as manifestly independent of the parties, have recognised human qualities and have wide discretion to make equitable conciliation proposals. In certain cases, notably family law disputes, the parties may be invited to appear in person, without counsel. In other instances, the conciliation process may properly continue with the lawyers only, if the absence of the parties becomes a condition for the success of the attempted conciliation.

There should be certain advantages attached to conciliation : the record of a successful conciliation could be enforceable ; court costs might be waived in cases of successful conciliation before the judge. Furthermore, the judge might take into consideration the attitude of each party during conciliation proceedings in distributing the procedural costs among them.

16. Although lawyers are bound to comply with their clients' instructions, they should nonetheless, in all cases that seem appropriate, advise those instructing them to seek a settlement with the opposing side. Moreover, fees should not be an impediment to this.

In order to develop the practice of conciliation, seeking conciliation should be recognised as an ethical duty of lawyers. According to the particular features of the legal system of each state, public authorities may be able to exercise a greater or lesser role in this respect. They may either amend any provisions applicable to the legal profession or invite the Bar and lawyers' associations to take steps to that end. It would further be appropriate to examine any obstacles – possibly in the determination of fees – to securing friendly settlements of disputes.

Freeing the judges from non-judicial tasks

17. The essential function of judges is to determine disputes regarding legal claims according to law.

It is nonetheless apparent that a considerable part of their working time is taken up with activities that do not relate to litigation and are administrative rather than judicial in nature. In the course of time, their training and impartiality, the knowledge they may have of certain legal matters when disputes are involved, have resulted in their taking on supervisory functions, an increasing role in family matters and a number of registering and certifying roles, as well as their exercising control in the economic sphere.

Obviously there is no question of making a universal recommendation that judges should be freed from all these tasks; it is a matter of encouraging a review of the many circumstances in which the courts are called upon in which there is no existing dispute, with a view to eliminating all those in which intervention by the court is not absolutely necessary.

18. As was pointed out above, the notion of "non-judicial tasks" cannot be easily defined. One has only to think of the controversies in the legal literature of several member states concerning the administrative, judicial or hybrid nature of decisions taken in the exercise of the courts' non-contentious jurisdiction.

Following a pragmatic approach, the committee considered all the tasks or activities which have no contentious element and examined to what extent responsibility for them was given to the courts in member states and what were the grounds for such decisions. At the end of

this survey the committee has drawn up a list – which is not exhaustive – of examples of non-judicial duties which the judges could be relieved of in some states, taking into account the particular circumstances of each country.

19. The courts generally have a supervisory role to play where members of a family propose by common consent to change the legal relations binding them. The justification usually put forward for this is the need to safeguard public policy and essential private rights and interests. The most common examples are divorce by consent, approval of agreements relating to the custody of children, and adoption order. Such areas of activity are not being called into question.

On the other hand, and to mention only one or two examples, it may be asked whether there is a cogent justification for entrusting the judge with the task of approving all agreements with which spouses intend to settle conflicts of their marital life. The same applies to the role of the judge in the matter of changing names and first names where such changes are permitted by law. The answers to this type of question will vary depending upon the judicial tradition, the procedural system and any other particular circumstance of each country.

20. The growing role of the courts in preventing and administering bankruptcies is undoubtedly attributable to the concern to uphold public policy and private interests. It is less obvious that this concern lies behind the judges' other activities in some states in the field of commercial law, such as monitoring various accounts and registers or granting licences.

21. Other than in certain special circumstances, is it appropriate to make the judges responsible for the organisation and administrative supervision of elections – except in disputed cases?

Judges are often appointed as chairmen or members of all sorts of committees with the sole aim of strengthening the committees' impartiality (real estate planning inquiries, political honours scrutiny committees, prisoners' welfare committees, etc.). Such a practice should normally be discouraged.

22. The appendix contains a series of examples of tasks which the judges could be relieved of according to the particular circumstances of each state.

In general, the carrying out of non-judicial functions should be provided for by law and restricted to a small number of eventualities in which intervention by the judges appears essential to safeguard a right or uphold public policy.

23. The tasks that would thus be withdrawn from the judges could be given to the civil service in some cases or to judicial staff in others. The *Rechtspfleger* may be mentioned as an example of a judicial officer who has been made responsible, in the Federal Republic of Germany and in Austria, for a large part of the non-contentious jurisdiction as well as for some duties in civil litigation procedure.

Settlement of disputes by other bodies

24. Mention was made above that it was advisable to encourage conciliation as a means of settling disputes, primarily with a view to relieving the courts (extra-judicial conciliation) or at least reducing the amount of time spent by judges on finding suitable solutions and writing records (judicial conciliation).

Would it be possible to go further and give certain extra-judicial bodies or authorities the task of settling some disputes?

Apart from arbitration, very little has been done in this direction in Europe.

25. One of the foundations of a state based on the rule of law, as expressed in national constitutions and in Article 6, paragraph 1, of the European Convention on Human Rights, is a citizen's basic right of access to the courts to establish or defend his rights. Access to the courts cannot be refused.

This should not, however, preclude the possibility of making alternative means of settling disputes by other procedures available to the public in certain circumstances, provided that such alternatives are optional or, failing that, do not exclude subsequent appeal to the ordinary courts.

26. Arbitration, which originates in a private agreement and ends with a final, binding decision, is the only longstanding alternative arrangement which is, in principle, of general application. It lends itself to the settlement of all disputes involving rights which the parties are free to dispose of.

It is unlikely that arbitration will come to be used much outside the business sphere. It seems desirable, though, that this institution should be both better known and more efficient in those fields to which it is particularly suited. Despite the relatively high cost, its speed, professionalism and relative informality are undoubted advantages. The institution would be more efficient if arbitration awards were not appealable

to the courts and could be set aside only on grounds such as public policy, incompatibility of reasons, *ultra vires* or infringement of the rights of the defence. Arbitrators should be empowered to rule in respect of their own jurisdiction and arbitration awards should be as easily enforceable as possible.

27. Apart from arbitration, other extra-judicial procedures could be set up, as they have indeed already been experienced in some member states. In the case of small claims and in certain special areas such as consumer law, rent disputes and road traffic, parties should be able – or even be obliged, subject to appeal to the courts – to seek rapid, inexpensive settlements from ad hoc bodies.

Use of single judges at first instance

28. Whatever measures are taken to reduce the courts' workload, the overall volume of work will remain substantial. It is therefore appropriate to encourage more judicious use of the human resources of the ordinary courts by making the practice of having single judges hear cases at first instance, more widespread in all areas of the law which lend themselves to it.

29. The recommendation particularly refers to courts of first instance with general jurisdiction.

Consideration should be given to how far, and on what conditions, cases brought before these courts could be assigned to a single judge rather than to a panel of judges.

30. In each national legal system there may be a small number of cases which by their very nature should be heard by more than one judge.

The distribution of other cases to single judges or to panels of more than one judge, where the two systems exist, should rely on objective criteria and be conducted under such safeguards as to avoid any form of arbitrariness.

31. Obviously, wider use of single-judge courts is not in itself a panacea. The courts' output will be increased though not multiplied. In some cases, registrars' departments and court secretariats will have to be given extra staff. Nonetheless, if it is implemented judiciously and if a simpler, more flexible procedure is simultaneously introduced in accordance with the principles set out in Recommendation No. R (84) 5, this measure should help relieve congestion in the courts without impairing the standard of justice.

The jurisdiction of the courts

32. If there are no regular adjustments in the monetary ceilings which determine the general jurisdiction of the courts, monetary depreciation results in a substantial number of cases being removed from courts of limited jurisdiction, which were perfectly equipped to deal with them, and being transferred to overload even more those courts which have jurisdiction to try cases without any monetary limit.

Similarly, a high level of inflation may limit the effectiveness of a number of alternative methods of settling disputes established in order to settle cases whose value does not exceed a statutory amount, notably disputes between consumers and suppliers.

33. The law establishing the jurisdiction of the various courts must be amended at suitable intervals in order to prevent or correct such shifts in jurisdiction. Minimum amounts for the admissibility of some appeals should also be regularly adjusted.

Similar attention needs to be paid to the distribution of special jurisdictions among the courts. Courts of limited jurisdiction, for instance, could have monetarily unlimited jurisdiction in a larger number of cases (maintenance, tenancies, etc.).

Legal-expenses insurance

34. Apart from a number of specific contracts in which it appears as an accessory clause (e.g., driver's third-party liability), legal-expenses insurance is, in many member states, an innovation which is rapidly becoming widespread and whose impact on the functioning of the judicial system is not yet easy to assess.

This type of insurance, which covers the insured person's court costs and attorneys' fees and, usually, those of the other party in the event of the insured person's losing his case, eliminates the limited financial risk incurred by anyone eligible for legal aid and the whole financial risk of anyone ineligible for legal aid. One can readily imagine, therefore, that such insurance, covering as it does a whole range of litigation (landlord and tenant, private nuisance, consumer problems, road accidents, individual labour disputes, etc.) may, if care is not taken, encourage excessive recourse to courts. Such a relationship of cause and effect has not been established in a clear-cut way, however. It accordingly seems desirable that states should make arrangements for studies and monitoring, if necessary in liaison with bodies representing insurers.