Status of the recommendations of the Committee of Ministers in the legal field of the Council of Europe – Synthesis

Document prepared in connection with the discussion of the draft recommendation of the Committee of Ministers on the rights and legal status of children and parental responsibilities, by Grégor Puppinck¹, March 27, 2012

The Council of Europe aims at narrowing the links between European States. Unlike the European Union, it does not have supranational powers. As an institution of cooperation, it operates in an intergovernmental fashion as an instrument producing international standards that fall within the classical scheme of the hierarchy of standards. The Council of Europe cannot produce standards that are not a preliminary expression of the will of its member states.

According to the Statute of the Council of Europe, a recommendation is one of the legal instruments by which the Committee of Ministers may communicate its conclusions regarding the measures it believes will further the aims of the Council of Europe (i.e. including “the conclusion of conventions and agreements and the adoption by governments of a common policy with regard to particular matters”) to governments.

A recommendation differs from other methods of communication to governments in that it explicitly indicates an agreement regarding the measures contained therein, irrespective of the legal nature of these measures (convention, agreement, common policy, and others).

In adopting a recommendation, each State expresses its willingness and the Committee of Ministers expresses its agreement.

As underlined in the note of the Jurisconsult, although non-binding, a recommendation is a legal instrument with legal significance. The legal significance can be assessed in light of (1) existing treaty standards, (2) especially the European Convention on Human Rights and its interpretation, (3) domestic law, and (4) other international standards being developed.

1) With respect to existing conventions of the Council of Europe

Being a legal instrument of infra-conventional value, a recommendation, when it falls within the scope of an existing convention, can only concern its interpretation. Such interpretation must be done in accordance with treaty law standards; otherwise there would be a threat to legal certainty. Thus, Member States cannot recommend that governments adopt new measures that are contrary to an existing convention to which they are already committed. This would be contrary to the hierarchy of standards and cause States to take on incompatible commitments. However, Member States may recommend that an existing convention be reviewed.

2) Regarding the Convention and the European Court of Human Rights

The Convention gives the Court competence for interpreting and applying the Convention and its Protocols regarding questions submitted to it according to Articles 33, 34, 46 and 47. Because the Committee of Ministers gathers all States party to the European Convention, when it is adopts a legal instrument within the scope of this Convention, it contributes to its interpretation, although such interpretation does not bind the Court.

In practice, the Court, referring to its preamble, interprets the Convention in order to develop,

¹ Grégor Puppinck PhD, Director of the European Centre for Law and Justice
and not only protect, human rights and fundamental freedoms. To this end, it developed the doctrine of the effectiveness of rights and evolutive interpretation according to which “the Convention is intended not to guarantee rights that are theoretical or illusory but rights that are practical and effective” and is “a living instrument which must be interpreted in the light of present-day conditions”.

Because any dynamic process of interpretation must constantly prove its legitimacy, the Court seeks guidance in the legal and social landscape of the Member States, particularly with regard to giving new meanings under the Convention. It relies on trends of domestic laws, the appearance of convergences or even consensus among domestic laws, as well as all legal instruments interpreting the provisions of the Convention. It is at this stage that the recommendations of the Committee of Ministers find their main function: the Court has made a practice of interpreting the Convention in the light of the recommendations of the Committee of Ministers and other legal instruments of the Council of Europe.

Although they are not binding on the Court, the Court may find it difficult to ignore the recommendations of the Committee of Ministers, but it can rely on them to justify a new development of the Convention. The Court may indeed legitimately feel authorised to do so, as a recommendation of the Committee of Ministers is adopted by a body which gathers all the States party to the Convention. The new obligation created is enforceable against every State party to proceedings before the Court, even if it has not expressly agreed to the legal instrument originally cited as the authority for this obligation (if adopted by a majority or by consensus).

Although the Court states that it cannot create a right that is not already included in the Convention, and that it cannot interpret the Convention against its wording, its case law indicates otherwise. The Court interprets the Convention extensively, sometimes against the original intention of its authors, or even against the wording of the Convention (see attached list).

3) In respect of domestic law
Ratification of a convention usually requires its adoption by the national legislature, in order to respect the separation between the executive and legislative powers and the relationship between international and domestic legal orders.

This is not the case with the recommendations of the Committee of Ministers, binding on the State without necessarily requiring a ratification procedure. It results in a double restraint for the executive when adopting a recommendation: it must be careful not to create, in the international order, a new standard in the field of competence of the national legislature which

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2 “Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms”.
3 Artico v. Italy, judgment of 13 May 1980, paragraph 33
4 Vo v. France [GC], no. 53924/00, paragraph 82.
5 Johnston and others v. Ireland, no. 9697/82, judgment of 18 December 1986, paragraph 53; Emonet and others v. Switzerland, no. 39051/03, judgment of 13 December 2007, paragraph 66; “the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate.”
6 This is particularly evident in the interpretation of Article 8 on privacy.
7 For example by extending the application of Article 12 (family life) to situations not covered by its wording. Schalk and Kopf v. Austria, June 24, 2010, paragraphs 101, 105. Also see the recent judgment of Bayatyan v. Armenia, no. 23459/03 recognising the right of conscientious objection to military service.
8 For example see the recent judgment in the case of Sindicatul Pastorul Cel Bun v. Romania, Ap. 2330/09 of 31 January 2012. The Court decides, against the first sentence of Art. 11-2 that under Article 11, the State may only impose restrictions of union liberty to the three groups mentioned in paragraph 2 of this provision, namely members of the armed forces, of the police or of the administration of the State, provided these restrictions are lawful.
9 According to the Rules of Procedure of the Committee of Ministers, the decisions on the adoption and opening for signature of conventions and agreements concluded within the Council of Europe do not require a unanimous vote. This can be explained by the fact that such a decision does not create any new commitment for the States: the commitments are taken later, with the signature.
aims to establish itself in the domestic legal order. This double restraint aims to preserve the
democratic legitimacy of the standards of law and, it is all the more necessary when the
subjects discussed in the recommendation are exercised by standards of domestic law
submitted to a regime of the qualified majority (organic law and constitutional law).

4) **In respect of other European and international authorities**
Lastly, the recommendations of the Committee of Ministers also have an influence on other
European and international standard-setting bodies, contributing as such to the dynamics of
consensual standardisation of the law.
Thus, for example, the resolution of the European Parliament of 28 September 2011 on human
rights, sexual orientation and gender identity at the United Nations and that of 15 December
2011 on the conditions of detention in the EU refer respectively to Recommendation
CM/Rec(2010)5 on measures to combat discrimination founded on sexual orientation or
gender identity and Recommendation CM/Rec(2010)1 on the Council of Europe Probation
Rules. Mere projects for Recommendations of the Committee of Ministers can also be cited as
illustrating an evolution in standards. Thus, the European Union report on "Recognition of
Parental Responsibility: biological parenthood v. legal parenthood"\(^{10}\) refers to the draft
recommendation of the Committee of Ministers on the rights and legal status of children and
parental responsibilities.

**Examples of references to recommendations of the Committee of Ministers in the**
**interpretation of the European Convention of Human Rights**

October 2002 on education of democratic citizenship;

*Unal Tekeli v. Turkey*, judgment of 16 November 2004, § 59 – Rec(85)2 of the Committee of Ministers
of 5 February 1985 on legal protection against discrimination based on sex;

September 2003 on execution of judgments;

2000 on the freedom of practice of lawyers;

of the Committee of Ministers of 14 May 1981 on the means of facilitating the access to justice, Rec
(93)1 of the Committee of Ministers of 8 January 1993 on the effective access to law and justice of
persons of severe poverty;

*Gebremedhin v. France*, judgment of 26 April 2007, § 58- Rec(98)13 of the Committee of Ministers of 18
Septembre 1998 on access to an effective remedy of asylum seekers…and Rec1236(1994) on the
right to asylum adopted by the PACE on 12 April 2004;

*Havelka and others v. Czech Republic*, judgment of 21 Juin 2007, §§ 137-139- Rec(2005)5 of the
Committee of Ministers of 16 March 2005 on the rights of the children living in an institution and
Rec(2006)19 of the Committee of Ministers of 13 December 2006 on policies related to aid a positive
parentality;

*Huylu v; Turkey*, judgment of 16 Novembre 2006, §§ 63-66 and *Nevmerjitski v. Ukraine*, judgment of 5
April 2005, § 93- Rec(98)7 of the Committee of Ministers of 8 April 1998 on ethical and organizational
issues of health care in prisons ;

\(^{10}\) Recognition of parental responsibility: biological parenthood v. legal parenthood, i.e. mutual recognition of
surrogacy agreements: What is the current situation in the MS? Need for EU action? European Parliament,
Directorate General for Internal Policies, PE 432.738.


Boris Popov v. Russia, judgment of 28 October 2010, § 42 - Rec(2006)2 of the Committee of Ministers to member States on the European Prison Rules;

Gaforov v. Russia, judgment of 21 October 2010, § 86 - Recommendation No. R (98) 13 of the Council of Europe Committee of Ministers to Member States on the right of rejected asylum seekers to an effective remedy against decisions on expulsion;

Alekseyev v. Russia, judgment of 21 October 2010, § 51- Rec(2010)5 of the Committee of Ministers of the Council of Europe to member States on measures to combat discrimination on grounds of sexual orientation or gender identity;


A. v. Croatia, judgment of 14 October 2010, § 45 - Rec(2002)5 on the protection of women against violence;


A.B. v. Russia, judgment of 14 October 2010, § 82 - Recommendation no. R (98) 7 of the Committee of Ministers of the Council of Europe to Member States concerning the ethical and organisational aspects of health care in prison;

Maria Atanasiu and Others v. Romania, judgment of 12 October 2010 - Rec(2004)6 on the improvement of domestic remedies;

Constantin Timciuc v. Romania, decision of 12 October 2010, § 143 - Rec(2003)13 of the Committee of Ministers of the Council of Europe to member states on the provision of information through the media in relation to criminal proceedings;


Nikolov v. Bulgaria (V), decision of 28 September 2010, Rec No. R(87)18 of the Committee of Ministers of 17 September 1987 on simplification of criminal justice;

Iskandarov v. Russia, judgment of 23 September 2010, § 80 – Rec No. R(98)13 of the Committee of Ministers on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights;

Schelling v. Austria (No.2), decision of 16 September 2010, Rec No. R(2000)2 of the Committee of Ministers on ensuring that there are adequate possibilities of reopening proceedings at domestic level where the Court has found a violation of the Convention;


Yordanova and Others v. Bulgaria, decision of 14 September 2010, Rec(2005) of the Committee of Ministers on housing conditions of the Roma; and CM/Rec(2008)5 of the Council of Ministers of 20 February 2008 on policies for Roma and/or Travellers in Europe;

Palade v. Romania, decision of 31 August 2010, § 27 – Rec(2003)13 of the Committee of Ministers of
10 July 2003 on provision of information through the media in relation to criminal proceedings;

Askı v. Turkey, judgment of 27 of July 2010, § 6(2) – CM/Rec(2008)5 of the Committee of Ministers of 20 February 2008 on policies for Roma and/or Travellers in Europe;


Stanev v. Bulgaria, decision of 29 June 2010, § 63 – Rec No. R(99)4 of the Committee of Ministers of 23 February 1999 on principles concerning the legal protection of incapable adults;


Artyomov v. Russia, judgment of 27 May 2010, § 97 – Rec No. R(98)7 of the Committee of Ministers on ethical and organisational aspects of health care in prison; and § 98 – Rec No. R(93)6 of the Committee of Ministers on prison and criminological aspects of the control of transmissible diseases including Aids and related health problems in prison;


Khaydarov v. Russia, judgment of 20 May 2010, § 78 – Rec No. R(98)13 of the Committee of Ministers on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights;


Khodzhayev v. Russia, judgment of 12 May 2010, § 65 - Recommendation No. R (98) 13 of the Council of Europe Committee of Ministers to Member States on the rights of rejected asylum seekers to an effective remedy against decisions on expulsion;

Maria Karolina Steck-Risch and Others v. Liechtenstein, decision of 11 May 2010, § 4B(3) - Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights;

Laska and Lika v. Albania, judgment of 20 April 2010, § 75 - Committee of Ministers of the Council of Europe adopted Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights;

Flinkkilä and Others v. Finland, judgment of 6 April 2010, § 45 - Rec(2003)13 on the provision of information through the media in relation to criminal proceedings;


Depalle v. France, judgment of 29 March 2010, § 54 - Recommendation No. R (97) 9 of the Committee of Ministers on a policy for the development of sustainable environment-friendly tourism in coastal areas;


Berzinis v. Lithuania, decision of 13 December 2011, Rec(2004)6 of the Committee of Ministers of 12 May 2004 on subsidiary character of the supervision mechanism set up by the Convention;

Negrea v. Romania, decision of 4 October 2011, pg. 7 - Rec(2003)13 of the Committee of Ministers of 10 July 2003 on the provision of information through the media in relation to criminal proceedings;

L.M. v. Latvia, judgment of 19 July 2011, § 49 - Rec(2004)10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder;


Bayatyan v. Armenia, judgment of 7 July 2011, § 54 – Recommendation no. R(87)8 of the Committee of Ministers on the right to conscientious objection; § 54 - Rec(2010)4 of the Committee of Ministers on the right to freedom of thought, conscience and religion of members of the armed force;

Giuran v. Romania, judgment of 21 June 2011, § 36 - Rec(2000)2 on the re-examination or reopening of certain cases at the domestic level following judgments of the European Court of Human Rights;


Golha v. The Czech Republic, judgment of 26 May 2011, § 32 - Rec (2010)3 of the Committee of Ministers of the Council of Europe to member States on effective remedies for excessive length of proceedings;

Ťupa v. The Czech Republic, judgment of 26 May 2011, § 21 - Rec(2004)10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder;

R.R. v. Poland, judgment of 26 May 2011, § 172 - Committee of Ministers’ Recommendation No. R (90)13 to Member States on Prenatal Genetic Screening, Prenatal Genetic Diagnosis, and Associated Genetic Counselling;

Finger v. Bulgaria, judgment of 10 May 2011, § 56 - Rec(2010)3 to member states on the need to improve the effectiveness of domestic remedies for excessive length of proceedings;

§ 56(2) - Rec(2010)3 encouraging states to introduce remedies making it possible both to expedite proceedings and to grant compensation to interested parties for damage suffered;


Dimitrov and Hamanov v. Bulgaria, judgment of 10 May 2011, § 52 – Rec(2010)3 of the Committee of Ministers on the need to improve the effectiveness of domestic remedies for excessive length of proceedings;

Editorial Board of Pravoye Delo and Shtekel v. Ukraine, judgment of 5 May 2011, § 29 –
CM/Rec(2007)16 of the Committee of Ministers of 7 November 2007 on measures to promote the public service value of the Internet;


Dowsett v. United Kingdom, decision of 4 January 2011, § C - Rec(2000) 2 of the Committee of Ministers of 19 January 2000 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights;

D.D. v. Lithuania, judgment of 14 February 2012, § 85 - Rec(99)4 by the Committee of Ministers of the Council of Europe stating that the person concerned should have the right to be heard in any proceedings which could affect his or her legal capacity;

Vejdeland and Others v. Sweden, judgment of 9 February 2012, § 6 - Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity;

Axel Springer AG v. Germany, judgment of 7 February 2012, § 96 - Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings, adopted on 10 July 2003;


Korneykova v. Ukraine, judgment of 19 January 2012, § 24 – Rec(87)20 of the Committee of Ministers to Member States of the Council of Europe on social reactions to juvenile delinquency; § 25 - Rec(2003)20 of the Committee of Ministers to Member States of the Council of Europe concerning new ways of dealing with juvenile delinquency and the role of juvenile justice;


Kurier Zeitungsverlag und Druckerei GMBH v. Austria, judgment of January 17 2012, § 26 - Rec(85)11 on the position of the victim in the framework of criminal law and procedure; § 27 - Rec(2001)16 on the protection of children against sexual exploitation; § 28 - Rec(2003)13 on the provision of information through the media in relation to criminal proceedings;

Stanev v. Bulgaria, judgment of 17 January 2012, § 244 - Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults;


Standard Verlags GMBH v. Austria (No. 3), judgment 10 January 2012, §19 – Rec(2003)13of the Committee of Ministers of 10 July 2003 on provision of information through the media in relation to
criminal proceedings;

*Ananyev and Others v. Russia*, judgment of 10 January 2012, § 57 – Rec No. R(99)22 of the Committee of Ministers of 30 September 1999 on prison overcrowding and prison population inflation;