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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

by Mr Pieter Van DIJK
(Member, Netherlands)

on the
PRELIMINARY REPORT
OF THE PARLIAMENTARY ASSEMBLY
OF THE COUNCIL OF EUROPE
ON THE EXECUTION OF JUDGMENTS OF THE COURT
AND MONITORING OF THE CASE-LAW
OF THE EUROPEAN COURT
AND COMMISSION OF HUMAN RIGHTS

approved by the Venice Commission
at its 42nd Plenary Meeting,
Venice, 31 March – 1 April 2000

1. The preliminary report of the Parliamentary Assembly contains an excellent analysis of the legal obligation of the Contracting States to execute the judgments of the European Court of Human Rights, of the necessity of prompt and full execution for the effective ensurance of the rights and freedoms laid down in the Convention, and of the shortcomings of such prompt and full execution and their main causes. It also contains a number of recommendations proposing tentative solutions, which would indeed, if put into practice by the national authorities, the Committee of Ministers of the Council of Europe and the Court itself, respectively, would mean steps in the right direction. My comments, therefore, can be brief and are mainly of a supplementary character.

2. The preliminary report takes as a starting point in paragraph 1 of the Introduction that, in order to maintain the standard of human rights protection, it is essential for States to continue to comply with their formal undertaking under Article 46(1) of the Convention to abide by the final judgments of the Court in any cases to which they are parties.
It is submitted that the starting point should be broadened.

The system of the Convention is based on the principle of *subsidiarity*.[i] In the present context this principle implies the following:

On the one hand, the primary responsibility for the ensurance of the rights and freedoms laid down in the Convention rests with the national authorities, including the domestic courts (see Article 1 of the Convention). Only if and to the extent that they fail to fulfil their responsibility, is there access to the mechanism provided for in the Convention (see Article 35, paragraph 1, of the Convention: exhaustion of local remedies as an admissibility requirements).

(b) On the other hand, the interpretation of the provisions of the Convention ultimately rests with the European Court of Human Rights (see Article 19 *juncto* Article 44 of the Convention). This means that, although Article 46 of the Convention only refers to the obligation of the State which is a party to the case, to abide by the judgment, the interpretations given by the Court in its judgments form part and parcel of the provision concerned and, consequently, share the legally binding force of the Convention *erga omnes*.[1]

From this it follows that, although the Contracting States are, first of all, under the obligation to execute the judgments of the Court pronounced in cases to which they are a party, they also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice. Only in that way can they meet in an effective and full way their primary responsibility, under Article 1 of the Convention, to ensure the rights and freedoms of the Convention *as interpreted by the Court*. In this broader context, I prefer to use the term "implementation" instead of "execution".

Although the special monitoring role of the Committee of Ministers, provided for in the second paragraph of Article 46 of the Convention, relates only to the execution of judgments by the States which are a party to the case, that does not exclude that the implementation by other Contracting States, as an element of their obligation under Article 1, is subject to the general monitoring procedures (see, *e.g.*, Article 52 of the Convention concerning inquiries by the Secretary General.

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[1] *See P. Leuprecht, "The Execution of Judgments and Decisions", in Macdonald a.o., supra, pp. 791-800 at pp. 792-793.*

2. It is common knowledge that the monitoring task with which the Committee of ministers has been entrusted, is not always performed in the most effective way. This is also explicitly stated in the preliminary report of the Parliamentary Assembly.

The Parliamentary Assembly, at various occasions, has addressed the Committee of Ministers expressing its concern about the unsatisfactory situation of the execution of certain judgments, and members of the Parliamentary Assembly have asked for specific information. This active approach has had some effect in that it has forced the (Chair of the) Committee of Ministers to (re-)emphasize the importance of a swift execution of the Court's judgments and to give explanations about some of the causes of delays, but has remained without much practical result.

As the preliminary report indicates, the Parliamentary Assembly and individual members should remain active, and become even more active, in this "monitoring of the monitoring". In my opinion, the Assembly and its members should in particular be more persistent by asking more detailed information and by giving a follow-up to questions addressed to the Committee of Ministers. In relation to each particular case or situation raised, recommendations or questions should be followed by new recommendations or questions if (a) the reaction or answer is not satisfactory; (b) the reaction or answer refers to a non-satisfactory situation in the State concerned without providing a perspective of a prompt and appropriate solution; or (c) the reaction or answer indicates intentions and/or measures which are not, not fully or not timely put into practice. In particular, the Parliamentary Assembly and individual members should see to it that the Committee of Ministers does not satisfy itself with formal information provided by the Government concerned but examines itself - assisted by the Directorate of Human Rights of the Council of Europe - whether and to what extent the measures indicated by the Government constitute full and effective execution of the judgment.[2]

3. As is rightly stressed in paragraph 16 of the preliminary report, the members of the Parliamentary Assembly can also play an important role in their national parliaments, of which they all are also members, to promote a prompt and full implementation of the Strasbourg case-law.

In my opinion, this point deserves more emphasis and more elaboration, since for the moment this monitoring role may well be more effective than that of the Parliamentary Assembly itself, given the fact that national parliaments have more instruments and powers to promote (or even initiate) the enactment of required new legislation or the amendment of existing legislation, and to bring pressure to bear on the competent authorities to change practices which are not in conformity with the Convention as interpreted by the Court. In this way, too, there is room for a more attentive and more persistent follow-up. The awareness which Assembly members, through their membership of the Assembly, obtain about shortcomings in their domestic law and legal practice, should also be "mobilized" through their membership of the national parliament.

4. In paragraphs 17 and 18, the preliminary report discusses the role which the Court itself may play in facilitating the implementation of its judgments. First of all there is the important element of the requirement, also in that respect, of clear and well-reasoned formulations of the judgments, which will make it easier for domestic authorities to recognize and translate the implications for their domestic law and practice. Secondly, precisely in view of the preventive effect of judgments and in view of the fact that judgments may also have implications for States which are not a party to the case concerned, the Court should avoid too casuistic an approach. On appropriate occasions it should use the concrete complaint brought before it to give a more general guidance to the domestic

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[2] *See D.J. Harris, M. O'Boyle & C. Warbrick, Law of the European Convention on Human Rights, London etc. 1995, pp. 701-702.*

authorities for the interpretation and application of the provision of the Convention at issue, which they should take into consideration in their domestic legislation and legal practice.

In addition, the Court should act in a more creative and extensive way in finding possibilities, without overstepping its judicial powers, to indicate in its judgments to the national authorities concerned in what way they should abide by the judgment. The judgment itself is of a declaratory character only and cannot contain an order for the State concerned, except an obligation to pay fair compensation.[3] That does not exclude, however, that the Court indicates, for instance, that a certain legal provision should be abrogated, amended or introduced, that a certain administrative practice should be abandoned or followed, that a certain measure should be taken to bring about *restitutio in integrum* or optimal reparation. It is submitted that such a recommendatory role does not require an express legal foundation in the Convention.[4]

Finally, the Court should make more frequent use of the opportunities to indicate in a judgment that a previous judgment has not, or not completely, or not timely been executed by the State concerned.[5] In this way it may give further guidance to the domestic authorities, even in a later phase of the implementation. In that context it is also important that, at its earliest occasion, the Court expressly recognizes that the applicant in a previous case may bring a new application under Article 34 to complain about non-execution, incorrect execution or incomplete execution in violation of his or her right under the Convention.[6]

5. One of the reasons why certain States are faced with problems to execute a certain judgment, mentioned in the preliminary report, deserves in my opinion a somewhat broader inventory and discussion, and possibly concrete action by the Parliamentary Assembly and individual Assembly members: practical reasons relating to internal legislative procedures (§§ 38-42). As is indicated in the preliminary report, in some States measures have been taken and practical solutions have been found to overcome legal obstacles, but in several States these obstacles remain.

If, as still is the case in some legal systems[7], domestic judicial proceedings which have been found by the Court to have been conducted in violation of Article 6 of the Convention, cannot be referred back to the competent domestic court for a retrial, execution of the Court's judgment by *restitutio in integrum* is excluded by law. As the Court cannot itself order the reopening of the proceedings[8], effect to its judgment can be given only by way of non-execution or stay of execution of the domestic judgment and/or reparation of immaterial and material damages. It is obvious that such a situation stands in the way of full and effective execution of the Court's judgment and is at odds with the State's undertaking to abide by the judgment.[9]

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[3] *See the Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, p. 25 § 58. In contrast, see Article 63, paragraph 1, of the American Convention on Human Rights.*

[4] *See P. van Dijk & G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights, 3d ed. The Hague etc. 1998, p. 259.*

[5] *See the Vermeire v. Belgium judgment of 29 November 1991, Series A no. 214-C, pp. 82-83 §§ 25-26.*

[6] *See S.K. Martens, "Individual Complaints under Article 53 of the European Convention on Human Rights", in: R. Lawson & M. de Blois, The Dynamics of the Protection of Human Rights in Europe; Essays in Honour of Henry G. Schermers, Dordrecht etc. 1994, pp. 253-292.*

[7] *For the Netherlands, see T. Barkhuysen, M. van Emmerik & P.H. van Kempen (eds), The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order, The Hague etc. 1999, pp. 223-355. For the situation in some other Member States of the Council of Europe, see ibidem, pp. 115-182.*

[8] *See the Pelladoah v. the Netherlands judgment of 22 September 1994, Series A no. 297-B, p. 36 § 44.*

[9] *See E. Myjer, "To be revised? Revision of res judicata sentences in Dutch criminal cases", in: Barkhuysen a.o., supra, pp. 243-253 at p. 250.*

The Parliamentary Assembly should recommend that the Committee of Ministers calls upon the States concerned to adopt the necessary legislation to overcome any legal obstacles to full execution of the Court's judgment, and Assembly members of the States concerned should take appropriate action in their respective parliaments to that end. A comparative study of the legislation and legal practice of the Member States of the Council of Europe in the areas where such obstacles occur, might assist the domestic authorities in finding solutions. This is one possible area where the Venice Commission might offer its expertise and assistance.

6. The Convention does not provide for a sanction in case a State does not, not fully or not timely execute a judgment of the Court. Also the Committee of Ministers cannot impose any sanction.[10] There is, of course, the possibility of application of Article 8 in conjunction with Article 3 of the Statute of the Council of Europe concerning suspension and withdrawal of membership, but these are sanctions which should be applied in very exceptional cases only.
Recently, the Court has taken a decision which, though not formally, in fact could be seen as a kind of sanction. In its Ferrari v. Italy judgment of 28 July 1999 the Grand Chamber of the Court unanimously held as follows:

> The Court notes at the outset that Article 6 § 1 of the Convention imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet the requirements of this provision (...).
> (...)
> The Court next draws attention to the fact that since 25 June 1987 (...) it has already delivered 65 judgments in which it has found violations of Article 6 § 1 in proceedings exceeding a "reasonable time" in the civil courts of the various regions of Italy. Similarly, under former Articles 31 and 32 of the Convention, more than 1,400 reports of the Commission resulted in resolutions by the Committee of Ministers finding Italy in breach of Article 6 of the Convention for the same reason.
> The frequency with which violations are found shows that there is an accumulation of identical breaches which are sufficiently numerous to amount not merely to isolated incidents. Such breaches reflect a continuing situation that has not yet been remedied and in respect of which litigants have no domestic remedy.[11]

If I see it well, the reason behind this part of the judgment is mainly impatience, not only with the Italian Government, which after so many years still had not taken measures to effectively remedy the situation that was repeatedly found by the Court to violate Article 6, but also with the Committee of Ministers which had not been able to persuade the Italian Government to take measures of a substantial character and, in its Resolution DH(99)437, had satisfied itself with the "supplementary measures" announced by the Italian Government. The "punitive" element of the Court's decision is that the Court takes the "continuing situation" into account when examining a new complaint relating to the same situation, which in fact means a shift of the burden of proof: the Court starts from the assumption that the reasonable-time requirement has not been met and it is up to the Government to advance special circumstances to prove the opposite.
Although it cannot be excluded that situations may arise in the future which will lead the Court to a similar conclusion in relation to another State and/or in relation to another repetition of complaints, this will be very exceptional and cannot function as a general sanction for disrespect of the Court's

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[10] *In the former supervisory system, prior to the entry into force of Protocol No. XI, for cases where the decision on the merits was taken by the Committee of Ministers instead of the Court, Article 32, paragraph 3, provided as follows: "If the High Contracting Party concerned has not taken satisfactory measures within the prescribed period, the Committee of Ministers shall decide by the majority provided for in paragraph 1 above what effect shall be given to its original decision and shall publish the report". A similar power has not been provided for in relation to judgments of the Court.*

[11] *Not yet officially published; § 21.*

judgments. Therefore, the issue of sanctions deserves further study and discussion within and outside the Parliamentary Assembly. In the meantime, the Parliamentary Assembly may continue to use the instrument of "mobilization of shame" by adopting recommendations to the Committee of Ministers in which serious failures to implement judgments of the Court are brought to the attention of the public at large.

7. The recommendations included in the provisional report for measures to be taken at the national level and at the Council of Europe level may, in my opinion, be wholeheartedly endorsed by the Venice Commission. I have only one observation to make in that respect.
In paragraph 61 it is stated that the Member States should ensure that the Court's case-law is properly available in the national language to the domestic authorities and courts, and should improve the provision of university-level education and in-service training on the Convention and its protection machinery. However, for several Member States, especially most of the new Members from Central and Eastern Europe, it will be very difficult, if not totally impossible, to put that recommendation into real practice, unless they are sufficiently assisted by the Council of Europe and by persons and organizations from the Western European Members. It is submitted, therefore, that a recommendation should be added, addressed to the Committee of Ministers, to instruct the Secretary General to intensify and, where necessary, improve and redirect the programmes of technical assistance and technical training, and to call upon the Member States to support individuals and organizations who assist in providing the required information and documents, and in training judges, lawyers and law-enforcing authorities.
It is this area where the Venice Commission could probably most usefully cooperate with the Parliamentary Assembly in its efforts to improve the situation of the implementation of the Court's judgments. The Commission could make an inventory and evaluation of existing programmes and actions in the field of documentation and practical training, and could make recommendations for improvement of the existing

i. *See H. Petzold, "The Convention and the Principle of Subsidiarity", in: R.St.J. Macdonald, F. Matscher & H. Petzold (eds), European System for the Protection of Human Rights, Dordrecht etc. 1993, pp. 41-62.*