THE EXECUTION OF JUDGMENT OF BY THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

A judgment delivered by the European Court of Human Rights, drawn up after supranational judicial proceedings, does not put an end to the litigation because the execution phase is the responsibility of the Committee of Ministers of the Council of Europe

Keywords: A judgment, the European Court of Human Rights, Committee of Ministers of the Council of Europe.

INTRODUCTION

The execution of judgments handed down by the European Court of Human Rights has aroused and still arouses among practitioners of the law of the European Convention on Human Rights (ECHR) less interest than that which attaches to the law interpreted by the European Court. From the point of view of the principles concerning the execution of court decisions, the European Court has repeatedly affirmed that the phase of execution of its decisions is an integral part of the "case" which must be "heard" by the judge In other words, as long as the decision rendered on the merits has not been executed, a dispute cannot be considered to have been resolved in accordance with the requirements of Article 6 of the ECHR.

F. Tulkens considers that "a judgment of the European Court of Human Rights is not an end in itself: it is the promise of change for the future, the beginning of a process which must allow rights and freedoms to enter the path of effectiveness[1]. This refers to the idea that simply noting violations is not enough; judgments must produce concrete effects.

It is therefore necessary to determine what exactly the execution of a judgment of the European Court of Human Rights consists of. Article 46 of the European Convention on Human Rights ("The Convention") requires States parties to it to comply with the judgments of the Court. First of all, States simply have an obligation of result regarding the execution of judgments. They therefore have the choice of means to use in their domestic legal order to fulfill their obligation[2]. Then, the judgments have the relative authority of res judicata, the judgment has a binding and definitive character. This definitive character "has the sole aim of shielding the Court's judgments from any recourse to another authority". Finally, it should be remembered that the obligation to execute judgments applies to all state authorities and not just the executive. Indeed, as long as the provisions of the European judgment are precise and complete, they are automatically executed in the internal order. This ensures that other individuals are not deprived of their rights during the period of time when the change in national law has not yet taken place.

Article 46 of the Convention also provides that the Committee of Ministers must ensure the

[1]F. Tulkens "The execution and effects of judgments of the European Court of Human Rights. The role of the judiciary", European Court of Human Rights, Dialogue between judges, Council of Europe, Strasbourg, 2006, p. 12.
[2]ECHR, Belilos v. Switzerland, April 29, 1988, § 78; ECHR, Scordino v. Italy [GC], March 29, 2006, § 233.

proper execution of judgments. The latter is a political mechanism, made up of the foreign ministers of the member states. Originally, the Committee of Ministers was the only body with the necessary powers to monitor the execution of judgments. Protocol No. 11, which entered into force in 1998, strengthened the control of the execution of judgments. In particular, it abolished the quasi-jurisdictional role of the Committee of Ministers which consisted of providing a response to cases which had not been transmitted to the Court within three months. This protocol also contributed to increasing the workload of the Court with the recognition of individual recourse and the abolition of the Commission. This is why the exponential increase in litigation before the ECTHR has been accompanied by an increase in the number of cases pending before the Committee of Ministers.

Indeed on December 2, 2009, the number of cases pending before the Court amounted to 8,644. Thus, in 2010, Protocol No. 14 aimed to improve and accelerate the execution process. It was therefore provided for in Article 46 of the Convention to bring appeals for interpretation and infringement before the Committee of Ministers. Then the system of supervision of judgments was again reformed by the Interlaken Declaration in 2010. This new mechanism responds to a series of structural principles: the prioritization of cases whose supervision is the responsibility of the Committee of Ministers; the of the procedure; modification of the cooperation approach and its strengthening; simplification of the procedure.

The Court considers that the execution of judgments must be considered as an integral part of the "trial within the meaning of Article 6"[3]. It is important to emphasize that the judgments of the ECHR are in principle only declaratory in nature. That is to say, the Court is content to note a violation.

But cannot under any circumstances annul a text or a decision Furthermore, in general, it does not specify the measures to be taken for the execution of its judgments. The execution of judgments is one of the keys to improving the European human rights system. Indeed, it is the execution of judgments which makes it possible to demonstrate or not its effectiveness and to have a real impact on individuals. Furthermore, if States take measures to avoid new violations of the Convention, the number of appeals before this jurisdiction will be reduced. It is therefore obvious that the proper execution of ECHR judgments is the most fundamental indicator of the effectiveness of the European mechanism for the protection of human rights.

Faced with a renewal of the procedure for executing the Court's judgments, we can ask ourselves whether today this new momentum has borne fruit and whether the Court and the Committee are more effective in enforcing their judgments.

On the one hand, it is interesting to review in detail the process of executing judgments (I). On the other hand, to analyze the results of this evolution of the process of executing judgments and to identify persistent problems but also existing progress (II).

I The general functioning of the execution of ECHR judgments

First of all, we are interested in the diversity of the content of the performance obligation (A). Then we observe how the monitoring mission of the Committee is articulated with the control exercised by the ECHR (B)

A- The diversified content of the obligation to execute judgments

There are three types of obligations: the obligation to cease the unlawful act, the obligation to make reparation and the obligation to avoid similar violations.

[3]ECHR, Hornsby v. Greece of March 19, 1997,§ 40; ECHR, Paudicio v. Italy, May 24, 2007, § 53

B. The diversified content of the obligation to execute judgments

There are three types of obligations: the obligation to cease the unlawful act, the obligation to make reparation and the obligation to avoid similar violations.

1 Just satisfaction

According to Article 41 of the Convention, "If the Court declares that there has been a violation of the Convention or its protocols, and if the domestic law of the High Contracting Party allows only imperfectly to erase the consequences of this violation, the Court shall grant the injured party, where appropriate, just satisfaction." It is clear from the wording of this article that the Court only grants just satisfaction in the alternative, in the event that the State has not done so correctly. It is also important to emphasize that the award of just satisfaction does not automatically follow from the finding of a violation by the ECHR.

Furthermore, the compensation awarded under Article 41 of the Convention must be "fair

» taking into account the circumstances of the case. The Court must therefore take into consideration the characteristics of the case before it, such as the respective situations of the applicant and the respondent State or the economic situation of the State in question. Just satisfaction is the only measure that the Court can order from the State under the terms of the Convention. The Court, to compensate for the States' delay in paying the sums due as just satisfaction, now sets a payment deadline (in principle 3 months) to the respondent State[4] and deadlines for late payment interest.

It is important to remember that in accordance with the principle of subsidiarity, the granting of just satisfaction at the domestic level in principle has priority. In fact, this has advantages: the appeal route is closer and more accessible than the appeal before the Court, it is faster and is carried out in the language of the requesting party. The Court, in three judgments [5] establishes as a principle that it cannot allow the coexistence of two parallel procedures having the same object.

2 Individual non-pecuniary measures

The reopening of domestic legal proceedings is the most spectacular measure. This measure affects the principle of definitive res judicata at the national level. Indeed, it could on the one hand cause serious harm to the rights of third parties in civil matters and on the other hand raise the question of the fate of co-defendants who did not bring their case to Strasbourg and of victims in criminal matters. This measure also has the consequence of lengthening an already extremely long procedure between the internal level and the European level.

However, the Committee of Ministers is quite favorable to this measure and has adopted a recommendation on this point. It provides for two cumulative conditions for assessing the necessity of such a measure: on the one hand, the nature of the violation must be "of such seriousness that serious doubt is cast on the result of the contested internal procedure", on the other hand, the individual "continues to suffer very serious negative consequences following the national decision, consequences which cannot be compensated by just satisfaction and which can only be modified by review or reopening". A growing number of States have therefore adopted special legislation providing for the possibility of such a review or such a reopening.

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[4] ECHR, August 28, 1991, Moreira de Azevedo v. Portugal

[5] ECHR, July 6, 2006, Baybasin v. Netherlands, Khalid Salah v. Netherlands, Salah v. The Netherlands

in criminal matters. This measure also has the consequence of lengthening an already extremely long procedure between the internal level and the European level.

In the absence of a reopening, a review measure, especially in administrative matters, may prove appropriate. The review measure mainly concerns the hypotheses of foreigners' law and family law. For example, the granting of a residence permit to a foreigner who had previously been refused

3 General measures

States have generally accepted from the outset the obligation, under Article 46 of the Convention, to take general measures to avoid repetitive cases. These general measures can take different forms. First of all, they can be jurisprudential; the judge is an important recipient of the European judgment because of the direct effect which is recognized for it. The judge must then directly apply the requirements of the European judgment by considering domestic law inapplicable pending a legislative modification[6]. However, the judge often refuses to endorse too significant a development in the law and procrastinates while awaiting the intervention of the legislator. The case of Kroon and others v. Netherlands illustrates this. The Supreme Court argued that the calling into question of domestic law results from an interpretation that is "too evolving and creative concerning the positive obligations of the State under Article 8"[7].

Then, there may be sub-legislative, legislative and constitutional modifications. The intervention of the power of constitutional revision may have been necessary, which the Court clearly affirmed: the Convention "makes no distinction as to the type of norms or measures in question and does not subtract any part of the 'jurisdiction' of the States members to the empire of the Convention (…) »[8]. This has been accepted in practice, although this requirement may pose certain difficulties, especially in the event that popular approval by referendum is required. In addition, the Committee of Ministers often translates and disseminates the judgment to the national authorities. This makes it possible to overcome the lack of knowledge of European requirements.

B. The apparent complementarity of legal control mechanisms and policy

1- A monitoring mission primarily devolved to the Committee of Ministers

The convicted State has the obligation to provide the Committee of Ministers with complete and up-to-date information on the process of executing a judgment which binds it. The Committee of Ministers ensures payment of the just satisfaction, coupled with any default interest. It requires written proof of the payment of the sum to the applicant, possibly verifying with the defense the payment of the sum owed by the State. In addition, it requires the adoption of individual non-pecuniary measures in accordance with the obligation of restitutio in integrum. It now requires the government to provide proof of the adoption of all general measures likely to avoid the repetition of future violations. The Committee of Ministers has several means of action. Firstly, the Committee of Ministers, under Article 46 (2), may adopt interim resolutions, in particular to take stock of the progress of execution or, to express its concern and/or to make suggestions regarding execution. Secondly, Article 8 of the Statute of the Council of Europe provides that in the event of an absolute refusal of a State to execute a judgment, the exclusion of that State from the Council of Europe can theoretically constitute a possible response of the European bodies.

The Interlaken Declaration provides for three distinct procedures. Firstly, the standard procedure which concerns the vast majority of cases.Cases are monitored by the Department for

[6] ECHR, Vermeire v Belgium, November 29, 1991, § 25
[7]Supreme Court of the Netherlands, 1st chamber, November 4, 1994, BJC, 1994-3
[8]ECHR, United Communist Party of Turkey and others v. Turkey, January 30, 1998, §§ 29 and 30.

the Execution of Court Judgments, which disseminates its information to the Committee of Ministers. Secondly, the supported procedure allows the Committee of Ministers to request its Secretariat to cooperate in depth with the state concerned. The criteria for determining a sustained procedure are: judgments involving urgent individual measures, pilot judgments, judgments revealing significant structural and/or complex problems as identified by the Court and/or the Committee of Ministers , interstate affairs. In addition, the Committee may decide to examine any matter under the procedure supported at the initiative of a Member State or the Secretariat. Thirdly, the procedure for payment of just satisfaction, for which the Department for the Execution of Judgments limits itself to recording the payments made and the default interest which may be due in the event of delay.

2- The jurisdictionalization of the control of the execution of judgments by the Court European Union of Human Rights

The ECHR is increasingly carrying out preventive control by specifying the scope of its judgments. It can thus detail the defects of a regulation in a particularly precise way. For example, it suggested that a State have the applicant retried or reopen the procedure in due time[9]. The Court even went further by issuing real injunctions. This mention nevertheless remains confined to hypotheses where the freedom or physical integrity of the applicant is in question. The individual directives addressed to the State can then consist of the assurance of his “release (...) as quickly as possible”[10]

The Court also developed the pilot judgment procedure due to the quantity of repetitive cases resulting from chronic dysfunction at the internal level. This method makes it possible to identify structural problems underlying repetitive cases against many countries and ask the States concerned to address the problems in question. As part of this procedure, the Court, in addition to finding or not a violation will identify the systemic problem and give the government concerned clear indications on the remedial measures it must take to remedy it. This procedure allows the Court to “freeze” for a certain period of time cases that fall under the systemic problem, provided that the government concerned quickly takes the required internal measures to comply with the judgment. The absence of a legal basis therefore does not seem to be an obstacle to the Court's investment in what is considered one of the keys to improving the European system.

Furthermore, Protocol No. 14 provides for two new procedures. First, referral to the Court in the event of a “difficulty of interpretation” of the judgment. The Committee can take the decision by two thirds of its representatives to refer the matter to the Court in the event of difficulty in interpreting a judgment. The Court will then rule on the question of interpretation.

Secondly, referral to the Court in the event of failure by the State to comply. When the Committee of Ministers considers that a State has not complied with a final judgment to which it was subject after having given it formal notice, it may refer the question of the State's non-compliance to the Court. of its obligation to comply with judgments. Therefore, in the event that the Court finds a violation of this obligation, it refers the case to the Committee of Ministers so that it can examine the measures to be taken. And in the opposite case, it refers the matter to the Committee of Ministers, which decides to close its examination.

3- The parliamentary assembly

Unlike the European Union model, “mainly elitist and centralized around the Commission”, the Council of Europe model aims to be more “participatory”. Over time, the Parliamentary Assembly has become increasingly involved in monitoring the execution of judgments. It increases the number of field visits, sends resolutions to the States and recommendations to the Committee, refocuses its activity on the control of judgments raising significant structural problems and

[9]ECHR, Oct. 23, 2003, no. 53431/99, Gencel v. Turkey, § 27.
[10]ECHR, gde ch., April 8, 2004, no. 71503/01, Assanidze v. Georgia, § 203

suffering from serious delays and hears state delegations.

This renewal of the procedure for executing judgments through cooperation between bodies nevertheless seems to come up against obstacles limiting its desired effectiveness, such as the Eurosceptism of certain governments and the strengthening of nationalism, with certain States refusing to cooperate to execute the judgments. judgments of the Court.

Ⅱ Execution of Court judgments limited by current issues

First of all, it appears that the effectiveness of the execution of judgments seems to have increased in recent years, even if difficulties, particularly political ones, persist (A). Therefore, the efforts put in place to remedy these difficulties must be recalled (B).

A. The results of the new procedure for monitoring and supervising the execution of judgments: between caution and optimism

1- The assessment carried out by the annual reports of the Committee of Ministers

In its 2016 annual report[11], the Committee of Ministers takes an optimistic approach. Indeed, the number of pending cases rose to just under 10,000 at the end of 2016. Since 2006, between 1300 and 1700 new judgments of the Court have been entrusted to the supervision of the Committee of Ministers. During 2016, 1,352 judgments, including 206 principle judgments, were concerned. The same year,2,066 judgments were implemented, including 282 principled judgments. The number of closed cases increased between 2015 and 2016. However, despite this positive trend, the number of unimplemented judgments has increased steadily in recent years, going from 278 in 2011 to 720 at the end of 2016. The report raises also a major problem which is that the average time which elapses between the adoption of a judgment and the completion of its implementation is increasing, although it varies in part between Member States: between 1.1 year (Liechtenstein) and 10.4 years (Slovenia) in 2016. On average, the duration of implementation of judgments in 2016 was 4.7 years.

In 2017, the 11th Annual Report of the Committee of Ministers states that the monitoring of the execution of judgments of the European Court of Human Rights has been marked by continued efforts in strengthening dialogue and exchanges of experiences between States to speed up execution. The number of closed cases reached a record rate thanks to a new policy of in-depth dialogue with States, which allowed the faster adoption of a greater number of closure decisions: in 2017, the Committee of Ministers closed 3,691 cases – compared to 2,066 cases closed in 2016. Notably, there was a significant increase of over 30% in the number of closed cases in which structural problems were revealed and which had been pending before the Committee for more than five years. As a result, the number of cases pending at the end of the year decreased by almost 25%. Thus, the number of structural problems under surveillance also decreased by around 7%. This 2017 report reveals numerous advances such as better criminalization of torture and hate crimes, improved protection against illegal detention, better risk assessment in the context of asylum procedures, or even the extension of the right to family reunification for same-sex couples.

2- The persistent difficulties in implementing the Court's judgments

Since 2006, the Parliamentary Assembly of the Council of Europe has expressed concern in various resolutions about the persistence of difficulties linked to the execution of several Court judgments. The country with the number of implementations still pending is Italy which had some in 2017: 2350, followed by Russia (1573), Turkey (1430), Ukraine (1147), Romania (588), Hungary (440), Greece (311), Bulgaria (290), Moldova (286) and Poland (225). These ten states have all been condemned for their passivity in resolutions of the Parliamentary Assembly of the Council of Europe; but do not seem to be affected by these convictions. The Parliamentary Assembly of the Council of Europe denounces the fact that the lack of political will to implement the Court's

[11]Annual Report of the Committee of Ministers, 2016, pp 52-71.

judgments leads to an erosion of the protection of human rights in Europe and urgently calls on member states for constructive cooperation. In its 2017 Resolution13, they speak of certain States as being “pockets of resistance”, the latter having “difficulties in the execution of affairs (…) not only [as to] the adoption of general measures, but also to that of individual measures or to the payment of just satisfaction. Furthermore, the Assembly observes that, in certain States parties, the execution of the Court's judgments takes place in the context of a virulent political debate, in which certain political leaders seek to discredit the Court and diminish his authority.

Implementation difficulties are often explained by complications linked to structural causes. In recent years, the ideological factor has also played a more important role in this problem. Indeed, the nationalist policies of certain European countries tend to oppose the sovereignty of their country to the legal force of the Court's judgments. Such a policy puts jeopardize the future of the protection and promotion of human rights in Europe and undoubtedly the execution of the judgments of the ECHR. To illustrate this, two examples can be analyzed. On the one hand, the example of the United Kingdom demonstrates the limits of the necessary political approach to human rights. Indeed, the country was condemned for its legislation prohibiting the exercise of the right to vote by detained persons, by a Hirst decision of October 6, 2005[12]. This case law was then reaffirmed in a pilot judgment Greens and M. T. v. 15, which gave the United Kingdom six months to grant prisoners the right to vote. At the end of this period, the United Kingdom had still not modified its legislation and a new condemnation came with the Firth decision in August 2014[13]. However, in a decision of December 2017, the Committee of Ministers appears to show leniency with regard to the refusal to execute a judgment for twelve years and it "notes with satisfaction" the development of British law which now grants the voting rights for prisoners on parole and those serving their sentence in a “Home Detention Curfew”. He believes that it “responds to the judgments of the European Court”. Thus, British prisoners will remain deprived of the right to vote, unless they are no longer in prison.

This tolerant decision towards English law and seeming to retract its initial intentions in the Hirst judgment, can be explained by the fact that the surveillance and monitoring of the execution of the Court's judgments is the subject of political control, the political weight of States can also have an influence on the procedure, particularly in the United Kingdom, a country with complicated relations with the ECtHR. The other example is Switzerland, where the Swiss Democratic Union (SVP) represents this political trend. With the popular initiative “Swiss law instead of foreign judges”[14] it calls for the Swiss Federal Constitution to take precedence over international law and for international law treaties not in conformity with national law to be denounced. This attack on the ECtHR threatens human rights in Switzerland, and endangers the Council of Europe because the country has so far been rigorous in executing the Court's judgments.

B-Efforts to improve the effectiveness of the execution of judgments

1-Increased interaction between organs in the execution process

As Professor Flauss noted, “the multiplication of participants in the execution control procedure is likely, particularly in the event of synergy of the respective actions, to contribute to greater effectiveness of the Court's judgments”[15].The The process of executing judgments therefore now involves several actors. The latest report of the Committee of Ministers [16] notes that the links between the Court and the Committee are marked by increased interaction. The Court contributes

[12]ECHR, GC, October 6, 2005, Hirst v. United Kingdom (No. 2), Req. No. 74025/01.
[13]ECHR, GC, October 6, 2005, Hirst v. United Kingdom (No. 2), Req. No. 74025/01.
[14] ECHR, August 12, 2014, Firth and others v. United Kingdom, No. 47784/09 and others
[15]Flauss, “The effectiveness of the judgments of the European Court of Human Rights: from politics to legality or vice versa”, RTDH, 2009, p. 72.
[16]11th Annual Report, 2017

regularly and in different ways to the execution process, for example by giving recommendations in its judgments on relevant execution measures: “pilot” judgments and “judgments containing relevant indications for execution (under the angle of Article 46)" insofar as the Court examines various questions related to execution without adopting a full pilot procedure. Furthermore, the Court relies on the resolutions of the Committee of Ministers[17] to justify recourse to the pilot judgment procedure or to conclude that there is a structural failure. Similarly, the Court considers that it is up to the Committee of Ministers, acting with regard to Article 46 of the Convention, to address the question of the measures that may be required of the State in the execution of the stop[18]. The improvement in the prioritization of the action of the Committee of Ministers within the framework of the new working methods, the emphasis placed on the effectiveness of national remedies and the evolution of the Court's practices, in particular with regard to “pilot” judgment procedures seem to significantly limit the increase in the number of repetitive cases linked to significant structural problems.

Then, a reinforced dialogue with the respondent State allows better execution of the judgment rendered by the ECtHR. The establishment of “sustained” surveillance by the Committee implies that the entire matter is included on the agenda of each meeting of the Committee (Rule no. 7). Thus, a permanent dialogue is established between the bodies: the applicant becomes an actor in the execution of the judgments because under rule no. 9, the Committee takes into account the information communicated by the government concerning the measures to be taken and the just satisfaction.

2- Strengthening the principle of subsidiarity

Cooperation and dialogue seem to be solutions to ensure the effectiveness of the Court's judgments. States skeptical of an “intrusion” by the ECtHR into their law must be reassured by the latter; it must remind them that it respects state sovereignty and the principle of subsidiarity. The principle of subsidiarity must in particular be reinforced and recalled by the Court: in fact it is the respondent States which must find the measures to comply with the judgment rendered by the Court. However, the identification of the measures to be taken by the Court and the Committee and then the monitoring of the execution encroach on the assessment of the respondent State when it will adopt the appropriate measures. However, States seem to have room for maneuver in the way they implement the measures to be put in place. Thus, good communication between the bodies and the respondent State seems essential for the State to believe that its legislative sovereignty is respected. With regard to the pilot judgment, the Court confirms that “an important aim pursued by the pilot judgment procedure is to encourage the respondent State to find, at national level, a solution to the numerous individual cases arising from the same structural problem, thus giving effect to the principle of subsidiarity which is the basis of the convention system[19]”.

CONCLUSION

To conclude, a desire for conciliation is promoted by the Court and the Committee in the execution of judgments; nevertheless, without a real means of constraint on recalcitrant States refusing to execute a judgment, the workload for the Committee and the Court is not likely to be reduced.

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[18] ECHR, December 2, 2010, Abuyeva and others v. Russia,§ 243, no. 27065/05.

[19] ECHR, January 15, 2009, no. 33509/04, Bourdov v. Russia, n°2, §127

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