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Taking the implementation of ECtHR judgments seriously: right assessment, wrong approaches?

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It is high time for State Parties to the ECHR to take the quick and full implementation of Strasbourg judgments seriously. Where political will does exist implementation has been satisfactory, and even swift. The workload of the Committee of Ministers (CoM) is increasing dramatically (as of June 2010 more than 9,000 cases were pending) and consequently the time taken for execution is rising and furthermore "the last few years have seen a significant increase in the number of cases relating to complex and sensitive issues".[1] The CoM does not have the power to sanction reluctant states to abide by judgments and interim resolutions have no concrete impact.[2] The entry into force of Protocol 14 will be of no help, as infringement proceedings are not coupled with daily fines, unlike the practice of the European Court of Justice.

If there is consensus that additional measures are indispensable and urgently required, which measures can tackle the right problems?

Prioritised or cheap supervision?

As it is inundated with cases, the Parliamentary Assembly is to use new and more selective criteria when supervising the implementation of judgments: *"judgments which raise important implementation issues as identified, in part icular, by an interim resolution of the Committee of Ministers; and judgments concerning violations of a very serious nature"*.[3]

The CoM itself is considering how to achieve a streamlined and prioritised supervision process. The current discussions appear to emphasise *"two (simplified and enhanced) practical supervision methods"*, which should be *"parallel and interdependent"* and *"the principle of continuous supervision"* (aside from the schedule of human rights meetings). Three types of cases would have priority: *"inter-state cases, pilot judgments and other cases raising significant and/or complex structural problems that may give rise to numerous repetitive cases, and judgments requiring urgent individual measures"*.[4] It should be noted that the proposed approach is still of a non-coercive nature.[5] Under the 'simplified' procedure, which will be the norm, CoM supervision will be purely formal, limiting itself to *"verifying whether or not action plans or action reports have been presented by member states"*.[6] It should speed up the adoption of a final resolution and be less time-consuming for the Secretariat.

Nevertheless, relying on the *bona fides* of a state may not be ideal, as without the collective political pressure of the CoM, the implementation of some judgments may be less than satisfactory. If a state does not submit an action plan or an action report within six months, a reminder will be sent to the state concerned within the next three months, and if a state still does not comply, the case may be transferred to the enhanced procedure. If states do not honour their obligations in due time, which might occur frequently - six months is very short - the simplified procedure will be a failure. At the request of some states, and despite the fact that the payment of just satisfaction has raised many problems in the past,[7] *"Registration would therefore become the standard procedure and supervision the exception"* in these issues;[8] only in cases where the applicant complains within a short period of time, will the Department for Execution involve itself in the supervision process.

Under the enhanced procedure the Secretariat will have a duty to assist states in preparing and/or implementing action plans, and the power to provide expertise as regards the type of measures envisaged. Such expertise is fundamental as states often do not know how to abide by a judgment. However, this often occurs not in the most serious cases or pilot judgments in which the ECtHR clarifies the measures to be adopted, but in all other cases, precisely the ones submitted to the standard procedure! Moreover, one important issue is missing: the involvement of civil society and/or an applicant's representative in the implementation of judgments. In this respect the European system differs from the Inter-American.

The responsibility of State Parties

Even if the standard supervision mechanism may save time, it seems unlikely that it will tackle the right issues. At least two types of measures are missing: State Parties should give the Department for the Execution of Judgments greater means. Moreover, greater pressure should be put on states in order that they respect their obligation to abide by judgments. The time has now come to move towards a more coercive system. In its 2009 report, the Parliamentary Assembly envisaged considering *"suspending the voting rights of a national delegation where its national parliament does not seriously exercise parliamentary control over the executive in cases of non-implementation of Strasbourg Court judgments"*.[9] Punitive damages could also be a way of sanctioning serious repetitive violations.[10] Daily fines should also be reconsidered in the light of the deteriorating situation.

It is clear from the spirit of current reflections that too much confidence is being placed in states' *bona fides* to abide by judgments. The existing non-coercive system is being confirmed and even reinforced, whereas it seems that the urgency of the situation requires measures of a completely different nature. The CoM and the Parliamentary Assembly, facing more issues and no extra funding, have no other choice than to focus on the most serious cases. Victims of violations of fundamental rights may have to pay the price of these reforms. Was the European system too ambitious from the outset? Certainly not! The non-respect of the ECHR and the refusal of states to fully implement judgments should be addressed by the states themselves. Right assessment, but wrong approaches!

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1 CoM, 2010. *Supervision of judgments of the European Court of Human Rights: 3rd Annual Report 2009*, p. 12.

2 See, for instance, Interim Resolution CM/ResDH(2009)43, *Execution of the judgments of the European Court of Human Rights in 145 cases against the Russian Federation*, 19.3.09.

3 Committee on Legal Affairs and Human Rights, 31 August 2009, *Implementation of judgments of the European Court of Human Rights: Progress Report*, AS/Jur (2009) 36.

4 Department for the Execution of Judgments of the ECtHR, 24 June 2010, *Supervision of the execution of the judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – elements for a roadmap*, CM/Inf(2010)28 revised.

5 *"Thus, enhanced supervision by the CoM may be conducted by means other than debate, e.g. support by the Execution Department in drawing up and implementing action plans; more intensive bilateral consultations and/or enhanced technical cooperation programmes with national authorities and regular reports to the CoM on the progress of execution"*. Supra 4, para. 9.

6 Department for the Execution of Judgments of the ECtHR, 6 September 2010, *Supervision of the execution of judgments and decisions of the ECtHR: implementation of the Interlaken Action Plan – Modalities for a twin-track supervision system*, CM/Inf/DH(2010)37, para.12.

7 See: Department for the Execution of Judgments of the ECtHR, 15 January 2009, *Monitoring of the payment of sums awarded by way of just satisfaction: an overview of the Committee of Ministers' present practice*, CM/Inf/DH(2008)7 final.

8 Supra 6, Appendix II.

9 Supra 3, para. 23.

10 Grozev, Y., 2009. How human rights protection has evolved. A critical analysis of ten years of case-law. *Ten years of the 'new' European Court of Human Rights 1998-2008, Situation and outlook*, p.39.