The Evolving Remedial Practice of the European Court of Human Rights

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I will speak about how the Court's use of specific remedial indications of individual and general measures impacts upon and/or facilitates the process of supervision of the execution of the Court's judgments. The answer to this question might appear to be very simple, from my point of view: there is no single overarching model of remedial practices that would fit each individual case examined by the Court and transferred for supervision over execution to the Committee of Ministers. Each situation and each case might envisage very specific remedial action and there is no standard approach for every single case.

In this respect, the experience of execution supervision by the Committee of Ministers ('CM') confirms that, in some instances, being more prescriptive in the Court's judgment – whether with regard to general measures or individual measures – provides useful assistance in the execution process. However, in numerous other cases, it would not provide such assistance, and in some cases, such prescriptions or indications might, on the contrary, be counterproductive.

The explanation lies in the foundation of the Convention and the supervision system, as this system is based on the principle of subsidiarity. It is thus for the states to choose the means by which to reach the results required by the Court's judgments – however, always under the CM's supervision. The normal procedure is that the relevant execution measures are identified in the process before the CM – today this is done on the basis of the action plans and action reports to be submitted by governments within a maximum of six months from the moment the judgment becomes final.

However, I think there are two specific situations in which it might be particularly interesting to see the Court's assistance.

- The first is the *Broniowski*-type situation, where the Court is capable of identifying immediately the scope, nature, cost and routes of a major, structural problem creating a potential to bring a big number of repetitive cases to the Court. In such a situation, the pilot judgment procedure provides immediate assistance both to the state and the CM in order to rapidly come to grips with the problem identified. Such judgments are, however, quite rare.

- The second situation relates to an ongoing execution process which encounters problems of one kind or another, where the Court finds that it may support the ongoing execution process by giving remedial indications either in pilot or – much more frequently – in so-called 'quasi-pilot' or 'Article 46' judgments.

These developments are closely followed in the CM's annual reports, and especially the CM's 2016 Annual Report. More specifically, in 2016, the CM identified 167 new structural problems. At the same time, the Court provided additional guidance in some 12 quasi-pilot judgments and one full-fledged pilot judgment adopted under Rule 61 of the Rules of Court. In nine of these judgments, support was given to the ongoing execution process; and in three cases, the Court gave indications with respect to new problems not earlier identified.

The support given by the Court is valuable notably when, for example, the government considers that the issue is of an isolated nature, notwithstanding the indication to the contrary, namely that the issue could be of a more systemic nature. The Court's clarifications on this matter are evidently very helpful.

Another situation is where the execution process drags out over time. For different reasons, the CM is usually reluctant to set definitive time limits or deadlines for particular execution processes. However, if the Court supports particular timeframes or timelines in the judgment itself, this may facilitate the execution process both for the government and the CM. But there are examples to the contrary as well, and these examples can be debated during our discussion.

One has to note another important aspect. The Court's support is evidently limited (and this was already highlighted by Judge Spano) to its knowledge of the situation as it stood at the time of the deliberations, not to mention the fact that the Court is examining a very specific individual application, faced with the specific arguments of the parties. Also, the execution problems arising from the examination by the CM may relate to situations not known to the Court at this moment. It is thus not infrequent that the CM might be confronted with situations which were not covered by the initial indications given by the Court in its judgments.

Notwithstanding this caveat, the Court's confirmation, already in the judgment, of the action to be taken is useful, and might assist in leading to tangible results. One example is the case of *Oleksandr Volkov v. Ukraine*, which concerned re-instatement of a judge of the Supreme Court to his previous position, and the eventual changes introduced to the Constitution of Ukraine and the implementing legislation with regard to the disciplinary liability of judges.

However, these indications should not distract from the 'normal' obligation to undertake necessary individual or general measures also in the absence of specific indications. To give another example: in the case of *Lutsenko v. Ukraine*, which concerned the detention of a well-known politician for political reasons, the reaction of the Supreme Court in this case was to argue that no execution measures were required, as the Court's judgment had only declared a violation and had prescribed no specific action to the authorities. Thus, the scope of the support of the Court for the execution process is evidently of great interest.

This issue has been discussed by academics and I would like to highlight the following articles: L.-A. Sicilianos, 'The Involvement of the European Court of Human Rights in the Implementation of Its Judgments: Recent Developments under Article 46 ECHR', N.Q.H.R, Vol. 32/3, 2014, 235-262; and A. Mowbray, 'An Examination of the European Court of Human Rights' Remedial Measures', HRLR, Vol 17/3, 2017, 451-478. I would also like to draw attention to the discussion by some of the experts involved in the processes of the Execution Department, such as Professor Costas Paraskeva, as well as discussion at an inter-governmental level, and notably within the CDDH (Steering Committee for Human Rights). In this connection, it would be useful to highlight some discussion that took place, within the CDDH, in relation to specific remedial measures:

- Firstly, I would like to refer to the 2016 report of the CDDH on the longer-term future of the system on the European Convention on Human Rights, which discussed – but rejected (see para 163) – a proposal to formally introduce a practice whereby the Court would indicate, on a regular basis, general measures in its judgments in order to assist the states and the CM in the execution process.
- Secondly, the report discussed and rejected (para 164) another proposal aimed at bringing more clarity in the execution proceedings: namely, allowing the Court, in appropriate cases and following an appropriate procedure involving the parties concerned, to expressly indicate in the judgment that, apart from the payment of any just satisfaction awarded, no other measures (individual or general) appear to be required. The CDDH took such an approach in view of the fact that – beyond several exceptional cases (such as *Oleksandr Volkov*) where the nature of the violations found is such as to leave no real choice as to the measures to be taken (especially individual ones) – in the vast majority of cases, judgments should remain declaratory. Thus, such an approach permits the states, within the limits of subsidiarity, to deal with the issues at stake as arising from the required general and individual measures.

To conclude, I would like to refer again to the interaction between the Court and the CM. The need for greater interaction is stressed through the possibility of having more efficient exchanges and information flows between the two bodies – the CM and the Court – supplementary to the interaction with the domestic and international interlocutors in the execution process. The Execution Department has tried to facilitate these exchanges through HUDOC-EXEC, which has been released recently; country fact sheets that highlight the problems related to execution of judgments with respect to particular countries; detailed annual reports which highlight problems in the execution process and the so-called 'pockets of resistance'; and a collection of decisions on a case-by-case basis, which is available on the website of the Execution Department. The Execution Department is currently in contact with the Court and its Registry to further enhance the information flow, the need for which was also underlined in the Interlaken process.

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