THE IMPLEMENTATION OF THE ECTHR'S CASE-LAW AND THE EXECUTION PROCEDURE AFTER PROTOCOL NO. 14*

Lorena BACHMAIER WINTER **

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I. Introduction

One of the goals of the Council of Europe, as stated in the Preamble of its Statute of London (5.5.1949) is to advance towards the idea of a democratic Europe, based on the principles of individual freedom, political freedom and the rule of law. Democracy and the commitment to respect the human rights, placing the importance of man before the importance of the State, is a condition to be accomplished by the states that should like to be members or are already members to the Council of Europe. In 1950 the European Convention of Human Rights (ECHR) is approved as an initial list of minimum essential fundamental rights, list that has been enhanced and completed later by different protocols. The body established to control the respect of the human rights and thus the compliance with the Convention is the European Court of Human Rights (ECtHR), which acquires exclusive jurisdiction to decide on the violations of the Covention since Protocol No. 11 was signed in 1998. Through its case-law the ECtHR not only grants protection against violations of the rights recognized in the Convention, but has contributed to expand the understanding of human rights and has promoted a legal harmonization within Europe by defining a common standard of human rights. In that sense, the ECtHR plays the role of a quasi-constitutional court for the protection of human rights[1]. But, once the decision is rendered, there is not a "European enforcement procedure".

When analyzing the impact of the European Court of Human Rights (ECtHR) upon the decisions and practice of domestic courts and institutions, a core issue is undoubtedly the implementation of the standards set out by the ECtHR and the execution of the Court's decisions in the Member States. The implementation of the case law of the ECtHR by the domestic courts, state institutions and in general the understanding of the Human Rights, requires that the Court's

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** *Complutense University of Madrid, J.D.; Complutense University, M.A. in Political Science; Complutense University, J.S.D.* Professor Bachmaier Winter has been a Professor at the Faculty of Law at Complutense University since 1996, where she has taught criminal procedure and civil procedure. She has written extensively on the subject of procedure. She has lectured in universities and governmental agencies in Europe and Latin America. She is a member of the Spanish Royal Academy of Jurisprudence and Legislation and of the Ibero-American Association of Procedural Law. She has been a fellow of the Alexander von Humboldt Foundation, and a visiting scholar in the Max-Planck-Institut for Criminal Law and Procedure (Freiburg i. Br., Germany) and at the University of California – Berkeley and Harvard University. Her comparative legal studies are focused on human rights and procedure, international judicial cooperation, comparative law and the EU process of legal harmonization. She has consulted for the Ministry of Justice of Spain. E-mail: l.bachmaier@der.ucm.es.

[1] E. GARCÍA DE ENTERRÍA, "Valeur de la jurisprudence de la Cour européenne des droits de l´homme en droit espagnol", in *Mélanges en l'honneur de Gérard J. Wiarda,* Köln 1988, p. 221.

decisions are enforced[2]. The ideal situation would be that immediately after the judgment has been rendered, the relevant state takes all the necessary individual or general measures in order to comply with the ECtHR's judgment. Unfortunately, this is not always the case. Although spontaneous execution of the judgments should be the rule, as the contracting states have assumed the obligation to abide by the Court's judgments – and this explains also why the Convention did not foresee any enforcement procedure or measures against the infringement of the Court's judgments –, experience has shown that a stronger supervising of the execution is needed. An overall assessment of the situation shows the excessive length of time taken to implement the Court's decisions. According to the working paper prepared by the Secretary in 2005, reflecting the situation of enforcements since 2000 when the Committee of Ministers (CM) commenced the procedure of supervising more intensely the execution of the Court's decisions, there were 2.597 decisions not executed, most of them stemming out of the systemic problems of the Italian judicial system.

The refusal and delays in the execution of the Court's judgments do not only constitute a violation of the rights of the individual in whose favour the judgment has been delivered, but the lack of execution of the Court's judgments undoubtedly does also have a very negative supra-individual impact as it affects the efficacy and credibility of the whole Convention system of protection of human rights[3]. The strengthening of the measures to achieve a more efficient execution procedure is essential to the functioning of the system, and if they are not implemented, the efficacy of whole system is endangered.

The aim of this paper is to give an overview on the execution of the Court's judgments and the supervising procedures adopted by the Committee of Ministers and the Court itself to overcome the present shortcomings of the European system of protection of human rights. We will also mention the provisions of Protocol 14 – which entered into force fully only a few months ago – specifically aimed to improve the execution of the Court's judgments and try to analyze the scope of these modifications which, even if they represent an improvement of the execution procedure, they might not be sufficient to face the unwillingness of certain states to abide by certain decisions of the Court.

II. The enforcement of ECtHR's judgments

1. The need to strengthen the execution procedure

Every legal system needs a reliable, independent and impartial judiciary to grant the rule of law. Moreover, for the system to work, the decisions of the courts have to be respected, and if the parties do not follow them willingly, an enforcement mechanism has to be in place. The right to access to court and the right to a fair trial, recognized in art. 6 ECHR encompasses the right to the execution of judgments. As the Court has held: the rights of art. 6 ECHR "would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party;" and "it would be inconceivable that Article 6 para. 1

[2] On the enforcement of the Court's decisions in Spain see C. RUIZ MIGUEL, *La ejecución de las sentencias del Tribunal Europeo de Derechos Humanos,* Madrid 1997; C. ESCOBAR HERNÁNDEZ, "Ejecución en España de las sentencias del TEDH", *REDI*, vol. XLII, 1990-2, pp. 547 et seq.; J.A. MORENILLA, RODRÍGUEZ, "La ejecución de las sentencias del TEDH", *Rev. Poder Judicial*, 15 (1990), pp. 79-102; J. BONET PÉREZ, "El problema de la efectividad interna de las sentencias del Tribunal Europeo de Derechos Humanos", in *Rev. Jca. Cat.* vol.92 (1993), pp. 58-59; D.J. LIÑÁN NOGUERAS, "Efectos de las sentencias del TEDH y Derecho español", *REDI* vol. XXXVII, 1985-2, pp. 355-376.

[3] Expressed in the report of the Group of Wise Persons, CM (2006) 203, of 15.11.2005, parag. 25.

(art. 6-1) should describe in detail procedural guarantees afforded to litigants -proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions"[4]. The same can be applied, saving the differences, to the ECtHR: if the judgments of the Court are not enforced by the States, the role of the sentences of the ECtHR would amount to recommendations. To the end, the whole European system of protection of human rights also relies on the enforcement of its decisions and the degree to which those decisions are integrated in the domestic legal order. The Committee of Ministers has also stated that respecting the judgments of the Court is one of the conditions of membership of the Council of Europe.

After a judgment condemning the respondent State has been rendered, the enforcement relies on the domestic rules. In other words, the efficacy of the decisions depends on the mechanisms provided in the domestic law and the intervention of the national authorities is needed to execute the decisions.

Aware of the shortcomings of the execution procedure, the Council of Europe back in the 90's started analyzing the situation and making a follow-up of the enforcement of the ECtHR's judgments by the States. The Parliamentary Assembly started paying growing attention to the execution of judgements and began putting strong pressure in some cases of non-execution. In September 2000, the Assembly adopted the Resolution 1226 (2000)[5]: it decided to keep an updated record of the execution of judgments, to hold regular debates on the issue and to adopt recommendations to the Committee of Ministers concerning the problems detected upon the record on the execution of certain judgments. In the same session, the Parliamentary Assembly also adopted the Recommendation 1477 (2000) to the Committee of Ministers on the execution of judgments of the Court[6]. Among other recommendations, the Assembly urged the Committee to strengthen de supervision procedure of the execution of judgments in order to ensure that effective measures were taken by the member States.

The same year 2000 the Committee of Ministers issued a recommendation to the member States with regard to the execution of judgments and precisely on the re-examination of cases and the setting aside of national judgments in order to comply with the Court's decisions. Since 2000 several recommendations and resolutions have been approved aimed on the effective implementation of the standards set out in the Convention, stating the obligation of the states to follow the decisions of the Court, and promoting the efficient execution of its judgements[7].

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[4] *Hornsby v. Greece*, 19.3.1997, para. 40. In the instant case, Mr. and Mrs. Hornsby, two English citizens resident en Rhodes, tried to open a private school there to teach English. The permit was denied by the administrative authorities. The case went up to the Supreme Administrative Court, which held that the permission had been unduly denied. However this judgment of the Supreme Administrative Court was not executed. They lodge complaint with the ECHR alleging a violation of art.6 ECHR. The respondent State, however affirmed that art. 6 ECHR did not grant the right to get a judicial decision enforced. This interpretation was completely rejected by the Court, stating that: "to construe Article 6 (art. 6) as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention (see, mutatis mutandis, the *Golder **v.** the United Kingdom* judgment of 21 February 1975, Series A no. 18, pp. 16-18, paras. 34-36). Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6 (art. 6)".

[5] Resolution 1226 (2000), Execution of judgments of the European Court of Human Rights, of 28 September 2000.

[6] Recommendation 1477 (2000) Execution of judgments of the European Court of Human Rights, of 28 September 2000. See also Recommendation 1546 (2002) of 22 January 2002, Implementation of decisions of the European Court of Human Rights. See also, Resolution 1268 (2002) on Implementation of decisions of the European Court of Human Rights of 22 January 2002; and Resolution of the Parliamentary Assembly 1411 (2004) of 23 November 2004, on the implementation of decisions of the ECtHR.

[7] The most relevant are:

– Recommendation(2000)2 / 19 January 2000 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights.

2. The content of the obligation to execute judgments of the ECtHR

Although art. 46 states that the Court's decisions have a binding effect[8] and art. 41[9] mentions specifically the right to just satisfaction when a violation of the Convention has been established, the system of the Convention does not provide for an enforcement procedure. The enforcement of the judgments relies on the domestic proceedings, and neither the Convention nor the Court does impose a specific ruling on the execution procedure and it is within the discretion of the states to choose the appropriate means of redress[10]. However, over the time the Court has slowly introduced more direct orders as to the measures to be taken to stop a violation or grant adequate redress. In fact, the Court's case law has evolved from ordering in a broad sense to grant restitution or just satisfaction to identify precise measures to be taken by the respondent state[11].

In the case of *Papamichalopoulos v. Greece*[12], of 31.10.1995, the Court clearly stated the obligation of the States to undertake individual measures for reparation:

– Recommendation (2002)13 of 18 December 2002 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights.

– Recommendation (2004)5 of 12 May 2004 of the Committee of Ministers to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights (adopted by the Committee of Ministers on 12 May 2004 at its 114th Session).

– Recommendation (2004)6 of 12 May 2004 of the Committee of Ministers to member states on the improvement of domestic remedies (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session).

– Recommendation (2004)4 of 12 May 2004 of the Committee of Ministers to member states on the European Convention on Human Rights in university education and professional training (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session).

– Recommendation (2008)2 of 6 February 2008, of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights (adopted by the Committee of Ministers on 6 February 2008 at the 1017th meeting of the Ministers' Deputies).

– Recommendation (2010)3 of 24 February 2010 of the Committee of Ministers to member states on effective remedies for excessive length proceedings.

Additionally see the Resolutions: Res (2002) 58 of 18 December 2002 on the publication and dissemination of the case-law of the ECtHR; Res (2002) 59, of 18 December 2002 concerning the practice in respect of friendly settlements; Res (2004) 3 of 12 May 2004, on judgments revealing an underlying systemic problem.

[8] Art. 46 of the Convention: "The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution".

[9] Art. 41 of the Convention: "If the Court finds there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

[10] On the authority of the Court's decisions and the discussion of their binding effect has been discussed and written widely, see, among others, A. Z. DRZEMCZEWSKI, *European Human Rights Convention in Domestic Law. A comparative Study,* Oxford, 1983, pp. 260 et seq., although reflecting the situation until the 80's, where the Court did not order specific measures to be taken to grant just satisfaction; D. KILLIAN, *Die Bindungswirkung der Entscheidungen des Europäischen Gerichtshofs für Menschenrechte,* Frankfurt a.M., 1994; L.M. BUJOSA VADELL, *Las sentencias del Tribunal Europeo de Derechos Humanos y el ordenamiento español*, Madrid, 1997, pp.92-108; S. Haß, *Die Urteile des Europäischen G*erichtshofs für Menschenrechte, Frankfurt am Main, 2006, pp. 60 et seq.

[11] On the evoultion of the ECtHR case-law with regard to art. 41 of the Convention, see J.T. OSKIERSKI, *Schadenersatz im europäischen Recht. Eine vergleichende Untersuchung des Acquis Communautaire und der EMRK,* Baden-Baden 2010, pp. 145-153

[12] *Papamichalopoulos v. Greece* of 31.10.1995. The case deals with a property expropriation. The applicants, Greek nationals, were deprived of the use of their land by virtue of a Greek law passed after the dictatorship was established in 1967 which transferred the land to the Navy Fund. After democracy had been restored the authorities recognized the applicants as having title and ordered exchange of the land for other land of equal value. None of the land chosen by the authorities was able to be used for the proposed exchange and by the date of the Court's judgment no compensation had been awarded to the applicants. The applicants complained of a violation of Article 1 of Protocol No 1 to the Convention.

> "By Article 53 (currently 46.1) of the Convention the High Contracting Parties undertook to abide by the decision of the Court in any case to which they were parties; furthermore, Article 54 (currently 46.2) provides that the judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution. It follows that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach."

The Court concludes that taken together arts. 41 and 46 of the Convention, the just satisfaction cannot be solely the remedy for certain violations. After the Court has found a breach of the Convention it does not suffice that the State pays the sums awarded to the applicant party, but such a judgment imposes also the obligation to adopt not only individual measures, but also general measures in the domestic legal order to put an end to the violation, to grant full redress and if possible, to prevent similar violations[13]. In their decisions, the Court and the Committee of Ministers have paid increasing attention to the situation of the individual concerned, even requiring the states to change their legislation and to allow the reopening of proceedings.

In sum, a judgment that founds a breach entails three obligations for the contracting state: 1) individual measures; 2) just satisfaction; and 3) general measures. All three obligations are expressly stated also in rule 6 of the Rules adopted by the Committee of Ministers on the supervision of the execution of judgments[14].

1) *Individual measures*

To grant redress for the damaged applicant is essential, and this is not always achieved by the payment of a pecuniary sum for damages. The adequate redress might require the adoption of specific individual measures to put an end to the illicit situation or to put the damaged in the situation it was before the violation of his rights took place.

For instance, the striking out of an unjustified criminal conviction from the criminal records, the granting of a residence permit or the re-opening of impugned domestic proceedings. In fact in certain cases – most frequently when the breach of the Convention is originated by a domestic judicial decision or by procedural errors in the proceedings –, the only effective remedy is to adopt non-pecuniary individual measures.

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[13] *Scozzari and Giunta v. Italy* of 13.7.2000; *König v. Germany* of 10.3.1980. Further, on the right to reparation see F. CASTRO-RIAL GARONE, "El derecho de reparación del Convenio Europeo de Derechos Humanos", in *Cuadernos de Derecho Judicial. Jurisprudencia del Tribunal Europeo de Derechos Humanos II,* Madrid CGPJ, 1995, pp. 123-158. For a comparison on the right to full reparation in the European Union system and the European Human Rights Convention, see also J.T. OSKIERSKI, Baden-Baden 2010.

[14] Rules adopted by the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (for the application of Article 46, paragraph 2 of the European Convention on Human Rights), adopted on 10 May 2006 at the 964th meeting of the Ministers' deputies. Rule 6(2) says: "2. When supervising the execution of a judgment by the High Contracting Party concerned, pursuant to Article 46, paragraph 2, of the Convention, the Committee of Ministers shall examine:

a. whether any just satisfaction awarded by the Court has been paid, including as the case may be, default interest; and

b. if required, and taking into account the discretion of the High Contracting Party concerned to choose the means necessary to comply with the judgment, whether:

i. individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention;

ii. general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations.

This is particularly evident in cases where the procedural safeguards of the defendant have been violated but the applicant is continuing to serve the sentence[15]. The re-opening of the judicial proceedings in such cases might be the only possible way to stop the violation and accord full reparation for the damaged. In those cases it would not be acceptable to merely pay just satisfaction while the applicant is still kept in prison. Recognizing that the reopening of proceedings might be the most efficient way to achieve a full reparation or *restitutio in integrum*, in 2000 the Committee of Ministers approved the Recommendation R(2000)2, on re-examination or re-opening of certain cases at domestic level following judgments of the ECtHR, already mentioned above.

The re-opening of a proceeding, being sometimes absolutely necessary to grant redress, poses several problems. First, it is a measure that directly conflicts with one of the essential principles in adjudicating, which is the *res judicata* effect and the protection of the legal certainty which is linked to the aforementioned principle. Second, the setting aside of a final judgment may also affect the rights of third parties, which should also be respected. This is especially relevant in non-criminal proceedings, as in criminal proceedings the rights of the accused should always prevail. Despite the principle of legal certainty, the enforcement of the judgment of the ECtHR might require to sacrifice the principle of certainty in order to put an end to a breach of the Convention. And it is the duty of the member states to make the reopening of proceedings possible so that a new trial can take place. This is clearly stated in the Recommendation R(2000)2 of 19 January. Pursuant to its point II it is the obligation of the states to ensure that "there exist at national level adequate possibilities to re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention". The possibility to reopen the proceedings has to be especially granted if two conditions are met: the procedural violation "is of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of", and "that the injured party continues to suffer very serious negative consequences because of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or re-opening".

On the other hand, the procedure for reopening cases might also be effective to deal at a domestic level with repetitive cases and thus prevent many clone-cases to come to the ECtHR. All these reasons explain why the Court in its recent case-law shows a tendency to compel states to reopen proceedings in order to grant full reparation[16].

However, there are still some member states where the domestic legislation does not provide for the reopening of a criminal case with the aim of enforcing a judgment of the ECtHR.

This is the case, for example of Spain, where there is neither a ruling on the enforcing ECtHR's judgments nor specific measures to set aside a sentence to comply with them. This issue has been addressed and repeatedly criticized in the scientific literature. In the absence of specific rules to execute the judgments of the Court[17], the re-opening of a case could only be achieved by applying the general instruments provided in the rules of procedure to set a aside final judgment.

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[15] This was the situation in the case *Hulki Günes v. Turkey* where the Committee of Ministers stated that not reopening the proceedings would amount to a "manifest breach of Article 46", see Interim Resolution CM/ResDH (2007)26 of 4.4.2007.

[16] For example, see *Claes and others v. Belgium*, of 2.6.2005, regarding a violation of the right to a tribunal established by the law; or *Lungoci v. Romania*, of 26.1.2006, relating a case of violation of the right to access to court. In this last case, the Court ordered the reopening of the proceedings, if this was the desire of the applicant, whilst awarding at the same time the payment of a certain sum for damages.

[17] On this topic see generally, S. RIPOLL CARULLA, *El sistema europeo de protección de los derechos humanos y el Derecho español,* Barcelona 2007, pp. 123-137; L. BUJOSA VADELL, op.cit., pp.57 y ss.; A. SALADO OSUNA, "Efectos y ejecución de las sentencias del Tribunal Europeo de Derechos Humanos en Derecho Español, in *Cuadernos de Derecho Judicial. Jurisprudencia del Tribunal Europeo de Derechos Humanos II,* Madrid CGPJ, 1995, pp. 189-223.

Focusing on the criminal procedure, these instruments under the Spanish domestic rules would be: the pardon – given by the government –; the annulment of the sentence; the review of the sentence; or the constitutional appeal before the Constitutional Court.

However none of these instruments is adequate for the purpose of the execution of a ECtHR's decision. In some cases, the pardon could possibly grant limited reparation of the damage, but still not a *restitutio in integrum*. And in cases where the violation found by the Court was a procedural error against the due process clause, the pardon would not allow a retrial of the case. The annulment of the judgment can only be requested within a short time limit and only for the specific reasons stated in the law.

Most frequently the attempts to reopen a case in order to comply with a ECtHR's decision have gone through the review of a penal sentence. Pursuant art. 954.4 of the Spanish Code of Criminal Procedure (CCP) review shall be granted if after the sentence has become final, new facts or documents previously unknown that proof the innocence of the convicted defendant appear. Only if a judgment of the ECtHR is considered a "new fact that proofs the innocence", this instrument would be suitable to reopen the case and comply with the Court's judgment. However the Spanish Supreme Court (Criminal Chamber) has not followed this interpretation of art. 954.4 CCP: in its view a new judgment is not a "new fact" that proofs a factual mistake of an already final decision, and therefore the grounds for review do not apply[18].

On the other hand, the Spanish Constitutional Court initially admitted the possibility of reopening a domestic case by way of constitutional appeal to grant the reparation ordered by the ECtHR, nevertheless this position was quickly abandoned. In its judgment 245/1991 of 16.12.1991 (case *Barberá, Messegué y Jabardo*)[19], it made a broad interpretation of art. 10.2 of the Spanish Constitution (SC)[20] declaring that the ECtHR's finding of a violation of art. 6 of the Convention amounted to a violation of art.24 SC[21], and therefore the constitutional appeal should grant protection to the convicted defendant and on this ground annul the conviction judgment[22]. Despite

[18] The Spanish Supreme Court in its sentence of 27.1.2000 refused the review of a final criminal judgment in the case *Castillo Algar*, stating that the ECtHR's decision only proofed that there had been a violation of art. 6.1 of the Convention, but it does not proof that the national sentence is wrong in the merits, nor does it proof that there are reasons to believe that the defendant is innocent. The same reasoning can be found in the Supreme Court's decision (Auto) of 27.7.2000, in the case *Riera Blume,* confirming that a final judgment cannot be reopened by way of review in order to execute a judgment of the ECtHR.

[19] On this case and its execution see C. RUIZ MIGUEL, "Las sentencias del TEDH: su ejecución desde la perspectiva del derecho constitucional comparado y español, pp. 836-845, available in: http://www.bibliojuridica.org/libros/1/113/37.pdf (visited 12.10.2010); A. SORIA JIMÉNEZ, "La problemática ejecución de las sentencias del TEDH. Análisis de la STC 245/1991 (Asunto Barberá, Messegué y Jabardo), *REDC*, 36 (1996), pp. 313-356.

[20] Art. 10.2 SC says: "The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain."

[21] Article 24 SC: "1. Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended.

2. Likewise, all persons have the right of access to the ordinary judge predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; to not make self-incriminating statements; to not declare themselves guilty; and to be presumed innocent.

The law shall determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences."

[22] The Constitutional Court holds also that, without setting aside the criminal conviction, a just reparation cannot be given to the applicant pursuant art. 41 of the Convention. All these reasons led the Spanish Constitutional Court to admit the constitutional procedure as a way to enforce the ECtHR' decision to reopen de criminal proceedings.

this initial stand, the Spanish Constitutional Court has thereinafter limited its own capacity to annul sentences in order to comply with the ECtHR's decisions. Only if following conditions are met, the Constitutional Court would declare the re-opening of the case, and thus fill the gap of the Spanish legislation: 1) if the right found to be violated by the ECtHR is also recognized in the Spanish Constitution and accords protection through the constitutional appeal; 2) if it is a criminal case; 3) if the effects of the sentence found in violation with the Convention are still lasting; and 4) if the freedom of the individual is affected.

Through this case-law, the Spanish Constitutional seeks to give reparation to the individual damaged in those cases where to stop the violation requires the reopening of a criminal case. It might not be the best solution, but at least, whilst the legislation provides a specific procedure for the execution of the ECtHR judgments, it may serve to put an end to the violation of the Convention.

2) *Just satisfaction*

If possible, the just satisfaction must amount to a "*restitutio in integrum*" to the damaged. In other words, only where the reparation of the damage and the *restitutio in integrum* are impossible, it should be substituted by a pecuniary compensation.

To grant just satisfaction the Court may order the payment of a certain sum to the applicant for pecuniary as well as non-pecuniary damages[23]. Although the Court has frequently held that the finding of a violation in itself constitutes just satisfaction for the applicant, there is a well established practice of granting pecuniary damages as just satisfaction. In such cases the Court sets a time-limit for payment by the respondent state. It is the function of the Committee of Ministers to control if the payment has been done within the established time or it has been delayed. Default interests may be demanded if the Court ordered so in the sentence. However there is a tendency within the Court to prefer that the just satisfaction is awarded on the domestic level[24]. With regard to the payment of pecuniary compensation the Court has kept the tendency of reinforcing the principle of subsidiarity embodied in the Convention. Pursuant to this principle, as a rule, the decision of the amount to be awarded as a compensation should be referred to the respondent state[25]. The Court would establish in the judgment a time-limit within the just satisfaction should be granted and lay down certain criteria that could serve as reference by the state when calculating the sum to be paid to the applicant.

3) *General Measures: to offer mechanisms and safeguards to avoid the repetition of the violation or prevent similar violations.*

This may require the adoption of general measures by the member states as, for example, legislative amendments as well as transitional measures in order to prevent new violations of the Convention while pending the required reform[26].

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[23] On the calculation of the damages, the currency, interests etc., see generally, G. DANNEMANN, *Schadenersatz bei Verletzung der Europäischen menschenrechtskonvention,* Köln 1994, pp. 203 et seq.; S. Haß, op.cit., pp. 104-111.

[24] See E. LAMBERT ABDELGAWAD, The execution of judgments of the European Court of Human Rights, Strasbourg, 2008, pp. 14-17.

[25] See, for example the case *Paudicio v. Italy*, 24.5.2007, where the Court refused to award a pecuniary sum for damages because the applicant could claim those damages before the civil courts of his country.

[26] See *Vermeire v. Belgium* of 29.11.1991. On precise legislative modifications launched by a judgment of the ECtHR, see L. BUJOSA VADELL, op. cit., p. 143-144. Some of the examples of general measures cited by the Committee of Ministers are: legislative or regulatory amendments, changes of case law or administrative practice or publication of the Court's judgment in the language of the respondent state and its dissemination to the authorities concerned.

Many legal changes have taken place in the member states as a consequence of the findings made by the ECtHR in its judgments, especially related to procedural safeguards and the judicial organization, but also in the field of criminal law, family law or administrative law. If a rule is not in line with the Convention, it does not make any difference what type of rule it is, regulatory, statutory or even constitutional. The Court does not make any distinction with regard to the category of the rule that has to be amended. In practice this has led to some constitutional reforms and in general to a certain legal harmonization within the member states, especially in the field of procedural safeguards.

The case *Broniowski v. Poland*[27] is the first pilot judgement aimed in improving the problem of repetitive cases. In essence it consists of a case that decides on the claim of the applicant, but orders the respondent state to adopt concrete general measures in order to grant full reparation to all the other individuals affected by the same problem, identified as a systemic problem[28]. After *Broniowski,* the Court has issued more judgments on pilot cases, where a systemic dysfunction was found to be underlying[29].

However the change of legislation may take a long time, therefore pending the reform of domestic law, a change of the case-law or a re-interpretation of the existing rules might be sufficient to prevent further violations. The problem in these cases is to assess in how far the reversal of precedent will be enough to avoid future violations and if the new interpretation is really followed by all the courts in future cases. In such cases, the supervisory function of the Committee of Ministers turns out to be of outmost importance, in order to check if, after the change of case law no further violations of the Convention have been found.

III. The supervision of the execution by the Committee of Ministers[30]

Under the ECHR it fell to the Committee of Ministers from the out-set to supervise the execution of the Court's judgments, functions that were strengthened after Protocol No.11 entered

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[27] The case *Broniowski v. Poland of 22 June 2004* deals with the case of Mr Broniowski, whose grandmother was deprived of her property, a house, as a consequence of the new territorial divisions of Poland after the second World War. But many other people were also obliged to abandon their land. From 1944 to 1953 around 1,240,000 people were "repatriated" under the provisions of the republican agreements. Poland undertook to compensate all those who had been "repatriated" from the "territories beyond the Bug River" and had had to abandon their properties. Since 1946, Polish law has entitled those repatriated in such circumstances to compensation in kind; they have been entitled to buy land from the State and have the value of the abandoned property offset against the fee for the so-called "perpetual use" of this land or against the price of the compensatory property or land. The State Treasury, however has been unable to fulfil its obligation to meet the compensation claims. This caused the lodging of Mr. Broniowski's claim before the ECtHR —suit that ended with a friendly settlement –, in which the Court issued a pilot judgement and ordered the state to adopt those measures to grant full reparation to the people who had suffered the same violation of their rights as Mr. Broniowski.

[28] The Court held that the violation of the applicant's Convention right —deprivation of property without compensation – originated in a widespread, systemic problem as a consequence of which a whole class of people had been adversely affected. The judgment had made clear that general measures at national level were called for in execution of the judgment and that those measures had to take into account the many people affected and remedy the systemic defect underlying the Court's finding of a violation. On the development of the "pilot judgment procedure", see C. PARASKEVA, *The Relationship Between Domestic Implementation of the European Convention on Human rights and the Ongoing Reforms of the European Court of Human Rights (With a Case Study on Cyprus and Turkey)*, Antwerp, 2010, pp. 98 et seq.

[29] See, for example, *Hutten-Czapska v. Poland*, of 22.2.2005; or *Sejdovic v. Italy*, of 10.11.2004.

[30] See generally the 3rd Annual Report (2009) of the Committee of Ministers "Supervision of the execution of judgments of the European Court of Human Rights" and the detailed statistics included in it.

into force and abolished the judicial functions of the Committee of Ministers. The main provision governing the Committee of Ministers' supervision of the execution of the Court's judgments is art. 46 ECHR[31]. The scope of the execution measures required is defined in each case on the conclusions of the Court in its judgment, considered in the light of the ECtHR's case-law and the Committee of Ministers practice, and relevant information about the domestic situation[32]. The Rules adopted by the Committee of Ministers for the execution supervision, as amended in 2006, govern the supervisory procedure. Pursuant these rules new judgments establishing violations —or accepting friendly settlements— are inscribed on the Committee of Minister's agenda once they become final. In performing its supervisory functions the CM is assisted by the Department for the Execution of Judgments, responsible for preparing the case files and contacting the relevant national authorities. In the examination in the periodical meetings, priority is given to those judgments that reveal an underlying systemic problem. The examination of the execution, which is based basically on the information submitted by the respondent state, comes to the annotated agenda under different sections. Those cases which appear to be complex, are proposed for debate, the others are normally examined without debate. Decisions are adopted in written within fifteen days; however some decisions regarding the cases debated might be adopted in the same meeting. After confirming that the state has taken all the necessary measures to execute the sentence —or the friendly settlement—, the CM adopts a resolution.

If the execution is being neglected, the CM may adopt one of the following types of resolution: 1) resolution stating the non-execution, that measures have not been adopted and inviting the state to abide by the judgment; 2) resolution noting certain progress and encourage the state to adopt specific measures in the future, which is the most frequent kind of resolution; and 3) resolution stating the refusal to execute the judgment and calling upon the authorities of the member states to take such action as they deem appropriate to this end. In these cases where there is proved that the state is reluctant to abide by the Court's judgment, the resolution may threaten with the adoption of more serious measures, and threat with the exclusion of the Council of Europe. Clearly this kind of resolutions and strong threats are used only exceptionally in cases where all other mechanisms of pressure have failed and the state persists in the non-execution[33]. The interim resolutions are a way of making information public in order to put pressure on the reluctant state and to speed up the adoption of the required measures.

1. The modifications introduced by Protocol 14 relating to the execution of the Court's decisions

Since the initial stages of the discussions that led to the approval of Protocol 14, the improvement and acceleration of the execution of judgments was identified as a priority goal. This is logic, since one of the central objectives of the reform was, not only to reduce the heavy workload of the ECtHR, but to improve the implementation of the Convention system. By reinforcing the effectiveness of the execution, not only the individual violation will cease and the

[31] See above under footnote N. 9.

[32] See the 3rd Annual Report (2009) of the Committee of Ministers "Supervision of the execution of judgments of the European Court of Human Rights", p.19.

[33] This was the situation in the case of *Loizidou v. Turkey*, of 28.11.1996, where the CM in its Interim resolution of 26.6.2001 for the first time threatened with the exclusion. Theoretically this measure could be possible under art. 8 of the Statute of the Council of Europe if the refusal to execute the Court's judgments is interpreted as a violation of art. 3 of the Statute. In practice however the threat of exclusion is implausible and obviously not an effective measure. However precisely in the case of *Loizidou v. Turkey* following the interim resolution of the CM, the European Union reacted by introducing in its partnership agreement with Turkey the requirement to comply with the ECtHR's judgments. See E. LAMBERT ABDELGAWAD, op.cit., p. 41. The case also gave rise to action by the Parliamentary Assembly and the Secretary General of the Council of Europe.

adequate redress to the injured granted. The effectiveness of the enforcement procedures has a broader consequence upon the whole Convention system: it contributes to reduce the violations in general and thus to reduce the number of applications filed with the ECtHR. And in fact, in every legal system, the more rapid and effective the enforcement of judges is, the deterrence effect of violating the law increases. If the execution of the Court's decision requires general measures to be adopted in order to overcome a systemic problem, the more rapidly these measures are taken, the fewer the number of repetitive violations, and thus the fewer the number of identical applications to the Court[34]. This is why specifically the Preliminary report states that in order to maintain the effectiveness of the system, it is necessary to improve the supervision of the execution of judgments.

With regard to the execution of the Court's decisions Protocol No. 14 accords two new competences to the Committee of Ministers: the right to request the Court for an interpretation of a judgment in order to facilitate its execution; and the right to bring infringement proceedings[35]. As set forth in the explanatory report of Protocol 14, there were no intermediate measures between the light pressure of interim resolutions and the hard measure of art.8. And precisely, because of the hard consequences of art.8 it cannot be used to compel with the execution of the Court's decisions. Three new paragraphs have been added to art. 46 ECHR by way of art.16 of Protocol 14 to overcome the existing shortcomings in the execution of judgments:

"46.3 If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee:

4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case".

The amendment introduced in Art.46.3 tries to deal with the problem of lack of precision or clarity in the Court's judgments which may create difficulties regarding the quick and efficient execution.

Paragraphs 4 and 5 of art. 46 regulate the new infringement proceedings by which the Court may support the tasks of the CM with an additional judgment deciding whether the state has taken the measures required by the judgment or not. The entry into force of Protocol No.14 has been awaited with much interest and hope by the Committee of Ministers. But still, the introduction of an infringement proceeding has been not unanimously supported as it raises important legal and

[34] See W. VANDENHOLE, "Execution of Judgments", in *Protocol No. 14 and the Reform of the European Court of Human Rights* (P. Lemmens and W. Vandenhole eds.), Antwerpen 2005, p. 114.

[35] Art. 15 of Protocol 14 also introduces a new wording for art. 39 of the Convention which formally provides for supervision by the CM of the terms of the friendly settlement. Although this does not represent a practical innovation as the decisions of the Court endorsing friendly settlements took the form of judgments, the CM already supervised its execution under art. 46.2. Still, from now on, friendly settlements will not have to be judgments, and even taken the form of a Court's decision, they will be supervised by the CM. See W. VANDENHOLE, "Execution of Judgments", op.cit., p 117.

practical questions[36]. In fact, during the drafting process of Protocol No. 14 the Court opposed to their adoption, so it is not easy to say what can be in practice expected from this new instrument. In my opinion its objective is mainly preventive: by merely giving the possibility that the findings of the CM might be supported by a judgment by the Court, may increase the pressure on the state to fulfil its obligations. It can be expected that it only will be used in very exceptional serious cases of repeated violation of the obligation to execute a judgment. In any case, it is doubtful that in a case of persistent failure of a state to abide by the Court's judgments, when the concerned state is really unwilling to take the required measures, the decision of the Court stating such non-execution would change much[37].

IV. Conclusions

Systematic refusal by a state to enforce a judgment of the ECtHR is uncommon; the majority of states try to act in compliance with the Convention and the case-law of the ECtHR. However, there are some serious cases of persistent refusal of certain states to take the necessary measures to comply with the Court's ruling. Such cases have to be addressed with effective measures in order to maintain the credibility of the system. More frequently the enforcement suffers unacceptable delays, specifically when the execution of the judgment and the avoidance of another violation require introducing important legislative reforms in a legal system. Political reasons and budgetary reasons may also hamper the swift execution of the Court's judgments. The modifications introduced by Protocol 14, entered into force in the 1st June 2010, try among other issues, to introduce additional tools to strengthen the execution of the Court's judgments and achieve its compliance. It is too early to make an assessment of the improvements that might be achieved by them and to evaluate how the new art. 46 ECHR will be able to speed up and make more effective the procedure of execution of judgments. Much effort and hope has also been put in the measures adopted relating the so called "pilot judgments" to prevent clone cases and the consequent applications, but only time will show if they turned out to be effective or not.

The measures taken to strengthen the supervision of the enforcement by the Committee of Ministers might not be as effective as a system of daily fines to compel the states to abide by the Court's decisions[38]. Nevertheless, taken together, many steps have been taken in the last decade towards a more effective execution of the Court's procedure. The establishment of a record of non executed decisions; the publication of the information provided and the evaluations made related to the execution of judgments; the existence of an effective supervisory procedure, with a clear working method within the meetings of the CM; the efforts made by the CM to evaluate the

[36] For example, E. LAMBERT ABDELGAWAD, op.cit., p.58 mentions following questions with regard to the infringement proceedings introduced in art. 46.4 and .5 of the Convention: "What would be the procedural rights of the respondent state in these proceedings? What would be the basis for making a finding of violation? Would this not raise questions of interpretation of the initial judgment? Would this not confuse the existing clear distinction between the political/executive branch of the Council of Europe and its judicial branch?"

[37] In the same sense, W. VANDENHOLE, "Execution of Judgments", op.cit., p.120: « the lack of any accompanying sanctions, makes it unlikely that much additional pressure will result from these infringement procedures. See also, L. CAFLISH, "La mise en ouvre des arrêts de la Cour: nouvelles tendances", in *La nouvelle procédure devant la Cour européenne des droits de l'homme après le Protocole nº 14*, (F. Salerno dir.), p. 174.

[38] In its Resolution 1411 (2004), already quoted, the Parliamentary Assembly regrets that the system of daily fines has not been adopted: "16. The Assembly welcomed the possibility of the Committee of Ministers asking the Court to clarify its decisions in cases of disputes concerning the requested measures, as established by Protocol No. 14, but regrets that its proposal to establish a system of *astreintes* (daily fines for a delay in the performance of a legal obligation) has been rejected.

developments made at national level and the possible existence of structural problems; the issuing and publication of interim resolutions by the CM; the publication of an annual report on the supervision of the execution of judgments; the pressure exerted through press releases; the involvement of the Parliamentary Assembly in the monitoring of the execution procedure and the pressure put to the national authorities through the state delegates; the dissemination and translation of the Court's judgments; the cooperation with the states concerned in identifying the systemic or structural problems; the assistance given by the Council of Europe in the drafting of laws and improving the domestic remedies; and the adoption of best practices that would help to prevent future violations of the Convention, are all together measures that contribute to improve the execution of the Court's judgment and the effectiveness of the Convention's system. Still, education and training of all the legal players —and the civil society— in the culture of human rights is of the outmost relevance for the implementation of the human rights standards within the member states of the Council of Europe, particularly in young democracies and transitional countries: the understanding of human rights culture and its significance is the best mechanism to improve the execution of the Court's judgments and, obviously, the implementation of the Convention as a whole. And in this field there is still much to be done.