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Actual challenges for the implementation of judgments of the European Court of Human Rights

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Abstract: The author analyzes the problem of the implementation of judgments of the European Court of Human Rights (ECtHR). In light of the European Convention on Human Rights (ECHR), a special role in its control mechanism is played by the Committee of Ministers of the Council of Europe. Despite the measures taken, there have been delays in the execution of judgments or the lack of their implementation for years. The author analyzed this problem in light of the latest reports of the Committee of Ministers and the recommendations of the Parliamentary Assembly. He pointed to the need for greater activity in this process of other bodies of the Council of Europe, including: the Commissioner for Human Rights, the Venice Commission, the CPT, the ECRI as well as institutions of the civil society. In the last decade, the interest of the Parliamentary Assembly of the Council of Europe in this matter has clearly increased. The author postulates that parliamentarians sitting in this body should be more active in this regard in their countries. They have instruments of control on the executive power, which could be used to increase the effectiveness of the execution of the ECtHR's judgements.

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1. Introduction

The European Convention of Human Rights[1], and its controlling system (The European Court of Human Rights, The Committee of Ministers of the Council of Europe) is considered as the most significant and most effective regional system of the protection of human rights[2], as compared with other human rights regional systems[3]. It involves a supranational mechanism which enables the individuals to achieve their right on the international level[4]. This mechanism of individual applications should overcome the discrepancy between the goals of international protection of human rights and execution of human rights norms at the state and local level. Successful and fast implementation of its judgments on the national level is of great importance for the Court, because the credibility and legitimacy of this system of protection depends on it[5].

The main achievements of those institutions include securing minimum standards across the continent as they deal with increasing expansion, complexity, multidimensionality, and interpenetration of their human rights activities[6].

One of the most important problems is implementation of the ECtHR's judgments[7]. The aim of this study is to identify and analyze problems with

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1 The Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5.

2 Janneke Gerards, *General principles of the European Convention on Human Rights* (Cambridge: Cambridge University Press, 2019), 48.

3 Avidant Kent, Nikos Skoutaris, and Jamie Trinidad, eds., *The future of international courts: regional, institutional, and procedural challenges* (London-New York: Routledge, 2019).

4 Bożena Gronowska, *Europejski Trybunał Praw Człowieka. W poszukiwaniu efektywnej ochrony praw jednostki* (Toruń: Wydawnictwo „Dom Organizatora", 2011), 59.

5 Bojan Tubić, "The execution of judgments of the European Court of Human Rights," *Zbornik radova (Pravni fakultet u Novom Sadu)* 53(10) (2019): 211.

6 Steven Greer and Rose Slowe, *Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges* (Cambridge: Cambridge University Press, 2018), 32.

7 Hellen Keller and Cedric Marti, "Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights," *European Journal of International Law* 26, no. 4 (2015): 829; Adam Bodnar, *Wykonywanie orzeczeń Europejskiego Trybunału Ochrony Praw Człowieka w Polsce. Wymiar instytucjonalny* (Warszawa: Wolters Kluwer, 2018), 49.

enforcement of ECtHR's judgments that occur at the beginning of the third decade of the 21st century. The following research methods are used: legal-dogmatic, legal-comparative, analyzing of documents and the method of system analysis.

The subject of verification in this study will be the following research hypothesis: "Although the system of human rights protection based on the European Convention on Human Rights is considered the most effective regional system for the protection of human rights, its effectiveness is more seriously weakened by problems with the implementation of ECtHR's judgments. What is needed here is not only the improvement of the supervisory mechanisms of the Committee of Ministers, but also greater involvement of other Council of Europe institutions (mainly the Parliamentary Assembly, the Commissioner for Human Rights, the Venice Commission, the CPT, the ECRI), as well as civil society organizations. The possibilities of parliamentarians to influence their governments in the process of executing the judgments of the ECtHR have not been fully used".

2. General characteristic of the European Court of Human Rights and its jurisprudence

2.1. The Strasbourg case law

Studies have exposed the domestic effects of judgments of the ECtHR as a challenge to the various levels of legal orders in Europe. The starting point is the divergent impact of the ECtHR's jurisdiction within the Convention States. Strasbourg case law is increasingly important for most areas of society. The case law of the Court are highlighted and discussed against the background of the principle of subsidiarity[8]. The Pilot-Judgment Procedure of the ECtHR is oriented to tackling structural human rights deficiencies in member states which is reconcilable with the European Convention on Human Rights[9].

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8 Linos-Alexander Sicilianos, "The Role of the European Court of Human Rights in the Execution of its own Judgments: Reflections on Article 46 ECHR," in *Judgments of the European Court of Human Rights - Effects and Implementation*, eds. Anja Seibert-Fohr and Mark E. Willinger (London: Routledge, 2014), 293.

9 Dominik Haider, *Pilot-Judgment Procedure of the European Court of Human Rights* (Leiden: BRILL, 2013), 42.

The ECtHR is perceived in a broader context of judicial power in a globalized world[10]. The analyses explore the Court's uniqueness as an international adjudicatory body in light of its history, structure, and procedure, as well as its key doctrines and case law[11]. The questions are shown: What was the best model for such an international organization? How should it evolve within more and more diverse legal cultures? How does a case move among different decision-making bodies?[12] It is discussed how the Court supports a liberal representative and substantive model of democracy, and outlines the potential for the Court to interpret the Convention so as to support more deliberative, participatory and inclusive democratic practices[13].

In the human rights courts, including the ECtHR, the central role played by the notion of consensus in the case law. The role exerted by the notion of consensus in this framework can be used not only to understand the evolving character of the rights and freedoms recognized by these international treaties, but also to reaffirm the international nature of these regional human rights courts[14].

'European consensus' is a tool of interpretation used by the European Court of Human Rights as a means to identify evolution in the laws and practices of national legal systems when addressing morally sensitive or politically controversial human rights questions. If European consensus exists, the Court can establish new human rights standards that will be binding across European states. It opens the way to answer such questions, as: Should prisoners have voting rights? Should terminally ill patients have a right to assisted suicide? Should same-sex couples have a right to marry and adopt?[15] The import meaning has ECtHR's jurisprudence concerning

10 Paulo Pinto Albuquerqe and Krzysztof Wojtyczek, eds., *Judicial power in a globalized world: liber amicorum Vincent De Gaetano* (Cham: Springer, 2019).

11 Andrzej Bisztyga, *Europejski Trybunał Praw Człowieka* (Katowice: GWSH, 1997), 39.

12 Angelika Nussberger, *The European Court of Human Rights* (Oxford: Oxford University Press, 2020), 24.

13 Rory O'Conell, *Law, democracy and the European Court of Human Rights* (Cambridge: Cambridge University Press, 2020), 38.

14 Francisco José Pascual Vives, *Consensus-based interpretation of regional human rights treaties* (Leiden-Boston: Brill Nijhoff, 2019), 37.

15 Vasilis Tsevelekos, *Building consensus on European consensus: judicial interpretation of human rights in Europe and beyond* (Cambridge: Cambridge University Press, 2019), 58.

the right to life[16]. The human rights connecting with the freedom of information and freedom of media are important subject of jurisprudence of the European Court of Human Rights[17]. The ECtHR' case-law on freedom of expression and media and journalistic freedoms has been widely analyzed[18].

2.2. Judicial activism

Judicial activism in respect of the protection of human rights and dignity and the right to due process is an essential element of the democratic rule of law in a constitutional democracy as opposed to being 'judicial overreach'. Selected recent case law of the ECtHR, as well as other international courts, illustrates that these Courts have, at times, engaged in judicial activism in the service of providing equal protection of the law and due process to the powerless but have, on other occasions, employed legalistic but insupportable strategies to sidestep that obligation[19]. Some analyses demonstrate the negative impact, in terms of unpredictability and legal uncertainty, of the discretion used by the Court when it comes to the regime of reparation. They reveal the adverse influence of such a high discretion on the quality of its rulings - ultimately on the coherence of the system and on the Court's authority[20].

2.3. Areas of the human rights protection

The Internet's importance for freedom of expression and other rights comes in part from the ability it bestows on users to create and share information, rather than just receive it. Within the context of existing freedom of expression guarantees, the studies evaluate the goal of bridging the 'digital divide'

16 Stephen Skinner, *Lethal force, the right to life and the ECHR: narratives of death and democracy* (Oxford: Hart), 48.

17 Michelle Farell and Edel Hughes, eds., *Human rights in the media: fear and fetish* (Abington-New York: Routledge, 2019).

18 Dirk Voorhoof, *Freedom of expression, the media and journalists: case-law of the European Court of Human Rights: a publication of the European Audiovisual Observatory* (Strasbourg: European Audiovisual Observatory, 2020), 28.

19 Sonja C. Grover, *Judicial Activism and the Democratic Rule of Law Selected Case Studies* (Cham: Springer International Publishing, 2020), 42.

20 Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge: Cambridge University Press, 2014), 48.

- the gap between those who have access to the Internet and those who do not. ECtHR, as well as other international courts try to answer the following questions: First, is there a right to access the Internet, and if so, what does that right look like and how far does it extend? Second, if there is a right to access the Internet, is there a legal obligation on States to overcome the digital divide?[21]

The ECtHR is one of the most significant institutions confronting the interactions among states, religious groups, minorities, and dissenters. In the 25 years since its first religion case, *Kokkinakis v. Greece*[22], the Court has inserted itself squarely into the international human rights debate regarding the freedom of religion or belief[23]. The ECtHR has mainly been concerned with religious courts in terms of compliance with the requirement for a fair hearing by an independent and impartial tribunal under Article 6 of the European Convention of Human Rights and has come to various conclusions. The judgment *Bélámé Nagy v. Hungary*[24], and in particular many associated dissenting opinions, demonstrate that the matter is worthy of study, particularly in the contemporary context of religious freedom[25].

The potential of international human rights law to resolve one of the gravest human rights violations to have surfaced post 9/11: extraordinary rendition has been analyzed. Although infamously deployed as a counter-terrorism technique, substantial evidence confirms that European states colluded in the practice by facilitating the transportation of suspects through their airspace or airports and in some cases, secret detention on their territories. Despite recent findings of the ECtHR, difficulties persist in holding many European States accountable for the role they played both at the domestic and international level[26].

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21 Anne Peacock, *Human rights and the digital divide* (London: Routledge, 2019), 32.

22 Application No. 14307, judgment in 1993, ECHR 20.

23 T. Jeremy Gunn and Malcolm D. Evans, eds., *The European Court of Human Rights and the freedom of religion or belief: the 25 years since Kokkinakis* (Leiden-Boston: Brill Nijhoff, 2019).

24 Application No. 53080/13, judgment of 10 February 2015.

25 Michał Rynkowski, *Religious courts in the jurisprudence of the European Court of Human Rights* (Leiden-Boston: Brill, 2019), 21.

26 Susanne Egan, *Extraordinary Rendition and Human Rights Examining State Accountability and Complicity* (Cham: Springer International Publishing, 2019), 67.

The ECtHR is being applied to military operations of every kind from internal operations in Russia and Turkey, to international armed conflicts in Iraq, Ukraine and elsewhere. The challenge that this development presents to the integrity and universality of Convention rights has been analyzed. The questions have been raised: Can states realistically investigate all instances where life is lost during military operations? Can the Convention offer the same level of protection to soldiers in combat as it does to its citizens at home? How can we reconcile the application of the Convention with other international law applicable to military operations?[27]

'Urgent' is a word often used, in very different contexts. Yet together with a reference to human rights violations, it likely triggers images of people caught up in armed conflict, facing terror from either the state, gangs, paramilitaries, or terrorists, or of people fleeing terror and facing walls, fences or seas, at risk of being returned to terror, or ignored, neglected, abused, deprived of access to justice and basic facilities, facing death, torture and cruel treatment. These ongoing and expected violations are explored in the context of (quasi-) judicial proceedings as international tribunals and domestic courts are increasingly called upon to order interim measures or accelerate proceedings in such cases[28].

There are analyses of the ECtHR jurisprudence on immigration policies, non-refoulement, humanitarian law and gender. It presents empirically based research of a quantitative, qualitative and comparative nature regarding the determinants of attitudes towards cosmopolitanism and more generally concerning public opinion on migration issues, and reflects on conceptions of and attitudes towards citizenship, while also imagining new forms of citizenship[29].

The research has been done of issues relating to the application of AI and computational modelling in criminal proceedings from a European perspective. It explores ways in which AI can affect the investigation and adjudication of crime. They examine how traditional evidentiary law is

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27 Stuart Wallace, *The application of the European Convention on Human Rights to military operations* (Cambridge: Cambridge University Press, 2019), 32.

28 Eva Rieter and Karin Zwann, eds., *Urgency and Human Rights The Protective Potential and Legitimacy of Interim Measures* (The Hague: T.M.C. Asser Press, 2021).

29 Mogens Chrom Jakobsen, Emnet Berhamu Gebre, and Drago Župarić-Iljić, eds., *Cosmopolitanism, Migration and Universal Human Rights* (Cham: Springer International Publishing, 2020).

affected by both new ways of investigation – based on automated processes (often using machine learning) – and new kinds of evidence, automatically generated by AI instruments. Drawing on the comprehensive case law of the ECtHR, it also presents reflections on the reliability and, ultimately, the admissibility of such evidence[30].

The future of economic and social rights is unlikely to resemble its past. Neglected within the human rights movement, avoided by courts, and subsumed within a single-minded conception of development as economic growth, economic and social rights enjoyed an uncertain status in international human rights law and in the public laws of most countries. However, today, under conditions of immense poverty, insecurity, and political instability, the rights to education, health care, housing, social security, food, water, and sanitation are central components of the human rights agenda[31].

Environmental law has always responded to risks posed by industrial society but the new generation of risks have required a new set of environmental principles, emerging from a combination of public fears, science, ethics, and established legal practice. The study taken shows how three of the most important principles of modern environmental law grew out of this new age of ecological risk: the polluter pays principle, the preventive principle, and the precautionary principle. The ECtHR, and other Courts have been invoking environmental law principles in a broad range of cases, on issues including GMOs, conservation, investment, waste, and climate change. As a result, more States are paying heed to these principles as catalysts for improving their environmental laws and regulations[32].

3. The problems with the implementation of judgments of the European Court of Human Rights

Among the issues connecting with the activity of the European Court of Human Rights very important meanings concerns the implementation of

30 Serena Quatrocollo, *Artificial Intelligence, Computational Modelling and Criminal Proceedings A Framework for A European Legal Discussion* (Cham: Springer International Publishing, 2020), 38.

31 Katharine G. Young, ed., *The future of economic and social rights* (Cambridge: Cambridge University Press, 2019).

32 Nicolas de Sadeleer, *Environmental principles: from political slogans to legal rules* (Oxford: Oxford University Press, 2020), 38.

judgments. Delays have been noted for several years in the enforcement of court judgments and particularly serious delays are observed in cases where a judgment demands that national legislation be modified[33]. It is analyzed in a general way and with connection to individual subjects, as for example prisoners' right to vote[34]. There are also analyses how individual states execute the ECtHR's judgments[35]. The studies look at the nature of judgments and their relationship with domestic measures to ensure implementation. It explores regional policy development concerning domestic implementation and shows that the co-ordinating role of the executive has been an important component of this[36].

The High Contracting Parties of the European Convention of Human Rights are obliged to execute judgments of the ECtHR. The Committee of Ministers of the Council of Europe supervises the execution of this obligation. On 1 November 1998 the long-awaited revision of the supervisory mechanism of the European Convention on Human Rights were put into effect[37], because on that date Protocol No. 11 to the ECHR has entered into force[38]. An action plan sets out the measures the Member State intends to take to implement a judgment. These acts are key tools of communication between the State and the Committee of Ministers in the procedure of supervision of the execution of judgments of the European Court of Human Rights.

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33 Christian Tomuschat, "Quo Vadis, Argentoratum? The success story of the European Convention on Human Rights. And a few dark Stasin," *Human Rights Law Journal* 13, no. 11–12 (1992): 401.

34 Ergul Celiksoy, "Execution of the Judgments of the European Court of Human Rights in Prisoners' Right to Vote Cases," *Human Rights Law Review* 20, no. 3 (2020): 555.

35 Donatas Murauskas, "Execution of Judgments of the European Court of Human Rights: Lithuanian Case," in *Legal Developments During 30 Years of Lithuanian Independence* (Cham: Springer International Publishing, 2020), 205.

36 Elizabeth Mottershaw and Rahel H. Murray, "National responses to human rights judgments: the need for government co-ordination and implementation," *European Human Rights Law Review* 6 (2012): 639.

37 George Nicolau, "The new perspective of the European Court of Human Rights on the effectiveness of its judgments," *Human Rights Law Journal* 31, no. 7–12 (2011): 269.

38 Ivonne S. Klerk, "Supervision of the Execution of the Judgments of the European Court of Human Rights: The Committee of Ministers' role under Article 54 of the European Convention on Human Rights," *Netherlands International Law Review* 45, no. 1 (1998): 65.

There are however critical analysis about the effectiveness of supervising the implementation of the ECtHR's judgments by the Committee of Ministers[39].

Non-execution of the judgments of the European Court of Human Rights is a matter of serious concern. The reasons for and dynamics of non-execution need to be fully considered. Non-execution is properly understood as a phenomenon that requires political rather than legal responses. This calls into question the usefulness of the infringement proceedings contained in Article 46(4) of the Convention and which it has recently been suggested ought to be embraced in attempts to address non-execution. Even if the practical difficulties of triggering Article 46(4) proceedings could somehow be overcome, the dynamics of non-execution suggest that such proceedings would be both futile and counterproductive, likely to lead to backlash against the Court and unlikely to improve States' execution of its judgments[40].

The efficacy and effectiveness of the European Convention on Human Rights depends on the implementation of judgments of the ECtHR. In the past and until recently, the trust in and actual authority of the Court has predominantly compensated for the lack of direct and executive power over signatory parties to the European Convention. However, the workload of the Court is increasing at an exponential rate; at the same time, individuals from several new member states are not making full use of this enforcement machinery. As a result of these two elements, combined with the lack of execution of some judgments for legal–political reasons, compliance with the Court's judgments has become a priority in the political agenda of the Council of Europe[41].

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39 Başak Çalı and Anne Koch, "Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe," *Human Rights Law Review* 14, no. 2 (2014): 321.

40 Fiona de Londras and Kanstantsin Dzehtsiarou, "Mission impossible? Addressing non-execution through infringement proceedings in the european court of human rights," *The International and Comparative Law Quarterly* 66, no. 2 (2017): 467.

41 Marinella Marmo, "The Execution of Judgments of the European Court of Human Rights — A Political Battle," *Maastricht Journal of European and Comparative Law* 15, no. 22 (2008): 235.

Questions were raised: Despite what the Convention provides, is the Court involved in supervising the execution of its judgments? What the Court does when it is engaged in this exercise? In order to answer these two questions, four aspects of the Court's practice that are linked to the execution process are examined. These are the four aspects of interest: just-satisfaction judgments under Article 41 ECHR, follow-up cases concerning individual measures, follow-up cases concerning general measures and the pilot-judgment procedure. The analysis of these aspects has lead to the conclusion that the Court indeed engages in supervising execution, but also that this does not mean that the Court is taking on the Committee's task and that supervising execution has not become in any way part of the Court's day-to-day work[42].

Due to the intergovernmental and confidential regime set up by the European Convention on Human Rights in view of supervising the execution of the judgments of the ECtHR, this field was for many years little suited to dialogue. However, a culture of dialogue has gradually emerged at the European and national levels in order to offer more transparency and legitimacy to the system; the ambitious gamble was that it would speed up and improve the compliance with the judgments of the Court. The current picture still seems to be diversified, with more bilateral and expert dialogue focused on the most serious cases at the European level. Meanwhile, a strategy for a more open and constructive dialogue with a very large panel of actors seems to be promoted in some countries[43].

One of the important problems is domestic judicial treatment of ECtHR case law[44]. This Court has been more and more confronted with criticism coming from the national sphere, including the judiciary. This culminated in constitutional court judgments declaring a particular ECtHR judgment non-executable, for reasons of constitutional law. Existing scholarship does not differentiate enough between cases of mere political unwillingness to

42 Lize R. Glas, "The European Court of Human Rights supervising the execution of its judgments," *Netherlands Quarterly of Human Rights* 37, no. 3 (2019): 228.

43 Elisabeth Lambert Abdelgawad, "Dialogue and the Implementation of the European Court of Human Rights' Judgments," *Netherlands Quarterly of Human Rights* 34, no. 4 (2016): 340–363.

44 David Kosař, *Domestic judicial treatment of European Court of Human Rights case law: beyond compliance* (London-New York: Routledge, 2020), 48.

execute an ECtHR judgment and cases where execution is blocked for legal reasons (mainly of a constitutional law nature)[45].

The specificity of the Strasbourg judgments is versatile and concerns many different areas of social life that it is not possible to effectively adapt legal norms and apply their interpretation by one entity of public authority. It can be said with full conviction that the execution of judgments is a continuous process and will last as long as the ECtHR is functioning; surely it will not end with the completion of the most difficult cases. It is important for the national system for the protection of human rights to be very efficient in the context of the protection of human rights. If, however, there is a violation of the norms of international agreements, the state must be effective in meeting obligations such as the judgments of the ECtHR. There are two aspects involved in fulfilling obligations under international law arising from the European Convention on Human Rights. The first one is the introduction of appropriate standards of respect for the rights and freedoms enshrined in the treaty, and the second one is the obligation to enforce judgments of the ECtHR in the case of a stated infringement of the Convention. Both obligations must be carried out simultaneously by the state – which, as a party to the Convention, respects its provisions and fulfills the required international legal obligations[46].

During the last decades, States no longer tend to invoke the principle of non-interference when it comes to the scrutiny of their human rights record by peer review, reporting mechanisms or judicial procedures. Nevertheless, compliance with the recommendations or judgments of international human rights fora is a persistent concern in a number of States. Infringement proceedings were introduced in the Council of Europe only with Protocol 14 to the ECHR. While for quite a long time dormant, the procedure was invoked against Azerbaijan[47]. On December 5, 2017, the Council of Europe's Committee of Ministers issued an interim resolution concerning

45 Martin Breuer, ed., *Principled Resistance to ECtHR Judgments - A New Paradigm?* (Berlin, Heidelberg: Springer, 2019).

46 Katarzyna Grzelak, "The role of the Polish government in execution of the judgements of the European Court of Human Rights," *Espaço Jurídico* 20, no. 2 (2019): 203.

47 Adrienne Komanović, "Infringement proceedings against Azerbaijan: judicialisation of the execution of the judgments of the European Court of Human Rights," *Anuario da Facultade de Dereito da Universidade da Coruña* 22 (2019): 138.

the European Court of Human Rights case of *Ilgar Mammadov v. Azerbaijan*[48]. In this resolution, the Committee, for the first time ever, launched infringement proceedings against a member state of the European Convention of Human Rights[49].

The reasons for poor execution of judgments in most Central and Eastern European states from the perspective of (il)liberalism, trying to draw out lessons concerning the understanding of current failures of those states to comply with the European Convention on Human Rights[50]. Some common reasons for non-execution of judgments can be identified across Central and Eastern European states. Those reasons can be *inter alia* located in legal formalisms, authoritarian judicial cultures and lack of self-criticisms of judicial structures. Central and Eastern European states could overcome the hurdles posed by the remains of socialist legal culture in a manner that will live up to their obligations concerning execution of judgments of the ECtHR[51].

For example, the Serbian authorities in charge of enacting legislation have not paid enough attention to the supervision of the execution of the ECtHR's judgments. The competence concerning the communication with the Committee of Ministers in the procedure of supervision of the execution of European Court judgments and submission of action plans and action reports is not regulated by domestic law. The active approach of the Government Agent of the Republic of Serbia has prevented the negative consequences that this legal gap may have on the fulfillment of international obligations of the Republic of Serbia[52].

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48 Application No. 15172/13, judgment of 22 May 2014.

49 Julie-Enni Astrow, "Interim Resolution CM/RESDH(2017)429: Execution of the Judgment of the European Court of Human Rights Ilgar Mammadov Against Azerbaijan (Council of Eur. Comm. of Ministers)," *International Legal Materials* 57, no. 2 (2018): 358.

50 Jerzy Jaskiernia, *Uwarunkowania efektywności prawa do dobrej administracji jako standardu europejskiego* (Kielce: Wydawnictwo Uniwersytetu Jana Kochanowskiego, 2020), 140.

51 Jernej Letnar, "A Glass Half Empty? Execution of Judgments of the European Court of Human Rights in Central and Eastern Europe," *Baltic Yearbook of International Law* 15, no. 1 (2016): 299.

52 Miloš Radovanović, "Submission of an action plan and an action report in the procedure for the execution of judgments of the European Court of Human Rights," *Zbornik radova Pravnog fakulteta u Nišu* 57(78) (2018): 379.

The developing approach of the ECtHR to the indication of specific non-monetary individual or general remedies and the impact of this practice on the execution of its judgments has been analyzed. The Court's remedial practice is fluid and pragmatic, with differences of perspective between Judges. The factors that influence judicial decision-making, and the implications of the Court's remedial approach both for its 'horizontal' relationship with the Committee of Ministers and its 'vertical' relationship with states were examined. It brings about a conclusion that the door is open to continued evolution, if not revolution, in the Court's remedial practice[53].

There are analysis how civil society has participated in the execution process to date, giving specific examples of where civil society has been more actively engaged and the benefits that their participation brings to the process[54].

4. Council of Europe's approach to solving the problems with the implementation of the ECtHR's judgments

The implementation of the ECtHR judgments is considered as an important issue in the activity of the Council of Europe[55].

The Committee of Ministers' in its 2019 Annual report[56], published on 1 April 2020, stresses the positive role of the ten years reforms of the system based on the European Convention on Human Rights undertaken in the framework of the "Interlaken process" started in 2010. However, it also shows that a considerable number of cases are still outstanding and that many new and old challenges lie ahead: problems of capacity of domestic

53 Alice Donald and Anne-Katrin Speeck, "The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments," *Human Rights Law Review* 19, no. 1 (2019): 83.

54 Lucja Miara and Victoria Prais, "The role of civil society in the execution of judgments of the European Court of Human Rights," *European Human Rights Law Review* 12, no. 5 (2012): 528.

55 *Supervision of execution of judgments and decisions of the European Court of Human Rights 2018. 12th Annual Report of the Committee of Ministers* (Strasbourg: Council of Europe Committee of Ministers, 2019), 9.

56 *Supervision of execution of judgments and decisions of the European Court of Human Rights 2019. 13th Annual Report of the Committee of Ministers* (Strasbourg: Council of Europe Committee of Ministers, 2020), 7.

actors, problems of resources, insufficient political will or even clear disagreement with a judgment.

The ECtHR's case law is an integral part of the action taken by the Council of Europe to protect democracy, the rule of law and human rights. It is now at the heart of European legal culture in the field of human rights and civil liberties[57]. The *acquis* of the Assembly, which has always highlighted the obligation for member States to implement the Court's judgments, is considerable in this field. Even if, from the standpoint of the Convention, this matter is above all the responsibility of the Committee of Ministers, the Parliamentary Assembly has shown that the monitoring it carries out in this field and the political influence it exerts on such occasions could provide greater support for the action of the Committee of Ministers and therefore present an added value. In particular, the Assembly has systematically called on national parliaments to be more proactive in the process of implementing the Court's judgments[58].

The Parliamentary Assembly urged in 2017 the Committee of Ministers "to use all available means to fulfill its tasks under Article 46.2 of the Convention", to continue to strengthen synergies, within the Council of Europe, between all the stakeholders concerned, to give renewed consideration to the use of the procedures provided for in Article 46, paragraphs 3 to 5, of the Convention, to co-operate more closely with civil society and guarantee greater transparency in supervising the implementation of judgments[59]. In February 2018 the Committee of Ministers submitted a reply to this recommendation, in which it referred to a number of measures taken to improve supervision of the Court's judgments' implementation in the context of the Brussels Declaration of 2015 and to the increase in the number of closed cases[60]. It stressed that the resources of the Department for the Execution of Judgments had increased significantly in the biennium 2016–2017. Moreover, it had started devoting part of its Human Rights DH meetings (which focus on the execution of the Court's judgments) to

57 Jerzy Jaskiernia, *Funkcje Konstytucji RP w dobie integracji europejskiej i radykalnych przemian politycznych* (Toruń: Wydawnictwo Adam Marszałek, 2020), 308–309.

58 PACE, The implementation of judgments of the European Court of Human Rights, Explanatory memorandum by Mr Eftastiou, rapporteur, Doc. 15123, 15 July 2020.

59 PACE Rec. 2110 (2017).

60 PACE, Doc. 14502, § 2, 5 and 7.

thematic debates to allow the representatives of member States to discuss their practices in executing judgments in specific areas (for example a debate on conditions of detention took place during the 1310th meeting in March 2018)[61].

In the contribution it prepared in response to Recommendation 2110 (2017) of the Assembly[62], the European Commission for Democracy through Law (Venice Commission) stated that it could "usefully contribute to a better execution of the ECtHR's judgments", as its role consisted, mainly, in drawing the national authorities' attention to the incompatibility of a legal act or of a practice with the Convention. This statement was not a surprise since on several occasions, the Venice Commission had issued in the past opinions (sometimes in co-operation with other Council of Europe departments or the Bureau of Democratic Institutions and Human Rights of the OSCE) on general measures adopted by the authorities with a view to executing the Court's judgments (for example, in the context of the execution of the following judgments: *Vyerentsov v. Ukraine*, concerning two draft laws on the guarantees for freedom of peaceful assembly[63], *Oleksandr Volkov v. Ukraine* concerning a draft law amending the law on the judicial system and the status of judges[64] or *Bayatyan v. Armenia* concerning a draft law amending the law on alternative national service[65]. The Venice Commission also took a stance on the amendment to the Russian Federal Constitutional Law adopted by the State Duma on 4 December 2015 and approved by the Council of the Federation on 9 December 2015[66]. According to this

61 Committee of Ministers, Rapporteur Group on Human Rights, GR-H(2017)8-final.

62 Venice Commission, CDL-AD(2017)017, Comments on Recommendation 2110(2017) of the Parliamentary Assembly of the Council of Europe on the Implementation of the judgments of the European Court of Human Rights with a view to the Committee of Ministers reply, adopted at its 112th plenary session (Venice, 6–7 October 2017), also appeared to the Committee of Ministers' reply to Recommendation 2110 (2017).

63 Application No. 20372/11, judgment of 14 April 2013. See opinion of the Venice Commission CDL-AD(2016)030.

64 Application No. 21722/11, judgment of 9 January 2013. See opinion of the Venice Commission CDL-AD(2015)0018.

65 Application No. 23459, judgment of 7 July 2011 (grand Chamber). See opinion of the Venice Commission CDL-AD(2011)051.

66 The amendment was signed by the President on 14 December 2015 and came into force on 15 December 2015.

law, the Constitutional Court has authority to declare the decisions of international courts (including the ECtHR) "non-executable" on the grounds that they are incompatible with the "foundations of the constitutional order of the Russian Federation" and "with the human rights system established by the Constitution of the Russian Federation". In its final opinion on this amendment, the Venice Commission pointed out that the execution of the ECtHR's judgments was an unequivocal, imperative legal obligation, whose respect was vital for preserving and fostering the community of principles and values of the European continent[67]. In its 2002 opinion on the implementation of the ECtHR's judgments, it had underlined the fact that the execution of judgments and its monitoring was not only a legal but also a political problem[68]. The Venice Commission's opinions prove to be a useful tool and method to ensure better implementation of the Court's judgments[69].

According to the 2019 Annual Report of the Committee of Ministers, 5 231 judgments were pending (on 31 December 2019) before the Committee of Ministers, at different stages of execution, in comparison with 6 151 at the end of 2018. The 10 following countries had the largest number of pending cases: Russian Federation (1 663, in comparison with 1 585 in 2018), Turkey (689, in comparison with 1 237 in 2018), Ukraine (591, in comparison with 923 in 2018), Romania (284, in comparison with 309 in 2018), Hungary (266, in comparison with 252 in 2018), Italy (198, in comparison with 245 in 2018), Greece (195, in comparison with 238 in 2018), Azerbaijan (189, in comparison with 186 in 2018), the Republic of Moldova (173, likewise in 2018) and Bulgaria (170, in comparison with 208 in 2018). There are fewer than one hundred cases concerning the other member States (Poland, which had 100 cases at the end of 2018, had 98 of them at the end of 2019). The overall number of judgments pending before the Committee of Ministers has considerably fallen in comparison with the end of 2016 (9 941)[70].

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67 CDL-AD(2016)016, § 38.

68 CDL-AD(2002)34, § 50.

69 Wolfgang Hoffmann-Riem, "The Venice Commission of the Council of Europe – Standards and Impact," *European Journal of International Law* 25, no. 2 (2014): 581.

70 PACE, Doc. 15123 (2020), § 12.

The issue is not only a quantitative one but also a qualitative one. Therefore, it is interesting to refer to the number of applications pending before the Court, whose statistics show slightly different figures from those of the Committee of Ministers. On 29 February 2020, of the 61 100 applications pending before the Court, more than two thirds came from the four following member States, namely the Russian Federation (25,2%), Turkey (15.7%), Ukraine (15.1%) and Romania (13%). They were followed by Italy (5.1%), Azerbaijan (3.3%), Bosnia and Herzegovina (2.7%), Armenia (2.7%), Serbia (2.1%) and Poland (2.1%). These statistics, which concern applications on which the Court has not yet ruled, often illustrate the extent of structural problems at the national level – problems which should have been resolved in the context of the execution of the Court's earlier judgments. This is particularly the case of the Russian Federation, Turkey, Ukraine and Romania, which come up high in both rankings. While Bosnia and Herzegovina, Armenia, Serbia and Poland are within the 10 countries with the highest percentage of cases pending before the Court, they rank respectively 16th (39 cases), 17th (38 cases), 13th (57 cases) and 11th (98 cases) in the statistics of the Committee of Ministers. While Hungary, Greece, the Republic of Moldova and Bulgaria are not among the countries having the highest number of cases pending before the Court, they still have many 'leading' cases pending before the Committee of Ministers[71].

With regard to the main themes under enhanced supervision, at the end of 2019, over half the cases related to five major problems: actions of security forces (17%), the lawfulness of detention on remand and related issues (10%), specific situations linked to violations of the right to life and ill-treatment (9%) conditions of detention and lack of medical care (8%), and excessive length of judicial proceedings (8%). These are followed by other interferences with property rights (7%), non-execution of domestic judicial decisions (5%), lawfulness of expulsion or extradition (4%), violations of freedom of assembly and association (4%) and of freedom of expression (4%). By the end of 2019 the share of cases concerning excessive length of judicial proceedings had decreased to 8% (in comparison with 22% in 2011), which may be due to the introduction of effective remedies at the national level. Together, these themes cover 76% of the cases pending

[71] PACE, Doc. 15123 (2020), § 13.

before the Committee of Ministers under enhanced supervision. For 81% of these cases, the breakdown by country is as follows: Russian Federation (19%), Ukraine (17%), Turkey (11%), Romania (8%), Italy (6%), Bulgaria (6%), Azerbaijan (5%), Poland (3%), Greece (3%) and Hungary (3%)[72].

The 2019 Annual Report shows a significant increase in the involvement of civil society in the process of implementation of the Court's judgments, in particular through the increased number of submissions presented to the Committee of Ministers under Rule 9.2. of its *Rules for the supervision of the execution of judgments and the terms of friendly settlements* (133 in 2019, compared to 64 in 2018 and 79 in 2017)[73].

The 2019 Annual Report also shows that the notion of "shared responsibility" for the implementation of the Convention norms works well with an increased involvement in the process before the Committee of Ministers of national actors, including ombudsman institutions and civil society, and at the Council of Europe, of other bodies, including the Commissioner for Human Rights, the CPT, the Venice Commission, the European Commission against Racism and Intolerance (ECRI), the Council of Europe Development Bank (which was one of the founders of the HRTF) and, last but not least, the Assembly itself. The case of *Zorica Jovanović v. Serbia*[74] concerning the disappearance of new-born babies from maternity wards, is a good example in this context: following good cooperation between the Serbian authorities and the Council of Europe, legislation setting up an investigatory mechanism to establish the fate of those babies was adopted at the beginning of 2020[75].

In their 2020 Annual Report[76] the Committee of Ministers have stated that despite the difficulties linked to the pandemic COVID-19, 2020 saw a significant reinforcement of the execution process, through a record number of communications from civil society organizations and national

72 PACE, Doc. 15123 (2020), § 62.

73 PACE, Doc. 15123 (2020), § 63.

74 Application No. 21794/08. Judgment of 26 March 2013. See decision adopted at the 1369th Meeting (DH), CM/Del?Dec(2020)1369/H460–30, 5 March 2020.

75 PACE, Doc. 15123 (2020), § 63.

76 *Supervision of execution of judgments and decisions of the European Court of Human Rights 2020. 14th Annual Report of the Committee of Ministers* (Strasbourg: Council of Europe Committee of Ministers, 2021).

human rights institutions and the first ever submission to the Committee of Ministers of a Rule 9 communication by the Council of Europe Commissioner for Human Rights, swiftly followed by four more. Notwithstanding, serious challenges continue to be raised in the context of the execution of many cases, in particular those concerning inter-state and other cases related to post-conflict situations and unresolved conflicts, "Article 18" judgments concerning abusive limitations of rights and freedoms and systemic/structural problems, such as ill-treatment or death caused by security forces and ineffective investigations, as well as non-Convention compliant detention conditions. In order to successfully cope with these challenges, member States' capacity for rapid, full and effective execution of the ECtHR's judgments needs to be strengthened and accompanied by further high-level political commitment as well as support from the Council of Europe. The number of judgments pending before the Committee reached 5,233, among the lowest counts since 2006. It follows the closure in 2020 of 983 cases (including 187 "leading" cases revealing notably structural or systemic problems), as a result of the adoption by respondent States of individual and a wide range of legislative and other general measures to execute the Court's judgments. Among the most significant cases which the Committee was able to close in 2020 were three cases regarding abusive limitations of the right to liberty and security in Azerbaijan (individual measures in *Ilgar Mammadov* and *Rasul Jafarov*), and a case concerning voting rights in local elections in Bosnia and Herzegovina (Baralija)[77].

As regards parliamentary involvement[78], more information has been obtained from 27 national delegations to the Assembly[79]. It follows that many national parliaments still lack permanent structures to monitor the implementation of the Court's judgments and the Convention's implementation in general. As regards the Assembly Secretariat's activities, the Parliamentary Project Support Division (PPSD) has organized a number of seminars for members of parliaments and their staff on the role of national parliaments in implementing the standards of the Convention.

77 Ibidem, 12.

78 Jerzy Jaskiernia, *Parliamentary Assembly of the Council of Europe* (Warsaw: University of Warsaw, Council of Europe Information Office, 2002), 89.

79 Information document AS/Jur(2019)85 of 8 November 2019.

A handbook on "National Parliaments as Guarantors of Human Rights in Europe" for parliamentarians was published in 2018 and is now available in 11 languages. The Assembly's role in monitoring the implementation of the Court's judgments has been emphasized in its recent PACE's resolution "The role and mission of the Parliamentary Assembly: main challenges for the future" of 10 April 2019[80].

The implementation of judgments of the ECtHR was a subject of PACE's resolution 2358 (2021) "The implementation of judgments of the European Court of Human Rights"[81]. Although primary responsibility for supervision of the implementation of judgments of the European Court of Human Rights lies with the Committee of Ministers, the Parliamentary Assembly has significantly contributed to this process. The Assembly recalled in particular its Resolutions 2178 (2017), 2075 (2015), 1787 (2011), 1516 (2006) and Recommendations 2110 (2017) and 2079 (2015) on the "Implementation of judgments of the European Court of Human Rights", in which it promoted national parliaments' involvement in this process. It also recalled that the implementation of a Court judgment, required by Article 46.2 of the Convention, may relate not only to the payment of just satisfaction awarded by the Court, but also to the adoption of other individual measures (aimed at *restitutio in integrum* for applicants) and/or general measures (aimed at preventing fresh violations of the Convention).

Since last examining this question in 2017, the Assembly noted further progress in the implementation of Court judgments, notably a constant reduction in the number of judgments pending before the Committee of Ministers (5 231 at the end of 2019) and the adoption of individual and general measures in many complex cases, which are still pending. This shows the efficiency of the reform of the Convention system started in 2010 after the high-level conference in Interlaken and the impact of Protocol No. 14 to the Convention, which entered into force in June 2010, in response to the extremely critical situation of the Court and over 10 000 judgments pending before the Committee of Ministers at that time. PACE welcomed

80 PACE Res. 2277(2019).

81 *Assembly debate* on 26 January 2021 (3rd Sitting) (see Doc. 15123 and addendum, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Constantinos Efstathiou). *Text adopted by the Assembly* on 26 January 2021 (3rd Sitting).

the measures taken by the Committee of Ministers to make its supervision of the implementation of Court judgments more efficient and the synergies that have been developed in this context within the Council of Europe as well as between its bodies and national authorities[82].

However, the Assembly remained deeply concerned over the number of cases revealing structural problems pending before the Committee of Ministers for more than five years. The number of such cases has only slightly decreased over the last three years. The Assembly also noted that the Russian Federation (including illegally annexed Crimea and temporarily occupied territories of Donetsk and Luhansk regions), Turkey, Ukraine, Romania, Hungary, Italy, Greece, the Republic of Moldova, Azerbaijan and Bulgaria have the highest number of non-implemented Court judgments and still face serious structural or complex problems, some of which have not been resolved for over ten years. This might be due to deeply rooted problems such as persistent prejudice against certain groups in society, inadequate management at the national level, lack of necessary resources or political will or even open disagreement with the Court's judgment. PACE was particularly concerned with the increasing legal and political difficulties surrounding the implementation of the Court's judgments and notes that any national legislative or administrative measure cannot add further obstacles to this process. The Assembly stressed the inadmissibility of member States to legitimize the possibility of non-implementation of the Court's decisions. The Assembly further expressed its concern for the obstacles to the implementation of the Court's judgments delivered in inter-States cases or showing inter-State features. It called on all States Parties to the Convention involved in the process of implementation of such judgments not to hinder this process and to fully co-operate with the Committee of Ministers. PACE once again condemned the delays in implementing the Court's judgments and recalls that the legal obligation for the States Parties to the Convention to implement the Court's judgments is binding on all branches of State authority and cannot be avoided through the invocation of technical problems or obstacles which are due, in particular, to the lack of political will, lack of resources or changes in national legislation, including the Constitution[83].

82 PACE Res. 2358 (2021), § 3.

83 PACE Res. 2358 (2021), § 4–7.

Thus, 70 years after the signing of the Convention, the Parliamentary Assembly invited all States Parties to the Convention to reaffirm their primordial commitment to the protection and promotion of human rights and fundamental freedoms, in particular though full, effective and swift implementation of the judgments and the terms of friendly settlements handed down by the Court. For this purpose, it strongly called on States Parties to the Convention to: 1) co-operate, to that end, with the Committee of Ministers, the Court and the Department for the Execution of Judgments of the European Court of Human Rights as well as with other relevant Council of Europe bodies; 2) submit action plans, action reports and information on the payment of just satisfaction to the Committee of Ministers in a timely manner; and to provide replies to submissions made by applicants, national institutions for the promotion and protection of human rights (NHRIs) and NGOs under Rule 9 of the Rules of the Committee of Ministers' for the supervision of the execution of judgments and of the terms of friendly settlements; 3) provide for effective domestic remedies to address violations of the Convention; 4) pay particular attention to cases raising structural or complex problems identified by the Court or the Committee of Ministers, especially those pending for over ten years; 5) not to adopt laws or other measures that would hinder the process of implementation of the Court's judgments; 6) take into account the relevant opinions of the European Commission for Democracy through Law (Venice Commission) when taking measures aimed at implementing the Court's judgments; 7) provide sufficient resources to relevant Council of Europe bodies and national stakeholders responsible for implementing Court judgments, including government agents' offices, and encourage them to co-ordinate their work in this area; 8) strengthen the role of civil society and NHRIs in the process of implementing the Court's judgments; 9) condemn statements discrediting the Court's authority and attacks against government agents working for the implementation of the Court' and NGOs working for the promotion and the protection of human rights[84].

As the implementation of Court's judgments still presents many challenges, the Parliamentary Assembly recommended that the Committee of Ministers: 1) continue to use all available means (including interim

[84] PACE Res. 2358 (2021), § 8.

resolutions) to fulfill its tasks arising under Article 46.2 of the Convention; 2) use once again the procedures provided for in Article 46, paragraphs 3 to 5, of the Convention, in the event of implementation of a judgment encountering strong resistance from the respondent State; however, this should continue to be done sparingly and in very exceptional circumstances; 3) give priority to leading cases pending for over five years; 4) consider transferring leading cases examined under standard procedure and pending for over ten years to enhanced supervision procedure; 5) continue to take measures aimed at ensuring greater transparency of the process of supervision of the implementation of Court judgments and a greater role for applicants, civil society and national institutions for the protection and promotion of human rights in this process; 6) continue to organize thematic debates on the execution of the Court's judgments during its meetings and consider organizing special debates on leading cases pending for over ten years; 7) continue to increase the resources of the Department for the Execution of Judgments of the ECtHR; 8) continue to step up synergies, within the Council of Europe, between all the stakeholders concerned, in particular the Court and its Registry, the Parliamentary Assembly, the Secretary General, the Commissioner for Human Rights, the Steering Committee for Human Rights (CDDH), the European Commission for Democracy through Law (Venice Commission), the European Committee for the Prevention of Torture (CPT) and the Human Rights Trust Fund (HRTF); 9) regularly inform the Assembly about judgments of the Court whose implementation reveals complex or structural problems and requires legislative action; 10) rapidly finalize its evaluation of the reform of the Convention system following the 2010 Interlaken high-level conference[85].

The analyzes undertaken by the Committee of Ministers and the Parliamentary Assembly on the implementation of the judgments of the European Court of Human Rights are characterized by a comprehensive approach. On the one hand, they focus on legal problems that often hinder and delay the implementation of judgments, and on the other hand, they point to political factors in individual countries that are the source of delays. It is particularly important that these analyzes are not limited to the role of the Committee of Ministers in the control of the enforcement of ECtHR

[85] PACE Rec. 2193 (2021), § 2.

judgments, although the role of this body in the ECHR's control system is crucial. In the last decade, the role of the Parliamentary Assembly, which systematically analyzes the state of execution of the judgments of the Tribunal, has exemplified significantly. Other organs of the Council of Europe system (e.g. the Commissioner for Human Rights, the Venice Commission, CPT, ECRI, HRTF) and civil society institutions also play an increasingly important role in this process. This comprehensive approach is already starting to bring tangible results. However, it would be hard to suggest now that the problem of the enforcement of ECtHR's judgments has already been resolved. The long list of judgments pending execution is a signal that this problem remains an important area of activity for the Council of Europe, which reduces its effectiveness and undoubtedly deserves attention and remedial action.

5. Final comment

In the light of this analysis, the initial research hypothesis was verified positive, indicating that the problem of the implementation of the judgments of the European Court of Human Rights cannot be narrowed down to the key role played by the Committee of Ministers of the Council of Europe in the control mechanism of the European Convention on Human Rights of the Council of Europe. The role of other CoE's bodies in this process should be increased, in particular: the Parliamentary Assembly, the Commissioner for Human Rights, the European Commission for Democracy through Law (Venice Commission), the Committee Against Torture (CPT), European Commission against Racism and Intolerance (ECRI) and the Human Rights Trust Fund (HRTF). Also activities of civil society institutions should be extended in this area as well.

In the last decade, the interest of the Parliamentary Assembly of the Council of Europe in this matter has clearly increased. This trend should be seen as a positive contribution. However, it should be postulated that parliamentarians sitting in the Parliamentary Assembly of the Council of Europe should be more active in this regard in their countries. They have instruments of control on the executive power in the country, which could be used to increase the effectiveness of the execution of the judgments of the European Court of Human Rights.

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