Gascon on Povse: a Presumption of ECHR Compliance when Applying the European Civil Procedure Rules?

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On the basis of the provisions of Articles 11(8) and 42(2) of the Brussels IIa Regulation, the Austrian courts, after a long and tortuous process, ended up ordering the Povse child's return to Italy, considering that the enforcement system without exequatur introduced by the Regulation at this point didn't allow them to do anything different. This «blind compliance» of the Austrian courts was, in fact, the subject of the complaint against Austria before the European Court of Human Rights (EctHR): both applicants (daughter and mother) complained that the Austrian courts had violated their right to respect for their family life, since they disregarded that the daughter's return to Italy would constitute a serious danger to her well-being and lead to a permanent separation of mother and child.

The basic argument of the Austrian Government against the complaint was to argue that its authorities had merely complied with their obligations under Brussels IIa Regulation and, in accordance with its provisions, they were not entitled to refuse to enforce the return decision nor to rule on its possible negative effects on the child. The Court's decision by majority accepts this argument and declares the application inadmissible. In the opinion of the Court a presumption exists that when a State is limited to meet its obligations as a member of an international organization (in this case, those arising from EU membership), it is also complying with the European Convention on Human Rights (ECHR) if the international organization provides fundamental rights a protection degree equivalent to that derived from the European Convention itself (as with the European Union).

The ECtHR applies to this case the doctrine of "presumption of compliance", which it had previously used in *Bosphorus v. Ireland* (30 June 2005, in a case

involving the implementation of Council Regulation No 990/93 concerning trade with the Federal Republic of Yugoslavia), *M.S.S. v. Belgium and Greece* (21 January 2011, in a case regarding the Dublin II Regulation on asylum) and *Michaud v. France* (6 December 2012, final 6 March 2013, concerning the implementation of EU legislation on money laundering and the obligation of lawyers to report suspicious transactions of their clients). In *Povse v. Austria* the focus turns to European Civil Procedure and, more specifically, to Brussels IIa Regulation and the abolition of exequatur in international child abduction matters.

Through this doctrine, the ECtHR seeks to establish an appropriate balance between control and respect for the activities of other international organizations; the Court has stated, in fact, that "the Court may, in the interests of international cooperation, reduces the intensity of its supervisory role" (*Michaud* decision, § 104). In order to decide whether this "presumption of compliance" is applicable, the ECtHR can check three different sets of questions:

a) Check that the international organization, as such, is respectful of fundamental rights in an equivalent way as these are defined in the ECHR. In the case of the EU, this first requirement is recognized without difficulty by the ECtHR, for reasons that need no further explanation here.

b) Check if the specific rule approved by the international organization and that States have the obligation to fulfill is also respectful of the fundamental rights standard set by the ECHR.

In *Povse v. Austria* the ECtHR (§ 80) performs this control when it ascertains that the Brussels IIa Regulation has sufficient mechanisms to control that potential risk to the child has been taken into account at the time of ordering his or her return. The ECtHR does not verify the legitimacy of the return system established by the Regulation from a substantive perspective: in other words, it doesn't check compliance with the right to family life of the rule according to which, if the child's removal is held to be wrongful, he or she must return to the State where he was habitually resident immediately before. But the ECtHR controls indeed that the Brussels IIa Regulation ensures that the decision ordering the return of the child is to be taken after verifying its impact on family and private life of the child, i.e. on his or her fundamental rights. There is, hence, a control on the existence of internal mechanisms to ensure respect for fundamental rights, even if

that control is made in the State of origin and can not be made in the requested State. The legislative decision –taken by the European Union when approving the Brussels IIa Regulation– to place those controls exclusively with the court of origin could not in any way be regarded as infringing the right to private and family life, as it is justified by the need to effectively combat international child abduction in the EU context.

c) Check, although in a limited manner, how State authorities have applied the specific rule approved by the international organization. In particular, the ECtHR feels empowered to check whether the rule grants discretion to the national authority, for then the use of such discretion itself may be detrimental to fundamental rights and could be criticized by the EctHR.

In *Povse v. Austria* the ECtHR concluded that Articles 11(8) and 42(2) of the Brussels IIa Regulation granted no margin for discretion to the Austrian courts required to enforce the Venetian court decision, since the system of the Regulation at this point only allows the law and the courts of the requested State to determine the best way to comply with the order, but does not entitle them to take any decision that may prevent or suspend it, although allegedly it could had the aim of safeguarding fundamental rights.

With or without the *Povse* decision, it is obvious that the implementation of the European civil procedural rules can determine the filing of applications to the EctHR. After the *Povse* decision, it seems clear that these complaints will be resolved by the ECtHR applying the presumption of compliance doctrine. The *Povse* decision may thus serve as a basis for thinking about the control the ECtHR can exercise on the rules integrating the *corpus* of European Civil Procedure Law and on their implementation by national courts.

a) The ECtHR could control, of course, if European civil procedural rules provide for the affected fundamental rights a level of substantive and procedural protection that can be assumed by the ECHR system. As a rule the European legislator is always very careful with these issues, making it difficult to estimate *a priori* the detrimental nature to the fundamental rights of the rules that comprise European civil procedural law. However, casuistry always overflows legislator's forecasts…

For instance, we can think now of the rules establishing minimum standards on

service to the defendant of the writ commencing the proceedings, which can be found in Article 14 of the European Enforcement Order Regulation, as well as in the European Order for Payment Procedure Regulation and in the European Small Claims Procedure Regulation. Approving these rules, the European procedural legislator has considered as tolerable certain mechanisms of service without proof of receipt by the debtor, although it is not always easy –at least from my perspective– to assume that the recipient actually received the documents (let's think of deposit of the document in the debtor's mailbox or of postal service without proof). Let's imagine that a default judgment is rendered against a defendant in the State of origin, because the writ commencing the proceedings had been served on him by one of these means and he didn't receive it for reasons that are not attributable to him. The judgment can be certified as European Enforcement Order and the creditor will be able to use it to seek enforcement in another Member State: in that case, the defendant will try unsuccessfully to prevent enforcement arguing that the judgment had been rendered in violation of his right to a fair trial. If the requested State is sued for that reason in the ECtHR (as happened in *Povse*), it could argue the presumption of compliance doctrine. However, when applying it to the case, could the ECtHR retain that Article 14 (c) of the European Enforcement Order Regulation, by endorsing a "too unsafe" service method, may violate the right to a fair trial arising from Article 6(1) ECHR?

b) The ECtHR should also direct control over the way the court acted in a single case, determining whether or not it had any kind of discretion. For example, if we focus on EU regulations that involve cross-border enforcement, it will be necessary to analyze the terms in which they have implemented the principle of mutual recognition and, in particular, if there is a possibility that the requested court refuses the enforcement of the decision from the court of origin.

In *Povse v. Austria* controversy arose on the occasion of the implementation of one of the pieces of the Brussels IIa Regulation ¬the return of wrongfully removed children– in which the rule granted no discretion to the addressed court: this lack of discretionary leeway drifts from the absence of an opposition to enforcement in which a public policy clause could be activated. Indeed, opposition to enforcement of a foreign decision based on the infringement of public policy is the gateway to the protection of fundamental rights in international judicial cooperation systems. The choice to suppress it or to keep it will have important

implications if the issue is examined from the perspective of a potential review by the ECtHR.

(i) In regulations establishing enforcement without exequatur and without public policy clause (Brussels IIa on child abduction and visits, European Enforcement Order, European Payment Order Procedure, European Small Claims Procedure and Brussels III) no critics can be made to the executing State which has not taken into account the possible violation of fundamental rights occurred in the original proceedings and which has not denied or suspended enforcement for this reason (precisely what happened in *Povse v. Austria*). There is, therefore, no control in the State of enforcement, and no further control can either be expected to be made by the ECtHR over the requested State, since the latter could benefit from the presumption of compliance doctrine.

It is perhaps ironic that a lower internal control also determines a lower external control by the ECtHR. This appearance, however, vanishes if attention is drawn to the following issues:

— Controls exist in the State of origin and they are sufficient to consider the right to a fair trial preserved (which is an issue that could also be scrutinized by the ECtHR, as in *Povse*).

— Eventually the courts' activity in the State of origin may also be subject to the scrutiny of the ECtHR. This, indeed, should be the most logical reaction, as it is more reasonable to blame the court of origin for a fundamental right violation than to blame the enforcement court for failing to offset the effectiveness of a foreign decision adversely affecting a fundamental right (although this sort of control is certainly possible and sometimes necessary). This is, without doubt, the clearest conclusion to be drawn from the *Povse* decision (endorsed by the critics that the ECtHR itself formulates against the applicants for failure to exhaust their means of defense before the Italian courts).

(ii) There are still regulations that maintain the public policy clause as a control tool in the State of enforcement (Brussels I, Brussels Ia –even if exequatur proceedings have been abolished–, Brussels IIa –for any matters apart from child abduction and visits–, and Regulation on Successions and Wills). If the application of one of those regulations in a particular case was under the control of the ECtHR, the question arises to what extent the existence of public policy clause

would be relevant to analyze the existence of the elements of the “presumption of compliance”. Can we understand that the existence of a “public policy exception” grants the court of enforcement a sufficient degree of discretion, whose exercise could be controlled by the ECtHR?

It is clear that the public policy clause can be used to refuse the enforcement of decisions that have been obtained violating fundamental rights or whose content itself violates a fundamental right. From this point of view, the ECtHR could criticize a national court for not using it in a particular case: like it or not, the existence of a public policy clause places the enforcement court in a position to guarantee the violated fundamental right, precisely a position it would not have if cross-border enforcement would be articulated through a system which did not include the public policy exception. This conclusion, however, should be made subject to a condition: the invocation of the public policy exception by the person against whom enforcement has been sought, since in the European procedural system in civil matters the breach of public policy can’t be ascertained by the court on its own motion. Hence, the absence of an active defense by the debtor places the enforcement court in the same position of “no discretion” that exists in regulations with no public policy exception.

This review and this definition of public policy will certainly be carried out by the ECtHR with the aim to control the way in which the courts exercise discretion; and this control on discretion, in itself, does not constitute direct control or attack against European civil procedure rules. However, if we take into account the fundamentals of this control and the context in which it operates, it is clear that the door is open to revision and, with it, to definition by the ECtHR about what should be understood for “public order” in the context of the implementation of European civil procedure rules.