7 Flying or landing? The pilot judgment procedure in the changing European human rights architecture

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1 Introduction

Polyana Valcheva, a member of the Bar in Bulgaria, was hit by the metaphorical boomerang twice. In 2004 she tipped a local prosecutor about possible documentary fraud by her former de facto spouse. In the course of the enquiry the investigating authorities found indications that Ms Valcheva herself had forged a document in order for her former partner to obtain a retirement pension. Criminal proceedings were started against both of them. Her tip about someone else led to her own prosecution. Finally, in 2010, she was acquitted. That same year she complained in Strasbourg about the excessive length of the proceedings, under Article 6 ECHR. In the summer of 2013 the European Court of Human Rights declared her complaint inadmissible.[1]

The reason is telling. In 2011 the Court had issued a pilot judgment, *Dimitrov and Hamanov*, on the systemic problem of overly long criminal proceedings in Bulgaria.[2] In that pilot judgment the Court held that the problem with such proceedings was not only 'recurrent and persistent' but also affected a potentially large number of people for whom there was need for redress at the national level.[3] In addition, the Court noted, it had found violations in over 80 cases about the same problem in the past decade and had over 200 of such cases still on the docket. Although the Court refrained from giving specific indications on how to solve the problem, as Bulgaria was already under scrutiny of the Council of Europe's Committee of Ministers on this, it did indicate that Bulgaria should put in place remedies not just for current but also for past excesses in this respect and enumerated a number of requirements such remedies should meet. Notably, the Court reiterated that

> the introduction of effective domestic remedies in this domain would be particularly important in view of the subsidiarity principle, so that individuals are

1 *Polyana Ivanova Valcheva and Enyo Nikolov Abrashev* v. *Bulgaria* App. Nos 6194/11 and 34887/11 (adm dec, ECtHR, 18 June 2013).
2 *Dimitrov and Hamanov* v. *Bulgaria* App. Nos 48059/06 and 2708/09 (ECtHR, 10 May 2011).
3 Ibid. para. 109.

> not systematically forced to refer to the Court in Strasbourg complaints that could otherwise, and in the Court's opinion more appropriately, have been addressed in the first place within the national legal system.[4]

When the Court had to decide in 2013 on Polyana, it reviewed a new remedial system set in place in Bulgaria to address the issue and concluded that it could be seen as effective, in spite of the lack of a long-term practice of implementing it. She was in effect asked to go back to the national system and try the domestic remedy first: trying to bring her case to a resolution at the European level thus failed – the second boomerang for her.

This episode in the Court's case law is illustrative of a practice developed over the past decade known as the pilot judgment procedure. It is a specific way of dealing with applications reaching the Court in Strasbourg in addressing systemic or structural human rights problems by way of giving states indications on how to try and solve these. It could be said to potentially shift the gravity of European human rights protection towards the Court, as it takes on a more intrusive supervisory role, adjudicating not just the symptoms of a problem but also looking into the root causes. By contrast, it could *also* be said to shift the centre of gravity more firmly back to the states, in line with the principle of subsidiarity. After all, by indicating parameters of how a solution of a structural problem should look like, the Court puts the bulk of decision-making in individual cases in the hands of the domestic authorities, while retaining its role as supervisor of the Convention's rights and freedoms. The pilot judgment procedure has also led to shifts in the division of labour between the Court and the Committee of Ministers and it may lead to shifts of gravity within the domestic legal order. Finally, a possible future accession of the European Union[5] may lead to a new shift, if the Court would apply its pilot judgment procedure to structural defects in the Union's legal order.

This chapter will delve into the pilot judgment procedure and the shifts in gravity of human rights protection it may result in. First, I will briefly go into the origins and the goals of the pilot judgments procedure. Second, I will investigate the conditions in which a pilot judgment can or should be applied. Third, the gravity shifts which may result from its application will be addressed.

2 Origins and goals

The pilot judgment procedure originates in two connected problems: systemic problems of human rights violations within the States Parties to the European Convention and ensuing large numbers of applications concerning these issues coming to the European Court of Human Rights in Strasbourg. In an ideal feed-back loop this issue would not occur, as once a violation would be found by the Court in one case, the state concerned would endeavour to remedy the problem

4 Ibid. para. 122.
5 Which now seems a prospect relegated to the very distant future, with the Court of Justice of the European Union's Advisory Opinion 2/13.

not only for the individual applicant of the case, but if necessary also change its laws or policies in order to address similar cases and avoid new violations. This would then prevent new applications on the same issue being lodged with the Court. However, in practice, states have very often either been unable or unwilling to implement the necessary changes. In addition, effective remedies to offer at least some relief to victims at the national level do not always exist. As a result, systemic human rights violations of various kinds, ranging from unclear restitution schemes to unduly delayed judicial procedures, have plagued Europe in spite of the presence of a long-established human rights protection system. To be sure, the problem that to a certain extent may have occurred in any event, was compounded by the accession of a large number of new state parties after the end of the Cold War in the 1990s. Many of these states struggled with the extensive process of change from communist dictatorship to capitalist democracy. On top of this, some regions such as the Balkans and the Caucasus were plagued by violent conflict.

All of the above changed the role of the Court. No longer could it limit itself to fine-tuning the parameters of relatively well-functioning states and to taking the time to deal with a relatively small amount of cases.[6] Indeed, one of the key reasons to make the Court a permanent, full-time institution as of 1998 was partly caused by a large increase in applications – and thus underlying human rights problems – reaching the Court. The number of human rights complaints was larger than what the Court could effectively deal with. In 1998, the backlog of cases was around 7,000.[7] These numbers would increase exponentially in the following years. The problem of the backlog quickly became an existential threat to the Court and attempts to reform the Court to deal more effectively with it has become a recurring theme in the years since. The rise in pending applications was only reverted from 2011 onwards, when it reached a peak of 161,000. The bulk of the admissible cases among those were repetitive cases, relating to recurring human rights violations.[8] In the discussions leading up to one of the key reform protocols to address the problem, Protocol No. 14 adopted in 2004, the pilot judgment procedure was born. The representatives of the state parties were of the opinion, contrary to the Court's own wishes, that it was not necessary to include the new idea formally in Protocol 14. Rather, the Steering Committee on Human Rights of the Committee of Ministers of the Council of Europe, argued that a new approach could be adopted within the existing rules.[9] This stance may have been triggered by expediency: the process of ratification and entry into force of a new

6 Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgments', *Sydney Law School Legal Studies Research Paper* No. 08/135 (2008), at: <ssrn.com/abstract=1295652>.
7 European Court of Human Rights, *Annual Report 2005* 24, at: <echr.coe.int>.
8 European Court of Human Rights, *Annual Report 2014*, foreword.
9 Costas Paraskeva, 'Returning the Protection of Human Rights to Where They Belong: At Home' (2008) 12 *International Journal of Human Rights* 415, 434.

protocol could take years[10] and new and creative solutions were called for right away.

Thus, the Committee of Ministers issued a resolution in 2004 on judgments revealing systemic problems with the implementation of the Convention.[11] The Court was invited to

> identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.[12]

The resolution indicated that this would both help to guarantee the effectiveness of Strasbourg's human rights protection system – by preventing it from becoming bogged down in an overflow of applications – and that it would enable state parties to receive guidance on both the identification and tackling of systemic human rights problems.

In spite of discussion, even within the Court itself, about the lack of a clear legal basis,[13] the Court began using the procedure right away. The 'pilot case' of the pilot procedure itself was *Broniowski* v. *Poland*, a case focused on the lack of sufficient compensation for Poles who had been forcibly displaced at the end of the Second World War.[14]

3 What is a pilot judgment procedure?

From the perspective of shifting gravities the pilot judgment procedure entails an increased role for the Court in the triangle Court (judicial decision-making) – Committee of Ministers (supervision of execution of judgments) – state (implementation of judgments). After all, the Court is called upon to take a more active role in both the assessment of an issue and in directions for its resolution. It also specifically is meant to go beyond the mere specifics of a single selected case. The direction the Court may suggest is more explicitly relevant for other similar cases than in its ordinary judgments. And state parties are more explicitly required than in such ordinary cases to make wider policy or legislative changes. Considering this

10 Indeed, Protocol 14 only entered into force as late as 2010.
11 Committee of Ministers, resolution Res(2004)3 on judgments revealing an underlying systemic problem, 12 May 2004.
12 Ibid.
13 See e.g. Lech Garlicki, 'Broniowski and After: On the Dual Nature of "Pilot Judgments"', in Lucius Caflisch and others (eds), *Human Rights – Strasbourg Views. Liber Amicorum Luzius Wildhaber* (Engel Verlag, 2007) 177, at 182–191.
14 *Broniowski* v. *Poland* App. No. 31443/96 (ECtHR, 22 June 2004). The decisions on the admissibility and on the friendly settlement reached were made on 19 December 2002 and 28 September 2005 respectively.

enhanced role for the Court it is all the more important to have a clear understanding of what a pilot judgment is and when it should be applied. The then President of the Court, Luzius Wildhaber, seems to have been a proponent of a sparing approach of the procedure. Taking his cue from the *Broniowski* case, he later identified no fewer than eight specific characteristics which turn a Strasbourg case into a pilot judgment. One of the underlying reasons might have been to avoid the Court from overstepping its boundaries and losing the good will of the state parties. The more strings one attaches to the application of a pilot judgment, the less one may be seen as overly activist. These eight characteristics are the following: (1) the Grand Chamber of the Court finds a violation of the Convention affecting a whole category of people in a similar situation; (2) the Court concludes that, as a result, this violation has brought or will bring many similar applications to Strasbourg; (3) the Court gives general instructions to the state concerned in order to address the issue; (4) such state measures should also retroactively apply to deal with comparable situations, e.g. when new remedies are offered; (5) the Court 'freezes' or adjourns similar pending cases; (6) the operative part of the judgment explicitly indicates the need for general measures, so as to increase the authority and effect of the pilot elements of the judgment; (7) just satisfaction in the particular case is deferred until the state has taken measures of implementation; (8) and, finally, the key Council of Europe institutions are informed of developments in the pilot case.[15] These institutions include the Committee of Ministers, the Parliamentary Assembly and the Human Rights Commissioner. The latter characteristic is illustrative of the fact that any potential shift in gravity goes hand in hand with enhanced cooperation between the institutions involved. The introduction of the pilot judgment is therefore far from a judicial coup by the Court – after all it was introduced at the prompting of the states themselves. Rather, it should be seen as a method of closer cooperation in the triangle mentioned above in order to solve systemic issues at the national level *and* preventing the meltdown of the European supervisory system.

The eight characteristics have not become the defining boundaries of the pilot judgment procedures. Rather the Court's practice shows a high number of variations upon a common theme. These could, as I have argued elsewhere,[16] be seem as a continuum: on the one extreme are those cases that fulfil all eight of Wildhaber's ideal-type requirements. On the other extreme there are those cases in which the Court has, also before 2004, established that there is a systematic problem or that a specific measure by a state is called for. These, in themselves, do not turn a case into a pilot judgment. Rather, it is the combination of these two factors that does:

15 Luzius Wildhaber, 'Pilot Judgments in Cases of Structural or Systemic Problems on the National Level', in Rüdiger Wolfrum and Ulrike Deutsch (eds), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Springer, 2009) 69, 71.

16 Antoine Buyse, 'The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges' (2009) 57 *Nomiko Vima* 1913.

first, identification of a systemic problem and, second, explicit guidance from the Court to the state concerned.[17]

In the first few years of practice many variations occurred. To mention just a few examples: in the 2005 judgment of *Lukenda* v. *Slovenia*,[18] on overly lengthy judicial procedures, the Court identified a systemic problem resulting from failing legislation and inefficient administration of justice. It did not, however, freeze comparable pending cases. These cases continued to be decided upon by the Court until the very moment that Slovenia put in place an effective domestic system in 2007.[19] Sometimes, pilot judgments were issued by sections of the Court, rather than by the Grand Chamber, such as in *Xenides-Arestis* v. *Turkey*.[20] In other instances, the Court did not at the time of the judgment itself dub a judgment as 'pilot' but rather did so after the fact: in 2006, in *İçyer*, on displacement in Eastern Turkey, the Court held that Turkey had put in place a relevant new domestic mechanism and declared the application inadmissible.[21] In the decision it referred to the original judgment in which it identified the problem, *Doğan and others* from 2004,[22] as the relevant pilot judgment on the issue – retroactively, as *Doğan* had not been called a pilot judgment previously. In the Italian case of *Scordino* the Court did identify systemic problems on several counts and asked Italy to address to issue within six months, but it did not mention this in the operative part of the judgment.[23]

These variations may benevolently be seen as a test phase in which the Court tested in which ways the pilot judgment procedure could work. However, these variations themselves caused criticism. Judge Zagrebelsky indicated in his dissenting opinion in the *Lukenda* case that for reasons of consistency of case law in such an important procedure, only the Grand Chamber should issue pilot judgments. In addition, the variations were not always to the liking of both states and applicants. Both have an interest in some kind of legal certainty as to when and how the Court would apply such a procedure. Especially for applicants whose cases are adjourned because they are in a comparable situation as the applicant in the pilot case, a lot is at stake. For them, justice delayed may feel as justice denied.

These practical concerns about the flexible application of pilot judgment linked up to concerns about the lack of legal basis. The Court was initially pragmatic in its response to these uncertainties. In a reversal of its initial position in 2004, it was of the opinion in 2007 that practical experience on the pilot judgments

17 See also: Erik Fribergh, 'Pilot Judgments from the Court's Perspective', in Council of Europe, *Towards Stronger Implementation of the European Convention on Human Rights. Proceedings of the Colloquy organised under the Swedish Chairmanship of the Committee of Ministers of the Council of Europe* (Council of Europe, 2008) 86, 91.
18 *Lukenda* v. *Slovenia* App. No. 23032/02 (ECtHR, 6 October 2005).
19 *Korenjak* v. *Slovenia* App. No. 463/03 (ECtHR, 15 May 2007).
20 *Xenides-Arestis* v. *Turkey* (merits) App. No. 46347/99 (ECtHR, 22 December 2005).
21 *İçyer* v. *Turkey* App. No. 18888/02 (adm dec, ECtHR, 12 January 2006).
22 *Doğan and Others* v. *Turkey* App. Nos 8803–8811/02 and others (ECtHR, 29 June 2004).
23 *Scordino* v. *Italy* App. No. 36813/97 (ECtHR, 29 March 2006).

procedure's efficacy was necessary before thinking about a change of the Convention itself.[24] The Court based its pilot judgments on an existing Convention provision, Article 46 ECHR. This article provides in its first paragraph that state parties are bound to abide by the final judgments of the Court in cases in which they are parties. Before the entry into force of Protocol 14 and thus during the first years of pilot judgment practice, Article 46 only had one second paragraph indicating that judgments were to be transmitted to the Committee of Ministers which would supervise the execution of judgments. Thus, the Court had to specify in its case law that the provision did provide, in its interpretation, a legal basis for giving more specific indications to state parties. It had done so as early as 2000 in the Italian *Scozzari and Giunta* case,[25] and repeated it in the first pilot judgment, *Broniowski*: Article 46 included an obligation which went beyond the paying of just satisfaction under Article 41. It included a state's legal duty to 'select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects'.[26] The Court held that the state was free to choose the means of implementation, but added that this was subject to monitoring by the Committee of Ministers and 'provided that such means are compatible with the conclusions set out in the Court's judgment'.[27] In doing so, the Court gave itself jurisprudential foundation to further develop the pilot judgments on.

After a number of years, the Court solidified the legal basis and enhanced legal certainty by including the pilot judgment procedure in its Rules of Court in 2011.[28] One may surmise that two developments triggered this. First, the Court had by then gained experience in the pros and cons of the possible variations in the procedure.[29] Second, Protocol 14 had, after a very slow ratification process, finally entered into force in 2010. The Protocol, among other matters, extended Article 46 ECHR on some crucial elements of the division of tasks between the Committee of Ministers and the Court – all the more important for pilot judgments. The new version of the provision gives the Committee the option to ask the Court for an interpretation of a judgment if the execution of that judgment is hindered by a problem of interpretation. In addition, it gives the Committee the opportunity, if a state party refuses to implement a judgment, to ask the Court for a formal pronouncement on whether this is indeed the case. Finally, if the Court finds a violation of a state's duty under paragraph 1 of the Article to abide by its

24 European Court of Human Rights, *Opinion of the Court on the Wise Persons' Report* (2 April 2007) 5, at: <echr.coe.int>.
25 *Scozzari and Giunta* v. *Italy* App. Nos 39221/98 and 41963/98 (ECtHR, 13 July 2000) para. 249.
26 *Broniowski* (n. 14), para. 192.
27 Ibid.
28 To be found at: <echr.coe.int>.
29 On the practice of the pilot judgment procedure, see extensively: Philip Leach, Helen Hardman, Svetlana Stephenson and Brad Blitz, *Responding to Systemic Human Rights Violations* (Intersentia, 2010).

final judgments, it shall refer the case to the Committee 'for consideration of the measures to be taken'.[30] What Article 46 does in its new version is to more closely connect the work and tasks of the Court and the Committee to each other. It aims to offer procedures both in cases in which a state is unwilling or unable – due to a lack of clarity in the judgment – to execute a judgment of the Court.

Since 2011, the new rule 61 of the Rules of Court specifies in detail that the Court may start a pilot judgment procedure 'where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications'. The wider extent of the problem must thus be ascertained. The Court can start the procedure of its own motion or at the request of either the state or the applicant, but will always seek the views of the parties on this. The Court, through this new rule, demands from itself not only to identify the nature of the systemic problem, but also 'the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment'.[31] This may include time-limits for implementation.

The new rule also includes procedural guarantees for applicants, as a result of what one could call a learning curve the Court had gone through in the previous years. Not only will they be consulted on the desirability of pilot procedure, such a procedure will also be processed with priority. The Court may still adjourn similar cases, but in such instances the people concerned will be informed of this as well as of developments relevant to their case. And if 'the administration of justice so requires' – read: when the freezing of a case would cause a disproportionate disadvantage or problem for an applicant – the Court may examine an adjourned application. When the violation at hand is very grave, the Court may choose to continue to deal with applications just to 'remind the respondent State on a regular basis of its obligation under the Convention'.[32] Finally, if a friendly settlement is reached in a pilot case, this settlement will include redress to 'other or potential applicants'. Tellingly, the factsheet on pilot judgments on the Court's website now indicates that there is a third objective as compared to the original two (assisting states and keeping the Court's workload manageable): the possibility of speedier redress for individual applicants.[33] If anything, the pilot judgment procedure thus also attempts to create some benefits for applicants – or at least neutralise as far as possible the disadvantages of freezing comparable cases. For some, such as Polyana Valcheva, this may mean having to exhaust newly created domestic remedies.

As can be seen from the above, some but not all of Wildhaber's characteristics of an ideal-type pilot judgment have been preserved. Notably, the Court does not

30 The new paragraphs 3–5 of Article 46 ECHR.

31 Rule 61, para. 3. Thus the factsheet of the Court only includes those judgments and not the judgments in which such issues only feature in the Court's reasoning but not in the operative part.

32 *Varga and Others* v. *Hungary* App. Nos 14097/12 and others (ECtHR, 10 March 2015), para. 116.

33 Factsheet 'Pilot Judgments', version July 2015, to be found at <echr.coe.int>.

need to decide in its formation of a Grand Chamber necessarily. While still preserving a good measure of flexibility, Rule 61 provides more clarity and safeguards for all parties concerned. On top of that, the revised version of Article 46 indicates a clearer division of tasks between the Court and the Committee of Ministers, shaped in the form of closer cooperation. The next section of this chapter will zoom in on the practice of the pilot judgment procedure in the Court's case law.

4 The practising pilot

Like a pilot learning to fly, the development of the pilot judgment procedure has been a process of trial and error and constant fine-tuning, to see what works and what does not. Contrary to pilots, however, the procedure has not been tested in a virtual cockpit, but rather been refined in its application to real cases. The practice of the Court shows that the pilot judgment procedure has been applied in a limited number of situations: basically four categories of cases and two odd ones out. The odd ones out are the British prisoner voting case and the problem of the removal of permanent resident status in Slovenia after the breakup of the former Yugoslavia[34] – the former was an unsuccessful example in the sense that the issue has not been resolved, the latter seems to have led to a satisfactory solution.[35] Both were politically sensitive issues and appear to be exceptional. There are, however, four categories of issues in which the Court has issued a number of pilot judgments.[36]

The first category is that of excessive length of national judicial proceedings and the lack of domestic remedies for that problem. This may be the most ironic category in this context, as it is the very problem of lengthy procedures in Strasbourg as a result of the high influx of repetitive cases that prompted the development of the pilot judgment procedure in the first place. These cases related both to civil and criminal proceedings and concerned both long-standing state parties to the Convention (Germany, Greece and Turkey) as well as those who had acceded after the end of the Cold War (Bulgaria, Poland and Hungary). The pattern was similar: the Court indicated, for example in *Finger* v. *Bulgaria*,[37] that deficiencies in the justice system were preventing cases being dealt with within a reasonable time – the requirement under Article 6 ECHR – and indicated that at the very least a domestic remedy for this Convention violation should be put in place so that victims could receive some form of compensation for justice delayed at the national level. It is revealing that even in a pilot judgment like *Finger*, the Court does not take full centre stage but leaves leeway both to the competences of the Committee of Ministers and to the state itself, as is shown here:

34 Respectively, *Greens and M.T.* v. *United Kingdom* App. Nos 60041/08 and 60054/08 (ECtHR, 23 November 2010) and *Kurić and Others* v. *Slovenia* App No. 26828/06 (ECtHR, 26 June 2012).
35 See the just satisfaction judgment in the same case of 12 March 2014.
36 For full and updated overviews, see the Court's own factsheet on pilot judgments.
37 *Finger* v. *Bulgaria* App. No. 37346/05 (ECtHR, 10 May 2011).

> The Contracting States enjoy considerable freedom in the choice of the means calculated to ensure that their judicial systems are in compliance with the requirements of Article 6 of the Convention. Moreover, the unreasonable length of proceedings is a multifaceted problem which may be due to a large number of factors, of both legal and logistical character. Some of those – such as an insufficient number of judges or administrative staff, inadequate court premises, overly complex procedures, procedural loopholes allowing unjustified adjournments, or poor case management – may be internal to the judicial system, whereas others – such as the belated submission of expert reports and failures by the authorities to provide in a timely manner documents needed as evidence – may be extrinsic to that system. The Court will therefore abstain from indicating any specific measures to be taken by the respondent State to tackle the problem. The Committee of Ministers is better placed and equipped to monitor the measures that need to be adopted by Bulgaria in that respect.[38]

Thus, far from being overly activist, the Court is explicitly conscious of its position as an *international* and *judicial* body. It limits itself to requiring a domestic remedy to the identified problem, but leaves the specific solution to address the root cause to the state under the supervision of the Committee of Ministers. And, indeed, once Bulgaria introduced compensatory remedies, the Court declared applications about the issue inadmissible, relegating the cases back to the national level. Basing itself on the scope of the new remedial mechanism and on the means allocated to it to make it effective, the Court held that even if no long-term practical experience with the mechanism existed yet, mere doubt about its efficacy were not enough for applicants not to exhaust the new remedy.[39]

The second category also relates to the national judicial systems: prolonged non-enforcement of court decisions and the lack of remedies for this. The pilot cases in this category thus far all concern states that came into existence after the dissolution of the Soviet Union (Russia, Moldova and Ukraine). These judgments related both to financial claims (judgment debts and honour debts) as well as material claims (for social housing and other public services). The Court's pilot judgments in these cases again show a variety of carrot-and-stick elements. Sometimes the Court stayed the examination of cases and requested the state concerned to introduce domestic remedies. When the state, in this case Ukraine on the issue of remedies for unenforced honour debt judgments, failed to adopt such remedies, the Court decided to resume the examination of the pending similar applications, to put renewed pressure.[40] After an initial indication by the Court, gravity of action thus shifted back to the state and later, when action was not sufficiently

38 Ibid., para. 120.

39 *Anton Antonov Blakchiev and Others* v. *Bulgaria* App. No. 65187/10 (adm dec, ECtHR, 18 June 2013), paras 70–81.

40 *Yuriy Nikolayevich Ivanov* v. *Ukraine* App. No. 40450/04 (ECtHR, 15 October 2009) and ensuing decisions.

taken, the Court took back the initiative. In another case, on enforcement of court decision granting benefits, the Court held that Russia had to set up, in cooperation with the Committee of Ministers (sic!), an effective remedy and had to grant redress to victims in around 600 similar applications pending in Strasbourg within two years.[41] One could speak here of a situation of enhanced supervision while at the same time safeguarding the interests of victims who found themselves in a comparable situation. Overall, the emphasis in this category of cases was on the creation of domestic remedies for the problem: the Court did not tell State Parties in detail how to solve the underlying issue. That was a task for the states themselves to take up, if need be in consultation with the Committee of Ministers.

The third category concerns violations of property rights, ranging from failing property restitution or compensation schemes, resulting from the aftermath of Communist expropriations during the Cold War, to repayment problems of foreign currencies saved up during that period in former Yugoslav countries. Thus many, but not all, were closely connected to the transition from communism to democracy. In these instances the Court gave general indications concerning the framework. To Albania, the court indicated for example that it should not rely purely on financial compensation but also to rely on alternative forms of compensation and to set realistic and binding time-limits for each phase of the compensation process. These were aimed at preventing further unnecessary delays. To emphasise this, the Court set a time-limit to the state of 18 months to effectively secure the right to compensation.[42]

The fourth and final larger category of cases relates to inhuman and degrading detention conditions. Since this concerns violations of one of the core Convention provisions, Article 3, the Court is more forceful on this issue. All pilot judgments on the issue include precise time-frames of action, between 6 and 18 months, and several include requests to create domestic remedies against complaints of prison overcrowding and bad detention conditions which are not only of a compensatory but also of a preventive nature.[43] Finally, similar applications are usually not adjourned, because the right concerned is so fundamental.[44]

What transpires from this practice is that, even if at first glance the pilot judgment procedure seems to mark a shift of gravity towards the Court, a closer look reveals that this is only true to a limited extent. Yes, the Court does limit a state's freedom to decide what kind of implementation measures are needed, but it does not do so in extreme detail. The framework set by the Court is often relatively general in nature. Many of the issues concern fields, such as the organisation of national justice or socio-economic property issues, in which a wide margin of appreciation

41 *Gerasimov and Others* v. *Russia* App. No. 29920/05 and others (ECtHR, 1 July 2014) and follow-up decisions.

42 *Manushaqe Puto and Others* v. *Albania* App. Nos 604/07 and others (ECtHR, 31 July 2012).

43 E.g. *Neshkov and Others* v. *Bulgaria* App. Nos 36925/10 and others (ECtHR, 27 January 2015).

44 *Ananyev and Others* v. *Russia* App. Nos 42525/07 and 60800/08 (ECtHR, 10 January 2012).

exists. Moreover, the Court in effect often implicitly builds on the principle of subsidiarity by calling for the creation or improvement of remedies at the national level. As judge Zupančič phrased it in an opinion in the pilot judgment *Hutten-Czapska* v. *Poland*, 'Look, you have a serious problem on your hands and we would prefer you to resolve it at home…! If it helps, these are what we think you should take into account as the minimum standards in resolving this problem…'[45]

5 When to apply it?

The practice described above shows that the pilot judgment procedure has become part and parcel of Strasbourg's practice. However, the total number of pilot judgments has not risen above a few dozen so far. This reflects that it is used sparingly, and for good reason. What reasons have been identified on the desirability applying the procedure? We can identify five relevant considerations. Two were highlighted by former judge Garlicki in one of the earlier reflections on the issue.[46]

First, he mentioned that the pilot judgment procedure is to be regarded as a measure of last resort by the Court, when more gentle ways of persuading State Parties to take action have not worked. The freezing of comparable cases, which after all is detrimental to the applicants concerned, then becomes more likely to avoid overflowing of the Court's workload. One may surmise that this has become slightly less pertinent with the Court's effective tackling of the backlog of cases.

A second consideration Garlicki put forward is that applying the pilot judgment procedure may be useful to tip the balance. When a stalemate exists between national institutions (e.g. judiciary versus executive) or within them (different parties within the legislative), the Court's verdict may weigh in to tilt the scales towards a more Convention-friendly resolution of an issue. A pilot judgment may then help to shift gravity between a state's domestic actors. The *Hütten-Czapska* judgment is a case in point, where the Court in effect aligned with the national judiciary against the executive, which had been an opponent of using the pilot judgment procedure in the matter of rent (rent-control regulations).

Two other elements have been identified by professor Wojciech Sadurski.[47] The third consideration is, and maybe rather obviously, the prospect of success. In this respect, it should be considered whether domestic judicial or bureaucratic structures are up to the task. Are only legal reforms needed or are complicated policy or even mentality changes also necessary? This consideration may help to explain that the Court focuses often on requiring domestic remedies rather than indicating a precise solution for the underlying problem.

A fourth consideration is the acceptability of quasi-constitutional adjudication by an international court vis-à-vis the state concerned. A pilot judgment with its

45 *Hutten-Czapska* v. *Poland* App. No. 35014/97 (ECtHR, 19 June 2006), partly concurring, partly dissenting opinion of Judge Zupančič.
46 For the first and second considerations, see Garlicki (n. 13).
47 For the third and fourth considerations, see Sadurski (n. 6).

explicitly general character indeed comes close to constitutional decision-making[48] and *qualitate qua* goes beyond the specifics of an individual case. Sadurski has argued that such a role may be more acceptable in the newer democracies of Central and Eastern Europe where the ECHR functions as a tool to anchor the new democratic institutions. He predicted that the procedure would be sparingly used towards more countries that had been State Parties to the Convention for a longer time. Although the majority of pilot judgments indeed pertains to the new democracies, practice has shown that this is certainly not exclusively the case.

A fifth consideration relates to the specific human rights issue at hand. Even when a large number of cases coming from a certain state relate to one Convention provision, the factual variety may still be so big, that a common approach is difficult and a representative pilot case may be difficult to find. The Court then has to limit itself to requiring procedural frameworks to be put in place, as the Article 3 pilot cases show.[49]

In applying the new procedure, the Court thus has to make assessments which go beyond its specific judicial role, taking into consideration partly unpredictable factors. This has not prevented it from increasingly using the procedure, in a good number of cases with positive effects.

6 Conclusion

With a procedure that is not laid down in the Convention itself but nevertheless has such far-reaching consequences, support of the State Parties is crucial. This support seems to have endured after the initial 2004 Committee of Ministers resolution. The 2012 High Level Brighton Declaration of all state parties, for example, expressed its support for the Court's proactive measures, such as the pilot judgment procedure to tackle its caseload of repetitive cases.[50] This was further enhanced by a call to the states themselves in the same Declaration. The Committee of Ministers was asked to 'pay particular attention to violations disclosing a systemic issue at national level, and should ensure that States Parties quickly and effectively implement pilot judgments'.[51] Pilot judgments thus continue to be of high priority, at least in the rhetoric of states. At a similar high-level conference in Brussels in 2015, representatives of many states reiterated support for the procedure, although concerns about the costs for the countries concerned (by Serbia) and admonitions about keeping more general indications limited to pilot judgments and not using them in ordinary Court judgments (Russia) could also be heard.[52] The latter is

48 On this constitutional character, see Markus Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights' (2011) 12 *German Law Journal* 1231.

49 See both Buyse (n. 16) and Leach *et al.* (n. 29).

50 High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 19–20 April 2012, to be found at: <echr.coe.int>.

51 Ibid.

52 See: *Proceedings of the High-Level Conference on the Implementation of the European Convention on Human Rights, Our Shared Responsibility*, Brussels, 26–27 March 2015, to be found at <coe.int>.

notable, as indeed, from the point of effectiveness of implementation of judgments, the 'quasi-pilot judgments' which reflect only some but not all traits of a pilot judgment procedure seem to have been less productive.[53]

The practice of the Court also shows a reassuring move towards more legal certainty on the pilot procedure, with the codification in Rule 61. In addition, implementation seems reasonable, although one must remember that pilot judgments come into play only when a situation has already vastly deteriorated – the last resort – and the prospects may not be as rosy as the Committee of Ministers noted back in 2013: 'as matters stand today no pilot judgment is unexecuted. The measures specifically prescribed by the Court in the operative provisions have all been taken, even if this has in certain cases taken a long time.'[54]

The pilot judgment has always been in danger of losing in depth (individual justice) what it gains in scope (dealing with larger numbers of situations). The procedural guarantees put down in Rule 61 partly remedy this, but not entirely. Cases can still be frozen. Those whose case is not chosen to be a pilot case, might be asked to go back to the national level to try a newly installed remedy. Apart from detrimental effects for individuals, frozen cases may also in a way let the state off the hook for a while. By contrast, continuing to deal with these comparable cases at some interval – in order not to fall back on an overload of work for the Court – may work as a pedagogic tool, a reminder for the state concerned that the problem needs to be solved. Otherwise, the Court will keep finding violations and keep imposing compensation payments on that state by way of just satisfaction to the victim concerned. But no matter which variation is used, some problems might be so politically sensitive, that no pilot judgment may help to solve them, as the problems with implementing British prisoner voting rights reflect: in *Greens and M.T.*, the Court found that a blanket ban on voting rights for people in prison was a structural problem. It first adjourned and later again started to deal with comparable cases, in an attempt to vary tactics to come to the best solution, but to no avail.[55]

If anything, the pilot judgment procedure can be seen as an additional tool in the Court's toolbox. While it has the potential to shift gravity – giving the Court a more active role in both how a judgment should be implemented and in, at least partially, assessing to what extent the state has abided by those terms – the choice for this shift is in the hands of the Court. It may shift the balance between the Committee of Ministers and the Court, between the Court and state parties and, in 'tipping-point' situations, between domestic state institutions. Moreover, it is

53 Philip Leach, Helen Hardman and Svetlana Stephenson, 'Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? *Burdov* and the Failure to Implement Domestic Court Decisions in Russia' (2010) 10 *Human Rights Law Review* 346, 358.

54 Committee of Ministers, *7th Annual Report on Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights* (2013) 10–11, to be found at: <coe.int>.

55 *Greens and M.T.* (n. 34). For other examples, see the Court's factsheet on pilot judgments (n. 33).

the Court which in calling for domestic remedies to be put in place decides to shift gravity towards the national level – even if this means a shift away from the Court, it is still a decision made by the Court itself. While the state parties have originally handed the Court this new tool, the Court decides whether to apply a pilot judgment procedure as well having the final say on its precise modalities. It is thus the Court's ultimate decision whether the pilot defies gravity.