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The pros and cons of the European Court of Human Rights pilot judgment procedure

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The ECtHR has applied the pilot judgment procedure in two cases against Poland: *Broniowski* (No. 31443/96 25/9/05) (for the first time ever) and *Hutten-Czapska* (No. 35014/97 GC 28/4/08). In both cases the underlying causes of the ECHR violation were found in systemic deficiencies of the legislation in connection with dysfunctional domestic practice. Having regard to the systemic cause of the violation, the ECtHR held that its consequences concerned not only the applicants in the abovementioned cases, but also applicants with pending ECtHR cases and potential applicants.

It comes as no surprise that the concept of pilot judgments is at the heart of the debate relating to the stronger implementation of the ECHR at the domestic level. This is exactly what the pilot judgment procedure is aimed at: implementing the ECHR in a domestic legal system in the context of systemic problems underlying the violation of the ECHR.

The judgment in the *Broniowski* case may be regarded as a leading *test case*, as it introduced a certain pattern for the pilot procedure. Having identified the defined the terms of both individual and general measures (and which was set out in the 2005 judgment).

It should be noted that whereas the 'pilot' applicant's claims under the ECHR were settled individually, the other applicants had to wait until an appropriate procedure was introduced into domestic law, since their cases were re-directed to the domestic level.

So, in fact, pilot judgments can hardly be called 'precedents', as their *rationes decidendi* are not supposed to be followed by subsequent court rulings on the same issues. Instead, pilot judgments are 'designed' for Governments rather than for applicants. The idea is to induce the domestic authorities to take over the responsibility for redressing ECHR violations in the domestic legal order. In other words, it is all about restoring the fundamental concept of subsidiarity to the ECtHR applies this procedure, it is balancing on a thin red line to justify the use of Art. 46 as a legal basis for the judgment.[1]

Secondly, one of the main weaknesses of the pilot procedure is its expanded structure. As a consequence, the ECtHR needs a considerable amount of time to reach a judgment within that framework. If we consider the pilot cases already examined by the Court, the period between the communication of the case to the Government and the delivery of the judgment amounts to up to four years. If we take into account the period prior to communication, as well the amount of time necessary to examine the clone cases, the whole procedure may take up to 10 years.

Presumably it is possible to shorten the time required considerably, at least in certain categories of cases. This could be

Responding to systemic human rights violations: an analysis of ECtHR pilot judgments

The Human Rights & Social Justice Research Institute (HRSJ) at London Metropolitan University is currently conducting research into the pilot judgment procedure and its impact within national legal systems. This research aims to provide a deepened understanding of pilot judgments and will assess whether European Governments are responding adequately to them. For more information, please see: http://www.londonmet.ac.uk/research-units/hrsj/research-projects/pilot-judgments.cfm.

systemic violation of the ECHR, the ECtHR indicated possible measures to redress the situation both in general and in respect of the applicant. The original 2004 judgment reserved the question of the payment of damages to the applicant, and, as a result of mediation between the applicant and the Government, with the involvement of the Court's Registry, a friendly settlement was reached which

the ECHR system.

In general, the pilot procedure is a useful way of dealing with systemic violations of the ECHR, however, it also has certain shortcomings. Firstly, this procedure was not envisaged in the ECHR itself and some doubts have been raised as to its legitimacy. An orthodox approach to the interpretation of the ECHR in fact indicates that whenever

achieved by simplifying some steps in the procedure. At present the pilot judgment procedure consists of three main steps: the delivery of a pilot judgment, friendly settlement and the delivery of a judgment approving the friendly settlement. We believe that in certain circumstances the procedure could involve the delivery of a pilot judgment approving a friendly

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settlement or the Government's unilateral declaration. In other words, the conclusion of a friendly settlement or the submission of a unilateral declaration could precede the delivery of a pilot judgment. The simplified pilot procedure would not replace the present one, but would have an optional character.

We are aware that the simplified pilot procedure may only concern cases where the Government does not deny the existence of a systemic violation and its causes. However, the practice of the Polish pilot cases reveals that the lengthy pilot procedure has considerable drawbacks with respect to both the Government's position and the applicants' status. It also affects the efficiency of the ECtHR.

Some other improvements could be introduced, for example, the Council of Europe Commissioner for Human Rights could act as the mediator. It is our profound belief that the expertise and experience of the Commissioner might be of great value in concluding a friendly settlement in cases revealing a structural problem.

Undoubtedly, the simplified pilot procedure could contribute to a more effective implementation of the ECHR in situations where the Government concerned declares its willingness to cooperate with the ECtHR in eliminating the problem underlying the systemic dysfunction. Of course, the concept of the simplified pilot procedure requires some further thought, however, the idea remains clear: to strengthen the mechanisms developed in the *Broniowski* and *Hutten-Czapska* cases in order to secure a more effective way of dealing with systemic violations of the ECHR.

Finally, it is noteworthy that the concept of pilot judgments is currently on the agenda of the Reflection Group (GDR) established by the Steering Committee for Human Rights in November 2007. The GDR is tasked with an in-depth examination of the concrete follow-up that could be given to the recommendations provided in the Report of the Group of Wise Persons, as well as other sources. The Polish Delegation to the GDR is particularly interested in the concept of pilot judgments and will support the idea of drafting rules governing the use of the pilot judgment procedure, with particular reference to the criteria for 'pilot cases', the procedure for their selection, the role of the Court Registry, possible involvement of other actors in the procedure and their desired effect.

There is an urgent need to clarify and simplify the pilot judgment procedure. Without any doubt, this task would benefit from the experience of the completed or pending pilot procedures, with particular emphasis on the *Broniowski* and *Hutten-Czapska* cases.

1 Article 46 of the Convention provides:
1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.