European Society of International Law

Conference Paper Series

Conference Paper No. 4/2011

Tallinn Research Forum, 26-28 May 2011

Implementation of the European Court of Human Rights' judgments concerning national minorities or why declaratory adjudication does not help

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Abstract:

Even though the European Court of Human Rights has attached an undeniable importance to the protection of national minorities through its case law, there have been particular groups of repetitive judgments that concern national minorities. These have demonstrated a serious difficulty on the part of the Court to effectively influence member states' law, policy and practice. The present paper focuses on a number of such cases coming from three southeast European states: Bulgaria, Greece and Turkey. The author observes that the traditional declaratory method of adjudication, which has been followed so far by the Court in these cases, has not aided the rapid, full and effective execution by states of the relevant judgments. A review of the work of the Committee of Ministers, the political and decision-making body of the Council of Europe supervising the execution of the Court's judgments, also demonstrates the Committee's inability to exert a substantial, decisive influence in this area so far. The paper underlines the importance of the Court's adjudicative methodology in the process of implementation of its judgments, and presents three major jurisprudential techniques the Court is currently developing: pilot, quasi-pilot and 'supportive' judgments, aimed at guiding European states in their efforts to effectively redress long-standing, systemic dysfunctions in law and practice. The author proposes a strategic overhaul of the Court's adjudicative approach towards national minority cases. This may be based on the pilot and quasi-pilot techniques in particular as well as on certain interesting case-law concerning mainly members of the Kurdish minority in Turkey, which may be systematically developed in order to enhance the effectiveness of the protection of national minorities in Europe.

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1. Introduction

The primary responsibility for the rapid, full and effective implementation of the rights and freedoms enshrined in the European Convention on Human Rights ('ECHR' or the 'Convention') lies with the contracting states, in accordance with Article 1 ECHR and the principle of subsidiarity on which international justice is founded. However, this is also a responsibility shared between the European states and the European Court of Human Rights ('the Court') whose task, under Article 19 ECHR, is to ensure the observance of the engagements undertaken by the contracting parties in the Convention and its Protocols. The importance of this *joint responsibility* was highlighted at the highest political level by the Interlaken Declaration of the High Level Conference on the Future of the Court on 19 February 2010.[1]

The Convention has played a central role 'as a constitutional instrument of European public order, on which the democratic stability of the Continent depends'.[2] Its interpretation by the Court and the implementation of the latter's judgments by the Council of Europe member states have advanced the quality of law and practice, and the effective protection of a number of disadvantaged social groups all over Europe.

[1] Available at: http://www.coe.int/t/DGHL/Monitoring/Execution/Themes/Interlaken/index_en.asp.
[2] See paragraph 2 of Declaration of the Council of Europe Committee of Ministers, *Ensuring the effectiveness of the implementation of the ECHR at national and European levels (12 May 2004),* in Council of Europe Directorate General of Human Rights (ed), *Guaranteeing the Effectiveness of the European Convention on Human Rights – Collected Texts* (2004), at 5-7.

The effective respect and protection of the rights and freedoms of 'all persons within its jurisdiction', including members of national minorities existing on its territory, is one of the basic undertakings of every one of the 47 Council of Europe member states.[3] Even though there is no established definition of the term 'national minorities', as such, for present working purposes, may be perceived groups of resident citizens that differ from the majority population of a country on grounds related to their ethnic, cultural, linguistic and/or religious identity.[4]

The Court has stressed that 'pluralism tolerance and broadmindedness' are the constituent elements of European democratic societies.[5] In the case of *Gorzelik v. Poland*, the Court's Grand Chamber elaborated further upon the notion of 'pluralism', stating characteristically that this is 'built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion'.[6]

Despite the undeniable importance attached to the protection of national minorities in the case-law of the Court, there have been particular groups of repetitive judgments concerning national minorities that have demonstrated a serious difficulty on the part of the Court to effectively influence member states' law, policy and practice. The present paper focuses on a number of such cases coming from three southeast European states, Bulgaria, Greece and Turkey, concerning members of national minorities present in these countries.

The major argument developed herein is that the adjudicative method followed so far by the Court in cases pertaining notably to national minorities in south eastern European countries, against which repetitive judgments[7] have been delivered, has not aided the rapid, full and

[3] See Article 3 of the Statute of the Council of Europe and Article 1 of the European Convention on Human Rights, available at: http://conventions.coe.int.

[4] Elements of such a definition are contained in Articles 5 and 6 of the 1995 Framework Convention for the Protection of National Minorities (FCNM). See also paragraph 7 of preamble to the FCNM: '…a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity', available at: http://conventions.coe.int.

[5] See e.g. *Handyside v. UK*, judgment of 7 December 1976, paragraph 49.

[6] Judgment of 17 February 2004, paragraph 92. Respect of 'cultural, religious and linguistic diversity' is also an obligation of the EU member states under Article 22 of the Charter of Fundamental Rights, OJ 2000 C 364/1; EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the EU*, June 2006, at 197-199.

[7] The term 'repetitive judgments' is used herein with reference to judgments finding violations by a respondent state of the same provisions of the Convention, thus indicating that the relevant applications derive from the same root cause relating to national law, policy and/or practice. The CM calls 'clone or repetitive cases' 'those relating to a structural or general problem already raised before the Committee of Ministers in one or several leading cases' and 'leading cases' those **'**which have been identified as revealing a new structural/general problem in a respondent state and which thus require the adoption of new general measures…more or less important according to the case(s)', see Council of Europe Committee of Ministers, *Supervision of the execution of judgments of the European Court of Human Rights, 4th annual report 2010* (2011), at 29.

effective execution of these judgments by the respondent states. This is due to the 'neutralized', casuistic character of these declaratory judgments that avoid an in-depth examination of the socio-political context and of structural dysfunctions of the domestic legal systems in which these violations originate.

As noted herein on a number of occasions, the Court has been extremely cautious to expressly recognize the existence of structural, chronic problems in respondent states, despite the delivery of numerous repetitive judgments concerning not only national minorities but also more anodyne, politically or socially, issues like excessive length of judicial proceedings or of pre-trial detention. Instead, the Court has opted for its traditional methodology of declaratory adjudication. This is limited to a mere recognition of violations by the respondent states without providing them, as well as the Council of Europe Committee of Ministers (the 'CM') that supervises the execution by states of the Court's judgments under Article 46 ECHR ('Binding force and execution of judgments'), with guidance to effectively ensure the non-recurrence of similar violations, thus the long-term redress of the victims.

This paper presents three major types of jurisprudential techniques that the Court is currently developing (pilot, quasi-pilot and 'supportive' judgments) and proposes a strategic overhaul by the Court of its adjudicative approach towards national minority cases. This is a challenging task that may be based on certain interesting case-law concerning mainly members of the Kurdish minority in Turkey (cases of *Ürper*, *Doğan* and *Aydin Içyer*), which is worthy to be further reflected on and developed. It is argued that the Court could draw upon and examine the possibility of making systematic use of the pilot or of the quasi-pilot judgment procedure, under development since 2004, also in national minority cases that usually, if not always, show the existence of structural dysfunctions in domestic law, policy and/or practice affecting whole classes of persons, thus warranting the special attention of the Court, the CM and, of course, the respondent states themselves.

2. The Court's declaratory judgments generating repetitive cases concerning national minorities

The Court has noted on numerous occasions that its judgments are, in principle, essentially declaratory, creating thus obligations of result and not of conduct on the part of the respondent states, by which adequate, effective redress may be attained for the Convention violations found. As a consquence, 'it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention,

provided that such means are compatible with the conclusions set out in the Court's judgment'.[8] This adjudicative policy is firmly based on the fundamental principle of subsidiarity of international justice by which of course the ECHR system is also bound.

However, the major problem that arises in this regard is that declaratory judgments are by nature more or less casuistic, lacking an analysis of the politico-legal context in which human rights violations are generated. The end result is that the CM which supervises the execution by respondent states of the Court's judgments, as well as the respondent states are left without effective, authoritative guidance as to the origins of the violations at issue and how these violations may be effectively redressed. In practice, declaratory judgments award states a wide margin of appreciation and action and on many occasions, such as in cases concerning human rights of members of minority groups, leave the victims of human rights violations without medium- or long-term redress and in fact allow recurrence of similar violations to happen. This is certainly to the detriment of the effectiveness of the ECHR system.

The CM's work of supervision of execution of the Court's judgments under Article 46 ECHR has been regarded as overall successful, leading to the reparation of hundreds of applicants and a large number of constitutional, legislative or administrative amendments in all member states aimed at ensuring the states' long-term, effective compliance with the Court's judgments. Nonetheless, there have been certain cases concerning national minorities, notably in southeast European states, where the implementation of the relevant judgments by the Court has not been successful in practice.

This situation raises serious questions pertaining to the effectiveness of the ECHR system. This includes the ability of the Court through its judgments to bring about necessary changes in national law and practice, in order to provide reparation to minority member victims of Convention violations and to ensure their non-recurrence. This section provides an overview of certain cases concerning members of national minorities in Bulgaria, Greece and Turkey, as a way of illustration of the adjudicative policy followed so far by the Court.

A. Bulgaria – judgments concerning members of the Macedonian minority

A major judgment by the Court covering national minorities in Bulgaria was the one delivered on 2 October 2001 in the case of *Stankov and the United Macedonian Organisation Ilinden*. It concerned a violation of Article 11 of the Convention (freedom of assembly) due to the prohibition by Bulgarian mayors of a number of commemorative meetings planned by members of the applicant Macedonian minority association in the period 1994-1997. The Court found in this case that 'the authorities overstepped their margin of appreciation and the measures banning the applicants from holding commemorative meetings were not necessary in a democratic society, within the meaning of Article 11 of the Convention' (paragraph 112 of the judgment).

[8] See, *inter alia*, *Assanidze v. Georgia* [GC], judgment of 8 April 2004, paragraph 202, and D. Shelton, *Remedies in International Human Rights Law*, (2005), at 255-268.

The supervision by the CM of the execution of this judgment by Bulgaria ended in 2004 by the adoption of a Final Resolution, ResDH(2004)78. The CM took into account the Bulgarian government's assurance that since 2001 the applicants had no longer been prevented from holding their commemorative meetings (individual measures). On the other hand, the direct effect of the Convention and of the Court's case-law were presented by the government, and accepted by the CM, as guarantees for a Convention-compliant interpretation and application by mayors of the national legislation concerning 'meetings and marches', which would prevent new violations similar to that found in the above case.

However, only a year later two similar judgments against Bulgaria were rendered by the Court in the cases of *United Macedonian Organisation Ilinden and Ivanov* (20 October 2005), and *Ivanov and others* (24 November 2005). They both concerned, *inter alia*, an unjustified prohibition by mayors of commemorative meetings planned by the applicant members of the Macedonian minority between 1998 and 2003 in southwest Bulgaria and in Sofia. In the former judgment the Court indirectly but clearly noted its discontent at this situation by saying that despite the earlier similar judgment in the case of *Stankov* and the government's assertion that following the *Stankov* judgment they had taken measures to ensure the exercise of the applicants' freedom of assembly, nothing had in fact changed. It added that

> with a few exceptions…the authorities persisted in their efforts to impede the holding of the commemorative events which Ilinden sought to organise, much as they had during the period 1994-97, when they had "adopted the practice of imposing sweeping bans on Ilinden's meetings"…It further observes that the authorities' justification for so doing was substantially the same as in *Stankov and the United Macedonian Organisation Ilinden…*and thus insufficient to make the impugned measures necessary in a democratic society. (paragraph 114 of the judgment)

As of December 2010 both these judgments were pending before the CM for supervision of their execution by Bulgaria. The CM expected from the Bulgarian government to adopt additional individual measures for the effective enjoyment of freedom of assembly by the members of the Macedonian minority in Bulgaria. As regards general measures, legislative amendments that took place in 2010 were considered satisfactory by the CM and no further general measures were considered necessary. As regards individual measures which concern the redress and practical amelioration of the applicants' situation, the CM appeared to be cautious and requested more information from the government, even though it noted information provided by the authorities indicating a 'distinct improvement in the applicants' situation in comparison to the period 1994-2003 when there was a practice of sweeping bans on their commemorative meetings'.[9]

Two other cases concerning members of the Macedonian minority in Bulgaria are those considered in the Court's judgments *United Macedonian Organisation [UMO] Ilinden-Pirin and others* (20 October 2005) and *United Macedonian Organisation [UMO] Ilinden and others* (19 January 2006). In the first case the Court found a violation of Article 11 ECHR, following the

[9] See CM DH agenda of 30 November, 1-2 December 2010, section 4.1, (1100 meeting), available at: http://www.coe.int/t/dghl/monitoring/execution/Documents/Doc_ref_en.asp.

dissolution in 2000 of the applicant party by the Constitutional Court, indicating that 'there did not exist a pressing social need' for this dissolution and thus it was not 'necessary in a democratic society'. In fact, the Court before reaching this conclusion made a link to its 2001 judgment in the case of *Stankov* adding, *inter alia*, that the reasoning adopted in the latter case applies in the new case before it as well, that is, '[t]he mere fact that a political party calls for autonomy or even requests secession of part of the country's territory is not sufficient basis to justify its dissolution on national security grounds' (paragraph 61 of the judgment). The second case concerned the non-registration in 1998-1999 of the applicant Macedonian minority association (a sibling organization with regard to UMO Ilinden-Pirin) which was also in fact the applicant association in the 2001 judgment in the case of *Stankov*. The Court found anew a violation of Article 11 ECHR, making references to its findings in the 2001 case of *Stankov*, concluding that the domestic courts' refusal to register the Ilinden association was 'disproportionate to the objectives pursued' (paragraph 82 of the judgment).

The case of the political party *UMO Ilinden-Pirin* was closed by the CM in December 2009 by a Final Resolution, CM/ResDH(2009)120, even though the party had not as yet been registered in Bulgaria**.** The CM stressed in its resolution that the judicial decisions relating to the applicants' third request for registration did not reiterate grounds that had been incriminated by the Court, and that they were exclusively based on the non-compliance with the law of the material acts for the constitution of the party and of the related documents to be submitted. Having taken note of the government's declaration that there would be no obstacle to the registration of this political party if the law is complied with, and of legislative changes concerning the level of memberships in political parties, the CM concluded that 'it seems that the applicants can at present apply for the registration of their party in proceedings which are in conformity with Article 11 of the Convention'.

As for the case concerning the association *UMO Ilinden*, it is still on the CM's agenda for supervision of execution. In its agenda of December 2010[10] the CM noted that the Bulgarian courts in 2002-2004 once again refused to register the applicant association and that these facts were the object of another application pending before the Court.

B. Greece – cases concerning members of the Macedonian and Turkish minorities

The first major judgment by the Court against Greece concerning members of a national minority was the one rendered in the case of *Sidiropoulos and others* (10 July 1998), relating to the Greek courts' refusal in the early 1990s to register the applicants' association bringing together members of the Macedonian minority in northern Greece. Domestic courts had held that the applicants and the association they wished to found, whose statutory aim was to 'preserve and develop the traditions and folk culture of the Florina region' (paragraph 44 of the judgment),

[10] CM DH agenda of 30 November, 1-2 December 2010 (1100 meeting), section 4.2, available at: http://www.coe.int/t/dghl/monitoring/execution/Documents/Doc_ref_en.asp.

represented a danger to Greece's territorial integrity. The Court found a violation of Article 11 ECHR having noted that the above refusal of registration was disproportionate to the objectives pursued. The case was closed in 2000 by the CM,[11] following, in particular, the provision by the Greek government of assurances that the domestic courts would not 'fail to prevent the kind of judicial error that was at the origin of the violation found in this case'.[12] The government actually added in the Appendix to the Resolution, by which the case was closed by the CM, that since the above judgment by the Court in 1998 no similar violation of the Convention was found, 'which confirms the exceptional nature of the case'.

The concerns that this case raises relate both to individual measures aimed at the applicants' *restitutio in integrum*, to the extent possible, and general measures necessary to be adopted by the respondent state for the prevention of similar violations. On the one hand, the applicants' association reportedly is not, as yet (2011) recognized in Greece. On the other hand, three judgments concerning violations notably of the freedom of association of members of another national minority, the Turkish in north-eastern Greece (see below), on grounds similar to that of the *Sidiropoulos and others* case, have raised the question of effectiveness of the Court's 1998 judgment, that is its effects on the Greek legal system, given that general measures were obviously necessary, at least since 1998, to be adopted by Greece in order to avoid similar violations of the Convention.

The three more recent judgments by the Court concerning the dissolution or refusal to register associations established by members of the Turkish minority in north-eastern Greece, were delivered in 2007 and 2008. In the first case, *Bekir-Ousta et autres* (judgment of 11 October 2007), the applicants who belonged to the 'Muslim minority of western Thrace' had attempted to have their non-profit association registered under the name 'association of the youth of the minority in the Evros department'. This application was finally rejected by the Greek Court of Cassation in 2006. According to the respondent state, the domestic courts had refused to register this association 'en raison de l'emploi du terme « jeunesse de la minorité », qui sous-entendait l'existence d'une minorité turque sur le territoire grec, ce qui est contraire au Traité de Lausanne' (paragraph 49 of the judgment). The Strasbourg Court found a violation by Greece of Article 11, having considered as disproportionate the domestic courts' refusal to register this association, having noted that

> le refus d'enregistrer l'association des requérants fut essentiellement motivé par le souci de couper court à l'intention qu'on leur prêtait de promouvoir l'idée qu'il existe en Grèce une minorité ethnique et que les droits de ses membres ne sont pas pleinement respectés. Autrement dit, la mesure litigieuse s'appuya sur une simple suspicion quant aux véritables intentions des fondateurs de l'association et aux actions que celle-ci aurait pu mener une fois qu'elle aurait commencé à fonctionner. Toutefois, les intentions des requérants n'ont pas pu en l'espèce être vérifiées par

[11] See Final Resolution ResDH(2000)99, available at: http://www.coe.int/t/dghl/monitoring/execution/Documents/Doc_ref_en.asp.
[12] Ibid. appendix to above Resolution. On the 'direct effect' of the ECHR and the Court's case-law see R. Blackburn, J. Polakiewicz (eds), *Fundamental Rights in Europe – The ECHR and its Member States, 1950-2000* (2001), passim.

> rapport à la conduite de l'association dans la pratique, puisque celle-ci n'a jamais été enregistrée. (paragraph 42 of the judgment)

The above exact citation was used by the Court in its reasoning also in the case of *Emin et autres* (judgment of 27 March 2008), concerning another refusal by the Greek courts (affirmed by the Court of Cassation in 2005) to have registered the ethnic Turkish applicants' non-profit association in north-eastern Greece, named 'cultural association of Turkish women in the Rodopi region'. The Court found another violation of Article 11 ECHR having been unable to discern the existence of any pressing social need that would justify the domestic courts' refusal of registration, which was thus considered disproportionate.

The third case, *Tourkiki Enosi Xanthis [Turkish Union of Xanthi] et autres* (judgment of 27 March 2008) concerns the radical measure of dissolution by court order (affirmed by a 2005 Court of Cassation judgment) of the applicant Turkish minority association which existed in north-eastern Greece since 1927. The Court found, *inter alia*, a violation of Article 11 ECHR, having considered that the national authorities exceeded their margin of appreciation and that the dissolution of the above association was not necessary in a democratic society.

It appears that this is the sole of the above three cases where the Court indirectly made clear that the subject-matter brought before it had been, in substance, re-examined in 1998 in the case of *Sidiropoulos and others* which cites along with the exact reasoning employed again ten years earlier*:*

> …la Cour note qu'elle a déjà admis que l'intégrité territoriale, la sécurité nationale et l'ordre public ne sauraient être menacés par le fonctionnement d'une association dont le but est de favoriser la culture d'une région, à supposer même qu'elle vise aussi partiellement la promotion de la culture d'une minorité ; l'existence de minorités et de cultures différentes dans un pays constitue un fait historique qu'une société démocratique devrait tolérer, voire protéger et soutenir selon des principes du droit international. (paragraph 51 of the judgment)

As of December 2010 all three judgments concerning these Turkish minority associations in Greece were pending for supervision of their execution before the CM. Domestic proceedings aimed at the registration of the three minority associations were also pending. The CM, in a decision adopted in December 2010, 'recalled the firm commitment of the Greek authorities to implementing fully and completely the judgments under consideration without excluding any avenue in that respect', and decided to resume examination of these items at the latest in December 2011,[13] an indication that a prompt resolution of these cases was not foreseeable.

[13] CM DH agenda of 30 November, 1-2 December 2010 (1100 meeting), section 4.2, available at: http://www.coe.int/t/dghl/monitoring/execution/Documents/Doc_ref_en.asp.

C. Turkey – cases concerning freedom of expression related mainly to members of the Kurdish minority

Between 1998 and 2009 the Court issued more than one hundred judgments concerning violations by Turkey of the right to freedom of expression (Article 10 ECHR). The vast majority of these cases concern criminal convictions for publication (or preparation of publication) of texts and messages addressed to the public and relate to the Kurdish issue and the ongoing conflict in southeast Turkey.

One of the first major cases of this category, *Inçal v. Turkey* (judgment of 9 June 1998), concerned the applicant's criminal conviction following the printing of a leaflet against a campaign in the town of Izmir aimed at 'driving Kurds out of the cities'. The Court, following an analysis based on the case's facts and on its own case-law, found that the applicant's conviction was disproportionate and therefore unnecessary in a democratic society. It found, *inter alia*, a violation by Turkey of Article 10 ECHR and awarded damages to the applicant. The same adjudicative approach was adopted by the Court in later similar judgments against Turkey, such as the one in the case of *Özer* (judgment of 5 May 2009), concerning the applicant's conviction following the publication of an article in a periodical owned by the applicant, concerning the situation of Kurdish women in Turkey.

From a 2010 CM list of 102 Court judgments concerning freedom of expression in Turkey, it is clear that the vast majority of them relate to the repeated application by Turkish courts for two decades, in the 1990s and 2000s, of specific provisions of the criminal code or of the anti-terror law in a manner that does not comply with the Court's established case-law.[14]

In 2008, in an information document on these cases published by the CM it was indicated that even though the provisions which were at the basis of violations found in these cases had been repealed, 'it seems that the new provisions, which replaced the old ones, while phrased differently, are of the same substance as the previous ones…In this context, special responsibility to apply domestic law in conformity with the ECHR and thus preventing new, similar violations lies with Turkish judges and prosecutors'.[15]

The Court appeared to make an important change in its method of adjudication by its judgment in the case of *Ürper and others v. Turkey* (20 October 2009).[16]It concerned the suspension by court decisions of the publication in 2006 and 2007 of four daily newspapers following publications

[14] CM DH agenda of 30 November, 1-2 December 2010 (1100 meeting), section 4.2, Appendix 20, *Inçal group against Turkey*,
available at: http://www.coe.int/t/dghl/monitoring/execution/Documents/Doc_ref_en.asp.
[15] *Freedom of expression in Turkey: progress achieved-Outstanding issues*, CM/Inf/DH(2008)26, 23 May 2008, at 5, available at: http://www.coe.int/t/dghl/monitoring/execution/Documents/Doc_ref_en.asp.
[16] The judgment became final on 20 January 2010 and as of early 2011 the respondent state had not presented to the CM any general measures in order to execute this judgment, available at: http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp.

deemed to be propaganda in favour of an illegal organisation, the Kurdish Workers' Party (PKK/KONGRA-GEL), by virtue of Section 6, paragraph 5 of the Anti-Terror Law. The Court found that the practice of banning the future publication of entire periodicals on the basis of that provision went beyond any notion of necessary restraint in a democratic society and amounted to censorship, thus to a violation of Article 10 ECHR.

Interestingly, in this case the Court proceeded to the identification of the above anti-terrorism provision as the main source of the problem. It made clear that it was on this legislative basis that the domestic courts had ordered the suspension of publication and distribution of several periodicals since 2006 (year of entry into force of this legislation). The Court added that '[s]everal other applications concerning the same issue are currently pending before the Court. Without prejudging the merits of those cases, the above facts indicate that the problem at issue is of a systemic nature' (paragraph 51 of the judgment). It went on to note in a non-operative provision of the judgment, contained in a section entitled 'Article 46 of the Convention', following the Court's practice:

> Having regard to the systemic problem disclosed in the present case, the Court is of the opinion that general measures at the national level would be desirable to ensure the effective protection of the right to freedom of expression in accordance with the guarantees of Article 10 of the Convention. In this respect, the respondent Government should revise section 6(5) of Law no. 3713 to take account of the principles enunciated in the present judgment (paragraphs 35-45 above) with a view to putting an end to the practice of suspending the future publication and distribution of entire periodicals' (paragraph 52 of the judgment).

The same quasi-pilot judgment method (on pilot and quasi-pilot judgments see below section 4), was subsequently used in 2010 by the Court in the case of *Gözel et Özer c. Turquie* (judgment of 6 July 2010). The case concerned the applicants' criminal convictions and suspension of publication of their periodicals containing articles including declarations of outlawed left-wing organisations. The provision that had been used in this case, similarly to many other cases that had been earlier brought before the Court, was Section 6, paragraph 2 of the Anti-Terror Law which outlaws the printing or publication of 'declarations or leaflets emanating from terrorist organisations', without obliging the domestic judges to examine and analyse such publications textually or contextually. The Court concluded that the alignment of the above domestic provision with the Convention would be an appropriate form of reparation that would put an end to the violation of Article 10 found by the Court (paragraph 76 of the judgment).

In December 2010, in the context of one of the meetings concerning the supervision of execution of the Court's judgments, the CM noted in its agenda relating the freedom of expression group of cases against Turkey:

> The question has been raised since 1998 of the need to adapt Turkish law to the requirements of the Convention so as to avoid further violations similar to those found. In particular, attention has been drawn to the need to assess the proportionality of restrictions on freedom of expression in the light of the presence of an "incitement to violence". Furthermore, the Turkish authorities have

> been invited to introduce a general criterion of truth and public interest into the Anti-Terrorism Law and to amend or abrogate Article 6 of this law; to review minimum penalties in crimes related to freedom of expression; to adopt specific measures aimed at ensuring the protection of freedom of expression.[17]

The analysis and proposals of general measures (basically concerning the need to review judicial practice and legislation) made by the CM are not found in the Court's relevant judgments delivered from the late 1990s until late 2009 (when *Ürper* was delivered) and constitute useful pathfinders for the respondent state's efforts aimed at remedying these structural dysfunctions and aligning its law and practice with the Convention's requirements.

Before concluding this section, it is worthy to be noted that the Court, in cases concerning issues related principally to the Kurdish minority, has used also an adjudicative method that may be called crypto-pilot: In the case of *Doğan and others v. Turkey* (judgment of 29 June 2004), concerning the applicants' forced eviction by security forces from their village in eastern Turkey, the Court found violations of the applicants' property rights, family lives and homes and their right to en effective remedy. It was clear from the judgment (especially the 'documents submitted by the parties' and the 'relevant international materials') that the case reflected a situation affecting a very large number of internally displaced persons, mainly Kurds, and a systemic dysfunctioning at national level that caused the state's failure to provide redress. However the Court did not expressly acknowledge this in the above judgment, nor did it proceed to any direct suggestion as to general measures that should have been adopted by the respondent state.

It was in a later case, *Aydin Içyer v. Turkey* (decision of 12 January 2006), where the Court baptized *Doğan and others* a 'pilot judgment' and declared the applicant's application inadmissible. In *Aydin Içyer*, the Court observed that the problem identified by *Doğan and others* had affected at least 380 000 persons and had led to the submission of approximately 1,500 applications to the Court (paragraph 67 of the decision). The inadmissibility decision was based on the Court's finding that the respondent state, subsequent to *Doğan and others*, had adopted *inter alia* legislation that the Court considered effective, in order to redress the Convention grievances of persons who were denied access to their possessions in their villages. *Aydin Içyer* appears to be a kind of regret by the Court for not using *Doğan and others* as a clear-cut pilot judgment, and clearly advising the respondent state as to how to proceed with necessary general measures. Despite its clumsiness, the above policy of adjudication is an indirect but clear indication by the Court itself of the need or usefulness to resort to pilot-type judgments in cases concerning national minorities.

[17] CM DH agenda of 30 November, 1-2 December 2010 (1100 meeting), section 4.2, available at: http://www.coe.int/t/dghl/monitoring/execution/Documents/Doc_ref_en.asp. See also Report by the Council of Europe Commissioner for Human Rights following his visit to Turkey from 27 to 29 April 2011, *Freedom of expression and media freedom in Turkey*, 12 July 2011, available at: http://www.commissioner.coe.int.

3. Challenges faced by the CM as supervisor of the execution by states of the Court's judgments

The repetitive judgments by the Court concerning national minorities in Bulgaria, Greece and Turkey, logically bring about (except for issues related to the effects of the Court's adjudicative methods and of its own judgments) the question of the institutional role of the CM in ensuring the effective execution by respondent states of the Court's judgments. This includes the applicant victims' adequate reparation and non-recurrence of similar violations.

The CM is the Council of Europe's 'decision-making body',[18] composed of the member states' foreign ministers or their permanent diplomatic representatives in Strasbourg. It is, in fact, a multi-faceted body: 'both a governmental body, where national approaches to problems facing European society can be discussed on an equal footing, and a collective forum, where Europe-wide responses to such challenges are formulated. In collaboration with the Parliamentary Assembly, it is the guardian of the Council [of Europe]'s fundamental values, and monitors member states' compliance with their undertakings'.[19]

Even though a clear-cut differentiation among these three major characteristics is difficult, if not impossible in practice, it is the third one that is particularly relevant to the process relating to the execution of the Court's judgments, that is, the CM's role as a monitor and guardian of Council of Europe member states' compliance with their undertakings under the ECHR. This role is directly linked to the need of 'collective enforcement' of the Convention by the contracting states, which is expressly provided for by the last paragraph of the Convention's preamble,[20] and was given a clearer form by Article 46, paragraph 2 of the Convention. According to this provision, '[t]he final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution'.[21]

At first glance, the system of supervising execution by states of the Court's judgments, as established by the ECHR, may appear to be an oxymoron: the CM is, in fact, a purely political organ (composed of state representatives) which is tasked with the control ('supervision') of the execution by its own member states of judicial decisions (the Court's judgments). This is in sharp contrast to the Inter-American system of human rights protection where the Inter-American Court

[18] See also Articles 13-21 of the Statute of the Council of Europe at http://conventions.coe.int.
[19] See http://www.coe.int/t/cm/aboutCM_en.asp.
[20] 'The governments signatory hereto, being members of the Council of Europe…[b]eing resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration…', see text at: http://conventions.coe.int.

[21] See http://www.coe.int/T/E/Human_Rights/execution. On the CM's decision-making (quasi-judicial) competence until 1998 (year of entry into force of Protocol N° 11 to the Convention) see Zwaak, 'The supervisory role of the Committee of Ministers', in P. van Dijk et al (eds), *Theory and Practice of the European Convention on Human Rights* (2006), at 292-295.

of Human Rights has developed the practice of monitoring respondent states' compliance with its judgments.[22] A deeper and longer look into the past and the politico-historical background of the ECHR, leads one to discern similarities with (or inspirations from) the Charter of the United Nations, adopted just five years before the ECHR. Indeed, a similar provision of the UN Charter (Article 94, paragraph 2)[23] provides that in case where any state party to a case before the International Court of Justice (ICJ) fails to comply with a judgment rendered by the ICJ, recourse may be had by the other party to the Security Council which, in turn, may take further action. Indeed, one could argue that the CM is a kind of a regional 'Security Council' overseeing compliance by European states with the Court's judgments, bearing similar functional advantages and disadvantages.

It is worth noting that the CM is tasked with supervisory functions also in the context of two other specialised Council of Europe treaties concerning directly minority protection: the 1992 European Charter for Regional or Minority Languages, and the 1995 Framework Convention for the Protection of National Minorities.[24] Under Article 16, paragraph 4 of the former treaty, the CM is entitled to prepare recommendations to states parties, on the basis, *inter alia*, of the special reports presented to it by the 'committee of experts' provided for by the Charter. On the other hand, Article 24 of the Framework Convention has entrusted the CM with a monitoring role for the implementation of this Convention, similarly to Article 46, paragraph 2 ECHR. In this case, the CM is assisted in its work of evaluation of measures taken by states parties by the Advisory Committee provided for by the Framework Convention (Article 26).

From the above-mentioned cases concerning Bulgaria, Greece and Turkey, the question arises as to the reason for which the CM has not been able to achieve in these national minority-related cases the applicants' effective reparation or the prevention of similar situations/violations. In the cases of Bulgaria and Greece, it is clear from the Final Resolutions adopted by the CM which closed the cases that the decisions of closure were rather a rubber stamp of the general measures adopted by states, accepting the assurances provided by the latter concerning the putting to an end of the violations, and the prevention of similar ones against the relevant ethnic minority members. The acceptance by the CM of such assurances is grounded upon the intergovernmental/diplomatic nature of the CM and its work under Article 46, paragraph 2 ECHR. Even though it acts as an institutional guarantor for the well-functioning and long-term effectiveness of the ECHR system, one may not lose sight of the fact that state interests and policies have a direct influence upon the CM's work, and its consensual method of decision-making as an intergovernmental organ.

[22] See http://www.corteidh.or.cr/supervision.cfm.
[23] See http://www.un.org/aboutun/charter/index.html.
[24] In 1993 and 2001 the Council of Europe Parliamentary Assembly (PACE) made proposals for the creation of an additional Protocol to the ECHR 'on the rights of national minorities'. The CM was cautious, regarding this debate 'immature', in particular in so far as Protocol No 12 had not then entered into force. See PACE Recommendation 1201 (1993) *on an additional protocol on the rights of national minorities to the ECHR*; PACE Recommendation 1492 (2001) *Rights of national minorities*, available at: http://assembly.coe.int; CM's reply to PACE Recommendation 1492 (2001), CM 799th meeting, 13 June 2002, available at: http://www.coe.int/t/cm.

One could reasonably argue that with regard to cases relating to national minority protection in states that have not as yet come to terms with the ethnic 'otherness' on their territories[25] or, in other words, have not come fully to terms with their own modern history, the supervisory role of the CM, as a collective guardian of the European human rights standards, is *de facto* limited. As a consequence, repetitive applications are lodged with and, essentially declaratory, (quasi-) clone judgments are rendered by the Court. Indeed, in all the aforementioned cases, all three respondent states seem to have been unable or unwilling to accept the, , unhindered functioning of civic or political organizations, or freedom of expression related to the aforementioned minority groups on their territories. Even though unjustified under contemporary human rights standards, this rather phobic, defensive stance in these countries may be explained by their modern nation-state histories, characterized by the unpreparedness of these states to recognise, *de facto* or *de iure*, the existence of certain national minorities on their territories, and their effective protection[26]

The CM, as a supervisory, intergovernmental organ, has proved so far unable to exert a substantial, decisive influence in these situations, confirming the established, albeit challenged, state practice of viewing national minority questions as falling within each state's *domaine réservé*. However, the CM's opening-up to the outside world since 2001 (and especially to the organised, international civil society as from 2006 through CM DH Rule 9, paragraph 2) provide new potentials for a more effective supervisory scheme. Indeed, by allowing NGOs and National Human Rights Institutions to communicate with and thus inevitably influence the CM in its work under Article 46, paragraph 2 ECHR, the CM has in fact allowed in a counter-weight that has the potential of counter-balancing state interests and policies which are discussed and assessed by this decision-making organ of the Council of Europe. Also the entry into force in 2010 of Protocol No. 14 to the Convention has provided new means (new paragraphs 4 and 5 of Article 46) by which the CM, in case where a state 'refuses to abide by a final judgment', may refer this question to the Court. This is certainly a potential means to boost implementation of judgments which prove hard to implement, like those related to national minorities. The usefulness in practice of these new provisions remains to be seen.

[25] See D. Anagnostou, 'Deepening democracy or defending the nation? The Europeanisation of minority rights and Greek citizenship', 28 *Western European Politics* (2005), at 335-357; Sitaropoulos, 'Discriminatory denationalisations based on ethnic origin: The dark legacy of ex Art 19 of the Greek Nationality Code' in P. Shah, W.F. Menski (eds), *Migration, Diasporas and Legal Systems in Europe* (2006), at 107-125.

[26] On national minority protection in Bulgaria see, *inter alia*, Report by the Council of Europe Commissioner for Human Rights following his visit to Bulgaria - Issues reviewed: Human rights of minorities and of children in institutions, 9 February 2010; on national minority protection in Greece see, *inter alia*, Report by the Council of Europe Commissioner for Human Rights following his visit to Greece - Issue reviewed: Human rights of minorities, 16 February 2009; on the protection of national minorities in Turkey see, inter alia, Report by the Council of Europe Commissioner for Human Rights following his visit to Turkey. Issue reviewed: Human rights of minorities, 1 October 2009, available at: http://www.commissioner.coe.int.

4. Challenges faced by the Court: why declaratory adjudication has not promoted effective implementation of judgments in national minority cases

The CM, during its supervisory exercise concerning execution by respondent states of the Court's judgments, is naturally based on and bound by the letter and spirit of the Court's judgments, and its adjudicative policy. Thus, a more in-depth study of the CM's role in minority protection through Article 46, paragraph 2 of the Convention leads one inevitably to a more critical reading and examination of the minority-related judgments rendered by the Court, especially the repetitive ones that demonstrate certain serious, structural problems of human rights protection.

In the aforementioned repetitive minority-related judgments cases against Bulgaria, Greece and Turkey (at least until the late 2009 *Ürper* judgment,) the Court has followed the classical line of adjudicative methodology, based on the principle that its judgments are simply declaratory. They are limited to the major task of identifying violations by respondent states and awarding pecuniary and non-pecuniary damages to the applicants. The questions of the victims' effective redress and the states' abidance by their obligation to secure the non-recurrence of similar violations are left unanswered by the Court and forwarded to the CM for supervision. The Court in these cases concerning national minorities has restrained itself and refrained from elaborating upon the structural problems that had actually led to the finding of almost identical violations. Following a laconic and casuistic approach of adjudication, the Court in effect has abstained from examining the absence of an effective law and policy, and from providing any kind of guidance to the states to enhance the framework of protection of members of the national minorities who are obviously in need thereof.

This adjudicative policy is in line with the established (until now) practice of the Court to 'neutralize' minority questions posed before it, avoiding looking in depth into the national, socio-political context from which originate the relevant human rights violations and complaints, (even if they are repetitive[27]) or if the Court itself recognises the existence of a general, structural problem.[28] The Court has made clear its position thereon in the judgment in the case of *Chapman v. UK* (18 January 2001) where it stated that *'the complexity and sensitivity of the issues involved in policies balancing the interests of the general population…and the interests of a minority with*

[27] See Pentassuglia, 'Minority issues as a challenge in the European Court of Human Rights: a comparison with the case-law of the United Nations Human Rights Committee', 46 *German Yearbook of International Law* (2003) 401, at 440-443; G. Pentassuglia, *Minorities in International Law: An Introductory Study*, Strasbourg, (2002), at 119-126. See also de Varennes, 'Using the European Court of Human Rights to protect the rights of minorities' in Council of Europe (ed), *Mechanisms for the Implementation of Minority Rights* (2004) 83 ff.

[28] See *Moldovan and others v. Romania,* judgment No 2 of 12 July 2005, paragraphs 108, 110 where the Court in a swift manner recognised the 'general attitude' of the authorities as the major ground for the violations of the rights of the Roma applicants. No analysis though was offered even though in the earlier, relevant friendly settlement (*Moldovan and others v. Romania,* judgment No 1 of 5 July 2005) the respondent state undertook the adoption of a series of general measures to resolve the apparently structural problems highlighted in that case.

possibly conflicting requirements renders the Court's role a strictly supervisory one' (paragraph 94 of the judgment). A similar position was expressed by the Court in another Roma-related judgment in the case of *D.H. and others v. The Czech Republic* (7 February 2006).[29]

Indeed on a number of occasions, the Court has shown itself unable or unwilling to recognise the existence of systemic human rights problems in respondent states, despite the production by it of numerous repetitive judgments and warnings issued by various Council of Europe institutions such as the CM. This weakness has been observed not only with reference to complex human rights questions involving national minorities, but also to more technical, issues, such as cases concerning excessive length of judicial proceedings. For example, it was only in December 2010 that the Court recognized the structural nature of the problem and adopted a pilot judgment against Greece, ordering the latter to adopt r appropriate remedial measures to tackle excessive length of proceedings and lack of an effective remedy within a year.[30] However from 1999 to 2009, the Court had rendered approximately three hundred declaratory judgments finding this kind of violations by Greece (see paragraph 36 of the judgment). Also already in 2007, the CM had adopted an Interim Resolution concerning this category of Greek cases, noting that 'the cases at issue...reveal structural problems giving rise to a large number of new, similar violations of the Convention' (CM/ResDH(2007)74).[31]

It is submitted that a different methodological approach would be most useful and possible to be adopted and applied by the Court in the case of repetitive national minority cases, by generating a more detailed, contextual analysis of the background to such violations. Thus, in its reasonings and/or operative provisions of its judgments, the Court may systematically provide the respondent states, and the CM, with a clear, diagnosis and guidance as to how best align domestic law and practice with the Convention standards, to the extent possible

It is to be noted that despite the tradition of the declaratory adjudication established in the Court's case-law, on many occasions the Court has not shied away from identifying the real source of violations in national legal orders, including state practice, and through operative parts of its judgments, has ordered respondent states to provide specific redress to applicants (individual measures). Probably the first most dynamic, in this context, judgment by the Court is the one concerning the case of *Papamichalopoulos and others v. Greece* (just satisfaction, judgment of 31 October 1995), relating to an unlawful land expropriation. There the Court noted that the source

[29] In paragraph 45 the Court noted that 'it is not its task to assess the overall social context. Its sole task in the instant case is to examine the individual applications before it and to establish on the basis of the relevant facts whether the reason for the [Roma] applicants' placement in the special schools was their ethnic or racial origin.' The Court adopted a different, contextual approach in its Grand Chamber judgment concerning this case, delivered on 13 November 2007, an approach which was criticised by Judge Borrego Borrego in his dissenting opinion.

[30] *Vassilios Athanasiou et autres c. Grèce*, judgment of 21 December 2010.

[31] Similar extreme cautiousness was shown by the Court with regard to cases concerning excessive length of pre-trial detention in Poland, despite numerous repetitive judgments and a 2007 CM Interim Resolution (CM/ResDH(2007)75) where the issue had been characterized as structural. It was in 2009 that the Court issued a quasi-pilot judgment to deal with this question in the case of *Kauczor v. Poland*, judgment of 3 February 2009.

of the property right violation found lied on the act of the Greek government that had proceeded to the expropriation of the land in question, without paying fair compensation. It stressed that 'it was a taking by the State of land belonging to private individuals, which has lasted twenty-eight years, the authorities ignoring the decisions of national courts and their own promises to the applicants to redress the injustice committed in 1967 by the dictatorial regime' (paragraph 36 of the judgment). Having said that the return of the land in issue would put the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach of the Convention, the Court ordered the respondent state, through the judgment's operative part, to return to the applicants the land in issue including the buildings on it within six months. Failing such restitution, Greece was ordered by the Court to pay the applicants compensation, which was what finally happened.[32]

The question of how to address repetitive judgments revealing systemic problems of human rights protection at national level, requiring the adoption of targeted, general measures by the respondent states, was left more or less ignored for a long time. It was finally addressed by the CM Resolution Res(2004)3 *on judgments revealing an underlying systemic problem*. In this groundbreaking Resolution, the CM addressed to the Court an 'invitation' concerning, in effect, the latter's own jurisprudential policy. Specifically, it invited the Court:

i.) as far as possible, 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 [italic emphasis added];

ii.) to specially notify any judgment containing indications of the existence of a systemic problem and of the source of this problem not only to the State concerned and to the Committee of Ministers, but also to the Parliamentary Assembly, to the Secretary General of the Council of Europe and to the Council of Europe Commissioner for Human Rights, and to highlight such judgments in an appropriate manner in the database of the Court.

The methodology proposed for adoption by the Court in national minority cases could draw upon the one already applied by it through its pilot (or quasi-pilot, see below) judgment procedures,[33] initiated in 2004 by the judgment in the case of *Broniowski v. Poland* (22 June 2004), following the above CM Resolution. By this innovative procedure the Court has tried to identify, as clearly

[32] See CM Final Resolution DH(98) 309, available at: http://www.coe.int/t/dghl/monitoring/execution/Documents/Doc_ref_en.asp. See also, among many other cases, *Affaire Fener Rum Patrikliği (Patriarcat Oecuménique) c. Turquie* (satisfaction équitable), judgment of 15 June 2010, where the Court stated in the operative provisions of its judgment that 'dans les trois mois à compter du jour où le présent arrêt sera devenu définitif…l'Etat défendeur doit procéder à la réinscription du bien litigieux au nom du requérant dans le registre foncier'.

[33] See Garlicki, 'Broniowski and after : On the dual nature of "pilot judgments"', in L. Caflisch et al (eds), *Liber Amicorum L. Wildhaber – Human Rights – Strasbourg Views* (2007), at 177-192.

as possible, 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'.[34] Even though no definition has been established by the Court, one could infer from the first *Broniowski* judgment of 2004 that such problems may be discerned when, for example, there has been a 'malfunctioning of [domestic] legislation and administrative practice…which has affected and remains capable of affecting a large number of persons'.[35]

The object of a pilot judgment is, according to the Court, 'to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of [a Convention right] in the national…legal order', especially if this dysfunction generates large numbers of repetitive cases. The Court has clarified further that

> the pilot-judgment procedure is primarily designed to assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level, thereby securing to the persons concerned the Convention rights and freedoms as required by Article 1 of the Convention, offering to them more rapid redress and, at the same time, easing the burden on the Court which would otherwise have to take to judgment large numbers of applications similar in substance.[36]

The Court has been careful to stress that the pilot judgment procedure is *not* meant to be a means by which the Court would take on the role of the CM in supervising the implementation of individual and general measures under Article 46, paragraph 2 of the Convention. At the same time, the Court has rightly highlighted that the respondent states remain primarily and ultimately responsible for the effective implementation of the Convention, as interpreted by the Court. In the Court's words, the pilot-judgment procedure aims 'to induce the respondent State to resolve large numbers of individual cases arising from the same structural problem at the domestic level, thus implementing the principle of subsidiarity which underpins the Convention system. Indeed, the Court's task, as defined by Article 19, that is to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto", is not necessarily best achieved by repeating the same findings in large series of cases'.[37] The development of the pilot judgment procedure may certainly be viewed as a corroboration of the Convention and the Court's quasi-constitutional character in modern Europe.[38]

Broniowski concerned the violation of the property rights of the applicant who claimed that his entitlement to compensation for property abandoned after World War II in the 'territories beyond the Bug River' had not been satisfied. The Court noted that the above malfunctioning on national

[34] See CM Resolution Res (2004)3 *on judgments revealing an underlying systemic problem,* available at: http://www.coe.int/t/dghl/monitoring/execution/Documents/Doc_ref_en.asp.
[35] Ibid. paragraph189.
[36] See judgment (friendly settlement) in *Broniowski v. Poland*, 28 September 2005, paragraph 35.
[37] *Burdov v. Russia (No 2),* judgment of 15 January 2009, paragraphs 126-127.
[38] On the crucial debate about whether the Strasbourg Court should concentrate on delivering 'individual' or 'constitutional' justice see, *inter alia*, S. Greer, *The European Convention on Human Rights – Achievements, Problems and Prospects,* (2006), esp. at 165-174.

level had affected nearly 80 000 people and that as of 2004 there were 167 similar applications pending. The Court expressly diagnosed that the applicant's property right violation 'originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which had affected and remains capable of affecting a large number of persons [it also used the term 'a whole class of individuals']'.[39] In view of the systemic situation identified, the Court observed that 'general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected'.[40] It went on to order, in the operative provisions of the judgment, the respondent state to secure 'through appropriate legal measures and administrative practices…the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu…'[41]

The striking out by the Court of *Broniowski*-clone cases in 2008 following the adoption of effective domestic measures by Poland,[42] and the subsequent closure of the case by the CM in 2009 (Final Resolution CM/ResDH(2009)89) show that the first pilot judgment procedure introduced by the Court has rather been effective providing redress, not only to the applicant concerned but also to all other persons in a situation similar to his. Similar conclusions may be drawn with regard to the second Polish pilot judgment of 2006 in the case of *Hutten-Czapska*, concerning domestic law applied to private property in Poland instituting rent controls and restrictions on the termination of leases. In March 2011, the Court stroke out twenty-six *Hutten-Czapska*-clone cases,[43] having found that the global solutions and the redress scheme available now at domestic level have provided effective solutions to the issues arisen in these applications.[44]

In certain other less instructive quasi-pilot judgments, the Court has not transformed advice into an order, by placing it in the operative provisions of relevant judgments. This is despite explicit identification in its reasoning of systemic, structural problems in national law and practice, and advice to respondent states as to the possible general measures that could be taken to resolve the dysfunction-related issues, by invoking Article 46 of the Convention.[45] This however has not

[39] Paragraph 189 of the judgment.
[40] Paragraph 193 of the judgment.
[41] See paragraphs 3-4 of the judgment's operative part and paragraphs 193-194. The Court even cited as example of general measures that could be adopted "a scheme which offers to those affected redress for the Convention violation identified in the instant judgment in relation to the present applicant", ibid. paragraph 193 and paragraph 194 *in fine*.
[42] See *E.G. v. Poland*, decision of 23 September 2008.
[43] See *The Association of Real Property Owners in Łódź v Poland*, and *Przemysław Piotrowski v. Poland*, decisions of 8 March 2011.
[44] Other instructive, pilot judgments are: *Xenides-Arestis v. Turkey*, judgment of 22 December 2005, *Burdov v. Russia (No 2)*, judgment of 15 January 2009, *Olaru and Others v. Moldova*, judgment of 28 July 2009, *Yuriy Nikolayevich Ivanov v. Ukraine*, judgment of 15 October 2009, *Suljagić v. Bosnia and Herzegovina*, judgment of 3 November 2009, *Rumpf v. Germany*, judgment of 2 September 2010, *Greens and MT v. UK*, judgment of 23 November 2010, *Vassilios Athanasiou and Others v. Greece*, judgment of 21 December 2010.
[45] See e.g. *Scordino v. Italy (No 1)* [GC], judgment of 29 March 2006, *Driza v. Albania*, judgment of 13 November 2007, *Cocchiarella v. Italy* [GC], judgment of 29 March 2006, *Gülmez v. Turkey*, judgment of

hindered the Court from ordering the adoption by a respondent state individual measures that deemed to be necessary. Thus in the 2009 quasi-pilot judgment in the case of *Sławomir Musiał v. Poland,* the Court, through an operative provision, ordered Poland 'to secure at the earliest possible date adequate conditions of the applicant's detention in a specialised institution capable of providing him with necessary psychiatric treatment and constant medical supervision'.

In addition, there has been a relevant third type of supportive judgments delivered by the Court where, even though no explicit mention is made of a systemic or structural problem in the domestic legal system, the Court, referring to Article 46 of the Convention, acknowledges the respondent states' commitment to resolving the general human rights issue in question, and encourages or urges them to take or complete general measures under way in order to prevent new similar violations. For example in the case of *Sürmeli v. Germany,* the Grand Chamber of the Court, in the section of the judgment entitled 'Article 46 of the Convention', took 'due note of the bill' that had been tabled in order to introduce in German law a new remedy for excessively lengthy judicial proceedings. The Court 'welcome[d] this initiative, finding no reason to conclude that it has been abandoned, and encourage[d] the speedy enactment of a law containing the proposals set out in the bill in question. It therefore consider[ed] it unnecessary to indicate any general measures at national level that could be called for in the execution of this judgment'.[46] Such supportive judgments certainly concern systemic or structural human rights questions, even though these adjectives are not explicitly used by the Court. The aim of the Court in these cases arguably was to aid or accelerate the adoption of measures by states that have already shown willingness or determination to resolve the structural problems in issue.

However, there are serious doubts about the impact and viability of this adjudicative technique, as shown by the follow-up to the *Sürmeli* case. In 2010, the Court pronounced itself on another similar case (*Rumpf v. Germany*) concerning excessive length of proceedings and noted that despite its 2006 judgment in the case of *Sürmeli*, the respondent state had failed until then to pass legislation in order to provide remedy to applicants and prevent similar violations of the Convention. As a consequence, the Court proceeded to rendering a pilot judgment by which it ordered Germany to 'set up without delay, and at the latest within one year of the date on which the judgment becomes final…an effective domestic remedy or combination of such remedies capable of securing adequate and sufficient redress for excessively long proceedings, in line with the Convention principles as established in the Court's case-law' (judgment of 2 September 2010).

All three aforementioned types of jurisprudential techniques are in fact currently in the making. They show a dynamic, very interesting evolution of the Court whose aim has always been to safeguard and promote effectiveness in the European human rights protection system. Such a

20 May 2008, *Sławomir Musiał v. Poland*, judgment of 20 January 2009, *Kauczor v. Poland*, judgment of 3 February 2009.

[46] Judgment of 8 June 2006, paragraphs 138-139. See also similar adjudicative technique adopted by the Court in *Dybeku v. Albania*, judgment of 18 December 2007, paragraph 64.

dynamism ties in well with the Convention's own character of a 'living instrument' that should be able to correspond to 'present-day conditions'.[47]

So far it has not been clear by which criteria the Court has or has not resorted to a pilot or quasi-pilot, or a supportive judgment. On 31 March 2011, a new Rule of the Court (Rule 61) entered into force, aimed at implementing the request to the Court set out in the final declaration of the February 2010 Interlaken Conference on the future of the Court. The Court had been requested to 'develop clear and predictable standards for the pilot judgment procedure as regards selection of applications, the procedure to be followed and the treatment of adjourned cases'.

Under this new Rule, the Court 'may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting State 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 new Rule does not really provide detailed criteria by which a case may be subjected to the pilot judgment procedure. Allowing the Court a margin of appreciation may indeed be wise. The Rule rather focuses on relevant procedures to be followed by the Court. It provides, *inter alia*, the following: the Court will consult the applicant/s and government of the state concerned and any other involved parties before starting the procedure; the Court shall identify the type of remedial measures the state concerned is required to take at national level; it may impose a time-limit on the adoption of such measures; and it may adjourn similar cases pending the adoption of remedial measures.

The subject-matters of the pilot or quasi-pilot judgments delivered to date concern various types of human rights violations, ranging from property rights, to excessive length of proceedings, non-execution of domestic judgments, unfair disciplinary proceedings concerning a prisoner, prisoners' right to vote in national and European elections, or excessive length of pre-trial detention. The Court's new Rule 61 and subsequent practice may contribute to the establishment in the near future of certain more precise criteria, by which the Court may decide whether or not the pilot or quasi-pilot judgment procedure is applicable. The application by the Court in October 2009 of the aforementioned quasi-pilot judgment procedure in the case of *Ürper and others v. Turkey*, concerning the exercise of freedom of expression related to an outlawed Kurdish organisation, indicates that a contextual method of adjudication is possible also in minority-related cases.

The delivery by the Court of pilot, quasi-pilot, or even supportive judgments have not necessarily led to a speedy execution of all these judgments. Even though promptness in execution is of course one of the *desiderata* of the pilot-judgment procedures, this may not reasonably be expected in cases that arise from usually long-standing, structural dysfunctions in states' law and practice. The major importance of the pilot or quasi-pilot judgment system is the fact that a structural problem is highlighted by the Court, and that the latter provides guidance to the respondent states to cope with the issue at hand, as well as to the CM that is obliged, under its

[47] See *Tyrer v. United Kingdom*, judgment of 25 April 1978, paragraph 31.

Rule 4 concerning the supervision of execution of the Court's judgments,[48] to prioritise the supervision of execution of these judgments.

It is worth noting that the contextual, prescriptive method of regional human rights adjudication may be a novelty in the European human rights system, but not in the context of another major regional system, that of the American Convention on Human Rights (ACHR,) where the Inter-American Court of Human Rights has been using this method for a longer period. One has to note in this context that the ACHR's concrete provisions regarding this treaty's 'domestic legal effects' (Article 2,) and the necessary remedial action by respondent states vis-à-vis the victim of a violation found by the Inter-American Court (Article 63) do not in fact exist in the European Convention on Human Rights.[49]

There seems to exist no formal or other reason for which national minority-related cases, which normally concern large groups of persons and have the real potential of generating repetitive applications before the Court, should be excluded from this adjudicative methodology. The only possible aspect of minority cases that may make the effective application of the pilot judgment procedure more difficult therein is the fact that the issues arisen in the context of such cases are often considered by states too sensitive, or not ready to be addressed, for a number of historico-political reasons that vary from one state to another. This is also the possible reason for which the Court will probably think twice before taking any decision that may lead to the systematic application of the pilot or quasi-pilot judgment procedure to national minority cases.

The contextual adjudicative approach adopted by the Court through the pilot or quasi-pilot judgment procedure may be usefully applied in national minority cases where violations *de facto* affect large numbers of persons, and there are objective elements demonstrating the existence of a systemic/structural problem linked to national legislation, administrative or judicial/prosecutorial practice. For example, in the aforementioned Bulgarian cases, it is rather clear that the repetitive violations of Article 11 of the Convention originate in an administrative practice contravening the Convention standards regarding freedom of assembly of minority members. The Greek repetitive cases concerning non-registration by domestic courts of Turkish minority associations indicate that Greek courts have not managed to fully adopt and apply the Convention standards relating to

[48] Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted on 10 May 2006, available at: http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Docs_a_propos/CMrules2006_en.pdf.

[49] See e.g. *Castillo Petruzzi et al v. Peru*, judgment of 30 May 1999, available at: http://www.corteidh.or.cr/casos.cfm, paragraph 14 of the judgment's operative part where the Court ordered 'the State to adopt the appropriate measures to amend those laws that this judgment has declared to be in violation of the American Convention on Human Rights and to ensure the enjoyment and exercise of the rights recognized in the American Convention on Human Rights to all persons subject to its jurisdiction, without exception'; see also *Bámaca Velásquez v. Guatemala* (Reparations), judgment of 22 February 2002, ibid. paragraph 4 of judgment's operative part. According to Article 2 ACHR (domestic legal effects), 'Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.'

freedom of association of members of national minorities. The same argument may well be raised in the large number of cases concerning violations of freedom of expression in Turkey and the convictions by domestic courts following exercise of this freedom in cases linked to the situation of the Kurdish minority in Turkey. In other words, 'direct effect' of the Convention and the Court's case-law has not materialised in these cases. In all these groups of cases, the repetitive violations found are symptoms originating in the lack of effective protection of certain human rights of particular national minorities in these countries. They all show serious dysfunctions at various levels of the respective national law, policy and practice.

The Court could have attempted to assist and guide the respondent states, and consequently the CM, in fulfilling their obligations under Articles 1 and 46 of the Convention, by carrying out either a pilot or quasi-pilot judgment diagnosis expressly, or indirectly noting (at the same time) specific general measures that the respondent states could adopt with a view to preventing similar violations and subsequent applications to the Court.[50] The problem in practice seems to be that these national minority-related cases, except for those concerning freedom of expression in Turkey, have not generated large numbers of applications that would have overburdened the Court's docket and consequently spurred the use of the 'pilot' adjudicative technique. This pragmatic, managerial approach though has nothing to do with the judicial principles that a pan-European Court of a quasi-constitutional nature should apply and adhere to.[51] This is also not supported by the CM Resolution Res(2004)3, on which the Court's relevant practice is based, that has invited the Court to use the pilot judgment procedure 'in particular', *but not only*, 'when [the identified systemic problem] is likely to give rise to numerous applications'.

The out-of-context method of adjudication followed by the Court in the above repetitive, national minority cases has arguably spared it (so far) from direct confrontations with contracting states, where national minority protection frameworks are still considered in principle to be within their own *domaine réservé,* and thus not tackled by third parties. However, the repetition of similar applications and the production of 'neutralised' judgments by the Court finding repetitive violations of certain Convention provisions by certain states have, at least, three major, negative

[50] See also European Commission for Democracy through Law (Venice Commission), *Opinion on the Implementation of the Judgments of the European Court of Human Rights,* No 209/2002, 18 December 2002, esp. paragraphs 56-63 regarding 'clear indication [by the Court] of the nature and cause of the violation found', available at: http://venice.coe.int. The aforementioned supportive judgments may hardly be used at least in the above-mentioned national minority cases, since respondent states have not shown, to date real willingness or determination to resolve the problems in issue.

[51] See, in this vein, Judge Zupančič, concurring opinion in the 2004 *Broniowski* judgment, *in fine*. See also Imbert, 'Follow-up to the Committee of Ministers' Recommendation on the implementation of the Convention at the domestic level and the Declaration on "Ensuring the effectiveness of the implementation of the ECHR at national and European levels"', in Council of Europe Directorate General of Human Rights (ed), *Reform of the European Human Rights System – Proceedings of the High-Level Seminar, Oslo, 18 October 2004* (2004), 33, at 39: 'While the title of the Committee of Ministers' Resolution [Res(2004)3] refers to an "underlying systemic problem" only, it is more important to recall that its purpose is clearly to help avoid a situation where the Court has to pronounce on large numbers of repetitive cases after it has already clarified the legal position under the Convention in a pilot case. For this reason, it is perhaps better to speak of judgments revealing a problem – whether systemic or specific- which affects a category or "class" of persons'.

side effects: first, they leave recidivist states without any substantial guidance towards a way out of their structural problems, allowing the perpetuation of violations against members of national minorities; secondly, they fail to provide the CM with an authoritative diagnosis and any particular, substantial help as to the potentially optimal general (and individual) measures that would be in a position to provide redress to victims and to prevent similar violations; last, but not least, they provide disservice to the effectiveness and reputation of the ECHR mechanism. The use by the Court of the pilot or quasi-pilot judgment procedure in cases where violations of national minority rights and freedoms are linked to structural domestic problems may well further promote and consolidate the Court's constitutional status, as well as justice and social cohesion that Europe so dearly needs this period of time.[52]

5. Concluding remarks

The European system of human rights protection is currently going through a dire straits' period which is arguably due to its own apparent 'success story', the consequent overloading of the Court's docket with individual applications, and the current system's inability to effectively cope with this situation. Although the unprecedented, ongoing rise of applications to the Court,[53] especially since the late 1990s, and the consequent increase of judgments and overloading of the CM DH agendas show indeed the European system's success at the same time they show a regrettable failure of Council of Europe member states to provide effective domestic remedies, or, in any way, to prevent the internationalisation of all these complaints by their arrival in Strasbourg. It has arguably shown the states' failure to effectively incorporate and apply the human rights and fundamental freedoms enshrined in the Convention.[54] The Council of Europe has attempted to respond to this situation through through various means, be it CM Recommendations,[55] high-level political declarations such as the above-mentioned one which was adopted in 2010 in Interlaken, or amendments to the provisions of the Convention itself concerning the binding force and execution of judgments (Article 46), through Protocol No 14 to the ECHR which entered into force in 2010.

Of particular concern are the repetitive applications that raise issues already examined by the Court. As of early 2011, there were 25 000 repetitive applications pending before the Court.[56]

[52] See Sitaropoulos, 'The role and limits of the European Court of Human Rights in supervising state security and anti-terrorism measures affecting aliens' rights' in E. Guild, A. Baldaccini, *Terrorism and the Foreigner* (2007) 85, at 117-120.
[53] As of January 2011 approximately 143 000 applications were pending before the Court, compared to 3500 in 1994, see European Court of Human Rights, statistics 2011, available at: http://www.echr.coe.int. See also Lord Woolf et al., *Review of the Working Methods of the European Court of Human Rights,* December 2005, available at: http://www.echr.coe.int, passim; *Report of the Group of Wise Persons to the Committee of Ministers,* Doc. CM(2006)203, 15 November 2006, available at: http://www.coe.int/t/cm, passim.
[54] See also Imbert, ibid. at 35.
[55] See notably CM/Rec(2008)2 *on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights,* adopted on 6 February 2008.
[56] See Preliminary Contribution by the President of the Court to the Izmir Conference 26-27 April 2011, 25 February 2011, paragraph 22 (document on file with the author).

This situation may well lead to the conclusion that the existing supervisory mechanism for the execution by respondent states of the Court's judgments, despite its successes, has not been fully up to its role which includes, apart from aiming at the individual victims' integral reparation, the prevention of Convention violations by the states parties, as prescribed by Articles 1 and 46, paragraph 1 of the Convention.[57]

Similarly to the Court, the Council of Europe member states today seem to have realized that their own mechanism of execution of judgments has to be under constant review so that the long-term effectiveness of the system is preserved. Hence, there have been changes that aim to boost the supervision by the CM of execution by states of the Court's judgments, introduced in 2010 by the entry into force of Protocol No 14 to the ECHR (new paragraphs 4 and 5 of Article 46), as well as the earlier CM Rules under Article 46, paragraph 2 ECHR, introduced in May 2006, which aimed, *inter alia*, at the CM's further transparency and openness to the international civil society.

The execution and supervision of execution by respondent states of the Court's judgments are indeed a 'subtle and complex matter going beyond legal formality',[58] depending mainly upon effective compliance and efficient synergy of a number of national, or local, administrative and/or judicial organs. This is even more valid in cases regarding members of national minority groups towards whom a number of European states continue to adopt a particularly defensive, or even occasionally offensive, stance for a variety of historico-political reasons.

The CM, under Article 46, paragraph 2 ECHR, is a collective, inter-governmental body entrusted with the supervision of execution by member states of the Court's judgments. The effectiveness of the CM's work, particularly in national minority-related cases, is directly linked to, or rather dependent upon the quality and evolution of its own member states' democratic societies. The aforementioned repetitive cases concerning national minorities in Bulgaria, Greece and Turkey show that as long as states have not managed to reach that stage of politico-legal evolution and maturity enabling them to come to terms with certain 'other' (minority) members of their polities, the role and effectiveness of the CM, as a collective organ guaranteeing the effective, long-term application of the Convention, is bound to be constantly challenged, despite its overall positive achievements.

The second major factor on which implementation of the Court's judgments is largely dependent is naturally the Court itself, and the way in which it decides to adjudicate on national minority cases. The examples of judgments cited above regarding repetitive cases against Bulgaria, Greece

[57] Article 1 reads: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention', while Article 46, paragraph 1 reads: 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case in which they are parties'.

[58] See Higgins, 'The execution of the decisions of organs under the European Convention on Human Rights', 31 *Revue Hellénique de Droit International* (1978) 1, at 39, and Leach, 'The effectiveness of the CM in supervising the enforcement of judgments of the European Court of Human Rights', *Public Law* (2006) 443 ff.

and Turkey demonstrate an inherent weakness of the Court's established methodology which is based on the principle of declaratory judgments. This is an adjudicative policy that opts for a casuistic, neutral, out-of-context method of adjudication, despite the fact that the repetitive applications before it show rather clearly the existence of long-standing, structural problems of minority protection in the countries concerned, linked to the turbulent 20th century history of these nation-states. Even though these issues are still considered by the respective states as 'sensitive' ones for which open, public debates are not usually pursued, it is to be borne in mind that there is a rich body of contemporary international law standards concerning protection of national minority members, by which states are bound and which international and domestic courts should also effectively apply.

By producing repetitive judgments in repetitive national minority cases and avoiding an in-depth, contextual analysis, to date, the Court has failed to provide respondent states and the CM with an authoritative diagnosis of the existing, structural minority-related problems, and with clear guidance. This has left individual victims in Europe without effective, long-term reparation. Having effectively denied its quasi-constitutional character, the Court has further burdened its docket and inevitably provided no help to the long-term effectiveness of the Convention which, as its preamble stresses, should aim at 'a common understanding and observance of the human rights' in Europe. The Court has therefore seemed to have directed itself, the CM, states parties and minority applicants themselves to a stalemate.

One way out of this situation may well be provided by the Court's novel practice of pilot judgments Since 2004, it has tried, following a contextual analysis of the problems at issue, to prescribe in the judgments' operative parts, certain remedial measures to respondent states in order to address and redress serious dysfunctions of their national human rights protection systems (potentially) affecting large numbers of persons. Another possible option is of course the use by the Court of the quasi-pilot judgment procedure by providing specific advice to the respondent states as to general measures that are necessary, without however transforming this advice into an order by placing it in the judgments' operative provisions.

The quasi-pilot judgment methodology may actually be more easily applicable by the Court and more effective at national level in the context of national minority protection, given the political sensitivity with which such cases are usually covered and the lack of readiness, as a rule, on the part of respondent states to accept international supervision or advice, let alone implement it rapidly and effectively. This is what was actually indicated in October 2009 by the use by the Court of the quasi-pilot judgment procedure in one case, *Ürper and others v. Turkey*, concerning the exercise of freedom of expression related to an outlawed Kurdish organisation. This, along with the earlier, crypto-pilot judgment in the case of *Doğan and others v. Turkey*, showed that a contextual method of adjudication is useful and possible also in minority-related cases.

Implementation of the Court's judgments is in any event becoming more and more judicial through the pilot and quasi-pilot judgment procedures, as well as through the aforementioned

supportive judgments.[59] All these jurisprudential techniques are actually based on the fundamental principle of subsidiarity, according to which human rights protection should start and end at home. By these methods the Court provides guidance to states in order to overcome long-standing dysfunctions in their law and practice affecting Convention rights and freedoms. The benefits of the pilot-judgment procedures have been welcomed both by the member states, which had actually requested them in 2004 and later further supported them, especially in 2010 by the Interlaken Declaration, and by the Court itself that now makes efforts to strengthen and refine them. Despite the skepticism that such a new adjudicative policy in the field of national minority protection may naturally give rise to, it is believed that, if used in a principled and solidly-reasoned manner, pilot or quasi-pilot judgments would be to the long-term benefit of the Court's constitutional future in Europe, of the states concerned and, last but not least, of the national minority members whose human rights and fundamental freedoms are at stake.

In the final analysis, it is the Court's own judgments that constitute the terms of reference and provide the contours of implementation by respondent states, as well as of the supervision by the CM under Article 46, paragraph 2 of the Convention. The more detailed and contextual the Court's national minority judgments are, the more effective the respondent states' measures and the CM's supervisory work in this complex, politico-legal field might be. The system of execution of the Court's judgments has thus to be viewed in a holistic manner, in which all main stakeholders (the Court, the CM and the contracting state parties) play their own, individual role, each one of them having, at the same time, short- and long-term repercussions on each other's effectiveness.

[59] See also Fribergh, 'Pilot judgments from the Court's perspective', in Council of Europe Directorate General of Human Rights (ed), *Towards Stronger Implementation of the ECHR at National Level* (2008) 86, at 93.