JUDICIAL CREATIVITY IN THE MAKING:
The Pilot Judgment Procedure a Decade after Its Inception

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The pilot judgment procedure emerged from the jurisprudence of the European Court of Human Rights. Introduced a decade ago, it has been used to address the problem of repetitive cases. This article will investigate the procedure’s creation through the prism of the Vienna Convention on the Law of Treaties. It will then analyze its subsequent institutionalization and application in the case law. This article will illustrate the structural changes generated by the procedure, and examine the reasons undermining the effectiveness of its operation. The pilot judgment procedure has been tainted by a tension between the Court’s traditional function of administering “individual” justice and its occasional dispensing of “constitutional” justice. The pilot judgment procedure bears the traits of the latter. Moreover, as a mechanism established without a formal amendment, it lacks the explicit consent of the states. This deficit creates complications with regard to its enforcement, and thereby jeopardizes its own success.

Keywords: European Court of Human Rights, pilot judgment procedure, principle of subsidiarity, individual versus constitutional justice, Vienna Convention on the Law of Treaties

I. INTRODUCTION

The European Convention on Human Rights (ECHR, the Convention) is one of the foremost international conventions aimed at safeguarding core civil and political rights. Drafted by the Council of Europe in 1950 the Convention came into force in 1953. It introduced, inter alia, a provision establishing a judicial review mechanism, namely the European Court of Human Rights (ECtHR, the Court),¹ which began operations in 1959. Since its inception, the Convention system has expanded not only institutionally, but also jurisprudentially and geographically.² Following the fall of the Iron Curtain, the European human rights regime has

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¹ In the beginning, accepting the Court’s jurisdiction and individuals’ direct access to the Court were optional. This changed with Protocol 11 that entered into force on 1 Nov. 1998. Protocol 11 also underlined that the Court shall function on a “permanent basis” and “the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols.”

incorporated former communist countries, increasing the number of state parties to forty-seven. This political move has led to a surge in the number of cases waiting to be reviewed by the Court. An unprecedented caseload arose due to the accession of former communist countries "whose transition to democracy ... [was] often slow and fitful," coupled with "systematic human rights problems in longstanding Convention member states." This case-load has significantly decreased the adjudicative capacity of the Court. To overcome this challenge, the Council of Europe institutions have concentrated on redesigning the Convention and the Court. For example, Protocol 14, which came into force in June 2010, led to significant changes in how the Court operates. These changes include new admissibility criteria, single-judge formations for establishing the admissibility of cases, provisions for facilitating friendly settlements, and measures to improve the enforcement of the Court's judgments. While all of these structural changes were designed to decrease the large number of cases before the Court, the desired effect has only partially materialized.

The Court has actively participated in this reform process by providing the Committee of Ministers with recommendations to overcome the problem of repetitive cases. Perhaps one of the most innovative recommendations was the pilot judgment procedure, which was intended to address a multitude of identical cases arising from systemic deficiencies. This new procedure has caused mixed feelings in the human rights community, creating a wide range of reactions – from deeming it a promising human rights litigation tool to questioning its legal basis. The former President of

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4 Helfer, supra note 2 at 126.


6 The Court has announced that there has been a decrease in the backlog of cases, which are inadmissible since Protocol 14 went into force. The total number of pending cases dropped from 160,200 to 111,350 in three years, namely from 1 Sept. 2011 to 1 Oct. 2013. Although this decrease is noteworthy it is not sufficient to increase the Court's adjudicative capacity. This is because the drop in the number of pending applications was accomplished with the work of single-judge formations to a great extent. What the Court needs to face now is the large number of pending chamber judgments. The European Court of Human Rights, Press Release: Reform of the Court Filtering of cases successful in reducing backlog, ECHR 312 (2013) (24 Oct. 2013).

7 The Committee of Ministers is the Council of Europe's decision-making body, and it comprises Foreign Affairs Ministers of all member states or their permanent diplomatic representatives.

8 O'Boyle, supra note 5 at 7.

9 For more see, Philip Royston Leach et al., Responding to Systemic Human Rights Violations: An Analysis of "Pilot Judgements" of the European Court of Human Rights and Their Impact at National Level (2010); Helen Keller, Andreas Fischer and Daniela Kühne, Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals, 21 THE EUROPEAN JOURNAL OF INT'L LAW 1025 (2010); Janneke Gerard, The Pilot Judgment Procedure before the European Court of Hu-
the Court, Luzius Wildhaber, noted that this procedure was “on an experimental stage.” Even though the pilot judgment procedure has been in use since 2004, it is still the subject of continuing debate. This debate will be engaged by evaluating (i) how the pilot judgment procedure was adopted in light of the Vienna Convention on the Law of Treaties of 1969 (VCLT) (ii) the extent to which it has been institutionalized, and (iii) the future prospects of the pilot judgment procedure. Particular attention will be paid to the pilot judgment procedure’s adoption and institutionalization, which are indicative of its success.

The pilot judgment procedure was adopted through an amendment by informal means. With this procedure, the Court reviews systemic problems and prescribes general measures, giving an erga omnes effect to its judgments. Such a function goes well beyond the intentions of the drafters of the Convention, and results in substantive and structural changes. However these changes have not been consolidated through the procedure’s institutionalization. In particular, the manner in which this procedure operates is incompatible with the principle of subsidiarity that is ingrained in the Convention. As a matter of fact, this incompatibility reflects a larger question on the role of the Court as an institution to deliver “constitutional” justice or “individual” justice consistent with the subsidiarity principle. The pilot judgment procedure inheriting this tension has been obstructed by this issue.

The structure of the article is as follows. First, the background of the pilot judgment procedure is examined. Second, the scope of the structural changes generated by this procedure is discussed. Third, the procedure’s inception using the principles of the VCLT is assessed. Fourth, the institutionalization of pilot judgments is considered. Finally, the shortfalls of the pilot judgment procedure are explained, in particular how it is caught between the principle of subsidiarity and the aspiration to make the Court more like a constitutional court.

II. THE BACKGROUND TO THE PILOT JUDGMENT PROCEDURE

The pilot judgment procedure was created to address repetitive cases, which “jeopardize the effectiveness of Strasbourg machinery.” The procedure finds its origins in the negotiations concerning the drafting of Proto-

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11 Fytyns, supra note 9 at 1233.

12 For more, see Helfer, supra note 2.

col 14. Despite the Court’s advocating,14 the Committee of Ministers’ Steering Committee for Human Rights15 did not incorporate a reference to the pilot judgment procedure in the draft Protocol.16 One reason for this decision was to avoid the political resistance that was likely to arise from imposing formal obligations on states to adopt general measures.17 Instead, in 2004, the Committee gave its blessings to the Court in a non-binding form, namely by adopting a resolution and a recommendation.18 The Committee encouraged the Court to identify underlying systemic problems that were likely to increase the number of applications, in an effort to “assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.”19 Similarly, the Committee advised state parties to “set up effective remedies in order to avoid repetitive cases being brought before the Court.”20 Following this advice, the Court gave its first pilot judgment in the case of Broniowski v. Poland in June 2004.

The Broniowski case was lodged as a compensation claim concerning properties lost during World War II.21 Poland’s eastern border was redrawn along the Bug River following the armed conflict, and Polish residents living “beyond the Bug River” were repatriated.22 Poland promised to compensate those who had to abandon their properties, a group totaling nearly 80,000 persons.23 Over the next fifty years, the government passed several legislative acts which provided a remedy to some of the claimants while leaving others without compensation.24 The applicant’s grandmother was one of those who were repatriated, but who did not receive sufficient compensation. The applicant claimed that his entitlement to compensatory property had not been satisfied. The Court found the application well-founded, and passed a judgment stating that the government’s compensation scheme, which provided the applicant with only 2 percent of the real value of the lost property, was in violation of Article 1 of Protocol 1.25

Nevertheless, the Court did not stop there. It held that this violation “originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected

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15 The Steering Committee is set up by the Committee of Ministers under Article 17 of the Statute of the Council of Europe. It is composed of the representatives of forty-seven member states. It is main responsibilities are to advise the Committee of Ministers on issues regarding human rights protection and elaborating common standards for the states.
17 Fyrmis, supra note 9 at 1239-1240.
18 Article 15b of the Statute of the Council of Europe mandates the Committee of Minister to issuing non-binding recommendation and resolution.
22 Id. at ¶11.
23 Id. at ¶162.
24 Id. at ¶34-35.
25 Id. at ¶186-87.
and remains capable of affecting a large number of persons.”26 The Court supported this reasoning with the Committee’s above-mentioned resolution and recommendation.27 Relying on Article 46 of the ECHR, the Court extrapolated the consequences for the responding state.28 Adopting a broad interpretation of this provision, the Court found that the state did not only have to pay the individual just satisfaction under Article 41 of the ECHR, but had a legal obligation to provide general and/or individual measures.29 These measures were “to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects . . . provided that such means are compatible with the conclusions set out in the Court’s judgment.”30 The Court explained this reasoning further:

Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State’s obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe 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. Above all, the measures adopted must be such as to remedy the systemic defect underlying the Court’s finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause.31

Evidently, this reasoning appears to be contradictory. On the one hand, the Court recognized that determining the remedial measures is not one of its tasks but on the other hand, it made a pronouncement on the remedial measures for the state concerned. Based on this reasoning, the Court included in the operative part of the judgment a statement to the effect that the responding state must “secure the implementation of the property right in question in respect of the remaining Bug River claimants.”32 As a result, it initiated the pilot judgment procedure.

In essence, this procedure was launched by the Court with the political support of the Committee of Ministers. The pilot judgment procedure, instituted by judicial creativity, bypassed the course of action needed for a formal amendment. Instead of initiating the amendment procedure, the Committee of Ministers issued a non-binding recommendation and resolution that advocated the creation of the pilot judgment procedure.33 The Court relied on these documents and its broad interpretation of Article 46

26 Id. at ¶189.
27 Id. at ¶190.
28 Id. at ¶192.
29 Id.
30 Id.
31 Id. at ¶193.
32 Id. at ¶4 (operative part).
of the ECHR when launching the procedure. This in its totality may constitute an amendment by informal means.

III. THE STRUCTURAL CHANGES WHICH AROSE WITH THE ESTABLISHMENT OF THE PILOT JUDGMENT PROCEDURE

Before examining the reasoning underlying the decision in the Broniowski case, some of the structural changes which have been spurred by this new procedure need to be considered. Based on Broniowski, the Court has drafted Rule 61 of the Rules of Court.  

This rule defines the main attributes of pilot judgments as providing guidelines and formulating general measures aimed at addressing the systemic deficiencies at national level.  

Furthermore, Rule 61(3) provides that the Court shall identify the type of remedial measures in the operative provisions of the judgment.  

Additionally, the Court may adjourn all other pending applications resulting from the same cause, as Rule 61(6) states.  

This procedure also requires a close supervision of the Committee of Ministers. In the event that the state fails to materialize the required changes, the adjourned applications might be reviewed individually, which is at the Court’s discretion.  

As the Court explains, a “pilot’ case necessarily extends beyond the sole interests of the individual applicant and requires it to examine that case also from the perspective of the general measures that need to be taken in the interest of other potentially affected persons.” Accordingly, the suggested changes are not minor, but rather substantial. They alter the whole landscape of the interactive realm between the Court, the state and the individual applicant, and lead to ramifications particularly for the latter two actors.

First, for the individuals whose applications are classified under the pilot judgment procedure but not selected as the pilot case, this translates as an obstruction to voicing their complaints. Most importantly, their applications could be adjourned. As Markus Fryns rightly stresses, this adjournment impairs the individual’s right of access to the Court under Article 34 of the ECHR. The Court only reviews the selected pilot case and extrapolates prescriptions for similar cases. However, this does not guarantee that general measures requested by the Court would address accu-

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34 The European Court of Human Rights, Rules of Court (1 July 2014), www.echr.coe.int/Documents/Rules_Court_ENG.pdf.
35 Id. at § 61(1).
36 The first case in which the Court indicated that some general measures should be taken was Marckx v. Belgium, 31 Eur. Ct. H.R., (ser. A) (1979). However, these measures were not framed as binding obligations but more like recommendations.
37 The Court might continue reviewing cases, which are directly linked to the most fundamental rights, such as inhuman and degrading treatment, as it was seen in Ananyev and Others v. Russia, App. No. 42525/07, 60800/08, Eur. Ct. H.R. (2012-I).
38 See Leach et al., supra note 9 at 176.
40 Fryns, supra note 9 at 1257.
rately all the legal issues raised in numerous frozen cases. For the frozen applications, the prospect of receiving individual compensation depends on the implementation of the general measures provided in the pilot judgment, which might or might not directly address their problem. In the event that a state fails to implement these general measures within the required time period, there is a possibility that the Court will review the adjourned cases. Nonetheless, there is no stated timeline for reopening the adjourned cases. As one would expect, these steps result in further delays and uncertainty. Hence, this procedure creates a serious disadvantage for the individual applicant whose case is not the pilot case.

Second, as for states, these ramifications come in the form of clear obligations to implement the general measures that have been identified by the Court. As Judge Lech Garlicki underlines, pilot judgments “indicate more concrete steps to be taken by the State” and are not “mere recommendations” but “commands.” This attribute of pilot judgments is inherently at odds with the subsidiarity principle. This principle has a distinct meaning in the Convention context, and underlines that Strasbourg institutions are “supplementary and subsidiary to the protection of rights and freedoms under national legal systems.” It first emerged in the Court’s case law, and has been defined as “a tool of judicial self-restraint.” In the Belgian Linguistic case, the Court defined the characteristics of this principle:

[The Court] cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the Convention.

The subsidiarity principle grants discretion to the national authorities in identifying the appropriate measures to be implemented. Moreover, it restricts the role of the Court to only reviewing the compatibility of these measures with the principles of the Convention by means of delivering individual justice. However, as Garlicki argues, unlike a single judgment, which creates obligations regarding the singular context of the individual

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41 Helfer, supra note 2 at 154.
43 Helfer, supra note 2 at 128.
45 Paul Mahoney, Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin, 11 HUM. RTS. L. J. 57, 78 (1990); See also Christoffersen, supra note 44 at 242.
claimants, pilot judgments combine individual and general effects to mirror "the procedure of constitutional complaint" and highlight the "constitutional dimension" of the Court's functions. The legitimate question to ask is whether such a position, namely "the same authority as a supreme court within a national system," is fit for the Court.

This leads to the debate concerning the Court's role as an institution to deliver "individual" or "constitutional" justice. Steven Greer explains this distinction clearly: the idea behind the individual justice model is that the Court's primary function is to provide redress to the individual applicant regardless of the systemic improvements, which might be generated in the process; as for the constitutional model, the Court's role is to choose and adjudicate only the most serious allegations to create a significant impact on the state concerned. Greer and Wildhaber underline the impossibility of the "systematic delivery of individual justice" due to the increasing caseload. Therefore, they call for the consolidation of the Court's role in administrating constitutional justice without transforming the Court into a constitutional court. They rightly point out that the Court already undertakes this role, which should be formally acknowledged and performed in a more consistent manner. Alec Stone Sweet takes it one step further and argues that the Court is already a constitutional court, because it acts like one.

Greer and Wildhaber's observation that the Court has assumed an increasingly more constitutional role is well reasoned. However the viability of its combining constitutional and individual justice can be called into question. As Greer rightly emphasizes, the "constitutionalization" of the Court did not take part in the official reform debate. Nevertheless, the Court's constitutionalization is underway, pilot judgments being its prime example. In order to assess the validity of this development, one has to look at the process from which the pilot judgment procedure was derived. This task will be undertaken in the following section.

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47 Id. at §186.
49 Steven Greer and Andrew Williams, Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice? 15 EUROPEAN LAW JOURNAL 462, 466 (2009).
50 Steven Greer and Luzius Wildhaber, Revisiting the Debate about 'Constitutionalising' the European Court of Human Rights, 12 HUMAN RIGHTS LAW REVIEW 655, 664 (2012).
51 Id. at 674.
52 Id.
55 Greer and Wildhaber, supra note 50 at 687.
IV. AN ASSESSMENT OF THE PROCEDURE THROUGH THE LENS OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

Since the pilot judgment procedure originates in the Broniowski judgment, it is through an evaluation of this judgment that one can unravel how and on what grounds the procedure came into existence. While making such an assessment, it is fitting to apply the general rules of interpretation in Articles 31–33 of the VCLT. According to Article 31(1) of the VCLT, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose."

When interpreting the Convention, the Court has adopted a more "flexible" approach, creating its own labels and principles such as "living instrument," or "margin of appreciation." This trend rejects the idea that the Convention must be interpreted by reference to its origins in the 1950s, and establishes instead that it should be interpreted "in the light of present-day conditions." The pilot judgment procedure has been considered a part of this tradition. Moreover, since it has been portrayed as a procedural innovation that is designed to reduce the Court's caseload, the Vienna Convention's rules of interpretation have not been employed in discussions on the formation of this procedure. In this section, these rules will be applied to the Broniowski judgment, which established the procedure's foundations.

In this judgment, the Court primarily relied on Article 46 of the ECHR in inaugurating the pilot judgment procedure. Interpreting this article rather broadly, it prescribed general measures to the responding state. These measures included making legislative changes, and providing remedies for not only the individual applicant, but many others potentially in the same situation as well. However, a legitimate question to ask is whether Article 46 of the ECHR provides the grounds for such an approach. This article reads as follows: "the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties." A textual analysis of the article clearly shows that this provision concerns the binding nature of the Court's judgments. Moreover, it does not grant the Court the capacity to deliver judgments that concern not only the indi-

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58 This term, meaning the Convention must be interpreted in the light of present-day conditions, was coined in Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) (1978).
59 This term refers to a degree of discretion that is granted to member states in fulfilling their obligations under the Convention. It was first used in Handyside v. United Kingdom, 24 Eur. Ct. H. R. (ser. A) (1976).
60 Letsas, supra note 13 at 59.
62 Broniowski v. Poland, supra note 21 at §192.
63 European Convention on Human Rights, art. 46, 4 Nov. 1950, ETS 5; 213 UNTS 221.
individual applicant, but also other victims. As Fyrnys explains, the substantive binding effect of the judgment’s operative part is confined to *ratione personae* (personal scope; the individual applicant or the state party that lodges the application), *ratione temporis* (temporal scope; the matter in dispute excluding its immediate prospective effect), and *ratione materiae* (material scope; the facts of the individual case).64

In addition, if one includes Article 41 of the ECHR in one’s analysis, the scope of the Court’s judgments becomes clearer. According to this provision, “if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.” 65 This provision provides that in cases where the national authorities do not provide full reparation (*restitution in integrum*), the Court can award the individual applicant just satisfaction. Evidently, this does not imply that the Court should dictate what measures to implement for providing reparations for possible victims other than the individual applicant. In other words, it does not condone the Court giving *erga omnes* effect to its judgments, or assuming an appellate body function to review the state’s national legislation. In fact, as Helfer emphasizes, none of the provisions of the Convention gives *erga omnes* effect to the Court’s judgments.66 Correspondingly, the Court’s reliance on Article 46 of the ECHR when delivering judgments, which include obligations to address systematic problems in the operative part of the judgment, is not persuasive enough.

Moreover, one can argue that the objective of the pilot judgment procedure corresponds to the broad object and purpose of the Convention, namely safeguarding Convention rights.67 However, the “object and purpose should be understood as an objective concept, referring to the goals of the treaty’s drafters as those goals are reflected in the treaty’s text.”68 Hence, it can be still be questioned whether using this procedure is in accordance with the drafter’s intentions. Articles 19 and 32 of the ECHR limit the Court’s function to “the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto,” and its jurisdiction to “all matters concerning the interpretation and application of the Convention and the Protocols thereto.” These two provisions describe the role of the Court as interpreting the Convention without granting it the competence to initiate structural changes in the Convention system.

This conclusion is also supported by the *travaux préparatoires*.69 As underlined in Article 32 of the VCLT, one can resort to supplementary

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64 Fyrnys, * supra* note 9 at 1234-1235.
67 Harder, * supra* note 61 at 264.
69 Fyrnys * supra* note 9.
means of interpretation, including the preparatory work of the treaty. An analysis of the preparatory work of the Convention shows that the scope of the Court’s competence was discussed during the negotiations. At the Plenary Sitting of September 7, 1949, Pierre-Henri Teitgen, the representative of France, touched upon this issue by emphasizing that “the Court will not in any way operate as a Supreme Court of Appeal having jurisdiction to review any errors of laws or of fact which are alleged against a national Court.”

This view was also reflected in the draft report of the Legal Committee to the Consultative Assembly, which underlined that “the Court will not in any way operate as a Court of Appeal, having power to revise internal orders and verdicts.” Ed Bates, who provides a brilliant account of the evolution of the Convention system, touches upon this point as well.

He argues that the drafters confined the Court’s functions to making declarations concerning individual violations, and did not grant the Court the authority to declare the state acts void. Furthermore, the Committee of Experts restricted the scope of the Court’s functions to only review the cases concerning the violation of individual rights. The Court was not permitted to give rulings on cases concerning violations “simply by the promulgation of legislative acts.” The drafters defined the Court’s powers to be limited to giving rulings on individual violations.

Therefore, an expansion in the competence of the Court, by granting erga omnes nature to its judgments or delivering constitutional review, cannot be traced back to the original intentions of the drafters. Clearly, there are serious possible challenges to the argument that, in light of present conditions, the Court should deliver judgments not only for the individual applicant concerned but also for a larger group of possible victims.

If these structural changes are to be introduced in the Convention system, then they should be presented in the form of an amendment to the ECHR. Given the fact that the basis of an expansion of the Court’s authority cannot be found in either the Convention or in the intentions of the drafters, the logical next step would be to adopt an amendment, allowing national legislatures to participate in the process.

The rules of this procedure are clearly laid down in Articles 39–40 of the VCLT. Article 40 of the VCLT presents the procedure as follows: “[a]ny proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in.” However, this provision was not observed in the initia-

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71 Id. at 93–94.
73 Id.
75 Id.
76 Fyrnys, supra note 9 at 1252.
tion of the pilot judgment procedure. The pilot judgment procedure was not mentioned in Protocol 14 or the two subsequent drafted protocols – Protocol 15 and Protocol 16, which were opened for signature in June 26, 2013 and October 2, 2013, respectively. Protocol 15 will lead to profound structural changes, such as a reduction in the time limit for admissibility from six to four months after a final national decision and the abolition of the parties' right to object to the relinquishment of cases to the Grand Chamber.79 As for Protocol 16, it will extend the jurisdiction of the Court to give advisory opinions to the highest courts and tribunals of the states upon their request.79 Manifestly, these protocols already entail some structural modifications to the Convention system, yet no reference to pilot judgments was made in their texts.

V. POST-BRONIOWSKI: INSTITUTIONALISATION OF THE PILOT JUDGMENT procedure

Following the Broniowski case, this procedure has been applied in several other cases80 concerning various systematic problems such as inhuman and degrading treatment,81 the lack of domestic remedies, the non-enforcement of court decisions,82 the excessive length of proceedings,83 and the right to free elections.84 In other words, the pilot judgment procedure that was established as a result of judicial creativity and tailored for the Broniowski case has now been applied in other contexts. Although this has served as an interesting testing ground for its viability, the institutionalization of the procedure has not been as forthcoming. The Steering Committee for Human Rights passed the ball to the Court, and announced that increasing the “visibility” of the procedure “through reference in a text explicitly endorsed by the States Parties” might be considered “in the light of the outcome of the Court’s rule-drafting exercise.”85 On February 21, 2011, the Court finally inserted Rule 61 governing pilot judgments, and the Committee of Ministers welcomed this development.86 Nonetheless, the

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80 According to the literature, there are three types of pilot judgments: (i) full-pilot judgments which are identified so by the Court (ii) quasi-pilot judgments, which address to general measures without the Court naming them as pilot judgments (iii) other decisions addressing to systemic problems, in which the Court mentions structural problems in the reasoning part rather than in the operative part. For more, see Leach et al. supra note 9.
81 Ananyev and Others v. Russia, supra note 37.
84 Greens and M.T. v. United Kingdom, supra note 39.
86 The European Court of Human Rights, Izmir Declaration, High Level Conference on the Future of the European Court of Human Rights (26-27 Apr. 2011),
codification of the procedure in the Rules of Court did not necessarily render the process more transparent or grant it any legal basis. With regards to transparency, there is uncertainty concerning situations where the individual applicant whose application is adjourned and how he or she can seek redress. According to Rule 61(6) of the Rules of Court, “the Court may at any time examine an adjourned application where the interests of the proper administration of justice so require.”87 The Rules do not mention the criteria or a timeline for reviewing these cases. The Court fails to clarify how frozen cases will be treated and what criteria will be used. More fundamentally, the legal basis is not solidified either. The Rules of Court regulate the practice of the Court, and facilitate the application of the Convention without creating substantive rights and obligations in themselves. The Court itself raised this point in its case law when referring to interim measures by noting that: “[i]n the absence of a provision in the Convention for interim measures an indication given under Rule 36 cannot be considered to give rise to a binding obligation on Contracting Parties.”88

The Steering Committee has been reluctant to amend the Convention, and has instead been willing to allow the Court to codify the pilot judgment procedure.89 This could be interpreted as a strategy to present this procedure as an entirely procedural innovation without dwelling upon the structural changes created for the states and the individual applicants. Wildhaber also alludes to this observation when discussing how giving *erga omnes* effect to judgments would not be a novel or unexpected development. He avers: “the good administration of justice requires that similar facts be handled in the same way and under the same rules. In that sense, judgments have the force of precedent. This follows from the equality before the law and the coherence and the consistency of the case law.”90 The argument is a straightforward one but it does not resolve the dilemma of the legality and transparency deficit of this procedure.

Indeed, the procedure has secured political support,91 expressed particularly in the Interlaken Declaration of 2010 and the Brighton Declaration of 2012, which were the products of two high level conferences on the future of the European Court of Human Rights.92 In the Interlaken Declaration, the state parties were called upon to cooperate with the Committee of Ministers with regard to pilot judgment cases, and to undertake necessary structural changes remedying the underlying structural or systemic

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87 Rules of Court, rule 61(6), *supra* note 34.
90 Id. at § 89.
problems giving rise to repetitive cases.\textsuperscript{93} Similarly, the Brighton Declaration “welcome[d] the continued use by the Court of proactive measures, particularly pilot judgments, to dispose of repetitive violations in an efficient manner.”\textsuperscript{94} It is rather curious that, despite such political backing, the matter has been left entirely to the Court.

Wildhaber foreshadowed this discrepancy by noting that: “it would certainly be most desirable if a better legal basis existed. It is just foreseeable that the Court will hardly get such a basis in the next years, and it will be the Court’s challenge to decide whether or not to react on its own” back in 2007.\textsuperscript{95} More interestingly, he underlines that one of the most crucial reasons behind the lack of such a basis is the “complications that might ensue from creating a legal obligation to introduce retroactive measures.”\textsuperscript{96} However, this drawback was bypassed by the Steering Committee, which, with reference to Article 46 of the ECHR, affirmed that the Court could introduce this procedure “under the existing terms of the Convention.”\textsuperscript{97} Nevertheless, as discussed in Section IV, the wording of Article 46 of the ECHR does not accommodate an expansion of the Court’s authority. Even though the Court has not refrained from assessing the compatibility of the states’ legislation with the Convention indirectly, this has never had a binding effect on the state parties.\textsuperscript{98} With this new procedure, the Court has now been granted a fait accompli authority to review national laws and policies rather than merely assessing whether an individual’s right has been violated by national authorities.\textsuperscript{99}

VI. END RESULT: THE PILOT JUDGMENT PROCEDURE CAUGHT BETWEEN SUBSIDIARITY AND CONSTITUTIONALISM

Curious enough, this takes us back to the issue of the state parties, as the success of the pilot judgment procedure largely depends on their willingness to cooperate. Antoine Buyse defines the states’ cooperation to address broader structural problems as the “Achilles’ heel” of the entire procedure.\textsuperscript{100} Wildhaber echoes this sentiment by stating that “there is indeed a problem with pilot judgments, the basis of which cannot be found directly in the Convention about whether States will always be willing to cooper-


\textsuperscript{95} Wildhaber, supra note 10 at 91.

\textsuperscript{96} Id. at 70.

\textsuperscript{97} Id.

\textsuperscript{98} Garlicki, supra note 42 at 182-83.

\textsuperscript{99} Fryns, supra note 9 at 1259.

\textsuperscript{100} Antoine Buyse, The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges, NOMIKO VIMA (GREEK LAW JOURNAL) 13 (2009).
ate fully. Wildhaber’s concern is not groundless, as this situation could arise. As the pilot judgment procedure has not secured the explicit consent of the states, it might be difficult to seek their cooperation in implementing the measures prescribed by this procedure within the required time. This has already surfaced in some cases. In Broniowski, the Polish government was willing to negotiate a friendly settlement. It introduced the necessary legislative changes and paid the required compensation to victims. Nonetheless, this procedure did not go as smoothly in other cases such as Burdov v. Russia (no.2) or Ivanov v. Ukraine. Anatoliy Burdov, a victim of the Chernobyl disaster, complained to the Court of the non-enforcement of domestic court decisions that awarded him with social benefits. The Court found that Article 6 ECHR (right to fair trial) and Article 1 of Protocol 1 (right to property) had been violated, and awarded Burdov with just satisfaction. However, since this judgment, the non-enforcement of court decisions has continued to be a significant problem, constituting 40 percent of all admissible applications that came before the European Court by 2007. In 2004, Burdov lodged a second application for the same reason, and the Court delivered its judgment in 2009. It stated that in addition to granting remedies to the victims, the Russian government must set up “an effective domestic remedy or combination of such remedies which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgments” The government passed a Compensation Act, which provided that a compensation claim regarding the non-enforcement of court decisions and the prolonged length of judicial proceedings can be brought before domestic courts. This act came into force on May 4, 2010.

On September 24, 2010, the Court declared two applications, namely Nagovitsyn and Nalgiyev v. Russia and Fakhretdinov and Others v. Russia, inadmissible on the grounds that the “remedy adopted by Russia in response to pilot judgments has to be exhausted.” More importantly, these cases provided the Court with a chance to review the Compensation Act. One of the applicants, Nagovitsyn, had already brought proceedings under the Compensation Act. Although the judgment was in his favor, he argued that the compensation award, which was around one thousand euros,
was insufficient and lower than European Court standards. Together with Nalgiyev he submitted that the new remedy "could—at best—lead to inadequate compensation for delays but could not ensure the State's ultimate compliance with the judgment." The Court's response to this claim raised even more concern about the capacity of this remedy:

The Court acknowledged that an issue could subsequently arise concerning whether the new compensatory remedy would still be effective in a situation in which the defendant State authority persistently failed to honour the judgment debt notwithstanding a compensation award or even repeated awards made by domestic courts under the Compensation Act. However the Court did not find it appropriate to anticipate such an event, nor to decide that issue in theory at the present stage.

The Court avoided the thorny issue of measuring effectiveness of the new domestic remedy. It effectively backtracked from the constitutional court role it had assumed when giving the Burdov ruling. Moreover, it declared the applications inadmissible on the basis of the non-exhaustion of domestic remedies. In other words, the Court gave retroactive effect to the Compensation Act, and declared the applications that were made well before the introduction of this act inadmissible. Subsequently, on the grounds of this new remedy, the Court struck more than 800 applications off its list. The Committee of Ministers decided to close the examination of the new remedy, but continue examining other general measures.

The ability of the Compensation Act to solve the protracted problem of non-enforceability and procedural delay is questionable. Both the Committee of Ministers and the Court have signaled this and reiterated that setting up domestic remedies does not relieve the concerned state from its "general obligation to solve structural problems underlying violations of the Convention." Although Russia has shown a willingness to make legislative changes to a certain extent, it is uncertain whether the state authorities are able to solve the problem. One thing is clear: the Burdov saga might re-appear due to shortfalls in implementation. It is primarily the individual who is at a disadvantage, because he or she needs to move back and forth between the domestic courts and the European Court. This is reminis-

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113 *Nagovitsyn and Nalgiyev v. Russia*, supra note 110.

114 Id.

115 Leach, supra note 112 at 236.

116 For example, Nagovitsyn and Malgiyev's complaints concerned judgments given by domestic courts in July 2007 and May 2007 respectively.


118 Id.


120 Leach, Hardman and Stephenson, supra note 91 at 358.
cent of the myth of Sisyphus, who was condemned to rolling a boulder uphill then watching it roll back down for an eternity.\textsuperscript{121}

The Sisyphus myth repeated itself in \textit{Yuriy Nikolayevich Ivanov v. Ukraine} case, which can be considered as a “failing” pilot judgment.\textsuperscript{122} Yuriy Nikolayevich, an army retiree, complained to the Court because he did not receive a “lump-sum retirement payment and compensation for his uniform,” to which he was entitled.\textsuperscript{123} The Court found a violation of his rights to a fair trial, property, and effective remedy, and ordered measures similar to the \textit{Burdov} judgment.\textsuperscript{124} However, unlike its conclusion in \textit{Burdov}, the Court decided to “resume the examination of applications raising similar issues.”\textsuperscript{125} It found Ukraine’s progress with respect to the required measures unsatisfactory, with 2500 cases waiting before the Court brought against Ukraine for similar reasons.\textsuperscript{126} The Committee of Ministers urged the government to introduce an effective domestic remedy scheme.\textsuperscript{127} As a response, in October 2013 the Ukrainian government introduced a law to facilitate the execution of national court judgments.\textsuperscript{128} However, it is not clear whether this measure will be effective, as the government has not submitted an action plan or any information regarding the implementation of individual measures.\textsuperscript{129}

These examples suggest that the suitability of the cases is \textit{conditio sine qua non},\textsuperscript{130} since not every systemic problem lends itself to be solved through this procedure. This procedure was clearly tailored for \textit{Broniowski}-type cases in which the problem was confined to an “identifiable class of citizens,” as opposed to the non-implementation of court decisions that affect larger number applicants in different contexts.\textsuperscript{131} Although the above-mentioned cases revolve around a similar violation, namely the non-enforceability of remedies regarding the right to property, we observe three different outcomes, due to the states’ lack of either willingness or ability. The Audit Court of Italy once commented that the cost of letting all the cases go to Strasbourg would be less than reforming the Italian judicial

\begin{footnotesize}
\begin{enumerate}
\item Albert Camus, \textit{The Myth of Sisyphus and Other Essays} (Justin O’Brien trans., 1955).
\item Id. at § 8.
\item Id.
\item The European Court of Human Rights, Press Release: Court decides to resume examination of applications concerning non-enforcement of domestic decisions in Ukraine, ECHR 086 (2012).
\item Id.
\item Communication from Ukraine Concerning the Case Yuriy Nikolayevich Ivanov (Pilot Case) and the Zhovner Group against the Ukraine (Applications Nos 40450/04 and 56848/06), DH-DD (2013)1165 (29 Oct. 2013).
\item Leach, Helen Hardman and Svetlana Stephenson, \textit{supra} note 91 at 351.
\end{enumerate}
\end{footnotesize}
system. One can easily imagine that this also holds true for the legal systems of most Convention states, and in particular those of the newly acceded former communist states.

However, the shortfalls in implementing the general and individual measures prescribed through pilot judgments might not only be due to the intractable nature of the problem at issue. There have also been cases where the states showed clear resistance to implementing these measures. One example is *Greens and M.T. v. the United Kingdom*, a case concerning the prisoners’ right to vote in the United Kingdom. This case was brought before the ECHR by two prisoners who complained that they were not allowed to vote in the European Parliament elections in June 2009 and the general elections of May 2010, due to the blanket ban on voting for convicted prisoners in detention. The Court found that a blanket ban on voting for all prisoners regardless of (i) “the length of their sentence,” (ii) “the nature and gravity of their offence,” and (iii) “their individual circumstances” was in violation of Article 3 of Protocol 1 (right to free elections). The Court also brought attention to the fact that the government of the United Kingdom had not implemented the Court’s previous judgment on prisoners’ right to vote, *Hirst v. the United Kingdom (No. 2)* of October 6, 2005. The Court, then, decided to apply the pilot judgment procedure to which the government raised objections. The government argued that the features of this case rendered it unfeasible to apply the pilot judgment procedure. It further relied on the fact that the Grand Chamber in the previous *Hirst (No. 2)* case granted the state a wide margin of appreciation concerning this issue. Therefore, this case was not suitable for the pilot judgment procedure. Manifestly, this objection was a clear indication of the resistance shown to the Court’s intention to request general measures on politically sensitive issues.

However, the Court went ahead with the decision and held that the United Kingdom must amend the Representation of People Act of 1983, which provides the blanket restriction within six months, and enact the required legislation within the specified time period that the Committee of Ministers deems fit. The government was given an extension to implement the measures within six months after the judgment delivery of *Scoppolla v. Italy (No.3)* of May 22, 2012, another case concerning the prisoners’ right to vote. On November 22, 2012, the government published a

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132 Wildhaber, *supra* note 10 at 69.
133 *Greens and M.T. v. United Kingdom*, *supra* note 38.
134 *Id*. at § 73.
135 *Id*. at §77.
137, *Greens and M.T. v. United Kingdom*, *supra* note 38, at § 104
138 *Id*.
139 *Id*.
140 *Id*.
141 *Id*. at § 6 (operative part).
143 The European Court of Human Rights, Press Release: Court adjourns 2,354 prisoners’
draft bill on prisoners’ voting eligibility.\textsuperscript{144} The bill included proposals to ban voting rights for either (i) prisoners who are sentenced to more than six months, (ii) or prisoners who are sentenced to four years or more, (iii) or all prisoners. Following this development, the Committee of Ministers decided to resume its considerations with respect to the implementation of the case at their September 2013 meeting.\textsuperscript{145} On March 12, 2013, in the light of this decision, the Court adjourned 2,354 similar cases against the United Kingdom waiting to be reviewed until September 30, 2013.\textsuperscript{146}

On October 16, 2013, the Supreme Court of the United Kingdom passed a judgment.\textsuperscript{147} This judgment upheld the 1983 Act, thereby keeping the blanket ban on inmates’ voting rights in force.\textsuperscript{148} Judges unanimously rejected the appeals of the two whole-life sentenced prisoners who argued that their right to vote is derived from the ECHR and European Union law.\textsuperscript{149} One line of reasoning pursued by the Supreme Court was that imprisonment means more than just a deprivation of liberty.\textsuperscript{150} As Lord Sumption stated, “it is a temporary reclusion of the prisoner from society, which carries with it the loss of the right to participate in society’s public, collective processes.”\textsuperscript{151} Moreover, the judges did not refrain from addressing the above-mentioned judgments of the European Court. Lord Sumption argued that the European Court had provided a contradictory reasoning:

Accordingly, the Strasbourg Court has arrived at a very curious position. It has held that it is open to a Convention state to fix a minimum threshold of gravity, which warrants the disenfranchisement of a convicted person . . . But it has also held that even with the wide margin of appreciation allowed to Convention states in this area, it is not permissible for the threshold for disenfranchisement to correspond with the threshold for imprisonment.\textsuperscript{152}

Praised by David Cameron, the Prime Minister of the United Kingdom, as “a great victory for common sense,”\textsuperscript{153} the Supreme Court judgment posed a serious challenge to the foregoing decision to apply the pilot judgment procedure to Greens. This judgment took a stand against the general measures prescribed by the ECtHR, and reinforced the position of the House of Commons, which had voted overwhelmingly in favor of keeping voting rights cases ECHR 091 (2013).

\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} R (on the application of Chester) (Appellant) v Secretary of State for Justice (Respondent) and McGeoch (AP) (Appellant) v. The Lord President of the Council and another (Respondents) (Scotland), UKSC 63 (16 Oct. 2013).
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id. at §128
\textsuperscript{151} Id. at §128.
\textsuperscript{152} Id. at §135.
\textsuperscript{153} Owen Bowcott, Prisoners’ right-to-vote appeal rejected by Supreme Court, THE GUARDIAN, 16 Oct. 2013.
the blanket ban on February 10, 2011. As a response to these developments, the ECHR announced its decision to reopen 2,281 adjourned cases brought against the United Kingdom concerning prisoners’ right to vote on December 13, 2013. While this decision renders Greens a prima facie failed pilot judgment, it remains to be seen whether this will set a precedent and other states will follow suit. However, it is evident that the problems regarding the implementation of Greens have cast doubt on the viability of the pilot judgment procedure.

While Greens concerns a legally straightforward, but politically difficult problem, Burdow and Ivanov signify a politically and legally straightforward, yet administratively difficult problem. Needless to say, the heart of the matter is an inability or unwillingness to implement the required changes at the national level by Russia, Ukraine and the United Kingdom. It is a crucial element affecting the feasibility of this procedure. However there are three other elements which contribute to this outcome of failing pilot judgments.

The first one is the nature of these judgments. One can question why the states, without giving formal consent to the creation of the pilot judgment procedure, would feel pressurized to undertake such systemic reforms prescribed by means of this procedure. For instance, the prisoners’ voting rights debate in the United Kingdom revolves around this issue. During the parliamentary debate of February 10, 2011 in the House of Commons, Jack Straw argued that the ECHR had “set itself up as a supreme court for Europe with an ever-widening remit.” Straw, the former Secretary of State for Justice, added that this undermines the Court’s “own legitimacy and its potential effectiveness.” The core of the debate is not simply the lack of implementation of the Court’s judgment, but a more fundamental question: whether it is up to the ECHR to decide the de facto minimum threshold to disenfranchise convicts, while Parliament and the Supreme Court are against voting rights for prisoners.

Needless to say, this question touches upon the Court’s competence. As explained above, the constitutional dimension of the Court’s role is not grounded in the Convention, and has not been solidified by means of an amendment. On the contrary, the states’ allegiance lies with the principle of subsidiarity, which allows more leeway to the national authorities.

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154 The House of Commons, Hansard Debate, 10 Feb. 2011, C. 502. The motion to keep the current ban was supported by 234 parliamentarians and opposed by 22.
155 Owen Bowcott, Prisoners ‘damn well shouldn’t’ be able to vote, says David Cameron, THE GUARDIAN, 13 Dec. 2013.
158 Hansard Debate, supra note 155 at C. 502.
159 Id.
160 Id.
161 The European Court of Human Rights, Interlaken Follow-up: Principle of Subsidiarity, Note by the Jurisconsult (08 July 2010),
article 1 of Protocol 15 provides that the subsidiarity principle, together with the margin of appreciation principle, is to be added to the preamble of the Convention. This change indicates that states prefer a more limited scope when it comes to the Court’s functions. The current state of affairs is that there is a discrepancy between the Court’s constitutional review powers practiced through pilot judgments, and the principle of subsidiarity. The main problem is that while subsidiarity has formal support, the Court becoming a more constitutional court lacks this support. This tension impedes the feasibility of the pilot judgment procedure.

The second issue is the complications arising from the dual role played by the Court. The Court has chosen to take a more constitutional court role in some cases and more deferential position in others. This inconsistency has repercussions especially for the individual applicants’ legal position. For example, in Burdov, the Court assumed a more constitutional court role, and demanded an effective domestic remedy scheme. However, in Nagovitsyn and Nalgiyev, despite acknowledging the shortcomings of this new remedy, the Court refrained from evaluating its effectiveness and opted for deference. In other words, instead of ensuring the effectiveness of the remedy is indeed effective or providing more feedback, the Court dismissed the case. It seems plausible that this new remedy temporarily shortened the Court’s docket, with more than 800 cases struck out. Nevertheless, judging from the complaints in Nagovitsyn and Nalgiyev regarding the insufficiency of the remedial measure, it is not clear to what extent it provided an effective remedy to the victims. Some of these applicants might need to re-apply to the ECHR in the near future. This would lead to further inefficiency.

Third, the lack of procedural transparency concerning the numerous applications grouped under the pilot judgment procedure is problematic. Pilot judgments may also take years to be implemented with a cloud of uncertainty surrounding the status of the applications, which might be “frozen,” then sometimes “re-opened,” or “struck out” without a sufficient guarantee as to whether the remedy is in line with the ECHR’s standards. In this regard, it is hard to determine whether the applicants are really better off with this procedure. Finally, the systematic delivery of individual justice might be improbable, as Greer and Wildhaber argue. However, to resolve this, launching the pilot judgment procedure within the individual justice paradigm without openly acknowledging or consolidating its constitutional dimensions creates “an unresolved tension,” which is exacerbated with this transparency deficit.


162 Protocol No. 15, art. 1, supra note 78.
163 Burdov v. Russia, supra note 103.
164 Nagovitsyn and Nalgiyev v. Russia, supra note 110.
165 Id.
166 Freezing, re-opening or striking off the cases are various procedures that the Court uses to deal with the cases grouped under a pilot judgment.
167 Greer and Wildhaber, supra note 50.
168 Id. at 474.
VII. CONCLUSION

The pilot judgment procedure, which was created to address systemic problems entrenched in the legal systems of the state parties, has not turned out to be the panacea that the Council of Europe had been seeking. Despite its intentions, the procedure has raised serious questions related to its legality and transparency. Particularly, an assessment of its adoption using the principles of interpretation of the VCLT points out the shortfalls in its legal basis.

Against the backdrop of this assessment, the legality issue goes beyond the conceptual realm and creates real implications. As far as the current state of affairs is concerned, the pilot judgment procedure carries the traits of a constitutional justice mechanism and is at odds with the administration of individual justice under the light of the subsidiarity principle. The procedure has been instituted without the explicit consent of the states, but its success relies on their willingness to implement general measures that the Court identifies for them. This incapacitates the pilot judgment procedure. While the general measures required by the Court might be implemented without much trouble in some cases, as was observed in Broniowski, states might show some resistance to implementation, as seen in Burdov, Ivanov and Green. These latter cases put the authority of the ECtHR’s judgments in jeopardy, and result in ineffective compensation for the individual applicants, who are the most disadvantaged party in this saga. Now, a decade after its introduction, the process still suffers from the same deficiencies.

For the pilot judgment procedure to be more effective, there are a few measures to be taken: (i) clarifying the rules, particularly those concerning the adjourned applications, (ii) readjusting the scope of the procedure, which can be limited to Broniowski-type cases, and (iii) securing the states’ consent, in the shape of a formal amendment to the Convention, in a timely fashion. As the window of opportunity to redesign the pilot judgment procedure is closing, it is high time that one of the most peculiar tools of judicial creativity was solidified with the active participation of the state parties.