

#### 4. European Institutions of PHR: The Judgments of the ECtHR and Their Effects

**Keywords:** just satisfaction, pilot judgment procedure, causality, indirect effect, damages, costs, enforcement of judgments, supervision, monitoring

*The effects of the judgments handed down by the European Court of Human Rights (ECtHR) as part of Council of Europe protections for human rights in Europe can be measured according to the different influence they have on the protection of human rights on the national and on the international level.*

*Distinctions need to be made regarding the different contexts within which these different effects apply and sufficient background needs to be provided based on the relevant provisions of the European Convention on Human Rights (ECHR). In addition, the most relevant case-law of the ECtHR on 'just satisfaction' needs to be analyzed, which is how the ECHR addressed the issue of financial compensation for any actual harm suffered through a violation of any rights protected under the ECHR by a state found in violation.*



**By Márton Sulyok dr. jur. PhD**

#### **Learning outcomes**

1. Understanding the different effects of ECtHR judgments in an international and national context
2. Understanding relevant procedural rules and their political as well as legal motivations
3. Understanding the role of the different institutions of the CoE regarding the enforcement of the judgments of the ECtHR

#### **Recommended Reading**

1. Article 41-46 ECHR
2. [Dean Spielmann: Judgments of the ECtHR – Effects and Implementation](#) (2014)
3. [Implementation of judgments \(ECHR background paper\)](#)
4. [Stuart Wallace: Much ado about nothing](#)
5. [The Pilot Judgment Procedure](#) (ECHR publication)
6. [Antoine Buyse: The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges](#) (Greek Law Journal, 2009)
7. All additional reading materials indicated under in-text links

*Study time: 1-2 hours (5-7 hours, with recommended reading included)*

#### **Disclaimer**

This reading material comments on the relevant provisions of the ECHR and the case-law of the ECtHR. (Edited by Márton Sulyok)

#### 4.1. How Does the ECtHR Affect Human Rights Protection?

In terms of the affects international (regional) human rights protection can have at the international or even at the national level, we may differentiate between different **(direct) financial, and (indirect) legal as well as political effects**. As outcomes, these can also be simultaneous in case of the ECtHR, because some decisions of the Court (called *pilot judgments*, examined in detail later) contain financial sanctions as well as legal recommendations, non-compliance with which has political implications as far as Council of Europe (CoE) membership is concerned. Even the judgments of the Court do not contain financial sanctions and legal recommendations at the same time, the decisions still exert the same effects once they have been handed down.

- The judgments of the ECtHR can **positively affect** the level of human rights protection of the **international level** as due to them **political and judicial** dialogue might be started relevant to increasing protections, which – in turn – will lead to an increased respect of international standards mirrored in improved statistics regarding violations.
- On the **national level**, the **financial and legal (constitutional, judicial) as well as political** effects can also be felt significantly, given that compensation for a violation established by the Court needs to be paid to the applicants, and the judgments might – in the short, middle or long term – lead to reforms of the law, policy or even the constitution. Respect of the judgment might have a beneficial political effect on the Member States (MS) the CoE as it minimizes the possibility of PACE monitoring or sanctions being applied by the CM.

#### Effects of Judgments of the ECtHR

**Financial / Legal / Political Effects (Simultaneous)**

**International: Political (dialogue -- increased respect of international standards) - good statistics**

**National: Financial + Legal (Compensation + Reform – Political (result is increased respect of international standards))**

**Indirect: Judgment as reference in national CC or court decisions**

**Direct: Constitutional or legal amendment, new law, change in interpretation**

## 4.2. Addressing Systemic Failures in Member States – The Pilot Judgment Procedure

As possibly one of the **most important legal and political effects** of the judgments of the ECtHR take shape in the so-called *pilot judgments*. These provide necessary input to the national level on how to address gross violations through introducing systemic changes in domestic law (as proposed by the Court). This politically motivated judicial dialogue eventually intends to realize an ever present endgame of the Court, that is to “close the floodgates” of hundreds and thousands of similar applications coming in to the Court that are due to systemic flaws in the constitutional or human rights frameworks of respondent States.

*In pilot judgment procedures, the ECtHR can propose the adoption of general measures to the States found in violation of the ECHR, which if introduced are continued to be examined by the CM, as part of their supervisory tasks regarding the execution of judgments.*

### What Are Pilot Judgments?



All applications filed to the Court, identifying similar root causes (thus usually have closely connected subject matter around one or two of the Articles of ECHR) and going beyond one particular problem or case, are potential targets for a pilot judgment procedure.

*If a case is selected for a pilot procedure, they will be decided with priority (bearing in mind that the ECtHR normally decides cases within 4-5 years). Applications selected for a pilot judgment procedure must reveal the “existence of a structural or systemic problem or other similar dysfunction”.*

This requirement can be examined by the Court within its own power (*ex officio*) and also on the request of the applicant. As an outcome of such a procedure, the Court can identify the dysfunction and require the establishment of national remedies, with a time limit to introduce these. Having regard to the admissibility criteria in front of the ECtHR (discussed in Reading Item 3), if these national remedies will be successfully introduced, it will prevent further applications flooding the Court. National remedies introduced based on the instructions of the Court will see most alleged violations under the ECHR resolved within the national jurisdiction, as one of the criteria to admissibility would be to unsuccessfully exhaust national remedies.

### Pilot Cases and Relevant ECHR Rights

- Protection of property (Broniowski v. Poland)
- Prisoners' right to vote (2500 similar applications, Hirst v. UK II.)
- Prohibition of torture/degrading detention conditions (500 similar applications, Varga and Others v. Hungary)
- "Reasonable time" and lack of domestic remedies for excessive length (Fair Trial)
- Domestic non-enforcement of national court decisions (Fair Trial and Effective Remedy)

#### 4.3. The Financial Effects of ECtHR Judgments

It stands to reason due to the above that we should discuss financial effects first.

Financial reparation of any violation suffered is called '**just satisfaction**' under Article 41 ECHR. Just satisfaction is and can only be guaranteed

- ✓ if **necessary**, and when
- ✓ a **violation** has been substantiated by the application and upheld by the Court, and
- ✓ due to reasons of subsidiarity, if **national law only allows for partial reparation**.

Procedurally, at this point **we are at a stage, where the judgment has become final** and has been **transferred to the CM for supervision of execution**. In this process, there are certain obligations of the respondent States found in violation of the ECHR, and one such **obligation** is the **payment of compensation**. (It should be pointed out that the average amount of just satisfaction for individual applications is around 3,000-5,000 Euros.)

If we consider the methodology of **assessing the justness of said satisfaction**, we are faced with the fact that there is *no adequate formula or specific calculations* to be made by the Court as ordering the payment of **just satisfaction is not an automatic condition of finding a violation**. (NB among the conditions, we also find necessity, which means that Court can decide within its discretion whether to award compensation or not.)

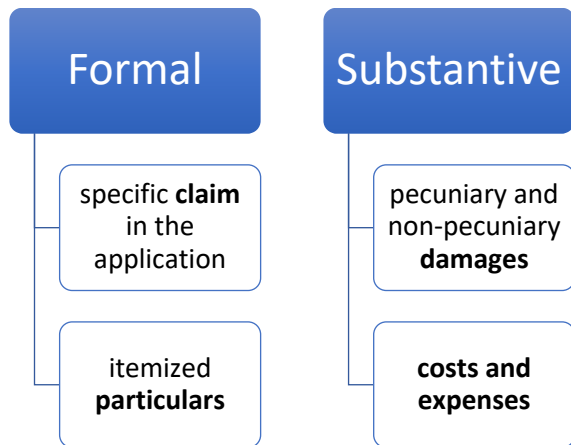
Assessment of justness takes shape in evaluating **the totality of circumstances**. If, in this light, a simple declaration of the violation is considered sufficient, then the Court only does so, while in other cases equitable assessment might decide whether the Court will order the payment of more or less compensation than what was asked for, or actually none at all.

In assessing just satisfaction, compensation is always examined bearing in mind **attributability**, that is whether the violation suffered did in fact come to be through the own fault of the applicant. Among other factors, **local economic circumstances**<sup>1</sup> and the **past jurisdiction** of the Court regarding former awards of just satisfaction also orient the assessment of just satisfaction and serve as standards, which the Court relies on.

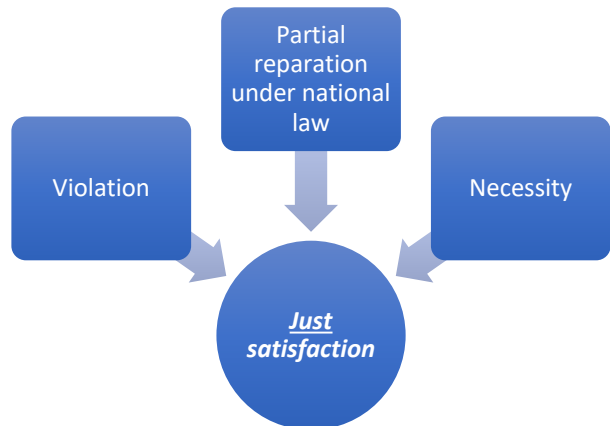
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<sup>1</sup> In fact, local economic circumstances are considered based on financial data available to the Court (refreshed two times a year), with the local circumstances of all MS being revised every two years. In some cases, this might mean that just satisfaction amount increase, while they decrease in others.

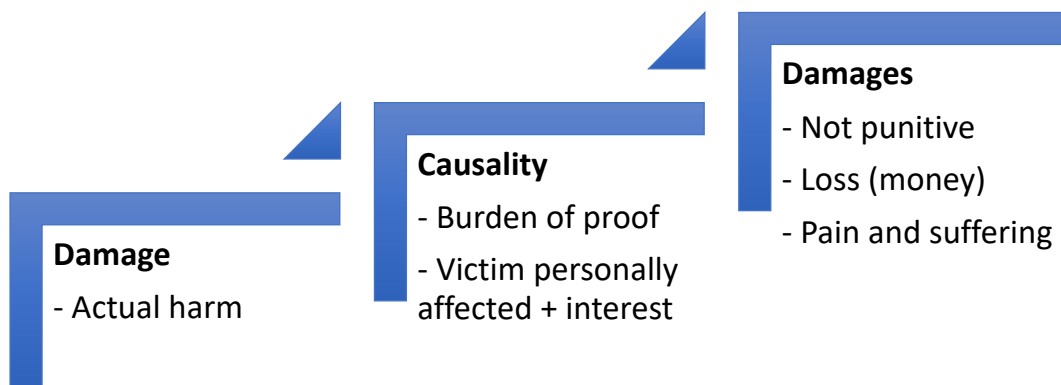
## Requirements of a Claim for Just Satisfaction



## Elements of Assessing Just Satisfaction



In assessing just satisfaction, *besides attributability*, the Court always examines **causality**, that is the causal link between the actual damage suffered and the violation causing said harm. The burden of proof in this regard rests with the applicants (who need to prove their victim status) and show actual harm resulting of the alleged violation. If the causal inquiry is successful, the Court may award **damages**, which are not meant to be punitive, thus, to compensate for any actual loss or diminished gains, as well as for any pain and suffering (mental, psychological, physical or otherwise) resulting from the violation.



## Three-Step Causal Inquiry conducted by the ECtHR

As for **costs and expenses**, only such necessary and actual amounts could be claimed in addition to just satisfaction for the violation, which are or have been incidental to the proceedings either on the national or the international level (e.g. travel costs to hearings, costs relevant to filing the application, such as attorney's fees).

### Assessing Just Satisfaction – Case-law Sample

Consider the ECtHR Judgment handed down in 2000, in the case [Caballero v. United Kingdom](#). (See: Judgment, Part IV, A-B. and study in accordance with the provisions of Article 41). Now, try to answer the following question: **Does Caballero's claim satisfy the requirements discussed (specificity, particulars, and a casual link)?**

### Assessing Just Satisfaction – Academic Inquiry

Made by the **Max Planck Institute**, [this study](#) (2016) examined almost 1000 judgments in respect of non-pecuniary damage awarded. The study is a good example on how to **measure human rights violations in a quantitative manner**.

**What conclusions can be drawn from such an analysis in respect of the ECtHR's awards practice?**

A few years ago, an interesting decision has been reached in deciding an interstate claim, the negotiations concerning which have went on for 40 years. In the case **Cyprus v. Turkey** (ending in 2014) the gross human rights violations committed by the Turkish army were subject to discussion as part of a military intervention by Turkey on the island. A total of 4 interstate (Article 33) claims have been made in the case, as well as countless individual (Article 34) applications have been submitted.

**Interstate claims are rare gems** in the jurisprudence of the Court, but are nonetheless **outstanding** in terms of their **financial, legal and political effects**. In *Cyprus v. Turkey*, the ECtHR has found a just satisfaction of an unprecedented 90 M Euros, which is the largest amount ever ordered to be paid to applicants as a result of any ECtHR proceedings. This amount has been ordered to be **divided between 1456 missing persons' next of kin** (all indirect victims) as well as the **inhabitants of a peninsula** enclaved by the intervention (who were all direct victims personally affected).

The decision is unique in a way as is a first-ever **extension of the scope of Article 41 (on just satisfaction) to interstate claims (under Article 33)**. Although in interstate claims, states are in the position of applicants, compensation in this case was not paid to the applicant state, but to the individuals as beneficiaries. As per conventional protocol, the **distribution of the funds** falls under the supervisory powers of the CM, who cooperate with the Cypriot Government.

#### 4.4. The Procedural Background of ECtHR Judgments

The ECHR contains several provisions regarding the form and content of decisions, judgments. While decisions by the Court may take many forms, we are going to be dealing with those below, which decide applications that have been examined on the merits after being found admissible. However, before we do that, the *admissibility of applications should also be remembered*, as it is through testing admissibility, how the court may dispose of meritless cases, or if not, can strike out cases from its docket based on formal grounds. If this is not the case, the Court will admit the application, examine it on the merits and render a decision (called a judgment).

Articles 41 to 46 ECHR deal with the rules that are relevant to our examination here, and their basic provisions should be introduced below. We also need to rely on what has been discussed under *Judicial Protection of Human Rights* in terms of the different institutional formations, the Court can sit to decide different groups of cases. (*See: Reading Item 3*)

*A judgment brought by the Chamber formation will become final*

**- if not referred to Grand Chamber for review** (NB Parties can waive this right or wait three months, when the Chamber decision shall automatically become final - Article 44)

- Regarding the acceptance of the referral by the Grand Chamber, Article 43 ECHR sets forth that it is only possible **“if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.”** (*admissibility criterion*)

Only final judgments have the power to fully take form in financial effects (i.e. the payment of compensation in the form of damages), although the decisions not yet final may already have political implications. It is not likely that not yet final decisions would lead to any legal changes, therefore, in this case, we cannot yet talk about legal effects.

#### 4.5. The Role of the CM and PACE in the Execution of Judgments

Once a judgment has been transferred by the Court to the CM for supervision of enforcement, MS are obliged to abide by the judgment.

If the CM considers that a State fails to do so, it can issue **a formal notice** and **refer the case to the ECtHR** to determine failure of compliance. If the ECtHR finds in favor of the CM, **sanctions** can be taken against the non-compliant MS (by the PACE and the CM). (*NB The operation and rationale of this process is quite similar to that of the so-called infringement proceedings in the European Union, initiated by the EU Commission against MS not in compliance with the Founding Treaties of the EU.*)

### *Interesting Facts and Numbers*

The increasingly popular ECtHR already examined **nearly 800,000 (!) applications** (1957-2017). Due to the strict admissibility criteria, only **about 21,000 cases ended with a judgment**. In more than **80%** of these a **violation was found**.

**The Court has already ruled against all the Contracting Parties**, but against some of them very often: **40% of the 21,000 decisions concern Turkey, Italy and Russia**.

From **Hungary, more than 21,000 applications** have been filed (mostly under Article 6 on fair trial, violating “reasonable time”), but only about **600 concluded with a judgment** (due to inadmissibility or settlement).

### *4.6. Debates on the Effects of Judgments (and of ECHR)*

Since the dawn of the Council of Europe, there has always been a varying amount of **debate on the efficiency of the protections** afforded.

A **first significant result** of these debates was the **reform of the institutional system**, abolishing the two-tier structure and with it terminating the European Commission on Human Rights resulting in the ECtHR we know today.

Even today, many CoE MS also voice **heavy criticism regarding the purpose of the Convention and the mechanisms it established**.

In the **UK**, the constitutional debate on the so-called “**control of conventionality**” in human rights cases after the 1998 adoption of the **Human Rights Act** (rendering the Convention applicable in the country) lead to the all-deciding question, whether to quit the ECHR or not? With another significant debate of leaving another regional integration, that of the EU, the question, however, still is whether – outside of the EU – the UK should remain a signatory of the ECHR.

### *Comic Relief Regarding the Debates on ECHR*

*British television, famous for its cutting and to-the-point English humor, has treated us with many snaps at political debates regarding international human rights protection. One such play at challenging the authority of the ECHR – as a topic of recent public debate in the UK - has been spearheaded by Sir Patrick Stewart, entitled [“What Has the ECHR Ever Done For Us?”](#)*

In **France**, the continued prolongation of the **state of emergency** due to terrorist attacks in the recent year also brought about the issues of **suspending the application of ECHR** in the country, of which the Council of Europe has been notified.

The coronavirus pandemic and the ensuing public health emergency is expected to become the new context for such debates, in addition to emergency powers invoked in response to an elevated level of terrorist threats all over Europe.



### *Self-Check Questions*

- 1. What Effects Does the ECtHR have on human rights protection on the national level?*
- 2. How do the decisions of the ECtHR become final?*
- 3. Name the three main elements the ECtHR examines when determining just satisfaction.*
- 4. Does the ECtHR have the power to award punitive damages? Why?*
- 5. How is the Cyprus v. Turkey case special in terms of just satisfaction?*
- 6. What are the conditions for selecting an application for a pilot judgment procedure?*
- 7. What is in the focus of the current, recent debates regarding the efficiency of the judgments of the ECtHR and the ECHR?*

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