THE EUROPEAN COURT OF HUMAN RIGHTS

Implementing Strasbourg's Judgments on Domestic Policy

Edited by **Dia Anagnostou**

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EDINBURGH
University Press

First published in hardback in 2013

This paperback edition 2014

Edinburgh University Press Ltd
The Tun – Holyrood Road
12(2f) Jackson's Entry
Edinburgh EH8 8PJ
www.euppublishing.com

Typeset in 10/12pt Goudy Old Style by
Servis Filmsetting Ltd, Stockport, Cheshire,
and printed and bound in Great Britain by
Printondemand-worldwide, Peterborough

A CIP record for this book is available from the British Library

ISBN 978 0 7486 7057 4 (hardback)
ISBN 978 0 7486 7060 4 (paperback)
ISBN 978 0 7486 7058 1 (webready PDF)
ISBN 978 0 7486 7059 8 (epub)

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Acknowledgements

I would like to acknowledge the generous financial support provided by the European Commission's 6th Framework Programme, which funded the research for this volume as part of the JURISTRAS project ('The Strasbourg Court, Democracy and Human Rights: Patterns of Litigation, State Implementation and Domestic Reform', contract no. FP6-028398, 2006–9). Further information on the project's findings can be found at http://www.juristras.eliamep.gr. I would like to especially thank Angela Liberatore, the European Commission's project officer, whose enthusiastic support for the subject of this research was from the start and throughout the project extremely encouraging and motivating.

This book was originally conceived at a project meeting in Strasbourg in June 2009 where its basic structure was also defined. As so commonly happens with collective volumes, it has taken much longer to complete it than was originally planned, partly due to some unpredictable setbacks along the way. Since then, the rapidly increasing case law of the European Court of Human Rights and changes in the state of execution of the judgments under study necessitated substantial and constant updating of the country-based chapters. I would like first of all to thank the contributors to this volume, who have sustained an unmitigated interest in and commitment to this book project during its lengthy process of preparation. They were extremely responsive throughout our collaboration, being willing to revise their chapters a number of times without losing their patience or temper.

I would also like to thank John Watson, commissioning editor at Edinburgh University Press, who believed in the value of this book project from the beginning, and his excellent support team, among them Rebecca Mackenzie, project manager, and Eddie Clark, managing desk editor. Special thanks go to the artist Holly van Hart from the San Francisco Bay area, who once again has kindly given her permission to use one of her paintings, *All Distances*, for the book cover. Even though we have never met in person, her paintings formed the bridge that brought us into contact, reifying their underlying concept about how we are all connected across nations, distances, time and cultures.

The bulk of the editorial and writing work on my part was completed during a Marie Curie fellowship at the Law Department of the European University Institute in Florence in 2010–12. It provided a highly stimulating and conducive environment for thinking about human rights in Strasbourg

and Europe, as well as an ideal place for research and writing, for which I can only be grateful.

Finally, on a personal note, I would like to acknowledge the contribution of my husband Yorgos Kaminis, which, although indirect, is significant. Without realising it, he transmitted to me his passion about human rights both as a constitutional lawyer and as a practitioner. Our heated discussions about the proper place and scope of rights in a democratic society helped me open up a new and exciting intellectual horizon at the crossroads of law and politics that continues to animate my academic research.

Athens, August 2012

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Introduction

Untangling the domestic implementation of the European Court of Human Rights' judgments

Dia Anagnostou

Over the past couple of years, the European Convention of Human Rights (hereafter ECHR or Convention) and its judicial arm in Strasbourg have attracted renewed scholarly interest. The European Court of Human Rights (hereafter ECtHR or Court) is a paradigmatic instance of a transnational tribunal that fundamentally differs from an international court based on inter-state processes:[1] it allows individuals, but also other civil society actors, to raise claims against states, once they exhaust domestic remedies. Over time, poised between judicial restraint and activism, the Court has expansively interpreted the basic civil and political rights contained in the Convention, as well as scrutinising states' restrictions of those rights. Through individual petitions, a large array of state laws and practices, including areas that are sensitive for national interests and security, such as those pertaining to minorities and immigrants, have come under its purview. Through both dynamic interpretation and enforcement, the ECtHR has over time substantially upgraded and expanded human rights standards across established European democracies, and also vis-à-vis the democratising states of the ex-communist world. Having come a long way from its obscure origins in the 1950s, it is now increasingly constitutionalised and it is characterised as the single most important rights-protecting tribunal in the world.[2]

Among the Convention's most remarkable characteristics is the obligation of national authorities to implement adverse judgments issued by the ECtHR. This involves a decentralised system of institutions and actors assigned responsibility for implementation at the national level, along with robust supervisory and enforcement mechanisms at the European level. Implementation is thoroughly rooted in the principle of subsidiarity: national authorities must define the nature and scope of measures that are necessary to remedy a violation detected by the ECtHR, in cooperation with the supervisory bodies of the Convention system, and the Committee of Ministers (CoM) in particular. While some judgments mainly require just satisfaction and an individual remedy, most rulings necessitate domestic legislative and administrative reforms to prevent recurrence of infringements of the Convention in the future, as well as shifts in national judicial approach and interpretation. Far from being overlooked, state compliance

with Strasbourg Court rulings that find a state to have infringed Convention provisions is actually remarkably high, and it has been described as 'as effective as those of any domestic court.'[3]

Despite such widely held appraisal, the issue of domestic implementation of judgments has emerged as particularly salient and problematic in connection with the current caseload crisis that is confronting the ECtHR.[4] Owing to an excessive backlog of cases threatening its stability and viability, the Convention system and the Strasbourg Court are currently at the centre of an ongoing reform process, in regard to which the ability of the Court to continue to provide individual justice is profoundly strained and challenged.[5] Available data from the CoM indicates that the overwhelming backlog of cases pending for judicial review and execution is largely due to clone or repetitive cases: these reflect persisting structural problems, which domestic execution measures and remedies have failed to effectively redress.[6] While most states sooner or later execute the ECtHR's judgments, a substantial implementation gap persists, at least in part due to the fact that the adopted measures do not remedy the root causes of rights violations.

This volume explores the processes of domestic implementation of the ECtHR's judgments and seeks to identify and understand the factors that account for variable patterns of implementation within and across states. It inquires into the reasons that national authorities and the various institutional actors involved in implementation sometimes respond positively and promptly to adverse judgments but at other times are recalcitrant or strongly resistant towards them. While the country cases mainly focus on the actions and measures of national authorities in response to judgments in specific issue areas, some of the contributions also probe the potential of these judgments to influence national policies and broader social-political change within states.[7] Domestic implementation may be a response to strings of similar adverse judgments necessitating fundamental reform of an entire issue area or area of state action. What is the impact of the ECtHR's case law on the legal norms, institutional structures and policies of national states that participate in it? Do national authorities implement the adverse ECtHR's rulings, and what factors facilitate, or conversely restrict, implementation? Do these judgments influence rights-expansive policy change at the national level? These are some of the questions that have guided the empirical research on which the individual contributions are based.

While domestic implementation of the ECtHR's judgments has received increasing scholarly attention over the past couple of years, important gaps both in the empirical focus and in analytical perspective remain. For a long time now, legal scholarship has analysed the legal and institutional characteristics of the Convention system and the Strasbourg Court, the modes of execution of its judgments, as well as the supervisory role of the CoM. The domestic effects of the Convention and the Court's case law are largely understood in reference to the legal structures and hierarchies within each

state, the extent and forms of national constitutional review, and the formal relations between the legislature and the judiciary, among others.[8] These studies are mainly confined to descriptive accounts of the processes and modes of execution of judgments, without systematically inquiring into the conditions and factors that influence their domestic implementation.[9] This, however, is a crucial aspect for understanding the domestic dynamics that state acceptance of the jurisdiction of a transnational tribunal elicits, as well as the domestic effects that it has. More recently, scholars have taken a more interdisciplinary approach to domestic implementation, exploring how, through what mechanisms and to what extent the national legal orders of the respondent states are coordinated with, adapted to or adjusted by the ECHR and ECtHR case law. While this interdisciplinary approach is more systematic and comprehensive than earlier studies, it mainly provides a broad and descriptive overview,[10] and it only begins to inquire into the factors that account for variable patterns of domestic implementation within and across states.[11]

In sum, attempts to explore the national and non-legal factors that influence domestic implementation of the ECtHR's judgments are still at an embryonic stage. Making progress in this direction, though, is essential in order to move beyond a descriptive and still mainly legally centred institutional analysis. A multi-faceted set of processes has over time led the Strasbourg Court to assume an authoritative role in the European institutional landscape and the region's integration processes. Understanding variable patterns of domestic implementation is also important in order to relate the Convention and the Court as a case of a transnational and judicialised human rights regime to the broader international legalisation processes that we encounter in other parts of the world, as well as to existing scholarly approaches to state compliance with human rights.[12] An overview of the Convention-specific literature cannot fail to notice that it has abstained from engaging with a sizeable international relations and comparative politics scholarship on enforcement of and state compliance with international law, including human rights law.[13] While the analyses in this volume do not link the domestic impact of Strasbourg Court judgments to these international and comparative politics approaches, their findings can contribute to scholarly analyses in this direction.

As a regional human rights regime, the Convention system is defined by the institutionalised participation of its contracting states in transnational legal processes. The processes of litigation in the Strasbourg Court and the domestic implementation of its rulings involve sustained interaction among individuals, civil society actors, governments and legal-judicial actors, as well as between European officials and national diplomats. Notwithstanding a vast legal and non-legal scholarship on the Convention and the Court, we have an insufficient understanding of the domestic institutional and societal dynamics that this highly successful and in many ways uniquely European

regime elicits. By focusing on domestic implementation processes, this volume provides an interdisciplinary perspective of the multi-faceted ways in which the Strasbourg Court's judgments come to scrutinise and influence human rights standards, laws and policies at the national level.

Eight country-based case studies focus on particular areas of law and policy to examine how national authorities implement the ECtHR's judgments, as well as whether state compliance with these actually influences legal and policy change in the direction of expanding rights. This is also the first book to explore the dynamics that develop as civil society and minority actors mobilise Convention provisions and seek to challenge state laws, policies and practices in Strasbourg. It sheds light on the ways in which individuals, civil society and political actors have been implicated in the processes of litigation and domestic implementation of the Strasbourg Court rulings. This bottom-up dimension, which is the focus of the second part of our volume, is an aspect of domestic implementation of international human rights law that is highly underexplored in comparative politics and international relations, and also in the Convention-specific literature.

The next part of this introductory chapter depicts the basic contours of the Convention's institutional evolution and its enforcement machinery. The third part expounds the methodological and analytical considerations guiding the present set of studies, while the last two parts elaborate on and provide an overview of the two main sections of the book.

THE ECHR'S INSTITUTIONAL EVOLUTION AND ITS ENFORCEMENT AT THE NATIONAL AND EUROPEAN LEVEL

The genesis of the ECHR system is to be found in the post-World War II geopolitical context shaped by the Cold War and driven by the aim of deterring the future rise of fascism and authoritarianism. Originally lacking institutional autonomy, the foundations of its initially obscure structure were put in place by national governments of western European states amidst conflicting national interests over the direction of European integration and at a high level of diplomacy.[14] Yet, over time, the system evolved away from its political origin towards a more legalistic and dynamic approach. Such an approach sought to harmonise European human rights standards and extended the initial catalogue of rights way beyond those contained in the original text,[15] leading to increasing intervention in the legal and political systems of the contracting states. This transformation occurred particularly during the 1970s, when the Strasbourg-based court began to enforce its doctrine of the Convention as a 'living instrument'. Allowing for a dynamic interpretation of the rights contained within it in accordance with shifting social values, this change prompted an increase in the Court's caseload.[16]

The 1990s provided another turning point when nineteen new states from

central and eastern Europe and the former Soviet Union acceded to the Convention. This placed enormous strain on the system not only by greatly expanding the pool of potential petitioners, but also by confronting it with structural and large-scale rights violations from countries with deficient democratic standards such as Russia and Turkey. Partly in response to the new situation facing it, a major institutional overhaul of the system abolished the European Commission on Human Rights and created a single court, while it also rendered mandatory the individual right to petition the Court. By 1998 when the new monitoring system was in place, the Court's jurisdiction and the right to individual petition had been accepted by all states party to the Convention, making it possible for more than 800 million people to petition the Court.[17] Today, all forty-seven member states of the Council of Europe have ratified the ECHR.

By applying and interpreting the fundamental rights contained in the Convention in the context of individual complaints, the Court reviews national laws and practices, thereby exposing domestic legal and political systems to European supervision and scrutiny in human rights matters. Since the 1990s, the extraordinary increase of its caseload appears to have been accompanied by a qualitative transformation in the status of Strasbourg jurisprudence vis-à-vis national legal orders, as well as in the nature of the Convention as an originally international treaty adopted by states. Legal scholars have for long now spoken of the Convention as 'a constitutional instrument of European public order'.[18] In examining individual petitions after all domestic remedies are exhausted, a domain customarily reserved to constitutional law, the ECtHR resembles less an international tribunal and more a court of final appeal. Over the past couple of years, the Court's initiative in ordering states to undertake structural measures in order to redress the systemic causes of human rights infringements (the so-called 'pilot' judgments) has been seen to strengthen its law-making and constitutional propensities.[19] Further reinforcing its European quasi-constitutional qualities is the fact that the Convention system has in practice become slowly incorporated into and intricately fused with the legal and governance structures of the EU.[20] Even though it remains formally separate from the EU, this is expected to change in the near future with the accession of the EU to the ECHR, which is provided for by the Lisbon Treaty.

The institutional architecture and the rules of the Convention system impose explicit and fairly demanding obligations upon national authorities to comply with the ECtHR's adverse judgments. When a state is found to have breached Convention provisions, national authorities are required to comply with the Court's judgment by undertaking both individual and general measures to rectify the injustice (Article 46 ECHR). Besides just satisfaction in the form of pecuniary compensation, individual measures may involve the reopening of judicial proceedings domestically, the cancellation of a person's criminal record as a consequence of a conviction, or changing/

overturning the administrative act in an individual case which was found to be in violation of the Convention. Individual measures aim at restoring the individual's condition to what it was before his/her conviction along the principle of *restitutio in integrum*, even if this may not always be possible in practice.

More important and harder to determine are the general measures that a respondent state, found to have violated Convention norms, is required to take. These are broader measures that extend beyond the specific individual case and are aimed at preventing the recurrence of similar infringements in the future. It is in the obligation to institute general measures that the potential for the ECtHR's rulings to exert broader influence in legal, judicial and policy reform at the national level lies, in areas that come under the Court's purview in the context of individual claims that it reviews. General measures may involve legislative (and in rare instances even constitutional) amendments, the adoption of administrative or executive measures (that is, ministerial circulars or regulations), or a shift in domestic judicial approach and interpretation in conformity with the ECtHR's jurisprudence, and also educational activities and other practical measures.[21] Legislative changes correspond to somewhat more than 50 per cent of the general measures taken by states.[22] These general measures are of cardinal importance to the Convention system. The extent to which states undertake reforms and measures to improve human rights protection at the national level beyond an individual case is decisive for the longer-term effectiveness, legitimacy and the credibility of the system.

While national authorities are obliged to implement Court judgments, responsibility for overseeing whether states actually do so lies with the CoM (Article 54 ECHR), to which a final judgment is first transmitted. Comprising the ministers of foreign affairs of all contracting states and their permanent representatives, the CoM is the political arm of the Convention system. It reflects its intergovernmental underpinnings, which were aimed at ensuring that the Convention would not pose any challenge to the sovereignty of the contracting states. In performing its supervisory role over the execution of judgments, the CoM enters into contact with the competent national authorities and reviews the adequacy of both individual and general measures that they undertake in response to adverse judgments. When the CoM considers that such measures are sufficient to provide an individual remedy and/or to pre-empt future violations, i.e. through a shift in national jurisprudence or through reform of national laws or practices in line with the Convention and the Court's rulings, it closes the case by adopting a final resolution.

Despite the fact that Convention rules prescribe extensive obligations and European supervision over member states, a number of factors can compromise the implementation of Court judgments and their ability to influence national human rights standards. For most part, Strasbourg Court judgments enunciate interpretations only to the extent strictly necessary for

the decision of a particular case.[23] They refrain from considering the broader laws and institutional structures to which the issues raised by the individual case at hand may be linked. With the exception of the recent 'pilot' judgments mentioned earlier,[24] the Court has for the most part refrained from ordering the respondent state to undertake specific measures, taking the position that it is not empowered by the Convention to do so. Confining a judgment to the specific conditions of a case, however, creates uncertainty as to how the legal principles enunciated in the latter can be generalised, and obfuscates its implications for broader legal and policy change. The Court has been reluctant to explicitly pronounce a national law to be in violation of the Convention. It instead confines itself to finding fault with the application or interpretation of the law by national courts, and allows national authorities a wide margin of discretion to determine the appropriate general measures. Court judgments are not directly enforceable by national authorities, that is, they do not have *erga omnes* effects. They do not in and of themselves have the effect of overruling national courts or of quashing a decision of state authorities which was found to infringe upon Convention principles.[25]

Furthermore, significant political constraints regarding the effective national implementation of the ECtHR's judgments are built into the Convention's monitoring mechanisms. In particular, the supervision exercised by the CoM has generally been viewed to be lax and deferential to national authorities, exercising a rather 'soft' kind of control in enforcing the execution of judgments against states.[26] It arguably fails to substantively examine the conformity, the appropriateness or the adequacy of the measures instituted in response to an adverse Court judgment. Whether or not the measures instituted are actually implemented, or are effective in preventing the recurrence of violations, is also arguably overlooked by the CoM.[27] As a political body representing states, the CoM relies on information provided by national representatives and has tended to refrain from putting pressure on the latter. It may accept minimal government action, such as distributing the content of a judgment, as sufficient to acknowledge compliance and terminate its proceedings on a case.[28] Critical of this approach, a former judge has noted that 'what is at stake is . . . not only whether remedial legislation is passed at all, but also whether, if passed, it is adequate and meets the requirements implied in the relevant judgment'.[29]

Since the late 1990s, however, the CoM's originally lax and timorous approach has evidently shifted to a more rigorous kind of supervision. The Committee requires national authorities to provide evidence for legal reform or change in judicial practice, before ending its supervision of a judgment.[30] The new rules adopted in 2006 have further empowered the CoM to assume initiative and exercise greater pressure towards national authorities in executing Court judgments.[31] Its supervisory role has also been increasingly assisted by the Directorate General of Human Rights and further bolstered by the activities and initiatives undertaken by the Parliamentary Assembly

of the Council of Europe.[32] Important as they may be, these changes do not undercut the substantial influence that competing and mutually accommodating state interests may have upon the CoM's work, especially with regard to judgments that involve nationally sensitive issues.[33]

Notwithstanding the institutional, political and jurisprudential limits of the Convention regime, its norms and the ECtHR's case law have gradually acquired a persuasive and authoritative character which national judges, legislators and other domestic actors are for most part disinclined, at least openly, to contradict. The influence and authority that the ECHR norms and case law have acquired in national legal orders is striking if we consider that the ECHR involves a largely self-restrained court, a lax intergovernmental system of European-level supervision, and extensive national discretion in implementing the orders. The authoritative position that the ECtHR has acquired along with the extraordinary rise of its caseload shows that it interacts dynamically with national legal and political systems and exerts substantial influences over them. Ample evidence shows that the Court's jurisprudence influences substantial legal, judicial and institutional changes, as well as human rights practices at the national level.[34] Why else would large numbers of individuals embark on the 'long and arduous road' to Strasbourg seeking a judgment against their own states, if in the end such a judgment had little result in providing redress and – even if only occasionally – a better kind of justice?

DOMESTIC IMPLEMENTATION OF THE ECtHR'S JUDGMENTS: ANALYTICAL AND METHODOLOGICAL CONSIDERATIONS

Domestic implementation of the ECtHR's rulings varies not only across but also within states, across different kinds of rights claims, and even across issues or policy areas. In some cases national authorities may provide an individual remedy but shy away from adopting any broader measures that may be called for by a judgment. They may confine general measures to minimal forms of action such as translating and distributing the Court's judgments among the judicial and other competent authorities with the goal of diffusing knowledge of Strasbourg case law. Not infrequently, national authorities respond in a formalistic manner, failing to engage in the substantive changes called for by a judgment. In other cases, though, they initiate legislative and/or institutional reform to bring national law, practice and policies in line with the human rights norms pronounced in the ECtHR's judgments. In some areas and issues, the execution of the ECtHR's judgments may inspire little interest or controversy. In others, it may involve mobilisation by interested individuals and actors to pressure governments for reform, or conversely, strong opposition among competing social and political actors to stall change.[35]