Original Scientific Article UDC: 342.7:341.645(4)

THE ROLE OF PILOT JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN ADDRESSING THE ISSUE OF THE RIGHT TO A TRIAL WITHIN A REASONABLE TIME[1]

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1. INTRODUCTION

Over its history the European Court of Human Rights (the Court) has found more violations of the right to a trial within a reasonable time, as protected by Article 6 (1), than any other provision of the European Convention on Human Rights.[2, 3] That shows that the problem of ensuring reasonable length of court procedure is not a problem of any specific member state of the Council of Europe but rather that the systemic or structural problem exists in many if not most member states. The regulatory framework of this paper are the Articles of the Convention, The Rules of Court (The Rules of Court of the European Court of Human Rights, Strasbourg, 22 October 1959, CDH (59)8 – Rules of Court) and the Protection of Right to Trial without Undue Delay Act (Zakon o varstvu pravice do sojenja brez nepotrebnega odlašanja).[4]

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[1] This paper was prepared based on the written paper for the 2013 THEMIS competition at the European Judicial Training Network (EJTN).

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950 – the Convention.

[3] D. Harris *et al.*, *op. cit.*, p. 570.

[4] OJ of the Republic of Slovenia, no. 49/2006, 117/2006 – ZDoh-2, 58/2009, 28/2010, 38/2013 – ZVPSBNO.

Considering the number of procedures before the Court and in sight of the ongoing economic recession, the importance of Article 6 (1) of the Convention is becoming ever more apparent, not only to lawyers but to laymen as well. In Slovenia the broader public has become aware of the European Convention on human rights through the quasi-pilot judgment *Lukenda v. Slovenia* where Slovenia failed to meet the 'reasonable time' requirement.[5] The Court found that the violation of the applicant's right to a trial within a reasonable time is not an isolated incident, but rather a systemic problem that has resulted from inadequate legislation and inefficiency in the administration of justice and instructed Slovenia to secure the right to a trial within a reasonable time through appropriate legal measures and administrative practices.[6]

As judge Zagrebelsky noted in his partly dissenting opinion, the judgment concerning appropriate legal measures and administrative practice is very general as it implies the obligation of the state to do several major steps within the legal system.[7] The question arises as to when the state has fulfilled its obligation and when it is on the path to recovery. History shows that procedural law reforms are very rarely successful.[8] Therefore it is very difficult for the state to effectively comply with the Courts decision. The state cannot immediately know if it is on the right path toward a successful reform and therefore cannot know if it has done enough for the pilot judgment to no longer completely apply. All changes take time to take effect and any one specific change cannot correct a system as a whole.

As the (pilot) judgments of the Court are in the focus of this paper we have decided to compare the judgments of the Court against several different states. We used the Slovenian legal framework and the judgments against Slovenia as the basis for comparison to the judgments against Poland, Italy and France that also appear to be facing systemic problems according to statistical data, namely, the number of breaches found by the Court regarding respective states. We will: (1) look at the similarities of the judgments and (2) look to a degree in which the Court has taken into account the differences between the legal systems.

The aim of this paper is to make several propositions concerning the scope of pilot judgments. The pilot judgment should not be the final aim in dealing with undue delay of judicial (and administrative) procedures, but should provide useful stepping stones both for the Court and the states toward a joint goal of preventing undue delays of judicial procedures. Therefore, we believe

[5] *Lukenda v. Slovenia*, no. 23032/02, 15 September 2005.

[6] *Ibid.*, § 93.

[7] *Ibid.*, Partly dissenting opinion of judge Zagrebelsky.

[8] A. Uzelac, *op. cit.*

that a (quasi) pilot judgment should contain clear guidelines as to the fulfilment of the states' obligations. The Court should be thorough each time when looking at a legal system facing systemic problems even after adopting a pilot judgment. The state on the other hand should take a (quasi) pilot judgment seriously and set a clear goal to improve the legal system in the long and short term. Only this way the judgments such as *Lukenda v. Slovenia* can become enforceable to the benefit of the authority of the Court and the citizens of all member states of the Council of Europe.

Due to the importance of theoretical context of our written assignment, we will first determine the definition and meaning of the 'reasonable time' requirement and of the pilot judgments.

2. REASONABLE TIME

Article 6 (1) of the Convention states that everyone is entitled to a fair and public hearing within a reasonable time. To properly understand the term "hearing within a reasonable time" it is necessary to look at the historical development of its meaning.

The text of the convention leaves much space for interpretation of Article 6 (1). There are many questions about the 'reasonable time' requirement that must be answered. What constitutes reasonable time? What are the criteria by which to determine if court proceedings complied with the 'reasonable time' requirement? What constitutes a fair hearing? Does a hearing (in the narrow term) suffice or does some kind of a judgment have to be made? What about the appellate court proceedings? Does a judgment have to be final?

With so many questions at hand, the Court had to set forth very open guidelines for interpretation of the meaning of the Convention. In the *Delacourt v. France* judgment, the Court stated that in a democratic society the right to a fair administration of justice holds such a prominent place, that a restrictive interpretation would not correspond to the aim and the purpose of that provision (the teleological approach).[9] Non-restrictive interpretation gives the Court a possibility of constructing an autonomous meaning to the words used in the Convention, even though the starting point is the domestic legal system concerned. That is why the meaning and scope of Article 6 has evolved immensely in time.

[9] P. Van Dyke, op. cit., p. 514 and *Delcourt v. Belgium,* no. 2689/65, 17 January 1970, § 25.

The teleological approach was already prominent in the *Stogmuller v. Austria* judgment (1969), where the Court presented its view on the purpose of the 'reasonable time' requirement:

> "*The purpose of the 'reasonable time' requirement is to protect all parties to court proceedings and underline the importance of rendering justice without delay which might jeopardize its effectiveness and credibility.*"[10]

In the *Ringeisen v. Austria* case, the Court has determined that Article 6 (1) is not limited to ensuring that in every determination of civil rights and obligations there must be a fair hearing within a reasonable time; it also requires, at least as a general rule, that the case be heard and a judgment pronounced in public.[11] In the same case the Court determined that the complexity of the case and the conduct by the applicant are important criteria which have to be taken into account.

The second breakthrough in the development of the meaning of the 'reasonable time' requirement was the *König v. Germany* judgment. The Court emphasized that the reasonableness of the duration of proceedings covered by Article 6 (1) of the Convention must be assessed in each case according to its circumstances.[12] There is no absolute time limit that can be used in all cases indiscriminately. Therefore the determination must be made using mainly three criteria: (1) the complexity of the case, (2) the applicant's conduct and the (3) manner in which the matter was dealt with by the administrative and judicial authorities.[13] In an overall assessment of the various factors, the Court also takes into account what was at stake (for the applicant) in the proceedings, which has often been used as a fourth criterion.[14]

The failure to comply with the 'reasonable time' requirement has become a systemic problem in most member states, which brought by an accumulation of identical breaches. The Court started delivering quasi-pilot and pilot judgments.[15] After a pilot judgment is delivered, similar cases are not examined in detail. That fact in combination with criteria for determining a breach of the 'reasonable time' requirement becoming a focus for rather than just support of the judgments, could constitute a problem for the Court. In the future the Court could prove to be unable to efficiently and promptly recognize new de-

[10] D. Harris *et al.*, *op. cit.*, p. 278, *Stogmuller v. Austria,* no. 1602/62, 10 November 1969.

[11] A. Mowbray, *op. cit.*, p. 346, *Ringeisen v. Austria,* no. 2614/65, 16 July 1971.

[12] *König v. Germany*, no. 6232/73, 28 June 1978, § 99.

[13] *Ibid.*

[14] *Ibid.*, § 111.

[15] <www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf> (23. 5. 2013).

velopments and changes in member states with structural deficiencies in their system of justice that cause delays.[16]

3. PILOT JUDGMENTS

3.1 General facts

Pilot judgments are judgments adopted after a special procedure called the pilot judgment procedure. It is a priority treatment of one or more cases in which the Court has identified a structural and systemic problem or cause that leads to repetitive breaches of a right, protected by the Convention.[17] The Court will then decide what the Government will have to do to remedy the individual breach but it will also give the Government guidelines on how to correct the systemic problem, i.e. give some indication of the general measures that a state should adopt so as not to overburden the Convention system with large number of applications deriving from the same cause.[18]

In its resolution on judgments revealing an underlying systemic problem, adopted on 12 May 2004, the Committee of Ministers invited the Court "to identify in its judgments finding a violation of the Convention what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments". According to rule 61 of the Rules of Court the Court may on its own motion or at the request of a party initiate a pilot judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.[19] Any application selected for pilot judgment treatment shall be processed as a matter of priority in accordance with Rule 41 of the Rules of Court.[20] This rule is a first legal codification of the pilot judgment procedure, which was for a long time without a clear legal basis.[21]

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[16] D. Harris *et al.*, *op. cit.*, p. 282.

[17] <www.echr.coe.int/NR/rdonlyres/61CA1D79-DB68-4EF3-A8F8-FF6F5D3B3BB0/0/FS_Pilot_judgments_ENG.pdf> (4. 5. 2013).

[18] D. Harris *et al.*, *op. cit.*, p. 26.

[19] <www.echr.coe.int/Documents/Rules_Court_ENG.pdf> (23. 5. 2013).

[20] According to the Rules, the Court shall in its pilot judgment identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment.

[21] M. Lazarova Tajkovska, *op. cit.*, p. 333.

In theory there is a differentiation between full pilot judgments and quasi-pilot judgments (Article 46 judgments). Article 46 judgments pre-date full pilot judgments, the first one being *Scozzari and Giunta v. Italy* of 13 July 2000, cited below, where the Court required the state to remedy the situation using institute of "restitutio in integrum"[22, 23] and the most famous being *Broniowski v. Poland* concerning large scale violation of right to property of former inhabitants of the territories east of the Bug River.[24] All of them however are a reaction to a systemic problem and overburdening of the Court by similar violations (clone cases) that stem from these systemic problems. In a quasi-pilot judgment the Court invokes Article 46 of the Convention (which binds the states to abide by the final judgments in any case to which they are parties) in highlighting systemic problems which have been the source of repeated Convention violations.[25] The Court stops short of including binding obligations in the operative provisions of the judgment. In these decisions the Court refers to the legal obligation under Article 46 to introduce general (giving the judgment an erga omnes effect)[26] or individual measures in the domestic legal system in order to end violations and provide redress,[27] however only in reasoning to the

[22] *Ibid.*, p. 158.

[23] For detailed analysis of the development of Courts' activism from awarding „mere" just satisfaction to adopting pilot judgments see C. Ribičič, *op. cit.*, pp. 175–179 and 199–201, and M. Lazarova Trajkovska, *op. cit*.

[24] *Broniowski v. Poland*, no. 31443/96, 22 June 2004. For detailed analysis of the judgment and its effects see M. L. Trajkovska, *op. cit.*, pp. 176–196.

[25] P. Leach, *op. cit.*, p. 88; <books.google.si/books?id=5Ekydfx_usMC&pg=PA88&lpg=PA88&dq=quasi+pilot+judgment&source=bl&ots=kiB5zOHOp2&sig=qb5sR4w8IbLJuQDAOKIiGd1W5bw&hl=en&sa=X&ei=Uyd0Ud-AAY7HswaV6YDADw&ved=0CF8Q6AEwCA#v=onepage&q=quasi%20pilot%20judgment&f=false> (3. 12. 2014).

[26] In the words of M. Lazarova Trajkovska, while the letter of Article 46 implies just inter parties effect for the judgments, the Convention's vocation as a „constitutional instrument of European public order" pleads for a broader view (op. cit., p. 37). Such interpretation holds particular ground when Article 46 is interpreted in light of Article, as the Court reiterated in case of *Rumpf v. Germany*, cited below.

[27] In the case *Scozzari and Giunta v. Italy* (no. 39221/98 and no. 41963/98, 13 July 2000) the Court for the first time stated that by Article 46 of the Convention the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they are parties. It follows, inter alia, that a judgment in which the Court finds a breach, imposes on the respondent state a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to chose, subject to supervision of the Committee of Ministers, the general and/or, if appropriate, individual measures 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. Furthermore, subject to monitoring by the Committee of ministers, the respondent state remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. Judge Zupančič referred to these paragraphs in his concurring opinion on judgment of Broniowski saying

merits, not operative parts of the judgments. Only very rarely does the Court prescribe general measures in Article 46 judgments (for example in *Lukenda v. Slovenia*)[28] – this was done for the first time in *Broniowski v. Poland*.[29]

In a full pilot judgment the Court a) explicitly applies the pilot judgment procedure,[30] b) identifies a systemic violation of the Convention and c) stipulates general measures in the operative part of the judgment.[31] In the next subsection, we will deal with full pilot judgments only, while Article 46 judgments are dealt with in other parts of this paper. This does not however in any way imply that Article 46 judgments are of lesser importance as their composition and desired effects are basically the same, as are the reasons for their adoption – underlying systemic problems. In order to find the criteria, by which the Court determines, when there is a necessity to adopt a pilot judgment, we decided to take a look at pilot judgments concerning reasonable time regarding different countries. Quite a few countries have to date received a pilot judgment because of frequent violations of the 'reasonable time' requirement.

3.2 The pilot judgments on the 'reasonable time' requirement

In the case of *Ivanov v. Ukraine* the Court dealt with lengthy enforcement proceedings of final domestic decisions.[32] The Court observed that the judgment of a military court, awarding the applicant a sum of military pension, had not been fully enforced for about seven years and ten months. The Government's submissions did not contain any justification for such substantial delays. The Court noted that the delays were caused by a combination of factors, including the lack of budgetary funds and shortcomings in the national legislation – lack of an effective domestic remedy to deal with it. There were over 300 such violations found with respect to Ukraine since 2004, with 1400 applications still pending before the Court. The Court found that a practice, incompatible with the Convention existed in Ukraine. It held that the structural problems with which the Court was dealing are large-scale and complex in nature. According to the Court they prima facie required the implementation of comprehensive

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the Court in *Scozzari and Giunta v. Italy* for the first time applied the language of Article 41 of the Convention in conjunction with Article 46, to the effect that, taken together, they require the state to do away with the situation which had caused the violation in the first place. Compare M. Lazarova Trajkovska, *op. cit.*, p. 158.

[28] P. Leach, *op. cit.,* p. 88.

[29] M. Lazarova Trajkovska, *op. cit.*, p. 196.

[30] Usually, after its adoption, by referring to rule 61 of Rules of Court.

[31] P. Leach, *op. cit.*, p. 87.

[32] *Yuriy Nikolayevich Ivanov v. Ukraine*, no. 40450/04, 15 October 2009.

and complex measures, possibly of a legislative and administrative character, involving various domestic authorities.

Germany's first pilot judgment in the case of *Rumpf v. Germany* was a result of excessive length of proceedings before German courts found by the Court.[33] The Court noted that the dealt with case before administrative court regarding a gun license that lasted 13 years in total (2 of which before the Federal Constitutional Court), concerned a recurring problem underlying the most frequent violations of the Convention found by the Court in respect of Germany; more than half of its judgments against Germany finding a violation concerned the issue of excessive length of judicial proceedings. The Court stated that it had delivered judgments in more than 40 cases against Germany finding such violations between 1959 and 2009. The Court held that Germany failed to adopt any measures to prevent the violations, thus 55 more cases against Germany were pending before the Court. The Court noted that the adoption of measures in response to the problem at issue had been addressed by the respondent state by tabling a draft bill regarding legal protection in the event of excessively long court proceedings, however it held that it was unclear whether and when that bill would enter into force. The Court stressed that the respondent state must introduce a remedy or a combination of remedies in the national legal system, at the latest within one year from the date on which the judgment became final, in order to bring it into line with the Court's conclusions and to comply with the requirements of Article 46 of the Convention.

The first pilot judgment with regard to Greece in the case of *Athanasiou and Others v. Greece* also dealt with a structural problem in the legal system.[34] In a case concerning a sum to be received from a solidarity fund of the army the total length of proceedings was approximately 14 years. The Court found that the length of the proceedings was excessive and failed to meet the requirement of 'reasonable time'. The Court also found that Greek law did not provide an effective remedy within the meaning of Article 13 of the Convention for the concerned parties to complain about the length of proceedings. Between 1999 and 2009, the Court delivered about 300 judgments finding an excessive length of judicial proceedings in Greece, while there were over 200 similar cases pending before the Court. The Court indicated general measures to be adopted – a remedy allowing for the expedition of proceedings along with a compensatory remedy. The Court also described the criteria regarding compensation for excessive length of judicial proceedings.[35]

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[33] *Rumpf v. Germany*, no. 46344/06, 2 September 2010.

[34] *Athanasiou and others v. Greece*, no. 50973/08, 21 December 2010.

[35] The action for compensation is to be decided quickly, the sum awarded had to be paid within six months of the decision becoming final, the action for compensation had to com-

Bulgaria also received its first two pilot judgments due to a systemic problem in the justice system. In one of them, *Finger v. Bulgaria*,[36] the Court dealt with a proceeding to divide inheritance that lasted 10 years. The Court held that the applicant was entitled to an effective domestic remedy in that regard. The Court found that Bulgaria had an acceleratory remedy, namely 'complaint about delays' instituted in Code of Civil Procedure and later a 'request for fixing of time limit in the event of delay', however the Court was not convinced either of them represented an effective remedy. There was also no effective remedy to provide redress for the violation – it did not seem that there existed a mechanism whereby the individuals concerned may vindicate that right or obtain redress for a failure to comply with that obligation. The Court noted that it had found breaches of the 'reasonable time' requirement of Article 6 (1) of the Convention in relation to civil proceedings in almost fifty cases. According to the information in the Court's case management database, there were at the time approximately five hundred cases against Bulgaria awaiting first examination which contain a complaint concerning the length of civil proceedings. The above numbers showed the existence of a systemic problem. Regardless of the fact that Bulgaria introduced new measures, the Court held it was too early to assess their effect. The Court gave criteria to which a remedy must adhere which were basically the same as in *Athanasiou and Others v. Greece*.

Table no. 1: Overview of the Criteria used by the Court in Compared Pilot Judgments

	Ivanov v. Ukraine	*Rumpf v. Germany*	*Athanasiou v. Greece*	*Finger v. Bulgaria*	*Lukenda v. Slovenia*
Length of proceeding	7 years and 10 months	13 years	14 years	10 years	5 years and 3 months
Number of violations thus far	300 since 2004	40 since 1959	300 between 1999 and 2009	50	
Pending cases	1400	55	200	500	500
Indicated measures	Adoption of effective remedies	Adoption of effective remedies	Adoption of effective remedies	Adoption of effective remedies	Adoption of effective remedies, administrative measures

ply with the principles of a fair hearing, court costs were not to be excessive and the amount of compensation had to be consistent with the awards made by the Court in other cases.

[36] *Finger v. Bulgaria*, no. 37346/05, 10 November 2011.

3.3 Ending remarks on pilot judgments

The comparison of the pilot judgments shows that there is no definitive criteria pertaining to when the Court will adopt a pilot judgment. The number of decided or pending cases is not decisive, however the identification of a systemic problem is. Does Germany really have a systemic problem? It would appear that, same as when examining the reasonableness of the time taken to decide a case, no margin of appreciation doctrine is applied – it is for the Court alone to decide and not for the states to argue whether the problem is already systemic or not.[37] In all judgments the respondent states are instructed to introduce domestic remedies to deal with identified systemic problems. As recognised in theory, the Court often connects the right to an effective remedy (Article 13 of the Convention) with the right to a trial in reasonable time.[38] This goes hand in hand with the principle of subsidiarity (Article 35 of the Convention) which means that only applicants, that have exhausted domestic remedies, may lodge an application to the Court, meaning that the states hold primary responsibility to protect human rights.[39] Here however, the Court holds that the state is free to choose the measures it will take, as long as those measures meet certain criteria.

The common development after adopting a pilot judgment concerning a state is a less detailed examination of future repetitive cases. It is not until a government shows it has adopted effective remedies to prevent violations of the right, protected by the Convention, that the Court will declare an application inadmissible for the reason of non-exhaustion of domestic remedies. We have found this development in Slovenia, Poland and Italy, and we believe this could happen regarding other countries as well. We estimate that this results in a lack of interpretation of the 'reasonable time' requirement. The requirement appears to be without substance, abstract and unattainable. Judgments that follow and rely on pilot judgments are therefore not the most appropriate material to seek interpretation of the 'reasonable time' requirement from. This is also true for inadmissibility decisions, however this is to be expected when merits of the case are not even examined. We believe that each case should still be examined thoroughly, if not by the Court, then by the Contracting State.

Sole existence and use of effective remedies do not mean that the right to a trial within reasonable time is respected and not breached. Furthermore, broad use

[37] D. Harris et al., *op. cit.*, p. 279.

[38] C. Ribičič, *op. cit.*, p. 163.

[39] *Ibid.*, p. 123.

of domestic remedies as a rule renders them ineffective while deepening the systemic problem by further clogging judicial system. Perhaps it was for this reason that in his dissenting opinion in *Lukenda v. Slovenia* case judge Zagrebelsky said that the reasoning of the judgment creates a degree of confusion between the need to prevent and to avoid violations of the right to a trial within reasonable time and the need to secure an effective redress for such violations at national level.

We think that prevention should be the first and foremost goal that should clearly be stated in pilot judgments. Similarly, judge Casadevall, in his dissenting opinion in *Kudla v. Poland* case, found it difficult to see how the structural problem of the unreasonable length of proceedings could be remedied by the obligation to first exhaust an additional remedy designed to make it possible to complain about the length of proceedings. According to him, there is nothing to warrant an assumption that such an action would be heard within a more reasonable time than the main proceedings, nor does anything warrant an assumption that the main proceedings would be speeded up as a result of bringing such an action, while ultimately only the litigant would suffer the consequences of this situation.

Lastly, if the Contracting States will rely solely on domestic remedies, the Court itself could soon encounter an even higher case-load. If problems with backlogs in domestic legal orders aren't resolved, there is no guarantee that actions concerning exhaustion of domestic remedies won't get buried among other cases and result in new applications to the Court. In Italy, this has already happened. In 2009 there were already claims before the Court because of the excessive length in dealing with these cases by the Courts of Appeal.[40]

Mirjana Lazarova Trajkovska recognized a possible weakness of pilot judgment procedure after the Court adopted *Ivanov v. Ukraine* judgment.[41] She sees the weakness in the fact that Ukrainian government failed to enact appropriate legislation and in the lack of cooperation between the Government and the Court. We agree that the basic step to ensure the authority of the Court is that the states enact legislative measures suggested by the Court. That in itself however will not ensure the effectiveness of pilot judgments nor prevent further undue delays in judicial procedures, caused by the underlying structural and systemic problems in the states.

[40] M. Fabri, *op. cit.*, p. 16.

[41] M. Lazarova Trajkovska, *op. cit.*, pp. 307–309.

4. CASE STUDIES FOR COMPARISON

4.1 Slovenia

There were several cases pending before the Court concerning the right to a trial within a reasonable time before the first judgment against Slovenia was delivered. The most important of those is probably *Belinger v. Slovenia*.[42] The applicants complained about the length of civil proceedings that had lasted for more than nine years. A friendly settlement was ultimately reached and Slovenia for a time avoided a judgment declaring a violation of the right to a trial within a reasonable time. This case represented a warning that something needed to be done about the length of (criminal and civil) trials in Slovenia. Unfortunately appropriate steps were not taken to amend this problem and a conviction was imminent.[43] *Lukenda v. Slovenia* is a quasi-pilot judgment in which the Court established there was systemic problem with the Slovenian legal system that needed to be amended.[44] In the case of *Lukenda v. Slovenia*, the total duration of the proceedings, which the breach stemmed from, was five years, three months and nine days. In the opinion of the Court, the length of the proceedings concerning disability benefits in the applicant's case was excessive and did not meet the 'reasonable time' requirement, especially before the first-instance court. The Court found that neither administrative action, a claim for damages, a request for supervision nor a constitutional appeal, whether taken separately or together, could be regarded as effective remedies. The Court also found that the length of judicial proceedings in Slovenia was a systemic problem and noted the applicant's allegation that judicial proceedings in Slovenia regularly failed to comply with the 'reasonable time' requirement. There were also over 500 similar cases pending before the Court against Slovenia at the time. The Court identified some of the weaknesses of the established legal remedies required by Slovenia, while acknowledging that certain recent developments show reassuring improvements. To prevent future violations of the right to a trial within a reasonable time, the Court encouraged Slovenia to either amend the existing range of legal remedies or add new remedies so as to secure genuinely effective redress for violations of that right.

After *Lukenda v. Slovenia* judgment, Slovenia adopted Protection of Right to Trial without Undue Delay Act (Act). The Act introduced three domestic remedies concerning the 'reasonable time' requirement: (1) a supervisory appeal, (2) motion for a deadline and (3) compensatory remedy. The Act also con-

[42] *Belinger v. Slovenia,* no. 42320/98, 13 June 2002.

[43] C. Ribičič, *op. cit.*, p. 198.

[44] *Lukenda v. Slovenia*, no. 23032/02, 15 September 2005.

tained provisions on jurisdiction, procedure and limitations on amounts of the compensatory remedy.

It was not until judgment in the case of *Grzinčič v. Slovenia* that the Court declared an application inadmissible due to non-exhaustion of domestic remedies, newly enacted in the Act.[45] In a subsequent case, *Žunič v. Slovenia*, the Court found that it was indispensable that the proceedings, which had already lasted a long time, were finally resolved particularly promptly following the exhaustion of the accelerative remedies.[46] The Court emphasized that the national authorities should ensure that the aggrieved party had prompt access to the compensatory remedy once he or she has made use of the accelerative remedies. The Court declared the application in Žunič inadmissible for being premature since only six months had elapsed since the applicant had exhausted the acceleratory remedies and progress had been made in dealing with his claim. It however instructed the authorities to conclude the proceedings within no more than a year, which is in our opinion an important precedent indicating the limits to the length of judicial procedures after acceleratory domestic remedies have been used. Contrary to its decision in Žunič, in the case of *Robert Lesjak v. Slovenia* the Court found that there is no effective remedy in Slovenia in respect of delays in Supreme Court proceedings.[47] Even before the publication of this judgment, on 15 July 2009, Slovenia changed the Act to remedy this situation.

In the case of *Jama v. Slovenia* the Court identified problems concerning the use of domestic remedies. In the non-contentious court proceeding regarding the amount of compensation for expropriated property that lasted from 1994 to 2008 (that is the period the Court took into consideration), the applicant lodged two supervisory appeals and a motion for a deadline.[48] The Court was struck by the fact that, despite the use of the acceleratory remedies provided by the 2006 Act, no significant progress was made in the case, which was still pending at first instance. The Court noted that, as a consequence of the system provided by the 2006 Act, whereby access to a compensation claim is dependent on the termination of the proceedings, the applicant and his successor have never been able to claim just satisfaction for the undue delay. The Court also found that in a situation where the proceedings have lasted a very long time and have moreover ground to a halt despite the use of acceleratory remedies, the compensatory remedy which has statutory limitation set to 5.000,00 EUR,

[45] *Grzinčič v. Slovenia,* no. 26867/02, 3 May 2007.

[46] *Žunič v. Slovenia,* no. 24342/04 18 October 2007.

[47] *Lesjak v. Slovenia,* no. 33946/03, 21 July 2009.

[48] *Jama v. Slovenia,* no. 48163/08, 19 July 2012.

may not provide a sufficient redress. The case of *Jama v. Slovenia* was an aberration both in regard to the overall length of proceedings and in regard to the ineffectiveness of the acceleratory remedies provided by the 2006 Act in practice. Even though it is not representative of the situation concerning the length of the trials in Slovenia which is gradually improving, we believe it to be a symptom of the fact that the systemic problem concerning the right to a trial within a reasonable time still persists.[49]

After the *Jama v. Slovenia* case there have been several cases that could forecast a change of the Courts position regarding Slovenia if the positive trend continues.[50] While the majority in these cases still held there was a breach of Articles 6 (1) and 13 of the Convention, the dissenting opinions argued against a 'broad brush' approach of the Court to look only at the overall period of proceedings.[51] We agree with the view that a thorough analysis of each criterion for establishing a breach of the right to a trial within a reasonable time should be conducted before a violation is found.[52]

In practice the adoption of the Act and its two subsequent changes have not brought a noticeable improvement concerning the violations of the 'reasonable time' requirement. Parties in judicial proceedings are starting to use acceleratory remedies more frequently. That brings with it more work on filing reports and consequently less time to deal with the substance of the cases.[53] There is also an increasing number of pending cases before the Court. We think that this growing number does not indicate worsening of the systemic problem in Slovenia but could in fact be the result of increased public awareness of the possibility to attain satisfaction before the Court. We looked at statistical data below (Court statistics) on the number of backlogs in Slovenia as they are defined in Article 50 of Court rules through several years, right before the *Luken-*

[49] <www.mp.gov.si/si/obrazci_evidence_mnenja_storitve/uporabni_seznami_imeniki_in_evidence/sodna_statistika> (23. 8. 2014).

[50] *Barišič v. Slovenia*, no. 32600/05, 18 October 2012, *Stojc v. Slovenia*, no. 20159/06, 18 October 2012, *Podbelšek Bračič v. Slovenia*, no. 42224/04, 18 April 2013 and *Plut and Bičanič-Plut v. Slovenia*, no. 7709/06, 18 July 2013.

[51] *Barišič v. Slovenia*, no. 32600/05, 18 October 2012, dissenting opinon of judge Ann Power-Forde.

[52] *Ibid.*

[53] Ciril Ribičič recognizes the value of the argument that domestic remedies should not be further clogging the judicial system and emphasizes that Slovenian Constitutional court (in judgment U-I-65/05) bound the legislator to ensure domestic remedies do not burden the judicial system further (*op. cit.,* pp. 191 and 189). The question arises whether the Slovenian system, that requires writing of reports about the case in question and actions for damages that have to be heard by courts do not do exactly the opposite.

da v. Slovenia judgment and after it till today.[54] Even though there are minor fluctuations, as a general trend the number of backlogs is in fact decreasing.[55] Additional information that should be observed is that the length of trials in Slovenia is also shortening.[56] This is one of the reasons we propose the Court should assess relevant statistical data when deciding on whether it will apply the pilot judgment procedure. The number of backlogs alone seems to indicate that a systemic problem still persists. On the other hand the trend of a steadily decreasing number of backlogs and length of trials shows that the situation is improving. That fact could (should) be relevant in future deliberations of the Court.

Table no. 2: Number of Backlogs in Slovenian Courts

Number of backlogs end of the year	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Local courts	290156	285953	276303	273240	287401	239477	236043	215733	175475	154290
District courts	13935	14204	12606	12037	11742	14452	24275	24121	22355	19210
High courts	6242	4744	3032	1898	853	242	326	788	1005	799
Supreme court	/	/	/	/	3617	2987	2270	1690	1088	741

4.2 Poland

Kudla v. Poland is a quasi-pilot judgment wherein the Court established that there was a systemic problem in Poland regarding ensuring the right to trial within a reasonable time to such an extent that there was no effective remedy before a national authority (Article 13).[57] In the *Kudla v. Poland* case the Court reiterated that the trial does not end until the final instance delivers a final

[54] Sodni red, OJ of the Republic of Slovenia, no. 17/95, with amendments.

[55] <www.mp.gov.si/si/obrazci_evidence_mnenja_storitve/uporabni_seznami_imeniki_in_evidence/sodna_statistika> (23. 8. 2014), year 2004, p. 149, year 2005, p. 156, year 2006, p. 1, of corrected data, year 2007, p. 149, year 2008, p. 184, year 2009, p. 184, year 2010, p. 170, year 2011, p. 181, year 2012, p. 266, year 2013, p. 272.

[56] <www.mp.gov.si/si/obrazci_evidence_mnenja_storitve/uporabni_seznami_imeniki_in_evidence/sodna_statistika> (23. 8. 2014).

[57] *Kudla v. Poland*, no. 30210/96, 26 October 2000.

judgment. One of the crucial factors was not the overall length of the proceedings but rather the lack of progress in nearly one year and eight months.[58] Due to the number of cases against Poland because of the violation of the right to a hearing within a reasonable time, the Court recognized the problem as systemic. Because the violation was systemic it required a special remedy for it within the national law that would not have been necessary if the procedures had functioned properly. The systemic deficiencies in Kudla were only implied by the judgment itself (in determining that there had been a violation of both Article 13 and 6 (1) of the Convention).[59]

In judgments following Kudla, the Court did not go into details of a certain case but only referred to Kudla. In *D. M. v. Poland* the Court found that an effective remedy for an alleged breach of the requirement under Article 6 (1) must be applied equally in a criminal and a civil law procedure.[60] It is true that the Court went through the criteria for establishing the reasonable time breach of Article 6 (1), but the criteria felt more like citations as there were only one or two sentences used to establish each.[61]

On 17 September 2004 the Law on complaints about a breach of the right to a trial within a reasonable time (the Law) entered into force in Poland. That was the most significant factor for the decision in the *Krasuski v. Poland* case.[62] Judge Pavlocschi noted in his partly dissenting opinion to the *Krasuski v. Poland* judgment, that the existence of a violation of Article 6 (1) was self-evident. It seems that the sole fact of passing a law that handled complaints concerning the breaches of the 'reasonable time' requirement was enough to convince the Court that from that moment on Polish law incorporated an effective remedy for breaches of the 'reasonable time' requirement in accordance with Article 13. According to the Court a completely new legal situation had been established, and the burden of proof as to the effectiveness of the remedies was shifted to the applicant.[63]

The Court's benevolence did not last for long. In the case of *Ratajczyk v. Poland* the Court in similar circumstances as the previously mentioned cases held that there was a violation of Article 6 (1) as a result of failing to meet the 'reasonable

[58] *Ibid.*, § 131.

[59] Kudla is the first case where the Court started connecting the right to a trial within reasonable time with the right to an effective remedy, see Ribičič, *op. cit.*, p. 187.

[60] *D. M. v. Poland*, no. 13557/02, 14 October 2003, § 47.

[61] *Krzak v. Poland*, no. 51515/99, 6 April 2004 and *Guzicka v. Poland,* no. 55383/00, 13 July 2004.

[62] *Krasuski v. Poland*, no. 61444/00, 14 June 2005.

[63] *Ibid.*, § 71.

time' requirement.[64] One of the more recent cases, *Glowacki v. Poland* seems to show that the Court's opinion on Article 13 is fixed to the *Krasuski v. Poland* judgment, while the benevolence concerning the violations of the 'reasonable time' requirement has almost evaporated.[65]

The judgments concerning Poland are very general. As *Kudla v. Poland* was one of the earlier quasi-pilot judgments concerning systemic nature of the breaches of the 'reasonable time' requirement, the existence of a systematic problem was stated only by implication. That shows that the Court has made considerable and important progress with the clarity of (later) pilot judgments. On the other hand, the statement of the problem by implication could be indicating a different (lower) level of the systemic problem. The estimation of the Polish Government Agent before the Court that the overall effects of the Law have been positive,[66] seems to correspond with statistical data.[67] If the level of the systemic problem in Poland was initially lower in comparison with other states, this could be one of the reasons for a positive outlook.

4.3 Italy

According to data in the Hudoc database, Italy is number one on the list of breaches of the 'reasonable time' requirement. Largely important case regarding Italy is *Botazzi v. Italy* where the Court noted that there is an accumulation of breaches, which constitutes a practice that is incompatible with the Convention.[68] The Court emphasized that the duty of the states is to organize their judicial systems so that their courts can meet the requirements of the reasonable time provision. In this case the Court did not refer to Article 46 but its reasoning was very similar. As a result of this judgment, Italy enacted the Pinto Act in 2001 in order to enable persons subject to excessive delays in domestic courts to seek compensation, but the implementation of that measure in turn generated further complaints to the Court.[69]

In particular, Italy has kept on failing to pay Pinto compensations in due time. On 29 March 2006 the Court delivered nine joined Grand Chamber judgments (Article 46 judgments) involving the Pinto Act which originated from failure of Italy to pay awarded compensation to victims of lengthy proceedings in ad-

[64] *Ratajczyk v. Poland*, no. 11215/02, 18 July 2006, § 24.

[65] *Glowacki v. Poland*, no. 1608/08, 30 October 2012.

[66] Jakub Wołąsiewicz et al., *op. cit.*, pp. 22-25.

[67] <ec.europa.eu/justice/effective-justice/files/cepj_study_scoreboard_2014_en.pdf> (20. 8. 2014) and table no. 3.

[68] *Botazzi v. Italy*, no. 34884/97, 28 July 1999.

[69] A. Mowbray, *op. cit.*, p. 432.

equate time.[70] The Court held that the period to make a payment of compensation for lengthy proceedings should generally not exceed six months from the date on which the decision awarding compensation becomes final. We believe that this practice of the Court is an important precedent as it closely follows the *pacta sunt servanda* principle. If the state obliged itself to perform a certain act, it must do so in a very limited amount of time. This applies even more in cases when the obligation of the state arose from breaches of an applicant's rights. The Court noted that the state is free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided they are compatible with conclusions set out in the judgment. As mentioned before, the choosing of measures is the only field where the Court applies margin of appreciation doctrine. We argue that this is problematic.

Later development in cases against Italy does not seem to be much different than the situation in the nine cases (*Simaldone v. Italy*).[71] The Court however did not find that the Pinto remedy in itself was not effective. In the same way, Pinto remedy was given benefit of a doubt in *Daddi v. Italy*.[72] We can see that also when it comes to Italy, at least in the first phase of dealt with cases, the Court seems to be satisfied that domestic remedy exists, but the problem in Italy seems to persist nevertheless.

Regarding Italy, there is another particularity which came to be as a consequence of Botazzi decision, namely deciding on many cases in one judgment.[73] This is not a pilot judgment procedure, but a special kind of procedure where the Court decides to join many applications and decide them by a single judgment.[74] In *Gaglione and others v. Italy* the Court dealt with 475 cases where 65 per cent of the applicants had waited at least 19 months for payment of their Pinto compensation.[75] Clearly, circumstances of every particular case cannot possibly be regarded enough in this type of procedure. Good points against this kind of procedure can be read in dissenting opinion of judge Ferrari Bravo in case of *Angelo Giuseppe Guerrera v. Italy* where 133 cases were

[70] Judgments in cases: *Scordino. v. Italy (no. 1),* no. 36813/97; *Riccardi Pizzati v. Italy*, no. 62361/01; *Musci v. Italy*, no. 64699/01; *Giuseppe Mostacciuolo v. Italy* (no. 1), no. 64705/01; *Giuseppe Mostacciuolo v. Italy (no. 2),* no. 65102/01; *Cocchiarella v. Italy*, no. 64886/01; *Apicella v. Italy*, no. 64890/01; *Ernestina Zullo v. Italy*, no. 64897/01; *Giuseppina and Orestina Procaccini v. Italy*, no. 65075/01, 29 March 2006.

[71] *Simaldone v. Italy*, no. 22644/03, 31 March 2009.

[72] *Daddi v. Italy*, no. 15476/09, 2 June 2009.

[73] D. Harris et al., *op. cit.*, p. 284.

[74] <www.coe.int/t/dghl/standardsetting/cddh/GT-GDR-C/GT-GDR-C%282013%29R2_Addendum%20II_Draft_CDDH_report_on_representative_application.pdf> (4. 5. 2013).

[75] *Gaglione and others v. Italy,* no. 45867/07 and others, 21 December 2010.

decided on in one day.[76] Judge Bravo believes that it is quite possible that a practice contrary to the Convention exists in Italy. Nevertheless he thinks the Court should examine in each situation what were the circumstances of the case, which is something the Court, overwhelmed by an avalanche of requests, does not do anymore. While judge Bravo saw this as understandable, he did not see it as fair. Judge Bravo asked himself what the Italian legislator should do to correct the problem and whether the Court believed all decisions should be adopted within a few months, as in some countries in northern Europe, where court procedures were so expensive, people hardly ever used them. He held it would be best to report the matter to the Committee of Ministers of the Council of Europe for a political assessment of the situation. We think this dissenting opinion cannot be disregarded and holds a lot of merit. We fear that, in the future, the Court may start to decide on many cases at once in cases against other states. If that happens, it could become common practice that circumstances of particular cases will not be examined, resulting in automatic condemnations.

4.4 France

For many years France has been facing complaints regarding the length of the proceedings. Since 1981, when France officially made the admittance to the Court possible for its citizens, the violation of Article 6 (1) is the subject of the 39 % of those cases before the Court.

In *H. v. France* the total length of the proceedings was seven years and seven months. The Court held that there was a violation of Article 6 (1), since the length was excessive and no appropriate measures by the state court were taken.[77] Delay caused by the conduct of the applicant's legal aid lawyer was not attributed to the state because a lawyer acts for his client, not the state.

In *Hentrich v. France* the Court held that the backlog of business in the Court of Appeal cannot excuse the length of procedures.[78] The specifics of the case, namely that the court wished to hear four cases that raised similar issues together, was taken into account. But it was held more important that the delay was substantial. The Court also took into account what was at stake for the applicant.

[76] *Angelo Guiseppe Guerrera v. Italy*, no. 44413/98, 28 February 2002.

[77] *H.* v. *France*, no. 21489/11, 24 October 1989.

[78] *Hentrich v. France*, no. 13616/88, 22 September 1994.

The central and often cited case concerning France is *Frydlender v. France*.[79] The complexity of the case, the conduct of the applicant and the conduct of the competent administrative and judicial authorities, were all taken into consideration in determining a violation of the 'reasonable time' standard. In that case the Court emphasized that it was the obligation of the Contracting States to organize their legal systems in such a way that their courts can ensure to everyone the right to a final decision within a reasonable time. It further stated that an employee, considered to be wrongly suspended or dismissed, had an important personal interest in securing a judicial decision on the lawfulness of that measure promptly.

A contestation over 'civil rights and obligations' must fulfil the condition of exhausting domestic remedies to be admissible to the Court. The judgment in the case *Mifsud v. France* established that the complaint based on the length of those proceedings is inadmissible if the applicant has not first unsuccessfully submitted it to the domestic courts, regardless of the stage reached in the proceedings of domestic level.[80]

The Court was very thorough in considering the circumstances of each case concerning France. We believe this to be the right approach and the Court should use it more often in cases that are dealt with by the Court after a pilot judgment is adopted. Furthermore the statistical data suggests that there is a systemic problem concerning violations of the 'reasonable time' requirement in France. To our knowledge this is not reflected in the Court judgments, as we have found no pilot judgments concerning the 'reasonable time' requirement. That would seem to indicate that France does not suffer from a systemic problem and structural deficiencies of its judicial system.

4.5 Similarities and differences

The similarities between the judgments against different states are several. The Court is consistent in using the same criteria for establishing that the 'reasonable time' requirement has not been met: (1) the complexity of the case, (2) the applicant's conduct, (3) the manner in which the matter was dealt with by the administrative and judicial authorities and (4) what was at stake (for the applicant) in the proceedings. The criteria are always thoroughly examined in the pilot or quasi-pilot judgment. In later judgments their further existence is only shortly confirmed. The case law concerning France differs from the others as there is no pilot judgment concerning France, so we were unable to compare

[79] *Frydlender v. France*, no. 30979/96, 27 June 2000.

[80] *Mifsud v. France*, no. 57220/00, 2 May 2000.

the situation after passing a pilot judgment. It also seems that in cases, originating from France, the Court puts higher emphasis on determination of circumstances of the particular case. This differs greatly from joint applications procedure, largely used in cases against Italy.

In most if not all of the newer cases the 'reasonable time' requirement is strongly (we think too strongly) intertwined with the right to an effective remedy. This can mask the importance of the basic need to prevent and to avoid violations.

The reasoning of the Court was also similar in its reaction to the passing of the Pinto act in Italy, the Law on complaints about a breach of the right to a trial within a reasonable time in Poland and the (changes of the) Protection of Right to Trial without Undue Delay Act in Slovenia. In all cases the Court was initially very benevolent to each of the mentioned states. In several cases after taking the appropriate measures, the Court apparently took the position that the systemic problem (for the time) no longer existed. The reasoning was similar in the case of *Grzinčič v. Slovenia* (3 May 2007), *Daddi v. Italy* (2 June 2009) and *Krasuski v. Poland* (14 June 2005).

In later judgments the Court reverted to its previous opinion concerning the existence of a systemic problem in the legal systems concerning the 'reasonable time' requirement. This may be proof that pilot judgments are not as effective as it was hoped they would be. We fear that will happen in other legal systems as well.

Another similarity is that the specifics of a legal system were not taken fully into account. The Court did not thoroughly research the changes in the legal system after the pilot judgments and after the state has taken certain (legislative) measures.

There is another important similarity between *Žunič v. Slovenia* and the jointly decided cases concerning the Pinto Act. In both instances the Court set a firm upper limit to the time a specific action of a state must be taken. In *Žunič* the Court held that, after the use of acceleratory remedies, the judicial proceedings should be concluded in less than a year. Likewise, in the jointly decided cases, the Court held that the state should pay the compensation for violations of the 'reasonable time' requirement in less than six months. We believe the Court made an important statement that the principle *pacta sunt servanda* also applies to states and should be upheld even more strictly when the states' obligation arises from its previous breaches of the applicants' rights. However, it is also important to note that if a particularly complex case is heard in a particularly short time, the time taken decide on this case could not be deemed reasonable – reasonable time does not equal fast trials.

The differences we have encountered are mainly in the fact that there are no set standards as to when the Court will adopt a pilot judgment, number of pending cases is considered to be indicative of a systemic problem and what is the nature of said cases. If we look at statistical data on the Hudoc web page, we can see that France is in second place in regard to 'reasonable time' requirement violations but a pilot judgment has not (yet) been adopted and a systemic problem not recognized.

5. CONCLUSION

After taking a deeper look into the functioning and the case law of the Court, we have shown what a current situation is after a Court has adopted a pilot judgment. In the conclusion we wish to offer several suggestions that are addressed both to the Court and to the states. We believe that a coordinated effort of both is needed to reach the desired goals. We have become aware that the Court is faced with an onslaught of new cases that have risen considerably in the last couple of years. The problems we have encountered are therefore understandable. Nevertheless we believe that we should all strive for improvement.

I. The Court (1) should consider the affected legal system more thoroughly and more often. Every reasonably positive act on the side of the state that provides remedies to applicants should be evaluated in the short and in the long term. The Court should take these actions on part of the state as part of the criteria for evaluating future cases. This argument is also supported by Article 19 of the Convention which states that the Court will be set up in order to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto.

The Court (2) should not be satisfied with the fact that an action on part of the state has taken place, but should also (a) see if the action has a realistic chance of success, (b) look at statistical data before and after the change in the legal system and (c) see if the state has a broader plan to move forward. Sole existence and use of effective remedies do not mean that the right to a trial within reasonable time is respected.

In the pilot judgments the Court (3) should set specific measures on how the state can abide by the judgment, taking into consideration the nature and specifics of the affected legal system. The main guideline to the measures to be adopted by the state is the principle of *pacta sunt servanda*. The state must firstly follow the rules it has set for itself, even concerning the length of judicial procedures. The Courts role is to oversee if the states abide by their own rules and to set standards on the point of what kind of state legislature concerning

the length of judicial procedures can still be considered in accordance with the Convention.

(4) Positive and negative effects of the pilot judgment procedure should be evaluated and a comparative evaluation of the different legal systems made in regard of the reasonable time requirement. Both evaluations should consider, that a broad use of effective remedies as a rule could in prospect render them ineffective while deepening the systemic problem by further clogging the judicial system. Also, as indicated by judge Zupančič in the *Broniowski v. Poland* case, the focus of pilot judgments should not be the Court's caseload, but rather the people, who might in the future face the same breach of human rights.

In evaluating the current situation there should be close cooperation between the Court and the states. The former is better equipped to offer guidelines and the latter are better suited to fund and operate the evaluation.

II. The state should take all judgments, and most of all the pilot judgments, of the Court seriously. That is why the state (1) should make a solid short and long term plan, collect appropriate statistical data and make specific provisions for change. The plan must be founded on the Court practice and can make use of good practice of other states.[81] The goals must be SMART (specific, measurable, attainable, realistic and time bound).[82] This could mean that all the backlogs should be registered, reasons for delays established and deadlines for decisions set.

Once the specific goals are set, (2) resources required for meeting them should be evaluated and if needed, increased. Making comparisons with other states and trying to follow their examples should be done with care – the state itself should not make a mistake by not considering its own circumstances and particularities. We ask ourselves, is it really appropriate to greatly reduce the number of judges in Slovenia? We offer this table for comparison and consideration – are France and Poland doing something right?[83]

The state (3) should keep the Court informed on the plans and goals at all times and also of important changes that came as a result of the actions of the state. The reports should be regular (yearly) and should emphasize whether its actions reached the predicted goals.

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[81] Recommendation CM/Rec (2010) 3 on effective remedies for excessive length of proceedings: <www.coe.int/t/dghl/standardsetting/cddh/Recommendations_en.asp> (24. 8. 2014).

[82] <www.projectsmart.co.uk/smart-goals.html> (25. 2. 2014).

[83] The data in first three numeric columns is taken from CEPEJ Study on <http://ec.europa.eu/justice/effective-justice/files/cepj_study_scoreboard_2014_en.pdf> (20. 8. 2014), pp. 70 and 216, and shows caseload in all courts of researched countries in the year 2012. The data in last two columns are calculated.

Table no. 3: Caseload and Human Resources in Compared Legal Systems

	Number of incoming cases per 100 inhabitants	Number of pending cases per 100 inhabitants	Number of judges per 100 inhabitants	Number of incoming cases per judge	Number of pending cases per judge
IT	19,2	22,4	0,01	1920	2240
SLO	61,7	28,5	0,05	1234	570
PL	54,4	8,9	0,03	1813	296,7
FR	9,3	7,2	0,01	930	720

(4) The role and impact of alternative dispute resolution such as arbitration, mediation, medarb and others should be evaluated and projections made on their further development. In addition to that the possibility of a private sector initiative in the judiciary should be considered and propositions made as to the viability of its application.[84]

(5) To ensure that the principle *pacta sunt servanda* is the cornerstone of each new reform, changes of legislation should be made in the sense that the prescribed duration of judicial procedures is first lengthened. When the first goal is reached new (legislative) goals should be set until a desired situation is attained.

The suggestions made are only a starting point on a long road to attaining the goal of judicial (and administrative) procedures lasting a reasonable time. The goal can never be reached in full for it is a continuing process based on the principle *pacta sunt servanda*. Even though it has been mentioned that the Court should take into account the differences between the legal systems and the specifics of a certain legal systems it is also apparent that the systems themselves are (and should be) moving more and more together to form an (increasingly) unified system of protection of human rights.

> *"Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law."*[85]

[84] Before amending Slovenian Enforcement and Securing of Civil Claims Act in 2010 such ideas were presented regarding Slovenian enforcement procedure where enforcement agents were to assume many competences of non judicial nature that would in turn be taken away from the courts. The ideas, however, were not brought into life.

[85] <walshslaw.wordpress.com/2013/05/20/a-reflection-on-john-marshalls-greatness-and-belief-in-law/> (26. 2. 2014).

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Izvirni znanstveni članek UDK: 342.7:341.645(4)

VLOGA PILOTNIH SODB EVROPSKEGA SODIŠČA ZA ČLOVEKOVE PRAVICE PRI OBRAVNAVANJU PRAVICE DO SOJENJA V RAZUMNEM ROKU[1]

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Prvi odstavek 6. člena Evropske konvencije o varstvu človekovih pravic in temeljnih svoboščin (EKČP) vsakomur priznava pravico do sojenja v razumnem roku. Evropsko sodišče za človekove pravice (ESČP) se sooča z naraščajočim številom zadev, ki se nanašajo na kršitev te pravice, pri čemer obravnavane zadeve izvirajo iz večine držav članic Sveta Evrope. V Sloveniji se je širša javnost seznanila z možnostjo uveljavljanja te pravice po objavi sodbe v zadevi *Lukenda proti Sloveniji*.[2] V prispevku primerjava sodbe ESČP proti Sloveniji, Poljski, Italiji in Franciji, pri čemer so sodbe zoper Republiko Slovenijo vzete kot osnova za primerjavo. Poleg iskanja podobnosti med sodbami posvetiva pozornost tudi temu, ali je sodišče upoštevalo posebnosti posameznega pravnega sistema in razlike med njimi.

Za razumevanje tematike je treba definirati razumen rok oziroma razumen čas. Zaradi pomenske odprtosti konvencijskega besedila je sodišče moralo postaviti zelo odprte usmeritve za razlago tega pojma, pri čemer se je od zadeve *Delacourt proti Belgiji* opredeljevalo zoper zožujočo razlago, v zadevi *Stogmul-*

[1] Ta članek je pripravljen na podlagi pisne naloge za tekmovanje THEMIS 2013 Evropske mreže centrov za izobraževanje v pravosodju, ki je potekalo od 17. do 20. junija 2013 v Bruslju.

[2] *Lukenda proti Sloveniji,* št. 23032/02, 15. september 2005.

ler proti Avstriji pa je zavzelo izrazito teleološki pristop.[3] V zadevi *Ringeisen proti Avstriji* je sodišče zavzelo stališče, da ne zadostuje, da je bila v razumnem roku opravljena obravnava, temveč mora biti v takem roku tudi javno razglašena sodba, ter kot pomembni merili izpostavilo kompleksnost zadeve in dejanja pritožnika.[4] V zadevi *König proti Nemčiji* je sodišče navedlo, da je razumnost trajanja sojenja treba v vsakem primeru oceniti glede na okoliščine posameznega primera, kot novo merilo pa dodalo način, kako so sodne in administrativne oblasti obravnavale posamezno zadevo.[5] Poleg tega je kot merilo za presojo upoštevalo tudi, kako pomembna je zadeva za pritožnika.

ESČP je problem močno povečanega števila zadev reševalo najprej tako, da se je pri obravnavanju sistemskih problemov v zvezi z obveznostmi države, da te probleme odpravi, začelo sklicevati na 46. člen Konvencije, ki države zavezuje k spoštovanju sodb v primerih, v katerih so stranke – sprejemati je začelo tako imenovane kvazipilotne sodbe. Te sodbe ne vsebujejo zavezujočih obveznosti v izreku. V njih se sodišče sklicuje na obveznosti iz 46. člena, zaradi katerih mora država v domačem pravnem sistemu sprejeti splošne ali individualne ukrepe, ki bi zagotovili prenehanje kršitve in zadoščenje, vendar ukrepe državi naloži samo v meritorni obrazložitvi sodbe, praviloma pa ne v izreku.[6] V pravi pilotni sodbi sodišče naloži sprejetje splošnih ukrepov v izreku, poleg tega tudi izrecno navede, da je uporabilo postopek s pilotno sodbo.[7] Dne 21. februarja 2011 je sodišče sprejelo pravilo 61, ki je prva kodifikacija sprejemanja pilotnih sodb.

Sodišče je pilotne sodbe izdalo na primer v zadevah *Ivanov proti Ukrajini*,[8] *Rumpf proti Nemčiji*,[9] *Athanasiou in drugi proti Grčiji*[10] in *Finger proti Bolgariji*;[11] iz njih je mogoče razbrati, katera merila je sodišče upoštevalo pri sprejetju pilotnih sodb. Primerjava pilotnih sodb je pokazala, da ni jasnih meril, po katerih bi se sodišče odločilo, kdaj bo sprejelo pilotno sodbo. Število odločb ali

[3] *Delacourt proti Belgiji,* št. 2689/65, 17. januar 1970*, § 25, Stogmuller proti Avstriji,* št.1602/62, 10. november 1969.

[4] *Ringeisen proti Avstriji,* št. 2614/65, 16. julij1971*, A. Mowbray, nav. delo str. 346.*

[5] *König proti Nemčiji,* št. 6232/73, 28. junij 1978, § 99.

[6] P. Leach, *nav. delo*, str. 88.; <books.google.si/books?id=5Ekydfx_usMC&pg=PA88&lpg=PA88&dq=quasi+pilot+judgment&source=bl&ots=kiB5zOHOp2&sig=qb5sR4w8IbLJuQDAOKIiGd1W5bw&hl=en&sa=X&ei=Uyd0Ud-AAY7HswaV6YDADw&ved=0-CF8Q6AEwCA#v=onepage&q=quasi%20pilot%20judgment&f=false>(4. 5. 2013).

[7] P. Leach, *nav. delo*, str. 87.

[8] *Yuriy Nikolayevich Ivanov proti Ukrajini*, št. 40450/04, 15. oktober 2009.

[9] *Rumpf proti Nemčiji*, št. 46344/06, 2. september 2010.

[10] *Athanasiou in drugi* proti G*rčiji,* št. 50973/08, 21. december 2010.

[11] *Finger proti Bolgariji,* št. 37346/05, 10. november 2011.

čakajočih primerov ni odločilno, odločilna je identifikacija sistemskega problema.

Običajno po sprejetju pilotne sodbe zoper državo sledi manj podrobna obravnava naslednjih ponavljajočih se primerov. Ko vlada dokaže, da je uvedla učinkovita pravna sredstva, s katerimi naj bi se preprečile kršitve pravice, zaščitene z EKČP, sodišče pritožbo razglasi in zavrže kot nedopustno zaradi neizčrpanosti domačih pravnih sredstev, kar povzroči pomanjkanje razlage zahteve po razumnem času. Zgolj obstoj in uporaba domačih sredstev ne pomenita, da je pravica do sojenja v razumnem roku spoštovana. Nadalje široka uporaba domačih sredstev povzroči, da ta postanejo neučinkovita, medtem ko hkrati poglabljajo problem z nadaljnjim obremenjevanjem sodnega sistema. Pilotne sodbe bi morale vsebovati jasne usmeritve, kako naj država izpolni svoje obveznosti, sodišče pa bi moralo podrobno preučiti posamezni pravni sistem tudi po sprejetju pilotne sodbe ter se opredeliti do sprememb, ob upoštevanju statističnih podatkov.

Kar zadeva sodno prakso sodišča glede sojenja v razumnem roku zoper Slovenijo, je bila pred sodiščem še pred zadevo Lukenda sklenjena prijateljska poravnava v zadevi *Belinger proti Sloveniji,*[12] ki je bila prezrto opozorilo.[13] V zadevi Lukenda je bilo trajanje izvornega postopka predolgo, sodišče pa je ugotovilo, da niti tožba pred upravnim sodiščem, odškodninski zahtevek, nadzorstvena pritožba niti ustavna pritožba, bodisi posamično ali skupinsko, ne morejo šteti kot učinkovita pravna sredstva, trajanje sodnih postopkov v Republiki Sloveniji pa je sistemski problem. V zadevi *Grzinčič proti Sloveniji*[14] je sodišče zavrglo pritožbo zaradi neizčrpanja pravnih sredstev. V sledeči zadevi, *Žunič proti Sloveniji,*[15] je sodišče izreklo, da je nujno, da bo postopek, ki je že trajal dolgo časa, pravnomočno končan še posebej hitro po izčrpanju pospešitvenih sredstev ter da mora prizadeta stranka hitro doseči pravično zadoščenje. V zadevi *Robert Lesjak proti Sloveniji*[16] je sodišče ugotovilo, da v Sloveniji ni učinkovitega pravnega sredstva v postopkih pred Vrhovnim sodiščem (čemur je sledila sprememba ZVPSBNO). V zadevi *Jama proti Sloveniji*[17] pa je sodišče opozorilo na nadaljnje probleme v zvezi z uporabo domačih sredstev. Zadeva Jama je sicer velik odstop od siceršnjega trajanja postopkov v Sloveniji. Zadnje čase je trend odločanja sodišča zoper Slovenijo rahlo bolj pozitiven; če-

[12] *Belinger proti Sloveniji*, št. 42320/98, 13. junij 2002.

[13] C. Ribičič, *nav. delo*, str. 198.

[14] *Grzinčič proti Sloveniji*, št. 26867/02, 3. maj 2007.

[15] *Žunič proti Sloveniji,* št. 24342/04 18. oktober *2007*.

[16] *Lesjak proti Sloveniji,* št. 33946/03, 21. julij 2009.

[17] *Jama proti Sloveniji,* št. 48163/08, 19. julij 2012.

prav število pritožb zoper Slovenijo narašča, pa slovenska sodišča zmanjšujejo sodne zaostanke.[18]

Sodišče je 26. oktobra 2000 izdalo kvazipilotno sodbo *Kudla proti Poljski*,[19] v kateri je ugotovilo obstoj sistemskega problema v Poljski ter neobstoj učinkovitih domačih pravnih sredstev, ki sicer ne bi bila potrebna, če bi postopek pravilno tekel. V sledečih sodbah sodišče ni podrobno presojalo okoliščin primera, temveč se je večinoma sklicevalo na sodbo v zadevi Kudla. V zadevi *D. M. proti Poljski*[20] sodišče tako ni preverilo ali vsaj omenilo možnega napredka v domačem pravnem sistemu. Sodišče je v poznejših zadevah sicer omenilo merila, po katerih je ugotovilo, ali je šlo za nerazumno trajanje postopkov, vendar bolj v smislu citiranja prejšnjih odločb. V zadevi *Krasuski proti Poljski*[21] z dne 14. maja 2005 je bistven poudarek na sprejetju zakonodaje, ki je uvedla domača pravna sredstva zoper kršitve pravice do sojenja v razumnem roku, kar je sodišče prepričalo, da so ta tudi učinkovita. Že 18. julija 2006 je v zadevi *Ratajczyk proti Poljski*[22] sodišče spet ugotovilo kršitev pravice do sojenja v razumnem roku, pri tem stališču pa je ostalo tudi v zadevi *Glowacki proti Poljski*[23] z dne 30. oktobra 2012.

Glede Italije je sodišče že 28. julija 1999 v zadevi *Botazzi proti Italiji*[24] (ki vsebuje podobno razlago kot kvazipilotne sodbe) ugotovilo, da je v Italiji veliko kršitev, ki pomenijo prakso, neskladno z EKČP. Posledica te odločitve je bila, da so se poznejši primeri odpravljali v skupinah po predhodni manj podrobni presoji.[25] Zaradi te odločitve je Italija leta 2001 sprejela zakon Pinto, ki je prizadetim osebam omogočil, da zahtevajo odškodnino, vendar pa je uporaba tega ukrepa sprožila nadaljnje pritožbe na sodišče. Sodišče je 2. marca 2006 sprejelo devet skupnih sodb Velikega senata (sodb po 46. členu), ki so izvirale iz dejstva, da Italija prisojenih odškodnin po zakonu Pinto ni izplačevala v ustreznem času.[26] Poznejša sodna praksa v zadevah zoper Italijo se ne razlikuje bistveno od sodbe v obravnavanih devetih primerih, zakon Pinto pa ni bilo

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[18] <www.mp.gov.si/si/obrazci_evidence_mnenja_storitve/uporabni_seznami_imeniki_in_evidence/sodna_statistika> (23. 8. 2014).

[19] *Kudla proti Poljski*, št. 30210/96, 26. oktober 2000.

[20] *D. M. proti Poljski,* št. 13557/02, 14. oktober 2003, § 47.

[21] *Krasuski proti Poljski*, št. 61444/00, 14. junij 2005.

[22] *Ratajczyk proti Poljski,* št. 11215/02, 18. julij 2006, § 24.

[23] *Glowacki proti Poljski*, št. 1608/08, 30. oktober 2012.

[24] *Botazzi proti Italiji*, št. 34884/97, 28. julij 1999.

[25] D. Harris in drugi, *nav. delo*, str. 284.

[26] Sodbe v zadevah: *Scordino proti Italiji (št. 1),* št. 36813/97; *Riccardi Pizzati proti Italiji*, št. 62361/01; *Musci proti Italiji*, št. 64699/01; *Giuseppe Mostacciuolo proti Italiji* (št. 1), št. 64705/01; *Giuseppe Mostacciuolo proti Italiji (št. 2),* št. 65102/01; *Cocchiarella proti Italji*, št.

spoznan za neučinkovitega (*Simaldone proti Italiji*[27] in *Daddi proti Italiji*[28]). Za Italijo pa velja še ena posebnost, in sicer odločanje z eno samo sodbo o velikem številu sicer ločeno vloženih pritožb, na primer v zadevi *Gaglione in drugi proti Italiji*[29] (475 pritožb) in *Angelo Giuseppe Guerrera proti Italiji*[30] (133 pritožb).[31]

Glede Francije je položaj bistveno drugačen. Tako je sodišče 2. maja 2000 v zadevi *Mifsud proti Franciji*[32] odločilo, da pritožba na sodišče ni dopustna, če kršitev pritožnik ni uveljavljal že pred domačimi sodišči. V zadevi *Frydlender proti Franciji*[33] je sodišče podrobno obravnavalo merila presoje razumnosti trajanja sojenja, v zadevi *Caillot proti Franciji*[34] pa poudarilo dolžnost države, da je pravosodni sistem učinkovito organiziran. V zadevi *Hentrich proti Franciji*[35] je sodišče izreklo, da sodni zaostanki in skupno reševanje več zadev ne morejo opravičiti dolžine trajanja sojenja. Sicer pa zoper Francijo ni bila izdana pilotna sodba glede sojenja v razumnem roku, kar pomeni, da v Franciji ni sistemskega problema predolgih sodnih postopkov.

Podobnosti v raziskovanih primerih so zlasti v konsistentni uporabi meril, ki so sicer podrobno obravnavana zlasti v pilotnih sodbah, nato pa je njihov obstoj zgolj pavšalno potrjen. V sodbah zoper Francijo je večji poudarek na obravnavi okoliščin posameznega primera, kar je popolno nasprotje postopka z združenimi pritožbami. V večini zadev glede sojenja v razumnem roku je zahteva po sojenju v razumnem roku močno prepletena s pravico do učinkovitega pravnega sredstva. V vseh primerih, ko je raziskovana država sprejela novo zakonodajno rešitev, je bilo sodišče naprej dobrohotno do vseh omenjenih držav. V poznejših sodbah se je sodišče vrnilo k svojemu prejšnjemu stališču glede obstoja sistemskega problema. Naslednja podobnost je, da posebnosti posameznega pravnega sistema niso bile povsem upoštevane. Sodišče tudi ni podrobno in celovito raziskalo sprememb v pravnih sistemih po sprejetju pilotnih sodb in določenih zakonodajnih ukrepov v državah.

64886/01; *Apicella proti Italiji*, št. 64890/01; *Ernestina Zullo proti Italji*, št. 64897/01; *Giuseppina and Orestina Procaccini proti Italiji*, št. 65075/01, 29. marec 2006.

[27] *Simaldone proti Italiji*, št. 22644/03, 31. marec 2009.

[28] *Daddi proti Italiji*, št. 15476/09, 2. junij 2009.

[29] *Gaglione in drugi proti Italiji,* št. 45867/07, 21. december 2010.

[30] *Angelo Guiseppe Guerrera proti Italiji,* št. 44413/98, 28. februar 2002.

[31] <www.coe.int/t/dghl/standardsetting/cddh/GT-GDR-C/GT-GDR-C%282013%29R2_Addendum%20II_Draft_CDDH_report_on_representative_application.pdf> (4. 5. 2013).

[32] *Mifsud proti Franciji*, št. 57220/00, 2. maj 2000.

[33] *Frydlender proti Franciji*, št. 30979/96, 27. junij 2000.

[34] *Caillot proti Franciji,* št. 36932/97, 4. junij 1999.

[35] *Hentrich proti Franciji*, št. 13616/88, 22. september 1994.

Smiselno bi bilo sprejeti ustrezne ukrepe in jasna merila tako na strani ESČP kot tudi na strani držav podpisnic EKČP ter razmisliti o povečanju pomena alternativnega reševanja sporov in omilitvi (opustitvi) državnega monopola za vodenje sodnih postopkov.

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Izvirni znanstveni članek UDK: 342.7:341.645(4)

STRNAD, Nataša, PAVLICA, Vid: Vloga pilotnih sodb Evropskega sodišča za človekove pravice pri obravnavanju pravice do sojenja v razumnem roku

Pravnik, Ljubljana 2015, let. 70 (132), št. 1-2

Evropsko sodišče za človekove pravice (ESČP) se sooča z naraščajočim številom zadev, ki se nanašajo na kršitev pravice do sojenja v razumnem roku, kar pomeni, da ima večina držav članic Sveta Evrope sistemski problem glede trajanja sodnih postopkov.

ESČP je ta problem sprva reševalo tako, da se je potem, ko je po obravnavi podobnih primerov zaznalo, da je problem v državi sistemski, pri naložitvi splošnih ukrepov državi sklicevalo na 46. člen Evropske konvencije o človekovih pravicah, ki države zavezuje k spoštovanju sodb, v katerih so stranke (kvazipilotne sodbe). Dne 21. februarja 2011 je sprejelo pravilo 61, ki določa postopek sprejemanja pilotnih sodb. Pilotno sodbo naj bi sodišče izdalo v primeru, ko v državi članici obstaja strukturni ali sistemski problem, zaradi katerega bi se lahko pojavilo več sorodnih zahtevkov. Avtorja raziskujeta, koliko so (kvazi) pilotne sodbe primeren način za obravnavanje primerov, v katerih je prišlo do kršitve pravice do sojenja v razumnem roku, in predlagata nekaj možnih rešitev. Smiselno bi bilo sprejeti ustrezne ukrepe in merila tako na strani ESČP kot tudi na strani držav podpisnic EKČP ter razmisliti o povečanju pomena alternativnega reševanja sporov in omilitvi (opustitvi) državnega monopola za vodenje sodnih postopkov.

Original Scientific Article UDC: 342.7:341.645(4)

STRNAD, Nataša, PAVLICA, Vid: The Role of Pilot Judgments of the European Court of Human Rights in Addressing the Issue of the Right to a Trial within a Reasonable Time

Pravnik, Ljubljana 2015, Vol. 70 (132), Nos. 1-2

The European Court of Human Rights (ECHR) is faced with a rising number of cases concerning the right to a trial within a reasonable time. This shows that the majority of member states of Council of Europe is faced with a systemic problem concerning the length of court proceedings. In an attempt to deal with this situation, the ECHR, when it started noting similar cases, identified systemic problems and then, when solving a particular case, invoked Article 46 of the European Convention on Human Rights, which obligates the states to abide by the judgments, to which they are parties, as ground for imposing general binding obligations to the state (quasi-pilot judgments). On 21 February 2011 it adopted a new rule (Rule 61) concerning the Pilot-judgment procedure. The pilot judgment procedure is applicable in cases where there exists in a Contracting Party a structural or systemic problem that could arise several related claims. In this article the authors examine whether the (quasi) pilot judgment procedure is always an appropriate way to deal with situations where there has been a violation of the right to trial within a reasonable time. Suggestions are made on other possible ways to confront the problem both on part of ECHR and on part of the Contracting Parties. Possibilities include increasing alternative dispute resolution as well as curbing (abandoning) the state monopoly in conducting judicial proceedings.